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CONSTITUTIONAL DISAGREEMENT IN EUROPE
AND THE SEARCH FOR PLURALISM

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Abstract

This paper has two purposes. One is to suggest that constitutional pluralism is an empty idea. Where there are multiple sources of apparently constitutional law one always takes precedence and the other is then no longer constitutional. Dialogue may help the legal sources reconcile, but it does not change the normative hierarchy between them. The second purpose is to make a concrete proposal for embedding pluralist thinking within EU law. The proposal is in the spirit of Maduro's suggestion that national courts should take account of EU interests in interpreting national law, and also in the spirit of Kumm's suggestion that EU law should be self-policing. However, unlike Maduro it focuses on the need for a more pluralist approach within EU law, rather than national law, and unlike Kumm it focuses on the need to prevent EU law becoming a threat to national constitutions, rather than mechanisms for defusing conflict if things get that far. The two purposes are linked by a common perception: that the investment in constitutional pluralism by scholars has not brought satisfactory returns, yet pluralism is too attractive an idea to be abandoned in haste.

Keywords

EU law, pluralism, constitutionalism, constitutional pluralism, constitutional courts, supremacy, proportionality

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Constitutional Disagreement in Europe and the search for Pluralism

Gareth Davies*

Introduction

This paper has two purposes. One is to suggest that constitutional pluralism is an empty idea. Where there are multiple sources of apparently constitutional law one always takes precedence and the other is then no longer constitutional. Dialogue may help the legal sources reconcile, but it does not change the normative hierarchy between them. The second purpose is to make a concrete proposal for embedding pluralist thinking within EU law. The proposal is in the spirit of Maduro's suggestion that national courts should take account of EU interests in interpreting national law, and also in the spirit of Kumm's suggestion that EU law should be self-policing.¹ However, unlike Maduro it focuses on the need for a more pluralist approach within EU law, rather than national law, and unlike Kumm it focuses on the need to prevent EU law becoming a threat to national constitutions, rather than mechanisms for defusing conflict if things get that far. The two purposes are linked by a common perception: that the investment in constitutional pluralism by scholars has not brought satisfactory returns, yet pluralism is too attractive an idea to be abandoned in haste.

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¹ M Maduro 'Contrapunctual [sic] Law: Europe's Constitutional Pluralism in Action' in N Walker (ed) *Sovereignty in Transition* (Oxford, Hart, 2003); M Kumm 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262.

The paper begins by outlining why constitutional pluralism is attractive to scholars, and why it is unconvincing. It provides a summary of the argument about constitutional pluralism. The paper then moves on to develop this in more detail. It first describes the disagreement between some national supreme courts and the Court of Justice about the relative status of national constitutional and EU law. It then considers the likely practical consequences of these disagreements, concluding that the greatest risk is not of a clash of grand constitutional principles, but rather just that EU law may spread to the point that it is seen as no longer constitutionally legitimate. The major need therefore, in a Europe where the Treaties co-exist alongside national constitutions, is for a mechanism within EU law which prevents such law and policy spread. This would be a mechanism integrating pluralism within EU law. The suggestion is thus that pluralism of legal systems, or of constitutions, leads us nowhere, but pluralism within a legal system - a pluralist legal system - is an option worth exploring.

Constitutional pluralism

The initial attractiveness of constitutional pluralism is as a description of the apparently unstable, or unresolved, hierarchy between (certain) national constitutions and EU law.² Since neither bows to the other, and each is supreme on its own terms, a description of the overall state of affairs in terms of pluralism seems more convincing than one which concedes to the claims of one side or the other.³ Yet the symmetry of the situation is illusory. National courts control the outcome of actual cases, and in most cases they still consider that their ultimate allegiance, in the event of conflict, is to national constitutions

² See generally N MacCormick 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259; N Walker 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; N W Barber 'Legal Pluralism and the European Union' (2006) 12 *European Law Journal* 306; M Maduro 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) *European Journal of Legal Studies* 1; N Krisch 'The Case for Pluralism in Postnational Law' LSE Law, Society and Economy Working Paper 12/2009.

³ MacCormick, *ibid*; N MacCormick *Questioning Sovereignty* (Oxford, OUP, 1999).

and national supreme courts.⁴ EU law may assert, but it lacks the means to enforce its assertions.⁵ National constitutions are the superior authority in practice.

