Plurality of Theories and Differences

An essay on Constitutional Pluralism in the EU - In the eye of the storm

Emil Danielsson Nykänen
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# Abbreviations

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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>EU</td>
<td>European Union</td>
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<td>FCC</td>
<td>German Federal Constitutional Court</td>
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<td>OMT</td>
<td>Outright Monetary Transactions</td>
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<td>TEU</td>
<td>The Treaty on the European Union</td>
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1 Introduction

Jean-Claude Juncker said in his state of the union speech 12 September 2018: ‘We need to be very clear on one point: judgements from the Court of Justice must be respected and implemented. The European Union is a community of law. Respecting the rule of law and abiding by Court decisions are not optional.’\(^1\) Here Juncker is referring to the Polish violation of the rule of law\(^2\) and the sentiment was very clear. The European Union (EU) requires Member States to adhere to the judgements of the Court of Justice of the European Union (CJEU). The history of Member States’ obligation to follow judgements delivered by the CJEU is extensive and stretches far back into the early days of the EU.\(^3\) However, the discussion of this non-adherence to CJEU judgements is not entirely new.\(^4\) One of the most notable examples of this is the *Maastricht Decision*.\(^5\) Wherein the Federal Constitutional Court of Germany (FCC) claimed authority to review EU law in order to ensure that the EU did not act *ultra vires* in regards to the EU’s competence or the CJEU’s jurisdiction.\(^6\) The FCC’s legal basis to review EU law and CJEU case law is based on uncertain reasoning as the CJEU case law does not allow for national courts to review EU law.\(^7\)

The *Maastricht Decision* and the FCC finding, on its own competence, to review the validity of EU law sent shockwaves through academia and with it, the movement of constitutional pluralism was born.\(^8\) The *Maastricht Decision* can be viewed as creating an issue of final authority in interpreting EU law. Prior to the *Maastricht Decision* there was a general consensus that Member States could not review EU law. The proponents of constitutional pluralism altered the perspective of this issue. Most adhering to constitutional pluralism believes that there is no longer a single final authority that can act as the sole interpreter of EU law. Instead, the most basic notion all supporters of constitutional pluralism unite under is the banner of heterarchy in

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1 Juncker, Juncker’s full 2018 State of the Union speech, 47:54-48:25 [https://www.youtube.com/watch?v=CPa7-Wi3uE].
2 See Order of the President of the Court of 15 November 2018, Case C-619/18.
3 See for example, Case 6/64 Flaminio Costa v E.N.E.L (hereinafter Costa v. ENEL).
6 Maastricht Decision, para 22.
7 See below in section 1.4.
the EU: the belief that the EU’s legal apparatus with the CJEU and Member States’ courts are no longer organised in a monistic way, as a pyramid, with the CJEU as the final interpreter of EU law. Instead the followers of constitutional pluralism propose a view of the EU where the CJEU and the Member States’ supreme and constitutional courts are equal in interpreting and developing the EU law and where treaties\(^9\) and Member States’ constitutions are considered equal. \(^10\) Their visions usually entail mutual understanding, showing restraint when faced with potential constitutional conflict and for the CJEU and Member States’ supreme or constitutional courts to accept a shared jurisdiction in matters concerning EU law and national constitutional law.\(^11\)

Constitutional pluralism might seem an attractive solution to the legal conundrum that arose due to the *Maastricht Decision*. However, since the field’s genesis additional proponents have caused a divide in what constitutional pluralism is, what should be solved and how to solve it. This has become severe to the point of risking the entire field’s credibility. MacCormick was the first to develop a theory of constitutional pluralism in his article *Beyond the Sovereign State*\(^12\) which quickly developed into multiple theories as more rallied under the pluralism banner.\(^13\) These proponents almost all have their own theory of constitutional pluralism they adhere to. Further, the authors of these theories rarely engage with theories by the other supporters of constitutional pluralism. The result is that instead of having one single theory with slight variations there are instead a multitude of theories that in turn lead to multiple different solutions, all claiming to be part of the constitutional pluralism fold. This raises the question of what constitutional pluralism is and what its goal is, if there is even one to be found.\(^14\)

### 1.1 Purpose

The purpose of this essay is to critically analyse the field of constitutional pluralism regarding the field’s internal coherence. The purpose is further specified by the following questions:

- Is there a definition of constitutional pluralism readily available?

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\(^9\) For explanation of this abbreviation see section 1.3 below.


\(^12\) MacCormick, 1993.


\(^14\) See section 6 below. See also Sarmiento 2015, p. 113.
What are some of the different theories and their features as stated in the academic writings? How can the different theories on constitutional pluralism be categorised? How do the theories in the same categorisations compare with each other?

1.2 Limitations

Klemen Jaklic claims that Joseph Weiler is an advocate of constitutional pluralism. I have, however, chosen not to include Weiler in this essay for two reasons. Firstly, he has not written an article developing his theory or claimed that he supports constitutional pluralism. Secondly, Weiler suggests that the solution posed by the *Maastricht Decision* can be solved by creating another EU body which he would call ‘Constitutional Council for the Community’. It would be an EU organ that would adjudicate disputes regarding competence and jurisdiction between the Member States and the CJEU. The CJEU would be unable to overrule its decisions. The council would be composed of judges from Member States’ supreme and constitutional courts. Member States, the Commission, the Council and the European Parliament could all make use of this council. Acting by a majority, the different Member States, courts and EU institutions could refer provisional legislation or an issue to be solved by a court to the council. The council would decide whether competence to rule or legislate on the matter at hand would be at the Union or the Member States. I agree with Miguel Maduro who suggests that this would maintain a monist view of the EU that is contrary to the heterarchical model common to the supporters of constitutional pluralism.

Further below I will describe Klemen Jaklic’s theory of constitutional pluralism. Jaklic, however, bases his theory on the writings of Joseph Weiler. I will therefore describe how Jaklic interprets Weiler’s works and what Jaklic considers Weiler’s theory to be. In doing this I will refrain from analysing or comparing Weiler’s theory with the other theories described in this essay, but rather use it only as a foundation to describe Jaklic’s theory.

I have further decided not to include Neil Walker’s definition of constitutional pluralism in section 2 below. Admittedly, Walker outright defines constitutional pluralism, however, I am more interested to include the definitions of Maduro, Jaklic and Sarmiento as they are attempting to define constitutional pluralism later than Walker is, who defines constitutional

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16 Weiler, 1997, p. 29.
17 See Maduro, 2003, pp. 531-532.
pluralism in 2003, when the field of study might still be in its early state.\textsuperscript{18} In contrast, Maduro’s, Jaklic’s and Sarmiento’s definitions were stated in 2008, 2014 and 2015 respectively. It is my hope that the field will have matured to the point where these definitions accurately represent the entire field of constitutional pluralism. Due to the complexity of the current analysis in section 2.2 I have decided to leave Walker out of the discussion as his inclusion would complicate the matter and I believe the contribution of including his definition would be limited.

Matej Avbelj and Jan Komárek have written a book on the subject called ‘Constitutional Pluralism in the European Union and Beyond’. Due to my inability to acquire this book it will go unmentioned in this essay.

\section*{1.3 Method and material}
The method used throughout this essay can be divided into three aspects. Firstly, what the EU law is as stated in The Treaty on the European Union (TEU) and Treaty on the Function of the European Union (TFEU) (both will henceforth be abbreviated to treaties) and interpreted by the CJEU. Secondly, the description and categorisations of the theories on constitutional pluralism. Lastly the method according to how the theories on constitutional pluralism have been analysed and compared will be explained below.

\subsection*{1.3.1 Selection of theories}
As the purpose requires a selection of theories, I have had to choose which ones to include in this essay. My selection is consisting of different theories and instead of naming them I will name the authors who have developed their own theory in case some theories being unnamed. These authors are Neil MacCormick, Mattias Kumm, Massimo La Torre, Neil Walker, Miguel Poiares Maduro, Nicholas Barber, Florence Giorgi and Nicholas Triart, Klemen Jaklic and Ana Bobić.

The theories developed by the authors mentioned above have been chosen in an attempt to achieve the most accurate representation of the entire field of constitutional pluralism. In the selection I have taken care to choose theories from different time periods evenly spread between the earliest author, MacCormick who began writing in 1993 – to the most recent - Ana Bobić.

\textsuperscript{18} Walker, 2003, p. 4.
whose last contribution to the field of study is in 2018. The theories must also, in literal wording, propose that there is to be no hierarchically superior authority tasked with interpreting EU law. These requirements are very inclusive as most theories would fit into them. That is according to the purpose which is to critically analyse the field of constitutional pluralism. I have not purposefully chosen theories differing from each other, but rather I have chosen theories almost arbitrarily, save for the vague criteria mentioned above. Surely, there are further theories that could have been included, perhaps one proposed by Matej Avbelj and Jan Komárek in their book ‘Constitutional pluralism in the European Union and beyond’. Due to practical reasons all theories cannot be included in an essay such as this, and therefore I chose the cut-off point at nine theories. I believe this to suffice. Had I chosen fewer theories and there seemed to be other theories comparable to a main branch of constitutional pluralism that would have had a negative outcome on the result of this essay. As it stands, however, few theories other than the ones chosen in this essay are referenced by these nine authors which makes me confident in that I have not overlooked including a significant theory in this essay.

1.3.2 Method regarding EU law

As the purpose of this essay is not to conclude what EU law is, little attention is given to it throughout. However, to properly grasp the issue that arose due to the Maastricht Decision and initiated constitutional pluralism, background information of the EU law prior to it is required. EU law necessary for the purpose of this essay is EU law that describes how the Maastricht Decision contrasted with the then current EU legal order. No detailed rendition of the Maastricht Decision will be given and only what is considered vital according to the constitutional pluralists themselves will be described. In other words, to determine what EU law is to be accounted for, it is required to determine why the Maastricht Decision was such a serious event. EU law that is relevant to the accentuating the severity of the Maastricht Decision will be described but not analysed. This purposefully ignores topics such as EU’s de facto status as a new international legal order and its position compared to the Member States that was raised in, for example, Van Gend & Loos.19 It suffices to state what the law is in the EU and what issue arose from the Maastricht Decision.

EU law relevant to the purpose of this essay are the treaties and CJEU case law. As the treaties are the foundation of EU law these are the most important sources used to determine what EU

19 Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, p. 12.
law is, according to art. 1(3) TEU. Further, the CJEU are tasked with ensuring that the interpretation and application of law in the EU according to art. 19(1) TEU. We can therefore conclude that CJEU case law is necessary to the application of EU law. Suggested by the name, constitutional pluralism regard mainly matters of constitutional nature and there is therefore no need to engage with, for example, secondary law. These remaining sources of EU law such as those mentioned in art. 288 TFEU will be unnecessary to fulfil the purpose of this essay and will therefore not be included.

Regarding the question of describing EU law and its development after the Maastricht Decision. This will not be done as the purpose is not to compare the theories of constitutional pluralism to current EU law. The rendition of EU law is simply only to put the Maastricht Decision into context and describe what initiated the field of constitutional pluralism.

Certain authors of constitutional pluralism will describe and use EU law in the development of their theory. Such EU law will be explained if it serves to understand the relevant theory. I will not be pointing out when a feature of a theory is in accordance with, or contrary to, EU law.

1.3.3 Method regarding constitutional pluralism

The purpose of this essay is to critically analyse constitutional pluralism regarding its internal coherence, to try to find a readily available definition of constitutional pluralism, explain some of these theories, and compare them.

Internal coherence is at its core a measurement of consistency. Internal coherence does not require flat out agreement on every point, rather, it serves to scrutinise the different aspects of one or multiple foundational concepts. Constitutional pluralism’s foundational concept is a heterarchical model, and the internal coherence surrounding that will be investigated.

