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## Constitutional pluralism - EU legitimacy and integration

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Challenges to Democracy and the Rule of  
Law in European Politics

Dr. Tom Theuns

This thesis can be listed as public

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## Introduction

The question of European integration is one which cannot be presented as a mere ongoing political event. Not only practically complex, it is also at the forefront of political discussion due to what many would call unresolved issues and inherent institutional complexities within the European Union. From 2004 and on, the chain of persisting crises from the refugee wave to Brexit have proven that the European project is far from being a *fait accompli* – it has, nevertheless, also proven that fatalistic predictions of an impending collapse leave much to be desired when compared to reality (Laczó, 2023, p. 164). The EU is by itself an emblematic example of a polity whose development arose out of even more harrowing crises and harsher disputes, in comparison to today's. Crises for the EU have been a historical constant (Segers, Van Hecke, 2023). This, however, does not negate the fact that these crises have put forward important questions. Can Europe today remain a legitimate authority in the eyes of its members, and to that extent, its citizens? And more importantly, where does this legitimacy lay?

Such a line of thinking leads to the scrutinizing of the very foundations of the EU which has long been at a crossroads in determining what type of organisation it seeks to be – one that enforces the primacy of national authority or one which accommodates its growing supranational elements. It is on this binary that a great many of academics and journalists have situated themselves, debating what they see as the merits and disadvantages of both. Journalist and author Simon Jenkins (2018) called on history to argue that the establishment of a veritable supranational entity is a fantasy for Europe, no matter how good and progressive its intentions may be. Such sentiments have even crossed into political every-day life, with a resurgent far-right along the likes of Wilders and Le Pen calling for a “Europe of free and sovereign nations” or Hungary's Viktor Orban attempting to put it in practice (Stickings, 2022) (NL Times, 2024) (Orban, 2017). On the other hand, academics such as Daniel Kelemen and Laurent Pech (2019) or Sonja Priebus and Lisa Anders (2023) do not only examine a steadily growing trend of supranationalism but see attempts to re-affirm national sovereignty as the great internal danger to the EU and its overall well-being.

These developments indicate that the crossroads which the EU faces is more apparent where a supposed rift between the “Europe in the making” and the existing European community has more deepened. The shortcoming of this is that it can firstly unnecessarily pit

these supposed Europes against each other. This is based on an immediate assumption that such conceptions are fully exclusive. Nonetheless, it is also evident that the EU cannot remain as is and that the many issues that plague it, namely the need for the protection of rule of law and democracy among its member and candidate states, can be resolved by clarifying the question of legitimacy and the very institutional character of the EU. Consequently, a possible middle ground presents itself as a solution - constitutional pluralism. Constitutional pluralism is a legal doctrine which in turn can provide the framework to build on the commonalities within the European communities while tolerating the constitutional frameworks still important to various national identities. Thus, the debate on what political foundations would reinforce the EU's legitimacy can be framed within a given research question:

*Is constitutional pluralism a more legitimate form of EU integration compared to intergovernmentalist or supranationalist interpretations?*

This paper will argue that constitutional pluralism is the more legitimate form of integration for it offers a more democratic framework that is in line with the values the EU is meant to promote. The case for constitutional pluralism is therefore argued on a normative basis. This work will deal with the considerations that come from assessing the values of the forms of EU integration, judging them from a value-based perspective. The purpose will not be to discuss the practicalities nor whether Europe today leans one way or the other but to argue that constitutional pluralism is the system of governance a fair and equitable Europe ought to adopt. The fixation over Europe's complexities as a source of strife or the primacy national characteristics can be described as too narrow and at worst as a retreat from the very values laid out by the EU itself. Instead of constructing an environment in which the position of the member states and position of Brussels lead towards a political "tug of war", Europe especially due to its heterogeneity possesses a strong normative case for affirming its diversity in the face of adversity.

#### ***a. Importance of research***

This research seeks to contribute to the debate on the various models as how the EU should be organised. The debate on why a given structural arrangement for Europe is legitimate tackles with the very purpose of the EU as a uniting factor among the European peoples. Beyond the endorsement for constitutional pluralism, the second objective of this research is to convey the notion that the EU is in a state of constant evolution whose aspirations and challenges demand a frank, contemplative and theoretical discussion about the foundations of

a European organisation. As such, the analysis of the theories of integration from a normative standpoint can offer clarity in comprehending the philosophical implications of such an organisation from which we can move forward and if need be, expand towards questions of policy and their applicability. The possibility of a proactive and vibrant decision-making structure is limited without a sound theoretical basis.

