Index

administrative governance 232, 233
administrative law 223, 348
agonistic pluralism 87–88
Ajos judgment (2014) 59, 60, 66, 67, 69
Alexy, Robert 69
all-inclusive pluralism 163–166
Amhleigh, Cormac Mac 3–4
anarchy 52
Anderson, Perry 257, 259
applicative determinations 75
Arnull, Tony 367
Arrest Warrant see European Arrest Warrant (EAW); Nordic Arrest Warrant
asylum seekers/asylum policy 96, 298, 379–382, 384, 389
Common European Asylum System 43, 226, 400
Austrian-Hungarian Empire 15, 16, 17
authority see also sovereignty; supremacy
constitutional, changing configurations 166–168
of ECJ 167
justification of public authority, problem of 201–202
legitimate 250–251
public, constitutional limits on 205–206
sovereign 23, 38
ultimate see ultimate authority
Avbelj, Matej 4, 80, 322, 350
Bank Resolution and Recovery Directive (BRRD) 225
Baquero Cruz, Julio 30–31, 138, 142, 143, 320
Barber, Nick 35
Bartelson, Jens 23
Bartolini, Stefano 226
basic norm see Grundnorm (independent and incompatible basic norm)
Bellamy, Richard 204
Benelux countries 294
Bengoetxea, Joxerramon 313, 315, 316, 317
see also Court of Justice of the European Union (CJEU); judicial adjudication and constitutional pluralism
Berlin, Isaiah 169
Berman, Paul Schiff 169
black-box model 40–41, 42, 53
Blackstone, Sir William 183
Bobić, Ana 255
Bodin, Jean 14, 25
boom–bust cycles 274
border control, legal pluralism in European regulation of 7, 373–391
and constitutional pluralism 375–378
development of EU laws of territorial exclusion 378–382
Schengen Agreement 1985 380–381
EU legal order and national legal orders 387–390
theorizing pluralism in the EU 375–378
transnational regulation of access to and exclusion from EU territory 383–387
and ultimate authority 375–378, 390–391
Brexit 7, 238, 409
and Article 50 TEU 357, 362–364, 367
disengagement, law of
Art 50 TEU 362–364
financial obligations in absence of a withdrawal agreement 364–367
‘hard’ 362
lessons from 355–372
negotiation 356–362
legal nature of the settlement 357–359
Legal Opinion of European Council 359–361
‘Negotiation Directives’ 363
possibilities for a ‘legally binding’ instrument 361–362
and pluralism 367–371
vote by UK to leave the EU (23 June 2016) 69, 355
White Paper 362
Brubaker, Rogers 179
Brussels II Regulation 300
Bundesverfassungsgericht (BVerfG), German Federal Constitutional Court see Federal Constitutional Court (FCC), Germany
412 Research handbook on legal pluralism and EU law

Cahill, Maria 3
Cameron, David 355, 356, 357
Capital Markets Action Plan 306
Carbonell, Flavia 79
central bank financing, prohibition 43
centrifugal centre/periphery conflicts 15
CFSP (Common Foreign and Security Policy) 96
Charter of Fundamental Rights 83, 95, 131, 149
   Polish derogation from 101
Chen judgment (2002) 193
choice-of-law principle 72
Christian Church 12, 13
Church
   Christian 12, 13
   Church of Rome 12, 13, 14
claim of 13–14, 17
citizenship 5, 179–198
   access to EU citizenship 195
   conferral of nationality 180, 181
defining 179
depprivation based on ethnicity prohibited
   by law international law 187
EU citizens and third-country nationals in
   any Member State 189–190
   genuine link rule 181, 182, 197
   harmonisation proposals, EU citizenship
   law 196, 197–198
   ius tractum status of EU citizenship 192
   nationalisation data 194–195
   naturalisation procedures, in the EU
   189–190
   non-discrimination principle 179, 181, 190, 191
   pluralism as a self-perpetuating value in
   EU law 193–197
   and state sovereignty 179–180
   transformation in Europe 186–192
CJEU see Court of Justice of the European Union (CJEU)
claim making
   claim of Church 13–14
   claim of CJEU 12
   claim of empire 17–18
   claim of European Union 18–20
   claim of state 14–17
   critiquing normative claim of constitutional
   pluralism 199–201
   mutually exclusive claims 66, 67
   significance of 12
   ‘clash of the Constitutions’ 125
   cleavages, political 17
co-application cases 64, 66, 67–68, 69, 72
Cohen, Joshua 235
colonialism, and classical legal pluralism 11
Comitology system 20
Committee of the Regions 34
Common European Asylum System 43
Common Foreign and Security Policy (CFSP) 96
competences
   EU law competence of the ECJ 49
   and European Treaties 260
   exclusive external, and recent court
   jurisprudence (Nordic states) 303–306
   external limits to EU competences 325–327
   internal limits to 327–338
   competition law 265–266, 305
comprehensiveness, legal systems 73
conferral principle 42, 45
conflicts, constitutional 4, 78–94
   agonistic pluralism 87–88
   conflictual consensus 78, 90
   by convergence 86
   by divergence 86, 87
   fundamental rights 91, 92
   management of 80
   non-discrimination principle 82, 83
   and order 93
   reading of 87–92
   struggle of constitutional pluralism with
   79–81
   and triangular constitutionalism 147–151
Congress of Vienna (1815) 18
constitution
   competing constitutions 323–325
   defining 155
   formal 115–116
   and institution of international law 115–116
   sociological concept vs. juristic 154–155
   and status of international law as ‘law’
   115–116
constitutional authorities, plurality of 167
constitutional conflicts 78–94
constitutional identity 8, 33, 85, 114, 211, 353, 396
   concept 46, 352
   of the EU 48, 55, 211, 394
   inalienable 99
   inviolable 43, 45, 47, 49, 394
   of Member States 48, 101, 211, 214, 217, 353
   national 8, 46, 84, 100, 104, 108, 127, 209, 394, 396, 397, 402, 403

Gareth Davies and Matej Avbelj - 9781786433091
Downloaded from Elgar Online at 12/06/2021 02:35:53PM
via free access
Index  413

