The Intrumentalisation of Constitutional Pluralism by Member States' governments in the Rule of Law Crisis

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How the governments of backsliding member states instrumentalise the theory of constitutional pluralism to isolate themselves from intervention of the institutions of the European Union

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(2220237)

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July 6th, 2021

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Words: 6534

Bachelor project: The European Union in Crisis

Introduction

Democracy is in decline and autocratisation is on the rise around the world (Csaky, 2021; Nazifa et al., 2021). The democratic backsliding, as this process is commonly referred to, varies in its intensity and scope depending on the specific case. In Europe, one of the process' most widely recognised aspects is the erosion of the rule of law in former socialist states such as Hungary and Romania (Cianetti, Dawson & Hanley, 2018). The rule of law crisis may have substantial implications not just for the counties affected by it but for the whole European Union.

Firstly, the citizens of Hungary, Poland, Bulgaria, Romania and other affected states may face arbitrary judicial rulings and find their rights violated (European Parliament, 2018a). Considering that the rule of law is a fundamental part of democracy, its erosion means that the citizens may find themselves in a non-democratic system. Secondly, the absence of a rule of law may lower the confidence of investors which in turn would result in fewer investments and less economic development (Alexander, 2014). Thirdly, the deterioration of rule of law in a country would mean that the Union law would not be applied (enforced) equally throughout the member states and as a consequence, the common legal framework would be endangered (Kelemen, 2016). Lastly, the image of the European Union would be hampered as it claims that it is a union based on democratic values and law (Manners, 2010). The European Union would lose its influence as normative power abroad which will weaken its position in international relations.

Rule of law crisis is a subject of expanding debate within the EU studies (1) and it can be argued that it is the crisis presenting the greatest threat to the future of the Union when compared to Brexit and the migrant crisis. That is, it possesses a challenge to the fundamental values and, thus, the identity of the European project. On a more practical side it damages the equal application of EU law, hence, pressures the functioning of the common market and the equal treatment of all EU citizens across all member states (Kelemen, 2019)

The theory of constitutional pluralism, which is commonly used to describe the current state of the European legal order, has come under attack in the last decade as the rule of law crisis intensified. Opponents of the theory argue that it provides “aspiring autocrats” in some European countries with a legal doctrine to justify their deviations while proponents of the

theory argue that its normative core is an antipode of authoritarianism (Avbelj, 2020). The main argument of this article is that the two sides seem to misunderstand each other. This is to say, while proponents refuse to recognise that their ideas are indeed abused by some governments and used to justify their practices of eroding the rule of law, opponents of the theory also fail to admit that these governments employ just a shell or shadow of what constitutional pluralism really is. Thus, the article introduces two versions of constitutional pluralism, thinner and thicker, which represent the way opponents and proponents of the theory view it. In order to investigate the difference between these two types and how they are deployed by governments with autocratic tendencies, this paper answers the research question "How is constitutional pluralism instrumentalized by some governments in the EU?"

The following text is divided into N-number sections. Firstly, it introduces the debate between the proponents and opposers of constitutional pluralism and links it to the emerging literature on the rule of law crisis. Secondly, it provides a theoretical framework in which two conceptions, a thinner and thicker version, of constitutional pluralism are offered. Additionally, the link between constitutional identity and pluralism is investigated. Thirdly, the research design is presented. Fourthly, the population of texts and their analysis is presented. Lastly, the findings and their implication for both the academic debate and current political situations are provided.

