

# *Constructive Versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU*

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## **Abstract**

This article argues that constitutional pluralism is not a theory merely for times of equanimity, but crucially, in times of constitutional conflict. Given that it rests on the premise of regarding law as a dynamic, incrementally developing creature, constitutional conflict is no exceptional event, and represents an important element of the system's functioning. However, this does not mean that every point of conflict necessarily means progress for the pluralist system as a whole: it is possible to distinguish constructive from destructive conflict. In this respect, this piece will put forward a normative argument concerning the limits to which the auto-correct function of constitutional pluralism can stretch. In so doing, this piece will look at the recent jurisprudence of constitutional conflict at the EU and national level to demonstrate the limits of constructive conflict, as well as show how the example of Poland falls into the category of destructive conflict.

**Keywords:** constitutional pluralism, constitutional conflict, primacy of EU law, EU judiciary, rule of law

## I. INTRODUCTION

*[B]y contradiction, is how the world moves: Not like an arrow, but a boomerang.*<sup>1</sup>

The last decade has been eventful for those following judicial interactions in the European Union ('EU'). In the wake of the Euro crisis, the German Federal Constitutional Court and the Court of Justice engaged in a back and forth exchange concerning the limits that the German Basic Law imposes on European integration.<sup>2</sup>

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<sup>1</sup> R Ellison, *Invisible Man* (Penguin Essentials, 2014), p 6.

<sup>2</sup> *Gauweiler and Others*, 2 BvR 2728/13, Order of 14 January 2014 (German reference); *Gauweiler and Others*, C-62/14, EU:C:2015:400 (Court of Justice's response); *Gauweiler*, 2 BvR 2728/13, Judgment of 21 June 2016 (German acceptance of the response); *Weiss and Others*, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, Order of 18 July 2017 (second German reference); *Weiss and Others*, C-493/17, EU:C:2018:1000 (Court of Justice's response); *Weiss and Others II*, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, Judgment of 5 May 2020 (German rejection of the response).

During the same period, in its constitutional review of the austerity measures demanded as part of bailout measures, the Portuguese Constitutional Court attempted to safeguard the high level of social protection enshrined in the Portuguese Constitution.<sup>3</sup> Most recently, the German Court struck down the Ratification Act creating the Unified Patent Court ('UPC'), arguing that the *Bundestag* should have enacted it by a two-thirds majority due to a structural shift in competences between the EU and the national level. The Court of Justice expanded the application of judicial independence to all activities of Member States, regardless of whether they are in the scope of EU law.<sup>4</sup> This in turn had the consequence of obliging the Polish government to refrain from intruding in the composition and disciplinary procedures of judges, threatening the basic fabric of the multilevel constitutional order.<sup>5</sup> The development in Poland resulted in a number of rule of law infringement proceedings taking place before the Court of Justice.

In this context, the Court of Justice, on the one hand, is convinced in the utmost value of effectiveness of Union law and is expecting all national courts to share its fervour. On the other hand, national courts performing constitutional review tend to prioritise their respective constitutions. Consequently, they have employed different methods of adhering to the requirements of EU law while at the same time fulfilling their original role of safeguarding the supremacy of the national constitution.

It will be the main argument of this article that constitutional pluralism is not a theory merely for times of equanimity, but also, crucially, in times of constitutional conflict. Given that it rests on the premise of regarding law as a dynamic, incrementally developing creature,<sup>6</sup> constitutional conflict is no exceptional event, and represents an important element of the system's functioning. In my earlier work,<sup>7</sup> I have argued that the system of constitutional pluralism is based on heterarchy,<sup>8</sup> and has an in-built auto-correct function, which serves to accommodate points of conflict through mutual respect and sincere cooperation of all actors involved. However, this does not mean that every point of conflict necessarily means progress for the pluralist system as a whole: it is possible to distinguish constructive from destructive conflict. By way of conceptual introduction, Part II will offer a definition of the EU's constitutional sphere, with the aim of creating a thesaurus common to the EU and national

<sup>3</sup> R De Brito, João Hanek and D Gallo, *Constitutional Change through Euro Crisis Law: Report of Portugal*, Annex I, <https://eurocrisislaw.eu.europa/wp-content/uploads/sites/44/2019/05/Portugal.pdf>.

<sup>4</sup> *Juizes Portugueses*, C-64/16, EU:C:2018:117.

<sup>5</sup> M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses*' (2018) 14 *EuConst* 622.

<sup>6</sup> R Higgins, *Problems and Process. International Law and How We Use It* (Clarendon Press, 1995), p 10.

<sup>7</sup> A Bobić, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between the European Court of Justice and Constitutional Courts of Member States' (2017) 18(6) *German Law Journal* 1395.

<sup>8</sup> Heterarchy can be defined as 'the relation of elements to one another when they are unranked or when they possess the potential for being ranked in a number of different ways'. C L Crumley, 'Heterarchy and the Analysis of Complex Societies' (1995) 6 *Archaeological Papers of the American Anthropological Association* 1, p 3.

levels of constitutional authority. Part III will offer an argument in support of a thick normative core of constitutional pluralism, building on the work of Miguel Maduro.<sup>9</sup> In this respect, the position taken in this article will be openly normative, by determining the limits to which the auto-correct function of constitutional pluralism can stretch; and beyond which we are conceptually falling into what Jessica Lawrence calls the ‘descriptive fallacy’ of constitutional pluralism.<sup>10</sup> The thick normative core of constitutional pluralism distinguishes constructive from destructive conflict. As I hope to show, convergent standards on EU and national levels of the ‘constitutional’ will still allow for ‘pluralism’, both substantively and institutionally. Moreover, strengthening the normative core of constitutional pluralism will result both in decreasing the ability of rogue states<sup>11</sup> to abuse it, and in increasing the capacity of the EU’s constitutional system to address such abuses. Subsequently, this article will look at the recent jurisprudence of constitutional conflict at the EU and national level to demonstrate the limits of constructive conflict (Part IV). Part V will show how the example of Poland falls into the category of destructive conflict, and Part VI will conclude.

## II. DEFINING THE EU CONSTITUTIONAL SPHERE

Legal academics have long faced the challenge of describing and assessing the nature of the European Union as a polity, specifically in relation to the well-established Westphalian<sup>12</sup> categories of states and international organisations. The struggle of calling the EU legal order a constitutional one stemmed from an almost natural assumption of states as constitutional orders, as opposed to international organisations based on public international law and created by the authority of participating states. Nevertheless, taking into account direct effect and primacy (ultimately constructing state responsibility beyond what the public international law sphere ever entailed),<sup>13</sup> constitutional features of the European Union are no longer disputed,<sup>14</sup>

<sup>9</sup> M Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in N Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003); M Maduro, ‘Three Claims of Constitutional Pluralism’ in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, 2012), p 67.

<sup>10</sup> J C Lawrence, ‘Constitutional Pluralism’s Unspoken Normative Core’ (2019) 21 *Cambridge Yearbook of European Legal Studies* 24, pp 26–27.

<sup>11</sup> The term is borrowed from L Pech and K L Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

<sup>12</sup> N Walker, ‘Late Sovereignty in the European Union’ in Walker, note 9 above, p 9.

<sup>13</sup> J H Weiler, ‘Prologue: Global and Pluralist Constitutionalism – Some Doubts’ in G de Búrca and J H Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, 2012), pp 11–12. See also N MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999), pp 97–98.

<sup>14</sup> The Court of Justice called the system of the Treaties the EU’s ‘constitutional charter’ in *Les Verts*, 294/83, EU:C:1986:166, para 23. For Lenaerts, this was an undisputed fact back in 1990. K Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38(2) *American Journal of Comparative Law* 205, p 210. See also E Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’ (1981) 75(1) *American Journal of International Law* 1.

despite a more general reluctance in the literature to ascribe constitutionalist characteristics to entities beyond the state.<sup>15</sup>

The major transformative momentum in the development of the EU was the Maastricht Treaty, more precisely, the sharp decline in public support that was taken for granted during all the previous integration benchmarks.<sup>16</sup> The public outrage translated into important judicial challenges to the ratification of the Treaty,<sup>17</sup> where national courts asserted their right to review the transfer of competences to the EU, and remained firmly on the view that they are the Masters of the Treaties.<sup>18</sup> In that respect, MacCormick concluded that law is an institutional normative order, the ‘principal example’<sup>19</sup> being found in nation-states, but not restricted solely to them<sup>20</sup>—they are only a species of a *genus*.<sup>21</sup> For a normative order to be an institutional one (regardless whether the institution is rooted in a nation-state or another type of polity), it needs to possess the ability for the norms of the order to be applied to the situation they govern, which results in the self-referential quality of the system.<sup>22</sup> Decades of development of the European Union and the self-referential nature of the *acquis communautaire* makes it impossible to reach any other conclusion than to recognise it as a ‘full-blown instance of an institutional normative order’.<sup>23</sup>

The debate on the possible existence of sovereignty beyond the state aroused a great deal of scepticism, connected mainly to the problem of defining any non-state system as constitutional.<sup>24</sup> The fear sparked by the Maastricht Treaty revolved strongly around the threat to the democratic form of self-government by the people.<sup>25</sup> The argument, in short, goes: only ‘We the People’ are able to create the constitutional framework claiming ultimate authority in a given space, and no unit beyond the state can satisfy this requirement.<sup>26</sup> While the EU certainly does not establish

<sup>15</sup> M Kumm, ‘The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law’ (2013) 20(2) *Indiana Journal of Global Legal Studies* 605, p 606.