Germany 43, 45, 76, 98–99, 214, 215, 340, 399
Hungary 100, 401, 402
respecting 214–215
protecting 109
constitutional pluralism
seeing also constitutional pluralism; EU legal pluralism; European Union (EU); pluralism
accumulation of evidence 74
Ajos judgment (2014) 59, 60, 66, 67, 69
anatomy of, in the EU 59–77
applicative determinations 75
and border control 375–378
characteristics of legal systems 73
co-application cases 64, 66, 67–68, 69, 72
concept 63–66, 154–161, 403
conflicts, perpetual struggle with 79–81
 dangers 392–403
Kompetenz-Kompetenz 394–397, 399
descriptive 80
epistemology 336–339
EU law and state law seeing EU and state law relationship
false promise of 5, 199–222
history 156
individuation of legal systems 73–74, 75
and judicial adjudication 309–322
juristic concept 155, 158–161
and lack of crisis seeing crisis, lack of
law and politics relation 206–207
and monist view 70–71, 164
and multilevel constitutionalism 103
mutually exclusive claims 66, 67
normative claim, critiquing 199–222
normative desirability of, alleged 205–206, 209
‘one big legal system’ approach 63–64, 70
politics and legitimation 174–176
post-unitary, in the EMU 335–354
and principled accounts 69, 71
procedural definition 168
and radical pluralism 69–72
shortcomings
constitutional pluralism and pluralist constitutionalism 139–141
constitutional pluralism not constitutionalist 135–138
constitutional pluralism not pluralist 138–139
integrity and epistemological indeterminacy 141–145
sociological concept 161–163
and supremacy 73–74
theories 1, 5, 6, 23, 102–106, 120, 144, 154, 157, 185, 390
unity and constitutional pluralism 119, 120, 127, 128, 129
‘two interacting legal systems’ model 63, 64, 66, 76
as ultimately untenable 395–396
and unity seeing unity, and constitutional pluralism
constitutional tolerance 32
Constitutional Treaty, failed 137
constitutionalisation
and European integration 167
and politicking 156
progressive 82
unexpected consequences of, in the EU 81–87
constitutionalism
beyond the state 137
cosmopolitan 102, 103, 141
defining 103
democracy 201–205
epistemic metaconstitutionalism 102, 104–106
essence of 92
global/transnational 113, 114
harmonious-discursive 102, 104
human dignity and EU legal pluralism
without 107–110
indefinite extension of 132
meaning of ‘constitutional’ 324
migration of 115
multi-level 87, 102, 103, 130, 231
national constitutional identity, respecting 214–215
overpoliticalisation 174
and pluralism 137, 201–205
polyarchic coordinate 141
in postnational sphere 135
pragmatic 102, 103, 106
socio-teleological 80–81, 102
substantive 117–119
and unity 114–119
and values of international law 117–119
Continental private law 55
contrapunctual law 69, 141, 210
Convention Implementing the Schengen Agreement (CISA) 380, 382
convergence, conflicts by 78
414 Research handbook on legal pluralism and EU law

Conway, Gerard 309
Cooperation in Matters of Competition (2001) 305
cooporative spirit, and sovereignty 32–33
Cornelisse, Galina 7
cosmopolitan constitutionalism 102, 103, 141
cosmopolitan pluralism 168–170
cosmopolitanism 183
Costa judgment (1964) 122, 394, 396
Court of Justice of the European Union (CJEU) 6, 12, 59, 60, 211, 248
Article 4.2 TEU, interpretation 85–86
case law 243
court functions and constitutional pluralism 310–313
and dangers of constitutional pluralism 392, 395, 398
engagement with 314–315
and human dignity 95–97
internal market law 261, 262
judicial adjudication and constitutional pluralism 309, 310, 311
legal interpretation criteria 312, 313–317
minimalist approach 317–321
and national courts 30–32, 38, 59, 78
and Nordic approaches to European integration 293
and sovereignty 29, 30
courts see also Federal Constitutional Court (FCC), Germany; German Constitutional Court (GCC); Hungarian Constitutional Court; national courts/national law constitutional, as guardians of national constitutions 200
exclusive external competence 303–306
functions of, and constitutional pluralism 310–313
hierarchy of, in EU law 330–331
legal interpretation, criteria 313–317
Craig, Paul 140, 344
crisis, lack of 67–73
explanation for 74–76
Czechoslovakia/Czech Republic 16
Danish Supreme Court 59, 60
Darwin, Charles 337
Dassonville judgment (1974) 263
Davies, Gareth 6–7, 33, 135, 136, 190
de Boer, Nick 5
de Bûrca, Gráinne 35
de Witte, B. 294
debt and deficit rules 266–271
defence doctrine 33, 236–237
deliberative polyarchy 235
democracy 43, 203–204
see also democratic legitimacy
and democratic jurisprudence 221–222
democratic self-government 236
ideals of democratic theory 204
judicial review 204–205
and pluralism/constitutionalism 201–205
principle, interpretation by German Constitutional Court 214
democratic legitimacy 209, 215, 222, 233, 254, 352
see also democracy; legitimacy
safeguarding 216–221
demos 175, 176, 179, 235
‘no demos problem’ 240
Denmark 15–16, 295, 301, 305
and Brexit negotiation 358–359
dialogical pluralism 40
dialogue, and sovereignty 31–32
dignity see human dignity
direct effect 12, 144, 228
disengagement, law of see also Brexit
Art 50 TEU 362–364
diversity, legal, and legal pluralism 40–43, 333–334
dualism 4, 7, 60, 61, 80, 355, 372
see also monism
avoiding in international law 158
concept 121
defining 111
international legal order, acknowledging autonomy of 112
vs. monism 112
and pluralistic dimension 121–128
refinement of 121–128
Dupuy, Pierre-Marie 117
Durkheim, Émile 169
Dworkin, Ronald 69, 370–371
Early Warning System, Treaty of Lisbon 34
East–West Schism (1054) 12, 13
EAW see European Arrest Warrant (EAW)
ECB see European Central Bank (ECB)
economic crisis, and pluralist socio-economic character of European treaties 285–287
economic growth 282–283
EEA see European Economic Area (EEA)
Ehrlermann, Claus-Dieter 280
Ehrlich, Eugen 15–16, 161–162, 164