Since one of the conventional attributes of a constitution is that it is the highest source of law within its jurisdiction, EU law is hardly constitutional in most states. Its constitutional status is limited to the Court of Justice itself and the courts of those states, if there are any, that accept unreservedly the absolute supremacy of EU law. In these states, national constitutions hardly deserve their name any more, and are now subordinate law. However, in the states that retain their own constitutions as the highest legal document, it is EU law that is ultimately subordinate. To speak then of constitutional pluralism, as if the Treaties and the constitutions of Member States were equal partners, is more deceptive than descriptive. It describes the rhetorical independence of the two legal orders, but ignores the fact that in actual situations – as sources of applicable law – there is in most states an unequivocal ultimate hierarchy. EU law is at best a constitution without a jurisdiction: it may be the final authority in its own sphere, but that sphere is largely virtual rather than actual.

This is uncomfortable for those reared on the optimistic assertions of the Court of Justice about the nature of EU law, and those who value the EU and fear the resurgence of nationalism and protectionism. Yet to keep faith with the Court is also uncomfortable. One can assert that national courts are simply ‘wrong’ but this is to refuse any concessions to reality, and risk rendering EU law ridiculous, even pitiful, while also ignoring the democratic problems of placing the less accepted European order above the more accepted national one. Alternatively, one can explain that the Court of Justice is entirely correct, but is talking about the EU legal order, not the national, so that there is no doctrinal conflict.⁶ This

⁴ See for overviews of the position of the various Member State supreme courts; J Baquero Cruz ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’ (2008) 14 *European Law Journal* 389, 397-403; M Kumm ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’ (2005) 11 *European Law Journal* 262, 263-266; A Albi ‘Supremacy of EC Law in the New Member States’ (2007) 3 *European Journal of Constitutional Law* 25. There may be some exceptions. See B de Witte ‘Do Not Mention the Word: Sovereignty in Two Europhile Countries’ in N Walker (ed) *Sovereignty in Transition* (Oxford, Hart, 2003).

⁵ D Chalmers ‘Judicial Preferences and the Community Legal Order’ (1997) 60 *Modern Law Review* 164.

⁶ This is sometimes called ‘radical pluralism’. See N MacCormick *Questioning Sovereignty* (Oxford, OUP, 1999).

Jesuitical argument is coherent, but entirely unconvincing. It assumes that when the Court of Justice answers preliminary references it is not providing an instruction to national courts which it expects to be followed, but instead making abstract assertions about the nature of the EU legal order, without any concern about their effect or role in national courts. First, this is manifestly incorrect: the Court does not conceive of itself in such a philosophical role. Second, it would be irresponsible if it did. The Treaties are goal-oriented, not theory-oriented. The Court's clear attributed function is not to wash its hands of the relationship between EU law and national law but to provide judgments which can and will be accepted by national courts, in order that EU law is effective in practice.

Hence there is a great attractiveness in solutions which seem to offer a third way between blind allegiance to one order or another. Constitutional pluralism is presented as such a third way, and its apparent descriptive nature belies an invariable normative undertone. Constitutional pluralists think that neither national constitutions nor the EU Treaty *should* dominate the other, and both should exist side by side in a non-hierarchical way.⁷

Yet normative pluralism is as unattractive as descriptive pluralism is inadequate. There is no finessing the choice between legal chaos and hierarchy.⁸ When a court is faced with a conflict between the Treaties and the national constitution it either chooses one consistently, in which case there is hierarchy, or it chooses arbitrarily, in which case there is chaos.⁹

Perhaps the basic error of constitutional pluralism is to forget that law is only meaningful, and only interesting, when it is applied. A non-applicable law is merely a castle of propositions. Pluralism can be used to describe the relationship between EU law and national constitutions right up to the point at which these are applied to actual situations, whereupon it collapses and melts away.

⁷ See n 2 above; P Kirchhof 'The Balance of Powers between National and European Institutions' (1999) 5 European Law Journal 225.

⁸ J Baquero Cruz 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 European Law Journal 389.

⁹ See R Dworkin *Law's Empire* (Cambridge Mass., Harvard University Press, 1986) 179 et seq ;179; P Eleftheriadis 'Pluralism and Integrity' Oxford Legal Studies Research Paper 43/2009 8-14..

Nevertheless, pluralism remains an attractive idea, with its implications of tolerance and accommodation. Hence, even if cannot be applied to the relationship between EU law and national law it is worth seeing if it can be applied within these systems. For example, as is expanded upon below, EU law could be made pluralist in that it could be constructed in a way that showed respect for and accommodation of the different national – and international - legal orders with which it must interact. It could display self-restraint. This paper makes a concrete proposal for how such pluralist self-restraint could be incorporated in EU law.