### ***b. Methodology and structure***

This paper will first begin with a literature review of the relevant conceptions of EU integration; supranationalism, intergovernmentalism and finally constitutional pluralism. This literature review serves the purpose of defining key terms and setting the foundations upon which the main arguments, and to that extent, criticisms, and endorsements rest on. After this, constitutional pluralism will be argued for based on two arguments: its normative coherence with the values laid out by the EU itself (such as the Treaty of the European Union) and its own values which are used as examples that constitutional pluralism is legitimate by comparison. This will be followed by a comparison between constitutional pluralism and the two other opposing viewpoints. These comparisons will serve to put these conceptions into debate with each other, where implications and benefits of one or the other will be discussed as to offer specific responses in the face of supposed shortcomings of constitutional pluralism.

## **2. Theories of European integration**

### ***a. Supranationalism***

The “Oxford Dictionary of Politics and International Relations” (Brown et al, 2018) defines supranationalism “as the formal transfer of legal authority and decision-making power from member states to an institution or international body.” Even within the dictionary itself, the EU and some of its institutions such as the European Parliament or the European Court of Justice are prime instances of bodies which are integral in the EU’s ever-expanding collaboration and ultimately political integration. Within Europe’s history itself, supranationalism in post-war Europe played a key role in the formulation of a “community of fate”. This community of fate, however, did not necessarily come about of purely selfless reasons nor pre-conceived plans. Ironically enough, it is the fear for the national security of France and its allies which fuelled reconciliation. Attempts to do so through sectoral integration were the uncertain catalysts of European integration which began with the establishment of the European Coal and Steel Community (Oates, 2020, p. 79). Thus, supranationalism in Europe

is one which is, from its very beginning, conditioned by calculated matters of foreign policy of respective member states – rather than integration, it is interdependence which was the first standpoint of what would be the EU. By examining such historical context shortly, it is possible to perceive what adherents of supranationalism have long criticized as being an inherent problem of the EU – its uneven institutional development impedes its ability to act in times of crisis and persists due to critical policy capacities being selectively split up between the EU's administration and its member states (Kelemen & McNamara, 2022, p. 972).

Nonetheless, no matter how complicated its origins are and no matter how complicated it seems today, integration has since moved forward at a steady pace. The Single European Act and the Maastricht Treaty which would pool sovereignty with majority voting within the European Council or give more regulatory authority to the European Commission are just a recent step of this trend, coming about as well due to member states hoping for increased help on matters of welfare and efficiency (Büthe, 2016, p. 498). Even if the backdrop of these events may not seem as principled as can be assumed, growing supranational elements within the EU can no longer be looked at as anything else but as current features of the Union's overall system of functioning. In fact, their relevance in day-to-day decision-making and transnational activities has led authors such as Sweet and Sandholz (1997) to posit that the bargaining between member states has slowly been reduced from a position of first order to an “ubiquitous feature of supranational governance” (p. 314).

It is precisely this sentiment that supporters of supranationalism within the European context vigorously promote, as well as the genuine belief, in some cases, that this trend of supranationalisation is one which can only be beneficial to the Union. As argued by Daniel Kelemen (2023), the democratic concerns take definitive precedence over any concerns for the national sovereignty of states which are in a state of democratic backsliding, the Hungarian government and former PiS Polish government being outstanding examples. Supranationalism is seen as a necessary mechanism in the protection of rule of law from member states which would seek to threaten it. For instance, a mechanism of the kind can be found in the calls for the centralising and homogenizing of its legal space thus impeding the ability of democratically backsliding states in using national individuality as an excuse for the state of their democracies (Perju, 2018, p. 433). The point of national individuality/identity in matters of legal identity proves to be one of the central points of contention between the three theories of European integration. This topic will be elaborated on later.

Furthermore, the EU, in fact, already possesses the tools necessary to implement protection. Beyond mere withdrawal of EU funds which is a moderately successful tactic, within the TEU articles, Article 258 on infringement procedures is a good example. It is a perfectly valid instance of a legal ordinance proving that the EU does not lack tools to enforce its will, but sometimes the will itself (p. 232). The ECJ's ruling that that the European Community is "a community based on the rule of law" further reinforces the thesis that the rule of law is the overarching foundation of a supranational polity, a polity which does not recognize national sovereignty when rule of law is infringed upon (Pech, 2010, p. 359). Indeed, the discussion about the EU's supposed democratic deficit has for the adherents of supranationalism been turned on its head – it is no longer a process of democratizing the EU but rather protecting democracy among its member states (Kelemen, 2017, p. 230-231). To do so, the federal level had to be overhauled where institutions such as the federal courts play an important role in monitoring and enforcing democracy in the face of growing autocratization, as well as mitigating possible politization by federal lawmakers (Kelemen, 2019, p. 64).

