STUDIES AND COMMENTS

Constitutional pluralism and legal perspectivism in European Union law

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Abstract

During the past decade, new theories of (constitutional) pluralism have challenged the classic authority and primacy of EU law as asserted by the classic jurisprudence of the Court of Justice of the European Union. This school of thought, represented by many different authors, has tried to construct a new horizontal relationship between legal orders and European supreme jurisdictions. Constitutional pluralism has enjoyed doctrinal success but also received harsh criticism. This study reviews the most important literature and argues that the (constitutional) pluralism diverse strands of scholarship represent a continuation of what, in philosophical terms, can be termed "legal perspectivism" as conceptualized by Spanish philosopher Ortega y Gasset in 1923. It explores the question when EU law should have higher authority and primacy over national constitutional laws from both classic and new perspectives. No legal theory of EU constitutional law has so far been universally accepted by all actors. It concludes with the finding that the critique to the unconditional authority of EU law that constitutional pluralists have brought to the European field is still alive and extremely relevant both in theory and in practice.

Keywords: *European constitutional law; European integration; legal pluralism; literature; legal perspectivism.*

JEL Classification: K10, K33.

1. Introduction

What are the legal foundations supporting the authority of European Union (EU) law? In the last decade the Court of Justice of the European Union (ECJ) has tried to provide some good reasons to justify the claims that this European legal order puts forward on the basis of the pooling of sovereignty consented by Member States by signing and ratifying the EU Treaties: autonomy, primacy, effectiveness, pre-emption and loyalty[2].

Regarding the authority of EU law, with the exception of some written provisions (Article 4(3) TEU, Article 2 TFEU, and Declaration 17 on the primacy of EU law); most of the arguments above referred have been created by the case-law of the ECJ to secure the primacy and effectiveness of EU law before national

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[2] Chalmers, D., Davies, G. and Monti, G., *European Union Law*, 4th edition, Cambridge University Press, Cambridge, 2019 pp. 201-203.

courts. The most important reason to which to ECJ refers in a line of jurisprudence sixty years old is that European law gives rights to citizens that are not provided by national law and must be implemented and enforced at domestic level. If primacy and effectiveness are not secured, the EU legal framework does not work. The problem is that national constitutional law also has competing claims for final authority and there are some occasions signalled by the doctrine and some high constitutional courts of Member States, where national law should not yield. As Chalmers et. al. put it, while there are some compelling reasons to claim the authority of EU law *a priori* over national law, there are also good fundamental reasons why, in some circumstances, domestic constitutional law should prevail *de facto* (ie. protection of fundamental rights, *ultravires* legislation, constitutional identity/even sovereignty)[3].

The current situation in EU legal doctrine is as it follows. Very few argue that EU law has to prevail over national (constitutional) law all the time and in all circumstances or reverse, that national law should prevail invariably over EU law. The real question is when EU law should have higher authority and take precedence over national law[4]. In fact, during the last decade different schools of (constitutional) pluralism have studied this problem of "if/when" EU law should prevail searching for theories describing how to conciliate the competing claims for final authority that both national law and EU law put forward. They do so by: 1) looking at common shared constitutional principles and values among Member States (constitutional pluralism) or 2) by rejecting overarching principles and admitting pluralism and diversity per se (pluralism).[5] No matter their differences, both strands of legal thinking challenge the classic doctrinal studies and ECJ´s case-law of the authority of EU law with a powerful critique.

While we certainly need a new theory of European constitutional law to describe our current legal reality, this study provides an overview of most important arguments put forward by the school of (constitutional) pluralism and explains how classic doctrinal theories on the authority of EU law have difficulties replying to this critique. Furthermore, it aims to prove the influence of the philosophical school of perspectivism upon the field of European constitutional law. This is done by asking the following questions: How do we justify different perspectives on the authority of one legal order over the other when they are constructed from different but equally valid legal premises? Is there any perspective more legitimate than the others? If not, how do we combine them? While this contribution does not intend to construct any new legal theory, it formulates nevertheless an invitation to reflect upon critique and claims of

[3] *Ibid*, pp. 208-212, 219. See also White (2017) who has even referred to a situation of "principled legal desobedience" where resistance to the authority of EU law is justified (ie. it is opressive) with three conditions: public approval (ie. e-democracy or plebiscite), defense of public interest and on the basis of EU´s breach of certain constitutional values. White, J., Principled disobedience in the EU, "24 Constellations", 2017, available at <http://eprints.lse.ac.uk/69103/> (last accessed 3 October 2019).

[4] Chalmers, D., Davies, G. and Monti, G., *op. cit.*, 2019, p. 222.

[5] *Ibid*, p. 203.

conditional authority of EU law from a different (mostly legal but also philosophical) approach. The most important claim and finding of the study is reflected on the title: the critique to the single authority of EU law put forward by the (constitutional) pluralism represent, in fact, the invitation of the classic philosophical theory of perspectivism into the field. (Constitutional) pluralism strands could be also be described as schools of "legal perspectivism" in European law.

Consequently, the methodology followed is based on a doctrinal approach to European law. The study of law, judicial made concepts is mostly based on secondary sources (legal doctrine) while primary sources such as EU Treaties and empirical case-law of the ECJ remain in the background and provide the general context. The survey of literature is inclusive of general textbooks and academic monographies or articles which discuss (constitutional) pluralism in EU law. Doctrinal legal analysis relies on a double method: in the first place, a descriptive and evaluative narrative explaining all valid perspectives and, in the second place, a neutral and critical assessment of some academic debates and legal reasoning. The main goal of the method is to reconstruct in a rational way and to portray the coherence and consistency of different schools of thought regarding the authority of EU law searching for a way to make a proper synthesis and move forward.

2. On the theory of perspectivism

Here it is argued that the theory of perspectivism is essential to understand the intellectual challenge that the school of (constitutional) pluralism represents in EU law and European integration process. Perspectivism is a philosophical theory which states that there can be radically different conceptual approaches (ultimate ways of looking at the world) or perspectives, one of which we (must) adopt (consciously or unconsciously), but none of which is more correct than its rivals. This theory draws on the notion of circumstance and, in consequence, the notion of perspective in order to answer metaphysical and epistemological questions.

Perspectivism claims that the access to the world and knowledge through perception, experience, and reason is possible only through one's own perspective and interpretation. In this sense, it rejects both the idea of a perspective-free and an interpretation-free objective reality. In visual perception, the appearance of an object changes according to a viewer's relative position to the object. As it will be explained below, Leibniz and Nietzsche integrated this view into their philosophies but it was the Spanish philosopher Ortega y Gasset who developed a full theory on the question.[6]

In the Western world the first philosophical pronunciations of perspectivism were made by G.W. Leibniz (1646–1716) in the 17th-18th century: „And just as one and the same village, looked at from different sides, appears quite

[6] Dobson, A., *An introduction to the politics and philosophy of José Ortega y Gasset,* Cambridge University Press, Cambridge, 1989. Dobson offers a translation of Ortega y Gasset´s theory in English, see Chapter 9 "Perspectivism and Truth", pp. 144-162.

different and is as it were multiplied perspectively, it happens similarly that, on account of the infinite multitude of simple substances, there are as many different universes, which are nevertheless just perspectives of a single one according to different points of view of each Monade" (Leibniz, *Monadologie* §57) [7] .

The notion of the 'point of view' was then elaborated by Friedrich Nietzsche (1844-1900) who stated that 'the perspectival (*das Perspektivische*) is the fundamental condition of all life' (*Jenseits von Gut und Bøse, Vorrede*). But its most important figure was José Ortega y Gasset (1883-1955), according to whom 'reality offers, like a landscape, infinitely many perspectives, which are all equally true and have equal rights ... the only perspective which is wrong is the one which claims to be the only one' (*Verdad y Perspectiva*).[8]

Ortega y Gasset in fact developed its philosophy inspired by the general theory of relativity in physics. In his conference and article "Verdad y Perspectiva" ("Truth and Perspective"), produced in 1916 and included in the first volume of his unipersonal periodical "El Espectador" ("The Spectator"), Ortega y Gasset talked on the historical significance of the general theory of relativity of Einstein published the same year and explains that a new philosophical theory is needed against narrow-mindedness, as well as against dogmatism and relativism which have brought endless war in Europe. Later on he developed the full theory of perspectivism in the book *El tema de nuestro tiempo* (1923) in Section X "The doctrine of the point of view".[9]

Ortega y Gasset invites Einstein into the field of social sciences and philosophy and the result is both fascinating and brilliant. On the basis of physics, Ortega challenges rationalism and dogmatism and the claim that the notion of perspective is ridiculous because universal truths really exist. Ortega also challenges the school of relativism and its claim that it is impossible to reach universal truths as we, as individuals, are biased by our subjectivity (as Nietzsche had argued before).[10]

Ortega y Gasset agrees with relativism that there is not a universal truth. There is not a single reality as there is no single absolute space and there is no absolute perspective. But Ortega claims that the only way to understand reality is from a concrete circumstance, and therefore from a perspective. For him, contrary to what relativism affirms, the world is perspective and the ultimate perspective is perfected by the multiplication of its viewpoints. Our mission in science and in life is therefore to fight against dogmatism and "exclusivism" and develop a broad outlook that embraces a multitude of perspectives. This multitude of perspectives, when put them together as in the spectrum of light, is as equal to the truth as one

[7] Later on, perspectivism was taken up in other philosophical movements such as phenomenology and postmodernism. *Ibid*.

[8] Dobson, *op. cit*., 1989, pp. 144-162.

[9] The book "El tema de nuestro tiempo" from Ortega y Gasset (1923) is accessible online in Spanish at http://meditaciones.org/wp-content/plugins/pdfjs-viewer-shortcode/pdfjs/web/viewer.php?file=http://meditaciones.org/wp-content/uploads/2018/06/EL-TEMA-DE-NUESTRO-TIEMPO.pdf&download=true&print=true&openfile=false (last accessed 30 September 2019)

[10] Dobson, *op. cit*., 1989, pp. 146-147.

may get.[11] Perspectivism is thus born.[12] However, Ortega y Gasset did not believe that all perspectives have equal value, as this depends on their width and profundity or the science/truth they represent. He suggests nevertheless that the widest perspective available is that provided by life itself.[13]

Our excursion into philosophical perspectivism must end here as it falls outside the scope of our study. However, one thing seems clear. The trends and discussions currently debated in the field of European constitutional law such as constitutional pluralism and the different perspectives of the ECJ and of national courts reflect in fact the rich influence and inheritance of philosophical perspectivism in social sciences, to which law is not an exception. The expression "European legal perspectivism" represent very well the critique to the authority of EU law that constitutional pluralism puts forward. As Chalmers et al. already noted some time ago, at the end of the day, legal sovereignty and authority will be vested in the order that emerges from the reconciliation of EU and national constitutional claims. EU law will only be sovereign to the extent that national courts accept the ECJ´s claims.[14]

3. Overview of different constitutional narratives in EU legal doctrine

Constitutional scholarship and approaches to sovereignty is a classic theme in European law[15]. The topic of European constitutionalism both from the perspective of EU law but also from the perspective of national constitutional law has been the subject of several studies based on general and comparative approaches[16]. In this study we will only refer to the most relevant authors who

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[11] *Ibid*, p. 152.