Literature review

The literature on the Rule of Law crisis in the field of political science covers many subtopics (Kochenov, Magen & Pech, 2016). Some authors are interested in the existing and prospective safeguards against eroding the rule of law in Europe (Blauberger & Kelemen, 2017; Sedelmeier, 2017). Others are more interested in why has the European Union failed to react and resolve the crisis and rely on established theories and frameworks such as neo-functionalism and institutionalism among others (Closa, 2020; Raub & Reis, 2020) or craft more novel approaches such as introducing contesting visions - Thick, Thin, Global and Parochial - about the nature of the European project (Soyaltin-Colella, 2020). Meanwhile, Muller (2015) investigates the normative side of the issue, that is, if the European Union has the right and the duty to intervene in member states in which the rule of law is eroding. At the same time, some authors research some of the actions undertaken by the EU Commission such as the Rule of Law Framework of

2014 and theorise about its implications for the Union and the member states (Kochenov & Pech, 2016). Lastly, some more niche contributions elaborate on the past and upcoming activities, and the future role of some institutions such as the European Parliament in the handling of the issue (Sargentini & Dimitrovs, 2016; Toggenburg & Grimhenden, 2016).

While these researches on the rule of law crisis cover many different segments of the topic, it seems that political scientists are not interested in the legal side of the issue. The authors of these papers are focused on the political side and, thus, are missing the underlying legal order of the European Union and the interactions between the EU and the member states. This is to say that political scientists tend to take a top-down approach to the crisis and advocate more activity on the side of the European institutions but forget that the Union is founded upon legally binding treaties and any disputes regarding potential breaches (of the treaties) should be resolved in front of the European Court of Justice.

From the perspective of legal studies, one theory is linked to the rule of law crisis. Constitutional pluralism is a theory of both political and legal nature and it is mainly concerned with the functioning of the common European legal order and the legal interactions between member states and European institutions (Cruz, 2012, 2016; Goldoni, 2012; Goldmann, 2016; Mac Amhlaigh, 2020). Additionally, constitutional pluralism is concerned with the question of Kompetenz-Kompetenz or where the jurisdiction of the European Court of Justice ends and where the authority of the national high courts start.

However, when it comes to the intersection of constitutional pluralism with the rule of law crisis, the available literature is rather narrow. It focuses on the theoretical validity and real life sustainability of the theory. For example, Kelemen (2016) argues that constitutional pluralism is unsustainable and eventually would destroy the common European legal order as its essential propositions challenge the rule of law's requirement of legal certainty and, thus, may further its erosion. Similarly, Julio B. Cruz (2016) claims that constitutional pluralism does not have a firm theoretical foundation and that efforts to maintain it may damage the practice of applying the law equally across the Union, hence, endanger the rule of law.

On the other side of the debate, N. Walker (2016) argues that constitutional pluralism is misunderstood by its opposers and may very well offer a realistic account of the functioning of the European legal order. Furthermore, the author emphasises the political side of the theory

and claims that its importance has not declined in relation to the legitimacy challenges faced by the EU in the past decade. Therefore, a constitutional pluralist framework may accommodate the different interests of the member states and their respective legal systems. M. Avbelj (2020) also inspects the claims made by the opposers of constitutional pluralism and argues that they fail to grasp the essence of the theory. Contrary to them, the author argues that constitutional pluralism is the antagonist of authoritarianism and it is incompatible with practices that erode the rule of law. Overall, constitutional pluralism may not be the best architecture for the European legal order but it is the only viable one.

The differentiated integration approach in the rule of law is another point of contest between proponents and opposers of the constitutional approach. On the one hand, Kelemen (2019) argues differentiation in the fundamental values and rule of law would result in unequal application of Union law across the member states and, consequently, the demise of the common European legal order as a whole. On the other hand, Bellamy and Kroger (2021) dispute this view and claim that constitutional pluralism may be employed to create criteria that the EU will deploy, together with processes and penalties, against backsliding governments. The latter may choose to value differentiation at the cost of their voting rights and EU funding. In this point of conflict, the two perspectives, of the opponents and the proponents of constitutional pluralism, emerge - the idealistic and pessimistic view of the former against the imperfect but consensual view of the latter.