Gareth Davies and Matej Avbelj - 9781786433091
Downloaded from Elgar Online at 12/06/2021 02:35:53PM via free access
Eleftheriadis, Pavlos 7
empire, claim of 17–18
EMS  see European Monetary System (EMS)
Engle Merry, Sally 169
epistemic indeterminacy 144
epistemic metaconstitutionalism 102, 104–106
epistemology
   integrity and epistemological indeterminacy 141–145
   post-unitary constitutional pluralism,
   paradox of 336–339
erga omnes obligations 112
ESM  see European Stability Mechanism (ESM)
ethnographic research 161–162
EU and state law relationship 4, 43, 60–65
   see also EU law; national courts/national
   law; states
   both systems applying simultaneously 67
   co-application cases 64, 66, 67–68, 69, 72
   and conflicts 67, 76
   fundamental rights 91
   and human dignity 97
   monist view of interaction between 70–71
   nature of national–supranational
   relationship 106
   and radical pluralism 68
   space for national courts in EU law
   328–330
EU constitutional pluralism  see constitutional pluralism
EU constitutions, functional 171–174
EU law
   see also EU legal pluralism; European
   Union (EU)
   balance of 331–332
   central parameters, transforming into
   national constitutional standards 43–44
   citizenship see citizenship
   and classic public international law 65
   'constitutional' nature 67, 70
   in Germany see German Constitutional
   Court (GCC); Germany
   hierarchy of courts in 330–331
   and human dignity 95–98
   integration of 332–333
   interpretative pluralism within see
   interpretative pluralism, within EU law
   Kompetenz-Kompetenz  see
   Kompetenz-Kompetenz
   legal pluralism and shared normative
   commitments 249
   mutual recognition principle 42–43
pluralism and diversity within 333–334
space for national courts in 328–330
and state law  see EU and state law
relationship
supremacy principle 33
and territorial exclusion 378–382
and transnational law 42
EU legal pluralism
   also legal pluralism
   avoiding principal–agent inversion 237–240
   and human dignity  see human dignity
   labels, quest for 226–229
   limits 223–242
   power-legitimacy nexus, consequences
   233–237
   public law, legitimacy fault line 229–233
   radicalizing 11–13
   without constitutionalism 107–110
Europarechtsfreundlichkeit  principle 44
European and Monetary Union (EMU),
   post-unitary constitutional pluralism in
   335–334
European Arrest Warrant (EAW) 43, 85
   and human dignity 96, 98, 99
European Banking Union 225
European Central Bank (ECB) 39, 226
   see also Federal Constitutional Court
   (FCC), Germany; German
   Constitutional Court (GCC);
   Gauweiler judgment (2015)
   independence 43, 44
   monetary policy 43, 44
   post-unitary constitutional pluralism, in the
   EMU 339, 348, 349, 351
European Coal and Steel Community (ECSC)
   18, 19
European Commission 6, 225, 270, 277
   Action Programme (1962) 273, 277
   White Paper on Completing the Internal
   Market 379
   White Paper on the Future of Europe 238
European Constitutionalism (Tuori) 227–228
European Convention on Human Rights 133,
   147
European Council 358, 379, 400–401
   Legal Opinion 359–361
European Court of Human Rights (ECtHR)
   147, 148, 187
   legal pluralism and shared normative
   commitments 245–246, 247, 248
European Economic Area (EEA) 291
   EEA states 294–298
   Joint Committee 297

Index 415

Gareth Davies and Matej Avbelj - 9781786433091
Downloaded from Elgar Online at 12/06/2021 02:35:53PM
via free access
416  *Research handbook on legal pluralism and EU law*

member 298
European Economic Community (EEC) 27, 227
European Free Trade Association (EFTA) 291, 292
European integration 6, 12, 54–55, 103, 134 constitutional limits to 207
and constitutionalisation 167
and EU constitutional pluralism 155–156
and judicial dialogue 210
Nordic approaches see Nordic approaches to European integration
polycentricity in 141
precondition for democratic government 208
resistance of national constitutional courts to 221
European Investment Bank 285
European Monetary System (EMS) 279
European Monetary Union (EMU) 336
debt and deficit rules 266–267
post-unitary constitutional pluralism see post-unitary constitutional pluralism in the EMU
judicial dialogue 211, 213
European Payments Union (EPU) 272
European Social Fund 286
European Stability Mechanism (ESM) 224, 287, 343, 344, 345
European System of Central Banks 348
European Union (EU) 17, 46
see also EU constitutions, functional; EU law; EU legal pluralism
anatomy of constitutional pluralism in 59–77
budget 224
changing configurations of constitutional authority in 166–168
citizenship 179–198
claim of 18–20
constitutional identity 48, 55, 211, 394
constitutional polity of values, and cosmopolitan pluralism 168–170
constitutionalisation, unexpected consequences 81–87
functional EU constitutions 171–174
interpretative pluralism see interpretative pluralism, within EU law
legal pluralism as defining feature 20–21
objectives of 36, 268
Official Journal 126
personnel 224–225
Professional Qualifications Directive 299
public law, legitimacy fault line 229–233
as reference order 146–147
societal constitutionalisation 174–176
sui generis character 224
UK’s vote to leave (23 June 2016) see Brexit
‘United in Diversity’ slogan 1, 158
vertical relationships with Member States 339–343
European Union Referendum Act (2015), UK 356
eurozone currency, financial crisis 174–175, 225–226, 229
bailout program 392, 398
Evans, AC 195
Everling, Ulrich 277
Everson, Michelle 172
evidence, accumulation of 74
fair trial, right to 43
Faroes, the 295, 301, 305
Federal Constitutional Court (FCC), Germany 20, 29, 61, 65, 76, 84, 130, 138, 184, 327, 336, 402
see also German Constitutional Court (GCC); Germany
and dangers of constitutional pluralism 392–394, 396–399
and fundamental rights 340
and human dignity 98, 99
post-unitary constitutional pluralism, in the EMU 340–343, 346, 347, 349, 351, 353
federalism 34, 45
feudal orders 15
financial crisis of 2008 296
Finland 292, 301
First World War 15, 16
Fiscal Compact 225, 271, 286
fiscal policy 229, 344, 346
countercyclical 269, 271
Flynn, Tom 4–5
‘founding acts,’ transnational 19
fragmentation 113, 173, 367
France
claim making 16
Constitutional Council 122–123, 127
Declaration of the Clergy of France (1681) 13
French Declaration of the Rights of Man and the Citizen 118
French Revolution 14
Second French Empires/Republics 17
functions, constitutional 229
polity- and non-polity-based 171–174
fundamental rights 91, 92, 245, 340, 340–341
Charter of Fundamental Rights 83, 95, 101, 131, 149
equivalent protection of 123
and human dignity 95–96
and Hungarian Constitutional Court 100