[12] For Ortega y Gasset, the theory of Einstein is a marvellous proof of the harmonious multiplicity of all points of view. As it happens naturally in a landscape, it is the sum of all perspectives which counts and not individual perspectives. In his view, this multiplicity of all different points of view as a means to understand the world and create knowledge represents a revolution for history, morals, aesthetics and life. See Dobson, *op. cit*., 1989, p. 151.

[13] Dobson, *op. cit*., 1989, p. 161.

[14] Chalmers, D., Davies, G. and Monti, G., *European Union Law*, 2nd edition, Cambridge University Press, Cambridge, 2010, p. 197.

[15] Classic studies on this subject are: Oppenheimer, A. (ed), *The Relationship Between European Community Law and National Law: the Cases*, Cambridge University Press, Cambridge, 1994; Slaughter, A-M., Stone Sweet, A. and Weiler, J.H.H. (eds), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context*, Hart Publishing, Oxford, 1998; De Witte, B., *Direct effect, Supremacy and the Nature of the Legal Order*, in Craig, P. and De Búrca, G. (eds), *The Evolution of EU Law*, Oxford University Press, 1999, pp. 177-213 and also in Craig, P. and De Búrca, G. (eds), *The Evolution of EU law*, 2nd edition, Oxford University Press, Oxford, 2011, pp. 323-362; Alter, K., *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, Oxford University Press, Oxford, 2001; and Jacobs, F.G., *The Sovereignty of Law: The European Way. The Hamlyn Lectures 2006.* Cambridge University Press, Cambridge, 2007.

[16] See also Weiler, J.H.H., *The Constitution of Europe*, Cambridge University Press, Cambridge, 1999; Piris, J.C., *The Constitution for Europe: A Legal Analysis*. Cambridge Studies in European Law and Policy, Cambridge University Press, Cambridge, 2006; Griller, S. and Ziller, J., *The Lisbon Treaty: Constitutionalism without a Constitutional Treaty?*, European Community Studies

represent diverse trends in the literature and scholarship regarding the issue of sovereignty and primacy/authority of EU law.

One of the most important works which helps us to understand the importance and relevance of the strands of constitutional legal pluralism is offered by Walker who develops a persuasive theory of "late sovereignty", In his opinion, these terms reflect the idea of constitutional pluralism in Europe and challenge many of our preconceptions in European law.[17] Walker argues that – in spite of its shortcomings to explain the current EU legal order – we should not "kill" the concept of State/EU sovereignty yet (as an ultimate claim to ordering power) but rather use it in a new way to produce the values and principles that we still need in a world of global economic governance.[18] In the words of Walker, we are now in a process of transition towards a post-Westphalian phase of configuration of legal authority not limited to the State.[19] For Walker, "the particular understanding of the world that provides the theoretical context for discussion of sovereignty is that of constitutional pluralism" which he defines as: "a position which holds that states are no longer the sole locus of constitutional authority, but are now joined by other sites […] most prominently […] those situated at the supra-state level, and that the relationship between state and non-state sites is better viewed as heterarchical rather than hierarchical".[20]

Walker has described and assessed various strands of (European) constitutional scholarship and the political positions associated with these strands. He categorizes them into four groups on the basis of their approaches into sovereignty.

In the first group Walker places all scholars that hold a unitary or one-dimensional approach to sovereignty, understanding and constructing the legal order from an internal point of view and accepted institutional practice. In this group we would find two opposing sub-groups:

a) domestic constitutional scholars who often assume the paradigms of sovereign state authority and who see the entire EU system relegated to the status of delegated authority as states stand as the ultimate "Masters of the EU treaties" (which he names "defensive internationalism"); and

b) EU constitutional scholars who embrace the deep presumption of sovereignty as constructed by the ECJ and endorsed by the other European institutions and defend an autonomous and self-understanding claim of EU law as unitary as the state perspective.[21] Depending on the political implications of the sub-group b) he refers to strands of federalism (the EU being a sort of superstate),

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Association (ECSA) of Austria Publication Series, Vol. 11, Springer, Vienna-New York, 2008; and Torres Pérez, A., *Conflicts of rights in the European Union: a theory of supranational adjudication*, Oxford University Press, Oxford, 2009.

[17] Walker refers to six sovereignty "features" of the EU. Walker, N. (ed.), *Sovereignty in Transition*, Hart Publishing, Oxford, 2006, p. 31.

[18] Walker, *op. cit*., 2006, p. 31.

[19] *Ibid*, p. 9.

[20] *Ibid*, p. 4.

[21] *Ibid*, pp. 11-12.

or legal supranationalism as multi-level constitutionalism (the EU being a complex and sui-generis unity).

For Walker, all these are unitary positions which endorse sovereignty discourses of national or EU constitutional actors. This is a position where national constitutional law and/or EU law are socially constructed. As MacCormick has observed, the issue is not trivial. Both the internationalist way and the Community "involving a new legal order" way offer solid and reasonable arguments to support their positions.[22]

In a second group, Walker places a group of scholars who observe a growing constitutional plurality and who view sovereignty in the European context in deconstructed or disaggregated terms, conceived not unitarily but with a polycentric dimension, usually referred as pooled, split or partial sovereignty.[23] Their metaphorical language is characterised by "self-consciously ironic quotation marks" and by "a rhetorical flourish to highlight the oxymoronic suggestion in such strange couplings as 'shared' or 'divided" sovereignty' and arguing on the basis of the failing of the traditional explanatory language and classic discourses of sovereignty".[24] This is a position of "disagreggated sovereignty" in the words of Walker. Under this approach national constitutional law and/or EU law are deconstructed to throw doubts into what used our certain and safe understandings of these legal orders.

In a third group, Walker finds those who take the development of a movement of the post-sovereign position in the European context into a more extreme form of deconstruction, talking about sovereignty sceptically, ignoring or dismissing sovereignty as an anachronistic irrelevance or reactionary danger or even celebrating the death of the concept of sovereignty itself (MacCormick).[25]

In the fourth group, Walker places the movement of constitutional pluralism as an attempt to resolve the tension between a resilient Unitarianism doctrine and an empirical pluralism impossible to deny. For Walker, this constitutional pluralism accepts that just as we cannot dismiss one or the other and we have to take both seriously. In his words: "constitutional pluralism stands beyond the perspective of any particular system in order to conceive of sovereignty in terms of a plurality of unities and in terms of the emergent possibilities of the relationships amongst this plurality of unities".[26]

There are different versions of (constitutional) pluralism and the diverse authors have even discussed similarities and differences between diverse approaches.[27] For Walker, all of them "tend to emphasize the possibility of

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[22] MacCormick, N. *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford, Oxford University Press, 1999, p. 108.
[23] Walker, *op. cit*., 2006, p. 14.
[24] *Ibid*, p. 15.
[25] *Ibid*, pp. 15-16.
[26] *Ibid*, p. 18.
[27] Avbelj, M. and Komárek, J., *Symposium: Four Visions of Constitutional Pluralism (Conference Report)*, "European Constitutional Law Review", 2008, Vol. 4, no. 3, pp. 524-527. Also available in the "European Journal of Legal Studies", 2008 vol. 2, no. 1, pp. 325-370.

constitutional collision between the high judicial authorities of different polities as the major point of contestation and crucial axis of communication between sovereign policies in a multi-dimensional configuration of authority". In his view, all constitutional cases adjudicated by the ECJ show "a contemplation of such collisions" between the EU and Member States and "about the strategic measure taken within different contexts to ensure the optimal assertion of the norms of the particular system without risking the mutually assured destruction that a direct clash would bring". For Walker these cases represent "the tip of the relational iceberg of constitutional pluralism".[28]

We will follow loosely the guidelines indicated by Walker in order to summarize the main different constitutional narratives in European legal doctrine that agree, challenge or deconstruct in their own terms the authority of EU law and the claim of supremacy/primacy of Union law over national law created by the ECJ. When it is appropriate, we will distinguish with the strands of constitutional pluralism and pluralism, a difference pointed out by Chalmers et al[29] in their latest edition.

4. Traditional constitutional theories in EU law

4.1 Traditional Community doctrine. Hierarchical relations and subordination of national law to European law. Pescatore

For the traditional Community (now Union) doctrine as represented in the early days of the European integration by Pescatore, the relationship between European law and national law is purely hierarchical and is characterized by a total subordination of national law to EU law. EU law is higher in rank and takes precedence in the event of conflict with contradictory internal domestic provisions.[30] Pescatore does not seem to draw a distinction between primacy in application and supremacy in validity. In his classical construction done in a time when European law was simpler, this distinction was not meant to be relevant.

4.2 A federalist view based on the transfer of powers to the EU. Lagrange

Another traditional Community (now Union) school is represented by Lagrange, who defends a federalist doctrine based upon the transfer, distribution and sharing of competences. According to this view, in areas of transferred powers, Member States have simply lost the competence to legislate. If they do so, they

[28] Walker, *op. cit*., 2006, pp. 28-29.
[29] Chalmers et al., *op. cit*., 2019, pp. 222-223.
[30] Pescatore, P., *The Law of Integration*, Sijthoff, Leiden, 1974, p. 94 and Pikani, D., "Supremacy of EU Law and the Jurisprudence of Constitutional Reservations", in *Central Eastern Europe and the Western Balkans: Towards a "Holistic" Constitutionalism*, Doctoral thesis, European University Institute, Department of Law, 2010, p. 97.

would be acting "ultra vires". For Lagrange it is natural that EU law takes precedence. In this federalist approach, the conflict simply disappears.[31]

The problem with the positions of both Pescatore and Lagrange is that the classical jurisprudence on the supremacy of European law can be challenged by the traditional international doctrine (defensive internationalism as described by Walker) built upon a traditional national constitutional doctrine.[32] Both are interrelated, the difference being that the arguments used deploy their effects externally (in the international legal order) or internally (in the domestic legal order).