<sup>16</sup> J H Weiler, *The Constitution of Europe. ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration* (Cambridge University Press, 1999), p 4. See also MacCormick, note 13 above, p 98.

<sup>17</sup> MacCormick, note 13 above, pp 98–99.

<sup>18</sup> For example, reiterated in the German *Bundesverfassungsgericht* case *Lisbon Treaty*, 2 BVerfG 2/08, Judgment of 30 June 2009, para 231, [http://www.bverfg.de/e/es20090630\\_2bve000208en.html](http://www.bverfg.de/e/es20090630_2bve000208en.html).

<sup>19</sup> MacCormick, note 13 above, p 1.

<sup>20</sup> He concludes the European Union is one such institutional normative order. *Ibid*, pp 102–03.

<sup>21</sup> *Ibid*, p 1. See also K Tuori, *European Constitutionalism* (Cambridge University Press, 2015), pp 87ff.

<sup>22</sup> MacCormick, note 13 above, p 7.

<sup>23</sup> *Ibid*, p 131.

<sup>24</sup> Kumm, note 15 above, p 608. See also N Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford University Press, 2013), p 27.

<sup>25</sup> MacCormick, note 13 above, p 125.

<sup>26</sup> Kumm, note 15 above, p 608. See German *Bundesverfassungsgericht* cases *Brunner*, 2 BvR 2134/92 and 2159/92, Judgment of 12 October 1993, (1994) 1 *CMLR* 57, p 94. For a fierce critique of this reasoning, see J H Weiler, ‘Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision’ (1995) 1(3) *European Law Journal* 219.

its ultimate authority in the same manner as states do, the Court of Justice's development of a self-referential system of the Treaties, grounded in the doctrines of primacy and direct effect,<sup>27</sup> not only restrict Member States' sovereignty<sup>28</sup> in the classic Westphalian sense, but also render the EU legal order 'independent, autonomous and non-derivative'.<sup>29</sup> The EU's sovereignty is thus rooted in the creation of the autonomous, independent, and self-referential nature of the system of Treaties.<sup>30</sup>

But does this mean that we can equate the EU's constitutional frame to that of a federation, as part of the legal scholarship argues? Lenaerts defines the common denominator of federalism to be 'the appropriate balance between the federation and its component entities'.<sup>31</sup> He further explains that integrative federalism, as a mode of constitutionalism that strives to unite diverse entities, can be applied to the model of the (then) supranational European Community.<sup>32</sup> The Treaty provisions setting out the vertical division of competences between the EU and the Member States, as well as the manner of exercise of these competences by the Union institutions (including a strong Court of Justice)<sup>33</sup> have been interpreted as clear indicators of a federalist structure.<sup>34</sup> In addition, federalism is praised due to its applicability to any system of divided powers, and discards any *sui generis* approach as methodologically flawed.<sup>35</sup> Finally, the development of EU citizenship has been extensively addressed from the perspective of federalism, given its clear connection to multiple vertical levels of government and political association.<sup>36</sup>

The crucial reason why federalism as a theory holds insufficient explanatory and normative power for the EU is because it fails to take into account national contributions to the EU constitutional landscape, resulting in conditional primacy of EU law.<sup>37</sup> For

<sup>27</sup> G de Búrca, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice' in Walker, note 12 above, pp 452–53; Walker, note 12 above, p 12.

<sup>28</sup> Stated explicitly by the Court of Justice as early as *van Gend en Loos*, 26/62, EU:C:1963:1, para 12; and *Costa v ENEL*, 6/64, EU:C:1964, para 593.

<sup>29</sup> De Búrca, note 27 above, p 453.

<sup>30</sup> See also H Lindahl, 'Sovereignty and Representation in the European Union' in Walker, note 12 above, p 107; J Komárek, 'It's a Stupid Autonomy...' (*Verfassungsblog*, 14 March 2015), <http://verfassungsblog.de/its-a-stupid-autonomy-2>.

<sup>31</sup> Lenaerts, note 14 above, p 205. Similarly, Kelemen provides the following, as he terms it, minimalist definition of federalism: 'Federalism is an institutional arrangement in which (a) public authority is divided between state governments and a central government, (b) each level of government has some issues on which it makes final decisions, and (c) a high federal court adjudicates disputes concerning federalism'. D Kelemen, 'The Structure and Dynamics of EU Federalism' (2003) 36(1–2) *Comparative Political Studies* 184, p 185.

<sup>32</sup> Lenaerts, note 14 above, pp 206–07.

<sup>33</sup> *Ibid.*, p 216.

<sup>34</sup> *Ibid.* See also Stein, note 14 above, p 1.

<sup>35</sup> F Fabbrini, *Fundamental Rights in Europe. Challenges and Transformations in Comparative Perspective* (Oxford University Press, 2014), pp 24–25.

<sup>36</sup> For a comprehensive contribution, see D Kochenov (ed), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press, 2017).

<sup>37</sup> See also M Fichera, 'Solidarity, Heterarchy, and Political Morality' (2020) *Jus Cogens* 2.

example, Lenaerts denies that the Lisbon Treaty diminishes any of the EU's federal features, since EU law retained a pervasiveness into national law, both through the obligation of national regulators not to legislate contrary to EU law, as well as due to a spill-over effect that EU law may have in the area of exclusive competences of Member States.<sup>38</sup> However, the position of the Court of Justice as the 'high federal court'<sup>39</sup> in the EU is but one reality; national courts performing constitutional review have developed a reality of their own, supported by jurisprudence that at times outright contradicts that of the Court of Justice. Thus, federalism cannot capture the EU without being stretched beyond recognition.<sup>40</sup> Federalism is thus, in my view, unable to capture the complex relationship of contestation between the EU and the national level.

We are then left with one final question: if Member States retain their sovereignty claim to the ultimate say, as does the EU in areas of its functional sovereignty, is there a way to redress the incommensurability of claims by these two levels of constitutional authority? Maduro argues that state constitutionalism is but a 'contextual representation of constitutionalism ...'.<sup>41</sup> In other words, how far can each of the levels of authority go in contestation before the constitutional frame is broken? For this, it is necessary to answer Jessica Lawrence's question posed to scholars of constitutional pluralism: 'what the "common project" is, what types of conflicts can be resolved within it, and/or which metaconstitutional principles apply'.<sup>42</sup> Constitutionalism can be defined as 'a normatively ambitious project of establishing legitimate authority over persons that are ultimately conceived as free and equals';<sup>43</sup> as 'having an overarching normative structure', where fundamental rights represent the normative expression of a constitutional system.<sup>44</sup> In the EU context, Shaw's four pillars of constitutionalism determine: (1) the nature of the polity; (2) the rule of law

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<sup>38</sup> He defines spill-over as the voluntary 'application by national authorities of EU norms (eg, rules, principles, concepts) to situations governed entirely and exclusively by national law'. K Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2010) 13 *Fordham International Law Journal* 1338, 1340–41.

<sup>39</sup> Kelemen, note 31 above, p 185.

<sup>40</sup> Tuori, note 21 above, p 345. See also P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39(5) *Common Market Law Review* 945, p 946; D Halberstam, "'It's the Autonomy, Stupid!'" a Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward' (2015) 16(1) *German Law Journal* 105, p 114.

<sup>41</sup> M P Maduro, 'Europe and the Constitution: What if This Is as Good as It Gets?' in J H H Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003), p 74. On the debate on different views on constitutionalism as regards the EU, see N Walker, 'European Constitutionalism in the State Constitutional Tradition' (2006) 59 *Current Legal Problems* 51, pp 51–56.

<sup>42</sup> Lawrence, note 10 above, p 28.

<sup>43</sup> Kumm, note 15 above, p 609. Similarly, Tuori sets out a functional definition of the European legal order as constitutional. However, he openly uses state-rooted terminology, finding that the European 'constitution' deviates from it. Tuori, note 21 above, pp 28–30, 257.

<sup>44</sup> A Stone Sweet, 'The Structure of Constitutional Pluralism: Review of Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law*' (2013) 11(2) *ICON* 491, p 493.

and its systemic properties;<sup>45</sup> (3) key values, principles, and norms;<sup>46</sup> and (4) the exercise and limitation of power of the polity.<sup>47</sup> Ultimately, thus, constitutionalism is a quality capable of existing in the EU as an institutional normative order claiming ultimate authority. In the next Part, I explore in more depth the content of the normative core of the EU's constitutional system, in order to find the edges of constructive conflict.

### III. THE NORMATIVE CORE OF CONSTITUTIONAL PLURALISM AND CONSTRUCTIVE CONFLICT

Determining the normative core of constitutional pluralism cannot be answered without properly addressing the principle of primacy of EU law. Without going into the history of the principle of primacy and its development, this Part will demonstrate the expansions of the self-referential system of the Treaties by the Court of Justice, namely asserting its right to *ultra vires* and fundamental rights review, starting with Opinion 1/91, and concluding with *Kadi* and Opinion 2/13. This will lead us to determine the substance of the normative core of constitutional pluralism. It is important to note here that while the formal source of inspiration in defining the normative core is found in formal sources of EU law, this does not mean that the source of national constitutional authority derives from the EU legal order. It is rather the other way around: national constitutional authority created the EU legal order, however, not without causing a permanent change on its own part.<sup>48</sup> The EU constitutional sphere as described in the previous Part thus necessitates an understanding of EU and national constitutional law as permanently enmeshed.<sup>49</sup> In Opinion 1/91, the Court finds primacy and direct effect to have resulted in constitutionalising the Treaties, based on the rule of law:

In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in

<sup>45</sup> See also Krisch, note 24 above, p 27.

