Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice

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Abstract

The theory of constitutional pluralism as advanced by MacCormick and Walker witnessed immense success in its attempt to explain the relationship between courts of Member States performing constitutional review and the Court of Justice. Despite its success, the theory has often been criticized for its lack of normative prescriptions and legal certainty in resolving the question of the final arbiter in the EU. It is the aim of this Article to address and move beyond these criticisms by introducing and exploring the auto-correct function necessary for the proper and balanced functioning of the pluralist system.

The auto-correct has the function of preventing an outbreak of conflict between the constitutional jurisdictions involved—in the EU judicial architecture, an awareness on the part of all the actors involved of the benefits of a pluralist setting results in conflict management and control. The auto-correct function operates as follows: in the EU as we know it, issues prone to constitutional conflict arise regularly, and both the Court of Justice and national constitutional jurisdictions are able, through their respective procedural avenues, to control the extent of the conflict. There are also two legal imperatives driving this dynamic in two opposite directions—the principle of primacy of Union law on the one hand, and the obligation to respect the national identity of Member States on the other.

As analyzing judicial behaviour shows, the application of self-restraint and mutual accommodation avoids a clash between parallel sovereignty claims on EU and national levels. In particular, national and EU law interaction demonstrates the existence of in-built conditions for the auto-correct function's application, such as the principle of EU-friendly interpretation in national constitutional law, or the national identity clause in primary EU law. The auto-correct function manifests itself and brings about a balance between the different constitutional orders only through the interaction of parallel claims to sovereignty.

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A. Introduction

The theory of constitutional pluralism advanced by MacCormick[1] and Walker[2] was immensely successful in its attempt to explain the relationship between supreme jurisdictions performing constitutional review in the Member States and the European Court of Justice. In particular, this theory rests on the premise that the question of who is the final arbiter among these courts is futile, as they co-exist in a multi-level setting.[3] The theory is based largely on the idea that the lines between national and international law are becoming increasingly blurred,[4] specifically in the European Union context where the doctrines of direct effect and the primacy of EU law have significantly changed the position of constitutional law in Member States.

Pluralism is certainly not without its weaknesses, and criticism has mainly been directed towards its descriptiveness and the lack of normative prescriptions,[5] as well as the lack of democratic legitimacy in the EU as a pluralist setting.[6] More recently, the theory of constitutional pluralism has received harsh criticism in light of the interpretations put forward by the *Bundesverfassungsgericht*, which retained for itself the ultimate power to interpret the core of the German Basic Law, even at the cost of a serious clash with the Court of Justice and its jurisprudence of primacy.[7] Most notably, the criticism—or more precisely

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[1] *See* Neil MacCormick, *The Maastricht Urteil: Sovereignty Now*, 1 EUR. L.J. 259 (1995); NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH (1999).

[2] *See* Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002) (hereinafter Walker 2002); Neil Walker, *Late Sovereignty in the European Union*, *in* SOVEREIGNTY IN TRANSITION 3 (Neil Walker ed., 2003) (hereinafter Walker 2003).

[3] Since then, seminal works have been published. *See* Miguel Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* SOVEREIGNTY IN TRANSITION 502 (Neil Walker ed., 2003); Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (Joseph Weiler & Marlene Wind eds., 2003); Nick Barber, *Legal Pluralism and the European Union*, 12 EUR. L.J. 306 (2006); Miguel Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 EUR. J. LEGAL STUDIES 1 (2007); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE 258 (Jeffrey Dunoff & Joel Trachtman eds., 2009); Nico Krisch, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (2010); CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND (Matej Avbelj & Jan Komárek eds., 2012).

[4] Jo Shaw, *Process and Constitutional Discourse in the European Union*, 27 J. LAW & SOC. 4, at 8 (2000).

[5] Krisch, *supra* note 3, at 70.

[6] Fritz Scharpf, *Legitimacy in the Multilevel European Polity*, 1 EUR. POL. SCI. REV. 173, at 175 (2009). For a defense of the democratic characteristics of pluralism, see Jonathan Kuyper, *The Democratic Potential of Systemic Pluralism*, 3 GLOBAL CONSTITUTIONALISM 170 (2014).

[7] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Jan. 14, 2014, 2 BVR 2728/13, para. 29 [hereinafter *Gauweiler I*].

the dismissal—of constitutional pluralism as a plausible theory for explaining the EU constitutional setting and its interinstitutional relations has been proposed by Kelemen,[8] Sarmiento,[9] and Fabbrini.[10] This Article offers a theoretical and practical response to the critique, and adopts the perspective of courts that enforce their respective constitutional norms that express the normative claim to sovereignty.

In that vein, Section B will present the critique and offer a theoretical reply. It will advance a reading of the Treaty that supports a pluralist understanding of the question of the final arbiter and the principle of primacy. The argument put forward by this Article is that, first, leaving the question of the final arbiter open contributes to a more open coordination between the courts performing constitutional review without submerging into conflict. Second, primacy of EU law should not be read as an all-purpose subordination of national law to EU law. It should be read in combination with the EU's obligation to respect the national identities of Member States, leading to a more balanced application of the principle of primacy.

Furthermore, the practical part, Section C, will analyze judgments, institutional documents and reports, as well as public statements and writings of current and former members of both the Court of Justice and national courts with a constitutional mandate across the EU. The analysis will show that a recurring use of various expressions, which I will refer to as keywords, points to the existence of a shared understanding of the division of obligations among the participants of the European judicial space. Section D will present some concluding remarks on the future of the theory of constitutional pluralism and its usefulness, particularly in relation to the most recent decision of the *Bundesverfassungsgericht* concerning the Outright Monetary Transactions (OMT) mechanism.

B. The Critique

To proceed with analyzing the most recent critique of constitutional pluralism, I will first lay out the four theoretical premises of constitutional pluralism that I consider essential to informing the discussion in this work. These premises help to clarify the inter-institutional relations between national constitutional adjudicators and the Court of Justice.

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[8] *See* Daniel Kelemen, *On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone*, 23 MAASTRICHT J. EUR. & COMP. L. 136 (2016).

[9] *See* Daniel Sarmiento, *The OMT Case and the Demise of the Pluralist Movement*, DESPITE OUR DIFFERENCES (Sept. 21, 2015), https://despiteourdifferencesblog.wordpress.com/2015/09/21/the-omt-case-and-the-demise-of-the-pluralist-movement/.

[10] *See* Federico Fabbrini, *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*, 16 GERMAN L.J. 1003 (2015).

(1) The classic theory of constitutionalism can no longer accommodate and explain the legal nature of European integration and the EU's legal system[11] nor its relationship to national law.[12] This inability results from the problem of using and translating State-centered constitutionalist terms with the aim of explaining and legitimizing non-State settings, such as the EU.[13] In other words, we should not be judging the EU and its institutions against the "State" vocabulary and standards; rather, we should regard it as having its own idiosyncratic nature.[14]

(2) A pluralist vision of the EU's legal system should be endorsed where the decisive determinants for defining and differentiating between diverse legal systems are no longer based on spatial boundaries,[15] but on an idea that the EU and national legal orders are inherently overlapping within the same geographical space.[16] It goes further, however, than this classical understanding of legal pluralism by advancing an explanation according to

[11] Shaw, *supra* note 4, at 21.

[12] The Polish Trybunał Konstytucyjny recognized this important moment in its decision on the Accession Treaty: "The concept and model of European law created a new situation, wherein, within each Member State, autonomous legal orders co-exist and are simultaneously operative. Their interaction may not be completely described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law." *Trybunał Konstytucyjny* 11.05.2005 [Polish Constitutional Tribunal decision of May 11, 2005] K 18/04 at para. 12 [hereinafter *Accession Treaty*].

[13] Because "state constitutionalism" is the default determinant, and because the destination language of "non-state constitutionalism" is under-developed, there is a danger that both scholars and actors in the integration process presume an isomorphism between the EU and their respective national polities. *See* Walker, *supra* note 3, at 40; Shaw, *supra* note 4, at 20; Renaud Dehousse, *Beyond Representative Democracy: Constitutionalism in a Polycentric Polity*, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (Joseph Weiler & Marlene Wind eds., 2003); Krisch, *supra* note 3, at 35. For political science literature, see MULTI-LEVEL GOVERNANCE (Ian Bache & Matthew Flinders eds., 2004), at 78.

[14] The same was underlined by Siniša Rodin, Judge at the Court of Justice, in a talk at the Bingham Centre in London, on November 2, 2015. He put forward the argument that the criticism addressed to the Court of Justice should be confined to those internal characteristics of the Court—not in comparison to a preferred, ideal type of a court, or even in comparison to a certain national constitutional or supreme court, but keeping in mind the specific context in which it operates as an institution of the EU. *See also* Ústavní soud České republiky 03.11.2009 (ÚS) [Decision of the Constitutional Court of Nov. 3, 2009], sp.zn. ÚS 29/09 paras. 137-140 (Czech) [hereinafter *Lisbon Treaty II*].