4.3 A perspective from international law. EU Member States as Masters of the Treaties

From the perspective of international law, we could assimilate EU law to all other international law and deny its special nature or *sui generis* character. After all, the European Treaties are nothing more – from a technical point of view- than international agreements between sovereign states. Although they allow for a transfer of powers or competences to an international organization (the so called supranational EU), the States remain the master of the Treaties and can always decide to retire from the EU.

From this perspective, national courts give precedence to Union law only to the extent provided by national constitutional rules and only because an internal constitutional mandate. The applicability, effect and enforcement of international/European law within the domestic sphere are ruled upon domestic rules. The basis for supremacy of EU law is the national constitution or, in the alternative, another specific law (sometimes super-law) which regulates it status in the internal legal order.[33]

Poiares Maduro agrees that we could very well assimilate EU law to international law, using the principle of *pacta sunt servanda* to regulate its effects in the domestic constitutional order as this understanding safeguards the uniform application of EU law without challenging the ultimate authority of the national constitutions.[34] The problem is that this vision is not the one embraced by the ECJ (direct relations between Community law and the peoples of Europe) and it does not fit with the nature and extent of the claims of authority made both by Union law (declaration of independence and autonomy from constitutional law of

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[31] View of Lagrange as reported by Pikani, *op. cit*., 2010, p. 98.

[32] Pikani, *op. cit*., 2010, p. 97.

[33] Claes, M., *The National courts' Mandate in the European Constitution*, Hart Publishing, Oxford, 2005, p. 158 and Pikani (2010) op. cit. p. 97. On the conceptualization of primacy and supremacy in EU law see also Mendez-Pinedo, M.E., *Supremacy/Primacy*, "Max Planck Encyclopedia of Comparative Constitutional Law" [MPECCoL], Max Planck Foundation for International Peace and the Rule of Law and Oxford University Press, Heidelberg-Oxford, 2016.

[34] Poiares Maduro, M., *Contrapuctual Law: Europe´s Constitutional Pluralism in Action*, in Walker, N. (ed.), *Sovereignty in Transition*, Hart Publishing, 2006, pp. 501-538, p. 504.

Member States) and the European political community.[35] For those reasons Poiares Maduro concludes that this classical vision is not correct and we would need to embrace a notion of competing sovereignties.[36]

4.4 Traditional national constitutional views. The national constitution as the supreme law of the land

For many constitutional lawyers the national constitutional law is the supreme law of the land, before and after accession to the EU. Dualism in international law reflects this position in domestic constitutional law. There would not even be a conflict of constitutional authority between EU law and national law since the supra-national status of EU law remains dependent on the constitutional ratification by Member States.[37] Even when a Member State has joined the EU, there would be a permanent national constitutional control over EU law, a kind of ultimate veto power with regards to the implementation and effectiveness of EU law that is still maintained by some constitutional judges in practice.[38] The final legislative and judicial *kompetenz-kompetenz* on European law issues would be for the state and this sovereign power cannot be transferred or surrendered away.

The clash regarding the primacy of some Union law and national constitutional law (where restricting the state sovereignty regarding future acts of the Parliament is highly problematic) exists in Denmark where euro-scepticism amongst the general population and scholarship is not infrequent. Based on a strict interpretation of the supremacy of the Danish constitution, this national constitutional theory that rejects the absolute primacy of Union law is represented i.e. by Rasmussen who specialized in a constructive critic of the role of the ECJ in the European legal integration.[39] On the subject of judicial activism, this author directly linked the ECJ´s case-law with the national judicial hostility[40] and EU Member States feeling that the ECJ was going too far with a creative jurisprudence.[41] The most recent *Ajos*[42] saga also shows a direct clash between the

[35] *Ibid*, p. 504.
[36] *Ibid*, p. 505.
[37] *Ibid*, p. 508.
[38] *Ibid*, pp. 511, 517 and 521.
[39] Rasmussen, H., *On Law and Policy in the European Court of Justice*, Martinus Nijhof Publishers, Dordrecht- Boston, 1986 and *Confrontation or Peaceful Coexistance? On the Danish Supreme Court´s Maastricht Ratification Judgment*, in O´Keeffe, D. and Bavasso, A. (eds.*), Judicial Review in European Union Law. Liber Amicorum in Honour of Lord Slynn of Hadley*, vol. 1, Kluwer Law International, The Hague, 2000, pp. 377-390.
[40] Rasmussen, H., *Why Deprive the European Judges their National Brethren of their Treaty-Given Competence to Perform Proportionality-Review?* in Baudenbacher, C. (ed.), *Dispute Resolution*, German Law Publishers, Frankfurt, 2010, pp. 223-241, p. 227.
[41] On the ECJ and the disintegration of EU law, see Arnull, A., *Me and my shadow: the European Court of Justice and the disintegration of EU law*, "Fordham International Law Journal", 2008, no. 31, pp. 1174-1211.
[42] ECJ, Case C-441/14 *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen (Ajos)* EU:C:2016:278 and Danish Supreme Court, Case no. 15/2014 *Dansk Industri acting on behalf of Ajos A/S v The estate left by*

Supreme Court of Denmark and the ECJ regarding the authority and effectiveness of general principles of EU law not directly written in the Treaties. A similar story can be said regarding the *Taricco*[43] saga, a confrontation between Italian Constitutional Court and the ECJ regarding the protection of fundamental rights and the principle of legality.

5. Some strands of legal (constitutional) pluralism in EU law

As stated above, the authority of EU law and the ECJ´s doctrine on primacy have been challenged and deconstructed by other narratives. While Member States have in general accepted the legal doctrines developed by the Court of Justice of the EU, and most national courts have recognized the ordinary primacy of European law, some constitutional courts in certain Member States tend to interpret the nature of the law and institutions of the Union based on their own epistemic premises. The supremacy is recognized not originating in EU law as described by the ECJ but with reference to national constitutional law (and/on the national laws on accession).[44] Sometimes these constitutional courts construct safeguards or reservations regarding the ultimate supremacy of Union law in certain circumstances[45]. This results in different perspectives on the primacy/supremacy of Union law.

For this reason, in the last decade academic discussions on the constitutional nature of European law and the perspectives of constitutional monism vs. constitutional pluralism (interaction of EU law with constitutional laws of the Member States) have shaped the most important legal research on EU law.[46]

A, available at <http://www.hoejesteret.dk/ hoejesteret/nyheder/Afgorelser/Documents/15-2014.pdf> (last accessed 24 September 2019).

[43] ECJ, Case C-105/14 *Criminal proceedings against Ivo Taricco and Others* EU:C:2015:555 and Case C-42/17 Criminal proceedings against M.A.S., M.B. (Taricco II). EU:C:2017:936.

[44] Cramér, P., *Does the Codification of the Principle of Supremacy Matter?,* "The Cambridge Yearbook of European Legal Studies 2004-2005", Hart Publishing, Oxford, 2006, pp. 57-79, at pp. 60-61.

[45] For a commentary of the most recent examples of constitutional/highest courts of some EU Member States challenging the authority of EU law see Chalmers et al., *op. cit*., 2019, pp. 224-243. For instance, the Federal Constitutional Court of Germany issued a famour ruling where it retained for itself the ultimate power to interpret the core of the German Basic Law, even at the cost of a serious clash with the Court of Justice and its jurisprudence of primacy. Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2728/13, (Jan. 14, 2014) [case *Gauweiler I*], at para. 29.

[46] A good summary of theories of constitutional pluralism is found in Avbelj, M., *The EU and the Many Faces of Legal Pluralism. Towards a Coherent or Uniform EU Legal Order?*, "Croatian Yearbook of European Law and Policy", 2006, vol. 2, pp. 377-391; and in Avbelj and Komárek (2008) *op. cit.* where four visions are confronted in a symposium. More recently see Avbelj, M. and Komarek, J. (eds.), *Constitutional Pluralism in the EU and beyond*, Hart Publishing, Oxford, 2012; Avbelj, M., *The European Union under Transnational law. A pluralist appraisa*l, Hart Publishing, Oxford, 2018 and Avbelj, M. and Davies, G. (eds.), *Research Handbook on Legal Pluralism and EU Law*, Edward Elgar, Cheltenham, 2018.

In the following sections an overview of the main trends of European constitutional pluralism is provided.

5.1 On the need to reform old constitutionalism. In search of legitimacy for the EU. Weiler

Weiler is not usually considered a pluralist voice but he is nevertheless important for the debate as he has conducted brilliant academic research focusing on the constitutionalisation of European law pursued by the ECJ.[47] While he still defends a hierarchical relation between European law and national laws (unitary or monist view), he nevertheless acknowledges that old constitutionalism must be reformed for reasons of legitimacy. For Weiler authority and power lie within the peoples of Europe: "European federalism is based on a top-to-bottom hierarchy of norms but with a bottom-to-top hierarchy of authority and real power".[48]

Weiler prefers a thesis of constitutional tolerance to articulate the relationship between the Union and the Member States' legal orders, a system where national identities are preserved. For him this would give the necessary legitimacy to the normative claims done by the European constitutionalism (among them the claims of supremacy and direct effect).[49] His work proposes a moderate revision of classic European constitutional law where the supremacy of Union law is not challenged but needs to be reinforced from the perspective of legitimacy.

5.2 Deconstructing the ECJ´s classic doctrines. Questioning sovereignty. MacCormick

MacCormick was the first author to question the classical legal approach to sovereignty in the field of EU law and to challenge the hierarchical legal view of the relationship between European law and national laws. In his seminal study where he questioned sovereignty, he described the constitutional tension between the narrative of the ECJ and the narrative of some high courts in EU Member States, especially those that apply a dualist doctrine of reception of international law but not only these.[50] As such, he represents a first strand of pluralism.

As MacCormick puts it, such pluralism denies the constitutional dependency of states on each other or of states of the Community (now EU). For each state, the internal validity of European law in the sense mandated by the "supremacy doctrine" results from its constitutional law. On the other hand, the

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[47] Weiler, J.H.H., *The Transformation of Europe*, "The Yale Law Journal", 1991, vol. 100, no. 8, pp. 2403-83.

[48] Weiler, J.H.H., *In defence of the status quo: Europe constitutional's Sonderweg*, in Weiler, J.H.H. and Wind, M.(eds), *European Constitutionalism Beyond the State*, Cambridge University Press, 2003, p. 9.