This conception thus identifies supranationalism as a natural and necessary evolution of the European system beyond national boundaries and calculations which is a stark difference from its origins of careful interdependence. Adherents of European supranationalism today demonstrate an elaborate advocacy for the primacy of a central judicial and legislative authority that rests not only on already existing structures but on highly moral and aspirational wishes to protect rule of law from the erosion of democratic institutions among member states and external threats, which represents the true realization of the "community of fate" for them.

### ***b. Intergovernmentalism***

If supranationalism conceives the European experiment as one of ever-expanding integration into a new political organism, intergovernmentalism rather emphasises the collaborative aspects within the EU's system – the EU is first and foremost an organisation in which European national governments cooperate who are the central actors within it (Hooghe & Marks, 2019, p. 3). The EU itself experienced what can only be termed a process of "summitization", wherein the European Council has received a central role in decision making (Costa, 2022, p. 17). From the Eurozone crisis to the refugee crisis, heads of state have highlighted their national interests as being paramount to the overall negotiation process on how to resolve these issues. This conception of analysing the overall functioning of the EU is called new intergovernmentalism, a European intergovernmentalism which has shifted the



balance of power within institutions and limited the delegation of sovereignty (Smeets and Zaun, 2021, p. 857). It can effectively be considered a form of integration that avoids in engaging in further endeavours that could lead to supranationalisation. Intergovernmentalism presents itself then as a more manageable route for member states which see more collective actions as being too costly or unfair. This would mean that decision-making will ultimately be dependent on the calculation of costs and benefits by national governments which must willingly cede authority for a higher return. Most importantly, the proponents of such a view are of a mind that intergovernmentalism, whatever form or capacity it may take, will most certainly be a feature within any European system.

The most extreme reiteration of such a conception of Europe can be found in the populist and souverainist movements that themselves envision a struggle between nationalism and globalism. The core foundation of such movements is the strong adherence to respective national identities which are supposedly under a constant state of attack from an imposed supranational authority (Gould & Messina, 2014, p. 235). It is the reformulation of diversity, be it national, religious, regional or otherwise, to the point where the focus on these characteristics serves to produce a siege mentality – the refugee crisis which induced polarisation on all matters of identity and integration are a prime example of the fortitude of emotion that this type of politics invokes. Indeed, even a re-functioning of European identity can be noticed where the refugee or the immigrant is seen as an alien interloper that does not conform merely to French, British or any other national culture and neither to the European one (Givens, 2014, p. 204). Viktor Orban's 2017 speech echoes such sentiments where he speaks not only of a Hungarian fear but of a collectively European one. The references to an inconsiderate and belligerent migrant culture or supposed shady dealings done by George Soros that undermine national governments are all reasons for his main point that the EU itself needs to regain its sovereignty and to reform (Orban, 2017).

Furthermore, many have identified this type of populist rhetoric as being a hallmark of political figures among the intergovernmentalist persuasion that are also accused of the worsening state of democracy within their countries. This state of worsening comes about from the very underpinnings of an exclusivist interpretation of national values and identity. Sardurski (2019) explains this in his book on Poland's constitutional breakdown – the pushing for an ascriptive status to who belongs and who doesn't or a distaste for pluralism that allegedly threatens a united country are all by default anti-democratic in nature (p. 247). This form of national authoritarianism that arises from populist tactics leaves a heavy strain on integration

efforts. It quite specifically reinforces this duality or conflict between the member states and Brussels, in this case intergovernmentalism presenting itself as an outlet for a questionable politics. The Polish and Hungarian example could maybe even be termed as not so much a consequence of European integration but one of disintegration due to the contradictions with the founding values of the EU. As Sardurski aptly summarizes: “To be blunt, what is democratic about an illiberal, exclusionary, and anti-pluralist democracy?” (p. 247).

Intergovernmentalism in the case of the EU is thus a more traditional model that puts the member states at the core of decision-making as it has functioned since the very beginning of the EU and in other international organisations. Nevertheless, questions about the ongoing democratic backsliding in Europe and the rise of identitarian politics cast a doubt on whether some of its political adherents are even mindful of further integration or would rather seek to limit Europeanization.