[15] *See* Shaw, *supra* note 4, at 7. Ingolf Pernice, *Introduction: Achievements and Challenges: The European Union, Its Constitutional Courts and the Perspectives After Lisbon*, *in* EUROPE'S CONSTITUTIONAL CHALLENGES IN THE LIGHT OF THE RECENT CASE LAW OF NATIONAL CONSTITUTIONAL COURTS: LISBON AND BEYOND, 9, 10 (José María Beneyto & Ingolf Pernice eds., 2011). For political science literature, see Liesbet Hooghe & Gary Marks, *Unraveling the Central State, but How? Types of Multi-Level Governance*, 97 AMER. POL. SCI. REV. 233, 237 (2003); Nupur Chowdhury & Ramses Wessel, *Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?,* 18 EUR. L.J. 335, 340 (2012).

[16] *See* WILLIAM TWINING, GLOBALIZATION AND LEGAL THEORY 83 (2000). *See also* MAARTJE DE VISSER, CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS 3 (2014); Joseph Weiler, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, 31 J. COMMON MKT. STUD. 417, 422 (1993).

which the EU represents a co-existence of different legal orders in the same geographical space, all of which claim sovereignty.[17]

(3) Given the above, the interactions between the national and the EU legal system should not be read in hierarchical,[18] but in heterarchical terms.[19] Such an understanding waters down the importance of the competition for the ultimate judicial authority in the EU,[20] because their interactions are taking place in a setting of mutual respect and are based on the principle of sincere cooperation.[21] The constitutional jurisdictions are ultimate interpreters and arbiters in their respective areas of competence.

(4) In order to resolve the clashes in interpretation evincing an unclear division of competences between the EU and the national level, such a division of competences should be addressed through functional, rather than territorial, criteria.[22] Because of these developments, the post-national constellation seems most appropriate to explain the legal nature of European integration, as it places an emphasis on the de-territorialization of law[23] that took place with the transfer of certain competences to the EU level, thus ending the territorial exclusivity of Member States. Analogously, the possible clashes between national law and the European jurisdiction should be resolved by recourse to the principle of sincere cooperation based on mutual respect.

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[17] Matej Avbelj, *The EU and the Many Faces of Legal Pluralism*, 2 CROATIAN Y.B. EUR. L. & POL'Y 377, 381 (2006). For a further argument on the need for abandoning monism and dualism in favor of pluralism, see Armin von Bodgandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT. J. CONST. L. 397, 399–400 (2008).

[18] Such an understanding does not disregard the existence of hierarchy in national constitutional settings, but emphasizes heterarchy as a framework for the interaction of a plurality of legal orders co-existing and claiming sovereignty in the same geographical space. Heterarchy can be defined as "the relation of elements to one another when they are unranked or when they possess the potential for being ranked in a number of different ways." Carole Crumley, *Heterarchy and the Analysis of Complex Societies*, 6 ARCHAEOLOGICAL PAPERS AM. ANTHROPOLOGICAL ASS'N 1, 3 (1995). Understood in this sense, heterarchy seems to adequately capture the relations between different units claiming authority, without predetermining the relationships within the plurality of unities. Nevertheless, the aim of the presented legal reasoning is to overcome "the almost unconscious assumption of hierarchy-as-order" that I find to be an inherent fallacy of the constitutionalist theory. *Id.*

[19] Krisch, *supra* note 3, at 69.

[20] Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53, 55 (2012).

[21] Different versions of the same principle are also in place at the national level. For an analysis of the principle of friendliness towards European integration in constitutional jurisprudence of Member States, see Section 3 discussed in the text below. *See infra*, note 114; De Visser, *supra* note 16, at 3 n.14.

[22] Walker 2002, *supra* note 2, at 346.

[23] Hand Lindahl, *A-Legality: Postnationalism and the Question of Legal Boundaries*, 73 MOD. L. REV. 30, 30 (2010).

With these premises in mind, I now turn to the literature that has recently criticized the contribution and viability of constitutional pluralism. The more general critique of constitutional pluralism literature has been directed towards its predominantly descriptive nature. The critique has explained how heterarchical inter-institutional relations work in the EU's multilevel setting,[24] mentioning only in passing the possibility of a constitutional conflict and the means of its resolution.[25] It seems, however, that the critique is becoming as fashionable as the theory itself was at one time.[26] The criticism received only seems reasonable in the aftermath of the response issued by the Court of Justice to the preliminary reference submitted by the *Bundesverfassungsgericht*. The critics view the reference for a preliminary ruling submitted by the German Court as the "demise of the pluralist movement,"[27] while others have categorically emphasized that a constitutional conflict is inevitable because the Court of Justice did not agree with the *Bundesverfassungsgericht*'s reading of the OMT mechanism's possible conformity with primary EU law.[28] While we now know that the two courts prevented the constitutional conflict from taking place, it is nevertheless necessary to pay further attention to the criticism directed at the theory of constitutional pluralism.

For purposes of clarity, this Section will briefly outline the well-known preliminary reference to emphasize the clashes in interpretation between the *Bundesverfassungsgericht* and the Court of Justice. The German Court received a challenge concerning the participation of the German *Bundesbank* in the implementation of the OMT mechanism. This occurred after the *Bundesbank* published an opinion about the incompatibility of the OMT mechanism with the limits of the monetary mandate of the European Central Bank (ECB), which would therefore exceed the competences of the Union in monetary policy. In resolving the case, the German Court decided to submit its first preliminary reference to the Court of Justice, seeking the interpretation of the provisions of the Treaty on the content and the limits of the ECB mandate.

The *Bundesverfassungsgericht*, however, made its own assessment of the OMT mechanism in the order for reference, finding that it was probably not only an *ultra vires* act, and therefore outside the bounds of ECB competence, but also that it encroached upon the inviolable core of the German Basic Act—its constitutional identity. It concluded: "While the Senate is thus inclined to regard the OMT Decision as an ultra vires act, it also considers it

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[24] *See* Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?,* 36 COMMON MKT. L. REV. 703 (1999).

[25] MacCormick, *supra* note 1, at 102.

[26] Barber, *supra* note 3, at 306.

[27] *See generally* Sarmiento, *supra* note 9.

[28] Fabbrini, *supra* note 10, at 1012.

possible that if the OMT Decision were interpreted restrictively in the light of the Treaties, conformity with primary law could be achieved."[29]

It is necessary to address the apparently aggressive language employed by the *Bundesverfassungsgericht*. In particular, the German Court has been heavily criticized[30] for stating in the reference its own opinion on the legality of the OMT mechanism, and it has also been accused of prejudicing its own subsequent ruling. It should be noted, however, that the wording of the *Bundesverfassungsgericht* is in line with the ECJ's recommendations for national courts and tribunals in relation to the preliminary reference procedure.[31] The procedure states that such a practice is welcomed by the Court of Justice, as it may prove useful in reaching the final decision on interpreting a particular provision of EU law. While the vocabulary of the *Bundesverfassungsgericht* is not common in the preliminary references that we encounter on a daily basis, it is my argument that it is essential that cases with this level of constitutional importance include the opinion of the referring court as well. This becomes even more important when references come from national constitutional courts.

In its judgment, the Court of Justice, as has been thoroughly explored elsewhere,[32] relied on its judgment in *Pringle*,[33] and stated that the OMT mechanism is not an act of economic policy, regardless of its effect on the stability of the euro zone area.[34] Many who have read the wording of the German Order for reference and the Court's disagreeing reply[35] have concluded that the pluralist theory is able neither to explain the inter-institutional relations in the European judicial space, nor to offer a normative solution for the ever-growing jurisdictional conflict.

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[29] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Feb. 7, 2014, Press release No. 9/2014, at introductory para. [hereinafter *Gauweiler I Press Release*].

[30] *See* Fabbrini, *supra* note 10, at 1012; Takis Tridimas & Napoleon Xanthoulis, *A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict*, 23 MAASTRICHT J. EUR. & COMP. L. 17, 18 (2016); Paul Craig & Menelaos Markakis, *Gauweiler and the Legality of Outright Monetary Transactions*, 41 EUR. L. REV. 4, 14 (2016).

[31] Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings, 2012 O.J. (338) 1, para. 24 (Nov. 2, 2012); *see also* Francis Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, 38 TEXAS INT. L.J. 547, 548 (2003).

[32] *See* Monica Claes & Jan-Herman Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, 16 GERMAN L.J. 917 (2015); *see also* Fabbrini, *supra* note 10; Georgios Anagstostaras, *In ECB we Trust . . . the FCC we Dare! The OMT Preliminary Ruling*, 40 EUR. L. REV. 744 (2015).

[33] ECJ, Case C-370/12, Pringle v. Government of Ireland et al., ECLI:EU:C:2012:756, Judgment of Nov. 27, 2012.

[34] ECJ, Case C-62/14, Gauweiler et al. v. Deutscher Bundestag, ECLI:EU:C:2015:400, paras. 51-52, Judgment of June 16, 2015 [hereinafter *Gauweiler et al.*].