[49] Weiler, J.H.H., *The Reformation of European Constitutionalism*, "Journal of Common Market Studies", 1997, vol. 35, no. 1, pp. 97-131, p. 121.

[50] MacCormick, *op. cit*., 1999. See also MacCormick, N., *The Maastricht Urteil: Sovereignty Now*, "European Law Review", 1995, vol. 1, p. 259-266. For a comment see Cramér, *op. cit*., 2006, p. 61.

Community´s legal order (now Union) is neither conditional upon the validity of any particular State´s constitution, nor upon the sum of the conditions that the states might impose, for that would be no Community at all.[51]

MacCormick argues for a theory of overlapping and interacting non-hierarchical legal systems without formal subordination between themselves. In his view, systems operate without serious mutual conflict in areas of overlap.[52] In his words: "Relations between states inter se and between states and Community are interactive rather than hierarchical".[53] The interpretative power of the highest decision-making authorities of the different systems must be, as to each system, ultimate.

Referring to the relations between EU and Member States legal systems, MacCormick argues: "Where a plurality of judgments each conclusive within a particular order can be passed, the question is: Which ought to prevail? As a question within a self-referential system, such a question is of course self-answering, for the system´s agencies can never say other than that the system´s norm ought to prevail".[54]

The limits and difficulties of legal pluralism are acknowledged as MacCormick explains: "This interlocking of legal systems, with mutual recognition of each other´s validity, but with different grounds for tat recognition, poses a profound challenge to our understanding of law and legal systems. The resources of theory need to be enhanced to help deal with a challenge full of profound and potentially dangerous implications for the successful continuation of European integration. We come to the frontier of the problem of legal pluralism, and have to reflect on solutions to the difficulties for practice implicit in the very idea of pluralism".[55]

MacCormick also represents a trend of pluralism where the ultimate question: who has the power? is left unresolved (legislative and judicial *kompetenz-kompetenz*) although in his late writings he has abandoned his initial preference for radical pluralism. Under radical pluralism, two or more objectively institutional valid normative orders, each with a functioning constitution, acknowledge each the legitimacy of every other within its own sphere, but may give conflicting answers to the same point and; this being the case, no specific legal method may be available for eliminating the conflict which might even go unresolved or be resolved through a political process.[56] A radical pluralism thesis suggests that neither can – or should – claim all-purpose supremacy over the other.[57] MacCormick explains: "The problem is not logically embarrassing, because strictly the answers are from the point of view of different systems". Avoiding such

[51] MacCormick, *op. cit*., 1999, pp. 117-118.
[52] MacCormick, N., *Beyond the Sovereign State*, "Modern Law Review", 1993, vol. 56 issue 1, pp. 1-18, pp. 8, 17.
[53] MacCormick, *op. cit*., 1999, p. 118.
[54] *Ibid*, p. 8.
[55] *Ibid*, p. 102.
[56] *Ibid*, p. 75.
[57] *Ibid*, p. 120.

problems in the first place, other than resolving, is a matter for circumspection and for political as much as legal judgment.[58]

Later on MacCormick evolved towards a thesis that he calls "pluralism under international law" (accompanied by the principle *pacta sunt servanda* or regard for mutual obligations).[59] MacCormick argues that in the event of an apparently irresoluble conflict arising between one or more national courts and the ECJ, there would always be on this thesis of "pluralism under international law" a possibility of recourse to international arbitration or adjudication to resolve the matter.

5.3 Deconstructing the ECJ´s classic doctrines. Constitutional pluralism. Walker

Walker is rather a representative of the movement of constitutional pluralism. For him, EU law goes beyond international law and makes its own independent constitutional claims together with the claims of states. Each constitutional system (EU and Member States) constructs its own legal order on the basis of its own epistemological starting points.[60] Each constitutional system has a different but valid way of stating claims. There are multiples sites or sources of constitutional discourse and authority.

As in the case of Mac Cormick,[61] Walker argues that the relationship between EU law and national laws would be in fact horizontal rather than vertical.[62] However, contrary to MacCormick, Walker argues that the only viable future for Europe is the mutual recognition and respect between these national and supranational laws[63] (that is to say, constitutional pluralism). A vision of radical pluralism builds upon these epistemological and mutually contradictory claims advanced by the EU and the national legal orders. In his view, in order to we get out of this impasse, we would need a sort of meta-constitutionalism, a structure standing above those different epistemic sites so that we can open influences, debates and relations between them.[64] Contrary to Mac Cormick and Poiares Maduro, Walker does not propose to leave the question of ultimate *kompetenz-kompetenz* unresolved.

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[58] *Ibid*, p. 119-120.
[59] *Ibid*, p. 121.
[60] Walker, N., *The Idea of Constitutional Pluralism*, "European University Institute (EUI) Working Papers". Law No. 2002/1 and "Modern Law Review", 2002, vol. 65 no 3, pp. 317-359. See in particular pp. 237, 357-359.
[61] MacCormick, *op. cit*., 1993, p. 8, 17.
[62] Walker, *op. cit*., 2002, pp. 357-359.
[63] *Ibid*., pp. 357-359
[64] *Ibid*., p. 359

5.4 Deconstructing and reconstructing the ECJ´s classic doctrines. Contrapunctual law. Poiares Maduro

Following MacCormick who deconstructed sovereignty on the basis of pluralism[65] and Walker who defends constitutional pluralism and classified trends of constitutional scholarship according to their approaches to sovereignty,[66] maybe the most important article on the topic is written by Poiares Maduro. This author, in spite of embracing current ideas of post-state constitutionalism, plurality of different sites of (constitutional) authority and heterarchical relations; is careful not to jeopardize the success of the European integration project by rejecting the primacy of Union law as a rule of conflict. Poiares Maduro represents a moderate and balanced form of constitutional pluralism that yields to European law in the last instance.

Poiares Maduro believes there are powerful and pragmatic and normative reasons not to adopt a hierarchical monist authority of EU law and its judicial institutions over national law.[67] He proposes what he thinks is a more mature approach and methodology based on mutual respect and normative principles for the practical application of this theory. Poiares Maduro explains his pragmatic vision of coexistence of different legal orders within this pluralism by articulating universal principles to assure his vision of integration.[68]

Based on a metaphor from musicology (harmony and the technique of contrapunct in baroque´s music), from which he derives the term contrapunctual law,[69] Poiares Maduro argues we can listen to the musical melodies played by different constitutional actors as variations of the same European musical theme.[70]

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[65] MacCormick, *op. cit*., 1999, p. 118.

[66] Walker, *op. cit*., 2006, pp. 9-18.

[67] Poiares Maduro, *op. cit.*, 2006, p. 522.

[68] *Ibid*, pp. 501-537. See also from the same author *Europe and the constitution: what if this is as good as it gets?*, in Weiler, J. H. H. and Wind, M. (eds), *European Constitutionalism Beyond the State*, Cambridge University Press, 2003, pp. 74-102; *Interpreting European Law-Judicial Adjudication in a Context of Constitutional Pluralism*, Working Paper Instituto de Empresa Law School WPL2008-02, 2008 and "European Journal of Legal Studies", 2007, vol. 1, No. 2, pp. 1-21; and *Three Claims of Constitutional Pluralism*, in Avbelj, M. and Komárek, J. (eds), *Constitutional Pluralism in Europe and Beyond*, Hart Publishing, Oxford, 2012.

[69] This author agrees with Komárek that the term "contrapuntal" law would be more appropiate for musicology reasons. However I respect the original term created by the author. See Komárek, J., *Institutional Dimension of Constitutional Pluralism*, Chapter 10 in Avbelj, M. and Komárek, J. (eds), *Constitutional Pluralism in Europe and Beyond*, in Hart Publishing, Oxford, 2012, p. 6 footnote 38.

[70] It is difficult to understand Poiares Maduro´s methapor without referring to the art of Baroque music, contrapunct and J.S. Bach. Although the first impression we hear is of diversity, when listening to the music of this European orchestra we realize that variations on the theme do not alter the substance and internal harmony of the musical themes (motives) but only its musical texture, timbre, tone or pitch. Like the special blend of music instruments and timbres in a polyphonic orchestra, their special blend has a unique texture. Contrapuntal technique employs counterpoint or two or more melodic motives or lines. It is based on a sophisticated use of polyphonic texture where at least two melodies play at the same time, each melody being equally important. See Poiares Maduro, *op. cit*., 2006, pp. 501-537.

Borrowing his musical metaphor, constitutional national players would be better understood from a broader perspective, not acting "solos" but playing in (a) larger European constitutional orchestra(s).

Poiares Maduro is one of the few scholars who has tried to offer, together with theory, a practical methodology to deal with constitutional pluralism in an empirical way, providing principles for legislative and judicial national praxis. For Poiares Maduro, apart from recognizing epistemic constitutional pluralism we should try to harmonize all these legal orders, categorizing common principles valid for all systems so that they can integrate peacefully. The common basis of contrapunctual law is articulated through some principles that all legal orders of the common European system should respect for the harmony of this common system.[71] In his view, these are normative principles that should guide the action of any constitutional actor in order to avoid conflicts: pluralism, consistency, vertical and horizontal coherence, universality and institutional choice.

If these normative principles of contrapunctual law are respected, as national courts and the ECJ must adjust to each other´s claims; conflicts between legal systems become an exceptional state of affairs.

For Poiares Maduro, what makes the European legal order unique is that the open question of "who decides who decides" (issue of ultimate authority) should remain open.[72] In his words: "As long as the possible conflicts of authority do not lead to a disintegration of the European legal order, the pluralist character of European constitutionalism in its relationship with national constitutionalism should be met as a welcome discovery and not as a problem in need of a solution".[73]

Borrowing also musicology terms, Alexander Somek's has taken the challenge of looking into constitutional pluralism as described by Poiares Maduro with a different result. His diagnosis of the present practice of EU legal doctrine and judicial practice is qualified, on the contrary, as "legal dissonance" when judicial rulings are methodogically weak.[74]

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[71] This musical methaphor made an impact on the European legal discipline but attention must be made that Poiares Maduro referred to baroque music and not to jazz or other forms of abstract and expressive music. An American scholar – J. Hart Elys (1991) has explained that, over the years he has tried to elaborate the metaphor between constitutional interpretation and jazz improvisation: "It "works" on the gimmicky level that various approaches to interpreting the Constitution can validly be compared to various jazz styles." Hart Elys, J., *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures*, "Virginia Law Review", 1991, Vol. 77, no. 4, pp. 833-879.