To achieve the purpose of this essay only the internal aspect of the field of constitutional pluralism will be analysed. The focus is therefore to study the different theories and analyse their substantial content and compare these features to features of other theories of constitutional pluralism. The different theories of constitutional pluralism will be analysed and compared to accentuate their similarities and differences. Of most relevance is to study the similarities and differences between the theories in order to fulfil the purpose as this will reveal the internal coherence, or lack thereof. This internal coherence will further be sought after in
how the authors conduct themselves regarding other theories. I will investigate whether the different authors of these theories take other authors work into consideration when writing their own theories. That is, whether the authors of the different theories are conducting themselves in a way that can be considered to mitigate the differences between the multitude of theories. Proponents attempting to compare their own theory’s features to another theory’s is of most importance as this will accentuate their perceived difference or similarity between the different theories. Likewise, attempts to agree on a definition of constitutional pluralism will be sought after due to it signifying a common foundation. The purpose of this is, again, in order to find internal coherence within constitutional pluralism.

As constitutional pluralism consists of several theories, it would be beneficial to judge the theories from a common definition. To serve the purpose of this essay I will be attempting to find one readily available definition of constitutional pluralism. Most obviously would be to find a definition in plain text that is mostly agreed upon. As will be shown, there is no definition explicitly spelled out and agreed upon. To investigate if there is a definition that is inexplicitly agreed upon, I will instead compare the authors ways of categorising different theories of constitutional pluralism.

In other words, I will conduct three tasks. Firstly, I will see if there are any clearly stated definitions of constitutional pluralism, or if there is only one. Secondly, I will try to see if there are any categorisations of constitutional pluralism. Lastly, I will compare the different authors categorisations and definitions to see if they, even though the wording differs, mean the same in practice. Naturally, more effort could be put towards finding a definition of constitutional pluralism however the purpose is not to find one unless it can be easily discovered.

Beyond finding a definition of constitutional pluralism I will critically analyse the theories regarding their internal coherence. In this task it is necessary to understand what the theories entail and what the theories are attempting to achieve. Every theories’ function will be described by examining its goals, method, proposed solutions and implementation.

As mentioned in the purpose above, I will show how the different theories on constitutional pluralism can be categorised. To achieve this, I will develop my own categorisations which I will apply to the different theories. The way in which the theories are categorised are not exhaustive, that means some theories in this essay will fit in more than one category. However,
I do not include the theory in every category it fits in as I do not believe this will strengthen my conclusion. Likewise, all theories will not be compared with every other theory. Only those within the same category will be compared for the same reasons as why not every theory is categorised in every possible category.

The categorisations that I have created are admittedly only categorising one aspect of every theory. It would therefore not be possible to fit all theories into every category as some theories simply do not contain a feature that is being categorised. One could argue that these categories are arbitrary or redundant as they are not universal or applicable to all theories. I believe, instead, that the categorisations benefit from being only in one aspect without claiming to be the ends all solution. This is, again, to showcase the internal coherence by accentuating similarities and differences.

I will not compare the theories on the same side in the categories, for example, Kumm’s and Maduro’s theories will not be compared with each other. The reluctance to compare the theories within the same side as each other stem from the fact that their difference are not related to the categories. The categories will provide the basis for analysis and comparison and in detail comparing all theories with each other would not serve the purpose of this essay to the same extent as comparing the differences accentuated by the categorisations does.

1.3.3.1 The categorisation of legally dominant contra politically dominant theories

The first categorisation will be whether a theory is legally dominant or politically dominant. A theory is classified as being legally or politically dominant depending on how issues are primarily solved according to the theory.

If a theory is legally dominant it means that it primarily depends on the courts within the EU, both Member States’ courts and the CJEU to solve issues that might arise between the Member States and the EU. What matter is not how the issue is solved, which courts have the last say or if the issue is solved by discourse between the courts and so on. What is important is that the theory focuses primarily on the courts being those tasked to solve the issue and political or other

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20 See section 3.2 below.
intervention being secondary. To apply the term ‘legally dominant’ does not suggest that the theory shuns all other methods of solution.

Politically dominant theories are harder to define. It presupposes that the judiciaries assume a secondary role in the process of solving constitutional issues. Certainly, it is easier to determine what theories are legally dominant and then negatively define politically dominant theories as those that are not legally dominant. The legally dominant theories primarily engage the judiciaries and the courts concerned are in every case, save for Jaklic’s theory, the CJEU and national supreme or constitutional courts. As an example, a theory that employs more democratic choices such as increased amounts of referendums can therefore be deemed politically dominant. However, if this is only a small part of the theory and the bulk of the theory concerns changes to the judiciary it can be legally dominant. Further, nearly all theories touch upon changes or suggestions to the judiciary. For some theories this is not the focus at all and so that theory can still suggest changes to the judiciary without being considered legally dominant. Defining politically dominant theories negatively is therefore to be preferred. It follows that there needs to be a definition of what a legally dominant theory is. A few questions can be asked in order to determine whether if a theory is legally dominant: Can the majority or the entire theory be implemented by judiciary conduct? Is the theory directly focused on imposing rules on the judiciaries? Does the theory almost entirely touch upon the CJEU and national supreme or constitutional courts? If the answer to all these questions are ‘yes’, or is unknown, the theory is legally dominant. The rest of the theories are politically dominant. The questions may seem to provide for unspecified amounts of wiggle room to fit anything into a legally dominant theory. However, in this essay there is no issue on determining which theories are legally dominant and which are politically dominant and as such these criteria suffice.

This categorisation creates great potential to determine the internal coherence of constitutional pluralism. Concerning the name ‘politically dominant’ I chose the word political as a joint term. Most things can probably be considered political, surely, even law and changes to the judiciaries can to some extent be considered political changes. However, rather than specifying legal theories and dubbing its opposing side the ‘other’ theories, I chose the term political theories.

1.3.3.2 Method categorising theories based on H.L.A. Harts rule of recognition

Prior to describing the categorisation, I will briefly describe what H.L.A. Harts rule of recognition is in brief. Hart describes his rule of recognition as something that specifies what is
to be considered a rule in a certain group. It may assume multiple shapes. A rule of recognition can be a list of what laws should be valid in a society as was probably common in very early civilisations. The rule of recognition can be more complex as to require, among other things, for rules to possess a common feature such as being enacted by a parliament.  

This categorisation is included to provide basis for the discussion on constitutional pluralism’s internal coherence. I will primarily see to how the rule of recognition function in the different theories. This will provide the basis for analysis and comparison. As to fulfil the purpose of the essay the theories will be described beyond how the rule of recognition function.

1.3.3.3 Method categorising theories proposing different inter-court relationships

Like the previous two categorisations this categorisation is to provide a basis for analysis regarding the internal coherence of constitutional pluralism. One the one hand there are the theories proposing that courts discourse should be characterised by mutual understanding, that for example national courts cannot deny the CJEU’s jurisdiction, that judgements must fit in all legal orders, Member States and EU and so on. On the other side there are the theories embracing how some courts withhold ultimate authority for themselves and deliver judgements incompatible with other legal orders.

I call the different categorisations of theories either ‘theories requiring compatible wording’ or ‘theories not requiring compatible wording’. This stems from certain theories requiring that judgements regarding constitutionality in the EU are compatible with each other. For example, the FCC cannot deliver a ruling where they claim to be the final authority of German constitutional law as this may sometimes involve EU law and the CJEU should be equal the FCC in that sense. These theories require compatible wording as judgements must be formally legal both in the Member States and in the EU.

Theories not requiring compatible wording allow, for example, the FCC to make assertions that they are the ultimate authority of German constitutional law even though this infringes on the CJEU’s competence according to the treaties.

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23 See for example Bobić, 2017.
1.4 Background

The saga of constitutional pluralism are thought to begin with the FCC’s, so called, *Maastricht Decision*.\(^{24}\) In it, the FCC concluded that the Maastricht Treaty was compatible with the German Constitution but also that the German Courts would disapply EU law if the EU were to act *ultra vires*, beyond the principle of conferral enriched in art. 5 TEU.\(^{25}\) The *Kompetenz-Kompetenz*, the ability to extend one’s own competence, of the EU was denied, meaning that the EU, or the CJEU, did not have authority to expand their own jurisdiction.\(^{26}\)

To begin grasping the severity of the *Maastricht Decision* a brief rendition of EU law and CJEU case law prior to it are warranted. This is sometimes referred to as the European or Union perspective.\(^{27}\) The CJEU does not possess any enforceable power in the Member States and as such is incapable of directly influencing the law on the national arena.\(^{28}\) Further, according to art. 19(1) TEU it is tasked with ensuring application of law in the EU. The CJEU has competence to rule when national courts refer questions to the CJEU on the interpretation or validity of EU law according to art. 267 TFEU.

In its effort to advance EU law, the CJEU has developed a principle of primacy which simply means that EU law is to be superior to national law.\(^{29}\) One of the first cases regarding this principle of primacy or principle of supremacy was *Costa v. ENEL* delivered by the CJEU in 1964.\(^{30}\) In it, the CJEU found that EU law is required to be hierarchically above national law for EU law to be applied evenly throughout the entire EU. If EU law could not override national law the legal basis of the EU would be called into question, the CJEU argued. The CJEU interpreted the law of the treaties and found that the principle of primacy was derivative of the treaties.\(^{31}\)

Later, in *Internationale Handelsgesellschaft* the issue whether the principle of primacy meant that EU law was above all national law, even constitutional law, was raised by a German


\(^{25}\) Germany formally has a Basic Law but for simplicity’s sake I will refer to it as constitutional law.


\(^{27}\) Schütze, 2016, p. 117. See also Payandeh, 2011.

\(^{28}\) Schütze, 2016, p. 377 and Arnulf, 2006 p. 95.

\(^{29}\) Schütze, 2016, p. 120.

\(^{30}\) Case 6/64 *Costa v. ENEL*.

\(^{31}\) Case 6/64 *Costa v. ENEL*, p. 594.
administrative court. The CJEU, with reasoning similar to that in Costa v. ENEL, argued that if EU law was not supreme to national law ‘however framed’, the legal basis of the EU would be called into question.

According to art. 267 TFEU the CJEU has the authority to interpret and rule on the validity of EU law and thus the CJEU is tasked with, and subsequently have been, developing the EU law. In the national sphere, the courts of the Member States apply the CJEU’s interpretations over national rules conflicting with EU law. After Costa v. ENEL and Internationale Handelsgesellschaft there were still uncertainties regarding how national legislation that were incompatible with EU law should be treated. This question arose in the case Simmenthal II. In Simmenthal II, the CJEU required national law conflicting with EU law to be disapplied and EU law applied in their stead rather than nullification of national law. Further, the CJEU has in the case Foto Frost declared that the CJEU alone possess the competence to nullify EU acts when the EU had acted beyond the principle of conferral in art. 5 TEU.

At the beginning of the 1990’s EU law was seemingly clear. The CJEU was supposed to develop EU law and disapply EU legislation that went beyond the principle of conferral in art. 5 TEU after the question had been raised by the courts of the Member States. The Member States’ courts were, as shown, supposed to request the CJEU to answer questions by requesting preliminary rulings regarding the application and interpretation of EU law. If the CJEU found that the act in question was beyond the principle of conferral the Member States’ courts could subsequently, with the approval of the CJEU, disapply that EU act.

The Maastricht Decision delivered by the FCC as mentioned above was not compatible with EU law as it had been interpreted by the CJEU and this in turn began the search for an explanation and a solution. One of these explanations or solutions developed into what is today called constitutional pluralism. The Maastricht Decision has in length been analysed by others.

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33 Internationale Handelsgesellschaft, para 3.
35 Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA (hereinafter Simmenthal II).
36 Case 106/77 Simmenthal II, para 21.
39 See note 8 above.
and will not be developed further here.\(^{40}\) For the purpose of this essay the reader needs to know little more than that the *Maastricht Decision* raised the issue of who was the final authority to interpret when the EU had gone beyond the principle of conferral or when the CJEU had acted beyond their jurisdiction.