<sup>46</sup> Including fundamental rights, non-discrimination, and the institutionalisation of Union citizenship as foundations of the delivery of fairness and justice. J Shaw, 'Process and Constitutional Discourse in the European Union' (2000) 27 *Journal of Law & Society* 4, p 16.

<sup>47</sup> *Ibid*, pp 15–18. Similarly, according to Priban, '[the] modern notion of democratic constitutionalism draw[s] on constituent power, ultimate sovereignty and the self-constitution of the people': J Priban, 'Asking the Sovereignty Question in Global Legal Pluralism: From "Weak" Jurisprudence to "Strong" Socio-Legal Theories of Constitutional Power Operations' (2015) 28(1) *Ratio Juris* 31, p 33.

<sup>48</sup> See also Maduro, 'Three Claims of Constitutional Pluralism', note 9 above, p 76.

<sup>49</sup> For example, the difficulty with which the UK Supreme Court attempted to divide EU from national law in order to decide on the Government's prerogative to act in the international sphere is further proof of the enmeshment of national and EU law. See UK Supreme Court case *Miller* [2017] UKSC 5; and a critical appraisal by M Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of a Constitutional Principle' (2017) 76(2) *Cambridge Law Journal* 257. For a critique of the *Bundesverfassungsgericht* for its lack of regard for such an enmeshment, see C Möllers, 'German Federal Constitutional Court: Constitutional *Ultra Vires* Review of European Acts Only under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*' (2011) 7(1) *EuConst* 161, p 164 (note).

ever wider fields, and the subjects of which comprise not only Member States but also their nationals ...<sup>50</sup>

The Court's move is an HLA Hart-esque one,<sup>51</sup> as it places the rule of law as the ultimate rule of recognition of the EU constitution. This in turn legitimises the system as a constitutional one and differentiates it from an international law one.<sup>52</sup> In *Kadi*,<sup>53</sup> the basis for the appellants' claims before the Court of Justice relied on a *Solange* claim of the EU: so long as the United Nations do not provide for an independent judicial fundamental rights review, the Union courts should make sure the implementing measures are fundamental rights compliant.<sup>54</sup> The Community is based on the rule of law, and any measure incompatible with the protection of fundamental rights is not acceptable.<sup>55</sup> Furthering the *Solange* logic, it concluded that the review mechanisms in the UN system are inadequate, and thus cannot prevent the Court of Justice to ensure fundamental rights protection by way of reviewing the implementing regulation.<sup>56</sup> The inspiration, or at least a strong resemblance to the different limits that national constitutional courts have placed on the principle of primacy is hard to miss when reading the Court of Justice positioning EU law *vis-à-vis* the acts of the UN, but also other actors in the international law arena.<sup>57</sup> The rights-based claim to ultimate authority was at the source of constitutional pluralism (initiated by *Frontini*<sup>58</sup> and *Solange I*),<sup>59</sup> and it continues to provide a substantive basis for such claims.<sup>60</sup>

The Court of Justice was able to resort to the dualist rhetoric in *Kadi* and use the ECHR as a shield<sup>61</sup> to establish its own reputation in fundamental rights protection. Yet, the same argument turned into a sword in relation to a possible ECHR accession.

<sup>50</sup> Opinion 1/91, EU:C:1991:490, para 21.

<sup>51</sup> See H L A Hart, *The Concept of Law*, 2<sup>nd</sup> ed (Oxford University Press, 1994), p 92.

<sup>52</sup> Opinion 1/91, note 50 above, para 20.

<sup>53</sup> *Kadi and Al Barakaat International Foundation*, C-402/05P and C-415/05P, EU:C:2008:461. For a general commentary of the international law aspects of the case, see G de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51(1) *Harvard International Law Journal* 1; D Halberstam and E Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural Legal World' (2009) 46(1) *Common Market Law Review* 13. For a fundamental rights driven approach, see T Isiksel, 'Fundamental Rights in the EU after *Kadi and Al Barakaat*' (2010) 16(5) *European Law Journal* 551.

<sup>54</sup> *Kadi*, note 53 above, para 256.

<sup>55</sup> *Ibid*, paras 281, 284. For an analysis of the constitutional core of the EU, and consequently its constitutional identity, see D Sarmiento, 'The EU's Constitutional Core' in A Saiz Arnaiz and C Alcobero Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia, 2013).

<sup>56</sup> *Ibid*, paras 320–26.

<sup>57</sup> See also Isiksel, note 53 above, pp 559–60.

<sup>58</sup> Italian Constitutional Court case *Frontini*, 183/1973, Judgment of 27 December 1973.

<sup>59</sup> *Internationale Handelsgesellschaft (Solange I)*, 37 BVerfGE 271, Judgment of 29 May 1974.

<sup>60</sup> W T Eijssbouts and L Besselink, "'The Law of Laws' – Overcoming Pluralism' (2008) 4(3) *EuConst* 395, pp 397–98.

<sup>61</sup> *Kadi*, note 53 above, para 283.

The constitutional vocabulary is particularly present, obviating the Court's intention to place the EU's distinctiveness and autonomy at the centre of the argument. In this sense, the EU treaties are 'unlike ordinary international treaties established a new legal order'<sup>62</sup> which has 'its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation'.<sup>63</sup>

The emphasis on the 'constitutional' is there for two important reasons—it extends the sovereignty vocabulary to the EU, and it underlines the EU's own capacity in fundamental rights protection. Accordingly, the Court of Justice developed a self-referential normative constitutional order, resulting in a plausible claim to ultimate authority,<sup>64</sup> overlapping in the same geographical space with that of the Member States and their courts tasked with upholding national constitutions. Thus, the EU's claim to ultimate authority by the Court of Justice (and the EU) is rooted in the autonomy of the EU's constitutional order, but also its independence and non-derivativeness. Accordingly, if we genuinely believe there is any such thing as sovereignty beyond the state, subjecting it to identical conditions as state sovereignty (namely popular representation) would be a *contradictio in adiecto*.<sup>65</sup>

Based on this, it is necessary to explore what content found in the EU's constitutional sphere cannot be done away with for the system to function. In other words, defining the 'constitutional' determines the basis that cannot be questioned by different sites of ultimate authority; defining the 'pluralism' tells us how far can reasonable disagreement concerning the 'constitutional' go without turning into destructive conflict. Recalling Maduro's work on principles of contrapunctual law, constitutional pluralism's normative core includes those values and principles that 'make it possible for the processes of justification of national and European decisions to be based on different arguments while their actual application leads to compatible decisions'.<sup>66</sup> He continues, 'it is however necessary to create a set of rules that is shared by the different legal systems in putting forward and applying their different claims of authority'.<sup>67</sup> In order to ascertain what this set of rules in the EU's constitutional sphere is, Lenaerts and Gutiérrez-Fons explain:

[General] principles leave some room for constitutional values that differ from one Member State to another. ... In this view, the ECJ cannot reply on general principles of EU law, particularly fundamental rights, as an unstoppable centripetal force that would ensure uniformity while destroying constitutional diversity.<sup>68</sup>

<sup>62</sup> Opinion 2/13, EU:C:2014:2454, para 157.

<sup>63</sup> *Ibid*, para 15.

<sup>64</sup> De Búrca, note 27 above, p 453.

<sup>65</sup> See also T Christiansen and C Reh, *Constitutionalizing the European Union* (Macmillan International, 2009), p 27.

<sup>66</sup> Maduro, 'Contrapunctual Law', note 9 above, p 524.

<sup>67</sup> *Ibid*, p 525.

<sup>68</sup> K Lenaerts and J A Gutiérrez-Fons 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47(6) *Common Market Law Review* 1629, pp 1662–63.

In the same vein, Cloots lists a number of interpretative guidelines to both national courts with constitutional jurisdiction and the Court of Justice, in order to not only contain conflict, but also resolve it in a manner that will be respectful of the values, and ultimately constitutional orders, in balance.<sup>69</sup> Besselink and Eijsbouts explain that the judge faced with situations of constitutional conflict should not address it by ‘mere reference to the autonomy or the supremacy of his own legal order, nor by reference to legal hierarchy. He shall do so by reference to fundamental substantive norms valid in the wider circumscription ...’.<sup>70</sup> In line with these points, the plurality of values agreed by all Member States and listed in Article 2 Treaty on European Union (‘TEU’) represent the normative core of constitutional pluralism.<sup>71</sup> It is useful to cite the provision in full:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

These values operate as the normative ideal of constitutional pluralism, without resulting in an ultimately monist solution. As the text of the provision itself states, the values listed therein are common to all Member States, and represent the basis for EU membership, in the same way as a geographical link to the European continent, satisfying certain economic criteria, etc. This does not lead to homogenisation of national constitutions and their content, but rather serves as a codification of their shared values, and reduces the incommensurability of constitutional concepts in substance.<sup>72</sup> In other words, we may not be in agreement as to the precise extent of the rule of law, or how it influences judicial independence in one or another constitutional and institutional context, but we can be in agreement what falls *outside* its borders. In this process, Maduro stresses the importance of the discursive element between different sites of constitutional authority, who jointly and coherently strive to create the shared European legal space.<sup>73</sup>

<sup>69</sup> E Cloots, ‘Germs of Pluralist Adjudication: *Advocaten Voor De Wereld* and Other References from the Belgian Constitutional Court’ (2010) 47(3) *Common Market Law Review* 645, p 668.