[72] Poiares Maduro, *op. cit.*, 2006, p. 522.

[73] *Ibid*, p. 523.

[74] For Somek the term "dissonance", also a musical metaphor, describes better the situation of legality in the European Union. He refers to music history and to the "emancipation of dissonance" done by Arnold Schönberg in 1908 which amounted to putting consonant and dissonant sonorities on an equal footing in the composition of music. Somek argues, in the first place, "interesting" or "appealing" judicial divinations of law which are methodologically weak on terms of legal reasoning are to be considered the legal equivalent of dissonance in music. He claims, on the second place, the ECJ has become the chief purveyor of the emancipation of legal dissonance. Somek, A., *The Emancipation of Legal Dissonance*, "University of Iowa Legal Studies Research

5.5 Deconstructing the ECJ´s classic doctrines. Radical pluralism. Constitutional reservations on EU law. Kumm

In the deconstruction of ECJ´s classic doctrines, Poiares Maduro and the late Mac Cormick referred in the previous sections still represent a moderate trend while Walker, as commented before, joins some others who call for a new meta-law (law of laws ruling over EU law and national constitutional laws). But there are other more radical approaches within the constitutional pluralist school which justify the ultimate reservations and resistance to the authority and primacy/supremacy of European law. On the basis of a constitutional theory conceived beyond the state, Kumm defends the most radical form of pluralism, one of constitutional resistance to EU law.

For Kumm the relations between EU law and national laws should be based on a theory of the best fit.[75] While Kumm still believes that the European legal process has a strong integrationist *telos* (purpose), he rejects a monist understanding of the EU legal order based on the case-law of the ECJ and its rejection of pluralism.

This radical form of pluralism represented by Kumm recognizes and accepts that, in the last instance, national legal orders can raise constitutional reservations over some fundamental issues. Radical pluralism excludes any form of harmonization, balancing or weighting of various and contradictory interpretations for the benefit of European integration. When contradictory claims exist that oppose EU law and national constitutional provisions, there might be a valid reason for it so that the constitutional domestic system should not abandon its claim for ultimate authority. In order to soften the disintegration effects that this construction entails for the EU legal order, Kumm admits that these reservations would be raised only in exceptional cases and would be only valid from the perspective of the domestic legal order not from the European perspective.[76]

Paper", 2009, no. 09-02. Available at <http://ssrn.com/abstract=1333194> (last accessed 3 October 2019).

[75] Kumm, M., *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*, "Common Market Law Review", 1999, vol. 36, pp. 351-386; and *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, "European Law Journal", 2005, vol. 11, no. 3, pp. 262-307.

[76] Schilling argues that Kumm´s claim that there is no legal reason for a court not to choose a different ultimate legal rule than the one it used to adhere to is erroneous and that the structure proposed by Kum would make impossible any distinction between general and legal discourses undermining the determinacy of law. He also argues that this idea of constitutionalism beyond the State can be reconstructed only as outright supremacy of EC law. Schilling, T., *The Jurisprudence of Constitutional Conflict: Some Suplementations to Mattias Kumm*, "European Law Journal", 2006, vol. 12, issue 2, pp. 173-193.

6. New forms of European constitutionalism?

All the strands of (constitutional) pluralism are based on a new approach to European constitutionalism as well as the different understanding of the notion of sovereignty in Europe. Although this topic is very large and cannot be covered in detail here, it is interesting for the purposes of our research to refer how all these strands try to propose new forms of thinking about European constitutionalism by constructing and understanding the classic concept of sovereignty in different ways.

6.1 Constitutionalism beyond the State. Weiler and Wind

In a classic book that became a reference in the field, Weiler and Wind summarized the constitutional discussions in the legal world of scholars into the phrase "European Constitutionalism Beyond the State". This book was based on a research project by a team of scholars who tried new ways of thinking on theories and approaches to EU law and on the constitutional future of Europe.[77]

As Weiler and Wind argued, we cannot deny that European constitutionalism is in crisis but for them its problems are old problems of constitutional issues just ignored until now[78]. This is mainly due to the fact that the EU legal order should integrate claims of validity of both national and EU constitutional law which has not yet happened.[79] In their view, the deconstruction of the constitutionalism theory created by the ECJ is necessarily required by the European integration process as it does not incorporate national constitutional perspectives.[80] On the other hand, it is also clear for them that national constitutionalism is artificially constructed and should not rule either over the diversity of European constitutions.[81]

In their view, we should consider a new form of open constitutionalism which leaves the question on the ultimate *kompetenz-kompetenz* unresolved.[82] Weiler and Wind do not agree, however, with the extreme deconstruction as practiced by Kumm who argues that national constitutional authorities can derogate from EU law as long as this derogation is only valid under national law.[83] Their vision is a moderate version of constitutional pluralism and saves, at the last instance, the uniformity and integrity of EU law by recognizing its primacy in the last instance.

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[77] Weiler, J. H. H. and Wind, M., *European Constitutionalism Beyond the State*, Cambridge University Press, Cambridge, 2003.
[78] *Ibid*, pp. 102 and 110.
[79] *Ibid*, p. 99.
[80] *Ibid*, p. 75.
[81] *Ibid*, p. 101.
[82] *Ibid*, p. 95.
[83] *Ibid*, p. 99.

6.2 Sovereignty in transition and post-sovereignty. Walker

As stated in section 2, the question of primacy of European law is intimately connected with the debates on sovereignty, central to both constitutional and international law. Some authors such as Walker have challenged the post-Westphalian understanding of classic State sovereignty and offer new explanations and constructions of sovereignty better adapted to the reality and complexity of the EU legal order.[84] Walker has studied the relationship between the sovereignty traditions of various member states on the one hand and the new claims to authority made on behalf of the European Union itself on the other in order to throw light on the EU constitutional debate. As Walker frames the current challenge in Europe, we should perhaps redirect our attention and focus to "the unity and authority of the EU legal system and the increased burden of law in the process of legitimating a post-state polity".[85]

For Walker, as well for many other scholars working in the field, the EU offers a particular interesting example as it shows how the classical centrality of the sovereignty concept is challenged by contemporary trends that, in fact, shift authority away from the sate to supra-state, infra-state and even non-state entities. He prefers therefore to refer to concepts such as "sovereignty in transition" and/or "post-sovereignty".

6.3 Transnational, comparative and cooperative constitutionalism

Many other scholars are currently trying to construct a new form of constitutional theory beyond the classic understanding of sovereignty. A few authors will be briefly indicated here. Tsagourias refers to "transnational constitutionalism" as a political and legal phenomenon taking place beyond the state from an interdisciplinary perspective. His discourse elaborates on the nature of European and international constitutional models, the principles, purpose or telos behind this renovated movement, the role of the state and central courts and relationships between "composite orders".[86]

Other authors do a systematic comparison of the institutions, policies and developmental patterns of the European Union and the United States in order to

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[84] Walker, *op. cit.*, 2006, pp. 3-32.

[85] Walker, N, *Legal Theory and the European Union*, "European University Institute (EUI) Working Papers". Law No. 2005/16. Available at <http://ideas.repec.org/p/erp/euilaw/p0032.html> (last accessed 3 October 2019).

[86] On this transnational constitutionalism see the work edited by Tsagourias, N., *Transnational Constitutionalism: International and European Models*, Cambridge University Press, Cambridge, 2007.

determine whether the EU resembles or should resemble the USA.[87] The term of cooperative constitutionalism is also employed.[88]

In a different line, Everson and Eisner describe a movement of new constitutionalism where judges and lawyers bring together when creating European jurisprudence and talk about a theory or praxis of "procedural constitutionalism" where we find not a grand theory of constitutional adjudication buy, rather a practical process of a making of European constitution.[89]

Last but not least, other authors such as Lasser talk about "judicial transformations" and a culture of "rights revolutions" which is transforming European judicial culture and judges´s political roles in Europe on the basis of the protection of fundamental rights. Petersmann points that we should refer to the sovereignty of citizens in the EU legal order, rather than State sovereignty[90].

7. On the difficulty of accepting any specific theory or perspective of EU law

The different approaches to European constitutional law all raise difficulties as they are not free from criticisms and do not solve all necessary issues or problems in practice. All classic, revisionist or deconstructive approaches present lights and shadows, pros and cons. An assessment of the shortcomings of the most important theories follows.

The main problem of the traditional Community (now Union) doctrine represented by Pescatore and Lagrange[91] is that the purely hierarchical relationship between EU law and national laws and the total subordination of national law vis-à-vis European law is problematic for national constitutional courts and that this approach does not theoretically reply to all issues. In the first place, why should EU law be higher in rank than constitutional law in the domestic legal order? On the basis of what specific norm or criteria? The lack of legitimacy is the Achilles' heel in the EU legal order because, at the last instance, it brings us back to the

[87] Menon, A. and Schain, M.A., *Comparative Federalism: The European Union and the United States in Comparative Perspective*, Oxford University Press, Oxford, 2007.

[88] On the role of national parliaments in the European legal order in relation with the supremacy of EC law in the new EU Member States, see Annelli, A., *Supremacy of EC Law in the New Member States. Bringing parliaments into the Equation for "Co-operative Constitutionalism*", "European Constitutional Law Review", 2007, vol. 3, pp. 25-67.

[89] See on this constitutive power of judges and law in Europe Everson, M. and Eisner, J., *The Making of a European Constitution: Judges and Law Beyond Constitutive Power*, Routledge – Cavendish, London – New York, 2007.

[90] Petersmann, E-U., *From State Sovereignty to the Sovereignty of Citizens in the International Relations of the EU?*, in Walker, N. (ed.), *Sovereignty in Transition*, Hart Publishing, 2006, pp. 145-166. See also Rosenfeld, M., *Rethinking constitutional ordering in an era of legal and ideological pluralism*, "International Journal of Constitutional Law", 2008, vol. 6, issue 3-4, pp. 415-455.

[91] See criticism by Claes, *op. cit.*, 2005, p. 158 et seq. and specially on p. 162 and Pikani, *op. cit.*, 2010, p. 97 et seq. on the approach represented by Pescatore, *op. cit*., 1974. See also Pikani, *op. cit*., 2010, pp. 71-74 for arguments against the legal reasoning of the ECJ.

national constitutional level (since EU Treaties are public international agreements signed by States). In the second place, the transfer of sovereign powers to the EU, in limited fields, does not carry along the automatic overriding force of EU law in all spheres pre-empting constitutional/national/regional/local law. And, in the third place, even when the EU has been given exclusive competence in one field, it is a fact that we cannot exclude domestic constitutional rules establishing general principles even in such a case.