[35] *See generally* Fabbrini, *supra* note 10; Sarmiento, *supra* note 9.

The *Bundesverfassungsgericht* most recently decided the OMT case after receiving the response from the Court of Justice,[36] and its judgment may be read with the main premises of the theory of constitutional pluralism in mind. First, the *Bundesverfassungsgericht* reasserted its ultimate claim to sovereignty by emphasizing its exclusive authority to perform constitutional identity review[37] and *ultra vires* review.[38] Subsequent to its claim of sovereignty and autonomy to carry out the above-mentioned reviews, the *Bundesverfassungsgericht* implemented a more reconciliatory approach to the OMT mechanism and the interpretation put forward by the Court of Justice. In particular, it placed the responsibility of protecting the voters' "right to democracy" on other constitutional organs in Germany—namely, the Federal Government and the *Bundestag*[39]—through the legal and political process. The shift from the judicial to the political arena as the proper forum for the protection of constitutional identity and the limits of transgression of powers to the EU enshrined in the Basic Law can be seen as a display of judicial self-restraint, and ultimately as a step towards a more balanced relationship between the constitutional adjudicators in the EU.

In light of these events, I will address the two most prominent points of contention among those scholars that have put in question the value and plausibility of the theory of constitutional pluralism—the lack of a determined final arbiter in a pluralist setting, and the role of the principle of primacy in a pluralist setting.

I. The Question of the Final Arbiter

As mentioned earlier, the theory of constitutional pluralism assumes that the question of the final judicial instance in the EU as we know it is immaterial. Rather, the basis for the inter-institutional relationship of national courts with a constitutional mandate and the Court of Justice is one of an interactive[40] heterarchy. Consequently, the pluralist theory asserts, there is no final arbiter, and there should not be one.[41]

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[36] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], June 21, 2016, Case No. 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 [hereinafter *Gauweiler II*].

[37] *Id.* at paras. 136–42.

[38] *Id.* at paras. 143–50.

[39] *Id.* at para. 163.

[40] MacCormick, *supra* note 1, at 264.

[41] Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MKT. L. REV. 351, 384 (1999).

Kelemen was especially critical of how easily the pluralist theory accepted that it is preferable, rather than problematic, to leave out an answer to the question of the final arbiter on the limits of EU competences.[42] In his view, the reluctance to resolve this issue shows a legal system's immaturity, and he called for a resolution of this question to enable the EU legal system to call itself a constitutional order.[43] His proposition is a clear one: In order for the EU constitutional order to be considered "mature," a decision on the final arbiter is necessary, and the arbiter should be the Court of Justice, in line with the primacy of EU law.[44] Should a national constitutional court disagree with such a setting, he added, the national court should declare the continuing membership of its Member State in the EU unconstitutional. Such a step would encourage Member State governments to resolve this constitutional conflict, if necessary, by recourse to Article 50 TEU, and to withdraw from their membership in the Union.[45]

Such an approach seems extreme and greatly resembles the Cold War logic; the question of the final arbiter will seemingly be settled solely because any other outcome would spell the end of that Member State's EU membership. In fact, it seems much more immature than the *status quo*, as it is proposing a shift from mutually assured trust to mutually assured destruction.[46] While both might yield the same result, the cooperation between courts is far more fruitful when they operate in the context of self-imposed restraint,[47] where none of the jurisdictions actually consider using the heavy weapons that are theoretically available to them.[48]

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[42] Kelemen, *supra* note 8, at 139.

[43] *Id.* at 140.

[44] *Id.* at 141.

[45] *Id.* at 141, 148–49.

[46] Mutually assured destruction is a doctrine of military strategy and national security policy in which a full-scale use of nuclear weapons by two or more opposing sides would cause the complete annihilation of both the attacker and the defender. It is based on the theory of deterrence, which holds that the threat of using strong weapons against the enemy prevents the enemy's use of those same weapons. The strategy is a form of Nash equilibrium in which, once armed, neither side has any incentive to initiate a conflict or to disarm. *Mutually Assured Destruction*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Mutual_assured_destruction (last visited Sept. 19, 2016).

[47] Monica Claes & Maartje de Visser, *Are you Networked Yet? On Dialogues in European Judicial Networks*, 8 UTRECHT L. REV. 100, 106 (2012).

[48] Even the Polish *Trybunał Konstytucyjny*, considered as one of the constitutional courts closest to the German understanding of limits to the primacy of EU law, proposed several possible solutions in the event of a constitutional conflict before leaving the EU:

> In such an event [of a collision between provisions of EU law and the Constitution] the Nation as the sovereign, or a State authority organ authori[z]ed by the Constitution to represent the Nation, would need to decide on: [A]mending the Constitution; or causing modifications

The difference is clearly reflected in the respect for the EU's national identity clause, the importance of which both Kelemen and Fabbrini overlook. While Kelemen entertains the idea of having respect for national—that is, constitutional—identity,[49] it results from his proposition that a proper safeguard of the inviolable core of a national constitution can only take place in the ultimate withdrawal of the Member State from the EU.[50] The doomsday device[51] activates, and everyone loses. Fabbrini, as discussed below, subordinates the national identity clause completely to the principle of equality of Member States, thereby leaving the reader in doubt as to why the national identity clause even exists.[52]

Applying these arguments to the most recent interactions between the Court of Justice and a national constitutional jurisdiction paints a clear picture. In Kelemen's scenario, the *Bundesverfassungsgericht* did not need to refer the *OMT* case to the Court of Justice in the first place. In his view, the doubts it had concerning the bounds of ECB's competence are easily resolved by: (1) Unconditionally accepting the OMT as it is; or (2) requiring withdrawal from the EU if there has been a breach of Germany's constitutional identity. In a pluralist context, however, the *Bundesverfassungsgericht* expressed its own view of the position of 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 *Bundesverfassungsgericht* on questions of national constitutional identity.[53] Both jurisdictions have balanced and, it is submitted, will continue to carefully balance their claims and arguments; as a result, they will exhibit considerable self-restraint based on the principle of sincere cooperation and mutual respect. This would certainly not be a novelty for the *Bundesverfassungsgericht*—it would be a continuation of the pattern of its EU-friendly reasoning,[54] in line with the pluralist vision of judicial

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> within Community provisions; or, ultimately, on Poland's withdrawal from the European Union.

Accession Treaty, *supra* note 12, at para. 13.

[49] Kelemen, *supra* note 8, at 148.

[50] *Id.*

[51] A doomsday device is a hypothetical construction—usually a weapon, or collection of weapons—which could destroy all life on a planet, particularly Earth, or destroy the planet itself, bringing "doomsday," a term used for the end of planet Earth. *Doomsday Device*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Doomsday_device (Sep. 19, 2016).

[52] Fabbrini, *supra* note 10, at 1018.

[53] The Court mentioned national identity only in the preliminary points of the judgment (§17), omitting any further analysis in the remainder of the judgment. *See generally Gauweiler et al.*, *supra* note 34.

[54] *See* Andreas Voßkuhle, *Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund*, 6 EUR. CONST. L. REV. 175, 188 (2010); Mattias Wendel, *Judicial Restraint and the Return*

interactions in the EU.

II. Primacy

A further criticism directed to the theorists supporting constitutional pluralism is that they seem to abandon or negate primacy[55] as it is expressed by the Court of Justice in its long-standing jurisprudence.[56] In addition, Fabbrini correctly emphasizes that the principle of primacy surpasses bilateral disagreements between the EU and individual Member States and their constitutional/supreme courts, and serves to guarantee equality of all Member States in a multilateral manner.[57] Yet he questions the usefulness of the pluralist theory in cases where a potential conflict in interpretation exists between EU law and national constitutions.[58]

Against this backdrop, two main counter-claims aiming to reconcile primacy with the pluralist approach state that: (1) Primacy should not be regarded as subordination; and (2) without undermining the importance of primacy in ensuring the equality of Member States, EU law's respect for national identity is equally important.

In relation to (1), it is important to distinguish between primacy and subordination. MacCormick explains this as follows:

> [T]he doctrine of supremacy of Community law is not to be confused with any kind of all-purpose subordination of Member State law to Community law. Rather, the case is that these are interacting systems, one of which constitutes in its own context and over the relevant range of topics a source of valid law superior to other sources recognized in each of the Member State systems.[59]

To understand this position better, it is useful to reflect upon the distinction between

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to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of September 12, 2012, 14 GERMAN L.J. 21, at 41 (2013).

[55] Kelemen, *supra* note 8, at 144.

[56] The Court of Justice introduced this long-standing jurisprudence as early as 1964. *See* ECJ, Case C-6/64, Flaminio Costa v. E.N.E.L., ECLI:EU:C:1964:66, Judgment of July 15, 1964.

[57] Fabbrini, *supra* note 10, at 1014–16.

[58] *Id.* at 1014.