Such internal EU pluralism would not affect the hierarchy between the national and the European. Internal EU doctrines cannot affect these inter-systemic issues, at least not in the short term. Perhaps in the long term they may have an indirect effect by rendering the ‘surrender’ of national systems to EU supremacy more or less likely. However, internal pluralism can make the chances that actual conflict arises between the legal orders much less likely. By increasing the acceptance of EU law within national orders it could also help EU law integrate into national law, so that it better achieves its goals and becomes a more present part of national legal life. Integrating the possibility of concession to national law into EU law may, paradoxically, increase the status and effectiveness of that EU law.¹⁰ It is thus, on the goal-oriented terms of the Treaties, a good interpretation of the law.

The disagreement between national supreme courts and the Court of Justice

There is an apparent disagreement between several national supreme courts and the European Court of Justice about the status of EU law. The national courts, notably the Bundesverfassungsgericht, take the view that if EU law infringes aspects of the national constitution it will no longer apply on their territory, at least to the extent of the

¹⁰ D Ross Phelan *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Dublin, Round Hall/Sweet and Maxwell, 1997); G Martinico ‘Preliminary Reference and Constitutional Courts: Are you in the Mood for Dialogue?’ University of Tilburg TICOM Working Paper 2009/10, on the attractions for national supreme courts of normative flexibility in EU law.

infringement.¹¹ The European Court of Justice, by contrast, claims that EU law is not subject to national constitutions.¹² In the event of a conflict, EU law should nevertheless be applied.

Each court is correct according to its own legal order. Each is the authoritative interpreter of its own document, in the first case the national constitution and in the second case the European Treaties. The national courts notably do not claim an interpretative jurisdiction over EU law. They do not claim that EU legislation or judgments which infringe the constitution are invalid or wrongful. They simply say that the national constitution prohibits the application of such acts. Since supreme courts are the authoritative interpreters of their constitutions, this view must be accepted as correct as a matter of constitutional law – whether or not it is wise or desirable. Similarly, if the ECJ, as the body that is unquestionably the authoritative interpreter of the Treaties, claims that EU law is unaffected by national constitutions, then this is also the case, as a matter of EU law.

It may seem odd that both sides can be correct. However, this difference of perspective is not between two courts within a common legal order, who take different views on what that legal order entails. Rather, there is a clash of legal orders. Two sets of rules exist, and they say different things. Since each order determines its own interpretation, there is no doctrinal reason why the two orders, or their courts, cannot say contradictory things but on their own terms each be correct.

This is nevertheless a disagreement, rather than just a difference, because both legal orders claim jurisdiction over the same circumstances. When the ECJ makes its claim of supremacy, it is not talking about EU law in the abstract or only insofar as it applies in the Court in Luxembourg. It is making the very concrete normative statement that, as a matter of EU law, national judges faced with a conflict between the constitution and EU law should prefer and apply the latter. This instruction – a particularly appropriate word since the claim was formulated in the context of the preliminary reference procedure – is directly contradictory

¹¹ N 4 above.

¹² Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

to the instruction which national constitutional courts do, would and will provide if they are asked the same question by the same judge, as may well occur.

In fact the ECJ is also making an implicit claim about national law. It is asking judges to transfer their allegiance from the constitution to the Treaties. However, it is clear that a judge cannot switch from subjection to legal order A to subjection to legal order B unless he takes the view that legal order A permits this. Legal order A may do so 'voluntarily', on its own terms, in a surrender to the new order, or it may be the case that in some sense legal order A has become weakened or diminished so that it is no longer 'capable' of binding a judge against legal order B. However, a slave cannot choose his master – he must be released.

The ECJ must be understood as inviting and instructing national judges to find that national law in fact permits them to transfer ultimate allegiance to EU law, and prefer it over the constitution. This may be voluntary, or because national law has in fact been 'conquered' by EU law. But in any case, for the ECJ's instruction to be more than posturing, it must be taking the view that national law is no longer capable of binding national judges against contrary EU law.

If the ECJ does not take this view, then it is making statements which it knows to be irrelevant. It is answering a question about what a judge should do with something that it accepts that judge cannot do. This would not be a very constructive use of the reference procedure, and nor would it be a very purposive or useful approach to EU law. The Court is not paid to provide interpretations that are, as a matter of principle, unconnected to adjudicative reality. It is therefore quite implausible to think that the judgments on supremacy should be read as 'you must obey EU law (although we are not saying anything about whether you can)'. Rather they are 'you must and can obey EU law'.¹³ These are therefore attempts at legal colonialism, at absorbing the national legal order within the European, and at removing the national constitution from its supreme position in the national courtroom – at de-constitutionalising it. They are, however - alas for the ECJ -

¹³ See also the loyalty obligation, Article 4(3) TEU.

attempts that have failed. National courts do not, at least in many states, regard the constitution as having surrendered.¹⁴ Since the ECJ has chosen not to retreat from its position, a principled disagreement remains.