The traditional international doctrine which assimilates EU law to international law is not perfect either as it does not solve the challenge of the need of uniform application and enforcement of European law in 28/27 different Member States (Brexit pending) and the uniform judicial protection of individual rights in all the territory part of the EU.[92] This is precisely what distinguishes most EU law from classic international law.

The classic constitutional approach does not work either as it basically "nationalizes" European law and makes it conditional upon provisions in national constitutional law, contrary to the requirements of the EU legal order as expressed by the ECJ[93].

As for the virtues of constitutional pluralism, they come along with several important shortcomings. Pikani is one of the authors who has offered a clear overview of the discussions. In general, for this author, constitutional pluralism offers a balance of virtues and vices.[94] As she argues, the theories of constitutional pluralism innovate and bring fresh air to classic discussions in EU law and enrich the discipline and debates in the sense that they offer alternative perspectives, approaches and methodologies to articulate the relations between European law and national laws and to understand the challenges raised by the primacy law in praxis.[95] We gain therefore a more progressive, sophisticated and accurate understanding of a EU legal order unveiled as pluralist (with different centers or sites of sovereign power and constitutional authority) in the context of a globalized world; realizing that our previous ideas about absolute superiority and a total surrender of powers of one legal order to another is difficult to accept in our post-modern understanding of law and democracy.[96] However, at the end of the day, taken to its logical consequences, Pikani is of the opinion that constitutional pluralism fragments EU law.[97]

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[92] Pikani, *op. cit*., 2010, p. 97.

[93] See, among others, Weiler and Wind, *op. cit.*, 2003; Von Bogdandy, A., *Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law*, "International Journal of Constitutional Law", 2008, vol. 6, issue 3-4, pp. 397-413; and Von Bogdandy, A. and Schill, S., *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, "Common Market Law Review", 2011, vol. 48, issue 5, pp. 1417-1453.

[94] Pikani, *op. cit.*, 2010, pp. 102-105.

[95] *Ibid*, p. 102.

[96] Pikani, *op. cit.*, 2010, p. 103.

[97] *Ibid*, p. 105.

Likewise, according to Komárek, the virtues of constitutional pluralism lie in the institutional dimension it brings into the field of European Union law.[98] In his words, "through its contestation of finality and conclusiveness, [it] highlights the role of particular institutions which take decisions of constitutional significance." This was a dimension not recognized by most theories of European constitutionalism which had focused too much on conflict and institutional choice. Komárek prefers to move the debate from choosing the right institutions to a line of inquire where we explore how involve all institutions and assure communication between them.[99] For him the school of constitutional pluralism has to advance in the research agenda following this line.

In a more concrete way, the shortcomings of the constitutional pluralist movement are several and difficult to ignore. Pikani categorizes them into four groups.[100] In the first place, the main value of constitutional pluralism is its flexibility into approaching EU law (as opposed to the required uniformity of EU law which the ECJ has insisted so much on in its case-law). In the second place, many representatives of the school seem to abandon altogether supremacy and primacy (both as criteria of validity and applicability as a rule of conflict) and reject the normative precedence of EU law over national law (substantially and procedurally). In the third place, she notes that constitutional pluralism is difficult to apply in practice and questions whether this experimental approach is really beneficial for EU law and the European legal integration. And, last but not least, Pikani notes that constitutional pluralism brings into the architecture of the EU legal system a serious risk of fragmentation.

Other scholarship refers to the conditional authority of EU law. As it was the case with a traditional constitutional approach, Cramér points that constitutional pluralism makes the nature and doctrines of EU law conditional upon provisions of national constitutional law. The conditionality basically follows two main lines of reasoning: conditionality specifically related to national constitutional safeguards for fundamental rights, and conditionality related to the scope of the competences conferred upon the EU.[101] Is this conditionality that justifies the jurisprudence of national resistance to Union law as expressed by some constitutional courts.

The most important critique to alternative constitutional narratives such as constitutional pluralism has been put forward by Baquero Cruz. For this author, it is clear that the Maastricht ruling of the German constitutional court of October 1993 left a deep mark on EU law.[102] In this way he has defined the movement of legal pluralism as an interesting attempt to come to terms with this *Maastricht-Urteil* decision and its legacy among both other national courts and scholars.

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[98] Komárek, *op. cit*., 2012, p. 1.
[99] *Ibid*., p. 1.
[100] Pikani, *op. cit*., 2010, pp. 102-105.
[101] Cramér, *op. cit.*, 2006, p. 61.
[102] Baquero Cruz, J., *The legacy of the Maastricht-Urteil and the pluralist movement*, EUI Working Paper RSCAS 2007/13 and "European Law Journal", 2008, vol. 14, no. 4, pp. 389-422.

Showing deep understanding of the reasons behind the movements arguing for different perspectives to European constitutional pluralism, Baquero Cruz has nevertheless criticized the radical approaches of some radical forms of legal pluralism such as Kumm[103] on the basis of the damage they may cause to essential dimensions of the rule of law within the EU legal order.[104] For Baquero Cruz, it is simply a misunderstanding that the ECJ claims absolute supremacy of EU law in the sphere of validity as what the ECJ requires is a technical rule of conflict in the sphere of application (a guarantee of the non-application of a conflicting national law). Although he acknowledges that, when applying that technical rule of precedence of European law, some sort of substantive or formal hierarchy is given to EU law, for him this is the only practical and feasible solution in the context of the European legal integration.[105] Last but not least, together with the risk of fragmentation of EU law, he notes how this school has little impact overall in the field of EU legal scholarship when the 27 countries are considered.[106]

Giorgi and Triart also agree with Baquero Cruz on the current confusion between primacy and supremacy. They point out that in reality the historical conflict between the ECJ and the national constitutional courts regarding primacy is a misunderstanding as all these European courts adopt comparable solutions in their treatment of legal pluralism and they see the denial of the same legal pluralism as a *sine qua non* condition for the survival of their own legal orders.[107]

More recently, Bobic has noted that criticism to pluralism has been based on its descriptive nature and the lack of normative prescriptions, as well as the lack of democratic legitimacy in the EU as a pluralist legal order[108]. Furthermore, the critique towards constitutional pluralism as a well-fit theory for explaining the

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[103] Kumm, *op. cit*., 1999 and Kumm, *op. cit*., 2005. For a critic of Kumm see also Schilling, *op. cit*., 2006, who, after studying the jurisprudence of constitutional conflict, argues that the idea of a constitutionalism beyond the State can be reconstructed, at the end, as outright supremacy of EC/Union law.

[104] Baquero Cruz, *op. cit*., 2008, 389-422.

[105] *Ibid*. For Baquero Cruz the preliminary reference procedure is an excellent tool for national courts to raise issues of constitutional relevance before the ECJ which affect the legal basis of EU legislation, the distribution of competences before the EU and Member States and even fundamental rights, as the principles of EU law and national constitutional systems are indeed very similar.

[106] Baquero Cruz, *op. cit*., 2008, 389-422.

[107] Giorgi, F. and Triart, N., *National Judges, Community Judges: Invitation to a Journey through the Looking-glass-On the Need for Jurisdictions to Rethink the Inter-systemic Relations beyond the Hierarchical Principle*, "European Law Journal", 2008, vol. 14, issue 6, pp. 693-717, in particular pp. 698-699. On the differences between primacy and supremacy see also Mendez-Pinedo, *op. cit*., 2016.

[108] Bobic, A., *Constitutional Pluralism Is Not Dead: An Analysis of Interactions between Constitutional Courts of Member States and the European Court of Justice*, "German Law Journal, 2017", vol. 18, no. 6, pp. 1395-1428. Available at <https://ssrn.com/abstract=2850589> (last accessed 3 October 2019).

relations and interactions between EU law and national legal orders have been put forward by scholarship (most notably Sarmiento[109], Fabbrini[110] and Kelemen[111]).

8. In need of a new comprehensive theory of EU constitutional law and principles for judicial praxis

As we have seen, all the current theories of European constitutional law (constructivism from the ECJ, traditional international/constitutional approaches, deconstruction and constitutional pluralism) are limited and present lights and shadows. None of them can fully articulate a perfect relationship between EU law and national constitutional law with the background of a sophisticated reality. It is still uncertain whether these new theories fully describe, apprehend and assess the new legal relations and dynamics that European Union law has created.

Once we accept that EU law has been constructed by the ECJ and we proceed to challenge this construction and even deconstruct it with the aid of "legal perspectivism";[112] once we prove the relativity of the main axioms and paradigms of every theory, the oxymoronic character of the claims made by EU law when confronted with similar claims of ultimate authority put forward by national constitutional actors; in short, once we "kill" the supremacy/primacy of EU law in the last instance, then what is left of the uniformity and integrity of the European legal order? How do we cope with non-ordinary conflicts between European law and national constitutional laws? As with all forms of deconstruction, once we prove the main premise, that one narrative is subjective and thus can be falsified by other narrative and other systems as valid as itself, all becomes relative. How we continue dealing with what has become deconstructed reality? How do we deal with the application and enforcement of European law in 28/27 different Member States without fragmenting the legal system? This contribution does not attempt to reply to this question but rather to briefly refer new forms of thinking and constructing comprehensive and critical theories of EU constitutional law incorporating different perspectives

8.1 Holistic constitutionalism. Besselink and Pikani

Pikani,[113] on the basis of previous work done by Besselink,[114] has put forward the proposal for what she calls "holistic constitutionalism", "understood as

[109] Sarmiento, D., The OMT case and the demise of the pluralist movement, in blog Despite Our Differences, available at <https://des piteourdifferencesblog.wordpress.com/2015/09/21/the-omt-case-and-the-demise-of-the-pluralist-movement/> (last accessed 3 October 2019).

[110] Fabbrini, F., *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*, "German Law Journal", 2015, vol. 16 (4), pp. 1003-1023.

[111] Kelemen, D., *On the unsustainability of constitutional pluralism. European supremacy and the survival of the Eurozone*, "Maastricth Journal of European and Comparative Law", 2016, vol. 23, pp. 136 -151.

[112] See section 1. On Ortega y Gasset, "Perspectivism and Truth" (1923).