### ***c. Constitutional Pluralism***

The concept of constitutional pluralism finds its origins in Neil MacCormick’s *Beyond the Sovereign State* which is the first article of its kind to theorise the very concept of ultimate sovereignty as becoming progressively obsolete (Klemen, 2014, p. 13) (MacCormick, 1993, p. 8). The realisation of the European Communities which has brought with itself a myriad of obligations, judicial processes, economic cooperation and most importantly an accepted supremacy of EU law has challenged the concept of the old vision of national sovereignty unlike any political process in the modern history of Europe. Faced with these developments, constitutional pluralism posits that the European continent can no longer be understood in the same vein as it was before but that the existence of a Union whose constitutional legitimacy rests on overlapping with the legitimacy of the national constitutions of its member states is more appropriate (Klemen, 2014, p. 19-21). Hence, the theory of constitutional pluralism can be defined as a post-sovereign heterarchical order that disperses authority across multiple sources of legitimacy – it functions on the basis of collaboration of different components that would precisely “preserve their separate constituent identity” (Canhac, 2021, p. 491-492).

A highly relevant concept to constitutional pluralism and to the European context is the concept of the *demoicracy*. Political scientist Kalypso Nicolaidis (2013) elaborates how the European project is one which relies not a single *demoi*, but on multiple *demoi*. The Union is then characterized as being in a “process of transformation which seeks to accommodate the tensions inherent in the pursuit of radical mutual opening between separate peoples” (p. 353).

As such, it rejects the notion that sovereignties are in some state of constant deadlock, pre-determined to go either towards an even more centralized authority or to revert to a pre-Union arrangement in the European sphere. It acknowledges that national and regional identities are well entrenched within European political life and existing institutions which must function on an equal basis as to make European political life egalitarian and democratic (Chevenal & Schimmelfennig, 2013, p. 337). A Europe fragmented in identity does not necessarily need to be corrected or to revert to a pre-Union setting in which national sovereignty is primary. It is precisely its diverse character which adherents emphasize as thus being the characteristic of a much more novel polity deserving primarily of accommodation. Its *sui generis* character has enabled, for better or worse, the formation of institutions which stand above national orders (Beetz, 2019, p. 946). This has in turn presented an opportunity to the European peoples with establishing popular sovereignty that would ensure the democratic rights of the demoi (p. 946). The democratic conception of Europe along with the concept of polar sovereignty can ensure that it is built on transnational democratic principles that accepts and even cherishes the EU's evolution along transnational lines but that protects the right of its peoples to freely engage in their respective national environments (Beetz, 2024, p. 512).

Thus, constitutional pluralism is a conception of the EU that can very simply be described as the middle way or third way. Effectively, it limits or rather protect the positive and negative rights which both the EU and its member states possess – “constitutional pluralism not only guards against over-reach by EU institutions, but also serves to tame the exclusive and self-interested nationalism of the MS” (Bellamy & Kroger, 2021, p. 627).

### **3. Constitutional pluralism – a normative case**

#### ***a. Normative coherence***

This part will examine relevant articles within the TEU and use them to illustrate a core argument of this paper: the values of constitutional pluralism are coherent and in line with the core values of the EU. Political norms are supremely important in Europe's context – no matter the viewpoint that has been laid out in this paper, all of them refer to foundational principles which shape their outlook on what is the EU system *ought to be*. By examining already legally enshrined values of the EU, this gives the ability to in turn examine the values of constitutional pluralism and to determine if they are consistent with each other. Hence, the position taken is that constitutional pluralism is normatively legitimate for it is coherent with important legal articles and values that the EU promotes.

The first article to be examined is art. 2:

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“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

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Art. 2 offers a statement on what the EU believes itself to be built on – it includes within itself all the most important and defining characteristics of its political system. Constitutional pluralism’s attempt to transcend hierarchical conceptions of law are a testament to its commitment to the values laid out. This can undoubtedly be mentioned in the same vein as the shared commitments to pluralism and equality. Indeed, the very beginnings in the conceptualization of constitutional pluralism can give credence to such an argument. The European community is by default seen as one where the imposition of subordination is deemed unnecessary, a much more egalitarian conception in the realm of rule of law (MacCormick, 1993, p. 10). These foundations build on an environment which nurtures tolerance, non-discrimination and so on. Art. 2 and constitutional pluralism’s conception of a mutually and equally shared environment of political and legal deliberation is fully compatible with the core values laid out.

Another article is art. 4(2):

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“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

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Namely, it is this article which has proven to be a point of main contention namely between the conceptions of European integration. Kelemen and Pech (2019) have greatly criticized the usage of this article as what they term to be the main argument of abuse done by constitutional pluralism. Indeed, attempts by the former PiS government in Poland have greatly used the theory of constitutional pluralism as an enabler for their policies – this has incited the authors to consider the very concept of constitutional identity and to that extent constitutional pluralism

which recognizes it as being inherently prone to abuse (p. 63). This point will be further elaborated upon in the argumentation against supranationalism later.