This leaves us in a position well-known in international law. Sometimes states, like people, make promises that they had no right to make – according to their own law – and which they cannot keep – because of their own courts. This does not make the promises any less binding in the eyes of international law.¹⁵ Nor does it make the national laws any less valid. It just means there is a problem. At the moment that problem in the European context is largely theoretical. However, if EU law crosses the lines that national constitutional courts draw the problem will become very real.

The chances of concrete conflict

If EU law does not in fact conflict with national constitutions then disagreements over supremacy become considerably less urgent. Until now it has only conflicted with one or two, and then only in fairly marginal and easily resolved ways.¹⁶ However, there are a number of reasons to fear that this happy situation may be temporary.

Firstly, EU law is spreading into ever more areas, including particularly sensitive ones such as criminal law, security, immigration and family law. The chance of a collision with basic national values becomes greater. Secondly, post-enlargement there are many more supreme courts in the Union, some of which have already shown themselves to be capable of assertiveness. Thirdly, in its recent Lisbon judgment the BvG reiterated a possible new basis for rejection of EU law; that it has limited the sovereignty of the state so much that the state can no longer define the socio-economic circumstances of its citizens.¹⁷ This national

¹⁴ N 4 above.

¹⁵ See Article 27 of the Vienna Convention on the Law of Treaties; Eleftheriadis, n 9 above, 12.

¹⁶ See J Komarek 'European Constitutionalism and the European Arrest Warrant: Contrapunctual [sic] Principles in Disharmony' Jean Monnet Working Paper 10/05; Baquero Cruz n 4 above.

¹⁷ Judgment of the Bundesverfassungsgericht of 30 June 2009, BverfG 2 BvE 2/08 63 (NJW) 2009, 2267. An official translation is available on www.bundesverfassungsgericht.de. See C Wohlfahrt 'The Lisbon Case: A Critical Summary' (2009) 10:8 German Law Journal 1277, 1284-1285; 'Karlsruhe has Spoken. "Yes" to the Lisbon Treaty but...', editorial in (2009) 46 Common Market Law Review 1023; D Thym 'In the Name of

capacity and autonomy was seen by the Court as a part of the democracy which the constitution protects. Thus for EU law to collide with the German constitution it is not necessary that it violate more conventional human rights, but sufficient that it just 'go too far' so that there is not enough national freedom left to define life in the German republic.

This interesting idea takes a fairly conventional constitutional value – democracy – and turns it into an extremely broad tool for policing the spread of EU law. Even conventional socio-economic EU legislation may, just by virtue of its accumulated mass and effect, become a constitutional issue, perhaps without any particular rule being notably offensive or odd.

This is in contrast to early perspectives on the supremacy debate which located it very much in the human rights corner, and emphasised the constitutional objection that the EU did not have an adequate system of rights protection.¹⁸ This was an easy one for the ECJ to address, and it did. However, the more general demand that EU law not limit state freedom too much will require a more subtle, and a broader, approach. This will be discussed further below.

Cheerful pluralism

The situation sketched above is sometimes described in terms of constitutional pluralism, and when these words are used it is very often in a broadly approving way. Such pluralism is seen as protecting diversity, and as preferable to the domination of one legal order by another. Since both enjoy a certain legitimacy, but represent different interests and perspectives, surely their courts should engage in an ongoing and respectful dialogue, seeking conciliation, but retaining the possibility of disagreement. In this latter possibility lies the autonomy of the legal order, and its legal self-respect, and its judges' capacity to

Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court' (2009) 46 *Common Market Law Review* 1795.

¹⁸ The emphasis began to move from rights to competence around the time of the Maastricht Judgment of the BvG. See M Kumm 'Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *European Law Journal* 351; L Besselink 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 *Common Market Law Review* 629.

fulfill their duty to those who have entrusted them with jurisdiction. Thus a pluralist perspective on the EU-national judicial relationship may welcome the consensual resolution of specific disagreements, but does not seek to resolve any of the 'ultimate' questions, or to remove the capacity for future differences. Maduro has recently taken this approach.¹⁹

One of the virtues of his analysis is that it is realistic, in that it accepts that differences about the question of ultimate supremacy will not go away. This is certainly the case for at least the near future. The ECJ shows no sign of discovering that the EU Treaties are in fact subject to constitutional law, and supreme courts seem to be becoming only more assertive in their claims that constitutions determine what applies within the national jurisdiction. The disagreement can only be finally resolved by the surrender of one side, which does not seem imminent.