[113] Pikani, *op. cit*., 2010, p. 4.

a full commitment of national and EU institutions to fulfill agreed obligations under the European composite constitution avoids clashes between the two legal orders at least at some extent". In such a system, we would have both national and European institutions truly engaged towards achieving the aims of European integration in the framework of EU constitutional law and the common constitutional principles that are in place in Europe. All actors operating within one or the other system would be loyal to the basic constitutional legal orders (EU and national) and would observe the limits to their institutional powers imposed by this holistic construction.[115]

8.2 Multi-level constitutionalism. The European constitution as a composite. Pernice

In spite of the sophisticated name of his theory, Pernice represents a unitary position of EU law in the view of Walker.[116] For Pernice legal supranationalism is better defined as multi-level constitutionalism (the EU being a complex and sui-generis unity made of different legal orders). He does not presuppose a priori supremacy, either for EU law, or for national laws as he opposes the hierarchical relations between European law and national law. Nevertheless, he still believes on a classic idea behind the European legal integration: functionalism and defends a concept of functional supremacy. For him, there is in fact a European constitution but is a complex (composite) Constitution, a unique legal system composed of complementary constitutional layers (European and national) which are interwoven and interdependent among them. While Pernice recognises the existence of different epistemological systems constructed from different constitutional premises he argues that, in case of conflict, the European norm must take precedence.[117] All different legal orders compose one system which must produce ultimately one legal answer in each case. The normative justification for this precedence in application is functional, not only the need to preserve the functioning of the European legal order but also the European rule of law.[118] Pernice agrees with the ECJ that the uniform application of EU law, at the last instance is for the benefit of citizens who are not discriminated against on their basis of the national systems through which European law is channelled, applied and enforced.

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[114] On the concept of a composite European Constitution see also the contribution of Besselink who makes a distinction between evolutionary and revolutionary constitutions. His work is wider reflection on the so-called "post-modern constitutionalism". Besselink, L., *A Composite European Constitution*, Europa Law Publishing, Groningen, 2007.

[115] Pikani, *op. cit*., 2010, p. 7.

[116] Walker, *op. cit*., 2006, pp. 11-12.

[117] Pernice, I., *Multilevel Constitutionalism in the European Union*, "European Law Review", 2002, Vol. 27, No. 5, pp. 511-529, at p. 520 and from the same author Pernice, I., *European v. National Constitutions*, "European Constitutional Law Review", 2005, vol. 1, pp. 99-103.

[118] Pernice, I., *op. cit*., 2002, pp. 514 and 520.

8.3 A new law of the laws to rule over EU and national constitutional laws?

Giorgi and Triart have argued that we need to overcome legal pluralism. In their view, the historical conflict between the ECJ and the national constitutional courts regarding primacy of EU law is nothing but a misunderstanding. With the metaphor of using a looking-glass, they prove, on the contrary, that in reality the ECJ and the national constitutional courts adopt comparable solutions in their treatment of legal pluralism.[119]

For Giorgi and Triart, all these courts see the negation of pluralism as essential for the survival of their own legal orders. In their view, a new theoretical context is needed to help all judges reconcile their role as supreme guardians of their legal orders with the pluralist reality. In short, similar to the principles established by Poiares Maduro in his contrapunctual law model,[120] they defend the notion that practical proposals are strongly needed if we want to give judges the tools and techniques to empower them to accomplish their national and European mandates within this pluralist structure.[121]

In order to articulate relations between legal orders, it is even possible to overcome pluralism and follow the invitation done by Walker[122] in order to design a law between heterogeneous legal orders, a kind of "metalaw", "law of laws" of "law between legal orders" as an object of study, teaching and research.[123]

8.4 Is constitutional pluralism dead?

As Jaklic has put it, "it is now commonplace to describe constitutional pluralism both as a whole new branch within constitutional thought and the single most dominant branch of European constitutional thought."[124] However, since the multiple crisis that affect the EU in the last decade, the context of the European integration has changed. Some rulings of the ECJ seem to be critical reactions to defend the unity, authority and effectiveness of European law against pluralist challenges coming not only from doctrine but also from high/constitutional courts in EU Member States. Harsh criticism on both sides has increased. For these reasons, some recent scholarship has engaged in the debate whether or not constitutional pluralism is still alive and relevant for the field of EU constitutional law.

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[119] Giorgi and Triart, *op. cit.*, 2008, 693-717.
[120] Poiares Maduro, *op. cit.*, 2006, pp. 531-538.
[121] Giorgi and Triart, op. cit., 2008, 693-717.
[122] Walker, *op. cit*., 2002, pp. 357-359.
[123] Editorial, *The Law of Laws - Overcoming Pluralism*, "European Constitutional Law Review", 2008, vol. 4, pp. 395-398. See also Editorial*, Karlsruhe has spoken: "Yes" to the Lisbon Treaty, but…"*, "Common Market Law Review", 2009, no. 46, pp. 1023-1033.
[124] Jaklic, K., *Constitutional Pluralism in the EU*, Oxford University Press, Oxford, 2014.

Avbelj is one of the scholars who has more recently attempted to deal with criticism to pluralist positions through what he calls "principled legal pluralism"[125], articulating a framework for the interaction of national law and "transnational law". Bobic also agrees that constitutional pluralism is reflected in a proper reading of the Treaties and most recent rulings from all judicial actors interacting in EU law[126]. Ideas such as "functional constitutionalism" are put forward by Isikse to describe the nature of European integration and soften the discussions[127]. Authors such as Wilkinson defend that, rather than a question of how national and European legal orders can coexist without formal hierarchy of one upon de other, "the pressing question is how national constitutionalisms can materially co-coexist in a harmonious (and heterarchical) fashion".[128] Both Bobic and Wilkinson defend that constitutional pluralism is not dead but alive, specially taking into account a fundamental formal conversation between the German Constitutional Court and the ECJ on the question of ultimate authority, the so called Outright Monetary Transactions (OMT) saga[129]. The most recent article by Menéndez strongly calls for a new constitutional theory of EU law and European integration[130]. The debates, therefore, on the authority of EU law will certainly continue.

9. Conclusions

Theories of constitutional pluralism in EU law have claimed and demostrated that there is more than one truth, reality and perspective in this complex, plural and sophisticated legal order that interacts with national constitutions. Following what we can call a critique based on a "legal perspectivism" approach of paramount importance, pluralism forces us all to search for different theory to justify the European legal integration project. On the other hand, constitutional pluralism has also been criticized as it brings chaos, fragmentation and disorder into the monist order that the ECJ has traditionally constructed.

How do we reconstruct the authority of EU law taking into account well founded critique? There are no clear answers as the debates continue. There is not a

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[125] Avbelj, M., *The European Union under Transnational law. A pluralist appraisal*, Hart Publishing, Oxford, 2018; and Avbelj, M. and Davies, G. (eds.), *Research Handbook on Legal Pluralism and EU Law*, Edward Elgar, Cheltenham, 2018. See also Avbelj, M. and Komarek, J., *op. cit*., 2012.

[126] Bobic, *op. cit*., 2017.

[127] Isikse, T., *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State*. Oxford University Press, Oxford-New York, 2016.

[128] Wilkinson, M. A., *Constitutional Pluralism: Chronicle of a Death Foretold?,* "ARENA Working Paper" 7/2017. Available at <https://ssrn.com/abstract=3018441> or http://dx.doi.org/10.2139 /ssrn.3018441> (last accessed 3 October 2019), p. 3.

[129] ECJ, Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* EU: C: 2015: 400 (16 June 2015); and Bundesverfassungs-gericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2728/13 (14 January 2014, 21 June 2016).

[130] Menéndez, A.J. *The Past of an Illusion? Pluralistic Theories of European Law in Times of "Crises",* "European Papers", 2018, vol. 3, no. 2, pp. 623-658 available at <http://www.europeanpapers.eu/sites/default/files/EP_eJ_2018_2.pdf> (last accessed 3 October 2019).

single theory of EU constitutional law universally accepted. Different constitutional systems exist de facto within the European constitutional order. On the other hand, diversity and plurality without limits challenge the European integration process. Scholarship calls for a new comprehensive theory.

While it is clear that traditional constitutional concepts have been eroded by new realities, the legitimacy of the European Union legal system is not to be taken for granted yet. Debates will continue. At the end of the day, whether these other alternative theories will succeed or not in our field will depend not so much on their expansion within the academia or rebuttal by some courts but rather on a "street law" perception by the European citizens: the evolution of general beliefs on the meaning of sovereignty, the constitutional protection of fundamental rights (both at EU and at national level) and the benefits of EU membership and legal integration in hard cases.

Bibliography

1. Alter, K., *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, Oxford University Press, Oxford, 2001.
2. Amar, V. and Tushnet, M., *Global Perspectives on Constitutional Law*, Oxford University Press USA, New York, 2009.
3. Annelli, A., *Supremacy of EC Law in the New Member States. Bringing parliaments into the Equation for "Co-operative Constitutionalism"*, "European Constitutional Law Review", 2007, vol. 3, pp. 25-67.
4. Arnull, A., *Me and my shadow: the European Court of Justice and the disintegration of EU law*, "Fordham International Law Journal", 2008, no. 31, pp. 1174-1211.
5. Avbelj, M. and Davies, G. (eds.), *Research Handbook on Legal Pluralism and EU Law*, Edward Elgar, Cheltenham, 2018.
6. Avbelj, M. and Komarek, J. (eds.), *Constitutional Pluralism in the EU and beyond*, Hart Publishing, Oxford, 2012.
7. Avbelj, M. and Komárek, J., *Symposium: Four Visions of Constitutional Pluralism (Conference Report)*, "European Constitutional Law Review", 2008, Vol. 4, no. 3, pp. 524-527. Also available in the "European Journal of Legal Studies", 2008 vol. 2, no. 1, pp. 3225-370.
8. Avbelj, M., *The EU and the Many Faces of Legal Pluralism. Towards a Coherent or Uniform EU Legal Order?,* "Croatian Yearbook of European Law and Policy", 2006, vol. 2, pp. 377-391.
9. Avbelj, M., *The European Union under Transnational law. A pluralist appraisal*, Hart Publishing, Oxford, 2018.
10. Baquero Cruz, J., *The legacy of the Maastricht-Urteil and the pluralist movement*, EUI Working Paper RSCAS 2007/13 and "European Law Journal", 2008, vol. 14, no. 4, pp. 389-422.
11. Besselink, L., *A Composite European Constitution*, Europa Law Publishing, Groningen, 2007.
12. Bobic, A., *Constitutional Pluralism Is Not Dead: An Analysis of Interactions between Constitutional Courts of Member States and the European Court of Justice*, "German Law Journal, 2017", vol. 18, no. 6, pp. 1395-1428.

