1. Introduction

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I. THE GOALS OF THE BOOK

This book has two purposes. One is, as befits a handbook, to be a guide to the scholarship on legal pluralism and EU law. Legal pluralism is not just a fact of EU life, but one that is central to its existence and development. There is hardly any branch of its law, from the most constitutional to the most functional, in which the practical questions arising out of legal diversity, and the principled questions about how to deal with and understand them, are not important. Our hope is that if a young, or not so young, legal researcher realizes that they need to engage with these questions seriously, and turns to a colleague or supervisor for advice, that colleague or supervisor should be able to take this book off their shelf and say: 'Read this, go through the doorways it opens, and follow the paths it indicates, and you will find what you need to know.'

The second purpose of the book is to take things further. Not so many years ago there was an explosion of interest in constitutional pluralism, as a new and powerful paradigm for the relations between constitutions and supreme courts in the EU. Thanks to now classic works by some of the leading scholars of EU law, the idea of constitutional pluralism entered the EU lexicon and has become central to attempts to explain and critique constitutional integration. Several chapters in the book revisit these classic works, discussing, expanding on and sometimes criticizing their ideas. The way in which the foundational theories of constitutional pluralism have developed, as well as their application to changed and troubled constitutional times, are important themes.

Yet we also wanted to go beyond the constitutional: the title refers to *legal* pluralism, of which the constitutional variety is but one subspecies, albeit a particularly fascinating and difficult one. The very motto of the EU, 'United in Diversity' – a slogan which one can both admire or ridicule, depending on one's mood – signposts the centrality of *difference* to the identity, functioning and challenges of the EU. For the lawyer, it is the multiplicity of legal systems and sources that adds layers of complexity to each policy field. We wanted, therefore, to think about what vulgar everyday legal pluralism means for EU law, and to put that pluralism in sociological, historical and theoretical perspective, as well to explore concrete fields and issues in which legal plurality is visible and perhaps problematic – or perhaps enriching. The constitutional may top the pyramid of the merely legal – to put things in pre-pluralistic terms – but it should not eclipse it.

With these goals in mind, the book is sorted into four parts. 'The Nature of European Legal Pluralism' tries to give context. The chapters here view pluralism as a product of history, society and European constitutional ideas. That is not to imply smooth continuity, or even consistency. Rather, these chapters help the reader understand where

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European legal pluralism fits, and how we can speak about it in the broader languages of social science and constitutionalism.

The next section, 'Theorizing EU Constitutional Pluralism', picks up on the classic debates about this theme. Where are these theories now? How have they developed, what has been added to them and what criticisms have emerged? The line between this section and the previous one is of course fine, not to say arbitrary, but whereas the first section emphasizes context, this one emphasizes critique, or its rebuttal.

The third section is called 'EU Legal Pluralism and Democracy'. Once again, we should emphasize that this choice of title does not reflect an essentialist claim about the organization of scholarship on pluralism: we could have done it differently, and we could have put many of the chapters in this part in other sections too. However, democracy emerged as a theme in several contributions, and we realized that as pluralism has become part of the toolkit of lawyers and theorists, it inevitably is applied to the burning questions of the day. Democracy broadly – in the sense of the capacity of government to reflect and respond to the people, and to serve their values and their needs, and to protect them from exploitation and oppression – is one of those questions, and in this section the chapters show how legal pluralism can be used for different purposes and agendas in the surrounding debate.

The final section is called 'The Practice of Legal Pluralism and Its Future'. This is not just a handbook of abstract theory, but one of legal pluralism, and here the writers consider concrete aspects of integration – policies, or elements of the legal machinery or doctrine of the EU – and think about what light pluralism may cast on their field. The authors here do not so much ask what they can contribute to legal pluralism as ask what legal pluralism can do for them. Their answers are mixed: whether an embrace of (constitutional) pluralism is a necessary and desirable condition for the successful working of the EU or an almost existential threat is a matter on which the jury is out.

As the discussion above may have implied, there is no attempt to advance any particular point of view in this book. It contains passionate, if not vituperative, disagreements between wholehearted pluralists and those who see the idea as a harbinger of theoretical or practical doom. We hope that this adds to its value, as well as making it a more enjoyable read.