A couple of months prior to the FCC delivering their ruling in the *Maastricht Decision* Neil MacCormick wrote an article on sovereignty which he later continued developing, thus creating his theory of constitutional pluralism.\(^{41}\) Klemen Jaklic consider MacCormick to be the catalyst that initiated the constitutional pluralistic movement and not the *Maastricht Decision*.\(^{42}\) Regardless of who came first, MacCormick’s article did not really establish a foundation that other theorists expanded upon, as will be shown below. Instead the movement branched out in different directions. However, the theories do share some common traits. They equalise treaties with the Member States’ constitutional laws. What is described are often that the treaties are heterarchically equal to Member States’ constitutions. This is coupled with the belief that the CJEU is not hierarchically superior to the Member States’ supreme or constitutional courts.\(^{43}\)

The potential issue introduced by the *Maastricht Decision* is that of lacking uniformity in the application of EU law. In this regard there are two aspects that need to be taken into consideration. Perhaps the most obvious is that there is a risk for the uniformity of EU law application between different Member States. The other aspect and perhaps less obvious is that there is a risk of uneven EU law application within the Member State itself. If the CJEU and a national supreme or constitutional court have given inconsistent rulings, how should national courts rule? The fact that the *Maastricht Decision* was delivered in 1993 does not make the issue any less relevant. Rather, more cases like these have been delivered implying that the issue is not part of the past.\(^{44}\)

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\(^{44}\) See Payandeh, 2011 and Neergard and Engsig Sørensen, 2017.
2 Defining constitutional pluralism

As mentioned above, constitutional pluralism has few characteristics that are common throughout the entire field. The notion that Member States’ supreme and constitutional courts share the CJEU’s responsibility to review and interpret EU law is one. Another similarity is, like the name constitutional pluralism suggests, that there is a plurality of constitutional sources that these courts must consider.45

Subject of this section are writings and words of Miguel Poiares Maduro, Klemen Jaklic and Daniel Sarmiento. By analysing what these authors have stated regarding their method of characterising, categorising and attempting to define constitutional pluralism a common definition will be sought. With a common definition of constitutional pluralism, a proper understanding of what constitutional pluralism is, in an internal aspect, may be more easily concluded.

2.1 The different authors attempt of categorisation

Miguel Maduro gives his definition of the whole movement of constitutional pluralism. It reads: ‘[Constitutional pluralism] refers to a pluralism of constitutional jurisdictions. Those equally valid normatively constitutional claims are now supported or developed by different jurisdictions. That is a new dimension of the constitutional pluralism which, however, is inherent in constitutionalism itself.’46

Maduro believes there are characteristics common for the entire field of constitutional pluralism. Some notable ones will be mentioned here. The first is the fact that there is a plurality of constitutional sources. Another is that there can be a pluralism of jurisdictions or of different constitutional sites. Maduro suggests that the CJEU and the national constitutional and supreme courts share jurisdiction in certain areas. A third is a plurality of interpretations, that different institutions not clearly defined into a hierarchical relationship can reach different conclusions when interpreting the same sources. The last characteristic are multiple, potentially different, political views of one constitution. These views are held by communities who are expressing different views of self-determination.47

45 See note 9 above.
Daniel Sarmiento does not attempt to define constitutional pluralism. Instead he explains the three categories that he applies to the different theories. Sarmiento categorises the different theories from the perspective of the relationship between the CJEU and the Member States’ courts. His first category encapsulates theories in which the strength of the legal argument is the most important in constitutional conflicts. For example, theories proposing that the *Maastricht Decision* should be questioned due to the quality of arguments used by the FCC fit in this category. A second branch, Sarmiento writes, seeks to find coherence between on the one hand judgements like the *Maastricht Decision* and, on the other hand EU’s claim to supremacy over national law. This categorisation tries to explain the discrepancies between judgements such as the *Maastricht Decision* and CJEU case law as differences in wording and not in reality. The last branch, Sarmiento explains, embraces the tensions created by judgements such as the *Maastricht Decision* claiming that this is what gives EU its legitimacy.\(^{48}\)

Like Sarmiento, Jaklic does not define constitutional pluralism outright in a single definition. Jaklic categorises the different theories of constitutional pluralism in an attempt to explain their differences. Jaklic’s categorisation consists of 4 discourses, or categorisations.\(^{49}\) Jaklic calls his categories *who, how, what* and *foundational discourse*. The first discourse Jaklic writes about, the one of *who*, determines who possess authority to make a final decision in a dispute, either an EU institution or the Member States. The who is thus supposed to answer the question ‘who decides who decides?’ The second discourse, *how*, is to determine the method of how the issue should be solved. This method would then provide rules for the who on how to make their decision. The third discourse would then be the discourse of *what*, the substantive content of the decision that must be made according to the rules of how and by the person determined by the who. The last discourse concerns only theoretical movements that are not yet concrete enough to be categorised into the other discourses and will therefore will not be developed here.\(^{50}\) These four discourses are supposed to be used as a mental frame when reading the different theories on constitutional pluralism.\(^{51}\)

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\(^{48}\) Sarmiento, 2015, pp. 112-113.

\(^{49}\) Jaklic calls his categorisations for discourses but for simplicities sake I will call them categorisations as that is their function. Different theories can all be categorised through his four categories.

\(^{50}\) Jaklic, 2014, pp. 11-12.

\(^{51}\) Jaklic, 2014, pp. 11-12.
Despite Jaklic not defining what constitutional pluralism is the following quote most closely resemble his definition: ‘With its cluster of sound, substantive building blocks the full-blown substantive pluralism at the same time also represents the sound pluralist meta-constitution that binds constitution makers and constitutional judiciary, as well as all policy makers at other levels of governance, be it nation-state or European. The sound meta-blocks are thus also very concrete constitutional standards that shape everyday public decision-making.’

2.2 Analysis on definitions and divisions of constitutional pluralism

While Maduro defines constitutional pluralism outright that is not the case with Sarmiento. In his discussion Sarmiento focuses on the relationship between the CJEU and national supreme or constitutional courts. This in turn can aid in discovering how Sarmiento would define constitutional pluralism. Sarmiento bases his categories on the relationship between the CJEU and the national supreme and constitutional courts.

Observing this difference from Maduro’s point of view; Miguel Maduro includes in his characteristics of constitutional pluralism the plurality of constitutional sources, most likely referring to the relationship of the constitutional sources in the EU and Member States. Maduro therefore goes beyond Sarmiento as Maduro’s characteristics are outside the realm of judiciaries. Sarmiento’s categorisations are therefore compatible with Maduro’s definition and categorisations as Sarmiento only speaks of the relationship between of courts such as the FCC and CJEU. In turn, Maduro means that a plurality of sources is a characteristic of constitutional pluralism and there is no evidence to support that Sarmiento also holds this view. Based on this I argue that Sarmiento defines constitutional pluralism more narrowly than Miguel Maduro.

Before comparing Maduro’s writings to Jaklic’s it is necessary to understand how Jaklic’s own categories fit inside his definition of constitutional pluralism. Surely, Jaklic’s definition is almost incomprehensible unless the reader is well versed with his theory in detail. Therefore, what Jaklic means will be explained here. Jaklic’s definition are, in a very abstract way, compatible with his three first categorisations.

As will be further explained below, Jaklic believes that the category of who, that is, who decides in situations when constitutional conflict arises, is answered by every person representing the

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EU or the nation state, and in a way even its citizens. Jaklic’s definition therefore regards every person representing the state or the EU as being a part of it. The category of how, how decisions should be made, requires decisionmakers to consider the plurality of the situation and view their decision from more perspectives than their own. The last category is the what. It determines what substantive content the decisions should contain. Jaklic means that every decision should be enriched with his ultimate three goods of democracy. One of these goods are for example the right for every person to self-determination. For example, when the FCC rules in a case they must consider the EU’s legal framework and all other Member States’ legal framework when ruling. As the FCC does this, they still cannot judge in a way that would deprive single individuals of their right to self-determination. The fact that the FCC must consider the self-determination of individuals is the soundness of Jaklic’s theory, which is reflected by the word ‘sound’ in his makeshift definition above.53 We can therefore conclude that the first three of Jaklic’s categories fit with his definition of constitutional pluralism, even if an explanation of it is lacking currently.

With a basic understanding of Jaklic’s definition and categorisations we can compare this to Maduro’s characteristics and definitions. As I mentioned above, Maduro’s characteristics include a plurality of legal sources, multiple jurisdictions without a hierarchical order and a plurality of interpretations. The linguistic difference between Maduro’s and Jaklic’s writings are apparent, however comparing the substantive outcome of the definitions may prove more revealing.

Jaklic categorisations seem to go further than Maduro’s characteristics regarding its scope, however it is not completely discernible. For example, Jaklic’s category of who leaves it to every person representing the state or EU to adhere to his theory of constitutional pluralism. In turn, how can this be compared with Maduro’s characteristic ‘plurality of jurisdictions’? It is very difficult to reach any decisive conclusions simply from the wording. Similar results are yielded when comparing the other categories and characteristics. Defining the scope of Maduro’s characterisations ‘plurality of interpretations’ simply from the wording is impossible. In turn, Jaklic suggests that, according to his what, that every interpretation is possible if it upholds the soundness of his theory of constitutional pluralism. With his how he states that those defined in the who shall take every other actor that could be relevant into consideration,

53 For Jaklic’s definition see section 2.2 above. For a full rendition of Jaklic’s theory see section 5.2.2 below.
naturally allowing for a plurality of views while simultaneously attempting to mitigate these. The inconclusiveness is apparent; however, one could argue that in some senses Jaklic’s categorisations show that his categorisations of constitutional pluralism is more inclusive than Maduro’s characteristics who does not seem to include every official representing a member state or the EU. In other words, Maduro’s characteristics seem to be narrower than Jaklic’s categories regarding who is to follow the different theories of constitutional pluralism.

The notion that Maduro’s definition is narrower than Jaklic’s is reinforced upon comparing their definitions of constitutional pluralism, yet some uncertainties remain. Initially, Maduro’s definition seems grounded to some sort of constitutional or legal issue. Jaklic’s definition on the other hand seem to go beyond and suggest that it is to be upheld by every person from the legislator, to everyone working in the judiciary and even those working in a state authority making decisions in the name of the EU or the Member State. Further, Jaklic mentions ‘the soundness’ in his definition meaning that certain democratic values must be upheld. Maduro does not outright include either every state or EU employee nor any requirement of soundness like Jaklic does. In other words, Jaklic’s theory include more actors than Maduro’s. However, Maduro’s theory does not restrict those tasked with upholding his theory to decide in a certain manner, upholding some basic values like Jaklic’s definition requires.

As the purpose of this essay is to investigate whether readily available definition of constitutional pluralism exist, I must conclude here that there is none. Sarmiento, Maduro and Jaklic all seem to define constitutional pluralism differently. Sarmiento most narrowly in that he is including only the CJEU and Member States’ supreme or constitutional courts. Maduro and Jaklic do not completely agree on what shall be included in a definition of constitutional pluralism, each of them making being narrower in some sense. Maduro does not seem to include every state or EU representative and Jaklic’s theory include a pre-determined set of conditions that cannot be violated in decisions concerning those tasked to uphold the theories of constitutional pluralism.
3 Theories proposing legally or politically dominant solutions

3.1 Politically dominant solutions

3.1.1 Neil Walker

The main inspiration for Neil Walker to engage in the field of constitutional pluralism is to answer criticism of constitutionality. Walker writes that the fact that constitutions have been under an array of critical assessments which led to him developing his theory of constitutional pluralism.54

In order to understand the issues Walker is seeking to solve I will outline the criticisms towards constitutionality. Walker believes the criticisms directed towards constitutionality portray constitutions as an instrument or method unable to solve today’s issues. He describes that some believe that constitutions were great solutions in the past but now they are insufficient in keeping up with the quick societal changes. The criticism, Walker explains, seeks to show how constitutions are unable to cater to an entire society but rather chooses a few privileged actors to protect. This protected group is chosen simply due to their majority and those on the fringes would be marginalised. Moreover, constitutions are claimed, by some according to Walker, to be used for provisions that does not require a constitutional garment only to increase their perceived importance. Simultaneously voices of concern have been raised against using the constitution as an instrument in order to solve too many issues. Walker mean that some believe there exist a constitutional fetishism. This leads to regulations of subjects in constitutional provisions that shouldn’t be regulated constitutionally.55

The solution Walker proposes in his theory of constitutional pluralism is to coin the constitutional site as the new holder of constitutionality.56 This entails states are no longer the sole holders of constitutionality, but now also entities fulfilling some normative criteria can too be holders of constitutionality. These criteria, Walker explains, on the one hand let other entities than states become a constitutional site. They also, on the other hand, serve to make it possible to distinguish states from non-state entities.57

56 Walker, 2003, p. 4.
To fulfil the purpose of this essay it is necessary to show how Walker’s theory is to work. It will allow for his theory to be analysed and compared with others’ theories. The core of understanding Walker’s theory is understanding what constitutes a constitutional site.