Overall, the available literature on the relationship between constitutional pluralism and the rule of law crisis is mostly written by legal scholars. Consequently, the literature has predominantly normative and theoretical character. Additionally, it seems that the authors fail to find a common ground as both sides, proponents and opposers of constitutional pluralism, employ different versions of the theory and, thus, cannot advance their debate. Finally, there are only two papers that are aimed at establishing an empirical link between the use of constitutional pluralism and backsliding governments (Kelemen & Pech, 2018, 2019). However, their scope is limited as it can be observed by the used data.

Theoretical framework

Before presenting the relevant concepts and theories to this inquiry, the question of Kompetenz-Kompetenz needs to be introduced as it is central to constitutional pluralism. In the European legal order it is accepted that the national apex courts have the ultimate judicial authority within the legal system of the respective member states and, similarly, the Court of Justice of the European Union (CJEU) has the authority in matters of Union law (Kelemen, 2016). The Kompetenz- Kompetenz question arises when the national high courts and the Court of Justice of the European Union do not agree on the boundaries of their jurisprudence and authority (Beck, 2011). The legal theory can be roughly separated into three perspectives on the matter which are briefly presented below (Cruz, 2016). Firstly, proponents of the Union law position argue that the CJEU should have the ultimate judicial competence and decide where the boundaries between the courts lie. Secondly, the national constitutional position argues that the ultimate boundaries of the courts' jurisprudence should be decided by the national courts and by the CJEU. Lastly, constitutional pluralists argue that the question of Kompetenz-Kompetenz should not be resolved in favour of any of the courts. On the contrary, pluralists support the idea that both the apex national courts and the CJEU should not be placed under hierarchical relations. Rather they should respect each other's views and if there are any points of conflict, they should find a resolution through dialogue and mutual re-adjustment.

The theoretical framework of this paper is based upon the constitutional pluralists' perspective of the Kompetenz-Kompetenz question and how this perspective has generated some claims that constitutional pluralism is susceptible to manipulation, "... is weaponised by Europe's autocrats" and "aspects of the concepts of constitutional pluralism … made them such a perfect tools for the PiS autocrats" (Kelemen, 2019, pp. 255-257). Therefore, opposers of the theory argue that it can be instrumentalized by backsliding governments to protect their internal practices of eroding the rule of law, from potential interventions of European institutions.

Thus, this paper aims to answer the question "How is constitutional pluralism instrumentalized by member states' governments in the rule of law crisis". The expectations are as follows - constitutional pluralism is instrumentalised by backsliding governments. However, the latter deploys a very limited form of the politico-legal theory. In the following text, this form would be labelled a thin or false version of constitutional pluralism and it would be contrasted to a thick version. In the following paragraphs, these two versions are presented and conceptualised.

Constitutional pluralism is a major legal school of thought with many branches and, thus, there is not a universally accepted version. (Avbelj & Komarek, 2012; Jaklic, 2013) Moreover, as it was mentioned in the text above both the proponents and the opposers of constitutional pluralism seem to fail to find a common ground about what are the essential characteristics of the theory (Ovadek, 2018). As a consequence, two perspectives emerge which are used as foundations for the thin and thick version employed by this research. The former type of constitutional pluralism is based upon the opposer's view.

Constitutional pluralism, according to its critics, is defined by its unwillingness to decide which court should have the ultimate judicial authority in the European legal order and by not providing resolution for the Kompetenz-Kompetenz question (Cruz, 2016; Kelemen, 2016, p.145). Hence, the disputes between the EU institutions and a member state on matters of rule of law may not reach the CJEU as long as the government of the country in question rejects the legal authority of the European court.

Furthermore, the opposers claim that the theory would allow for member states or their highest courts to decide which segments of the EU law would be applied and which would not. This is to say that the backsliding governments can isolate themselves from legal acts of the EU as "they deem [them] incompatible with their constitutions or particularly inviolable aspects of their constitutional identity" (Kelemen & Pech, 2019, p.62). As a consequence, the EU law would not be applied equally across the member states, the legal uncertainty would increase and the fundamental rights of people may not be under the protection of Union law. Thus, the rule of law would erode as its core characteristics would be absent.