[59] MacCormick, *supra* note 1, at 264.

supremacy and primacy made by the Spanish *Tribunal Constitucional* in its decision on the Constitutional Treaty:

> Supremacy is sustained in the higher hierarchical character of a regulation and, therefore, is a source of validity of the lower regulations, leading to the consequent invalidity of the latter if they contravene the provisions set forth imperatively in the former. Primacy, however, is not necessarily sustained on hierarchy, but rather on the distinction between the scopes of application of different regulations, principally valid, of which, however, one or more of them have the capacity for displacing others by virtue of their preferential or prevalent application due to various reasons.[60]

Both statements highlight the principle of primacy as a trigger for the application of EU law in areas of EU competence in the event that there is a conflicting provision on the national level. This principle outright rejects the absolute primacy of the EU legal order as a whole over national legal orders. Dougan further explained this view using what he calls "trigger primacy"—in a situation of conflict between national and EU law, the latter has primacy when it satisfies the criteria for direct effect.[61] In essence, Dougan is right to note that the trigger primacy model accommodates both the constitutional requirements of national legal systems while at the same time respecting the primacy of Union law, under the direct effect condition.[62]

It is also important to point out that national constitutions of Member States have all, to a certain extent, gone through a process of amendments with the aim of accommodating the requirements and specificities of EU law.[63] Mutual respect and judicial self-restraint,

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[60] S.T.C., Dec. 13, 2004, (Case No. 1/2004, para II-4) (Spain) [hereinafter *Constitutional Treaty*].

[61] Michael Dougan, *When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy*, 44 COMMON MKT. L. REV. 931, 934 (2007).

[62] *Id.* at 942.

[63] Millet points to different constitutional amendments that several Member States undertook in order to accommodate the implementation of the European Arrest Warrant. *See* François-Xavier Millet, *How Much Lenience for how Much Cooperation? On the First Preliminary Reference of the French Constitutional Council to the Court of Justice*, 51 COMMON MKT. L. REV. 195, 196 (2014). Moreover, the Spanish Constitutional Court accepted the necessary changes in its *Melloni* decision after receiving a response to the preliminary reference submitted to the Court of Justice in Case C-399/11 *Melloni*. *See* S.T.C., Feb. 13, 2014 (Case No. 26/2014) (Spain) [hereinafter *Melloni*]); ECJ, Case C-399/11, Stefano Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107, 26 Feb.2013. In addition, this serves as a case in point to demonstrate that national courts performing constitutional review are only one among many of the relevant constitutional actors at the national level, and while their jurisprudence might be seen as central to

advanced by the pluralist theory as the characteristics of the *status quo* among judicial actors in the EU, do not deny the primacy of EU law. A pluralist account rejects the outright subordination of national legal orders in their entirety to the EU legal order.

In close connection with the previous point, we now turn to point (2), which underlines the importance of respect for national identity and its effect upon the equality of Member States. If we were to accept the unconditional primacy of EU law over national legal systems, the national identity clause in Article 4(2) TEU would become redundant. To understand this dynamic, let us briefly recall Fabbrini's argument on the importance of primacy in ensuring the equality of Member States. Looking at the EU—not through a series of bilateral relations, but rather as a multilateral entity in which actions of individual members affect all other members—he identifies the principle of primacy as the ultimate assurance of the equality of all Member States in the EU.[64] He dismisses the possibility that each Member State will re-negotiate the terms of its membership, and concludes that EU law should be applied in all Member States equally.[65]

Fabbrini's response to the counter-claim about the importance of the national identity clause in the EU setting is not convincing. He interprets Article 4 TEU literally, stating that the respect for national identity of Member States is located after, and is thus subordinate to the declaration of equality of Member States.[66] He dismisses the role of the national identity clause in ensuring the equality of Member States too quickly, and ignores the fact that the national identity clause was agreed upon by all Member States and, when applied under the same conditions, it contributes to the equality of Member States while also respecting the plurality of legal systems in the EU. In other words, all Member States are, under equal conditions, able to protect their national particularities and constitutional specificities. In addition, neither the case law of the Court of Justice, nor any other international document,[67] supports the literal interpretation suggested by Fabbrini. On the

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the prospect of constitutional conflict, the national constitutional structure will also serve as a break in conflict control.

[64] Fabbrini, *supra* note 10, at 1019.

[65] *Id.* at 1015.

[66] *Id.* at 1019.

[67] Article 31(1) of the Vienna Convention on the Law of Treaties states that treaties shall be interpreted: "[I]n good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." No mention can be found of the literal interpretation which would result in a subordinate relationship of two clauses within the same provision.

contrary, cases such as *Omega*,[68] *Sayn-Wittgenstein*,[69] and *Runevič-Vardyn*[70] serve as excellent examples of how the Court found that national particularities are to be protected at the cost of EU law's primacy, but without any effect on the equality of Member States.

The national identity clause aims to accommodate national particularities in the application of EU law on the national level, while the role of the Court of Justice is to determine the limits to this exception through the application of the principle of proportionality. The pluralist nature of the proposed interpretation of Article 4(2) TEU stems from its intrinsically heterarchical nature, as it does not impose an overarching European value over specific national values.[71] On the contrary, it endorses an equal position of a variety of national specificity claims that are all subject to the same process of being assessed through the proportionality test. Consequently, respect for national specificities, subject to the principle of proportionality, reinforces the role of the Court of Justice in ensuring the uniform application of Union law through an essentially common limit to the exception of Article 4(2) TEU, and in ensuring the equality of Member States.[72]

The case law of the Court of Justice on national identity confirms these assertions. The Court has applied a contextual interpretation of "national identity" according to the already established principles of a certain area of EU law in order to ensure its coherence with the existing jurisprudence. In other words, when invoked in the area of free movement, the clause has been interpreted analogously to public policy justifications on national restrictive measures.[73] The case law where the clause has been invoked to protect a national language confirms this assertion. In *Runevič-Vardyn*, the Court stated that the protection of a national

[68] ECJ, Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, ECLI:EU:C:2004:614, Judgment of Oct. 14, 2004

[69] ECJ, Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, ECLI:EU:C:2010:806, Judgment of Dec. 22, 2010.

[70] ECJ, Case C-391/09, Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija et al., ECLI:EU:C:2011:291, Judgment of May 12, 2011.

[71] For a similar pluralist reading of the national identity clause, see Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417, 1452 (2011).

[72] The Polish *Trybunał Konstytucyjny* made an excellent point concerning the national identity clause: "[C]onfirming one's national identity in solidarity with other nations, and not against them." *Trybunał Konstytucyjny* 24.11.2010 [Polish Constitutional Tribunal decision of Nov. 24, 2010] K 32/09 at para. 2.1 [hereinafter *Polish Treaty of Lisbon*].

[73] *See Sayn-Wittgenstein*, Case 208/09. The Court's reasoning in Case C-208/09 *Sayn-Wittgenstein* is particularly useful in this regard. The Court first analyzed the status of the value invoked by the Austrian authorities, *id*. at paras. 74, 83, after which it introduced its connection to the already existing public policy justification. *Id*. at para. 84. Finally, it states that "the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions." *Id*. at para. 86.

language forms part of the national identity of a Member State and is therefore considered to be a legitimate aim of a national restriction on free movement enshrined in Article 21 TFEU.[74] Once defined as a legitimate aim, it is subject to the same test that is consistently used in the context of restrictions on free movement.[75] In effect, the Court of Justice introduced a common denominator for all national identity claims—the principle of proportionality.[76] The Member States' will to have their national particularities protected, as embodied in the national identity clause, can effectively be implemented without adversely affecting the equality of Member States—without an unconditional claim of primacy of EU law over national legal systems in their entirety.

C. A Reply from the Courts

Critics of the theory of constitutional pluralism have, as shown earlier, concluded that it lacks the ability to accommodate recent interactions between the *Bundesverfassungsgericht* and the Court of Justice in relation to the legality of the OMT mechanism. They concluded that the pluralist theory should be abandoned as a plausible way of explaining the judicial interactions in the EU. It is therefore anything but an easy task to explain the latest events through the lens of constitutional pluralism.[77] In this Section, however, I argue that a proper reading of the Treaty, but also the formal and informal expressions of all the judicial actors involved, favor a heterarchical, multilateral approach.

In order to proceed with the argument, this Article adds an empirical contribution to the discussion on the credibility of constitutional pluralism. It analyzes judgments, institutional documents and reports, as well as public statements and writings of current and former members of both the Court of Justice and national constitutional/supreme courts across the EU. The analysis seeks to demonstrate that the use of a shared vocabulary proves the main premises of the theory of constitutional pluralism. First, the use of a vocabulary to underline the claims of ultimate authority by constitutional/supreme courts in their own respective national orders, as well as by the Court of Justice, prove the first assumption of the theory—the co-existence of multiple claims of authority within the same geographical space.[78]

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[74] *Runevič-Vardyn*, Case C-391/09 at para. 87.

[75] *Id.* at para. 88.

[76] Academic literature in this field generally seems to agree on this point. In opposition to the usefulness of the principle of proportionality in the balancing exercise before the Court of Justice, see ELKE CLOOTS, NATIONAL IDENTITY IN EU LAW 196 (2015).