Nonetheless, constitutional pluralism and intergovernmentalism would consider this to be an integral principle of their conceptions of the EU. Both affirm member states as being important actors who are indispensable and should remain important in Europe's political decision-making structure. Where they differ is that intergovernmentalism would identify national governments and their constitutional orders as principal actors, it effectively imposes a hierarchical order with the member states at the top of it. This stands in stark contrast to the principle of *demoicracy* which centers on the inclusivity of legal and constitutional orders. It is the realisation of a "third leap" in European history with the attempt to establish a state of post-sovereignty (Klemen, 2014, p. 263). This "third leap" still identifies the member states and all institutions therein as being an important factor in European political life where self-governance and national identity are a public good that are to be respected *equally* before the EU's Treaties, which constitutional pluralism affirms as its basic propositions.

The final article to be examined is art. 9:

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"In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

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Art. 9's emphasis on equal attention and egalitarian outlook has already been outlined in the previous articles as examples where ideals expounded by the EU are in line with those of constitutional pluralism. However, art. 9 introduces an important factor to consider – the question of dual citizenship, a European one and an already national one. What this entails is effectively an affirmation that the EU considers itself to be an organisation which cherishes plural identity as being a core feature of its system. Furthermore, citizenship is a legal category where the existence of two is in this case considered as establishing distinct and collaborative legal identities within the Union.

Many intergovernmentalist or supranationalist authors would claim that such a situation incentivises confusion, competitiveness, or elements prone to misuse. Poland's White Paper, a response to the heavy criticism received by the former PiS government due to its judicial reforms, is an infamous example of where the interpretation of plural legal orders is more of a

matter of selectively picking by referring to the supposed letter of the law but not its spirit. Their attempts to paint a picture of a constitutional identity which only constrains the EU's ability to act while the member states are exempted from the consequences of their action shows another extreme – constitutional identity being used as a loophole through which they can “shield themselves from EU scrutiny as they violate their own constitution” (Kelemen & Pech, 2019, p. 71).

Constitutional pluralism, however, considers this to be the legal and normative standpoint from which the realisation of pluralism and a truly *demoicratic* Europe can be realised. If anything, the crises which the EU has recently faced point to there being “a state of uncertainty with roughly equal actors” (Klemen, 2014, p. 287). Intergovernmentalists and supranationalists would still be in the right to argue that their systems are the ideal ones for Europe, and as previously examined, the multilayered complexity of EU's mixed system does offer a solid base through which these conceptions can build on. Nevertheless, constitutional pluralism sees art. 9 then not as the base which has worked for a specific historical moment that now needs to be transcended or reinforced but a practical and normative ideal – a citizen of Europe is as well a citizen of a European member state. They are not exclusionary, but complimentary. Proponents of constitutional pluralism thus argue that should the nature of such a relationship be by default framed as one of destined competitiveness, the citizens of Europe would be in a position to incur a moral loss if they are absorbed within a unitary system or further isolated within their own national characteristics (Bellamy & Kroger, 2021, p. 621).

To conclude, these three articles from the TEU are examples with which a constitutionally pluralist outlook can be considered a valid method of organisation for the EU, considering the interpretations laid out.

### ***b. Normative merit***

This part of the paper serves to argue the normative merit that constitutional pluralism has by itself. Elements have already been elaborated upon during the discussion on normative coherence. The two arguments by which normative merit will be argued are: its promotion of democracy and enhancement of legal diversity. These two aspects are the foundational proposition by which constitutional pluralism can stand as the more legitimate theory of integration for the EU.

#### ***1. Promotion of democracy***

Constitutional pluralism envisions the furthering of democracy for Europe. Europe's supranational elements have long been criticized for their supposed lack of legitimacy and democratic accountability, one of the most notable examples being the weak position of the European parliament in comparison to other EU institutions. But the promotion of democracy is so much more comprehensive than the mere call for the overhaul of the authority of given EU institutions (a process that is admittedly itself a divisive topic). The democratic wellbeing of a people within a state is further extended to the wellbeing of the member states and their peoples within the EU framework which protects their democratic needs and character. Bellamy and Kroger underline (2021) this important ideal:

“Just as pluralism among the persons constituting a demos within a state mandates democratic mechanisms that allow for critical opposition by citizens that protect their rights and limit the capacity of governments to act arbitrarily, so pluralism between demoi justifies mechanisms fostering opposition by the MS to protect their rights and avoid arbitrary rule by federal agencies, such as the CJEU.” (p. 626)

The EU's legitimacy has from the beginning been partly derived from the willingness of the member states to engage with each other, but this can only be considered a starting position, one which examines a historical fact. What makes such a relationship reciprocal and fair is the recognition that the EU's legitimacy must be sustained by the consent of its members and vice versa. If we are to govern a system which is defined by equality and fairness, it would stand to reason that we should seek to promote such a structure on the international spectrum as well. The EU must be able to firstly argue that its foundational relationship among its institutions and its members is one of mutual and, more importantly, equal recognition.

