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Constitutional and Administrative Pluralism in the EU System of Banking Supervision

By Matej Avbelj[*]

Abstract

This Article examines the relationship between the developing European Union (EU) system of banking supervision and the theories of constitutional pluralism. It questions the remaining epistemic, explanatory, and normative value of these theories with regard to the EU system of banking supervision. The argument is broken down into three parts. First, the Article briefly describes the system of banking supervision in the European Union and the pluralist challenges that it spurs. Second, it schematically maps out the leading theories of constitutional pluralism to test, by way of their application to the field of EU banking supervision, their epistemic, explanatory, and normative value. Finally, to the extent that this value has diminished, the Article offers another pluralist theory, not a constitutional one, which could supplement the identified epistemic, explanatory, and normative gaps. This is a theory of administrative pluralism.

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A. Introduction

This Article examines the relationship between the European Union (EU) system of banking supervision, as it has emerged in the aftermath of the EU financial and economic crises, and the theories of constitutional pluralism. It asks what, if any, is the epistemic, explanatory, and normative value of these theories with regard to the system of EU banking supervision. First, the Article briefly describes the system of banking supervision in the EU and the pluralist challenges that it spurs. Second, it schematically maps out the leading theories of constitutional pluralism to test, by way of their application to the field of EU banking supervision, their epistemic, explanatory, and normative value. Finally, to the extent that this value has diminished, the Article offers another pluralist theory, not a constitutional one, which could supplement the identified epistemic, explanatory, and normative gaps. This is a theory of administrative pluralism. This leads to the conclusion that constitutional and administrative pluralism should be seen as complementary rather than in opposition. By approaching the EU system of banking supervision through the lenses of constitutional and administrative pluralism together, its growingly complex, increasingly variegated legal, and political landscape can be adequately understood and explained. In addition, this Article provides an appropriate normative guidance to ensure the EU's viability in practice.

B. The EU System of Banking Supervision

After the outbreak of the financial and, later economic crises, the EU has proposed and implemented a wide range of reforms to its financial sector. Their scope and depth have remained partially unaccounted for—due to various reasons, but mainly due to the complexity of the crisis situation, the short timeframe, and tense, extremely politically loaded atmosphere. Theory has clearly been surpassed by practice, and it is now, already with the benefit of hindsight, trying to catch up and compensate for that epistemic delay. The practice of emerging financial regulation in the EU is thus developing in response to concrete and imminent practical challenges. The emergence is also subject to the necessary constraints of political and transnational compromises in the EU and its member states. Even if the new EU financial regulatory system was envisaged as coherent, it has fallen short of that goal. The product, which has been described as part of the EU's silent revolution,[1] is not absent of internal contradictions, competence overlaps, duplications, and less than efficient solutions. As such, there is doubt the system can deliver the regulatory outcomes it promised.[2] Although not perfect, the European System of Financial

[1] Piotr Buras, *The EU's Silent Revolution*, *in* EUROPEAN COUNCIL ON FOREIGN RELATIONS 2 (2013), http://www.ecfr.eu/page/-/ECFR87_EU_SILENT_REVOLUTION_AW.pdf (last visited Sept. 16, 2016).

[2] For a detailed report, *see* the IMF, *A Banking Union for the Euro Area*, IMF Staff Discussion Note (Feb. 2013), https://www.imf.org/external/pubs/ft/sdn/2013/sdn1301.pdf [hereinafter IMF].

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Supervision ESFS was created and widely accepted as a good idea; yet, it still awaits implementation.[3] The following Section considers the ESFS's main traits.

I. The European Banking Supervisory Authorities

Since 2008, the EU system of financial supervision *lato sensu* emerged and is constituted of two pillars. The first pillar stands for financial supervision *stricto sensu* (ESFS), which is intended to ensure the functioning of the single market. It is made of four institutions: The European Banking Authority (EBA),[4] the European Securities and Markets Authority (ESMA),[5] the European Insurance and Occupational Pensions Authority (EIOPA),[6] and the European Systemic Risk Board (ESRB).[7] They are coordinated by the Joint Committee. By their legal form, these institutions are EU agencies with their own legal personality. With their national counterparts, their task is to coordinate a decentralized system of financial supervision *stricto sensu*. This is structured around three basic divides: The level of supervision, the sector of supervision, and the type of supervision.

The supervision takes place on the supranational and national level, so that the named supranational agencies are in charge of the more systemic, EU-wide overview, whereas the supervisory institutions on the national level execute day-to-day competences on the ground. The sectors of supervision are banking (EBA), securities (ESMA), and insurance (EIOPA). The supervision can be micro-prudential, which is focused on the financial soundness of individual financial institutions, or macro-prudential, which is concerned with the viability of the financial system as a whole. EBA, ESMA, and EIOPA are in charge of the former, whereas the ESRB is tasked with the latter.

II. The European Banking Union

The second pillar involves the banking supervision aimed at safeguarding the viability of the Eurozone. It sets up the European Banking Union (EBU). This is composed of two parts: The Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). A third part, typical of banking unions,[8] is the not yet fully created Common Deposit

[3] Eilis Ferran, *European Banking Union: Imperfect, But It Can Work*, *in* EUROPEAN CORPORATE GOVERNANCE INSTITUTE (2014); BERNHARD SPEYER, EU MONITOR, EU BANKING UNION: RIGHT IDEA, POOR EXECUTION (Barbara Böttcher ed., 2013).