[77] For another recent piece supporting the theory of constitutional pluralism, see Matthias Goldmann, *Constitutional Pluralism as Mutually Assured Discretion: The Court of Justice, the German Federal Constitutional Court, and the ECB*, 23 MAASTRICHT J. EUR. & COMP. L. 119 (2016); Neil Walker, *Constitutional Pluralism Revisited* 22 EUR. L. REV. 333 (2016).

[78] Walker 2002, *supra* note 2, at 337.

Second, a common reconciliatory vocabulary points to the existence of a shared understanding of the division of obligations among the participants of the European judicial space—which I argue will auto-correct any imbalance that might arise from a constitutional conflict. In this respect, all Member States are equal, and their relationship with the Court of Justice is always conducted within the bounds of mutual respect[79] and sincere cooperation.

I. Methodology

In order to grasp the attitudes of national courts conducting constitutional review of the principle of primacy, and to be able to offer some conclusions on the usefulness of the theory of constitutional pluralism, I will briefly present the methodology used in the present analysis. This will address, first, the choice of the Member State courts under analysis; second, the sources that have been used; and, third, the choice of particular keywords. I will also underline some limitations of the study.

First, the analysis focuses on national courts with a constitutional mandate, that is, courts performing constitutional review. As a result of this focus, all Member States except for Finland, the Netherlands, and Sweden were included in the analysis. The three countries mentioned are difficult to include in the analysis as none of the them has a court that conducts binding constitutional review of legislative acts. Sweden's Supreme Court and Supreme Administrative Court form a Council that conducts a non-binding review of legislative drafts, whereas Finland's draft legislation is reviewed by the Constitutional Committee of the Parliament.[80] In the Netherlands, judicial review against the Constitution is prohibited by the Constitution[81] and is performed by the Council of State (*Raad van State*), an independent advisor to the government, Parliament, and the Dutch Senate. Such a situation removes the point of comparison for these three Member States, as there is no national jurisdiction performing binding constitutional review against the Constitution,[82] and consequently, no judicial interactions that are taking place in the context of a judicial conflict of constitutional interpretation.

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[79] *Id.*

[80] Franz Mayer, *The European Constitution and the Courts Adjudicating European Constitutional Law in a Multilevel System*, JEAN MONNET Working Paper 9/03 at 4 (2003).

[81] *See* GW. [Constitution] art. 120 (Netherlands). The Constitution in English is available at http://www.parliament.am/library/sahmanadrutyunner/niderland.pdf, (Sept. 17, 2016). The prohibition includes both *ex ante* and *ex post* review, as well as both substantive and procedural review. *See* Gerhard van der Schyff, *Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?*, 11 GERMAN L.J. 275, 277 (2010).

[82] MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION 253–54 (2006).

The status of parliamentary sovereignty in the UK and in the Netherlands[83] may lead us to conclude that both jurisdictions should be excluded from the analysis, but there are several points that differentiate the two principles and warrant the inclusion of the UK's Supreme Court in the present analysis and not the Netherlands' *Hoge Raad*. First, the Dutch Constitution prohibits constitutional review by the courts against the Constitution, but allows the Courts to review acts of Parliament against treaty law.[84] This means that courts are allowed to appraise acts of Parliament solely in relation to external sources of law, and not the Constitution.[85] Substantively, therefore, it is almost impossible for Dutch courts to find themselves in conflict with the Court of Justice, as it is EU law—among other sources of treaty law—and not national constitutional law, that is the standard of review envisaged in Article 94 of the Dutch Constitution. This additionally removes the possibility to analyze the interinstitutional dialogue, as there is no supreme jurisdiction in the Netherlands that engages in constitutional dialogue with the Court of Justice. Finally, given the clear powers of constitutional review of the Dutch Council of State and the Dutch Senate, both of which are non-judicial bodies, the Supreme Court of Netherlands was excluded from the analysis.[86]

The situation in the UK is more nuanced when it comes to the powers of courts to review legislation. The principle of parliamentary sovereignty emphasizes the exclusive power of the Parliament to enact legislation, and gives the Parliament the power to repeal any previous legislation, be it express or implied.[87] In this reading of the principle, all statutes are considered equal and courts are not allowed to review them. Nevertheless, Lord Justice Laws in his decision in *Thoburn*[88] distinguished between ordinary statutes and constitutional statutes. The latter, he claims, are more entrenched and may not be repealed by implication. Constitutional statutes include, for example, the European Communities Act of 1972 (ECA) and the Human Rights Act of 1998 (HRA). This exception is relevant for the position of constitutional review in the UK, as Section 4 of the HRA allows the courts to review all acts

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[83] For a comparative analysis of the two systems, see Gar Yein Ng, *Judicialisation and the End of Parliamentary Supremacy: Shifting Paradigms in the Protection of the Rule of Law and Human Rights in the UK, France and the Netherlands*, 3 GLOBAL J. COMP. L. 50 (2014).

[84] Article 94 of the Dutch Constitution says: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons." *See* GW. [Constitution], *supra* note 81, art. 94. *See also* van der Schyff, *supra* note 81, at 280.

[85] Yein Ng, *supra* note 83, at 88 (concluding that as a result of the monist approach to the incorporation of international law, the Dutch courts have a peculiar role in interpreting directly applicable international law and using it as a standard of review against national statutes).

[86] Yein Ng, *supra* note 83, at 93 (concluding that the Netherlands, in comparison to the UK and France, has the weakest form of judicial review).

[87] Sir John Laws, *Constitutional Guarantees*, 29 STATUTE L. REV. 1, 3 (2008).

[88] Thoburn v. Sunderland City Council [2002] EWHC 195 (Admin) [§§ 62–63].

of Parliament against the standards of the HRA, and to possibly declare them incompatible. The Parliament has thus far repealed all the statutes where the courts found an incompatibility,[89] but the one concerning the prisoners voting rights,[90] resulting in a new role for judicial review in the UK. In addition, the courts have also been torn between the requirements of EU law and national law. In the controversial *Factortame*[91] decision, the House of Lords granted interim relief in relation to an act of Parliament. The House of Lords relied on the response received by the Court of Justice,[92] and created a precedent for judicial review.[93] Finally, the role of the recently established Supreme Court, in opposition to a clearly defined political *ex ante* review of legislation—as can be found in the Netherlands and Finland[94]—makes it more important to include it in the analysis.[95] Malleson presented an array of opinions on the role the Supreme Court might assume, and concludes on a wide consensus for a role that assumes a more active policing the boundaries of Parliament action.[96] The UK Supreme Court can therefore be regarded as a court with the competence to perform constitutional review, albeit to a limited extent,[97] thus warranting its inclusion in the analysis.[98] The position of the Supreme Court is additionally relevant because of its interpretations of the British constitution, which place it in interinstitutional dialogue with

[89] Kate Malleson, *The Evolving Role of the Supreme Court*, PUB. L. 754, 760 (2011).

[90] HOUSE OF LORDS AND HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS, HUMAN RIGHTS JUDGMENTS, 2014–15, HL 130 HC 1088, at 19, (Sept. 20, 2016) https://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/130.pdf.

[91] R v. Secretary of State for Transport, ex parte Factortame (No 2) [1991] 1 AC 603.

[92] ECJ, Case C-213/98, The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others, ECLI:EU:C:1990:257, Judgment of June 19, 1990.

[93] POLITICAL AND CONSTITUTIONAL REFORM COMMITTEE OF THE HOUSE OF COMMONS, CONSTITUTIONAL ROLE OF THE JUDICIARY IF THERE WERE A CODIFIED CONSTITUTION, 2013–14, HC 802, at 22, (Sept. 18, 2016) http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/802/802.pdf.

[94] *Id.* at 21.

[95] de Visser, *supra* note 16, at 83–86.

[96] Malleson, *supra* note 89, at 763.

[97] For Lord Neuberger's response to the Political and Constitutional Reform Committee of the House of Commons, see *supra* note 94, at 24. For a comprehensive analysis of the influence that the introduction of the Human Rights Act has had on judicial review, and an argument supporting the existence of constitutional review in the UK, see Malleson, *supra* note 89. *See generally* AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT (2009).

[98] The United Kingdom was included in the analysis regardless of the subsequent decision of the British voters to leave the European Union. This was done primarily while the UK Supreme Court has been part of the European judicial space, contributing to the development of the relationship between UK and EU constitutional law, and will continue to do so until the final exit agreement between the UK and the EU. The decision of the UK to leave the EU does not do away with the role the Supreme Court in relation to EU law, nor would the analysis be complete had it been excluded.

the Court of Justice. The remaining Member States all have either a separate constitutional court performing binding constitutional review or this jurisdiction is held by the supreme court—or a particular chamber thereof.