<sup>70</sup> Eijsbouts and Besselink, note 60 above, p 397.

<sup>71</sup> See also S Weatherill, *Law and Values in the European Union* (Oxford University Press, 2016), p 250. The point is proven well with the latest Hungarian example: the recent reforms of the constitutional system undermining the rule of law cannot form part of the national identity protected by Article 4(2) TEU. For more information on the abuse of identity review by the Hungarian Constitutional Court, see G Halmai, ‘National(ist) Constitutional Identity? Hungary’s Road to Abuse Constitutional Pluralism’ (EUI Working Papers, 2017), Law 2017/08, [http://cadmus.eui.eu/bitstream/handle/1814/46226/LAW\\_2017\\_08.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/46226/LAW_2017_08.pdf?sequence=1).

<sup>72</sup> Christiansen and Reh, note 65 above, p 27. See also K Lenaerts and A Wójcik, ‘Judges Should Be Fully Insulated from Any Sort of Pressure’ (*Verfassungsblog*, 30 January 2020), <https://verfassungsblog.de/judges-should-be-fully-insulated-from-any-sort-of-pressure>.

<sup>73</sup> Maduro, ‘Contrapunctual Law’, note 9 above, pp 513–14, 518.

In its essence, the normative core of constitutional pluralism promotes a firmly cosmopolitan, rather than nationalist perspective. There is no normative reason why equality of Member States should take precedence over equality of EU citizens, and there is most certainly no basis for the treaties to be interpreted in this way. The Court of Justice has, since the early days of European integration, established the so-called ‘*Simmenthal* mandate’, according to which each national court must apply EU law to cases within their jurisdiction and protect the rights that it accords to citizens in their entirety.<sup>74</sup> Keeping the EU as a polity within the conservative confines of the principle of conferral and limited to a ‘compound of states’, in fact results in more power for the states, and diminishes the direct empowerment of their citizens to take ownership of the integration project; this tendency is aided by Member States’ governments but also those constitutional courts who employ the retrograde rhetoric of public international law.<sup>75</sup> So precisely to overcome the ‘Member States are the Masters of the Treaties’ logic,<sup>76</sup> equality of Member States should be read together with equality of EU citizens.

Sovereign equality of states means that once states sign up to a legal obligation in the international sphere, they are all equally bound to abide by it.<sup>77</sup> With the increase in the ability of international (and arguably, supranational) organisations to assume responsibility for carrying out the common interest of its members, it is becoming likelier that those members will decrease their insistence on their ‘sovereign status and, correlatively, to equality’.<sup>78</sup> Indeed, placing the individual as the ‘fundamental moral unit of concern’<sup>79</sup> demands a move away from the formalistic view of equality of Member States. The cosmopolitan literature emphasises the drawbacks that equality of states inflicts upon the equality of individuals:<sup>80</sup>

... political equality among states is of value *only* so far as it contributes to justice as goal or as process. Political equality among states is not valuable for its own sake, and certainly cannot be regarded as a necessary condition in its own right for system legitimacy.<sup>81</sup>

Thus, the principle of equality of Member States is merely an indicator of membership, whereas the normative aim of European integration should be one of

<sup>74</sup> M Claes, *The National Courts’ Mandate in the European Constitution* (Hart Publishing, 2006), p 108.

<sup>75</sup> I Pernice, ‘Multilevel Constitutionalism and the Crisis of Democracy in Europe’ (2015) 11(3) *European Constitutional Law Review* 541, p 543.

<sup>76</sup> Regrettably endorsed by Lenaerts, note 72 above.

<sup>77</sup> S R Ratner, *The Thin Justice of International Law* (Oxford University Press, 2015), p 194.

<sup>78</sup> L S Rossi, ‘The Principle of Equality Among Member States of the European Union’ in L S Rossi and F Casolari (eds), *The Principle of Equality in EU Law* (Springer, 2017), p 10.

<sup>79</sup> A E Eckert, ‘Peoples and Persons: Moral Standing, Power, and the Equality of States’ (2006) 50 *International Studies Quarterly* 841, p 864.

<sup>80</sup> D Chandler, ‘New Rights for Old: Cosmopolitan Citizenship and the Critique of State Sovereignty’ (2003) 51 *Political Studies* 332, p 343.

<sup>81</sup> A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press, 2004), p 321.

partnership.<sup>82</sup> It is therefore regrettable that the Court of Justice has employed this logic in its press release following the *Weiss II* judgment of the *Bundesverfassungsgericht*, where it restated the jurisprudence concerning the preliminary reference procedure, concluding: ‘That is the only way of ensuring the equality of Member States in the Union they created’.<sup>83</sup> Yet, the preliminary reference procedure has for decades claimed success in allowing individuals to enforce their EU law rights against their governments.<sup>84</sup> This should remain the priority, as Article 9 TEU reminds us that: ‘In all its activities, the Union shall observe the principle of the equality of its citizens ...’. Prioritising equality of Member States over equality of citizens because it currently appears politically useful may result in rather grave long-term consequences on some of the building blocks of EU law and the well-established benefits of judicial cooperation.

Furthermore, in order to understand how the ‘pluralism’ of ‘constitutional’ works, it is necessary to distinguish between *institutional* and *substantive* pluralism.<sup>85</sup> Institutional balancing is closely linked to the use of self-restraint, and is the first step to be taken once a national constitutional limit is invoked in a particular case.<sup>86</sup> If the specific case is before the Court of Justice, the use of institutional balancing will mean rendering a decision on which court is to take the final decision. Such an approach is well-known in the case law of the Court and, as Tridimas explains, the Court of Justice employs it regularly in what he calls ‘guidance’ and ‘deference’ cases.<sup>87</sup> In particular, the Court of Justice either gives guidance to the national court that is then finally to decide (guidance cases), or it leaves it entirely up to the national court to decide (deference cases). In deciding whether to rule on a certain issue itself, or leave it to the national court, the Court of Justice will be driven by taking into account the sensitivity of the case, which will condition the extent of self-restraint to be applied.<sup>88</sup> By contrast, when a case takes place before a national constitutional court, regardless of the fact whether the court submitted a preliminary reference or not, national instances will be wary of a possible

<sup>82</sup> Rossi, note 78 above, p 39.

<sup>83</sup> Available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf>.

<sup>84</sup> S Rodin, ‘Back to the Square One: The Past, the Present and the Future of the Simmenthal Mandate’ in J M Beneyto and I Pernice (eds), *Europe’s Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts – Lisbon and Beyond* (Nomos, 2011), p 298. On the trend of increase of private *vis-à-vis* Commission enforcement of EU law, see A Hofmann, ‘Is the Commission Levelling the Playing Field? Rights Enforcement in the European Union’ (2018) 40(6) *Journal of European Integration* 737.

<sup>85</sup> See also Maduro, ‘Three Claims of Constitutional Pluralism’, note 9 above, p 80.

<sup>86</sup> See also A Bobić ‘A Dynamic Analysis of Judicial Behaviour: The Auto-Correct Function of Constitutional Pluralism’ in M Derlén and J Lindholm (eds), *The Court of Justice of the European Union. Multidisciplinary Perspectives* (Hart Publishing, 2017).

<sup>87</sup> T Tridimas, ‘Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction’ (2011) 9(3–4) *ICON* 737, p 739.

<sup>88</sup> See also P M Huber, ‘The Federal Constitutional Court and European Integration’ (2015) 21 *European Public Law* 83, p 107, who emphasises how the principle of cooperation among courts in the European judicial space needs to work in both directions.

constitutional conflict. In addition, any situation of a constitutional conflict is to be approached with great self-restraint, and in a manner open to European integration.<sup>89</sup>

The institutional balancing—ie, the determination of which instance will ultimately decide the case, as explained in the preceding paragraphs—is followed by the substantive balancing of values in opposition in the particular case.<sup>90</sup> Surely, the result of the institutional balancing will serve as a strong indicator as to the extent of the substantive balancing that a particular court is to exhibit. In essence, when the Court of Justice defers to the national court on the ultimate decision, this undoubtedly means an endorsement for that court to protect the national value in question.

The pluralist nature of constitutional identity stems from its intrinsically heterarchical nature, as it does not impose an overarching European value over specific national values. In that respect, constitutional identity is in itself a contributing element to the pluralistic nature of EU constitutionalism, endorsing an equal position of a variety of national specificity claims.<sup>91</sup> Such a view appears to outweigh the argument of Advocate General Cruz Villalón in *Gauweiler*<sup>92</sup> in favour of a converging European identity in a *Solange*-like trend.<sup>93</sup> There are several reasons to support this claim. First, the application of the Advocate General's view would create a hierarchical relationship between identity claims on the EU and the national level, thus increasing the possibility of constitutional conflict. A clear statement of hierarchy does not appear as something that national constitutional adjudicators would welcome, as their jurisprudence revolves around the reconciliation between the primacy of EU law, and the supremacy of national constitutions in their own territory.<sup>94</sup> Second, from an institutional point of view, respecting national particularities contributes to the mutual respect and cooperation between constitutional adjudicators and the Court of Justice, which would be jeopardised if a converging European identity were to replace the current understanding of the identity clause.