The criteria a constitutional site must fulfil are further divided into 3 sub-categories and these are as follows: two constitutive criteria, three governance criteria and two societal criteria. The two constitutive criteria require firstly, an internal constitutional self-consciousness and secondly, whether the site can be considered to claim to possess legal authority or sovereignty.58

The three governance criteria are setting up boundaries of the governance including where the site’s jurisdiction and competences ends. If there is an organ in the site making sure to uphold this boundary and whether there is a constitutional document providing guidance on how the site shall be governed.59

The last two societal criteria concern the members, or citizens, of the site. There needs to be a term to define who are citizens of the site and what their rights and obligations are. There also needs to be a mechanism to register the opinions of the citizens, but it must not necessarily be democratic.60

Walker believes that these constitutional sites can only realistically function if these seven criteria are upheld. Walker believes that suggestions such as his must maintain historical, normative and cultural continuity. It would be impossible for his theory to work without a sense of continuous development from previous concepts of governance. The seven criteria allow his theory of constitutional pluralism to maintain this necessary historical and normative continuity.61 However, Walker believes that this continuity is not enough for his theory of constitutional pluralism to remain attractive. To solve this, he develops another six criteria of renewal that the site must fulfil or uphold.62

Only the fifth of these criteria of renewal will be mentioned due to its importance in the functioning of Walker’s theory. This fifth criteria requires that the different constitutional sites

cannot be exclusive of other constitutional sites that also fulfil the seven criteria. The constitutional site can remain sceptic vis-à-vis other sites as blind acceptance would not be preferable, Walker suggests, but they cannot completely deny the authority of sites that fulfil all the criteria. Differently organised constitutional sites may very well exist these should be considered equal. Walker claims that this conception is axiomatic and thus should be accepted as true. The equal authority between constitutional sites would lead to a heterarchical legal order rather than a hierarchical one where there is one final authority over all others.

Regarding practical long-term effects derivative of his theory Walker remains uncertain and cannot foresee all of them. However, some consequences can be foreseen through implementation of Walker’s theory. Walker believes his theory of constitutional pluralism could allow constitutional sites to ‘both focus on a clearer and more coherent framework of governance and avoid placing too many matters beyond the reach of ongoing political engagement and contestation in the federal domain.’ This would, according to Walker, lead to more issues being resolved nationally at the same time as politics on higher federal levels would be assured.

Another effect according to Walker would be an increase in popular democratic choices on how to affect the world. As new different constitutional sites appear people within that constitutional site would be required to make decisions ‘both nationally and supranationally’.

At a judicial level Walker believes there might be two consequences of his theory of constitutional pluralism. As it would require drafting of a constitutional instrument on the supranational level, the EU in the European case, it would be possible to thoroughly investigate the supranational entity’s jurisdictional limit. Secondly, Walker believes that if there is a national and a supranational constitution that would govern overlapping areas and people, both systems would have an equal chance to accept the other’s systems stance and allow for better collaboration between their shared members, who might favour one system over the other.

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3.2 Legally dominant solutions

3.2.1 Mattias Kumm

In the introduction to the article *Who is the final arbiter of constitutionality in Europe*, Kumm summarises what his theory regards: ‘This article examines whether and to what extent national courts may subject secondary EC law to constitutional review.’ Kumm’s theory focuses on solving issues when there is a normative conflict between the CJEU and national supreme or constitutional court. His theory require courts to balance three potentially conflicting principles. In so doing all three principles are to be given as much weight as possible, in each case of constitutional overlap between the CJEU and the Member States’ supreme or constitutional courts. Kumm calls these principles the *principle of constitutional fit*, the *principle of expanding the rule of law* and the *principle of Liberal-Democratic governance*.

The *principle of constitutional fit* entail that in case of a constitutional conflict the ruling judges must look to both their own constitution and the constitution of the other party in order to rule in way that is legal, according to both constitutions. Simply put, it means that case law that is created must be applicable to those constitutions it concerns.

In his *principle of expanding the rule of law* Kumm takes inspiration from the CJEU monist position. Although believing that Member States’ supreme or constitutional courts shall be able to review EU law, Kumm admits that if everyone followed the EU law without questioning it there would be more unity between Member States. The principle is to be used to ensure that EU law is applied the same throughout the entire EU. It means that national courts must ensure that when they rule, their judgements are ‘justified to the European community as a whole’.

The final principle, the *principle of Liberal-Democratic governance* serves to ensure the highest level of democratic legitimacy and fundamental rights on every level of governance, in every system. This principle is supposed to protect individuals against violations of their fundamental freedoms and democratic rights that may arise due to EU legislation. In practice it means that

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the national courts are bound by their constitutions and if the EU creates law that is contradictory to a Member State’s constitution the national courts have jurisdiction to uphold their national constitutional provisions.\textsuperscript{76}

On the topic of democratic legitimacy Kumm finds two arguments against constitutional pluralism. The first is a positive argument, Member States democratic development is sophisticated and therefore it is worth defending national constitutions against violations from the EU. The second argument is negative, if laws in the EU are enacted without sufficient democratic legitimacy, they should not prevail over national constitutions. Kumm goes on to explains that there are two possible issues arising from these arguments. The first being that the EU may introduce law that is contradictory to a Member State’s fundamental constitutional provisions. The other is that the EU may create law in an area without the adherence to the principle of conferral. This leads Kumm to the insight that there is a balancing act between the protection of democracy by the Member States versus upholding the rule of law through supremacy of the EU.\textsuperscript{77} Kumm, seeking to find balance, argues that the Member States should be able to review EU law.\textsuperscript{78}

To prevent arbitrary review of EU law, Kumm proposes a two-step test to determine when national courts have jurisdiction to review EU law. The first step is to determine an EU law violation in the EU sphere by looking at the EU law sources and CJEU case law.\textsuperscript{79} Further, the CJEU must rule that there is no breach of the CJEU’s jurisdiction or the principle of conferral. The second step is to determine if there is also a breach in the national constitution. These two steps lead to national courts assuming a double role, they are determining the legality of law in the EU sphere and their own national sphere simultaneously. Only after finding breaches in the EU and national sphere can a national supreme or constitutional court declare EU law inapplicable in that Member State.\textsuperscript{80}

Issues may arise if Member States’ supreme or constitutional courts could exercise judicial review of EU law, Kumm concedes. He envisions two scenarios, the first being the Cassandra scenario, in which Member States’ supreme or constitutional courts would strike down EU law

\textsuperscript{76} Kumm, 1999, p. 378.
\textsuperscript{77} Kumm, 1999, pp. 357-358.
\textsuperscript{78} Kumm, 1999, p. 358.
\textsuperscript{79} Kumm, 1999, p. 380.
\textsuperscript{80} Kumm, 1999, pp. 380-382.
more often than national law. This would result in chaos. The second is the Pangloss scenario, in this scenario Member States’ courts would only exercise the power of review seldomly and with good reasoning behind it, ensuring as much coherence in the EU legal order as possible.\textsuperscript{81} Kumm believes the Pangloss scenario to be the more likely one for three reasons. The first reason is due to how Member States up to that point had acted when practicing their judicial review. The second reason is that some Member States made constitutional amendments to adhere to the obligations in the treaties. The third reason is ‘Member States adopt forms of judicial review of a not overly intrusive character.’\textsuperscript{82}

Kumm claims that the Pangloss scenario would lead to the Member States being recognized as a corrective force in the development of EU law, which in turn would develop constitutionalism in Europe in three ways. The first is that the Member States’ courts would be a constant force to encourage more democratic legislation on the EU level and for the CJEU to ‘develop a sensitivity to questions of legislative jurisdiction’ and become more thorough when ruling in cases regarding to fundamental rights. The second is that case-law of Member States’ courts in EU would be studied by courts in other Member States and lead to constitutional awareness among the European courts. The third consequence of the Pangloss scenario is that the courts would become an important part of developing democracy in their country. The national courts would initiate debates over the development of the EU and on what constitutional amendments might be necessary for the Member State to work toward the goal of an ever-closing union.\textsuperscript{83}

Kumm believes that if an EU act or EU case law is declared inapplicable in a member state the issue can be solved by political intervention. Either by changing a national constitution in an \textit{ad hoc} manner or renegotiating the provision on the EU level. Kumm believes this to suffice as there would be political pressure to find a consensual solution and secure coherence in the EU legal order.\textsuperscript{84}

\textsuperscript{81} Kumm, 1999, p. 360.
\textsuperscript{82} Kumm, 1999, p. 361.
\textsuperscript{83} Kumm, 1999, pp. 360-361.
\textsuperscript{84} Kumm, 1999, pp. 361-362 and Kumm, 2005, p. 270. See however Kumm, 1999, p. 385, where Kumm writes that the article does not provide a general solution on how to ensure coherence between national courts and the CJEU.
3.2.2 Miguel Maduro

Like Kumm, Maduro develops a theory to tackle the issue of Member States’ supreme or constitutional courts ability to review EU law. Maduro’s theory consists of four principles that seek to provide a common basis for solving legal issues within the EU. These four principles Maduro calls pluralism, consistency and vertical and horizontal coherence, universalizability and institutional choice. The first principle of pluralism has a foundational and participative dimension. The foundational dimension requires that the legal orders in the EU, both the Union and the Member States, respect the identity of the other legal orders. The right to internal self-determination exists in every legal order and this needs to be respected by all other legal orders.\(^{85}\) The participative dimension of the principle of pluralism is that the need for discourse. This is to ensure participation in the development of constitutionality in the EU as far as possible. Maduro argues that all national courts of highest instance should be equal to the CJEU. No court should possess larger influence than the other to impose change on the joint development of EU law.\(^{86}\)

The second principle, that of consistency and vertical and horizontal coherence serves to ensure uniform and coherent application of EU law. Maduro believes that, despite the fact that different legal orders within the EU might adhere to different theories and conceptions of what law is, coherence can be ensured. This requires all actor’s commitment to maintaining a coherent legal order. This will be assured by discourse between both national courts and the CJEU as well as between the Member States.\(^{87}\) As such, national courts must take other national courts interpretation of EU law into consideration while still adhering to the CJEU’s case law.\(^{88}\) Maduro claims that there is a discrepancy between EU law in the eyes of the CJEU compared to the Member States. Maduro seeks to mediate the different views harboured by the CJEU and the national courts and how the EU law is thought of in the Member States’ legal orders.\(^{89}\)

The third principle is that of universalizability. This principle requires national courts and the CJEU\(^{90}\) to justify their decisions and judgements to all other legal orders in the EU. Decisions

\(^{85}\) Maduro, 2003, p. 526.
\(^{86}\) Maduro, 2003, p. 527.
\(^{87}\) Maduro, 2003, p. 527.
\(^{88}\) Maduro, 2003, p. 528.
\(^{89}\) Maduro, 2003, p. 529.
\(^{90}\) Maduro has in his text from 2003 not included the CJEU in this principle but that was simply a coincidence and the CJEU is to be included. This is conveyed by Jaklic who has spoken to Maduro in Jaklic, 2014, p. 107 note 29.
must thus be taken with the notion that they are to be universalizable and applicable for all other legal orders in the EU. Maduro writes that “This form of discourse will promote a virtuous cycle in the application and construction of EU law, with national courts feeling “bound” by the decisions of their counterparts in other Member States.”

The last principle is the principle of institutional choice. To explain this principle Maduro borrows from Komesar and reasons that the legal actors in the EU needs to follow Komesar’s method of comparative institutional analysis when making institutional choices. Maduro argues that this principle would provide guidance to which legal actor is the most apt to exercise legal power. Maduro writes “The only way to define the borders of the different legal systems and promote an appropriate allocation of legal resources (judicial and otherwise) among them is by reinforcing the mutual understanding of their respective virtues and malfunctions and their awareness that they are only one among a variety of institutional alternatives.” Maduro claims that Komesar argues that institutional choice is really a matter of determining who decides who decides. Investigation by the different legal actors who are the best to exercise legal power when faced with a question or issue should be conducted.