*Gauweiler* judgment (2015) 44, 46, 85, 393, 398
*see also* European Central Bank (ECB); Federal Constitutional Court (FCC), Germany; German Constitutional Court (GCC)
governmentality and EU legal order 245, 255
post-unitary constitutional pluralism, in the EMU 342, 343, 345–348
GCC *see* German Constitutional Court (GCC)
General Agreement on Tariffs and Trade (GATT) 272
General Postal Union 18
general will 26
German Constitutional Court (GCC) 39, 43–45, 65, 76, 85, 106, 222, 245, 255, 392
*see also* European Central Bank (ECB); Federal Constitutional Court (FCC), Germany; *Gauweiler* judgment (2015); Germany; identity review; *ultra vires* review
compared to Hungarian Constitutional Court 109
and the ECJ 45–47
identity review *see* identity review
Maastricht Treaty 1992, review by 61, 199, 207–209, 213, 214, 216
*ultra vires* review *see* *ultra vires* review

*Grundgesetz* (GG) *see* *Grundgesetz* (GG)
(Basic Law for the Federal Republic of Germany)
*Grundnorm* (independent and incompatible basic norm) 39, 50–55
human dignity and constitutional identity 98–99
principle of respect for 97–98
participation in OMT eurozone bailout program, constitutionality of 398
primacy of EU law in 99
Reich of 1871 15, 17
Weimar Germany 16
Gerstenberg, O 141, 145, 148
Gill, Stephen 257, 259, 286
Gillingham, John 257
global constitutionalism 113, 114
global governance regimes 18
global legal pluralism 163, 164, 169
globalisation 155, 163
God, will of 24, 25
Goldmann, Matthias 7
governmentality and EU legal order 243–256
legal pluralism
discourse 251–256
and legitimate authority 250–251
and shared normative commitments 245–250
legitimacy 244, 251, 254
grand narratives, demise of 338
Great Depression 274
Greece 225
Greenland 295, 301, 305
Griffiths, J 291
Groussot, Xavier 33
*Grundgesetz* (GG) *see* *Grundgesetz* (GG)
(Basic Law for the Federal Republic of Germany) 44, 116
eternity clause 45
identity review requirement *see* identity review
*ultra vires* review *see* *ultra vires* review
*Grundnorm* (independent and incompatible basic norm) 39, 50–55, 120, 174
and sociological concept of constitutional pluralism 158, 160, 161
Guastaferro, Barbara 85–86
gubernaculum 171, 174, 175, 176
Gurvitch, Georges 113

Habermas, Jürgen 203
Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) 180, 181
418 Research handbook on legal pluralism and EU law

Hague Convention on Child Abduction 304
Halberstam, Daniel 247, 248, 250–251, 254
Hall, Stuart 257, 259
harmonious-discursive constitutionalism 102, 104
harmonisation, and legal pluralism (Nordic context) 300–303
Hart, H. L. A. 50, 158, 369, 370
Hartley, Trevor 309
Hegel, Georg Wilhelm Friedrich 16, 19, 336
Heidegger, Martin 337
heterarchy 138, 151
shortcomings of constitutional pluralism 142, 143
and sociological concept of constitutional pluralism 155, 157, 164, 165
hierarchy 32, 40, 41, 50, 112, 185, 199, 221, 376
and anatomy of EU constitutional pluralism 60, 61, 62, 77
axiomic 77
constitutional 256
and constitutional conflict 79, 80
and constitutional pluralism 116, 117, 122, 124, 127, 128, 131, 205
of courts, in EU law 330–331
governmentality and EU legal order 245, 246, 249, 251, 254, 255, 256
and human dignity 105, 106, 110
and interpretative pluralism within EU law 323, 324, 325, 328
legal 151, 323, 376
of norms 127, 128, 157, 327, 330, 369
and perspectivism 53, 54
and shortcomings of constitutional pluralism 136, 138, 143, 144
and sociological concept of constitutional pluralism 155, 157, 161, 164, 166, 167, 176
and Treaties of the European Union 275, 281
and triangular constitutionalism 145, 148, 149, 151
of values 131
higher law 202, 228
Hobbes, Thomas 14, 25–27, 239, 336
Holy Roman Empire, end of (1806) 17
Honeywell judgment (2010) 44, 45, 341
horizontality 62, 343–348
House of Commons European Scrutiny Committee 359
House of Lords EU Financial Affairs Sub-Committee 364
Report 365
human dignity 4
asylum policy 96
bioethics and patentability of human tissue 96–97
Common Foreign and Security Policy (CFSP) 96
constitutional role 100–102
equality of 110
and EU constitutional pluralism 102–106
and EU law 95–98
and EU legal pluralism 95–110
without constitutionalism 107–110
European Arrest Warrant (EAW) cases 96 as fundamental value of the EU 95
and German constitutional identity 45, 98–99
Germany
and constitutional identity 98–99
principle of respect for 97–98
and Hungarian Constitutional Court 99–100
and national law 98–102
and proportionality principle 97, 98, 109
theories of EU constitutional pluralism and human dignity 102–106
human rights 118–119
see also fundamental rights
European Convention on Human Rights 133
Hungarian Constitutional Court compared to German Constitutional Court 109
and human dignity 99–100
refugee policy 399–402
Hungarian constitutional identity 100, 401, 402
Hungary 8, 16, 99, 234, 354, 393, 399–401
Constitutional Court see Hungarian Constitutional Court
constitutional identity see Hungarian constitutional identity
self-identity 100, 109
Iceland 299
identity review 43, 45, 47–48, 55, 99
INDCs (intended nationally determined contributions) 239
institutional sovereignty 22, 27, 28
integration, European see European integration
integrity and epistemological indeterminacy 141–145
interlegality 162