However, the nonchalant charm of a pluralist world view can easily lead to a rather too sanguine assessment of the actual state of affairs. Tolerance of the other is a virtue, and thoughtful dialogue is a good thing, but they are not always sufficient to provide a fair and predictable legal regime.²⁰ In particular, a defence of constitutional pluralism inevitably attempts to gloss the stark choice between a hierarchy of law, and a breakdown of law. It is suggested here that this attempt is hopeless, and the attachment of a pleasant-sounding pluralist label to the venture makes it no less so. For the reasons described earlier, constitutional pluralism turns out to be inadequate as either a description or a justification of the way things now are.

The only situation which might be described as constitutionally pluralist is where national judges sometimes prefer EU law and sometimes the national constitution.²¹ Then both Treaties and constitutions would still have a claim to be constitutional, at least sometimes, while co-existing. However, a consideration of this possibility shows why pluralism is a

¹⁹ M Maduro 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) *European Journal of Legal Studies* 1.

²⁰ J Baquero Cruz 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 *European Law Journal* 389.

²¹ See n 9 above.

virtue mostly reserved for the political and social sphere. It is, in law, not a good thing. A legal system in which it is uncertain, or at the discretion of the judge, which rules apply is not compatible with most ideas of legal certainty. One might speak of a situation of constitutional arbitrariness. It is in fact the simple breakdown of law, and its replacement by judicial preference – the one judge being more pro-European than another.

Respect and communication

The policy risk which results from the European judicial standoff is that cold war becomes hot war: that EU law is set aside in national jurisdictions, on constitutional grounds, and that this becomes a trend which harms both the status of EU law and its application and effectiveness. Even if the concrete effect of constitutional judgments are not of great European importance – were the European Arrest Warrant not to take full effect in one land it would be regrettable, but not in itself a great impediment to European functioning or development, for example²² – the breaking of a taboo by actually setting EU rules aside may lead to a general loss of judicial respect for EU law. In many contexts the effectiveness of EU law is not just a question of application or not, but of the way that the rules are applied to particular facts, and the spirit in which they are interpreted. A diminution of respect may have hard-to-quantify but nevertheless important effects.

This in turn may mean that EU policies do not achieve their goals, so that the capacity of the EU to influence economic and social development is limited, which in turn may heighten cynicism about the EU, and encourage policy-makers to look to other forums and means. Europe is the first point of call when cross-border problems arise only insofar as people believe that Europe is capable of effective action, and of harnessing the forces of application within Member States.

How serious these risks are, and the likelihood of serious problems, is difficult to assess. It is really a matter which is best decided by empirical research into the attitudes and behaviour of judges, by psychologists and anthropologists. However, given that the political

²² See Komarek n 16 above.

foundations of and support for the EU are not rock-solid, and its law is often viewed with some suspicion, dislike or mystification by national judges, it seems plausible that the risks should at least be taken seriously. That is to say, the EU and the ECJ should at least consider what measures they could take to address them and minimise the chance that a destructive conflict or sequence of conflicts occurs.²³

In fact, both national and European courts have a legal obligation to minimise the chance of conflict. Even though national courts may express skepticism about EU law at the limits of its competence or legitimacy, they do not express doubt that most aspects of national participation in the EU are constitutionally legitimate. Thus the very same ideas of democracy and autonomy which threaten the EU in extreme circumstances may help it in everyday ones. The fact that the national democratic organs have chosen to participate in it is a reason to accept its rules wherever this is legally possible. Moreover, it is a fairly uncontroversial principle of good judging that as far as possible one seeks to reconcile the different rules relevant to a situation. On the whole, national courts should, and do, try to avoid stark choices. Nevertheless, such a soft approach has its limits, particularly where constitutions are the bearer of vested meanings and values. There are plenty of imaginable situations where a constitutional court might feel that conflict cannot be interpreted away.

This leaves an important role for the ECJ. It is, moreover, in the position of supplicant. The national courts ask nothing of it, but it wants national courts to apply its law. Its law is also the law at risk. The ECJ is therefore the actor with the most obvious responsibility for reconciling the national and the European, by developing EU law in a way that avoids conflicts in the first place. It may also be noted that any interpretation of EU law which leads to its rejection by national courts is a bad interpretation, as a matter of EU law, since it manifestly does not achieve the goals of that law. It must moreover be open to doubt whether such an interpretation corresponds to the intention of the Treaty signers, insofar as that may matter.

²³ N MacCormick 'Risking Constitutional Collision in Europe' (1998) 18 Oxford Journal of Legal Studies 517.