<sup>89</sup> See, for example, German *Bundesverfassungsgericht* case *Mr R*, 2 BvR 2735/14, Order of 15 December 2015, Key Considerations 1.b.

<sup>90</sup> See K Lenaerts and J A Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47(6) *Common Market Law Review* 1629, pp 1649–53 for a detailed analysis on how the balancing exercise is to be carried out in order to achieve the rule of law.

<sup>91</sup> To quote the Polish *Trybunał Konstytucyjny* from a different era: 'confirming one's national identity in solidarity with other nations, and not against them'. *Treaty of Lisbon*, K 32/09, Judgment of 24 November 2010, para 2.1.

<sup>92</sup> Opinion of Advocate General Cruz Villalón in *Gauweiler*, C-62/14, EU:C:2015:7, para 61.

<sup>93</sup> Lord Mance in fact used the argument of the Advocate General against him—in *Pham* he stated: 'This recognises, perhaps, that Europe has not yet reached a situation where it is axiomatic that there is constitutional identity between the Union and its Members'. United Kingdom Supreme Court case *Pham* [2015] UKSC 19, para 79.

<sup>94</sup> To use the wording of the Spanish and Polish Constitutional Tribunals. See Spanish *Tribunal Constitucional* case *Constitutional Treaty*, DTC 1/2004, Declaration of 13 December 2004, Ground 4; Polish *Trybunał Konstytucyjny* case *Accession Treaty*, K 18/04, Judgment of 11 May 2005, para 12.

#### IV. RECENT EXAMPLES OF CONSTRUCTIVE CONFLICT

The aim of this Part is to better understand the contrasting demands stemming from primacy of EU law on the one hand, and from the supremacy of national constitutions, on the other. Namely, as I will aim to show, both are far less absolute than the courts interpreting them would have us believe. Rather, both levels of constitutionality are in a permanent relation of mutual influence, developing and changing incrementally through their interactions. In that sense, the famous statement that Member States are the ‘Masters of the Treaties’ is no longer accurate<sup>95</sup>—rather, in some sense, the Treaties no longer have a clear master as once found in the international law sphere. The Court of Justice has famously taken to expanding the self-referential system of the Treaties.<sup>96</sup> However, while Member States would in principle be at full liberty to do so, it is almost impossible to imagine a treaty reform doing away with the cornerstone principles of EU law introduced by the Court of Justice. The same goes for national constitutions—the entrenchment of EU integration clauses therein<sup>97</sup> significantly restricts the extent to which constitutional review is to be conducted.<sup>98</sup> The aim of this Part is thus to underline some of these tensions, and demonstrate that individual instances of constitutional conflict under analysis form part of constructive conflict, and are not attacks on the existence of the entire EU legal order (destructive conflicts). In what follows, I will briefly reflect upon a number of cases decided on the EU and national level in order to demonstrate the constructive nature of those constitutional conflicts. The aim of this exercise is not to provide an in-depth analysis of each of the cases, but to point to the salient issues behind the constitutional conflict in place, and underline how they remain within the confines of constitutional pluralism’s normative core.

##### A. Juízes Portugueses

In the context of the Euro crisis and financial assistance to debt-ridden Member States, the Court of Justice decided that a Memorandum of Understanding grounded

<sup>95</sup> See note 76 above.

<sup>96</sup> Lenaerts concludes that the Court of Justice has ‘a constitutional mandate in a self-referential and, in that sense, autonomous legal order’. K Lenaerts, ‘The Court’s Outer and Inner Selves: Exploring the External and Internal Legitimacy of the Court of Justice’ in M Adams, H de Waele, J Meeusen, and G Straetmans (eds), *Judging Europe’s Judges. The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, 2015), p 15.

<sup>97</sup> M Claes, ‘Constitutionalizing Europe at Its Source: The ‘European Clauses’ in the National Constitutions: Evolution and Typology’ (2005) 24(1) *Yearbook of European Law* 81.

<sup>98</sup> Millet points to different constitutional amendments that several Member States undertook in order to accommodate the implementation of the European Arrest Warrant. See F-X Millet, ‘How Much Lenience for How Much Cooperation? On the First Preliminary Reference of the French Constitutional Council to the Court of Justice’ (2014) 51 *CMLRev* 195, p 196. Moreover, the Spanish Constitutional Tribunal accepted the necessary changes in its *Melloni* decision (*Melloni*, Judgment 26/2014 of 13 February 2014), after receiving a response to the preliminary reference submitted to the Court of Justice in *Melloni*, C-399/11, EU:C:2013:107.

in the European Financial Stabilisation Mechanism is justiciable in *Juízes Portugueses*.<sup>99</sup> This unlikely champion of legal accountability in economic governance owes its importance to the current salience of judicial independence in the EU.<sup>100</sup> Namely, the association of judges in Portugal challenged the austerity measure temporarily reducing their salaries, arguing it interfered with their independence guaranteed by Articles 2 and 19 TEU. The Court of Justice, arguably in need of establishing a legal precedent for its jurisdiction concerning the rule of law challenges taking place in Poland and Hungary,<sup>101</sup> found that Article 19(1) TEU, which states that ‘the Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’, was engaged and the preliminary reference was admissible. Importantly, the Court of Justice declared judicial independence the cornerstone of the rule of law, expanding its application to all Member State action, regardless of the applicability of EU law in a specific case.<sup>102</sup>

From the perspective of a national court, this may be seen as intrusion into the division of competences between the EU and the national level, and certainly the Court of Justice expanded its jurisdiction to hear cases concerning the rule of law and judicial independence. Upon closer inspection of possible interpretations of Article 2 TEU, there is nothing problematic in placing a rule of law and judicial independence obligation on all Member States at all times—precisely because this is the common constitutional core all levels of constitutional authority share. It forms part of the ‘constitutional’ in constitutional pluralism. And while it can be interpreted in a number of different ways—for example concerning length and renewability of judicial mandates, or powers of courts in the national judicial structure—the core of judicial independence remains (or should remain) untouched.

### *B. Pending Preliminary Reference from the Romanian High Court of Cassation and Justice*

The Romanian High Court of Cassation and Justice submitted a reference concerning the position of the Constitutional Court in relation to corruption cases. The subject matter of the reference is not of much relevance here, but rather, the direct question concerning the principle of primacy, and the position of national constitutional courts. In its third question, the Romanian court thus asks:

<sup>99</sup> *Juízes Portugueses*, note 4 above, paras 19–26.

<sup>100</sup> Bonelli and Claes, note 5 above, p 622.

<sup>101</sup> *Ibid*, p 623.

<sup>102</sup> *Juízes Portugueses*, note 4 above, where the Court of Justice states that: ‘In the present case, the order for reference contains sufficient information to enable the Court to understand the reasons why the referring court seeks an interpretation of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter for the needs of the main proceedings’. No such reasons are given beyond stating that the reduction in salaries of judges were the result of austerity measures attached to financial assistance (granted outside EU law proper). *Ibid*, para 21.

Is the primacy of EU law to be interpreted as permitting a national court to disapply a decision of the constitutional court which has been handed down in a case concerning a constitutional dispute and is binding under national law?<sup>103</sup>

Were present times not as precarious for the rule of law in the EU as they are, the Court of Justice could easily answer this question by referring to its previous Grand Chamber decision in *Križan*:

The national rule which obliges the Najvyšší súd Slovenskej republiky [Slovakian Supreme Court] to follow the legal position of the Ústavný súd Slovenskej republiky [Slovakian Constitutional Court] cannot therefore prevent the referring court from submitting a request for a preliminary ruling to the Court of Justice at any point in the proceedings which it judges appropriate, and to set aside, if necessary, the assessments made by the Ústavný súd Slovenskej republiky which might prove to be contrary to European Union law.<sup>104</sup>

Therefore, we already know the answer to the question the Romanian court asked: primacy of EU law in its EU-exclusive reading, demands that all national courts set aside all contradicting jurisprudence, even that of a constitutional court. Yet, given that the question refers directly to the principle of primacy, no doubt will the Court of Justice conjure a Grand Chamber, and use it as an opportunity to elaborate in plenty of detail the meaning of the principle. Taking into account the rule of law backsliding in Poland and Hungary, dealt with also in a number of cases already closed and pending, it is expected that the Court of Justice will follow its approach in *Juizes Portugueses*, where the consequences of this decision will largely be felt in future cases. Still, the Court of Justice here needs to be wary of the limits of the normative core of constitutional pluralism, and carefully balance the basic principles of the EU's constitutional sphere with the need to police destructive conflict in other Member States. So, while the answer to the question posed will be in the affirmative, it remains to be seen what methods of interpretation the Court of Justice will use to reinforce, or perhaps extend the meaning of the principle of primacy.