Constitutional identity is an important concept in contemporary European legal studies and it is extensively researched (Fabbrini & Sajo, 2018; Halmai, 2018; Fichera & Pollicino, 2019). Kelemen and Pech (2018; 2019) consider it to be a twin concept of constitutional pluralism and that the two create the same implications for the European project, that is, erosion of the European legal order and the rule of law. Nevertheless, the two concepts are not linked by proponents of constitutional pluralism or scholars of constitutional identity and for that reason, the latter is considered to be beyond the scope of this paper (Walker, 2016; Halmai, 2018)

The thick version of constitutional pluralism takes into account its normative core. The roots of the latter can be found in legal pluralism in particular and philosophical pluralism as a whole (Avbelj, 2020, p. 1027). Arguably, pluralism as a concept can be rather vague with too many conceptions that differ from author to author. Nevertheless, it may be presented as something along the lines of Sartori (1997, p. 58): “Pluralism affirms the belief that diversity and dissent are values that enrich individuals as well as their polities and societies”.

The EU is a union based on the law in which diversity is among the fundamental values as it can be observed by its motto. The European Union consists of independent states with different cultures and identities and all of them have joined voluntarily and kept their distinctiveness. However, joining in requires that the member states be committed to pluralism, both internally and externally (Avbelj, 2020). That is, they need to integrate pluralism in their institutions and create checks and balances so all members of their society may keep their respective distinctiveness. Externally, the states should aim to integrate pluralism in the European institutions and keep accountable not only them but each other as well. Therefore, constitutional pluralism, at its core, is an antagonist of authoritarianism. Thus, any attempts of backsliding governments to justify their practices of eroding the rule of law and democracy with constitutional pluralism would be empty of its normative core. For this reason, they would deploy a thin, false version of the theory. Meanwhile, Bellamy and Kroger (2021) argue that constitutional pluralism provides a legitimate justification for both EU institutions and other member states to act against backsliding governments and, hence, the theory cannot be instrumentalised by these governments at best or can be aimed against them at worst.

The concept of loyal opposition is another point of interest for this paper as it helps to make a greater distinction between the proper application of constitutional pluralism, that is the thick version, and the thin version. T. Flynn (2021) applies this concept to the interaction between national high courts and the European Court of Justice. The author shows that the presence of constitutional pluralism allows for loyal opposition to exist which in turn benefit the development of both national and Union law. Consequently, in order for Polish and Hungarian national authorities to be able to deploy constitutional pluralism, they need to act as a loyal opposition (and not as a disloyal one). It is worth mentioning that this idea resembles the principle of sincere cooperation, enshrined in article 4 of the Treaty of the European Union (Treaty of the European Union, 2012). Thus, dealing in bad faith automatically excludes the

possibility to justify this or that action by referring to the theory of constitutional pluralism or to some of its proponents.

Research Design, Case and data selection

The erosion of democracy as a whole and the deterioration of the rule of law in the European Union affect many states (European Commission, 2020a; Freedom House, 2020). However, the available proceedings under article 7 of the Treaty of European Union are initiated only against Hungary and Poland (Michelot, 2019). For that reason, this paper will investigate how the governments of these two countries or their representatives instrumentalise constitutional pluralism. Both these countries are stated to be paradigmatic (Cianetti, Dawson & Hanley, 2018). Moreover, they can be considered to be prototypical and / or exemplary, and thus can be used as a foundation for future research on the issue (Hague, Harrop, McCormick, 2016; Lorenz & Anders, 2020). Additionally, Hungary is the only member state that is labelled as a non-democratic regime in the European Union (Nazifa et al., 2021) and its democratic regression continues for more than a decade. Focusing on these countries would allow for in-depth analysis and would make the findings more reliable even though they will not be generalisable to the same extent as if a large-N approach was chosen.