Gareth Davies and Matej Avbelj - 9781786433091
Downloaded from Elgar Online at 12/06/2021 02:35:53PM via free access
Index 419

legal-cultural 50–56
internal market law 188, 261–265, 279
International Court of Justice (ICJ) 118, 181
international law 64, 65, 112
see also international legal order
and citizenship 179, 180, 182, 187
liberal philosophy 118–119
Nordic context of international agreements
298–300
pluralism under 68, 79, 141
status as ‘law’ 115–116
values 117–119
international legal order
see also international law
acknowledging autonomy of 112
founding principles 117–118
metamorphosis 113
International Red Cross and Red Crescent
Movement (formerly International
Committee of the Red Cross) 18
International Steel Cartel 18
International Telegraph Convention (now
International Telecommunication Union)
18
interpretative pluralism, within EU law
and balance of EU law 331–332
competing constitutions 323–325
external limits to competences 325–327
hierarchy of courts 330–331
and integration of law 332–333
internal limits to competences 327–328
plurality and diversity 333–334
rethinking theory of validity of norms
124–128
space for national courts 328–330
uniformity of law 330–331
interpretative pluralism within EU law, and
proportionality principle 329, 331
intervalidity of norms 125–128
Investiture Conflict, twelfth-century 12, 14,
17
Ireland 358
iurisdictio 171, 174, 175, 176
Joint Declaration No. 28 on Nordic
Cooperation 292
judicial adjudication and constitutional
pluralism 309–322
see also Court of Justice of the European
Union (CJEU)
contra legem interpretation 314, 316
minimalism 317–321
judicial dialogue 210–214
judicial review 200, 203
weak-form 204–205, 218
Juncker, Jean-Claude 237
jura sunt servanda principle 92
jurist concept of constitutional pluralism
155, 158–161
jus cogens 112, 117, 132
Kadi judgment (2008) 92, 123, 124, 130, 131,
132, 245, 249
Kant, Immanuel 336
Kapteyn, Paul 276
Karlsruhe, Germany 39, 46, 130, 393,
398–402, 399
see also Federal Constitutional Court
(FCC), Germany; Germany; German
Constitutional Court (GCC)
Kaupa, Clemens 6
Kelemen, Daniel 7–8, 255, 410
Kelsen, Hans 50–54, 69, 120, 121, 155, 158,
159, 228, 336–337
Ought/Is distinction 51–52
Pure Theory of Law 51, 52
Kelsenian–Hartian conception of law 41
Kelsen’s Theory of the Basic Norm (Raz) 51
Kennedy, David 118
Keynesian economics 268, 271, 273, 282
Kjaer, Poul 3
Klabbers, Jan 249, 250
Kochenov, Dimitry 5
Komárek, Jan 31, 350
Komesar, Neil, K. 310, 317–318, 321
Kompetenz-Kompetenzen 49, 65, 66, 68, 139,
143, 246, 325, 334, 399
see also competences; EU law
claim to 334, 392
and dangers of constitutional pluralism
392–397
and perspectivism 50, 54
Kosovo conflict 245
Krisch, Nico 62, 135, 137, 139, 148,
253–254, 370
and principal–agent inversion, avoiding
238–239
Kuijper, Pieter Jan 357
Kumm, Mattias 30–31, 37, 80, 129, 143, 169,
213, 216, 217, 221
and triangular constitutionalism 148, 149
Lasser, M. de S.O.I. 316
Law & Justice (PiS) party, Poland 402
Lawrence, Jessica 6

Gareth Davies and Matej Avbelj - 9781786433091
Downloaded from Elgar Online at 12/06/2021 02:35:53PM
to free access
League of Nations 18
legal anthropology 42, 161, 162
legal entrenchment 228
legal interpretation, court criteria 313–317
legal normativity 51–52, 171
discursive 173
pure 162
legal orders
autonomous yet interdependent, mutual
recognition 121–124
Church of Rome 13
clash of 183
European, gradual construction of 19–20
feudal 15
governmentality and EU legal order
243–256
Grundnorm (independent and incompatible
basic norms) 50–55
institutional normative orders 140
international, founding principles 117–118
and Kelsen 53–54
multiplicity of 11
norms of 136
partial 111
pluralism of see normative pluralism
relations between EU and national legal
orders 387–390
relationships between 61–62
and self-preservation 249
suborders 111
two readings of pluralist situation
(Kelsenian and Koskenniemiian) 3,
39–40, 55
legal pluralism
black-box model 40–41, 42, 53
claim making
claim of Church 13–14
claim of empire 17–18
claim of European Union 18–20
claim of state 14–17
classical postcolonial discourse 11, 21
defining 40
as defining feature of Europe 20–21
discourse 21, 251–256
and diverging obligations, Nordic countries
EEA states 296–298
EU states 294–296
international agreements 298–300
European see EU legal pluralism
global 163, 164, 169
and harmonisation (Nordic context)
300–303
human dignity as precondition of 108
and legal diversity 40–43
and legitimate authority 250–251
new 11, 77
origins of concept 42
pluralism of legal orders or systems 41–42
vs. polycentricity of law 40
and shared normative commitments
245–250
legal positivism 40, 41
legal practices 41
Legal Reasoning of the European Court of
Justice: Towards a European
Jurisprudence (Bengoetxea) 313
legal systems
identity of 63
individuation of 73–74, 75
key characteristics 73–74
‘one big legal system’ approach 63–64, 70
overlapping and intersecting 112
pluralism of 41, 42
scope 74
state and suprastate 61
‘two interacting legal systems’ model 63,
64, 66, 76
legal-cultural interlegality 50–56
legitimacy 262, 325, 389, 409
claims to 371
conferral of 327
constitutional 236, 240
democratic 209, 215, 222, 233, 254, 352
safeguarding 216–221
functional 230
governmentality and EU legal order 244,
251, 254
input and output 254–255
institutional 312
legal pluralism and legitimate authority
250–251
and limits of EU pluralism 239, 241
loss of 324
political 349
politics and legitimation 174–176
power-legitimacy nexus 240
consequences 233–237
public law, legitimacy fault line 229–233
sacrifice of 333
social 326
technocratic 230
legal authority, and legal pluralism
250–251
Leino, Päivi 6
Lemke, Thomas 253
Leppävirta, Liisa 6
Index 421