Throughout the book we made choices: the chapters could have been organized in many different ways, no doubt equally coherently. Ultimately, our decision was based to a large extent on what we felt the authors themselves were trying to do, or what their underlying concern was. Did they want to expose practical consequences and dangers? Then we put them in Part IV. Was their real concern a democratic one? That is why Part III exists. Were they participating primarily in the attempt to give constitutional pluralism a base in theory, or take that base away? This was for Part II. Or were they trying to take a step back, and look at pluralism from outside its own language and terms? If we felt this was the case, we put them in Part I. If the reader finds that chapters in different sections sometimes speak to each other strongly, and takes the view that they could better have been next to each other in the book: well, we hope that this minor provocation makes the experience of reading all the more stimulating.

II. THE CHAPTERS

The book opens with three contextual chapters. The idea is to begin with a broad focus, to enlarge the perspective taken by the already existing works in the field and to demonstrate that legal pluralism transcends the normative confines of European integration. We hope to immunize the reader against an overly introspective approach, and give them a robust metalegal framework on which to hang later insights. This serves as preparation for the later parts of the book which zoom in on specific EU theoretical and practical challenges that legal pluralism has been expected to address and solve.

Chapter 2, by Poul Kjaer, makes a historical argument for a continuous presence of legal pluralism in Europe. Tracing the legal and political practices especially since the Peace of Westphalia, the chapter demonstrates that Europe has always been characterized ‘by multiple sources of legal authority and parallel legal universes which symbolically refer to the same geographical space’. The contemporary pluralist character of the European Union is therefore nothing unprecedented. Rather, EU legal pluralism marks just another historical stage in a long historical chain of European legal pluralisms. This necessitates that legal pluralism is not only a point of departure for studying the legal structure of Europe; it is the very essence of what Europe really is about.

For many in the past, but also at present, sovereignty has been the foundational concept of (political) modernity in Europe. The sovereign nation state was a child of Europe, as well as a source of many ills the continent has suffered in modern times. In Chapter 3, Maria Cahill argues that legal pluralism and subsidiarity both act as a check on sovereignty’s immanent voluntarism. In short, legal pluralism in Europe tips the scale away from *voluntas* in favour of *ratio*. This generates a number of positive effects. However, it foremost forces the political and legal practices – which are, as Kjaer also stresses, always claims and counterclaims to authority – to be conducted in a form of reasoned dialogue: self-restraint for the sake of cooperation as part of the pursuit of a common good.

The chapter by Cahill paves the way for Chapter 4 and Kaarlo Tuori’s thesis on two alternative readings of legal pluralism in Europe: the conflictual and the dialogical. The former privileges the absence of a final authority and hence emphasizes the inevitable irresolution of the competing authority claims. The latter, on the other hand, insists that – the competing authority claims notwithstanding – pluralism is endowed with numerous instruments and techniques that make the emergence of actual conflicts not impossible, but very unlikely in practice. In defence of a dialogical approach to legal pluralism, Tuori builds on a cultural approach to the law and legal perspectivism defended by Kelsen. Despite the fact that different legal orders approach the legal issues they face from different perspectives, they can, *pace* Kelsen, nevertheless draw on the shared deep culture of Europe. This permits them to avoid conflicts and to arrive at common, even if not always entirely harmonious, solutions characteristic of the European ‘legal cultural interlegality’.

Chapter 5, by Cormac Mac Amhlaigh, opens a theoretical discussion on legal pluralism in the European Union. Unintentionally building on Tuori’s dialogical account of legal pluralism, it puts its puzzling character at the centre of inquiry. How is

it possible that, despite the plurality of exclusive claims to authority over the same subject and competences in the European Union, the relationship between EU law and state law is not marked by crisis? In response, the chapter provides a truly refreshing approach. Relying on Raz's work on the identity of legal systems, the chapter explains the relative absence of legal crisis in the European Union through the nature of legal systems themselves. The supremacy claims of national constitutional courts are an inevitable feature of their self-identification as autonomous legal orders. As practice has shown, they do not undermine the application of legal norms of the EU legal order, and neither are they directed against its autonomy. The supremacy claims of national legal orders, contrary to what most of the EU constitutional pluralist theory has suggested, contribute to rather than weaken the EU's status as an independent and autonomous legal order.