Initially, a single case study was considered to be done. However, in the course of the preliminary search for texts and creating criteria for this paper's text pool, it was found that the issue of constitutional pluralism is insufficiently present. Consequently, it was decided that in order for this investigation to be full-fledged and contribute to the current state of knowledge, additional sources are needed. For that reason, the perspective of Poland's national authorities was included as the country itself presents a subject of equal interest as Hungary. Furthermore, the small-N design approach benefits this paper as it allows for a more varied view of the instrumentalisation of constitutional pluralism by the respective governments.

The method which is used is textual analysis. It is chosen because this research is interested in constitutional pluralism which is a normative and idea-based theory and relies on the used language. Quantitative methods will not be able to provide the needed insights and thus answering the research question would not be possible. Because of the normative character of constitutional pluralism, a discursive analysis is best suited to investigate the matter. To be more

precise, the paper will use policy narrative analysis as it would allow tracking the development of the arguments used by the backsliding governments in relation to the rule of law crisis.

There are two earlier contributions on the use of constitutional pluralism and constitutional identity by the backsliding government (Kelemen & Pech, 2018, 2019). In order to further develop the field of study, this paper takes into account the time frame from 2018 till the first quarter of 2021. In that way, it partially overlaps with the earlier papers and can trace if there were any substantial developments in the discourse of constitutional pluralism. These contributions are focused on the events in Hungary and Poland and should be considered as good starting points for further research. It is worth mentioning that some of the sources used by Kelemen & Pech (2019) are reexamined in this paper in order to offer continuality

The pool of texts used is selected by the following criteria. Firstly, they should be created between 2018 and 2021. Secondly, the sources should be in one of these categories - legal cases presented in front of the Court of Justice of the European Union, legal acts of institutions of the European Union, non-legal acts of the same institutions such as reports, reports or speeches made by high ranking Hungarian or Polish officials or other papers issued by the respective national authorities such as the "White Paper on the Reform of the Polish judiciary (The Chancellery of the Prime Minister of Poland, 2018). It should be noted that all legal cases having Hungary, its courts or institutions as a side to them are taken into consideration. Media articles are not included as they do not show official positions or in case that the media is an official representative of the Hungarian government, its working language is Hungarian, which makes it unsuited for textual analysis. Press releases were also considered, however, they proved to contain little to no information on the subject of interest.

Statements made by Polish or Hungarian members of the European Parliament during debates on relevant resolutions are also investigated as well as the written explanations for the way they have voted. These members of the parliament are formally representatives of the European institutions and not the relevant national authorities. However, they are de facto members of the ruling parties in the member states and thus are viewed as representatives of the Polish and Hungarian authorities. Their statements and written explanations for their voting are useful in that they provide another perspective on the rule of law crisis.

Empirical analysis

The analysis would start with an example of an earlier contribution of Kelemen and Pech (2019). They present parts of the aforementioned White Paper which contains a whole subchapter dedicated to constitutional pluralism (The Chancellery of the Prime Minister of Poland, 2018). In the following paragraphs, its text is analysed as it provides a great example of the use of constitutional pluralism by Polish authorities and places a framework that can be applied to sources that are published later in time.

It should be noted that it is outside of the scope of this thesis to analyse the potential implications of judicial reform in Poland. Rather, this analysis focuses solely on the arguments used by the national authorities:

169. The legal system of the European Union is based on the constitutional pluralism of the member states. It means that there are multiple constitutional systems – on one side there are national systems of the Member States, on another, the European framework, having its "constitutional charter" in the Treaties... Each country has specific constitutional solutions that are rooted in its history and legal traditions and these differences are protected by the treaty law of the European Union. Article 4 of the Treaty on European Union quoted above shows that the Union respects national identity which is inherent in the fundamental political and constitutional structures of the member states. (The Chancellery of the Prime Minister of Poland, 2018).