### C. Grossmania

The Court of Justice is further being asked about the temporal limits of the principle of primacy, this time by the Hungarian Administrative and Labour Court:<sup>105</sup>

<sup>103</sup> Request for a preliminary ruling from the *Înalta Curte de Casație și Justiție* (Romania) lodged on 26 November 2019, Criminal proceedings against FX, CS, and ND (Case C-859/19), [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2020.201.01.0004.01.ENG&toc=OJ:C:2020:201:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2020.201.01.0004.01.ENG&toc=OJ:C:2020:201:TOC).

<sup>104</sup> *Križan*, C-416/10, EU:C:2013:8, para 71.

<sup>105</sup> Request for a preliminary ruling from the *Győri Közigazgatási és Munkaügyi Bíróság* (Hungary) lodged on 7 April 2020, '*Grossmania*' *Kft v Vas Region Administrative Department* (Case C-177/20), <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=228101&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=17511548>.

Must Article 267 of the Treaty on the Functioning of the European Union be interpreted as meaning that, where the Court of Justice of the European Union, in a decision given in preliminary ruling proceedings, has declared a legislative provision of a Member State to be incompatible with EU law, that legislative provision cannot be applied in subsequent national administrative or judicial proceedings either, notwithstanding that the facts of the subsequent proceedings are not entirely identical to those of the previous preliminary ruling proceedings?

Read together with the preliminary reference from Romania above, the Court of Justice is again in a position to instil some rather permanent changes to the operation of the principle of primacy. If answered in the affirmative, this may in fact result not in a disapplication of the relevant national provision in the case at hand, but in an invalidation of such norm for the future. It is less obvious, however, whether the Court of Justice would go as far as turning the obligation of disapplication into one of invalidation for national courts, which would demand a serious reconsideration of the role and scope of the principle of primacy.

#### *D. Unified Patent Court*

The European Commission has spent over four decades in an endeavour of creating one single EU patent system. The existing system of national patents and European patents, which still must be confirmed in the Member State in which its recognition is sought, is having a highly disincentivising effect on research and innovation in the EU. The latest event in this trajectory was the Agreement on the Unified Patent Court opened for signature in 2013.<sup>106</sup> The newest agreement allows patent applicants to sidestep the cumbersome patent registration in each Member State, by applying for a unitary patent. In addition, it creates the Unified Patent Court to hear disputes arising from unitary patents. Importantly, the UPC would have the legal status of every national court, thus able to submit preliminary references to the Court of Justice.<sup>107</sup>

The German ratification act was challenged before the *Bundesverfassungsgericht*, where it was decided that the *Bundestag* needed to ratify the act with a two-thirds rather than a simple majority. The German Court, having stated that the accession to the UPC constituted a material constitutional amendment by transferring jurisdictional tasks to an intergovernmental institution, annulled the ratification act.<sup>108</sup> It also set out some thoughts on the principle of primacy:

<sup>106</sup> Available at <https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf>. The current number of ratifications is not enough for it to enter into force. In addition, the United Kingdom has provided a notification that it will not continue its participation in the UPC due to Brexit.

<sup>107</sup> Art 21 UPC Agreement.

<sup>108</sup> *Unified Patent Court*, 2 BvR 739/17, Judgment of 13 February 2020, para 131. The *Bundesverfassungsgericht* did not provide an official translation, and therefore the analysis is based on an unofficial translation made by the author, solely for the purposes of the present analysis. All mistakes remain my own.

Moreover, according to the consistent case-law of the Federal Constitutional Court, Union law only has priority over German law in terms of application and not validity, so that a violation of Union law does not lead to the invalidity of the national provision. Nor does a violation of Union law automatically constitute a violation of the Basic Law. If a statute of German law satisfies the national legislation, it remains effective even if it violates Union law ... .

Nothing else follows from the principle of the European law-friendliness of the Basic Law ... . Admittedly, the latter constitutionally obliges German bodies to comply with Union law ... . They must avoid infringements of Union law to the extent that this is possible within the framework of methodologically justifiable interpretation and application of national law ... . However, this alone does not lead to Union law itself becoming the constitutional standard. Its validity and application in Germany are based—in accordance with Article 23.1 sentence 2 of the Basic Law—on the order for the application of the law issued with the law approving the Treaties, which itself has no constitutional quality ... . This cannot be overplayed by recourse to the principle of European law-friendliness ... .<sup>109</sup>

The language employed here does not correspond entirely to the traditional way in which the German Court regarded the relationship between national and EU law, as here the two appear entirely separate. Conversely, the German court stated back in its *Lisbon Treaty* decision that conferral is a principle of both EU and national constitutional law,<sup>110</sup> and in the *Right to Be Forgotten II* decision stated that fundamental rights of the Union are a functional equivalent of the rights protected by the Basic Law.<sup>111</sup> It is therefore not possible to make a conclusion as straightforward as the *Bundesverfassungsgericht* made in the *UPC* decision. Yet, we are again in the scope of reasonable disagreement on the scope of the principle of primacy of EU law, and, as introduced in the previous Section, indeed the Court of Justice has only recently been invited to interpret the future effects of the principle of primacy on conflicting national law.

### E. Weiss II

A veritable industry of academic pearl-clutching developed<sup>112</sup> after the German *Bundesverfassungsgericht*'s decision on 5 May 2020 in *Weiss II*. According to the

<sup>109</sup> Ibid, paras 114–15.

<sup>110</sup> *Lisbon Treaty*, 2 BVerfG 2/08, Judgment of 30 June 2009, [http://www.bverfg.de/ces20090630\\_2bve000208en.html](http://www.bverfg.de/ces20090630_2bve000208en.html), para 234.

<sup>111</sup> *Right to Be Forgotten II*, 1 BvR 276/17, Judgment of 6 November 2019, para 59.

<sup>112</sup> See, for example, A Jakab and P Sonnenschein, 'The Bundesbank Is under a Legal Obligation to Ignore the PSPP Judgment of the Bundesverfassungsgericht' (*Verfassungsblog*, 25 May 2020), <https://verfassungsblog.de/the-bundesbank-is-under-a-legal-obligation-to-ignore-the-pspp-judgment-of-the-bundesverfassungsgericht>; T Marzal, 'Is the BVerfG PSPP Decision "Simply Not Comprehensible"? A Critique of the Judgment's Reasoning on Proportionality' (*Verfassungsblog*, 9 May 2020), <https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible>; E Venizelos, 'Passive and Unequal: The Karlsruhe Vision for the Eurozone' (*Verfassungsblog*, 27 May 2020), <https://verfassungsblog.de/passive-and-unequal-the-karlsruhe-vision-for-the-eurozone>,

*Bundesverfassungsgericht*, the judgment of the Court of Justice, on the occasion of the preliminary reference submitted to it, represents an *ultra vires* act and is not binding on the German Court.<sup>113</sup> The *Bundesverfassungsgericht* argues that the proportionality review as exercised by the Court of Justice with regard to the European Central Bank's quantitative easing programme ('PSPP') neutralises the principle of proportionality's function to protect Member State competence.<sup>114</sup> In consequence, the *Bundesbank* was given a three month deadline during which it is obliged to work together with the European Central Bank ('ECB') in ensuring the programme meets the principle of proportionality as interpreted by the German Court. Otherwise, the *Bundesbank* will no longer be allowed to participate in the PSPP programme.<sup>115</sup> Since then, the ECB has decided to comply with the request of the *Bundesverfassungsgericht*,<sup>116</sup> which the President of the *Bundesbank* deemed to be in compliance with the demands on the proportionality analysis to be carried out and published by the ECB.<sup>117</sup>

Increasingly overtaking the interpretation of EU law itself, the *Bundesverfassungsgericht* took it upon itself to interpret the scope of the monetary policy mandate of the ECB; to define the relevant steps of the proportionality test; and whether the programme is in line with the Treaty prohibition of monetary financing. Is this conflict constructive? That is to say, is the decision of the German Court distorting the meaning of values listed in Article 2 TEU? Without going into the details of the legal framework underpinning the Economic and Monetary Union, there is a long-standing issue concerning the accountability mechanisms embedded therein.<sup>118</sup> In that sense, the approach taken by the *Bundesverfassungsgericht* is one of remedying the flaws it has over the years been warning about—namely a need to more seriously scrutinise the ECB.<sup>119</sup> Accountability as a democratic value therefore

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(*F*'note continued)

F Fabbrini and D Kelemen, 'With One Court Decision, Germany May Be Plunging Europe into a Constitutional Crisis' (*Washington Post*, 7 May 2020), <https://www.washingtonpost.com/politics/2020/05/07/germany-may-be-plunging-europe-into-constitutional-crisis>.

<sup>113</sup> *Weiss and Others II*, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, Judgment of 5 May 2020, para 116, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505\\_2bvr085915en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html).

<sup>114</sup> *Ibid*, para 123.

<sup>115</sup> *Ibid*, para 235.

<sup>116</sup> See the letter by ECB President Christine Lagarde to MEP Sven Simon on 29 June 2020, [https://www.ecb.europa.eu/pub/pdf/other/ecb\\_mepletter200629\\_Simon~ece6ead766.en.pdf](https://www.ecb.europa.eu/pub/pdf/other/ecb_mepletter200629_Simon~ece6ead766.en.pdf); Speech by Yves Mersch, Member of the Executive Board of the ECB, 'In the Spirit of European Cooperation', 2 July 2020, <https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200702~87ce377373.en.html>.