[4] EUROPEAN BANKING AUTHORITY, http://www.eba.europa.eu/ (last visited Sept. 16, 2016).

[5] EUROPEAN SECURITIES AND MARKETS AUTHORITY, https://www.esma.europa.eu/ (last visited Sept. 16, 2016).

[6] EUROPEAN INSURANCE AND OCCUPATIONAL PENSION AUTHORITY, https://eiopa.europa.eu/ (last visited Sept. 16, 2016).

[7] EUROPEAN SYSTEMATIC RISK BOARD, https://www.esrb.europa.eu/home/html/index.en.html (last visited Sept. 16, 2016).

[8] IMF, *supra* note 2, at 9.

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Guarantee Scheme (DGS). The Single Resolution Fund (SRF) currently fulfills its role, albeit in a limited manner. In the future, subject to political compromise, the European Stability Mechanism (ESM) might replace the DGS.[9] As in the case of the ESFS, the EBU is also organized as a decentralized system, operating on the supranational and national level. It exercises two basic functions of supervision and resolution, this time in a single banking sector.

1. The Single Supervisory Mechanism

The SSM rests on a sophisticated division of competences between the European Central Bank (ECB) and the National Competent Authorities (NCA). Their joint endeavor represents a number of principles,[10] which, on the one hand, concern the organizational structure of the supervision and, on the other hand, concern its quality standards. The organizational principles encompass the principles of conferral, integrity and decentralization, homogeneity within the SSM, consistency with the single market, and the principle of proportionality. The latter builds a bridge to the qualitative principles, such as use of best practices, independence and accountability, risk-based approach, adequate level of supervisory activity for all credit institutions, and effective and timely corrective measures.[11] The most basic "constitutional" principle is the principle of conferral, on the basis of which the ECB has only those supervisory powers that have been transferred to it, while the residual supervisory powers remain with the NCA.[12]

In line with the principle of integrity and decentralization, the system of supervision emerged as a single, but decentralized, unity. The close and sincere co-operation between the ECB and NCA ensures and implements the necessary continuity and consistency of supervision across the Union.[13] The principle of homogeneity, standing for a harmonized set of substantive standards for supervision, plays an important role in meeting that objective.[14] These harmonized standards—also known as the single rulebook[15]—directly

[9] For a more detailed discussion, *see* David Howarth & Lucia Quaglia, *Banking Union as Holy Grail: Rebuilding the Single Market in Financial Services, Stabilizing Europe's Banks and 'Completing' Economic and Monetary Union*, 51 J. COMMON MKT. STUD. 103, (2013).

[10] GUIDE TO BANKING SUPERVISION, EUROPEAN CENTRAL BANK 6–9 (2014), https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf.

[11] *Id.*

[12] *See* also Niamh Moloney, *European Banking Union: Assessing its Risks and Resilience*, 51 J. COMMON MKT. L. REV. 1609, 1618 (2014) who also observed that "*the allocation of supervisory power under the SSM is specific and enumerated*."

[13] EUROPEAN CENTRAL BANK, *supra* note 10, at 7.

[14] *Id.*

[15] *Id.* at 7–8.

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connect with the principle of consistency with the single market and the main regulatory agency in its financial leg, the European Banking Authority (EBA). In so doing, a bridge between the EBA, explicitly tasked with drafting the single rulebook mentioned above, and the SSM develops by connecting the EBU and the EFSF *stricto sensu* in the larger whole of the ESFS *lato sensu*. But before looking at that relationship in depth, the governance inside the SSM requires more focus.

In the absence of a single supervisory authority, the ECB supervises the so-called significant banks, whereas the less significant banks—in principle—remain under the supervisory authority of NCA.[16] In this relationship,[17] the ECB has a somewhat elevated, but not directly superior, position to the NCA. While EU law prescribes a duty of cooperation in good faith between the ECB and the NCA,[18] the ECB holds ultimate responsibility for the overall effective and consistent functioning of the SSM.[19] To ensure that this objective is met, the NCA must assist the ECB in the execution of its tasks and must follow the ECB's instructions in that respect.[20] This has led some authors to conclude that the overall legal infrastructure of the SSM privileges the ECB over the NCA.[21] The same has been said of the SRM.[22]

2. The Single Resolution Mechanism

As the second building block of EBU, the SRM establishes a supranational system for restructuring banks in grave financial trouble. This system has both a preventive and a curative leg. The preventive leg builds on the SSM by introducing a requirement for the national authorities and financial actors to draw up recovery and resolution plans on how to deal with situations in which supervision has identified a potential financial stress or

[16] *Id.* at 10. A bank is considered significant if it meets any of the following conditions: (a) The total value of its assets exceeds €30 billion or—unless the total value of its assets is below €5 billion—exceeds 20% of national GDP; (b) it is one of the three most significant credit institutions established in a Member State; (c) it is a recipient of direct assistance from ESM; and (d) the total values of its assets exceeds €5 billion and the ratio of its cross-border assets and/or liabilities in more than one other participating Member State to its total assets and/or liabilities is above 20%. Notwithstanding the fulfillment of these criteria, the SSM may declare a bank significant to ensure the consistent application of high-quality supervisory standards.

[17] *See* Council Regulation (EC) No. 1024/2013 of 15 Oct. 2013, art. 6, 2013 O.J. (L 287) 63–89 9 [hereinafter Council Regulation No. 1024/2013].