3.2.2.1 Maduro’s theory in practice

Maduro writes of three different consequences that he considers would be derivative of his theory of constitutional pluralism. The first consequence is prevention of constitutional conflicts, secondly the way of thinking regarding constitutionality on the EU level would change and thirdly the uncertainty of EU law’s reach and the question of who has competence to decide in a case becomes irrelevant.

The first consequence of preventing constitutional conflict will be ensured since the courts need to justify and provide reasoning behind judgements to all other legal actors. This entails that all legal orders, the EU as well as the Member States, must be prepared for other legal orders claiming authority in situations previously being within the exclusive domain of the prior. This is due to the nature of Maduro’s theory itself. As any legal order may rule in certain cases other

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93 Maduro, 2003, p. 531.
95 Komesar, 2006, pp. 3-4.
96 Maduro, 2003, p. 531.
97 Maduro, 2003, pp. 531-537.
legal orders must naturally include a mechanism to deal with the rulings that will to indirectly affect themselves. The principle of universalizability would further ensure uniformity within the EU due to the requirement that decisions are justified and provided reason for.\textsuperscript{98}

Regarding the second consequence, Maduro believes that his theory can contribute to changing how constitutionality is thought of in the EU. The development of constitutionality in the EU has been conducted in cooperation with national constitutions and Maduro suggests that this cooperation will continue and to a greater extent if his theory of constitutional pluralism is adhered to. Maduro claims it may also be more democratic ‘since it will save much “constitutional energy” that would otherwise be lost on the stark question of whether or not to adopt a formal constitution.’\textsuperscript{99}

The last consequence according to Maduro regards the manner courts in the EU will use the law to solve issues. Other Member States’ constitution will be considered law as the different actors will consider constitutional law from different legal orders when ruling. The different legal orders will open and become more available as the hierarchy between the EU and the Member States disappear. Maduro argues that there will be multiple fora available to national actors where they may pursue their interest as strict boundaries of where jurisdiction lies will diminish.\textsuperscript{100}

\textbf{3.3 Analysis of politically contra legally dominant theories}

There is no mistaking that the theories of Miguel Maduro and Mattias Kumm are very different from the theory of Niel Walker. The theories of Maduro and Kumm specifically looks to the EU as it tries to explain and solve the relationship between the CJEU and national courts. Walker’s instead seeks to find what a new constitutional site is. Another difference is that Kumm and Maduro are trying to give an answer to an issue they believe lie between courts while Walker holds that the issue is a constitutional one and can be solved by more democratic choices for the people. The theories seem to seek completely different solutions. Walker claim to seek a solution to the critique directed towards the constitution as an instrument while Kumm and Maduro, in their own respective way, try to solve the issue of constitutional conflict between the CJEU and Member States’ supreme or constitutional courts. Walker compared to

\textsuperscript{98} Maduro, 2003, p. 533.
\textsuperscript{99} Maduro, 2003, pp. 535-536.
\textsuperscript{100} Maduro, 2003, pp. 536-537.
Kumm and Maduro are imposing changes on different parts of society in their theories. Walker’s objective is instead directed towards trying to reform what can possess a constitutional document and how the different constitutional sites should work, constitutional pluralism, for Walker, is to make constitutions as an instrument seem attractive again. For Maduro and Kumm constitutional pluralism is about solving an issue between courts that has arisen due to incompatible interpretations with no clear definitive answer regarding who is correct. This is interesting as their premises, their means and their practical end goal all differ. Surely, they all believe that their theories will solve the issue that arose from the *Maastricht Decision*, however Walker does so somewhat reluctantly. Walker is not trying to solve this issue directly but would rather try to conceive of a, what he would consider, longer lasting solution, probably believing that if the issue between the CJEU and FCC was settled it would be the equivalent of fixing a soldering job with tape. Thus, Walker is trying to go to the root of the problem, as he most likely perceives it. Walker probably believes that his theory would solve the issue that Maduro and Kumm are specifically trying to solve, however the solution to the problem between the CJEU and FCC would be an indirect effect and not the sole goal of Neil Walker.

Sarmiento have suggested that the lack of a common premise and goal is the biggest issue facing constitutional pluralism as a field of study. In this regard it is worth mentioning that Kumm does not claim to be advancing a theory of constitutional pluralism. Jaklic, however, believes Kumm’s theory to be one of constitutional pluralism. I am inclined to agree with Jaklic. Kumm’s theory is looking for a solution beyond a hierarchical perspective with one ultimate and final authority. Instead Kumm is trying to propagate for a relationship between the courts that is, like Maduro’s, characterised by cooperation and understanding of the other courts’ positions, seeking solutions to legal problems where no official solutions exist. Regardless of the lack of a definition of constitutional pluralism I conclude that both Kumm and Maduro are describing theories on constitutional pluralism.

101 Sarmiento, 2015, p. 113.
102 See section 2 above.
What of Neil Walker then? Could it be argued that his theory is not one of constitutional pluralism? Himself he would definitely believe to adhere to constitutional pluralism judging by the names of his articles. His 2002 article is called *The Idea of Constitutional Pluralism* and his 2016 article is called *Constitutional Pluralism Revisited*. Another aspect in favour of Walker writing about constitutional pluralism is the inclusion of the axiomatic fifth criteria. This needs to be fulfilled by the different constitutional sites to prevent claims of hierarchical superiority between sites. Had Walker’s theory been functional neither the EU or the Member States could claim ultimate authority over the other. Walker’s proposal of a plurality of equal constitutional sites clearly speaks of his theory embracing both a pluralistic and constitutional aspect. The EU and its Member States would possess a constitution, their own model of governance and their own definition of their citizens, albeit somewhat overlapping. It is this foundational way of governing that Walker’s theory of constitutional pluralism entail and comparing these properties to the definition of constitutional pluralism given by Maduro lends me to conclude that Neil Walker’s theory is also constitutionally pluralistic and is compatible with Maduro’s definition.

Another question worth raising is whether it is correct to label Neil Walker’s theory as politically dominant. The reason for Walker to develop his theory is to rebut some of the criticisms directed towards constitutions as an instrument. Further, his theory revolves mainly around the constitutional site as the holder of constitutionality. Lastly, his suggestions would only indirectly affect the EU and the states’ judiciaries and makes no concrete attempt to solve the issue that arose from the *Maastricht Decision*. Based on this I conclude that Walker’s theory to be politically dominant as it does not fulfil the criteria to be a legally dominant theory.

Having analysed and compared the theories it is clear that they share some similarities regarding their attempt to solve the relationship between the CJEU and FCC, directly or indirectly. However, there is no denying that the solution would be found using different means, with different premises and different ultimate end goals. Interestingly they are still all to be considered theories on constitutional pluralism. As Daniel Sarmiento argues, it is not reassuring that the different authors of constitutional pluralism are unable to agree on the very basic features such as what the issue they are trying to solve is, or what the substantial basic features
are. The root of this issue, I believe, is that these authors are not engaging with each other at all and are instead focused on defending their theories from external critique instead of working together to create internal coherence, this will be developed in detail later.

In summary, the theories of Maduro, Kumm and Walker can be categorised into a legally and politically dominant camp. The difference between these categories are vast and it seems at first glance strange to consider them all to be theories of constitutional pluralism. However, as the definition of constitutional pluralism is subject to debate the ease to label a theory one of constitutional pluralism arise. This is detrimental to the field of constitutional pluralism as, so far, it seems to lack internal coherence.

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104 Sarmiento, 2015, p. 113.
105 See section 6 below.
4 Theories referring to H.L.A. Hart’s rule of recognition

In this section I will compare two theories that borrow aspects from H.L.A. Hart’s ‘rule of recognition’. 106

4.1 One rule of recognition – Massimo La Torre

In his article *Legal Pluralism as Evolutionary Achievement of Community Law* Massimo La Torre advances a normative approach to constitutional pluralism. His main goal is to develop a theory of constitutional pluralism focusing on citizens ability to use it in practice. La Torre means that the theory ‘[…] recommends that the judge (and the citizen) do not direct themselves solely to one source of law when in search for a regulation of a case.’ 107

The foundation of La Torre’s theory on constitutional pluralism is, borrowing a model from Hart, to consist of one rule of recognition. This would require the EU and the Member States to adopt an *interactionist* constitution. Such a constitution would be shaped by discourse between the Member States and the EU with the goal to create a joint constitution for all the people within the EU. 108 This constitution would contain the single rule of recognition. La Torre admits that this might be monist in some sense but believes that pluralism cannot work unless reducible to some sort of monism with one normative system that able to result in actual legal consequences. 109 The joint constitution La Torre promotes would not consist of normative provisions imposing obligations on the different Member States. Rather, this would simply be a list of acceptable sources of law and what common goals the EU should strive towards. 110 Despite the fixed nature of the possible legal sources, usable by the national courts or the CJEU, the purposes and aims of that constitution would be changeable through discourse by the Member States. These changes would be continuous and would happen gradually without any noteworthy political effort. 111

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106 See section 1.3.3.2 above.
111 La Torre, 1999, p. 194.
4.2 Multiple rules of recognition – Nicholas Barber

Nicholas Barber develops a theory of constitutional pluralism, though he uses the words legal pluralism, that promotes a heterarchical constitutional order to be preferable over a hierarchical one. Barber’s contribution to the debate is to take Hart’s concept of a rule of recognition and argue that pluralism exists where there are multiple rules of recognition.\footnote{Barber, 2006, p. 306.} Barber means that these rules of recognition can be inconsistent and that there is a risk the different rules of recognition might identify inconsistent rules for individuals, that there might be a constitutional crisis or that it might compel officials to have to choose which institution to show loyalty to.\footnote{Barber, 2006, p. 306.}

Barber describes that when the FCC ruled in the Maastricht Decision a new set of inconsistent rules within the EU arose. This in turn led to there being inconsistent rules of recognition operating on the EU level. Barber points out that the inconsistent rules of recognition identified the principle of supremacy on the EU level whilst the German rule of recognition identified FCC case law stating that the FCC had the authority to review EU law. Both courts believed themselves to be the final arbiter of law in Germany. For the FCC it was all constitutional law in Germany while the CJEU claimed to the right to final authority on the application of EU law in Germany.\footnote{Barber, 2006, pp. 323-324.}

Barber claims that the inconsistency of the rules of recognition is the core of his pluralistic conception. Barber believes that this inconsistency can, and probably will, lead to constitutional disagreements between courts but that these constitutional disagreements must not lead to a crisis. To prevent such a crisis the CJEU and the national supreme and constitutional courts must show restraint and consider the other legal order in their judicial practice. It will not be an immediate solution to the uncertainty issue. Rather, the perpetual uncertainty can be a part of a long-term solution working to reduce inconsistencies according to Barber.\footnote{Barber, 2006, pp. 327-328.}

4.3 Analysis of theories employing Hart’s rule of recognition

Paradoxically, both La Torre’s and Barber’s theories seem to suggest the same outcome, a legal order in the EU shaped by discourse between courts. On the one hand the theories are...
incompatible with each other as one proposes one rule of recognition and the other proposes multiple. Practically however, both theories lead to advancement of the EU legal order by discourse between courts.

The differences between the theories are very subtle. The actual issue is whether La Torre’s theory of a single rule of recognition holds true. If it does, no issues would arise according to La Torre’s theory. In comparison, Barber acknowledges that there is a risk for constitutional disagreement. Assuming, for arguments sake, that La Torre’s single rule of recognition would not in all cases be correct. This is not at all a foreign concept, as the rule of recognition is to be shaped by discourse between the Member States. What if the FCC, for example, were to rule in a way that is incompatible with the current rule of recognition in La Torre’s theory? Then both theories would include a de facto risk of constitutional disagreement arising. The solution to this disagreement would according to both theories be inter-court discourse. Therefore, in practice, the theories would function in the same way. In theory the situation is only a little different. Say the FCC was to rule incompatibly with current EU law. The change of La Torre’s single rule of recognition would happen before every rule of recognition in Barber’s theory would change. As La Torre’s theory only has one rule of recognition it cannot remain the same if the FCC was to rule in a way that is incompatible with the previous rule of recognition and La Torre’s rule of recognition would change instantly. In Barber’s case however, the change would first be in Germany’s rule of recognition and perhaps the CJEU would never acknowledge this as a part of their rule of recognition. There could be incompatible rules of recognition in theory, but as both courts, according to Barber, would try to mitigate this by discourse, constitutional conflict must not arise. The theoretical differences between the theories are minimal, and practically they are almost non-existent.