<sup>117</sup> C Siedenbiedel, 'Weidmann sieht Forderungen des Verfassungsgerichts als erfüllt an' (*Frankfurter Allgemeine Zeitung*, 3 August 2020), <https://www.faz.net/aktuell/finanzen/jens-weidmann-verfassungsgerichtsurteil-zur-ezb-erfuellt-16887907.html?GEPC=s3>.

<sup>118</sup> M Dawson, A Maricut-Akbik, and A Bobić, 'Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism' (2019) 25(1) *European Law Journal* 75.

<sup>119</sup> For an overview of the *Bundesverfassungsgericht*'s issues with judicial review in the EMU, see M Dawson and A Bobić, 'Quantitative Easing at the Court of Justice – Doing Whatever It Takes to Save the Euro: Weiss and Others' (2019) 56(4) *Common Market Law Review* 1005.

certainly falls in the scope of Article 2 TEU, and the rule of law—its increase can hardly lead to destructive conflict. Rather, while ultimately the German reading of ECB accountability may not be taken up as the general standard across the EU, it is my argument that it opens up space for debate and for a revised framework of accountability in the Economic and Monetary Union ('EMU').

Part of academic reactions to the decision appear to straightforwardly assume this to be a rule of law issue.<sup>120</sup> If so, this decision would fall in the scope of destructive conflict, questioning the very foundations of the EU's constitutional sphere. Yet, as will become obvious in Part V, the decision of the *Bundesverfassungsgericht* does not in any way question judicial independence of the Court of Justice. To insulate the Court of Justice from any sort of criticism by national courts would indeed disregard structural properties of judicial cooperation in the EU, bringing about more harm than good in the long term.<sup>121</sup>

### F. Dansk Industri

Denmark, a majoritarian democracy, has a decentralised system of constitutional review, where all courts can review legislation with the Supreme Court at the top of the hierarchy. Regardless of this broad power, the Nordic courts have more generally applied self-restraint in favour of the supreme parliament.<sup>122</sup> The Court of Justice's case law on the scope of general principle of non-discrimination on grounds of age and the Framework Directive triggered a series of interactions with the Supreme Court.<sup>123</sup> As mentioned above, the Danish law regulating retirement discriminated between workers' right to severance package based on their age. The expansion of the general principle of non-discrimination on grounds of age to horizontal situations, as decided in *Küçükdeveci*,<sup>124</sup> was almost automatically applied to the situation referred by the Danish Supreme Court. The Danish court rejected the obligation to interpret the Danish Law on salaried employees *contra legem* in order to afford horizontal effect to the general principle of non-discrimination on grounds of age.

The Supreme Court undertook an extensive interpretation of the limits to the competences that Denmark conferred upon the EU. Essentially, the Danish Court rejected outright the expanded self-referential system of the Treaties as created by the Court of Justice; more precisely, its jurisprudence on the direct effect of general principles of

<sup>120</sup> See, for example, Editorial Comments, 'Not Mastering the Treaties: The German Federal Constitutional Court's PSPP judgment' (2020) 57 *Common Market Law Review* 965, p 966.

<sup>121</sup> Analogously to the abovementioned long-term disadvantages of prioritising equality of Member States over equality of citizens.

<sup>122</sup> J E Rytter and M Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9(2) *ICON* 470, p 471.

<sup>123</sup> The Danish Supreme Court submitted a preliminary reference on the matter, and the Court of Justice replied in *Dansk Industri*, C-441/14, EU:C:2016:278. The Court of Justice has already found the Danish provision incompatible with the Directive in *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:600, where the relationship between the parties was a vertical one.

<sup>124</sup> *Küçükdeveci*, C-555/07, EU:C:2010:21.

EU law.<sup>125</sup> Article 6(3) TEU was used as the central provision to determine the extent to which general principles of Union law are applicable in Denmark, and the Supreme Court found no basis in that provision for the Court of Justice's findings in *Mangold* and *Küçükdeveci*.<sup>126</sup> In consequence, the judgments of the Court of Justice in *Mangold* and *Küçükdeveci* were found to be *ultra vires*. The Supreme Court also decided it would be acting outside its constitutional powers if it allowed the application of a principle (arguably) not covered by the transfer of powers from Denmark to the EU.<sup>127</sup>

The reaction of the academic community to the decision expectedly did not pick up the existing critique directed to the Court of Justice in relation to its *Mangold*-initiated jurisprudence, but rather turned on the Supreme Court for stepping out of bounds. The decision was called an act of 'defiance of clear guidelines from the Court of Justice',<sup>128</sup> and 'controversial',<sup>129</sup> which 'took the European legal community by surprise'.<sup>130</sup> The present work does not share the shock of the mentioned commentaries. In the description of the background of the case, the Supreme Court mentioned opinions of several Advocates General employing the same criticism as the Supreme Court. First, the Supreme Court cited the analysis of Advocate General Trstenjak<sup>131</sup> concerning the implications of *Küçükdeveci* for the principle of legal certainty, and in particular her questioning of the remaining scope of the Framework Directive beyond the general principle of anti-discrimination.<sup>132</sup> In addition, the Supreme Court cited Advocate General Kokott, who called the outcome in *Mangold* and *Küçükdeveci* a 'makeshift arrangement',<sup>133</sup> for resolving discrimination situations between individuals.<sup>134</sup> Finally, in support for its formalistic reading of the application of general principles of EU law, the Supreme

<sup>125</sup> *Dansk Industri*, 15/2014, Judgment of 6 December 2016, paras 45–46, <http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf>.

<sup>126</sup> *Ibid*, p 45.

<sup>127</sup> *Ibid*, p 48.

<sup>128</sup> M R Madsen, H P Olsen, and U Šadl, 'Legal Disintegration? The Ruling of the Danish Supreme Court in *AJOS*' (*Verfassungsblog*, 30 January 2017), <http://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos>.

<sup>129</sup> S Klinge, 'Dialogue or Disobedience between the European Court of Justice and the Danish Constitutional Court? The Danish Supreme Court Challenges the *Mangold*-Principle' (*EU Law Analysis Blog*, 13 December 2016), <http://eulawanalysis.blogspot.nl/2016/12/dialogue-or-disobedience-between.html>.

<sup>130</sup> M R Madsen, H P Olsen, and U Šadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the *Ajos* Case and the National Limits of Judicial Cooperation' (2017) 23(1–2) *European Law Journal* 140, p 140.

<sup>131</sup> Opinion of Advocate General Trstenjak in *Dominguez*, C-282/10, EU:C:2011:559.

<sup>132</sup> *Dansk Industri*, note 125 above, para 4.

<sup>133</sup> Opinion of Advocate General Kokott in *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:248, para 22.

<sup>134</sup> *Dansk Industri*, note 125 above, para 40.

Court cited Advocate General Bot<sup>135</sup> in *Küçükdeveci*, where he criticised the Court of Justice's overestimate of the commonality of the constitutional protection of antidiscrimination on grounds of age across EU Member States.<sup>136</sup> Rather, he recommended a more formalistic reading of the principle, based on the prohibition of discrimination in the then Article 13 TEU, and Article 21(1) of the Charter.<sup>137</sup> These concerns have been present since the *Mangold* judgment, and, accordingly, regardless of the ultimate resolution of this debate, it is clear that the differences in interpretation do not go beyond reasonable disagreement allowed for in Article 2 TEU.

## V. DESTRUCTIVE CONFLICT AND THE FUTURE OF CONSTITUTIONAL PLURALISM

In their highly critical piece on constitutional pluralism, Kelemen and Pech state that the theory is at best 'a fudge' and is conceptually identical to constitutional identity; and since it is so prone to abuse by governments aiming to dismantle the rule of law, we should simply give it up and read primacy of EU law as a federal supremacy clause.<sup>138</sup> They conclude that constitutional pluralism is so prone to abuse, that it is likened to 'an abnormally dangerous product and its manufacturers should be held to a standard of strict liability'.<sup>139</sup> However, because the authors themselves focus exclusively on abuses of constitutional pluralism, we are never told how is the product of constitutional pluralism abnormally dangerous in the first place. Rather, the analysis leaves the impression that precisely the setup of constitutional pluralism is to blame for the rule of law backsliding being possible.<sup>140</sup> Thus, as recently pointed out, they are attacking 'an empirical conclusion on normative grounds'.<sup>141</sup> In his earlier work, Kelemen himself points to entirely different causes in the EU's institutional setup that allow for what he calls the 'authoritarian equilibrium':<sup>142</sup> EU's system of party politics, the EU's funding and investment structure, and free movement of persons causing a depletion of opposition in authoritarian regimes.<sup>143</sup>

<sup>135</sup> *Dansk Industri*, note 125 above, para 38.

<sup>136</sup> Opinion of Advocate General Bot *Küçükdeveci*, C-555/07, EU:C:2009:429, [77].

<sup>137</sup> *Ibid.*

<sup>138</sup> R D Kelemen and L Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 *Cambridge Yearbook of European Legal Studies* 59, pp 60–61.

<sup>139</sup> *Ibid.*, p 61.

<sup>140</sup> Even in the section where they attempt to outline the inherent dangers of constitutional pluralism, they only refer to the possibility of abuse. *Ibid.*, pp 62–63.

<sup>141</sup> M Baranski, F Bastos, and M van den Brink, 'Unquestioned Supremacy Still Begs the Question' (*Verfassungsblog*, 29 May 2020), <https://verfassungsblog.de/unquestioned-supremacy-still-begs-the-question>.