Point 169 of the Paper starts by outlining the existing status of the European legal system which is constitutional pluralism, and this descriptive claim is supported by the scholars of the theory. The Polish authors also refer to the existing historical and constitutional distinctions between their legal order and the others' and argue that these differences are protected by Article 4 of the Treaty of the European Union (Treaty of the European Union, 2012). Kelemen and Pech (2019, p. 70) correctly point out that the Polish authors have conveniently not included the principle of sincere cooperation which is a prerequisite for the proper functioning of Article 4.

Constitutional identity is introduced in point 170 of the White Paper (The Chancellery of the Prime Minister of Poland, 2018, p. 82). It is said to be a "core value" which sets limits to the reach of the European Union. In points 171 and 172, the White Paper supports its argument by

referring to cases of both the German Federal Constitutional Court and the European Court of Justice:

171. Defence of constitutional identity is a key matter for the German Constitutional Tribunal, which in its 2009 ruling on the Lisbon Treaty (2 BvE 2/08)…

172. The importance of the protection of national identity for the European Legal system was also stressed by the European Court of Justice – that ruled that it can sometimes lead even to exception from the rule of primacy of the EU law that was itself protected and strengthened by the Court (see C-208/09 – Sayn-Wittgenstein, C-391/09 Runevič-Vardyn and Wardyn)…

(The Chancellery of the Prime Minister of Poland, 2018).

While this paper is not particularly interested in the instrumentalisation of constitutional identity by the Polish and Hungarian authorities, it is important to recognise that they can misuse or abuse case-law of other courts the same way, they can employ a thin version of constitutional pluralism. Thus, claims that the latter theory is inherently susceptible to misexplotation is rather arbitrary as the same can be said for decisions of the European Court of Justice.

The Polish authors of the paper continue their line of argument by referring to Neil MacCormick, who is considered to be one of the fathers of constitutional pluralism (The Chancellery of the Prime Minister of Poland, 2018 p. 83). The White Paper uses some of the ideas developed and spread by constitutional pluralists:

175. …In order to avoid conflict that could destroy the peculiar construction of the European legal system, the EU and its Member States should mutually respect themselves and remain open to withdraw some of their actions if they would interfere too much in the areas reserved for the other party – even if both of the parties would believe that there are some legal grounds for action. Thus, one of the main principles is self-restraint – resulting from mutual trust, which is a condition for each and every community. This balance in the European Union that has been constructed carefully for years should.

(The Chancellery of the Prime Minister of Poland, 2018)

It can be observed that the Polish authorities rely on mutual trust and respect, self-restraint, and open for dialogue. However, they have neither included the principle of sincere cooperation nor loyal opposition in their line of thinking. They have not included the normative core of constitutional pluralism. That is, they have not bothered to even imitate any commitments to pluralism within their state. Rather, they argue that it is normal for the different legal systems within the European Union to differ and that both European institutions and other member states should abstain from interfering with their internal solutions to their judicial problems as this would violate their sovereignty. Hence, they reject the checks and balances or the defending both the internal and external pluralism which is required by the normative aspect of the theory (Avbelj, 2020). Overall, the type of constitutional pluralism, that is offered in the White Paper by the Polish authorities, resembles what was conceptualised in the text above as a thin version.

In a case of the Court of Justice of the European Union regarding the temporary suspension of the newly introduced legislation regarding the judicial system in Poland, the position of the member state is briefly presented (CJEU, 2020a). Poland's stance, in this case, resembles the standard national position in the Kompetenz-Kompetenz debate (and not the one of constitutional pluralism) as it argues that the internal structure of the judicial system and how it is managed under the jurisdiction of the member state and not the supranational EU institutions (CJEU, 2020a, p. 26). Similarly, in another point of conflict of interest between Poland and the European Commission, the member state argues that it is within its competence to decide how to change the retirement age for judges of the Polish Supreme Court (CJEU, 2019). What is interesting to observe is that Poland keeps using the official channels of dispute settlement instead of not recognising the opinion and decision of the European Court of Justice. Thus, it may be argued that they represent a type of loyal opposition, and thus the Polish authorities prefer to stick to the model of constitutional pluralism, although, they do not use the arguments of the theory but keep the standard national stance described in the theoretical part of this paper. That is not to say that the authorities are dealing in good faith, it may be very well the fact that they just exploit this model to win time in hope that the political landscape within the European institutions will change.