Nordic see Nordic approaches to European integration
self-determination 215
and shortcomings of constitutional pluralism 138, 139
and sociological concept of constitutional pluralism 160, 166–168
vertical relationships with 339–343
and voluntarism 23, 28, 33, 34
metabolic function 223–224, 225, 229, 240–241
Middle Ages, as golden age of pluralism 113
migration policy 7, 373, 374
Miller, Peter 252
Millet, François-Xavier 4
minimalism 317–321
modern law, historical background 12
modernity, disenchantment with 337
monism 4, 7, 61, 68, 69, 80, 116, 124–126, 355, 372
see also dualism; Kelsen, Hans
defining 111–112
vs. dualism 112
refinement of 128–132
and sociological concept of constitutional pluralism 158, 159
Mouffe, Chantal 4, 78, 87–92
multilevel constitutionalism 87, 102, 103, 130, 231
multilevel governance 17
mutual recognition principle
autonomous yet interdependent legal orders 121–124
diversity and pluralism 42–43
scope of mutual recognition 43
mutually assured discretion 7, 335, 348–354
limits of 354
normative preferability 350–354
operationalizing constitutional pluralism through 339–354
fundamental rights 340–341
horizontal relationships between actors at EU level 343–348
ultra vires acts 341–343
vertical relationships between EU and Member States 339–343
practicality 349–350
mutually exclusive claims 66, 67
national courts/national law

Leviathan 25, 26, 27, 336
see also Hobbes, Thomas
Levi-Strauss, Claude 132
Lindeboom, Justin 5
Lindseth, Peter 5–6
Lisbon Treaty see Treaty of Lisbon (2007)
‘living law’ concept 161
Lisbon Treaty see Treaty of Lisbon (2007)
Maastricht Treaty see Treaty of Maastricht (1992)
see also radical pluralism
and constitutional pluralism in the EU 61, 62, 64, 66, 68–70
as ‘father of pluralism’ 32
and sociological concept of constitutional pluralism 156–157
sociological realism 64, 70
macroeconomic stability 266–268, 277, 283
Maduro, Miguel Poiares 31, 69, 80, 141, 148, 206, 210
and judicial adjudication 310, 311–312, 316, 321
Malta 191
Marquardt, Paul 35
Martinico, Giuseppe 4
Marx, Karl 17, 337
May, Theresa 357
MEEs (measures having equivalent effect) 262, 263
Member States 6, 47, 48, 55, 111, 127, 147, 148, 150, 179, 208
see also EU law; European Union (EU);
national courts/national law; state sovereignty; states
and claim making 19, 20
competences 260
and constitutional conflict 78–80, 82–84, 91, 95
constitutional identity of 48, 101, 211, 214, 217, 353
and constitutional limits on public authority 205–206
and EU citizenship 189, 190, 191–192, 197, 198
and human dignity 97, 98, 99, 100, 101, 103, 104, 109, 110
judicial dialogue 211
macroeconomic stability 266–268
and mutual recognition principle 42–43
nationalities 189, 190, 191–192, 197
Nordic see Nordic approaches to European integration
self-determination 215
and shortcomings of constitutional pluralism 138, 139
and sociological concept of constitutional pluralism 160, 166–168
vertical relationships with 339–343
and voluntarism 23, 28, 33, 34
metabolic function 223–224, 225, 229, 240–241
Middle Ages, as golden age of pluralism 113
migration policy 7, 373, 374
Miller, Peter 252
Millet, François-Xavier 4
minimalism 317–321
modern law, historical background 12
modernity, disenchantment with 337
monism 4, 7, 61, 68, 69, 80, 116, 124–126, 355, 372
see also dualism; Kelsen, Hans
defining 111–112
vs. dualism 112
refinement of 128–132
and sociological concept of constitutional pluralism 158, 159
Mouffe, Chantal 4, 78, 87–92
multilevel constitutionalism 87, 102, 103, 130, 231
multilevel governance 17
mutual recognition principle
autonomous yet interdependent legal orders 121–124
diversity and pluralism 42–43
scope of mutual recognition 43
mutually assured discretion 7, 335, 348–354
limits of 354
normative preferability 350–354
operationalizing constitutional pluralism through 339–354
fundamental rights 340–341
horizontal relationships between actors at EU level 343–348
ultra vires acts 341–343
vertical relationships between EU and Member States 339–343
practicality 349–350
mutually exclusive claims 66, 67
national courts/national law
Piiparinen, Touko 249, 250
pluralism 40, 108, 148, 201
agonistic 87–88
all-inclusive 163–166
as ‘anything goes’ 180–183
and Brexit 367–371
connected nature of 108
constitutional see constitutional pluralism
and constitutionalism 137, 201–205
cosmopolitan 168–170
and democracy 201–205
‘fact of reasonable pluralism’ 201
as federal balance 183–186
under international law 68, 79, 141
interpretative see interpretative pluralism,
within EU law
legal see legal pluralism
of legal orders see normative pluralism
of legal systems see legal systems
Middle Ages as golden age of 113
moderate 79
normative 41, 161–163
past and present developments 407–410
and perspectivism 30–55
pluralist self-restraint 33
radical see radical pluralism
and reason 32
as a self-perpetuating value in EU
citizenship law 193–197
and subsidiarity 23
substantive 103, 105
theories 23, 29
two readings of pluralist situation
(Kelsenian and Koskennieman) 3,
39–40, 55
voluntarism, escape from 27–33
Poland 8, 101, 354
Constitutional Tribunal 402
Political Parties, Elections and Referendums
Act (2000), UK 356
political power 234, 355, 374
see also power/powers
pluralism, constitutionalism and democracy
202, 203
and sociological concept of constitutional
pluralism 154, 164, 173
and voluntarism 24–25, 27, 35
politics
basic rights and liberties 202–203
as clash of contradictory wills 28
cleavages 17
and law 206–207
and legitimation, in EU constitutional
pluralism 174–176
political liberalism 104
political voluntarism 25, 29
polities/economy cleavage 17
politics/religion cleavage 17
polycentricity 40, 141, 225
polycentric constitutionalism 232
popular sovereignty 27, 28
populism 90, 175, 176, 238, 354, 409, 410
Pospíšil, Leopold 165
post-unitary constitutional pluralism, in the
EMU 335–354
epistemology 336–339
mutually assured discretion,
operationalizing constitutional
pluralism through 339–354
paradox 336–339
proportionality principle 335, 340, 343,
345–349, 353
potestas, power see potestas, classic distinction
between 154, 171, 175
Pound, Roscoe 164
power-legitimacy nexus 240
consequences 233–237
power/powers
absolute 25
constituent 26, 27, 128, 132
constitutional 149, 150, 239
delegation 26
distribution of 225
empowerment 140, 141, 145
EU powers 195, 326, 328
exclusionary 383, 385, 387, 388, 389, 390
extecutive 27
formal 15
of God 24, 25
institutional 27
interpretative 66
judicial 381
lawmaking 36, 387
normative 151, 231, 321
normative/regulatory 225
perpetual 25
political 24–25, 35, 154, 164, 173, 202,
203, 234, 355, 374
power-legitimacy nexus 233–237, 240
private 16
rhetorical 34
sociological concept of constitution 154
sovereign 25–27, 45, 49
symbolic 388
temporal power 14