Interestingly the authors have developed seemingly incompatible theories that in practice and theory are almost the same. Naturally, La Torre who wrote his article in 1999 could not do much to prevent this. However, Barber should discuss La Torre’s theory in order to highlight the differences and assure the reader of his theory’s superiority. Doing this would greatly increase the internal coherence of constitutional pluralism.
5 Theories describing different inter-court relationship

Following here is a section categorising the theories with two differing views on how courts can word their judgements. Firstly, there is the category that are indifferent to how judgements are worded and instead focuses on the legal outcome. In practice this means that this theory allows for courts delivering incompatible judgements, as will be shown below when describing Bobić’s theory. The second category commands courts to not write judgements that are incompatible with each other. Like Maduro’s principle of universalizability these theories requires courts to take other courts stances into consideration when ruling.

5.1 Theories indifferent regarding judgements’ wording

5.1.1 Ana Bobić

Ana Bobić develops her theory of constitutional pluralism descriptively and calls it the auto-correct function. She claims to subscribe to Walker’s definition of constitutional pluralism when developing her own theory. Bobić’s theory focuses solely on discourse between the CJEU and Member States’ courts. Bobić seeks to find a solution to situations when issues of constitutionality arise between the different courts. Discourse enables solutions between the courts and mitigates the potential reach of the conflict until a satisfactory solution is found. The way that discourse between the CJEU and Member States’ courts is conducted is in accordance with ‘their respective procedural avenues’.

Bobić means that the discourse between courts have a legal basis that serve to ensure uniformity within the EU. The legal incentives that the national courts must consider is the principle of primacy which serve to secure unified application of EU law in all Member States. In turn, the CJEU should take national identities of the Member States in consideration according to art. 4(2) TEU.

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117 Bobić, 2018, p. 36.
119 The principle of primacy was discussed in section 1.4 above.
120 Bobić, 2018, pp. 37-38.
Answering critique Bobić explains how her theory of constitutional pluralism can be applied to the *Gauweiler*\(^{121}\) case and the *OMT*\(^{122}\) case.\(^{123}\) Originally the FCC had requested a preliminary ruling from the CJEU. In the order to the CJEU the FCC found that the Outright Monetary Transactions (OMT) conducted by the European Central Bank was probably both an *ultra vires* act and that it was intruding on German constitutional law.\(^{124}\) After the CJEU’s ruling in *Gauweiler* the FCC delivered its judgement in the *OMT* case. Bobić points out that the FCC are claiming to be the ultimate power to interpret German constitutional law at the cost of the principle of primacy.\(^ {125}\) She also writes that the FCC ‘reasserted its ultimate claim to sovereignty by emphasizing its exclusive authority to perform constitutional identity review and *ultra vires* review.’\(^ {126}\) This, she considers, does not impact her theory on constitutional pluralism.\(^ {127}\)

Bobić then goes on to describe the discourse between the courts in the *Gauweiler* saga. She writes: ‘In a pluralist context, however, the Bundesverfassungsgericht [FCC] expressed its own view of the position of the constitutional identity and how that might be affected by the introduction of the OMT mechanism. The Court of Justice entered the discussion focusing solely on the analysis of the mechanism but deferred to the Budesverfassungsgericht on questions of national constitutional identity. Both jurisdictions are balanced and will continue to carefully balance their claim and arguments. In so doing they will exhibit considerable self-restraint based on the principle of sincere cooperation and mutual respect.’\(^ {128}\)

Bobić explains another feature of her theory that she calls incrementalism. Incrementalism is that courts will refrain from making great changes at first opportunity and rather develop the law, as they believe it to be, slowly. Bobić argues that what is *lex feranda* is stated in the judgements by the courts. Unless faced with opposition they later turn this *lex feranda* from previous judgements into *lex lata* when ruling. Bobić suggests that this makes development of law a continuous process that can gain momentum and be difficult to stop. She claims that the FCC and CJEU are jointly developing EU law in this way.\(^ {129}\)

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\(^{121}\) Case C-61/14, *Peter Gauweiler and Others v Deutscher Bundestag* (hereinafter *Gauweiler*).

\(^{122}\) BVerfG, Judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13 (hereinafter the *OMT* case).

\(^{123}\) Bobić, 2017, pp. 1396-1397.

\(^{124}\) Bobić, 2017, p. 1400.

\(^{125}\) Bobić, 2017, p. 1396.

\(^{126}\) Bobić, 2017, p. 1402.

\(^{127}\) Bobić, 2017, p. 1404.


Bobić believes that the FCC denying the principle of primacy and EU case law is irrelevant as they ultimate reach a satisfactory conclusion in the matter without causing a constitutional crisis.\textsuperscript{130} Further, the tension created by the language the FCC used in the OMT case is irrelevant to Bobić. Instead she considers a satisfactory solution to be found in a tricky case.\textsuperscript{131} Bobić believes that the end solution will be a result of balancing between courts who are displaying ‘self-restraint and the strong will to avoid conflict.’\textsuperscript{132} Incrementalism will ensure gradual development of law and the \textit{auto-correct function} will, in the long run, make sure that imbalances between the different legal orders are worked out.\textsuperscript{133}

5.2 \textit{Theories requiring compatible discourse between courts}

5.2.1 Florence Giorgi and Nicholas Triart

Contrary to Bobić, Giorgi and Triart’s theory require judgements to be \textit{de jure} compatible with each other. Giorgi and Triart call their theory “The network model”.\textsuperscript{134} It is my interpretation that their theory is divided in two parts. One descriptive section in which they are suggesting an altered view of the EU, their network model. The other part is a normative section in which they are proposing concrete suggestions their network model would allow for unlike the current monist viewpoint.\textsuperscript{135}

Giorgi and Triarti proposes that the law in the EU should be viewed less as a pyramid and more as a heterarchical network in order to explain and solve constitutional issues.\textsuperscript{136} They suggest that within the sites there are nodes and that these nodes can influence nodes in other systems normatively through so called liaisons. To Giorgi and Triart the CJEU would be a node within the EU site and the national supreme or constitutional court would be a node in the respective Member State’s site. These nodes are connected by liaisons allowing the nodes to influence each other normatively. Further, the authors explain that there might be dormant liaisons, currently unformed liaisons with the possibility of being created later. To ensure flexibility and for the theory to adapt to the world it must be possible to change the different liaisons through,

\textsuperscript{130} The EU case law that the FCC denies is for example the \textit{Foto Frost} case, see section 1.4 above.
\textsuperscript{131} Bobić, 2017, p. 1404.
\textsuperscript{132} Bobić, 2017, p. 1426.
\textsuperscript{133} Bobić, 2018, p. 39.
\textsuperscript{134} Giorgi and Triart, 2008, pp. 711-712.
\textsuperscript{135} See Giorgi and Triart, 2008, p. 695.
\textsuperscript{136} Giorgi and Triart, 2008, pp. 712-714.
5.2.1.1 Normative suggestions

In their normative section, Giorgi and Triart advance three suggestions to judges in the CJEU and in the national supreme and constitutional courts that they hope will ‘convince them of the virtues of legal pluralism.’139

First, the authors propose that national constitutional courts should still be able to review EU law. Whilst doing so however, the national courts must read their constitution “in light of a strong interpretative principle according to which nothing in the national constitution prevents the enforcement of law, unless national constitutional provisions address or compensate for structural deficiencies on the level of the EU.”140 This means that the national courts should not disapply EU law unless there is a structural deficiency on the EU level and this is protected by the national constitution. The authors do not explain what such a structural deficiency would be. They suggest that it is for national courts decide when one is apparent. The national courts should do their utmost to prevent interpreting EU law in a way that would lead to more structural deficiencies.141

The second suggestion carries two aspects, a ‘Member State to EU’ aspect and an ‘EU to Member State’ aspect. Beginning with the former, Giorgi and Triart believes that some constitutional courts does not request preliminary rulings due to nationally imposed time limits within which they are forced to deliver a ruling. To resolve this the authors suggest that there should be a section at the CJEU that can decide urgently in accordance with rules on a simplified procedure when there are requirements of a swift adjudication on the national level.142 Regarding the other aspect, the authors suggests that the CJEU should seek the opinions of the affected national constitutional courts when ruling on an issue that is enriched in that Member States’ constitution. The national constitutional courts’ suggestions would not be binding, but rather function as a venue for the courts to officially and publicly communicate.143

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137 Giorgi and Triart, 2008, p. 713.
139 Giorgi and Triart, 2008, p. 714.
Lastly, Giorgi and Triart finds inspiration in Miguel Maduro’s four principles and borrow them to their own theory. Giorgi and Triart only slightly alters the principles and will therefore be mentioned only briefly here. These principles are: Firstly, the nodes must have a pluralistic mindset. In other words, the equality between the nodes must be respected and the nodes must realise that they possess ultimate authority only in their site. The second principle is that of uniformity and horizontal and vertical coherence. This principle serves to ensure unity of law in the EU. The third principle is that of universalizability which is supposed to ensure that the rulings are written in a language that is ‘universally accessible to the other actors’. Lastly, the principle of institutional choice would mean that the different nodes are comparing themselves to other in determining who is best suited to deal with the relevant issue.

5.2.2 Klemen Jaklic
Klemen Jaklic develops his own theory and has published a book on constitutional pluralism. In this book Jaklic describe and analyse these different theories on constitutional pluralism: MacCormick’s, Kumm’s, Weiler’s, Walker’s and Maduro’s. Jaklic believes that this allows him to spot weaknesses and strengths with constitutional pluralism and allowed him to develop his own theory on constitutional pluralism.

Jaklic bases his theory on the theory he attributes to Joseph Weiler, which I will not include in this essay. For the purpose of explaining Jaklic’s theory I will still briefly describe Weiler’s theory as described by Jaklic.

5.2.2.1 Weiler’s theory according to Jaklic
To avoid unnecessary repetition, I will refer to Weiler as the author in this sub-chapter despite actually referring to Jaklic writing about Weiler’s theory. I will however make clear when Jaklic himself develops upon Weiler’s theory in any way.
Weiler’s theory on constitutional pluralism is inherently focused on the people in the EU being able to live in a heterarchy. Weiler visions an EU characterised by inclusion of the other and the other’s right to internal self-determination.\textsuperscript{149} Unlike the other theories of constitutional pluralism, Weiler’s would be exercised at all levels of the state and EU and even influence individuals themselves.\textsuperscript{150}

Jaklic has contributed personally to Weiler’s theory in that he created a metaphor of building blocks. These building blocks contain ethical values which in turn together creates the principle of constitutional tolerance and is the entire foundation of Weiler’s theory of constitutional pluralism.\textsuperscript{151} Weiler means that the ethical values are not ends, but they are means and therefore something to constantly strive towards.\textsuperscript{152} As such, the purpose of Weiler’s theory is to make these different ethical building blocks be practiced by the respective legal order.\textsuperscript{153}

To discern what these building blocks contain Weiler observes what is good and bad about the concept of the EU and the concept of a nation state and tries to refine them both drawing inspiration from the respective concept. When refining the nation state, for example, Weiler observes that the nation state inherently imposes a clear boundary to who is a part of it and who is not. Weiler believe the EU to be refining this by allowing for inclusion of people rather than excluding them, and this refinement should be included in the Member States’ consciousness.\textsuperscript{154}

\textbf{5.2.2.2 Jaklic’s theory continued}

Resting on the conception of Weiler’s building blocks Jaklic develops his theory, which he calls full blown substantive pluralism. Jaklic seek to refine both the Member State and the EU in the same fashion Weiler does.\textsuperscript{155}