[18] *Id.* at art. 6(2).

[19] *Id.* at art. 6(1).

[20] *Id.* at art. 6(3).

[21] Moloney, *supra* note 12.

[22] *Id.*

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failure of a bank.[23] It also includes an authorization for early intervention into a failing bank before its financial situation deteriorates irreparably.[24] Even if that fails, the curative measures set in: The program of resolution, backed up by a reinforced cooperation and coordination between national authorities, particularly in cases involving cross-border banking groups.[25]

Similar to the SSM, the governance of the SRM is decentralized, relying on cooperation between the national resolution authorities (NRA) and the Single Resolution Board (SRB), the EU agency in charge. The division of competences follows the rationale adopted in respect to the SSM, so that the SRB oversees the banks supervised by the ECB, whereas the NRA remains responsible for the less significant banks in need of resolution. The resolution process carries a risk of financial burden-sharing—mutualization of debt—inside the Eurozone, creating from the start a delicate political issue. The issue has resulted in a limited fiscal-backstop as the last resort to support governments,[26] in the form of the SRF,[27] and an overall delayed implementation of SRM.[28] The latter's system of governance, which tries to accommodate the supranational and national interests by requiring swift action when the need emerges, represents a reflex of this delicate political balancing inside the Eurozone. The ECB normally starts the resolution process. The SRB, in consultation with the NRA, prepares the resolution scheme, which must be adopted by the Commission and the Council and then executed by the NRA under SRB supervision.[29]

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[23] European Commission Memo, *EU Bank Recovery and Resolution Directive (BRRD): Frequently Asked Questions* (Apr. 15, 2014), http://europa.eu/rapid/press-release_MEMO-14-297_en.htm.

[24] *Id.*

[25] *Id.*

[26] Dirk Schoenmaker, *On the Need for a Fiscal Backstop for the Banking System* 4 (DSF Policy Paper Series, Paper No. 44, 2014), http://www.dsf.nl/wp-content/uploads/2014/10/DSF-Policy-Paper-No-44-On-the-need-for-a-fiscal-backstop-to-the-banking-system.pdf.

[27] The SRM Regulation provides that the prescribed contributions of national banks to the SRF are levied by the respective Member States and transferred by them to the SRF, following the special Agreement on the Transfer and Mutualization of Contributions to the Single Resolution Fund. *Agreement on the Transfer and Mutualisation for Contributions to the Single Resolution Fund*, COUNCIL OF EUROPE, http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT (last visited Sept. 16, 2016).

[28] The build-up of SRM started in January 2016.

[29] Moloney, *supra* note 12, at 1640.

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3. The European Bank Authority

Finally, the EBA provides the link between the two pillars of the ESFS *lato sensu*. Established in 2011, the EBA adopts the common standards for financial services in the European Union and performs the so-called stress tests of the main EU financial institutions. Following the establishment of EBU, the EBA remains responsible for creating a single rulebook for financial services in the EU, for developing a single supervisory handbook, for supervising consistency in bank supervision across the twenty-eight countries in the single market, and for conducting the EU-wide stress tests.[30] The single rulebook acts as a material bedrock on which the two parts of EBU are built. Nevertheless, this should not create the impression that EBA is supreme over EBU. To the contrary, the establishment of the EBU and the newly acquired supervisory role of the ECB will probably weaken the role of EBA,[31] which has previously been appraised as too narrow with respect to its functions and too broad as a matter of EU institutional and constitutional law.[32] While the latter is largely due to its question-begging legal basis of Art. 114 TFEU, the former involves the fact that EBA is circumscribed in its supervisory, regulatory, and enforcement powers due to the constraints attached to its legal status of an EU agency by the *Meroni* doctrine.[33]

The link between ESFS *stricto sensu* and the EBU hinges on a relationship between the EBA and the ECB, which—to make things even more complicated—depends simultaneously on a relationship between the single market and the Eurozone, between the EU-28 and the EU-19. They stand for two different visions of Europe: One purely economic and the other more political. This complex arrangement appears in two circumstances: First, the specific voting arrangement inside the EBA reflects this complexity[34] because it seeks to find a suitable balance between the participating and non-participating Member State.[35] Second,

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[30] *Id*.

[31] *See* the fears expressed in the British Parliament "that the Single Supervisory Mechanism proposals may seriously undermine the authority of the EBA in its relations with the ECB." *The Impact Of Banking Union On The EBA And The ESRB*, U.K. PARLIAMENT, http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/88/8806.htm (last visited Sept. 16, 2016).

[32] *See generally*, Elaine Fahey, *Does the Emperor Have Financial Crisis Clothes? On the Legal Basis of the European Banking Authority*, 74 MOD. L. Rev. 581. (2011).

[33] Case 9/56, Meroni & Co., Industrie Metallurgiche, SpA v. High Auth. of the European Coal and Steel Cmty., 1958 E.C.R. 133.

[34] Howarth & Quaglia, *supra* note 9, at 25.