Chapter 6, by Giuseppe Martinico, continues the discussion on the role of actual or potential conflicts in a constitutionally pluralist European Union. Drawing on the idea of agonistic pluralism famously developed by Chantal Mouffe, Martinico, quite originally, takes a favourable view of conflicts in EU law. He insists that conflicts belong to the life of constitutional polities, and especially those exhibiting pluralist properties. Furthermore, contrary to the still prevailing deterministic views according to which the EU is bound to progress toward uniformity, Martinico argues that conflicts can be functional to the practices of integration, and even contribute to its viability.

Most of EU legal theory would be willing to recognize that if there is one value on the basis of which most constitutional conflicts in the European Union should be overcome and reconciled, it is the value of human dignity. Chapter 7, by Matej Avbelj, gainsays this mainstream assumption. It recognizes that human dignity is a monistic foundation of European legal space, but as such it does not lead to universality, let alone uniformity of other fundamental values, principles and rights. To the contrary, as a licence for diversity, human dignity is constitutive of the EU's legally pluralist structure and a point of departure for Avbelj's own theory of principled legal pluralism, which is pluralist, but not constitutional.

Chapter 8, by François-Xavier Millet, explores a familiar theme of monism and dualism as a theoretical framework for describing and explaining the relationship between a plurality of legal orders. The gist of his argument is that the monist/dualist dichotomy is inadequate to capture the richness of the intralegal relationship under international law, and even more so under EU law. Constitutional pluralism is thus endorsed as an alternative, much more compelling normative framework for capturing the legal plurality of the twenty-first century. The chapter puts forward its own conception of constitutional pluralism, and in so doing refutes the arguments that constitutional pluralism is either just a revised version of legal dualism or simply legal monism through the backdoor.

In Chapter 9, Tom Flynn engages in a project similar to Millet's. He too notes the inadequacies of the existing theories ordering legal plurality in the European legal space, and in response advances his own conception of constitutional pluralism, tagged as triangular constitutionalism. Dismissing two powerful charges against constitutional pluralism, according to which the latter is simply an oxymoron – and, on top of that, perhaps even a threat to legal integrity – Flynn argues that in the European legal space, composed of national law, EU law and ECHR law, the three constitutional orders

should be approached holistically. In so doing, the solipsism of individual constitutional orders is overcome. Furthermore, normative guidance is provided as to how to internally engage with the plurality of norms not just in case of conflicts, but indeed in their quotidian operation.

In the same vein as Flynn, Jiří Přibáň, in Chapter 10, also wants to remove some of the present shortcomings in the theories of EU constitutional pluralism. Approaching the theoretical landscape from a sociological perspective, he argues in favour of overcoming the excessively juridical focus of constitutional pluralism by situating it more in the context of sociology of power and its legitimation. Accordingly, theories of constitutional pluralism should not be concerned just with jurisprudential problems arising out of a plurality of legal orders. Instead, they should recognize that this plurality of legal orders simultaneously represents ‘a plurality of social systems, subsystems and normative regimes constituting the European society by their differentiated self-constitutions’. In framing a theoretical issue in this way, it is the questions of legitimacy and of European democracy that move to the forefront. Part III of the book is therefore dedicated to them.

Chapter 11, by Dimitry Kochenov and Justin Lindeboom, addresses the core issue of EU democracy: the question of EU citizenship. They pinpoint the fact that EU citizenship has so far been the only successful example of transnational citizenship. This outcome was however achieved thanks to the pluralist structure of the European Union – but, in a paradoxical twist, for utmost nonpluralist reasons. The plurality of national legal methods of acquiring EU citizenship has made such citizenship more accessible to third states’ nationals. The chapter therefore concludes by arguing strongly against the harmonization of EU citizenship rules. This is motivated by a normative ambition to keep the gates to EU citizenship open as widely as possible.