Hungary is the second country against which the proceedings under article 7 of the Treaty of the European Union are initiated at the time of writing. The proceedings were started as an initiative of the European Parliament after Sagrentine's report was published and voted in as a resolution (European Parliament, 2018a). In response to the report, the Hungarian authorities

prepared and shared an information sheet that is aimed against the alleged misrepresentations in the report. From the starting pages of the Hungarian paper, it becomes clear that Orban's government is ready for a sincere cooperation in order to harmonise their national legislation to that of the Union:

> It is unquestionable and evident from the Treaties that only the Court of Justice of the European Union may interpret the provisions of the Treaties and that binding norms may only arise from legislation and not from unilateral soft law instruments ... Hungary has always been and will be ready to discuss the legality of any specific measure and respond to any concern that may arise.
> (About Hungary, 2018, p. 8)

It should be mentioned that both Hungary and Poland consider "rule of law" as value to be a vague concept when it comes to its position in the Treaty of the European Union and so their governments consider all the proceedings under article 7 to be of purely political nature as it will become clear from their debates in the European Parliament which are analysed below. Nevertheless, it seems that the Hungarian authorities are willing to participate in dialogue and mutual accommodation as desired by constitutional pluralism.

In the text, the Hungarian authors often are comparing their institutional solutions to that of other member states such as Germany and use them as justification for their actions (About Hungary, 2018, pp. 9-10). It is important to note that this information sheet is very precise in its language and examples as it responds to specific points made in the abovementioned Sagrentini's report. Meanwhile, constitutional pluralism is theory and as such, it is about principles, ideas and assumptions, as a consequence, the report does not specifically refer to the theory. However, some of its ideas are present in a more subtle way:

> On 18th September 2017 a Panel of five judges of the Court accepted the Government's request that the case be referred to the Grand Chamber. The Government argued that the case raised serious issues of general importance affecting the interpretation and application of the Convention and the legal order of several High Contracting Parties, and posing serious social challenges. The Government presented in their Memorial submitted to the Grand Chamber that global migration is currently based on a purported right to asylum-shopping encouraged by an implicit recognition of that right

by the jurisprudence of the Court contrary to the explicitly reiterated principles in the Court's jurisprudence recognising the States' right to control the entry and stay of aliens on their territory.
(About Hungary, 2018, p.51)

It is observable that Hungarian authorities do recognise that different understandings, and thus interpretations, of the European Convention for Human Rights, exist among the contracting sides. This is an implicit way of claiming that different constitutional traditions exist and they need to be adjusted to each other through dialogue between the courts. Overall, the information sheet of the Hungarian government seems to argue for dialogue and mutual understanding as it often refers to practices of other member states of the European Union as well as opinions of the Venice Commission or successful interaction with the European Commission in regards to infringement procedures (About Hungary, 2018, p.52). Consequently, it may be argued that this represents recognition of a thin version of constitutional pluralism.

The statements made during debates in the European Parliament are also an intriguing source for the perspective of the representatives of the governments of Poland and Hungary as they are not as formal as the information sheet, the white paper or cases presented in front of the Court of Justice of the European Union. At the same time, they are more of political nature and thus can offer new nuances to the topic. For example, during his speech in the Parliament, Orban says that "What holds our union together is to settle disputes within a regulated framework" (European Parliament, 2018b). This is to say that even though the understanding of different actors in the EU deviates from one another, a compromise should be found.