13. Chalmers, D., Davies, G. and Monti, G., *European Union Law*, 2nd edition, Cambridge University Press, Cambridge, 2010 and *European Union Law*, 4th edition, 2019.
14. Claes, M., *The National courts' Mandate in the European Constitution*, Hart Publishing, Oxford, 2005.
15. Cramér, P., *Does the Codification of the Principle of Supremacy Matter?,* "The Cambridge Yearbook of European Legal Studies 2004-2005", Hart Publishing, Oxford, 2006, pp. 57-79.
16. De Witte, B., *Direct effect, Supremacy and the Nature of the Legal Order*, in Craig, P. and De Búrca, G. (eds), *The Evolution of EU Law*, Oxford University Press, 1999, pp. 177-213 and also in Craig, P. and De Búrca, G. (eds), *The Evolution of EU law*, 2nd edition, Oxford University Press, Oxford, 2011, pp. 323-362.
17. Dobson, A., *An introduction to the politics and philosophy of José Ortega y Gasset* (in particular Chapter 9 "Perspectivism and Truth"). Cambridge University Press, Cambridge, 1989.
18. Everson, M. and Eisner, J., *The Making of a European Constitution: Judges and Law Beyond Constitutive Power*, Routledge – Cavendish, London – New York, 2007.
19. Fabbrini, F., *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*," German Law Journal", 2015, vol. 16 (4), p. 1003-1023.
20. Giorgi, F. and Triart, N., *National Judges, Community Judges: Invitation to a Journey through the Looking-glass-On the Need for Jurisdictions to Rethink the Inter-systemic Relations beyond the Hierarchical Principle*, "European Law Journal", 2008, vol. 14, issue 6, pp. 693-717.
21. Griller, S. and Ziller, J., *The Lisbon Treaty: Constitutionalism without a Constitutional Treaty?,* European Community Studies Association (ECSA) of Austria Publication Series, Vol. 11, Springer, Vienna-New York, 2008.
22. Hart Elys, J., *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures, "*Virginia Law Review", 1991, Vol. 77, no. 4, pp. 833-879.
23. Isikse, T., *Europe's Functional Constitution:* A *Theory of Constitutionalism Beyond the State*. Oxford University Press, Oxford-New York, 2016.
24. Jacobs, F.G., *The Sovereignty of Law: The European Way. The Hamlyn Lectures 2006*. Cambridge University Press, Cambridge, 2007.
25. Jaklic, K., *Constitutional Pluralism in the EU*, Oxford University Press, Oxford, 2014.
26. Kelemen, D., *On the unsustainability of constitutional pluralism. European supremacy and the survival of the Eurozone*, "Maastricth Journal of European and Comparative Law", 2016, vol. 23, pp. 136 -151.
27. Komárek, J., *Institutional Dimension of Constitutional Pluralism*, Chapter 10 in Avbelj, M. and Komárek, J. (eds), *Constitutional Pluralism in Europe and Beyond*, in Hart Publishing, Oxford, 2012.
28. Kumm, M., *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, "European Law Journal", 2005, vol. 11, no. 3, pp. 262-307.
29. Kumm, M., *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*, "Common Market Law Review", 1999, vol. 36, pp. 351-386.

30. MacCormick, N. *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford, Oxford University Press, 1999.
31. MacCormick, N., *Beyond the Sovereign State*, "Modern Law Review", 1993, vol. 56 issue 1, pp. 1-18.
32. MacCormick, N., *The Maastricht Urteil: Sovereignty* Now, "European Law Review", 1995, vol. 1, p. 259-266.
33. Mendez-Pinedo, M.E., *Supremacy/Primacy*, "Max Planck Encyclopedia of Comparative Constitutional Law" [MPECCoL], Max Planck Foundation for International Peace and the Rule of Law and Oxford University Press, Heidelberg-Oxford, 2016.
34. Menéndez, A.J. *The Past of an Illusion? Pluralistic Theories of European Law in Times of "Crises"*, "European Papers", 2018, vol. 3, no. 2, pp. 623-658
35. Menon, A. and Schain, M.A., *Comparative Federalism: The European Union and the United States in Comparative Perspective*, Oxford University Press, Oxford, 2007.
36. Oppenheimer, A. (ed), *The Relationship Between European Community Law and National Law: the Cases*, Cambridge University Press, Cambridge, 1994.
37. Ortega y Gasset, J., *El tema de nuestro tiempo* (1923), Austral, Madrid, 2003 available at <http://meditaciones.org/wp-content/plugins/pdfjs-viewer-shortcode/pdfjs/web/viewer.php?file= http ://meditaciones.org/wp-content /uploads/2018/06/EL-TEMA-DE-NUESTRO-TIEMPO.pdf& download=true&print=true&openfile=false> (accessed 30 September 2019)
38. Ortega y Gasset, J., *Verdad y Perspectiva*, "El Espectador", 1916, Madrid, vol. 1.
39. Pernice, I., *European v. National Constitutions*, "European Constitutional Law Review", 2005, vol. 1, pp. 99-103.
40. Pernice, I., *Multilevel Constitutionalism in the European Union*, "European Law Review", 2002, Vol. 27, No. 5, pp. 511-529.
41. Pescatore, P., *The Law of Integration*, Sijthoff, Leiden, 1974.
42. Petersmann, E-U., *From State Sovereignty to the Sovereignty of Citizens in the International Relations of the EU?*, in Walker, N. (ed.), *Sovereignty in Transition*, Hart Publishing, 2006, pp. 145-166.
43. Pikani, D., *Supremacy of EU Law and the Jurisprudence of Constitutional Reservations*, in *Central Eastern Europe and the Western Balkans: Towards a "Holistic" Constitutionalism*, Doctoral thesis, European University Institute, Department of Law, 2010.
44. Piris, J.C., *The Constitution for Europe: A Legal Analysis.* Cambridge Studies in European Law and Policy, Cambridge University Press, Cambridge, 2006.
45. Poiares Maduro, M., *Contrapuctual Law: Europe´s Constitutional Pluralism in Action*, in Walker, N. (ed.), *Sovereignty in Transition*, Hart Publishing, 2006, pp. 501-538.
46. Poiares Maduro, M., *Europe and the constitution: what if this is as good as it gets?*, in Weiler, J. H. H. and Wind, M. (eds), *European Constitutionalism Beyond the State*, Cambridge University Press, 2003, pp. 74-102.
47. Poiares Maduro, M., *Interpreting European Law-Judicial Adjudication in a Context of Constitutional Pluralism*, Working Paper Instituto de Empresa Law School WPL2008-02, 2008 and "European Journal of Legal Studies", 2007, vol. 1, No. 2, pp. 1-21.
48. Poiares Maduro, M., *Three Claims of Constitutional Pluralism*, in Avbelj, M. and Komárek, J. (eds), *Constitutional Pluralism in Europe and Beyond*, Hart Publishing, Oxford, 2011.

49. Rasmussen, H., *Confrontation or Peaceful Coexistance? On the Danish Supreme Court´s Maastricht Ratification Judgment*, in O´Keeffe, D. and Bavasso, A. (eds.), *Judicial Review in European Union Law. Liber Amicorum in Honour of Lord Slynn of Hadley*, vol. 1, Kluwer Law International, The Hague, 2000, pp. 377-390.
50. Rasmussen, H., *On Law and Policy in the European Court of Justice*, Martinus Nijhof Publishers, Dordrecht- Boston, 1986.
51. Rasmussen, H., *Why Deprive the European Judges their National Brethren of their Treaty-Given Competence to Perform Proportionality-Review?* in Baudenbacher, C. (ed.), *Dispute Resolution*, German Law Publishers, Frankfurt, 2010, pp. 223-241.
52. Rosenfeld, M., *Rethinking constitutional ordering in an era of legal and ideological pluralism*, "International Journal of Constitutional Law", 2008, vol. 6, issue 3-4, pp. 415-455.
53. Schilling, T., *The Jurisprudence of Constitutional Conflict: Some Suplementations to Mattias Kumm*, "European Law Journal", 2006, vol. 12, issue 2, pp. 173-193.
54. Slaughter, A-M., Stone Sweet, A. and Weiler, J.H.H. (eds), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context*, Hart Publishing, Oxford,1998.
55. Somek, A., *The Emancipation of Legal Dissonance*, "University of Iowa Legal Studies Research Paper", 2009, No. 09-02.
56. Torres Pérez, A., *Conflicts of rights in the European Union: a theory of supranational adjudication*, Oxford University Press, Oxford, 2009.
57. Tsagourias, N., *Transnational Constitutionalism: International and European Models*, Cambridge University Press, Cambridge, 2007.
58. Von Bogdandy, A. and Schill, S., *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, "Common Market Law Review", 2011, vol. 48, issue 5, pp. 1417-1453.
59. Von Bogdandy, A., *Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law*, "International Journal of Constitutional Law", 2008, vol. 6, issue 3-4, pp. 397-413.
60. Walker, N, *Legal Theory and the European Union*. "European University Institute (EUI) Working Papers". Law No. 2005/16.
61. Walker, N. (ed.), *Sovereignty in Transition*, Hart Publishing, Oxford, 2006.
62. Walker, N., *Late Sovereignty in the European Union*, in Walker, N. (ed.), *Sovereignty in Transition*, Hart Publishing, 2006, pp. 3-32.
63. Walker, N., *The Idea of Constitutional Pluralism*. "European University Institute (EUI) Working Papers". Law No. 2002/1 and "Modern Law Review", 2002, vol. 65 no 3, pp. 317-359.
64. Weiler, J. H. H. and Wind, M., *European Constitutionalism Beyond the State*, Cambridge University Press, Cambridge, 2003.
65. Weiler, J.H.H., *In defence of the status quo: Europe constitutional´s Sonderweg*, in Weiler, J.H.H. and Wind, M.(eds), *European Constitutionalism Beyond the State*, Cambridge University Press, 2003.
66. Weiler, J.H.H., *The Constitution of Europe*, Cambridge University Press, Cambridge, 1999.
67. Weiler, J.H.H., *The Reformation of European Constitutionalism*, "Journal of Common Market Studies", 1997, vol. 35, no. 1, pp. 97-131.
68. Weiler, J.H.H., *The Transformation of Europe*, "The Yale Law Journal", 1991, vol. 100, no. 8, pp. 2403-83.
69. Wilkinson, M. A., *Constitutional Pluralism: Chronicle of a Death Foretold?*, "ARENA Working Paper" 7/2017.