[35] *See Statement by the Council on the Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No 1093/2010 Establishing a European Supervisory Authority (European Banking Authority) as regards the Conferral of Specific Tasks on the European Central Bank Pursuant to Council Regulation (EU) No 1024/2013*, COUNCIL OF EUROPE (last visited Sept. 16, 2016),

complexity is expressed through the system of mutual supervisory cooperation between the EBA and the ECB, whereby the ECB is bound to act in accordance with EU law, including using the single rulebook prepared by the EBA.[36] As constitutionally independent, the ECB is also subject to an EU agency, which is a creation of EU secondary law.[37] It has been rightly observed that the relationship between the two falls nothing short of a constitutional conundrum in terms of the institutional balance set up under the Treaty.[38]

In short, the system of EU banking supervision, as part of the broader ESFS, exhibits a deeply plural composition. First, it features a plurality of regimes, whereby banking supervision is simultaneously conducted as part of the single market as well as of the Eurozone, the two not necessarily pursuing exactly the same objectives. The plurality of regimes at the same time represents a plurality of constituencies: Banking supervision on the single market takes place in the name of and for twenty-eight member states, whereas inside the Eurozone the constituency counts only nineteen member states. Next, there is a plurality of regulatory levels. Banking supervision is conducted on the supranational and national level through an intricate system of coordination. This coordination involves a plurality of institutions, which both on the supranational and national level are divided between the institutions of constitutional character—primary institutions—and their administrative counterparts—various supranational and national administrative agencies.

This plurality must be connected in order for the system of EFSF—and banking supervision inside it—to function as a viable common whole and exhibit as few internal contradictions and conflicts as possible while being able to contribute to the efficient achievement of the objectives for which it was created. In other words, plurality has to grow into pluralism. To do so, a theory of pluralism must provide a roadmap to that end. The theories of constitutional pluralism are prominent and best-suited candidates to fit that role. Can they also provide an adequate descriptive, explanatory, and normative guidance for the EU system of banking supervision? This a question addressed in the following Section.

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http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2013766%202013%20REV%201%20ADD%201. For details, *see* Regulation 1022/2013 of the European Parliament and of the Council of 22 October 2013 Amending Regulation (EU) No 1093/2010 Establishing a European Supervisory Authority—European Banking Authority—regarding the Conferral of Specific Tasks on the European Central Bank pursuant to Council Regulation (EU) 1024/2013, 2013 O.J. (L 287) 20–22 (EU).

[36] *See* Council Regulation No. 1024/2013, *supra* note 17, at para. 32.

[37] *Id.*

[38] Moloney, *supra* note 12, at 1665.

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C. Theories of Constitutional Pluralism and the EU System of Banking Supervision

In 1995, Neil MacCormick first introduced into the EU legal theoretical landscape the idea of constitutional pluralism, which eventually diversified into multiple theories of constitutional pluralism.[39] In response to the German Constitutional Court's *Maastricht* decision, MacCormick was one of the very few scholars, if not the only one, who argued that this widely and harshly criticized ruling had "a sound basis in legal theory."[40] This theory was pluralist, rather than monist. Pursuant to this theory, "the legal systems of Member States and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another."[41] Yet, it took another piece, a few years later, for the theory to be explicitly called constitutionally pluralist and cast in more concrete terms. MacCormick thus defined, albeit vaguely, constitutional pluralism as a situation of plurality of institutional normative orders, each with a functioning constitution, where each acknowledged the legitimacy of every other within its sphere while refraining from asserting constitutional superiority over another.[42] As applied to the European integration, constitutional pluralism entails a strongly decentralized conception of the EU whose constitutional architecture is much closer to confederation than to federation.[43]

Thus, constitutional pluralism first emerged as an EU-specific theory. Nevertheless, Neil Walker attempted to generalize it by extending its theoretical reach to describe the overall phenomenon of the post-Westphalian constellation.[44] As he has compellingly argued ever since, the state is no longer an exclusive unit of legal and political organization. The link between autonomy and territorial sovereignty has been severed and the exclusivity of the territorially limited claims towards ultimate legal authority have given way to the competition of various functional- but equally plausible—claims towards ultimate legal authority. Alongside the state, new sectorally and functionally oriented polities have

[39] What follows draws closely on CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 2–9 (Matej Avbelj & Jan Komárek eds., 2012).

[40] Neil MacCormick, *The Maastricht Urteil: Sovereignty Now*, 1 EUR. L.J. 259, 265 (1995).

[41] *Id.* at 265.

[42] NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH 104 (1999).

[43] Neil MacCormick, *A Comment on the Governance Paper* (Jean Monnet Ctr., Working Paper No. 6/01, 2001), http://www.jeanmonnetprogram.org/archive/papers/01/012501.html

[44] Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 333 (2002) [hereinafter Walker, *Constitutional Pluralism*].

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emerged and exist on the sub-state, trans-state, supra-state, and other non-state levels.[45] Besides extending the reach of constitutional pluralism, Walker also furnished it with a new objective to rehabilitate the language of constitutionalism, which has faced growing marginalization and irrelevance precisely when its values and social-engineering capacity are needed most.[46]

Yet, with the launch of the process of EU documentary constitutionalism destined to result in the Treaty Establishing the Constitution for Europe (TECE), the idea of constitutional pluralism again turned explicitly toward the EU. Driven by the event, as is usual in EU scholarship, constitutional pluralism started drawing attention in wider scholarly circles, pushing itself into the mainstream and simultaneously diversifying itself. A single idea of constitutional pluralism evolved into many theories of constitutional pluralism. In my previous work, I have tried to distinguish at least between six theories of constitutional pluralism.[47]