But if we consider an important aspect of the assertion that such arrangement establishes or enforces a democratic order, it can be said that value pluralism is a theoretical cornerstone of democracy, domestic or international. Value pluralism is the belief that values within a given society are not or should not be ordered into a hierarchical perspective but acknowledged for their heterogeneity and multiplicity (Galston, 2000, p. 255). These values do not possess an overriding character that would seek to establish a monist framework. Even if these values are not complementary (which can fully be the case), it understands the importance of not relegating them to a common measure of value. This in turn is beneficial for the fostering of mutual respect. Let's consider the existence of two values which possess contradictory properties – the supranationalist-intergovernmentalist dichotomy is a perfect

example of values which are supposedly in conflict. But value pluralism objects to the supposedly conflictual relationship and functions based on a politics of inclusion. Even if one would be favoured over the other, the aspect of mutual recognition of validity in both a united Europe and one of acknowledged institutional diversity imposes rights and limits on both. This, in fact, does not impose limitations but minimizes them for it seeks to solve issues through democratic deliberation. It is an arrangement which affirms a universally valid hierarchy of ends but not a universally valid rule of action (p. 258). Such a state of affairs naturally promotes a truly democratic environment, one that isn't predicated on the enforcement of authority but on the enforcement of respect for even the minority opinion. In the case of the EU and its member states, constitutional pluralism is the theory through which this can be realized, as can be seen from the previous Bellamy and Kroger quote. It thus becomes a question of not interpreting the validity of values but of their appropriateness.

An important element to elaborate is specifically the notion that value pluralism can introduce a mechanism through which the very concept of democracy is questioned. Indeed, if value monism is rejected it is far from an impossibility to assume that democratic politics can rightfully be challenged by illiberal and even authoritarian propositions, as exemplified by the former Polish and current Hungarian examples. While such a notion is not without reason, it makes the mistake of identifying value pluralism with relativisation of all propositions or ideas in the political field. One of the fundamental concerns of value pluralism and to that extent pluralist deliberation is the understanding that all values can be subject to revision and debate (p. 266). But if we examine authoritarian politics – is this not a set of values which would seek to implement value monism and enforce an exclusionary framework that defeats the whole purpose of value pluralism in the first place? It is precisely such a viewpoint which value pluralism criticizes as a negative phenomenon in political deliberation and harmful to democratic practices. Value pluralism does not reject the ability of political actors to define for themselves all possible ends which are worthy of pursuit to all (p. 266). Consequently, the debate on the legitimacy of constitutional pluralism in relations to intergovernmentalism and supranationalism is of an internal character among democratic proponents, who recognize and identify with the very Treaties and values of the EU. The question of European integration is one in which proponents of the theories mentioned have argued for either on the basis of making the EU more democratic or to protect democracy. It stands to reason than that to abuse democratic concerns for ulterior motives or to directly engage with authoritarian ideas such as in the case of Hungary or Poland would not be engaging in good faith.



Nevertheless, from this standpoint it can most definitely be argued that the biggest normative merit of constitutional pluralism is its conception of democratic life applied to the international stage – value pluralism as a foundation for the recognition of constitutional orders and the European peoples which have contributed so much to developing them. In this way, constitutional pluralism does not impose itself as an imperative, but it understands even its own propositions as part of an ongoing dialogue within the European context that it thinks can best be structured democratically and on the basis of equality.

## ***2. Enhancement of legal diversity***

The enhancement of legal diversity is a position that builds on its promotion of democracy through its promotion of pluralism as being not just a facet of democracy but a distinct value by itself. For there to be a successful and moral collaboration between them, they must by default identify humans and their systems as being “bearers of dignity” deserving of respect (Klemen, 2014, p. 291). We can term such opinions under legal pluralism. Legal pluralism recognizes the existence of multiple legalities, or rather, the multiplicity of normative orderings which co-exist in the same social space, not unlike constitutional pluralism (Miller, 2012, 192). Legal pluralism thus oversees the collaborative aspects between these different legal and constitutional orders, the alternative being the dominance between one or the other.