Firstly, Jaklic seeks to refine the nation state by changing the conception of sovereignty. Jaklic argues that when states engage in supranational co-operations, such as the EU, the state must include the external other who is also part of this supranational co-operation. The state must realise and allow other members of those supranational projects’ ability to affect the

\textsuperscript{149} Jaklic, 2014, pp. 71-72, 74.
\textsuperscript{150} Jaklic, 2014, p. 75.
\textsuperscript{151} Jaklic, 2014, p. 76.
\textsuperscript{152} Jaklic, 2014, p. 76.
\textsuperscript{153} Jaklic, 2014, p. 75.
\textsuperscript{154} Jaklic, 2014, p. 76.
\textsuperscript{155} See Jaklic, 2014, pp. 300 and 313.
supranational project and other indirect effects to the state’s previously exclusive sovereign rights. As an example, Jaklic explains that this affect may take the shape of enaction of laws at the supranational level.\textsuperscript{156}

Secondly, states that agree to be affected by other states indirectly by supranational projects must, according to Jaklic, unalteringly adhere to what he calls the three ultimate goods of democracy.\textsuperscript{157} The three ultimate goods are firstly, humans’ ability to rule their own life effectively, both individually and to exert its will over the group or groups to which it belongs. Secondly, the individual must be allowed to participate their life to the greatest extent possible. Jaklic writes ‘The second ultimate end and meaning of democracy is the idea of self-rule according to which the individual is not excluded from entering the domains of her life, but instead has the gateways wide open so that her chance for taking part (participation) in her life is as great as possible’. The third and last ultimate good of democracy entail that individuals must be able to rule over themselves. It is not enough that the individual can effectively participate in their life, but that they can decisively rule over themselves too.\textsuperscript{158} These values must be written into the state’s constitution.\textsuperscript{159}

The third refinement of the state is to require the three ultimate goods of democracy to be adhered to by states joining supranational projects. Jaklic argues that this will lead to supranational projects not being able to exclude countries joining the project simply due to the applicant’s geographical location. Citizens in a state who seeks to join a supranational project cannot be forced to fulfil a territorial requirement they might realistically never be able to fulfil as that would be incompatible with the three ultimate goods of democracy. The three ultimate goods of democracy include individuals being able to rule over their life, and as such these rights could not be exercise fully if they were excluded only due to geographical limitations, according to Jaklic.\textsuperscript{160}

Fourthly, adhering to the second building block of maintaining the three ultimate goods of democracy, states must, as they are joining a supranational project, transfer its norm-creating

\textsuperscript{156} Jaklic, 2014, p. 301.
\textsuperscript{157} Jaklic, 2014, p. 301.
\textsuperscript{158} Jaklic, 2014, p. 292.
\textsuperscript{159} Jaklic, 2014, p. 301.
\textsuperscript{160} Jaklic, 2014, pp. 301-302.
rights in the areas that affect everyone in the project.\textsuperscript{161} This transfer is conditional and there is a need for agreement in the form of national referendums regarding what in the supranational project is considered to affect all individuals.\textsuperscript{162}

Regarding the refinements of the EU Jaklic proposes that the EU abandons its claim to become an ultimate monist authority.\textsuperscript{163} This change in perception will be replaced with practical changes with a basis in pluralist thought. Jaklic gives a very brief account of these changes: ‘Among them are the adoption of the principle of open-ended expansion of the European formation, acceptance to divide jurisdiction with the nation-state according to the principle of affectedness, the establishment of both direct electoral authority and opened access for the affected throughout its jurisdictional sphere, the refined approach to maintaining boundaries recognition of the sound democratic components of the refined nation state and so on.’\textsuperscript{164}

Jaklic claims that his theory, full blown substantive pluralism, has already begun taking shape within the EU. Jaklic urges the EU to act in accordance with this change and begin creating a pluralistic foundation as soon as possible.\textsuperscript{165} Jaklic believes that constitutional pluralism is the only sensible option: ‘You can either continue holding to the current European situation or any of the monisms, but you will need in that case to realize and admit openly that you do not actually recognize those [the three ultimate goods of democracy] basic tenets of humanity’.\textsuperscript{166} Jaklic describes his theory as follow: ‘[it is the] final picture of what it means to “get together” (ie, construct or refine a political formation) in a fully legitimate way, one that unlike the monist type of “getting together,” [sic] does full justice to every single bearer of dignity in this world as the rightful addressees of democracy’s ends.’\textsuperscript{167}

These refinements that each constitute one building block would be included in the Member States’ constitution and in a constitutional document on the EU level. These constitutional provisions would be written in such a way to affect every public decisionmaker in both the EU and the Member States.\textsuperscript{168}

\begin{flushright}
161 Jaklic, 2014, p. 302. \\
162 Jaklic, 2014, p. 303. \\
163 Jaklic, 2014, p. 313. \\
164 Jaklic, 2014, p. 314. \\
165 Jaklic, 2014, p. 325. \\
166 Jaklic, 2014, p. 323. \\
167 Jaklic, 2014, p. 316. \\
\end{flushright}
5.3 **Analysis of theories with different inter-court relationships**

The theories constructed by Bobić, Girorgi and Triart and Jaklic display three different examples of constitutional pluralism. This categorisation showed how three different theories believe the discourse between courts should be, or can be, conducted. On one side are Jaklic’s and Giorgi and Triart’s theories. On the other side is Bobić’s theory. Jaklic and Giorgi and Triart introduce criteria for how the courts shall conduct themselves. They both believe, for example, that the FCC cannot claim ultimate authority to determine constitutional law in Germany. Bobić’s theory, however, is indifferent as it focuses on the results achieved and the courts practicing incrementalism as a form of cooperation between the judiciaries.

I believe that dividing these theories based on the criteria whether they impose rules for how the courts must rule serve to reveal differences between the theories. As Bobic is neutral to the language used in the *OMT* case, she must acknowledge that even though the FCC claimed ultimate power to interpret German constitutional law the CJEU are sometimes able to influence it. Likewise, as the CJEU claims to be the only institution to interpret EU law as shown above, the FCC will sometimes influence EU law.\(^{169}\) To me that is the only logical step Bobić’s theory can take. If a conflict between the FCC and CJEU was to arise and the respective courts cannot influence each other, that would mean that the courts are unable to rule as they believe the law to be as that would create a constitutional issue between the courts. Then both the FCC and CJEU would simply be fixed in their view and they would rule incompatibly.

Contrast this with Girorgi and Triart’s and Jaklic’s theories that both assert that the FCCs and CJEU’s judgements must reflect the actual law that the courts are referring to while at the same time not denying the courts equality. It would be unfathomable for the FCC, according to Giorgi and Triart’s theory, to state that they were the ultimate interpreters of the German constitutional law. That would be contrary to the principle of *universalizability* which states that judgements must be applicable to all other legal orders. Similarly, Jaklic’s theory cannot function when the FCC claim to be ultimate interpreters of German constitutional law as this would go against the self-determination of non-German people in the EU. In both Giorgi and Triart’s and Jaklic’s theory the court is to apply their own law and take consideration of law of other Member States.

\(^{169}\) For a description of EU law see section 1.4 above.
What then, happens with the theories of Giorgi and Triart, and Jaklic when the FCC announces that they are the ultimate authority of the German constitution and that they can review EU law to determine if it is *ultra vires*? Bobić’s theory can be considered to describe the current situation in the EU, while Jaklic’s and Giorgi and Triart’s theories can either be said not to be practiced yet or already fallen out of practice. Naturally, this does not lead to any conclusions of the value of Girorgi and Triart’s or Jaklic’s theories, however it does not seem convincing to claim that the FCC was adhering to either of their theories when ruling in the *OMT* case.

One possible explanation to the discrepancy is that Bobić’s theory is descriptive, that is, trying to explain the situation as it is, while Giorgi and Triart’s and Jaklic’s theories are normative, meaning that they are looking for a solution. However, both Jaklic and Giorgi and Triart include descriptive aspects to their theories. Giorgi and Triart suggests that the courts in the EU should be thought of as sites in a network. Jaklic claims that his theory has already begun to take hold within the EU and are in process of becoming descriptive. Jaklic’s does not mention what part of his theory he believes to be descriptive. Giorgi and Triart’s theory are directed towards courts and no court has expressed adherence to their theory. Let us therefore assume that both Jaklic’s and Giorgi and Triart’s theories are normative. Let us also assume that Bobić’s theory is accurately describing the present situation in the EU.

To investigate the possible internal coherence of constitutional pluralism, can it be concluded that Bobić’s theory could develop into either Jaklic’s or Giorgi and Triart’s theories? Currently, Bobić’s theory focuses on the CJEU and Member States’ supreme or constitutional courts will to prevent conflict and introduce changes in an incrementalistic way. The will to prevent conflict can be found in both Jaklic’s and Giorgi and Triart’s theories, however, incrementalism is not expressively part of either. I doubt incrementalism as being part of Jaklic’s and Giorgi and Triart’s theories. As their theories are both already imposing requirements on the CJEU and Member States’ supreme or constitutional courts to take each other into consideration and view the issue from the other’s perspective incrementalism seems pointless. It would only result in a slower development than necessary as the courts would purposefully implement small changes. The courts are to rule in an issue and having cooperative courts developing law in an incrementalistic manner would leave solvable issues unsolved. Bobić probably believes that incrementalism has a natural place in her theory as the CJEU and the FCC, for example, are not required to deliver *de jure* compatible judgements when ruling. In delivering rulings
incompatible to the other legal actor, the CJEU and FCC are proposing their view on the issue and tests the water as they leave it for the other court to contribute with their input.

Further, Bobić’s theory impose no requirements on the actual contents of how courts shall rule, that it is to affect every public decision maker or that it even includes democratic values as Jaklic’s theory does. Neither does Bobić’s theory encourage that the EU should be thought of as a network, that the CJEU shall be extended with a chamber quickly adjudicating in cases through a simplified procedure where national time restraint exists or propose that the courts shall openly communicate by giving unbinding opinions. The last suggestion Bobić would probably oppose as she believes it would be unnecessary since the courts are able to advance EU law in an incrementalistic way which results in changes unlike unbinding opinions.

In conclusion, internal coherence is lacking in the field of constitutional pluralism regarding the amount of weight attributed to linguistic inconsistencies. Jaklic’s and Giorgi and Triart’s theories lay out rules on how the interactions between the courts should be conducted and is an important part in both of their theories. This leads to a disconnect with descriptive theories such as Bobić’s who seeks to explain the actual situation in the EU currently. As have been shown, Bobic’s account of the EU’s legal situation is incompatible with Jaklic’s or Giorgi and Triart’s theories. Comparing the substantive contents of these theories yielded few similarities, and even the methods differed. Where Bobić was trying to find explanations to current events Giorgi and Triart as well as Jaklic trying to find the best, for their purpose, possible outcome. The result is that there is a slight disconnect from reality. This is also suggested by Sarmiento regarding Jaklic’s theory.  

6 Final analysis on internal coherence

The main issue with constitutional pluralism is that the field lacks a solid internal coherence. The authors of constitutional pluralism cannot seem to agree on: a definition of constitutional pluralism, a common premise of what should be changed, whether the theory should reform the judiciaries or something else, a common goal of what the result should be and even the issue that they are developing a solution for. What is agreed upon is a concept of a heterarchical order with no clear superior authority, either state wise or between the CJEU and Member

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170 Sarmiento, 2015, pp. 110 and 117.
171 Sarmiento writes of the field lacking a common premise and goal, see Sarmiento, 2015, p. 113.
States’ supreme or constitutional courts. This order is usually, though not always, based upon the courts or constitutional sites taking other bodies into consideration and viewing them as equals.\textsuperscript{172}

As argued for above, there is no widely agreed definition of constitutional pluralism.\textsuperscript{173} Regarding a common premise, there is no consensus whether constitutional pluralism should concern only on the various judiciaries as advanced by Kumm, Maduro, Barber, La Torre, Giorgi and Triart and Bobić, or if constitutional pluralism goes further to also reform concepts such as sovereignty and constitutional autonomy such as MacCormick and Walker believe, respectively. Jaklic’s theory further include both aspects in his theory, and as the premise is lacking, so too will the goal naturally differ as well. As some theories are only looking to the courts as those who will solve the constitutional conflicts the goal will be different than a whole re-imagining of what a state is. Walker believes that constitutions shall continue to be used and sees his goal in the legal equality of the EU and its Member States while Kumm, as one example, only want courts to avoid creating inconsistent judgements that could result in incompatible EU law. As such, without consensus on the scope of the issue, or how to define one in a centralised manner, the theories will not be able to focus on solving only one issue, but instead different proponents will attempt to solve different problems.