Joseph Weiler developed the first of these—socio-teleological constitutionalism. His special brand of European constitutionalism has three dimensions: (1) The formal, (2) the normative, and (3) the sociological dimension. According to the formal dimension, the EU already has a constitution, developed in the interaction between the national judicial and political branches, and therefore did not need a special, documented one resembling the statist constitution. Pursuant to the normative dimension—the key pluralist component in this conception—the EU is founded on the principle of constitutional tolerance, which sends a deeply normative message of necessity and desirability of mutual recognition between the self-reflexive individuals and the Member States in their eternal pursuit of a decent life. Finally, in sociological terms, constitutional tolerance is said to be exercised on a daily basis between all the actors of the integration—from the lowest-ranked official to the highest judicial authority.[48]

Epistemic meta-constitutionalism, advanced by Neil Walker, offers constitutionalism redefined pluralistically as a meta-framework above and beyond the constituent entities of European integration. It stresses the need of fostering dialogue, mutual-learning, and cross-fertilization,[49] while acknowledging that each entity is a distinct epistemic site and

[45] Most recently, *see generally* NEIL WALKER, INTIMATIONS OF GLOBAL LAW (2014).

[46] *See* AVBELJ & KOMÁREK, *supra* note 39, at 4.

[47] The ensuing paragraphs draw directly on Matej Avbelj, *Questioning EU Constitutionalisms*, 9 GERMAN L.J. 1, 11–22 (2008).

[48] J. H. H. Weiler, *In Defence of the Status Quo: Europe's Constitutional Sonderweg*, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 23 (J. H. H. Weiler & Marlene Wind eds., 2003).

[49] Neil Walker, *Flexibility Within a Meta-Constitutional Frame: Reflections on the Future of Legal Authority in Europe*, *in* CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY? 14 (Gráinne de Búrca & Joanne Scott eds., 2000).

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has limits.[50] Epistemic meta-constitutionalism distances itself, more than Weiler's approach does, from the classical hierarchical constitutional structure; at the same time, it remains in favor of the EU's own "documented" constitution because of the potentially positive effects a constitution-making process could have on integration.[51]

The third version of constitutional pluralism is best fit universal constitutionalism, recently dubbed cosmopolitan constitutionalism.[52] It also recognizes the pluralist structure of European integration. But unlike the epistemic meta-constitutionalism, this version situates the plurality in a universal framework of substantively homogeneous, shared principles and values of political liberalism which lie at the base of the modern constitutionalism. Political liberalism should be relied upon as a universal language for measuring and balancing the competing claims of the entities constituting European integration and for finding a best fit solution for the integration as a whole.[53]

The fourth, harmonious discursive constitutionalism,[54] joins the quest of universal constitutionalism, but also differs from it in two respects: First, it differs with regard to the intensity of the plurality and its recognized implications, and second, with regard to the degree of anticipated or assumed universalism. Harmonious discursive constitutionalism is slightly more disposed towards plurality. It refrains from making strong claims about the actual substantive universality of principles and values, and insists only on the procedural dimension of universalizability of arguments through which actors across different entities of the integration can justify their claims to authority.[55] Constitutional pluralism, in this sense, provides for a shared discursive—e.g. procedural framework—rather than for universally shared substantive foundations.

The fifth version, multilevel constitutionalism, was authored by Ingolf Pernice and has been very popular among German scholars.[56] This approach also proceeds from the presumption of considerable substantive unity and homogeneity of values between the

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[50] Walker, *Constitutional Pluralism*, *supra* note 44, at 338.

[51] Neil Walker, *Europe's Constitutional Engagement*, 18 RATIO JURIS 387, 398 (2005).

[52] Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State*, *in* RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE 258 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

[53] Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, 11 EUR. L.J. 262, 292 (2005).

[54] Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* SOVEREIGNTY IN TRANSITION: ESSAYS IN EUROPEAN LAW 502 (Neil Walker ed., 2003).

[55] *Id.* at 525.

[56] Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 27 EUR. L. REV. 511, 514 (2002).

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constituent entities of the integrated whole, which can function as a composite of two independent constitutional layers—national and supranational. They nonetheless form part of a single European constitution. Multi-level constitutionalism presupposes one European sovereign as well as a single answer in any constitutional conflict that might arise.[57] In so doing, the theory most closely approaches the classical, e.g. non-pluralist constitutional account.

In direct contrast with the five holistic accounts of constitutional pluralism, the sixth version, pragmatic constitutionalism argues that the classical constitutional paradigm should be abandoned along with its sovereignty conundrum in the pursuit of universality, coherence, and integrity. Constitutional language should switch from the whole to the particular, from the constitutionally holistic to the constitutionally atomistic approach. Accordingly, European integration should be completely re-constructed and established as a directly-deliberative polyarchy,[58] characterized by a pragmatic, experimentalist approach to governance with a range of private and public actors entangled in an array of policy networks.[59]

It follows from the most representative theories of constitutional pluralism that they are concerned with the plurality of legal, specifically constitutional, orders. This constitutional preoccupation with supreme legal acts and legal authorities necessarily entails considerations of sovereignty, its locus and role, and the importance of demos and underlying shared substantive values. Thus, the theories of constitutional pluralism, other than pragmatic constitutionalism, have a predominantly holistic focus. They are occupied with questions of the more or less hierarchical EU framework—, e.g. with the challenges of achieving and preserving the EU common whole. In short, the key question that the majority of the theories seems to be addressing is whether European integration has a viable legal nature, which boils down to the relationship between the EU and national constitutional orders. Even more concretely, the theories eventually judicialize this relationship, making the question of supremacy subject either to a final determination by the national or EU judiciary, or, at least, to creative judicial dialogue.[60]

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[57] *Id.* at 518–19.