But what is the normative merit that legal pluralism brings? For one, such a notion rests on the premise that diversity is on its own a necessary and productive element of any functioning society. Legal pluralism is seen as offering a framework that enables the communication between normative communities that can lead towards the creation of a mutual “jurisgenerative” space (p. 193). New legal meanings and understandings come about from various communities and their respective legal orders that all engage with one another for the purpose of innovation within diverse legal fields. The push for the enrichment of our legal landscapes and for the innovation within our systems of governance present a positive endeavour towards the overcoming of a European system at a crossroads. This further extends to an overall outlook which examines the pursuit of knowledge as not a matter of competitiveness but a process of deliberative discussion. It seeks to negate the possible debilitation of legal systems that can come about through conflict or an environment in which conflict is supposed to be the assumed relationship between multiple sources of legitimacy.

Legal pluralism presents itself as a mechanism through which divisiveness can arise but need not be its only consequence. In that regard, it joins the ranks of other theories and

approaches which refuse monist interpretations in regards to legal capabilities and developments. In that sense, legal pluralism also moves on from its more epistemic origins for it does possess a core normative persuasion. The fact that interaction between legal orders can possibly lead to the collaborative reframing of our institutions and the generation of new legal norms becomes not a side effect of the “dynamics of society” but a positive feature (p. 195). Effectively, legal pluralism becomes a necessary counterpart to constitutional pluralism for it values methods of interaction and accommodation for the establishment of what ought to be a more comprehensive legal system.

#### **4. Concepts in opposition – a deeper look**

This part of the paper focuses on addressing the main criticisms of constitutional pluralism that have been raised by adherents of the opposing viewpoints of European integration. Its function is to provide an answer to what can be termed either as misconceptions or fundamental disagreements between them.

##### ***a. Constitutional pluralism v supranationalism***

The single biggest criticism of constitutional pluralism from the supranationalist perspective is that constitutional pluralism becomes an effective tool in the hands of autocrats in the EU to continue with the erosion of democratic institutions and the rule of law in their respective countries. R. Daniel Kelemen and Laurent Pech (2019) summarize the current impact and legacy of constitutionally pluralist ideas as one which puts in to question the very legal character of the Union by introducing a mechanism through which a "pick and choose" mentality arises among member states which would seek to curtail the rule of law (p. 62). For them, the negative aspects of constitutional pluralism are intensified by the utility that concepts the likes of constitutional identity provide to said autocrats. What it does is that it gives them the ability to challenge core values of the EU by invoking constitutional identity, as was the case with the Hungarian government, which becomes little more than a veneer for populist and nativist rhetoric, as well a reinforcement of autocratic behavior - "Hungary's constitutional identity is whatever Viktor Orban says it is" (p. 68). In the end, constitutional pluralism is not so much criticized for its motives but rather that it is highly inadequate proposition in a divisive environment where it can be abused for the benefit of ongoing autocratisation (p. 74). Thus, supranationalism examines constitutional pluralism as at best an antiquated attempt to bridge gaps between Community and national law and that today must be dismantled if the integrity of the EU's democratic character is to be preserved.

Nevertheless, it is precisely the mention of abuse which reveals a gap in such an argument - the theoretical principles of constitutional pluralism are being misconstrued which limits the damage to their general validity and furthermore is a very obvious attempt at their misrepresentation. Richard Bellamy and Sandra Kroger (2021) posit in their article on democratic backsliding that constitutional pluralism is intrinsically aligned with the principles that make a constitutional democracy. A free and fair electoral system, protection of democratic rights and an established separation of powers are integral elements of such a polity (p. 622). Hungary and Poland have freely engaged in the curtailing of these principles on the domestic scene which fundamentally pits it against constitutional pluralism. To add, Kellemen and Pech (2019) consistently cite Poland's attempts where constitutional pluralism is purposefully misinterpreted as a wish to purposefully dismantle their democratic institutions (p. 71-73). This particular quote from a Polish association of judges is telling as it shows to what degree this line of argumentation is shallow: 'the autonomy of constitutional identity presupposes that the Member State respects the *patere legem quam ipse fecisti* principle, especially towards its own constitution' (p. 71). The proposition of Poland possessing a particular legal and national identity is one thing, but the proposition that this can be utilised as an outlet through which it can demolish the very foundations of this identity which rest on the TEU and its own liberal constitution is completely paradoxical.