Maduro and Kumm have both suggested ways in which national and European courts can get along with each other. Maduro's ideas are communicative and respect-based. He would like to see courts – his emphasis is on national courts, although not exclusively so – paying more attention to the nature of their reasoning.²⁴ When they take decisions they should take account of other legal orders, show them respect, and reason their judgments using arguments accessible to courts in other states. Instead of just focusing on the local context, they should explain in more general terms, European terms, why their decisions are justified, to show that they have taken account of the non-national interests involved, such as EU policies, or actors established in other states. Maduro would like to see judicial reasoning become less parochial in its perspective and conceptual vocabulary.

Kumm addresses what happens when conflicts occur.²⁵ He suggests that there should be a principle of EU law which authorises national constitutional courts to set aside EU law on specific constitutional grounds, that is to say when there are specific types of conflict with important constitutional rules. This is in the spirit of Ross Phelan's suggestion that EU law be set aside in circumstances where it would lead to national legal revolt or revolution.²⁶

This chapter proposes a variation on Kumm's argument. What is taken from him is the idea that EU law should try to police itself, and not leave this to national constitutions. While national courts will undoubtedly continue to regard their constitutions as a line which may not be crossed, they may well be prepared to consider whether conflicts can be avoided by first voicing their concerns within the framework of EU law, if that framework allows such concerns can be heard. It is this giving of a voice to national constitutional concern to which EU law should now aspire.

However, addressing national concerns purely by reference to the national constitution, as Kumm does, has disadvantages. Firstly, it cuts the ECJ out of the loop. Even if they were to be asked to contribute to the decision, via a reference, the framing of the issue purely in terms of national law would limit what they could contribute. Secondly, this approach

²⁴ Maduro, n 1 above.

²⁵ Kumm, n 1 above.

²⁶ Ross Phelan, n 10 above.

encourages national legal insularity. It stimulates exactly what Maduro warns against: national courts which focus exclusively on their local doctrine and interests and fail to interpret their national law in a European context. Thirdly, it is implausible to expect constitutional courts to show any interest in this doctrine. It amounts to an EU law acknowledgment of what they had already asserted the independent right to do anyway. As such, it can be seen as an attempt to force constitutional courts to concede EU law supremacy even while they reject European rules, by claiming that their rejection is a part of EU law. The unshakeable importance which these courts attach to their constitutions would probably lead them to refuse this offer to come into the European legal order. They would, it is suggested, continue to locate any reasoning about the interaction of the constitution and the Treaties firmly within the constitutional context, as a matter of constitutional principle.

But the most substantive objection is that by placing his conciliation process at the constitutional level Kumm offers a last line of national defence whereas it is a first line that is perhaps more urgently needed. It was suggested above that future constitutional conflicts may arise because ordinary EU law has spread so much that national autonomy and democracy are perceived to be threatened. The aim of the ECJ should be to prevent this point from being reached. EU law needs to be policed before it becomes a constitutional threat. It is precisely the escalation of everyday EU law to a national constitutional issue that the ECJ should try to avoid.

Policing by proportionality and procedure

In fact direct conflicts with traditional constitutional law are likely to be relatively trivial matters, and easy to resolve. In the event that an EU measure violates some fundamental right it can be dropped or amended without loss of face as a matter of EU law.²⁷ Where EU law directly contradicts other aspects of the constitution, this is likely to be legal accident. For example, where the European Arrest Warrant was incompatible with several

²⁷ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Charter of Fundamental Rights of the European Union.

constitutions, this was simply because states had not completed their constitutional amendments on time.²⁸ Although the cases are discussed in terms of grand principle, the problem was caused by procedural hiccups, relatively easily sorted out with little long term impact. In short, the principles and structures of classic constitutionalism are open enough, and unobjectionable enough, that complying with them is not a significant policy constraint for the EU and should not raise any structural problems. Conflicts will be incidents, not clashes of ideology.

The more serious problem is what the BvG identified as the growing threat to national autonomy posed by EU law. It was concerned that the law may so limit the capacity of national governments to define the life circumstances of their citizens that national democracy could no longer be said to be effective.²⁹ Given that national democracy remains, in the eyes of most constitutional courts, essential, and constitutionally protected, the policy-constraining effect of the growth of EU law becomes a potential constitutional issue.

The most serious risk of constitutional conflict is therefore raised by everyday EU law – socio-economic, criminal, environmental – which constrains national policy freedom. The challenge of preventing open rejection of EU law is the challenge of ensuring that EU law as a whole does not invade autonomy to an extent that crosses the constitutional courts’ red lines.³⁰ In other words, it is the interaction of ordinary EU law with ordinary national law and policy that needs policing, with the aim of avoiding the circumstances where national courts feel the need to invoke the constitutional protection of democracy.

As examples of serious substantive policy constraints, one may consider free movement, competition law, state aid and the euro rules, all of which have far-reaching and often unexpected consequences. As examples of intervention in areas of national law apparently removed from EU policy one may consider the rulings in which rules on the naming of

²⁸ See Komarek, n 16 above.