Throughout the debates, other topics emerge. Firstly, members of the Parliament, affiliated with Fidesz or Law and Justice parties, talk about the principle of subsidiarity and the separation of competencies and how the European institutions do not have the mandate to intervene in the internal affairs of Poland and Hungary (European Parliament, 2018b). Secondly, the topic of the EU as intolerant of different standpoints appears throughout the arguments of the conservative politicians: "It was mentioned here that we are united in diversity, so how has it come about that you want to kick out someone for being so different"(European Parliament, 2018b). Finally, the parliamentarians argue that a double-standard exists and point out that the same or similar institutional solutions can be found in other states:

Secondly, by the appointment of the judges – which is done in the same way as in Spain. You know, in Poland the judicial council is appointed by parliament, like in Spain, by the same majority as in Spain, and you say: 'In Spain everything is good but in Poland, you harm the rule of law'. And this is the equal treatment?
(European Parliament, 2018c)

Conclusion

This paper tried to answer the question "How constitutional pluralism is instrumentalised by the governments of the member states in the context of the rule of law crisis?". It was done by creating two versions of constitutional pluralism - a thin and a thick. The former represents some claims made by scholars of the theory regarding the need to avoid conflict between the constitutional courts and attempts for mutual accommodation of their differences and self-restraint. The thick version builds upon that and includes additional normative claims regarding the need to respect and defends plurality both within the country and outside of it or as M. Avbelj (2020) puts it internally and externally. This framework was applied to a pool of texts gathered from different sources and having different statuses such as white papers, information sheets and statements during parliamentary debates among others.

The theoretical framework has its limitations as it represents just two types of constitutional pluralism while in reality there are many (Avbelj & Komarek, 2012; Jaklic, 2013). This might have resulted in not detecting arguments in the spirit of constitutional pluralism which does not fall under the conceptions developed in this paper. Additionally, the thick version of the theory might have been further developed by deepening the notion of legal pluralism. Nevertheless, the difference between the two concepts is large enough in order to be successfully applied in the text.

The research design also has its limitations as it considers only two countries while there are many more which suffer from similar erosion of the rule of law such as Bulgaria and Romania to name a few. Thus, generalisations are not possible and should not be made. Additionally, while the discursive method of analysis is suitable to investigate the use of theory in the real environment, a broader content analysis may result in additional insights on other recurring topics related to the rule of law and justifications made by the relevant governments or their

representatives. Moreover, other methods may show the frequency with which these arguments appear, including the use of constitutional pluralism.

The analysis of the chosen texts led to the following findings. Firstly, the thick version of constitutional pluralism is employed neither by the government of Poland nor by that of Hungary. Secondly, the thin version of the theory is employed by the Polish authorities but it is seldom explicitly shown. Rather, some tenets of the theory are used as an argument for avoiding conflict or justifying actions of the respective national authorities. The only exception being the White Paper on the Reform of the Polish Judiciary where arguments similar to the thin version are developed to a greater extent. Finally, it may be argued that while national governments' instrumentalisation of constitutional pluralism is mostly implicit, their interactions with the Court of Justice of the European Union can be interpreted as signs of support for the maintaining of the current legal status quo in which the different sides need to readjust and mutually accommodate their differences in their understandings and perceptions.

While this paper is not comprehensive, neither it manages to exhaust the topic of the instrumentalisation of constitutional pluralism by the governments of Poland and Hungary, it can be used as a starting point for further research. For example, a content analysis may be performed creating similar categories to these of the thin and thick version. Alternatively, the focus might be switched to other countries or to other legal concepts such as constitutional identity.

Overall, this research managed to answer the presented research question and even though some limitations are conferred, it manages to contribute to the state of knowledge and fill some of the existing gaps in the literature through insights from the perspective of governments associated with the erosion of the rule of law in their countries.

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