[58] Oliver Gerstenberg & Charles F. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 289, 292 (Christian Joerges & Renaud Dehousse eds., 2002).

[59] *See generally*, Gary Marks, Liesbet Hooghe & Kermit Blank, *European Integration from the 1980s: State-Centric v. Multi-Level Governanc*e, 34 J. COMMON MKT. STUD. 341, (1996); GARY MARKS, FRITZ W. SCHARPF, PHILIPPE C. SCHMITTER & WOLFGANG STREECK, GOVERNANCE IN THE EUROPEAN UNION (1996).

[60] *See generally, e.g.*, GIUSEPPE MARTINICO & ORESTE POLLICINO, THE INTERACTION BETWEEN EUROPE'S LEGAL SYSTEMS: JUDICIAL DIALOGUE AND THE CREATION OF SUPRANATIONAL LAWS (2012).

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Among the pluralities brought about by the system of EU banking supervision, the plurality of constituencies falls most squarely within the traditional ambit of constitutional pluralism. This plurality takes place inside the EU common whole as it concerns the relationship among the EU, its twenty-eight member states constituting a single market, and the nineteen members of the Eurozone. This differentiated constitutional framework raises challenges of how to accommodate the divergent interests of the partly overlapping national constituencies within the single common whole of the EU. Differing from classical constitutional pluralism, these questions have not been judicialized (yet). Instead, they have been left in the hands of high politics.

There are slight, but important, differences regarding the plurality of regimes. The relationship between the single market and the Eurozone exemplifies the differentiated integration inside the EU legal order, not in the EU common whole.[61] The question raised here is already posited on a lower scale. It does not concern the constitutional framework of the EU as a whole. Instead, it centers on the unity of the EU legal order by finding a balance ensuring that the legal regime of Eurozone does not detract from, or undermine, the wider but shallower legal regime of the single market, or vice versa. Unlike the constituencies' pluralism—an example of classical constitutional pluralism that Daniel Halberstam described as systems pluralism[62]—the regime pluralism is about ensuring coherence between different, semi-autonomous fields of competences inside a unitary and hierarchical EU legal order. In other words, the regimes of the single market and the Eurozone have not made claims to the existence of autonomous legal, let alone constitutional, orders. Their plurality is not constitutional.

The same, albeit reinforced, conclusion applies to the plurality of regulatory levels. Here, the issue is how to exercise and divide a plethora of administrative competences—supervisory, regulatory, and executive—between the national and supranational levels. Obviously, these questions are not directly constitutional in nature. The proper allocation of administrative competences and their efficient execution is a matter of administrative rather than constitutional law. This is not to suggest that constitutional questions are irrelevant or that they cannot arise here. On the contrary, they are always present in the background because any administrative division of powers must be set in a proper constitutional framework. The constitutional pluralism of the EU as a whole dictates and simultaneously conditions the pluralism of regulatory levels. This pluralism normally does not raise constitutional dilemmas. But as practice shows,[63] sometimes the allocation of

[61] *See, e.g.*, Matej Avbelj, *Differentiated Integration—Farewell to the EU-27*?, 14 GERMAN L.J. 191, 191–212 (2013).

[62] Daniel Halberstam, *Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance*, *in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 85, (Matej Avbeli & Jan Komárek eds., 2012).

[63] *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], 2 BVR 13/13, Jan. 14, 2014, paras. 1–24, http://www.bverfg.de/e/rs20140114_2bvr272813.html [hereinafter *Judgment of Jan. 14, 2014*].

administrative powers translates into a more fundamental problem related to the principle of conferred competences. In admittedly few, but sensitive areas, it can give rise to the notorious *Kompetenz-Kompetenz* conundrum, which traditionally has been at the heart of constitutional pluralism.

If the plurality of regulatory levels cannot assimilate easily under the classical theories of constitutional pluralism, such assimilation is even more difficult for institutional plurality. In contrast with regulatory plurality, this last example of plurality, spurred by the EU system of banking supervision, is internal to—and does not apply across—the EU and national legal orders. Within the constitutional confines of the EU and national legal orders, this plurality addresses the nitty-gritty administrative details of actual and concrete division of labor between the ordinary, constitutionally-based institutions and organs (or institutions of primary EU law, in case of the EU), and derived, usually administrative, yet independent, agencies as statutory creations. This institutional plurality is clearly set up in a single, monist, either national or EU constitutional order, and cannot be described as constitutional plurality. To a certain extent, it can be captured by what Halberstam called institutional pluralism.[64] Institutional pluralism arises when "multiple actors carry out the same function within a single system,[65] [so as to] execute the same law, in the same territory, regarding the same matters and the same individuals or targets."[66]

It follows from this brief presentation of the leading theories of EU constitutional pluralism and the types of plurality emanating from the EU system of banking supervision, that constitutional pluralism's epistemic, explanatory, and normative value is relatively low with regard to these forms of plurality. Only the plurality of constituencies can be nicely subsumed under the classical constitutional pluralism, whereas the other forms of plurality occur on a sub-constitutional level. It seems that they might be more aptly branded as forms of administrative rather than constitutional pluralism. The next Section sketches out what administrative pluralism might stand for, what its relationship to the constitutional pluralism is, and how either of them or both together could, or could not, contribute to the viability of the EU system of banking supervision.