Second, the analysis focused on particular expressions and speech acts from the following sources: (1) Judgments of the Court of Justice and national constitutional and supreme courts; (2) national reports composed by national constitutional courts in 2014 for the 26th Congress of European Constitutional Courts;[99] (3) interviews conducted with Judges and Advocates General of the Court of Justice;[100] and (4) public statements of members of all the judicial actors involved, in the form of academic writings, talks, seminars and public interviews.[101]

Third, the study of the mentioned sources resulted in a finding of widespread use of several common expressions—or concepts—[102]that are used by both national courts performing constitutional review, as well as by the members of the Court of Justice. While there was not one single keyword used across all the Member States' courts performing constitutional review, several synonyms, as will be shown, have been found in various sources in sixteen Member States.[103] Moreover, another six Member States have expressly accepted the primacy of EU law in their national legal orders, be it by way of a constitutional provision, or

[99] All reports are available at http://www.confeuconstco.org/ (last visited Nov. 4, 2015). The advantage of the reports is that all constitutional/supreme courts were answering the same questionnaire, thereby ensuring that all the replies were given in the same context.

[100] The interviews were conducted as part of the research visit to the Court of Justice between February and May 2015, with seven Judges and Advocates General. To ensure the anonymity of the interviewees, they will be referred to as "Interviewee 1," "Interviewee 2," etc.

[101] While the sources under (3) and (4) do not represent the official stance of the institution(s) for which the interviewees work, Grainger pointed out, in relation to the Court of Justice in particular, that it is not a homogeneous actor, but is rather a "complex social entity." Similarly, Weiler pointed out that any analysis of the Court of Justice cannot be complete if the Court is regarded simply as an "homogeneous institution." *See* Marie-Pierre Grainger, *The Future of Europe: Judicial Interference and Preferences*, 3 COMP. EUR. POLITICS 155, 175 (2005); Joseph Weiler, *The Reform of European Constitutionalism*, 35 J. COMMON MKT. STUD. 95, 106 (1997); Iyiola Solanke, *"Stop the ECJ"?: An Empirical Analysis of Activism at the Court*, 17 EUR. L.J. 764, 765 (2011). Consequently, the personal opinions of the decision-makers in the Court of Justice and other national constitutional courts bear significance regarding the work and position of their institution(s). The same was underlined in the national report of the Irish Supreme Court, which confirms the influence of the jurisprudence of both the ECJ and the Court in Strasbourg on the case law of the Supreme Court, underlining how inevitable this is, given the work experience of current Supreme Court judges as judges in European courts. *See* National Report–The Supreme Court of Ireland (2014), at 3.

[102] I will refer to them as keywords throughout the text.

[103] Bulgaria, Cyprus, the Czech Republic, Denmark, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and the United Kingdom.

based upon the binding nature of the ECJ's case law.[104] Estonia, France and Greece have expressed reservations towards the principle of primacy of EU law in relation to their national constitutions, but have never applied such limits in an actual case.

Finally, it is necessary to emphasize that the analysis ahead might be limited because it will involve comparing identical expressions that come from different legal systems and might therefore have different meanings. This certainly holds true when comparing, for example, the notion of "openness to European law" in the jurisprudence of the *Bundesverfassungsgericht* and a statement of a judge of the Court of Justice given in an anonymous interview. Nevertheless, the analysis is focused on national reports composed by national constitutional courts and interviews with different Judges and Advocates General of the Court of Justice, both of which were used in the same context and therefore contain comparable notions.

II. Keyword Analysis

In order to address the first premise of the theory of constitutional pluralism, it is necessary to briefly reflect upon those expressions which would point to a State-centered sovereigntist view of national courts with a constitutional mandate. National courts with a constitutional mandate have consistently claimed final authority in their territory. They do this to protect the national constitution as the highest act applicable in a Member State,[105] and to emphasize sovereignty as the ultimate limit for European integration and the reach of the principle of primacy.[106]

National constitutional courts have also put forward identity-based limits to the principle of primacy of EU law, reasserting the untouchable character of the constitutional core.[107] These

[104] Austria, Belgium, Croatia, Ireland, Luxembourg, and Malta.

[105] *See* Ústavní Soud České republiky ze dne 26.11.2008 (ÚS) [Decision of the Constitutional Court of Nov. 26, 2008], sp.zn. Pl. ÚS 19/08 para. 216 (Czech) [hereinafter *Lisbon Treaty I*]; Danish *Højesteret*, *Carlsen and Others v. Prime Minister*, UfR [Apr. 6, 1998], Case No. I 361/1997, 800, reported in English in 3 COMMON MKT. L.REP. 854 (1993) [hereinafter *Carlsen*]; Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], July 6, 2010, 2 BVR 2661/06, 126 BVERFGE 286, para. 68 [hereinafter *Honeywell*]; National Report, The Constitutional Court of the Republic of Lithuania (2014), at 5; *Accession Treaty*, *supra* note 12, at para. 11; UK Supreme Court, *Pham v. Secretary of State for the Home Department*, U.K.S.C. 19 para. 90 (2015) [hereinafter *Pham*].

[106] *See Ústavní Soud České republiky* 08.03.2006 (ÚS) [Decision of the Constitutional Court of Mar. 8, 2006], sp.zn. Pl. ÚS 50/04 at headnote para. 8 (Czech) [hereinafter *Sugar Quotas III*]; Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Oct. 12, 1993, 2 BVR 2134/92, 89 BVERFGE 155 at para. C.II.1.a [hereinafter *Maastricht*]; *Constitutional Treaty*, *supra* note 60, at para. II–2.

[107] *See Lisbon Treaty II*, *supra* note 14, at para. 150; Conseil constitutionnel [CC] [Constitutional Court] decision No. 2006–540 DC, July 27, 2006, para. 19 (France) [hereinafter *Information Society*]; Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], June 30, 2009, Case No. 2 BvR 1010/08; 2 BvR 1022/08; 2 BvR 1259/08; 2 BvR 182/09, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 123, para. 240 [hereinafter *Lisbon*]; *Gauweiler Press Release*, *supra* note 29, at para. 2; Corte Cost. 27 dicembre 1973, n. 183/1973, reported in English in 2 COMMON MKT. L.REP

expressions point to the parallel existence of competing claims to ultimate authority on the national level, thus illustrating the main premise of constitutional pluralism. The sovereignty claims on the national level are consistently put forward by constitutional adjudicators, particularly in situations of possible clashes in interpretation.[108] This does not, as will be shown below in the analysis of reconciliatory keywords, undermine the ability of constitutional pluralism to balance these opposing claims through its auto-correct function.

The debate concerning the EU's sovereignty is more complex. This complexity stems from the inherent and almost natural assumption that sovereignty belongs to nation states. Nevertheless, while the source and the development of EU sovereignty differs substantially from the classic notion of State sovereignty, and we may debate its nature,[109] there seems to be consensus on its existence.[110] The sovereignty of the EU, although never explicitly mentioned, can be discerned from the early case law of the Court of Justice, most notably in *Costa v. ENEL*:

> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[111]

372 (1974) (Italy) [hereinafter *Frontini*]; Latvian *Satversmes tiesa* [Constitutional Court decision of Apr. 7, 2009] Case No. 2008-35-01, [hereinafter *Latvian Treaty of Lisbon*], paras. 16.3, 17; *see also Polish Treaty of Lisbon*, *supra* note 72, at para. 1.1.2.

[108] For an analysis of the increasing frequency of state-centered claims by the *Bundesverfassungsgericht*, see Jo Murkens, *"We Want our Identity Back": The Revival of National Sovereignty in the German Federal Constitutional Court's Decision on the Lisbon Treaty*, 25 PUB. L. 530 (2010).

[109] Gráinne de Búrca, *Sovereignty and the Supremacy Doctrine of the European Court of Justice*, *in* SOVEREIGNTY IN TRANSITION, 449 (Neil Walker ed., 2003).