The categorisations I have presented above aptly display the lack of internal coherence.\textsuperscript{174} It shows how the theories differ on foundational features that determine if the theories suggest changes to the judiciaries or the entire state apparatus as was the topic in the politically or legally dominant theories,\textsuperscript{175} if they are able to accurately describe the situation in the EU as was shown with theories proposing different inter-court relationships.\textsuperscript{176} In the case of the category regarding Hart’s rule of recognition the seemingly contrary theories were found to be almost identical.\textsuperscript{177}

Theories that can be categorised as legally or politically dominant, as explained above, show that there is disagreement on whether constitutional pluralism explain what is happening in the

\textsuperscript{172} Only Bobić seem to be indifferent on whether courts outright state that they are taking the other into consideration, see section 5.1.1 above.
\textsuperscript{173} See section 2 above.
\textsuperscript{174} See sections 3, 4 and 5 above.
\textsuperscript{175} See section 3 above.
\textsuperscript{176} See section 5 above.
\textsuperscript{177} See section 4 above.
courts or the EU at large, or both. This is certainly the greatest difference within constitutional pluralism. It is easily understood when simplified almost *ad absurdum*, whether it is a question of solving a problem with judicial changes or with changes to concepts such as the nation state or sovereignty. This is, to me, a choice of enormous importance and it cannot be taken for granted that one way or the other is correct without proper investigation. It must be agreed what the issue is, what the end goal should be and what the best solution to reach this is. Yet, the proponents mentioned herein have not made sufficient attempts to standardize these aspects of the discussion.

The third category regarding the different inter-court relationships is important due to how it clearly helps distinguishing between theories that are normative and descriptive. The *Maastricht Decision*, and more recently the *OMT* case have set the stage for how the FCC view their role in Germany. The sentiment is clear, the FCC is the final interpreter of constitutional law in Germany, including EU law potentially affecting German constitutional law. As such, theories that propose national courts to deliver judgements that are compatible with EU law cannot be said to describe reality. This does not in itself signify a lack of internal coherence within the constitutional pluralistic field, but the comparison it enables does. The ease of discerning whether a theory is descriptive or normative makes it possible to investigate if a descriptive theory has begun developing into a normative theory. As showed above, Bobić’s theory is likely to not gradually develop into either Jaklic’s or Giorgi and Triart’s theory. Bobić would probably oppose the unbinding opinions between courts proposed by Giorgi and Triart. Neither does Bobić’s theory suggest that her theory will impose restrictions on the substantial matter judgements must contain like Jaklic’s three ultimate goods of democracy does. Worth mentioning is the criterium of how courts shall act or how the can act does not automatically entail the entire theory’s descriptiveness.

The second category regarding the use of Hart’s rule of recognition display an interesting side of the lack of internal coherence haunting constitutional pluralism. It reveals the lack of engagement with other theories of constitutional pluralism. Barber’s and La Torre’s theories are initially considered contrary and different, despite this their theories would lead to almost identical outcomes. As Barber does not reference or mention La Torre’s theory it suggests that he is either unaware of it or purposefully disregard it. It is unlikely that Barber was aware of La

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178 See section 5 above.
Torre’s theory without referencing it as the similarities in practice surely must be considered highly relevant. The other scenarios are not particularly attractive either. Had Barber been unaware of La Torre’s theory that would raise the question whether enough research had been conducted prior to writing his theory. Had he purposefully disregarded it an even greater issue would arise as that is not how legal science is conducted. Assuming good faith I believe Barber was coincidentally unaware of La Torre’s theory. The sheer amount of material to research is impossible for one person to cover, however in this case it is a truly unfortunate accident. Regrettably, the lack of engagement with other theories is not an issue isolated to Barber.

One major reason for the lack of internal coherence affecting constitutional pluralism, I believe, is due to the proponents’ reluctance to engage with each other in a meaningful way. Daniel Sarmiento suggested that constitutional pluralism’s greatest issue is itself.\textsuperscript{179} I agree with Sarmiento on that point. Only Klemen Jaklic attempts to engage in detail with multiple theories of constitutional pluralism. However, the goal of Jaklic’s book is to find the superior conception of constitutional pluralism and not to promote the field in its entirety or to develop an internal coherence.\textsuperscript{180} This is a recurring theme within the field of constitutional pluralism. Its proponents will at most acknowledge the existence of other theories of constitutional pluralism without engaging with them in an attempt to advance the coherence, but rather focus on external criticism.

Issues are apparent when reading Neil Walker’s theory. In his 2016 article \textit{Constitutional Pluralism Revisited} Walker specifically refers to Jaklic’s book on constitutional pluralism, he is thus aware of it.\textsuperscript{181} However, Walker does not discuss the criticism of his theory by Jaklic. Jaklic claims that the axiom proposed by Walker in his fifth criteria of his theory on constitutional pluralism must be argued for.\textsuperscript{182} Further, Walker does not at all touch upon the fact that Jaklic claims that his theory is superior to Walker’s theory.\textsuperscript{183} Neither does Walker answer to criticism by Daniel Sarmiento who argues that constitutional pluralism lacks a common foundation and goal.\textsuperscript{184} Walker is aware of other theories existence but he does not engage with them in an attempt to further internal coherence in the entire field of study.\textsuperscript{185}

\textsuperscript{179} See Sarmiento, 2015, p. 113.
\textsuperscript{180} Jaklic, 2014, p. 8.
\textsuperscript{181} Walker, 2016, pp. 338 and 339.
\textsuperscript{182} Jaklic, 2014, p. 56-57.
\textsuperscript{183} Jaklic, 2014, p. 261.
\textsuperscript{184} Sarmiento, 2015, pp. 113 and 116.
\textsuperscript{185} Walker, 2016, p. 336.
Instead Walker focuses on arguing for the benefits of constitutional pluralism over describing the EU as a federation as proposed by Robert Schütze.\(^\text{186}\)

Similar tendencies are apparent in the texts of Ana Bobić. Believing that constitutional pluralism is one coherent theory she writes: ‘Consequently, the pluralist theory asserts, there is no final arbiter, and there should not be one.’ citing only Mattias Kumm’s 1999 article.\(^\text{187}\)

Ironically, Kumm himself outright state that the national supreme and constitutional courts will possess ultimate authority to determine their own national constitution. EU law that overlaps with the national constitution will therefore be reviewed by national courts.\(^\text{188}\) Kumm writes that there will not be one final arbiter of EU law. Yet, what he suggests is that there will be multiple indirect ones.\(^\text{189}\) This differs from Giorgi and Triart who also claim that there should be no final arbiter of EU law going so far to deny even an indirect final arbiter of EU law.\(^\text{190}\) Bobić does not take this fact into consideration and like Walker focuses on answering external critique.\(^\text{191}\)

Let us look further to the relationship between Bobić’s and Walker’s theories. After all, Bobić claim to subscribe to Walker’s definition of constitutional pluralism.\(^\text{192}\) As described above, Walker’s theory employs an axiomatic requirement stating that the different constitutional sites cannot deny the equal authority of other constitutional sites.\(^\text{193}\) Bobić however, explain that the FCC did assert its authority over the CJEU in the *OMT* case.\(^\text{194}\) Bobić’s foundation, that is Walker’s theory, does not allow for the claim of ultimate authority that the FCC expressed in the *OMT* case. Perhaps Bobić would say that she does not fully subscribe to Neil Walker’s theory and this fifth axiomatic criterium would be something she disregards. As it stands now this discrepancy goes unexplained.

Both Bobić and Walker have contributed to the field of constitutional pluralism in 2018 and 2016 respectively, as such their works are the most recent ones on the topic. However, the reluctance of engaging with other theories of constitutional pluralism is not an issue isolated to

\(^{186}\) Walker, 2016, pp. 342-347.


\(^{190}\) Giorgi and Triart, 2008, p. 712.

\(^{191}\) Bobić, 2017, for example pp. 1402-1409.

\(^{192}\) Bobić, 2018, p. 36.

\(^{193}\) See section 3.1.1 above.

\(^{194}\) See section 5.1.1 above.
Bobić and Walker. Kumm have contributed with three articles, one from 1999, a second one from 2005 that he co-wrote with Victor Comella and one he wrote on his own in 2005. Neil Walker wrote about constitutional pluralism in 2002 and later in 2016 and Miguel Maduro wrote in 2003, after both of Kumm’s and Walker’s first texts on the topic. Surprisingly, little effort is exerted by the different authors to engage with the others. Kumm refer to Neil MacCormick and Miguel Maduro and Neil Walker without engaging with their theories at all. Nowhere in his article from 1999 does Kumm mention another theory on constitutional pluralism. Walker, in his 2002 article mention no other authors and only very briefly mention the works by Maduro and Kumm in his 2016 article. Similarly, Maduro refer to MacCormick, Walker and Kumm only briefly without engaging with them in more than a paragraph.

Studying MacCormick’s contributions yield a similar result. However, as MacCormick is widely considered to be the first to write about constitutional pluralism it is not surprising that he is unable to refer to other theories on constitutional pluralism in his earlier works. In his article Questioning Post-sovereignty from 2004 MacCormick does mention that Miguel Poiares Maduro has developed a theory on constitutional pluralism. However, the interaction stops there as the remainder of the article focuses instead on propagating for his theory over another one that he calls Sovereignty in transition.

7 Concluding remarks

I believe the lack of internal coherence is the greatest flaw of constitutional pluralism. It makes the entire field very difficult to overview. This leads to the credibility of the entire field to suffer as it becomes impossible to see how a proponent’s opinion of their theory compares to another. If the authors were to engage with the other theories, they could probably find strengths and weaknesses with both theories, accentuate these differences and create something jointly. The result could be fewer main branches of constitutional pluralism emerging, however these branches would be supported by more authors which would allow for advancing the internal coherence and face external critique. As it is now, every author must develop a theory, defend against external criticism towards their theory and attempt to find some sort of internal

coherence. This third step is currently lacking, and it is very understandable, there is simply too much for the proponents of constitutional pluralism to do. Advancing the internal coherence could, however, lead to fewer main branches of constitutional pluralism that in the long run would be more likely to stand up to scrutiny, both internal and external.

Constitutional pluralism does not know what it is, but it knows what it wants to be. Its supporters uphold it as the way Europe should develop and painted a picture full of discourse, tolerance and self-determination. This is acceptable for a field of philosophy which allows for abstract ideas to be abstract, but the legal world is a practical one. Constitutional pluralism has yet to find that internal practical foothold required for it to gain coherence among its proponents, solve one or several agreed upon issues and at the same time be applicable to the real world. Instead the authors insistence on writing normatively can imagine any solution for any issue, and that is precisely what has happened. Little to no effort has been made to establish a foundation which can be generally agreed on and the result is that many authors enter the realm of theory crafting unconstrained. Interesting for them, surely, but the academic contribution is limited. Ultimately the contribution is not more than a single voice in a struggle larger than any one person can overcome.
Bibliography

Cases from the Court of Justice of the European Union


Case C-62/14, Peter Gauweiler and Others v Deutscher Bundestag, ECLI:EU:C:2015:400.

Cases from the Bundesverfassungsgericht (FCC)


Judgment of the Second Senate of 21 June 2016 (the OMT case), 2 BvR 2728/13.

Cases from the Danish Supreme Court

**Literature**


Neergaard, Ulla and Engsig Sørensen, Karsten, Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the *Ajos* Case, in *Yearbook of European Law*, Volume 36, No. 1, 2017, pp. 275-313.


**Miscellaneous sources**

Juncker, Jean-Claude, *Juncker’s full state of the Union Speech* [https://www.youtube.com/watch?v=CPa7-WiZ3uE], 20-12-2018.