D. Administrative Pluralism and the EU System of Banking Supervision

Administrative pluralism, unlike its constitutional counterpart, is a far less, if at all, developed theoretical phenomenon. Its origins can be traced back to the idea of global administrative law (GAL) in the early 2000s. GAL was a response to the post-Westphalian global constellation in which a plethora of non-statist actors started to engage in rule-

[64] Halberstam, *supra* note 62.

[65] *Id.* at 109.

[66] *Id.* at 110.

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making, creating legally binding or soft-law measures for public and private actors alike. As these non-statist actors and their juris-generative practices most closely resembled national administrative actors and their practices, the term GAL was coined.[67] The construction of GAL had to be embedded in a broader legal paradigm. Several authors tried to assimilate it under global constitutionalism as another example of constitutional pluralism.[68] Others insisted that GAL was a legal paradigm in its own right.[69] Among them, Nico Krisch, in an attempt to divorce GAL from constitutionalism, argued in favor of pluralist GAL.[70] This perspective discourages creating a clearly structured institutional order and accepts mutual challenges, even open confrontations between different regimes and different levels in global regulatory governance; these were not resolved in a hierarchical legal way, but rather in a heterarchical way, usually in a politically-based, pragmatic manner.[71]

Scholars have attempted to transpose a similar theoretical approach to the level of the EU.[72] De Lucia,[73] for example, baptized the execution of EU law, mostly founded on numerous techniques of informational, procedural, and institutional co-operation laid down in secondary law, and occurring vertically and horizontally between the EU and the national administrative units, as administrative pluralism. Hartmann,[74] while using the language of administrative constitutionalism, has been even more explicit and detailed. He notes that "the multilevel nature of European administration has evolved into a multidimensional concept of regulation, legal planning, and trust-building."[75] This administrative cooperative scheme is legally inclusive,[76] based on functional openness and responsivity, aiming at institutionalizing reflexive administrative standards "for

[67] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 15 LAW & CONTEMP. PROBS. 68, 15–61 (2005).

[68] *See, e.g.*, Anne Peters, *The Merits of Global Constitutionalism*, 16 IND. J. GLOBAL LEGAL STUD. 397, (2009).

[69] Kingsbury, *supra* note 67.

[70] Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 278, (2006).

[71] *Id.* at 278.

[72] *See generally*, PLURALISM IN EUROPEAN ADMINISTRATIVE LAW: PROCEEDINGS OF THE SECOND REALAW RESEARCH FORUM (Kars J. de Graaf, J. H. Jans, Alexandra Prechal & R. J. G. M. Widdershoven eds., 2012).

[73] Luca de Lucia, *Administrative Pluralism, Horizontal Co-Operation and Transnational Administrative Acts*, 5 REV. EUR. ADMIN. L. 17, 17-45 (2012).

[74] *See generally* Moritz Hartmann, *Administrative Constitutionalism and the Political Union*, 14 GERMAN L.J. 695 (2013).

[75] *Id.* at 704.

[76] *Id.* at 705.

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transcending territorially limited topologies of national legal preconditions."[77] Developed as a response to growing legal plurality, functional differentiation, and "normative inconsistencies created by the executive pluralism," [78] in the EU, administrative constitutionalism is said to be a functional paradigm,[79] capable of "endogenously internalizing the multiplicity of the legal phenomena that are developed on the European and Member States levels, without trying to impose an overarching hierarchy of legality."[80] This model of governance still lacks robust judicial controls and standards, but it could evolve through the judicial dialogue if conducted in pluralist terms.[81]

Administrative pluralism as presented here—including Hartmann's approach despite his different terminology—captures well the pluralities created by the EU system of banking supervision. As already noted, the regulatory and institutional plurality occurs on the sub-constitutional and therefore administrative level. Also noted are the complex, not infrequently overlapping and conflicting interactions between different somewhat independent supervisory, regulatory, and executive national and EU organs, either administrative in nature or in practice. As described above, they face and spur challenges that, due to their occurrence on the sub-constitutional level, go under constitutional pluralism's radar. Administrative pluralism, as attested to by GAL, appears to have the capacity to explain these phenomena, not only as part of EU governance, but as an incidence of a broader, sweeping movement taking place on transnational and sometimes even global level. In pursuit of the problem-solving-capacity, the contemporary models of governance have witnessed a shift from the international and intra-constitutional level to a mezzo-administrative level that is filled with specialized, expert-based, and independent administrative authorities.

Administrative pluralism is also normatively attractive. It prescribes co-operation, dialogical accommodation, compromises, and avoidance of direct confrontation. It has been suggested that, being more political in nature,[82] administrative pluralism offers more opportunity for democratic contestation and consequently legitimization. All of that, as national constitutional challenges and other concerned voices prove,[83] is very much needed for the democratic foundation of the EU system of banking supervision. In

[77] *Id.* at 706.

[78] *Id.* at 709.

[79] *Id.*

[80] *Id.* at 708.

[81] *Id.*

[82] *Id.*; Krisch, *supra* note 70.

[83] Judgment of Jan. 13, 2014, *supra* note 63.

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normative terms, administrative pluralism, not unlike constitutional pluralism, emphasizes self-reflexivity[84] and mutual-learning in an experimental and not hierarchical manner.