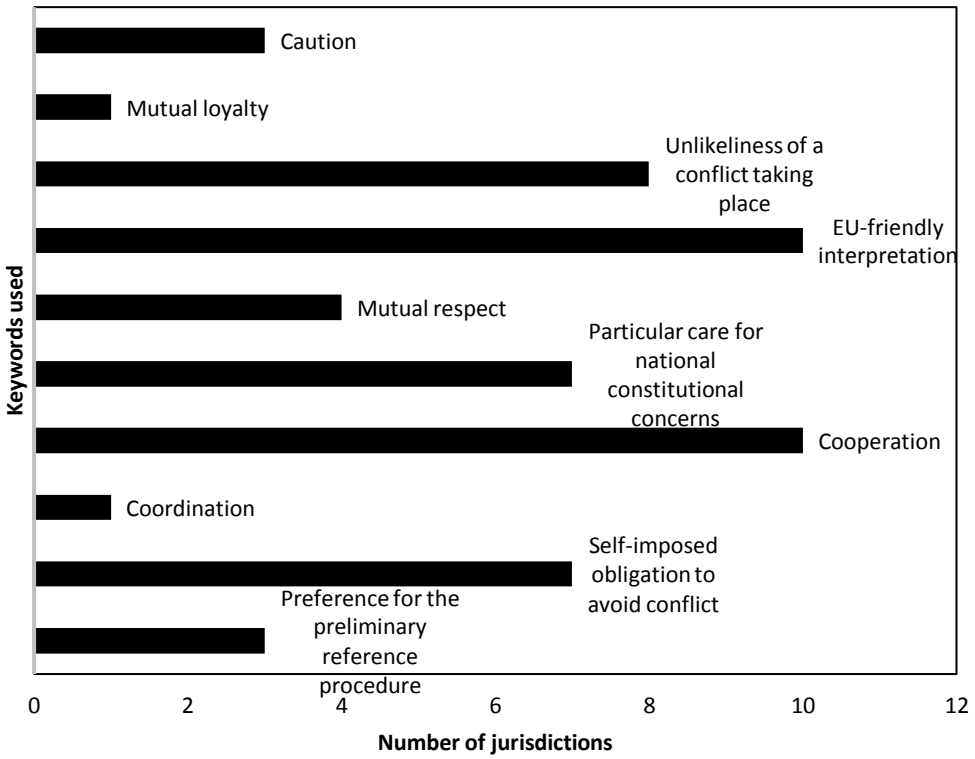
[110] *See* Walker 2003, *supra* note 2, at 12; Hans Lindhal, *Sovereignty and Representation in the European Union*, *in* SOVEREIGNTY IN TRANSITION 87, 107 (Neil Walker ed., 2003); De Búrca 2003, *supra* note 109, at 451. Conversely, the Latvian Constitutional Court concluded the EU does not have sovereignty in the classic Westphalian sense. Its subsequent analysis points to a clear struggle to fit the EU into the category of a classical international organization. *See Latvian Treaty of Lisbon*, *supra* note 107, at paras. 17–18.

[111] Costa v. E.N.E.L., *supra* note 56, at 593. A more detailed analysis of the vocabulary of the Court of Justice concerning the question of sovereignty of the EU can be found in Bruno de Witte, *Direct Effect, Supremacy and the Nature of the Legal Order*, *in* EVOLUTION OF EU LAW (Paul Craig & Gráinne de Búrca eds., 1999).

The Court of Justice addressed the characteristics of the newly established legal order, asserting a claim to ultimate legal authority in the limited fields of its competence, albeit not in the classical sense that we usually associate with nation states.

I will proceed with the analysis of the recurring reconciliatory vocabulary, which will auto-correct any imbalance that might arise from a constitutional conflict. In my view, it points to the existence of a shared understanding of the division of obligations among the participants of the European judicial space. The following figure depicts the keywords and the intensity of their use in the sources under analysis. The horizontal axis represents the number of jurisdictions in which a certain keyword placed on the vertical axis was used.

Figure 1 ***Use of keywords***



The argument proceeds as follows: The actual implementation of the keywords used, the exhibited self-restraint, and a self-imposed obligation to avoid conflict. All of these offer

strong proof that a clear, *ex ante*, answer to the question of the final arbiter is indeed unnecessary. Moreover, an insistence upon its resolution might bring about more harm than good, as it may provoke conflicts of unimaginable proportions.[112] Subsequently, the analysis of common keywords will be used to depict the functioning of the pluralist "auto-correct" system as a way of preventing an outbreak of constitutional conflict.

The sets of keywords under analysis, as will be shown in what follows, have four common characteristics: (1) Their implementation is voluntary in nature, which means that the decision to abide by them is political, rather than legal;[113] (2) they are aimed at conflict prevention, both from the perspective of national constitutional jurisdictions and that of the Court of Justice; (3) they are inherently pluralist, as none of them contain elements of either superiority or subordination; and (4) their implementation shows institutional awareness of the big, multilateral picture in the everyday work of the courts under analysis, as they are conscious of the need for a balanced relationship among all constitutional jurisdictions in the EU.

All four characteristics point to the conclusion that there exists a strong awareness of the importance of preserving the pluralist setting, present both in national constitutional jurisdictions and the Court of Justice.

As can be seen in Figure 1, the most commonly used set of keywords is "EU-friendly interpretation".[114] In particular, the majority of answers were given in national reports on the question of their approach towards the relationship between national constitutions and EU law, and how to proceed in a case of a possible divergence between the two. Such an understanding is a direct application of the principle of sincere cooperation among the courts under analysis.[115] The use of the term was so widespread among the national reports

[112] Discussed above in Section 2.

[113] Weiler reflected upon the relationship between the Court of Justice and its interlocutors, concluding it is not "a matter of legal determination and then logical deduction from the doctrine, but a matter of empirical observation and social and political explanation." Weiler, *supra* note 16, at 419; *see also* Christina Eckes & Stephan Hollenberg, *Reconciling Different Legal Spheres in Theory and Practice: Pluralism and Constitutionalism in the Cases of Al-Jedda, Ahmed and Nada*, 20 MAASTRICHT J. EUR. & COMP. L. 220, 224 (2013).

[114] *See Corte Cost.* 8 giugno 1984, n. 170/1984 at paras. 7–3 [hereinafter *Granital*]; Voßkuhle, *supra* note 54, at 188; *Honeywell*, *supra* note 105, at paras. 100, 111; *Lisbon Treaty*, *supra* note 107, at para. 221; *Polish Treaty of Lisbon*, *supra* note 72, at para. 3.1; General Report, Conference of European Constitutional Courts (2014), at 2–4; National Report, The Supreme Court of Cyprus (2014), at 3; National Report, The Constitutional Court of the Czech Republic (2014), at 4; National Report, The Federal Constitutional Court of the Republic of Germany (2014), at 2; National Report, The Constitutional Court of Hungary (2014), at 3; National Report, The Constitutional Court of the Republic of Latvia (2014), at 8; National Report, The Constitutional Court of the Republic of Lithuania, *supra* note 105, at 15, 26; National Report, The Portuguese Constitutional Court (2014), at 23.

[115] Regarding its principle of openness towards EU law, the German *Bundesverfassungsgericht* stated in *Honeywell*: "When exercising this competence to affect a review, the principle of openness of the Basic Law towards Europe is

that it was also underlined as one of the most common practices in the General Report of the 2014 Conference of European Constitutional Courts.[116] While the use of this term in national reports has little legal value *per se*, I argue that it reflects a shared attitude that, in practice, results in a uniform application of EU law at the national level.

The second most commonly used set of keywords is the "self-imposed obligation to avoid conflict".[117] The term was used widely among European constitutional courts when asked about possible divergences in interpretation between national constitutional law and the exigencies of EU law. In addition, Advocate General Wathelet[118] agreed that there is a degree of self-restraint that drives the behavior of the courts involved in order to prevent a conflict from taking place when a particular case calls into question both national constitutional law and EU law. The use and application of this keyword is central to the preservation of the pluralist setting without any claims of superiority or subordination, as it aims to prevent constitutional conflict.

From an anti-pluralist perspective, self-restraint might be regarded as an inherent weakness of the current system that needs to be remedied by a clear set of jurisdictional demarcations. Essentially, the critics point to the lack of conflict resolution rules as the main failure of the pluralist theory. Conversely, as shown below, when we regard law as a dynamic process, rather than law as a static rule, the *lacunae* of the system are resolved by interpreting the norms in their societal context through analogy; these norms are applied as "tools of authoritative decision-making" in place of a precise rule.[119]

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to be complied with as a correlate of the principle of sincere cooperation (Article 4.3 TEU) and to be made fruitful." *Honeywell*, *supra* note 105, at para. 100.

[116] General Report, Conference of European Constitutional Courts, *supra* note 114, at 2–4.

[117] *See Trybunał Konstytucyjny* 16.11.2011 [Polish Constitutional Tribunal decision of Nov. 16, 2011] SK 45/09 para. 2.6 [hereinafter *Brussels Regulation*]; *Lisbon Treaty II*, *supra* note 14, at para. 112; General Report, Conference of European Constitutional Courts, *supra* note 114, at 2; National Report, The Constitutional Court of the Czech Republic, *supra* note 114, at 4; National Report, The Supreme Court of Denmark (2014), at 12; National Report, The Federal Constitutional Court of the Republic of Germany, *supra* note 114, at 3; National Report, The Constitutional Court of Hungary, *supra* note 114, at 2-3; National Report, The Constitutional Tribunal of the Republic of Poland (2014), at 2; National Report, The Constitutional Court of Romania (2014), at 12; M. Wathelet, Advocate General, Constitutional Courts and the CJEU: Is There a Dialogue? History and Prospects, Address at the EU Law Discussion Group at the Law Faculty, University of Oxford (Oct. 23, 2015).

[118] *See generally* Wathelet, *supra* note 117.

[119] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 10 (1995).

Two more keywords need to be mentioned alongside the "self-imposed obligation to avoid conflict": (1) The unlikeliness of a conflict taking place;[120] and (2) caution.[121] All three sets show a preference for the parallel functioning of Member States' legal systems and the EU legal system, not operating in a hierarchical relationship. When the EU competence to regulate a certain area clashes with the national competence to protect constitutional values, the situation will be resolved through an EU-friendly interpretation, which is also driven by a self-imposed obligation to avoid any conflict, wherever possible. Even in the eyes of the constitutional courts of Member States, such situations are extremely unlikely to occur, but when they do, they should be approached with caution, keeping in mind the ultimate aim of avoiding conflict.