Gareth Davies and Matej Avbelj - 9781786433091
Downloaded from Elgar Online at 12/06/2021 02:35:53PM
via free access
transferring 26
vacuums 320–321
pragmatic constitutionalism 102, 103, 106
precommitments 230, 232, 236
preemption 12, 19, 20
preliminary references 85, 227, 295, 315, 318, 340, 342
judicial dialogue 211, 212
procedure 75, 211
preliminary rulings 44, 46, 49, 317, 320
Priban, J 378
Přibáň, Jiří 5
price stability 47
primary units, subsidiarity 36–37
principal–agent inversion, avoiding 237–240
Pringle 287, 343, 344–345
private law 15, 55
Professional Qualifications Directive 299
proportionality principle 33, 128, 389, 401
and European Treaties 261, 263, 264, 265
and human dignity 97, 98, 109
and interpretative pluralism within EU law 329, 331
and judicial adjudication 318, 320, 321
post-unitary constitutional pluralism, in the EMU 335, 340, 343, 345–349, 351, 353
public law
claim making 15, 16
legitimacy fault line (EU) 229–233
Public Sector Purchase Programme (PSPP) 342–343
Pure Theory of Law (Kelsen) 51, 52
Quantitative easing (QE) judgment 342–343
radical pluralism 40, 128, 143, 205, 355, 368
see also McCormick, Neil
and constitutional pluralism in the EU 68, 69–72, 76–77
and exclusive perspectivism 55
and moderate pluralism 79
orders 246
and pluralism under international law 78, 141
Rawls, John 201–202, 203
Raz, Joseph 51, 52, 63, 73, 74, 76, 369, 370
and sociological concept of constitutional pluralism 158, 159–160
recognition, rule of 124, 126, 369–370, 371
reference orders 146–147
Reformation 12, 13, 16
refoulement principle 43
Return Directive 383, 387, 389
Rheinstein, Max 164
Roberts, Simon 164
role splitting theory 116
Roman law 55
Romano, Santi 113
Rome, Treaty of see Treaty of Rome (1958)
Röpke, Wilhelm 257, 273–274, 285
Rose, Nikolas 252
Roughan, Nicole 371
Rousseau, Jean-Jacques 114
rule of recognition 124, 126, 369–370, 371
Russian Empire 17
Sabel, Charles F. 141, 145, 148, 235
Salaried Employees Act, Denmark 59
Sankari, Suvi 6
Sarmiento, Daniel 318
Saussure, Ferdinand de 337
Scandinavian countries
see also Nordic approaches to European integration
claim making 16
polycentricity of law 40
Scelle, Georges 112
Schäuble, Wolfgang 237
Schengen Borders Code (SBC) 383, 384, 385, 386
Schengen Executive Committee 380
Schill, Stephan 83, 214
Schmitt, Carl 89, 160
Schütze, Robert 185
Scotus, Duns 24, 25
self-containment 408
separation of powers 118
Shachar, A. 197
shared territoriality 387
Single European Act (SEA) 278, 279, 280, 281, 380
Single Resolution Board (SRB) 225
Six livres de la République (Bodin) 25
Six Pack 225
social plurality, and normative pluralism 161–163
societal constitutionalisation, EU 174–176
sociological concept of constitutional pluralism 154–176
descriptive sociology as social fact 155
normative pluralism and social plurality 161–163

Gareth Davies and Matej Avbelj - 9781786433091
Downloaded from Elgar Online at 12/06/2021 02:35:53PM
via free access
Index 425