In this way, administrative pluralism is truly pluralism and not just administrative plurality. As argued elsewhere in defense of principled legal pluralism, pluralism is much more than plurality. It is a connected plurality.[85] In light of the normative spirit of pluralism, which stands for a double commitment to the plurality and to the common whole, different sites of plurality—constitutional legal orders, regimes, constituencies, regulatory levels or institutions—should not just co-exist; rather, these pluralities should connect in a common, non-unitary, pluralist whole. This is possible in virtue of a developed self-reflexivity, which requires the sites taking part in a pluralist environment to be open to the claims of other sites and be willing and capable of reconsidering their own foundations as a response to their environment. This self-reflexivity is not and cannot remain unlimited, so long as the sites of plurality continue to exist as different epistemic sites.[86]

This means that conflicts between different sites of plurality are not excluded.[87] If conflicts do occur, pluralism requires they be performed in a dialogical, deliberative, and principled way, in light of the normative spirit of pluralism. Such performance, for example, could include defending particular claims on their own chosen basis while demonstrating commitment to a bigger picture of the common whole. This administratively pluralist normative requirement can be seen in the Council Regulation (EU) No. 1024/2013. The regulation prescribes a co-operative, mutually respective relationship between the ECB, the EBA, and others, including national supervisory authorities. It even calls for their semi-institutionalization in the form of concluded memoranda of understanding and ECB's participation in the Board of Supervisors of EBA.[88]

While the intensity of pluralist connections between different types of plurality inside the EU might be stronger than in other functional transnational regimes, this difference remains one of degree rather than kind. Thus, administrative pluralism appears in

[84] Hartmann, *supra* note 74, 706.

[85] On the need to distinguish between pluralism and plurality, *see generally* Neil Walker, *Four Visions of Constitutional Pluralism*, 2 EUR. J. LEGAL STUD. 336 (2008).

[86] For a more in-depth discussion, *see* Matej Avbelj, *Can European Integration be Constitutional and Pluralist–Both at the Same Time?*, *in* AVBELJ & KOMÁREK, *supra* note 39.

[87] *See*, *e.g.,* MARK DAWSON, HENRIK ENDERLEIN & CHRISTIAN JOERGES, BEYOND THE CRISIS: THE GOVERNANCE OF EUROPE'S ECONOMIC, POLITICAL, AND LEGAL TRANSFORMATION 151 (2015), in observing many potential strains in the relationship between the ECB and the EBA, as well as between the participating and non-participating Member States, but simultaneously noting "a series of governance safeguards to both protect the cooperative nature of EBA-ECB relations and to address the concerns of . . . all Member States." *Id.*

[88] Council Regulation 1024/2013, art. 3, 2013 O.J. (L 287) (EC).

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descriptive, explanatory, and normative terms, to be a generic theory capable of adapting to a plethora of juris-generative sites, marked by sub-constitutional pluralities connected by varying degrees of intensity.

E. Conclusion

If conducted on the basis of the above described pluralism, the viability of the EU system of banking supervision would be enhanced. To achieve that objective this pluralism needs to draw together its constitutional and administrative face. Despite the fact that constitutional pluralism's epistemic, explanatory, and normative value to the EU system of banking supervision is diminished, this does not mean that constitutional pluralism ought to be discarded in favor of administrative pluralism. To the contrary, while administrative pluralism still needs to be theoretically reinforced, its role is to supplement rather than to supplant constitutional pluralism.

Constitutional and administrative pluralism are closely related but mutually exclusive. Administrative pluralism first describes and then explains a widespread subnational, national, and transnational phenomenon of growth and fragmentation of administrative functions on the sub-constitutional level. It is also a normative theory, which provides guidance for the viable functioning of a hence identified administrative plurality. The latter is not reserved to constitutionally pluralist settings, but also exists in a constitutionally monist environment, such as a—federal—state.

Even in a constitutionally hierarchical setting, the administrative competences are exercised by a number of institutions of public, hybrid, and private stature, which can be situated in more or less semi-autonomous unities charged with administrative tasks *lato sensu*. In a constitutionally monist environment, the constitutional straightjacket on the administrative plurality is tighter, making the achievement of administrative pluralism less difficult. Nevertheless, the increasingly dynamic practices and overall functional differentiation present an unstoppable need for differentiation and, hence, pluralization of administrative functions, even inside a monist state.

A pluralist setting, such as the EU, enhances the pluralization of administrative functions. There, constitutional and administrative pluralism presuppose and complement each other. Constitutional pluralism, as an overlap of different and not entirely harmonious theories, enables, requires, and limits the development of administrative pluralism. An autonomous constitutional site is an autonomous juris-generative site with its own institutions, executing constitutional, judicial, legislative, and administrative competences. A plurality of such autonomous constitutional sites leads to a plurality of administrative sites. With both constitutional and administrative plurality, each doing their job on their respective level of regulation, the need for connecting the two—and hence for constitutional and administrative pluralism—increases. With more plurality involved, the challenge of ensuring pluralism grows.

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As a result, while constitutional pluralism, on a first sight at least, remains ill-equipped to describe, explain and normatively guide the new economic and financial infrastructure in the European Union, this does not mean that as a theory it has become defunct or passé. To the contrary, the need for constitutional pluralism has increased, but it needs to be complemented by a lower-level pluralism: administrative pluralism. The two together, following the meta-prescriptions of principled legal pluralism, remain one of the most compelling theoretical accounts for describing, explaining and normatively guiding the ever-changing European Union, now and in the future.

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