Most of the contributions in this part of the book share a relatively critical perspective on constitutional pluralism’s contribution to EU democracy. Nik de Boer, for example, accuses constitutional pluralism of a false promise in Chapter 12. He argues that, when defending the constitutional limits of their respective legal orders – often in the name of preserving the national democracy – national constitutional courts are in fact reducing the scope for its exercise. Rather than leaving more room for a democratic disagreement on fundamental constitutional, and hence political, issues – which is in de Boer’s view an advantage of constitutional pluralism – in drawing constitutional lines against the EU legal order, the national constitutional courts are in fact increasingly constitutionalizing such questions, taking them out of the ordinary political process. Consequently, constitutional pluralism is thus narrowing rather than widening the scope for democratic political contestation.

Peter Lindseth, in Chapter 13, pursues a similar normative line. Rather than focusing on the constraining function of constitutionalism, as much of the scholarship does, he considers the constitutive role of constitutions. On this basis, the chapter postulates that a central role of a constitution is to mobilize the social resources in any given polity in a legitimately compulsory manner. Due to the distinctive nature of the European Union, the mechanisms for a legitimate compulsory mobilization remain on the national level, while the regulatory authority has increasingly travelled on the supranational plane. As a result, due to its failure to exercise a core constitutional role, the EU ought not to be labelled constitutional: administrative is a more fitting term. The chapter claims that it

is important to get the legal nature of European integration right, for normative, political and academic reasons.

While Lindseth has been well known for critiquing the normative ambitions of those who attach a constitutional tag to the European Union, Jessica Lawrence, in Chapter 14, queries the normative implications of legal pluralism discourse in the European Union. She leaves no doubt that legal pluralism in the European Union is not just a descriptive but also a normative account of integration. It conveys a normative sense of 'us' in the European Union, what we have in common and what a legitimate government structure of the Union might be. Legal pluralism in the EU thus comes along with a triple normativity. Unlike much of the EU theory on constitutional pluralism, Lawrence's chapter makes this explicit and hence charts the ground for further theoretical explorations.

Ending Part III, in Chapter 15, Clemens Kaupa engages with the question of the degree to which the existing EU legal structure preempts the content of European democratic practices. To what extent is the EU socioeconomic orientation, which should lie at the heart of any democratic decision making, already predetermined by the EU Treaties? While extremely divergent views exist on this question, Kaupa argues that the Treaties 'cannot be understood to conform to any specific socioeconomic paradigm or ideology in a way that would bind institutions or Member States to such view'. They are, instead, marked by a pluralist socioeconomic character. Consequently, very different socioeconomic projects have been and still will be pursued within the EU Treaty framework. Kaupa concludes that, contrary to the prevailing approaches both in EU scholarship and in the public discourse more generally, their legality must be evaluated on their individual merits, and cannot be rejected on general grounds relating to some alleged socioeconomic orientation of the Treaties.

The final part of the book studies EU legal pluralism in practice and reflects on its future with a view of its present utility or embeddedness in actual practices of integration. Chapter 16, by Päivi Leino and Liisa Leppävirta, examines the role of legal pluralism in EU external relations. Taking the Nordic countries as its case study, the chapter claims that the scope for legal pluralism in EU external relations is very limited. In the authors' view, the case law of the European Court of Justice and the normative ambitions of the European Commission furthermore indicate that even the remaining flexibility in external relations resulting from inherited regional specificities, such as those of the Nordic countries, is destined to give way to uniform solutions closely in line with the EU *acquis*.

Chapter 17, by Suvi Sankari, centres on the ECJ's approach to legal interpretation in its jurisprudence. It does so by connecting the already existing empirical findings on the Court's reasoning with theories of constitutional pluralism. While admitting that the Court's jurisprudential approach is compatible with a variety of theoretical accounts of European integration, it locates an added value in the normative accounts of EU constitutional pluralism. According to Sankari, these engage with shortcomings of judicial adjudication recognized by comparative institutional analysis better than other theoretical approaches, and can potentially even contribute to their removal.