EU law and state law see EU and state law relationship
legal space 41
and Nordic approaches to European integration
EEA states 294–298
EU states 294–296
as reference orders 146
state law and international law 64
and suprastate legal systems 61, 62
third see third states
Stein, Eric 81
subsidiarity 3
and pluralism 23
primary units, loyalty to 36–37
rejection of voluntarism 34–37
theories 23
Treaty of Maastricht (1992) 23
substantive constitutionalism 117–119
substantive pluralism 103, 105
superterritorialization 375, 387
supranational bodies 241
supranational practices 103, 108, 109, 110
supranational surveillance 226, 229
supranationalization 375, 390
supremacy 16, 73, 228
absolute nature of supremacy doctrine 60
and CJEU 12, 60
and constitutional pluralism 73–74
Papal 13
Sweden 292, 295, 305
Switzerland 15–16
systemic pluralism 41
Tamanaha, Brian 162
technocratic governance 232, 233
technocratic legitimacy 230
TEU see Treaty of European Union (TEU)
Teubner, Gunther 163, 173
TFEU see Treaty on the Functioning of the European Union (TFEU)
theological rationalism 24
theological voluntarism 23–25, 29
third states 5, 292, 293, 304
see also Nordic approaches to European integration
Torres Pérez, Aida 211
transcendental imperial universalism 17, 18
transnational constitutionalism 113, 114
transnational governance regimes 18
transnational law 42
Treaties, European
see also specific treaties
“1992” project 278–281
current objectives, functional interpretation 281–285
economic growth 282–283
intermediary findings 285
trade and regional cohesion, benefits from 283–285
failed Constitutional Treaty 137
historical perspective 272–278
and international law 116
and interpretative pluralism within EU law 325, 327
methodological considerations 258–260
pluralistic socio-economic character 257–287
and economic crisis 285–287
and proportionality principle 261, 263, 264, 265
textual interpretation 78, 260–272
competition law 265–266
debt and deficit rules 266–271
intermediary findings 271–272
internal market law 261–265, 279
Treaty of Rome, objectives of 272–278
Treaties of Accession, Nordic 292
Treaty of Lisbon (2007) 307
Early Warning System 34
entry into force 83, 131
debt and deficit rules 266, 267, 269
ratification process 213
review by German Constitutional Court 61, 199, 207–209, 213, 214, 216
Treaty of Rome (1958) 118, 259
“1992” project 279, 280
Action Programme (1962) 273, 277
competition law 265–266
objectives of 272–278, 281
Treaty of the European Union (TEU) 82, 92
see also Treaty of Maastricht (1992)
Article 2 131, 392
Article 4.2 78, 83–86
Article 50 357, 367
and law of disengagement 362–364
Treaty on the Functioning of the European Union (TFEU) 43, 44, 46, 47, 190
competition law 266
debt and deficit rules 267, 269–270
internal market law 262, 263, 264
interpretation of Article 125 (no-bailout clause) 286–287
triangular constitutionalism 134, 145–151

see also constitutional pluralism
consequences for domestic constitutional thought 151–153
and constitutional conflict 147–151
triangular constitution as a composite constitutional polyarchy 145–147
Tuori, Kaarlo 3, 172, 227–228, 229
Tusk, Donald 356, 359
Twining, William 40, 163
Two Pack 225
tyranny, and sovereignty 26

Uitz, Renáta 402
ultimate authority 125, 225, 394
anatomy of constitutional pluralism in the EU 74–77
and border control 375–378, 390–391
governmentality and EU legal order 247, 255
judicial adjudication and constitutional pluralism 310, 311, 320
sociological concept of constitutional pluralism 173
triangular constitutionalism 146, 147
ultra vires review 43–45, 47, 55, 341–343
and safeguarding democratic legitimacy 216, 219–220
‘United in Diversity’ slogan 1, 158
United International Bureau for the Protection of Intellectual Property 18
United Kingdom
see also Brexit
claim making 16
United Nations 116
Charter 117
Human Rights Committee 187
United States, Supreme Court 261
unity, and constitutional pluralism 119–132
constitutional dimension or refinement of monism 128–132
pluralistic dimension 121–128
scale of values or pluralism mitigated by constitutional values 131–132
unity framework or pluralism mitigated by ‘constitutional’ principles 128–131
Universal Postal Union 18
universalism 337
validity of norms 121
intervalidity of norms 125–128
and rank of norms 124, 126
rethinking theory of 124–128
values
    constitutional
disagreement over 200
    scale of values or pluralism mitigated by
    131–132
EU constitutional polity of 168–170
    hierarchy of 131
    international law 117–119
    scale of 131–132
Van Gend en Loos judgment (1962) 262
Varoufakis, Yanis 237
Verdross, Alfred 116
Ver Loren van Themaat, Pieter 276, 277
Vienna Convention of the Law of Treaties
    356, 359, 360, 361, 366
Villalón, Cruz (Advocate General) 46–48, 55, 98, 101, 345
Visa Code 383, 385, 386
Visa Information System (VIS) 384
voluntarism 22–38
    assumptions of 22–23
    and Bodin 25
    effects/problems 27, 28
    escape of pluralism from 27–33
God, power of and theological voluntarism
    24
    and Hobbes 25–27
lingering commitment of sovereignty to
    23–27
political 25, 29
    and political power 24–25, 27, 35
rejection by subsidiarity 34–37
sovereignty
    conditioned by cooperative spirit 32–33
    conditioned by fundamental principles
    29–31, 37
    conditioned by reasoned dialogue 31–32
state sovereignty 22, 27, 28, 34, 38
    theological 23–25, 29
    will, dominance of 22–25, 29
Von Benda-Beckmann, Franz 161
Von Bogdandy, Armin 83, 214
Vordermayer, Markus 353
Vorverständnis (preconceptions of legal actors) 53, 54, 55
Vosskuhle, Andreas (president of the GCC) 48
Waldron, Jeremy 203
Walker, Neil 8, 28, 72, 80, 93, 133, 157, 171, 248, 396
    human dignity and EU legal pluralism 102, 104, 105, 108
    and shortcomings of constitutional pluralism 139, 141
Walter, Christian 353
weak-form judicial review 204–205, 218
Weber, Max 337
    and sociological concept of constitutional pluralism 160, 161
Weimar Germany 16
Werner Plan for Monetary and Economic Union (1970) 279
Westphalia, Treaty of see Peace of Westphalia (1648)
    will, dominance of in voluntarism 22–25
William of Ockham 24, 25
Wittgenstein, Ludwig 337
World Intellectual Property Organization 18
World Trade Organisation (WTO) 249
Zucca, Lorenzo 92
Zuleeg, Manfred 259