<sup>142</sup> R D Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) 27(3) *Journal of European Public Policy* 481.

<sup>143</sup> *Ibid.*, p 483.

In addressing these issues, Kelemen and Pech argue that only a full-blown supremacy of EU law<sup>144</sup> can ensure the equality of Member States, recalling Fabbrini's argument on the relationship between equality of Member States and the national identity clause.<sup>145</sup> In other words, constitutional identity is the sword threatening the existence of the European Union. Yet, constitutional identity is acting precisely as a shield from authoritarian, anti-democratic tendencies: constitutional identity is a concept necessarily including the rule of law. Pech convincingly and thoroughly shows that the rule of law is indeed a common *constitutional* tradition of both the EU and its Member States.<sup>146</sup> Surely even Fabbrini's reading of Article 4(2) TEU<sup>147</sup> would include the values of Article 2 TEU to be necessarily embedded in national identity of Member States. Moreover, values contained in Article 2 TEU are entrenched in the accession process to the European Union, and any state aspiring to become a member would, in principle, not be able to follow the footsteps of Hungary and Poland.<sup>148</sup>

Furthermore, a proper understanding of the nexus between constitutional pluralism and the rule of law best demonstrates the capacity of constitutional pluralism to reject abusive practices of illiberal governments. Kelemen and Pech refer to abusive governments and their actions as 'legal miscreants'<sup>149</sup>—and they are very correct. These cases, rather than showing a disagreement on the interpretation of basic values of Article 2 TEU, show a complete disregard for their existence, and violate the normative ideal of the European integration project itself. For example, in Poland, it is possible for the Minister of Justice to personally delegate a judge to a case, alongside other flagrant breaches of judicial independence in judicial appointment.<sup>150</sup> In

<sup>144</sup> In reaction to the decision of the *Bundesverfassungsgericht*, some academics alongside Kelemen and Pech published the following statement: 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order' (*Verfassungsblog*, 26 May 2020), <https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments>.

<sup>145</sup> Kelemen and Pech, note 138 above, p 62. See F Fabbrini, 'After the *OMT* Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) 16(4) *German Law Journal* 1003. In essence, Fabbrini employs a surprisingly literal reading of Article 4 TEU, granting priority to equality of Member States over the obligation to respect national identity, simply by reference to the textual ordering of clauses.

<sup>146</sup> Emphasis added. L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (Jean Monnet Working Papers, 2009), Working Paper No 04/09, <https://eclass.uoa.gr/modules/document/file.php/LAW272/rule%20of%20Law.pdf>.

<sup>147</sup> Fabbrini, note 145 above.

<sup>148</sup> For an analysis of the rule of law conditions and compliance during and after the accession process, see J B Slapin, 'How European Union Membership Can Undermine the Rule of Law in Emerging Democracies' (2015) 38(3) *West European Politics* 627.

<sup>149</sup> Kelemen and Pech, note 138 above, p 74.

<sup>150</sup> See a line of preliminary references submitted by Polish courts on this point: *Prokuratura Rejonowa w Mińsku Mazowieckim v WB*, C-748/19, Request for a Preliminary Ruling from the Sąd Okręgowy w Warszawie (Poland) Lodged on 15 October 2019; *Prokuratura Rejonowa Warszawa-Żoliborz w Warszawie v XA and YZ*, C-749/19, Request for a Preliminary Ruling from the Sąd Okręgowy w Warszawie (Poland) Lodged on 15 October 2019; *Wola w Warszawie v DT*, C-750/19, Request for a Preliminary Ruling from the Sąd Okręgowy w Warszawie (Poland) Lodged on 15 October 2019—*Prokuratura Rejonowa Warszawa; DS v SP, AP, DK, Sz w K*, C-763/19, Request for a Preliminary

addition, national judges were warned by the Deputy of the Disciplinary Commissioner of Judges of Common Courts not to publicly question the effectiveness of appointing judges adjudicating in the Chamber of Extraordinary Control and Public Affairs of the Supreme Court.<sup>151</sup> Finally, a Dutch court submitted a preliminary reference to the Court of Justice, asking whether it is still possible to cooperate with Polish institutions within the European Arrest Warrant system, given that they may no longer be considered independent courts within the meaning of mutual trust in the Area of Freedom, Security and Justice.<sup>152</sup> It is clear that these cases do not fall within the scope of a reasonable disagreement in interpreting values contained in Article 2 TEU, but are questioning their very existence.

Poland is abusing the concept of constitutional identity through a *contra legem* reading of principles contained in Article 2 TEU. The reaction of the Polish Government to the decision of the *Bundesverfassungsgericht* concerning the ECB mandate is a case in point. The Polish Government stated that Polish courts can disapply EU law obligations on the basis of constitutional identity, in the same way as the German Court did.<sup>153</sup> Yet, in the actual decision, the German Court found that constitutional identity was *not* breached,<sup>154</sup> but rather, the Court of Justice insufficiently controlled an EU institution in keeping within its mandate (an *ultra vires* finding).<sup>155</sup> It is possible to disagree with the merits of the German decision, but it is *not* possible to claim the findings went beyond a reasonable interpretation of any of the values contained in Article 2 TEU.

## VI. CONCLUSION

The constitutional sphere of the EU is a strange and rare creature, for decades resisting being sorted according to the easy, well-known categories of states and international organisations. Accordingly, the analysis of this strange creature demands us to abandon some pre-conceived assumptions concerning constitutionalism more

(*F*'note continued)

Ruling from the Sąd Apelacyjny w Krakowie (Poland) Lodged on 18 October 2019; *C SA v Administrator in the Insolvency of IT in Liquidation*, C-764/19, Request for a Preliminary Ruling from the Sąd Apelacyjny w Krakowie (Poland) Lodged on 18 October 2019.

<sup>151</sup> Statement of the Deputy of the Disciplinary Commissioner of Judges of Common Courts, 6 August 2020, <https://www.iustitia.pl/en/activity/informations/3916-statement-of-the-deputy-of-the-disciplinary-commissioner-of-judges-of-common-courts>.

<sup>152</sup> Available at <https://pace.coe.int/en/news/7973/monitoring-rapporteurs-react-to-judgment-of-the-court-of-amsterdam-regarding-the-independence-of-polish-justice-system>.

<sup>153</sup> Available at <https://twitter.com/RULEOFLAWpl/status/1257684311395962880>.

<sup>154</sup> German *Bundesverfassungsgericht* case *Weiss II*, note 113 above, para 228. See also the interview with the *Bundesverfassungsgericht* judge Ulrich Maidowski, explaining how the decision cannot be comparable to the Polish case. Available at <https://dprv.eu/index.php/pl/aktualno%C5%9Bci?fbclid=IwAR3xair3sPdYqoyqulqWBzw4gHCm3QACvDwmL5NOJBYL96ILynYM2BsIs>.

<sup>155</sup> The difference between identity and *ultra vires* review in the German constitutional jurisprudence is one of consequence: when constitutional identity is breached, it represents an area untouchable by European integration; *ultra vires* review controls *already transferred* competences and how they are used. See Huber, note 88 above.

generally. It demands regarding law as a dynamic, incrementally developing creature, where constitutional conflict is not a bug, but an important feature of the system's functioning. So long as the 'constitutional', expressed through the values in Article 2 TEU, is coherently interpreted within the limits of the 'pluralist', we can speak of constructive conflict, conducive to the dynamic development of the EU's constitutional sphere. However, this does not mean that the system is immune to bugs: it is possible to observe instances of destructive conflict, questioning the system's entire existence: the 'constitutional'. In this respect, the auto-correct function of constitutional pluralism can only stretch as far as constructive conflict, whereas instances of destructive conflict cannot be resolved through mutual accommodation and self-restraint, the determinants of the auto-correct function.

Mutual respect and judicial self-restraint do not deny the primacy of EU law in its particular context, but a pluralist account does reject the outright subordination of national legal orders in their entirety to the EU legal order. The case law of the Court of Justice on this matter reinforces the normative ideals of constitutional pluralism shared by all Member States, as it safeguards the rule of law once a national constitutional court is no longer able to do so. The object of constructive constitutional conflict is the balancing between these values, and the degree to which they are protected, rather than their very existence. The scope of Article 2 TEU still allows variety in interpretation and does not result in a uniform monist solution in every single case. Rather, a heterarchical constellation means that through sincere cooperation and mutual respect, different interpretations will prevail at different points in time. Yet, there is no reason why this would undermine the coherence of EU law.<sup>156</sup> The deficiencies in addressing this rule of law crisis then tell us something about the institutional (in)capacity of political elites of the European Union to resolve it.<sup>157</sup>

It may well be that the latest preliminary references from Romania and Hungary will result in a detailed elaboration, and possibly an expansion of the principle of primacy into something closer to a federal understanding of supremacy. In response, there may or may not be challenges from national constitutional courts. If it results in strengthening the rule of law across member states, it will be a welcome step forward. However, we are not there yet, and until then, the auto correct function of constitutional pluralism with a strong normative core will continue to guide the developments in the EU constitutional space.

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<sup>156</sup> See also, Lenaerts, note 72 above.

<sup>157</sup> A point beyond the scope of this contribution, but addressed in-depth by Pech and Scheppele, note 11 above.