²⁹ N 17 above.

³⁰ See G Davies ‘Subsidiarity: the wrong idea, in the wrong place, at the wrong time’ (2006) 43 *Common Market Law Review* 63.

children,³¹ the language of court cases,³² and questions of procedural administrative law were found to conflict with free movement,³³ or in which state aid law has set limits to regional autonomy.³⁴ Less surprisingly, but more importantly, one may consider the impact on welfare states and social policy of economic regulation as a whole.³⁵

It is understandable that states may feel that their autonomy is increasingly circumscribed, to a point that they may find almost intolerable. Yet at the same time, a simple concession to these feelings of powerlessness would amount to the abandonment of important EU policies, to which those same states have agreed. What is needed is therefore a policing process which is effective, and demonstrably effective – showing that the law is policed is almost as important to calming national nerves as actually policing it. On the one hand, therefore, there must be a system ensuring that EU law does not cause unnecessary destructive effects on national policy, and on the other hand there must be a system ensuring that national concerns as well as European interests are voiced and articulated in the decision-making process, so that it is apparent why judicial decisions go the way they do. Following the two paths indicated by Maduro and Kumm, there must be better communication and respect between orders, and there must also be rules mediating conflicts of interest, rules which may be no less important for almost never being used.

Proposal

The inclusion of state interests and of the value of autonomy should begin at the legislative phase. However, legislation, and the Treaty, will often have unintended consequences, particularly within a specific national institutional context.³⁶ There is therefore also a need

³¹ Case C-148/02 *Garcia Avello* [2003] ECR I-11613.

³² Case C-274/96 *Bickel and Franz* [1998] ECR I-7637.

³³ Case C-224/97 *Ciola v Land Vorarlberg* [1999] ECR I-2517.

³⁴ Case C-88/03 *Portugal v Commission* [2006] ECR I-7115; Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja* [2008] ECR I-6747; R. Greaves 'Autonomous regions, taxation and EC state aids rules' (2009) 34 *European Law Review* 779.

³⁵ See 'The European Social Model: Coping with the Challenges of Diversity' Fritz Scharpf (2002) 40 *JCMS* 645; G Davies 'The Process and Side-effects of Harmonisation of European Welfare States', Jean Monnet Working Paper 2/06.

³⁶ See J Trachtman 'Regulatory Competition and Regulatory Jurisdiction' (2000) 3 *Journal of International Economic Law* 331, on the inevitable imperfection of economic regulation.

for a principle of substantive law which addresses the situation where EU law has unusually destructive or chaotic effects, and balances the interests involved.

Such a balancing belongs naturally within proportionality, and as such is already a part of EU law. Asking whether the application of that law is in fact disproportionate, because it has particularly dramatic or harmful consequences, is not doctrinally new. However, in the application of proportionality national autonomy and the national capacity to formulate and carry out policy is rarely seen as a value in itself.³⁷ That is precisely what needs to change. It is suggested that the statement below should be applied by the Court:

‘States often have to adapt their policies and institutions to comply with EU law. That is an unavoidable consequence of membership. However, if the application of EU rules makes achievement of important and legitimate national policy preferences effectively impossible, or unreasonably difficult, then, depending upon the degree of EU or other interest in full application of that rule, it may be disproportionate to apply the rule in the particular context in question. States must provide evidence that amending their systems or policies to achieve their goals in a way compatible with EU law would either be unreasonably difficult or disproportionately harmful to other interests.’

The application of this would take place in the context of the preliminary reference procedure. As ever, application of EU rules is for the national court, and ultimately it would be they who would decide on specific cases of setting aside of an EU rule. However, it would be appropriate to ask a question to the Court, and it could even be suggested that a national court must do so if it is considering setting aside on these grounds. The Court would then provide general guidance on the meaning of proportionality and the nature and strength of the EU interests to be taken into account in the balancing process. It should also provide guidance on the kind and level of evidence that may be expected from Member States.

The ambiguous and slippery nature of the division of powers in the reference procedure means that both national and European courts have an important role. Neither is

³⁷ See Davies n 30 above.

emasculated, and it is in the interest of each to formulate their concerns and the relevant interests at their level in the most clear and complete way. Should their collective deliberation lead to the conclusion that application of EU law would be disproportionate there should then be an automatic procedure for investigation of the situation, consultation with the Commission and so on.