Gareth Davies, in Chapter 18, similarly focuses on the interpretative disagreements in the European Union over the same legal provisions by different courts in different fora, both national and supranational. For him, not unlike other legally pluralist

approaches, such differences are not a pathological occurrence, but something which is normal, even desirable and indeed an essential feature of EU law. This favourable approach to legal pluralism, which he has branded ‘interpretative pluralism’, should, *inter alia*, shift our focus from identifying the law, which is supreme, to concentrating on the best interpretation of the law. Rather than homogenizing EU law from the top down, as many have preferred, Davies in this chapter approves of competing interpretations of EU law on the part of the supranational and national judicial authorities, seeing this also as a vehicle of mutual learning that is prone to a more inclusive and hence more viable form of European integration.

Chapter 19, by Matthias Goldmann, asks almost the same question as Mac Amhlaigh in Chapter 5, but offers a substantively different response. For him, the explanation for the lack of crisis in the national–supranational relationship and, in fact, its stabilization through pluralism lies in what he calls ‘mutually assured discretion’. Applying his theory to the several landmark rulings by the highest national and supranational courts in the field of European economic and monetary union, Goldmann shows that the relationship between legal orders in the EU is structured around interdependent legal concepts whose opened character provides sufficient room for an interpretative – that is, discretionary – accommodation when the two legal orders conflict. However, the chapter concludes, not entirely in a legally pluralist manner, that the success of mutual discretion might ultimately depend on a sufficient degree of discursive unity between the highest judicial authorities.

Chapter 20, by Pavlos Eleftheriadis, rejects (almost) any virtue in constitutional pluralism as applied to the European Union. In a nutshell – and in clear conflict with Millet’s chapter – Eleftheriadis argues that constitutional pluralism is either another example of dualism, a descriptive account in need of no general theory, and to the extent relied upon by the ECJ – which is in fact monist – might in fact be simply wrong. Instead the chapter argues, using examples of pre- and post-Brexit referendum negotiations between the UK and the EU to support its claim, that the latter is and remains a creation of international law. Any disagreements between its constitutive units are to be resolved ‘through the ordinary work of legal argument’, to which constitutional pluralism can contribute little, or even nothing at all.

Like the question of Brexit, the question of migration has been a burning and extremely divisive topic in the European Union in recent years. In Chapter 21, Galina Cornelisse takes stock of EU migration policy from the perspective of legal pluralism by focusing on the transnational regulation of border control in the EU. She argues that as an aspect of anticrisis measures, and also more broadly, many lawmaking competences have been transferred from the national to the EU level. This has had a number of consequences for the nature of political authority in Europe; in particular, it has grown in complexity. The chapter demonstrates that the existing dominant theories of EU constitutional pluralism are not well equipped to do justice to the complexity of EU legal regulation of migration, which takes place on a quotidian basis and on an infraconstitutional level, because of their excessively abstract and metaconstitutional focus.

Finally, in Chapter 22, Dan Kelemen concludes the book’s final Part by presenting an openly hostile attitude to constitutional pluralism. In his view, constitutional pluralism poses many dangers for the European Union. It is a noble, well-intended idea that now

threatens to destroy the EU legal order, especially in the hands of semi-authoritarian, rogue regimes like those of contemporary Hungary and Poland. To prevent this, Kelemen calls on all scholars to embrace the ECJ's orthodoxy of the unconditional supremacy of EU law, for it is as compelling as it is straightforward. Those who disagree and are not willing to jump on the just proposed supremacist bandwagon, perhaps out of a concern for their national constitutional identity, are always free to exit.

In his Afterword, Neil Walker looks at the past and present of legal pluralism in the European Union. He notes that practices of EU integration have changed dramatically in recent years. The centripetal currents of the 1990s and the early 2000s, against which EU constitutional pluralism was also born, have been replaced and strong centrifugal forces have taken over. Nevertheless, Walker remains 'committed to the heuristic value of the "p" word in allowing us to make sense of how the interconnected legal, political and social diversity of Europe is and might legitimately be addressed through processes that remain committed to a settled pattern of integration'. He hopes the present volume will provide a new spark for future generations to move the debate, and presumably also practices of European integration, forward.