Thus, the argument that constitutional pluralism must be dismantled as it provides cover for autocratization cannot be argued as a necessity unless detractors of constitutional pluralism concede that those who use it as a cover have completely misrepresented it in the first place. As Bellamy and Kroger (2021) point out, there is not a legal or theoretical basis through which the worsening of democratic functioning and rights can be achieved - this process rejects democratic and pluralist principles both internally (the relationship between the national government and the demos) and externally (the relationship between the European demoi themselves).

### ***b. Constitutional pluralism v intergovernmentalism***

Intergovernmentalist critiques of constitutional pluralism can be quite overtly centered around the notion of popular sovereignty between the national government and the EU. However, both agree that popular sovereignty is a fundamental element for any democratic basis. The main disagreement therefore lies in whether popular sovereignty and therefore legitimacy can be held by any other institution but the democratically elected national

government. For them, the divisions between supranational institutions and national ones are too at odds for popular sovereignty to be shared - popular sovereignty has been replaced by a sort of pooling of capabilities and legitimacy among the different member states of the EU. Using the British example, Christopher Bickerton (2019) examines how this state of affairs has led to Brexit becoming, for better or worse, a mechanism for the resolution of these tensions where national sovereignty would once again become interchangeable with that of popular (p. 898-899). Furthermore, these tensions have also introduced a debate on which institutions were to realize this sovereignty. Even within a strongly entrenched representative democracy in the UK, the question of whether a second referendum was to be held relegated parliament to the second place in manners of decision making. Brexit was thus to be finally determined by the direct "will of the people", which defeated the whole purpose of British constitutionalism which saw the MPs as exercising their will (Bickerton & Brack, 2022, p. 310). Pooled sovereignty that would come about through constitutional pluralism has thus introduced not only the division between the national and supranational (a claim posited by supranationalism as well), but introduced domestic tensions on questions of legitimacy as well. In summary, constitutional pluralism is criticized as producing tensions for it cannot outsource guarantees of fundamental civic and political norms the way a national government has done in the past and does so currently. Democracy requires that a democratic polity has self-rule, rather than constraints.

We can acknowledge this as a possible point of fallibility of constitutional pluralism. But if this is an example of fallibility, has not the purely intergovernmentalist approach proven to be even more divisive or tension inducing. The amply talked about Polish and Hungarian examples of autocratization provide evidence that respect for democracy or popular sovereignty is most certainly not the main concern of these governments. Even before these issues have become apparent, MacCormick (1993) has already laid out that there exists an even greater threat in regression than from the discussion of different poles of legitimacy - has not universal sovereign authority led the conflicts of the 20th century and a divided Europe (p. 17). Thus if it would be a question of fallibility, intergovernmentalism also possesses difficulties in adaptability and reducing divisiveness, even more so than attempts in building a heterarchical order within the EU's framework.

## **5. Conclusion**

In conclusion, the question of European integration can be summarized along the lines of three theories: supranationalism, intergovernmentalism and constitutional pluralism, with

the latter being deemed the more legitimate. Legitimacy was established on the basis that its principles are normatively coherent with the core values of the EU (as seen in the TEU) and that its normative underpinnings on their own provide a sound basis for further integration. Normative coherence was used to demonstrate logical alignment between the EU and constitutional pluralism, thus demonstrating that both have fundamental agreements on what basis political legitimacy can be determined - democracy, equality and respect for the rights of all. Furthermore, constitutional pluralism's promotion of democracy and enhancement of legal diversity are argued to be fundamental goods that if introduced can only be beneficial to the EU that is still evolving and adapting to the difficulties and changes of its time.

The limitations of this paper must be addressed. Namely, this paper has provided only normative arguments and critiques which are concerned with what the EU ought to be - matters of practicality are another matter all together. Specifically, the normative arguments concerning value and especially legal pluralism have not been dealt with in a methodologically epistemic approach. Such an approach would be able to determine whether there exists robust evidence to confirm their validity to be applied to the European context. Further research is needed to specifically address these concerns as they justifiably point out that there is a noticeable difference between conception and implementation. To add, it must be acknowledged that not only theories of European integration, but the very notions of monism and pluralism are highly debatable concepts which require a standardization in their definitions and implications, if a sound discussion on their qualities or misgivings is to be had. For example, constitutional pluralism itself has many adjacent concepts (such as democracy or popular sovereignty) which can by all accounts be defined differently, depending on various interpretations. This paper has set out to provide a framing through which these theories can interact with one another. Yet, this cannot be interpreted as presenting an overarching picture, but allow it to be modified if new understandings of these concepts are introduced.

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