This proposal is presented in terms of proportionality, and the adoption of national autonomy as a value to be weighed within that principle. However, it can equally be seen as a generalised public policy exception, or as a subjection of the supremacy principle to the principle of proportionality; the Court should acknowledge that under certain circumstances to grant supremacy to an EU rule, over a far more important national one, may be disproportionate. It matters little which description is chosen. The key idea reflected in the proposal is that good policy and constructive European integration require the EU to take account of national interests in the formulation, interpretation and application of EU law, just as national courts and institutions are supposed to take account of EU interests when developing and using their domestic rules. The aim is to defuse conflict by making interests and balances explicit. Instead of national judges setting aside national law because they feel they have to, they would be setting aside national law because, having heard evidence, they are satisfied that the state has been unable to provide a pressing reason not to. Occasionally, they would be setting aside EU law, because the state has made a convincing argument for exceptional circumstances, whereupon the Commission and other parties would begin working upon an acceptable solution.

It is of course a dangerous proposal. It concedes the possibility of letting substantive EU law fail, in some contexts, at some times. However, the interests involved at national level are real, and ignoring them is a politically untenable as well as an undemocratic option. At any event, they will be discussed and asserted by national courts. The EU interest is therefore in bringing that discussion as far as possible within the European legal order, to ensure that European as well as national interests have a voice in resolving conflicts.

There are (at least) three more criticisms. One is that the proposal amounts to re-opening the Treaties. In accepting, and continually reaffirming, the substantive content of the

Treaties Member States must be taken to have accepted the enforcement of the rules they contain. To introduce derogatory principles other than those which the Treaties already contain would be no more or less than a step backwards in integration.

The response to this criticism is that it under-estimates the importance of the openness of the Treaty texts. They are more convincing as commitments to a process than as precise policy statements, and it seems reasonable to suggest that as interpretation develops and extends the scope of EU law it should also, in parallel, develop and extend the doctrines of control and restraint. Indeed, this is precisely *Cassis de Dijon*: the price for bringing equally applicable rules within the law on free movement was the parallel extension of the possibility of derogation.³⁸

This suggests the second obvious criticism: that the proposal above is no more than is already accepted in the law on free movement, where proportionate derogations on grounds of legitimate national interests are part of the law.³⁹ Indeed there is much similarity, but the proposal goes two steps further. First, it generalizes the idea of such derogations to all EU law, including secondary legislation. Second, it makes the balancing of EU and national interests more explicit. The national judge, in particular, is invited not just to consider the national interest at stake, but the extent of the European one.

Ironically, the greatest threat to EU law may then be national judges who fail to consider national interests. By over-applying EU law they raise the risk of its extension beyond the legitimate. On the contrary, such open rules need policing, and it will be the involvement of national judges in this process which will prevent constitutional conflict from becoming real.

The third criticism is that this proposal would be bad for legal certainty. Particularly if it is applied to secondary legislation it will render all EU legislation conditional. Given the value placed on reciprocity by Member States, if they see other states successfully evading rules on the basis of special national circumstances this could lead to a spiral of 'special cases'.

³⁸ Case 120/78 *Cassis de Dijon* [1979] ECR 649.

³⁹ *Ibid*; Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori de Milano* [1995] ECR I-4165.

This is, in fact, precisely the point. There are two kinds of legal uncertainty which may arise: uncertainty over whether the law will in fact be properly applied, and uncertainty about the content of the law. The aim here is replace the first danger by the second, to internalise the tension between national policies and EU law. If states are not to ignore threatening rules, a mechanism is necessary to allow the threat to be addressed within the law. Having created that mechanism, the need is then to make the resulting uncertainty about content acceptable. That is done by exposing the rationale behind it. There is a trade-off between certainty and ambition. Rules which are clear and accepted will inevitably be limited in their capacity to create change. The EU, however, aspires to change Europe. Yet at the same time, it does not want to destroy the individuality of national legal systems or institutions. To reconcile these goals it is necessary to admit both ex ante and ex post assessments of the working and effect of EU law. The challenge is then to get states to accept the risks of ex post assessment, and that challenge is met by making it as reasoned and transparent as possible, and involving national courts as much as possible, so that the possibility of setting aside EU law after a reasoned judicial process becomes an integral part of its legitimacy, and also of its own goal of reconciling unity and diversity.

Conclusion

Accepting limits is part of legal maturity. EU law should not just recognise the lines drawn by doctrines of human rights and attribution, but also those resulting from the legitimate desire of communities to define their own life circumstances. If that means EU policies must sometimes make concessions, so be it: EU law has goals, but so do Member States, and EU law has no monopoly of legitimacy.

An inability to compromise is usually fatal to relationships. The practical importance of taking proportionality seriously can be summed up without resort to pluralism: it makes the EU reasonable, and as such makes it a polity with which national law can work towards the shared goals of a better European society.