The next group of keywords relevant for the pluralist explanation of the judicial interactions in the area of constitutional interpretation are: (1) Cooperation,[122] (2) coordination,[123] (3) mutual respect,[124] and (4) mutual loyalty.[125] While the previous group of keywords indicated a more passive attitude of conflict avoidance, in the highly unlikely scenario that problems arise, this group of keywords takes a step forward and engages constitutional jurisdictions in conduct that is more active. Not only do the constitutional jurisdictions avoid conflicting situations, but they foster cooperation and coordination in their work. In addition, they operate in the context of mutual respect and loyalty. Read together, these sets of keywords show that constitutional courts implement the principle of sincere cooperation in practice.

The final group of keywords focuses more on reflecting the attitudes of those that make decisions at the Court of Justice—the judges and advocates general. In particular, it aims to

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[120] *See* National Report, The Constitutional Court of Belgium (2014), at 31; *Lisbon Treaty I*, *supra* note 5, at para. 5; *Carlsen*, *supra* note 105, at para. 9.6; *Granital*, *supra* note 114, at para. 7-7; *Brussels Regulation*, *supra* note 117, at para. 2.7; *Constitutional Treaty*, *supra* note 60, at para. II-4; *Melloni*, *supra* note 63, at para. II-3; National Report, The Federal Constitutional Court of the Republic of Germany, *supra* note 114, at 3; *Pham*, *supra* note 105, at para. 91.

[121] *See Brussels Regulation*, *supra* note 117, at paras. 2.5, 2.8; National Report, The Constitutional Court of Romania, *supra* note 117, at 12; *Pham*, *supra* note 105, at para. 91.

[122] *See Brussels Regulation*, *supra* note 117, at para. 2.6; General Report, Conference of European Constitutional Courts, *supra* note 114, at 12; National Report, The Portuguese Constitutional Court, *supra* note 114, at 23; National Report, The Constitutional Court of Romania, *supra* note 117, at 12-13; National Report, The Constitutional Court of the Slovak Republic (2014), at 12; National Report, The Constitutional Court of the Republic of Slovenia (2014), at 18; UK Supreme Court, *R (on the application of HS2 Action Alliance Limited*) [2014] U.K.S.C. 3 at para. 202 [hereinafter UK Supreme Court, *HS2*]; *Pham*, *supra* note 105, at para. 91.

[123] *Granital*, *supra* note 114, at para. 7-4.

[124] *See* National Report, The Constitutional Court of the Czech Republic, *supra* note 114, at 11; *Brussels Regulation*, *supra* note 117, at para. 2.5; National Report, The Constitutional Court of Romania, *supra* note 117, at 58; *Pham*, *supra* note 105, at para. 91.

[125] National Report, The Constitutional Tribunal of the Republic of Poland, *supra* note 117, at 2.

show not only the need for the national constitutional jurisdictions to project an EU-friendly jurisprudence, but also the need to show the Court of Justice's attempts to adhere to the principle of sincere cooperation, as well as the obligation to respect the national identities of Member States. Two sets of keywords have been analyzed to this end: (1) Particular care is taken where national constitutional concerns are involved;[126] and (2) there is a preference for the use of the preliminary reference procedure.[127] When asked about possible clashes in interpretation with national constitutional jurisdiction, six judges/advocates general have confirmed that in their work in a specific case, particular care is taken if a national constitutional concern arises. In addition, three interviewees expressed their preference for any possible conflict to take place in the realm of the preliminary reference procedure. The importance of such an attitude should not be underestimated—the trust that national constitutional courts have in the Court of Justice to comply with the obligation to respect national particularities is not unfounded.

In addition to the use of keywords, the present work has analyzed the extent of cross-referencing to other constitutional jurisdictions throughout the EU, as such cross-referencing represents yet another sign of constitutional adjudicators' awareness of the multilateral momentum of judicial interactions, both institutionally and substantively. The practice of cross-referencing is common among a broad range of constitutional jurisdictions in the EU,[128] and the practice has become more widespread in recent years.[129] This trend is significant as it further confirms the argument that constitutional courts throughout the EU are aware of the need for a multilateral approach to judicial interactions in the EU.

Cross-referencing is, of course, not without its shortcomings; the courts that do make use of it may be seen as cherry-picking only those judgments that support their argument. On this

[126] Interviewee 1; Interviewee 2; Interviewee 3; Interviewee 4; Interviewee 5; Interviewee 6.

[127] Interviewee 1; Interviewee 2, Interviewee 4; *see* National Report, The Supreme Court of Denmark, *supra* note 117, at 12; National Report, The Portuguese Constitutional Court, *supra* note 114, at 23; *Brussels Regulation*, *supra* note 117, at para. 2.6.

[128] *See* National Report, The Constitutional Court of Austria (2014), at 11; National Report, The Constitutional Court of Croatia (2014), at 24; National Report, The Supreme Court of Cyprus, *supra* note 114, at 5; National Report, The Constitutional Court of the Czech Republic, *supra* note 114, at 20; National Report, The Federal Constitutional Court of the Republic of Germany, *supra* note 114, at 17; National Report, The Constitutional Court of Hungary, *supra* note 114, at 2; National Report, The Supreme Court of Ireland, *supra* note 101, at 5; National Report, The Constitutional Court of the Republic of Latvia, *supra* note 114, at 8; National Report, The Constitutional Court of the Republic of Lithuania, *supra* note 105, at 30; National Report, The Constitutional Court of the Republic of Malta (2014), at 4; National Report, The Constitutional Tribunal of the Republic of Poland, *supra* note 117, at 15; National Report, The Portuguese Constitutional Court, *supra* note 114, at 38; National Report, The Constitutional Court of Romania, *supra* note 117, at 61–62; National Report, The Constitutional Court of the Slovak Republic, *supra* note 122, at 9; National Report, The Constitutional Court of the Republic of Slovenia, *supra* note 122, at 26; National Report, The Constitutional Tribunal of Spain (2014), at 26; *Pham*, *supra* note 105, at 91.

[129] General Report, Conference of European Constitutional Courts, *supra* note 114, at 8.

point, Claes and Reestman[130] analyzed the cross-referencing done by the German *Bundesverfassungsgericht* in its preliminary reference to the Court of Justice, where case law from nine other Member States was cited in support of the court's interpretation of constitutional identity. They found that the case law cited only partially supports the view of the German Court, while more recent jurisprudence of the cited courts has been omitted. Nevertheless, even such cross-referencing is welcome and contributes to the general awareness of all the courts involved that they are equal counterparts who are jointly and multilaterally contributing to the development of what can be perceived as EU constitutional law.

The practice of cross-referencing underscores both the substantive and the institutional elements of a pluralist heterarchical judicial setting. Substantively, constitutional jurisdictions in the EU are using each other's jurisprudence to add a comparative element to their reasoning, as well as to support their arguments. The use of foreign jurisprudence both enriches the reasoning of the court in question and adds to a broader momentum of mutual acknowledgment and the idea of a shared legal culture and standards. As explained in the General Report of the Conference of European Constitutional Courts, the use of European constitutional jurisprudence contributes to the creation of a "European standard" of converging jurisprudence in Europe.[131] In that respect, one can conclude that these judicial interactions—in the broadest sense—represent a conversation and a discussion on the substantive matters of European constitutional law.

Institutionally, the cross-referencing acknowledges the multilateral, heterarchical setting among Europe's highest courts. When one constitutional jurisdiction cites another one to support its claims, it means that they are regarding each other as peers and equal counterparts.[132] The same logic is applicable not only among national constitutional jurisdictions, but also in relation to the Court of Justice. Consequently, one should reject Fabbrini's claims concerning the too narrow bilateral relationship among courts that would arise when there are exceptions to the principle of primacy of EU law.[133] Conversely, introducing an exception with a common limit for all Member States contributes to the equality of Member States.[134] The relationship is characterized again by the same mutual respect and self-restraint that occurs between the Court of Justice and national

[130] Claes & Reestman, *supra* note 32, 941.

[131] General Report, Conference of European Constitutional Courts, *supra* note 114, at 9.

[132] The very framework of the Conference of European Constitutional Courts demonstrates how cooperation among judges and courts contributes to what Jacobs famously called the cross-fertilization of legal systems. *See generally* Jacobs, *supra* note 31.

[133] Fabbrini, *supra* note 10, at 1014–1016.

[134] To reiterate the point made by the Polish *Trybunał Konstytucyjny*: "[C]onfirming one's national identity in solidarity with other nations, and not against them." *Polish Treaty of Lisbon*, *supra* note 72, at para. 2.1.

constitutional jurisdictions. This demonstrates a clear heterarchy.[135]

The use of the keywords under analysis, when examined in the context of possible clashes in constitutional interpretation, resounds immensely. Kelemen's claims on the immaturity of the EU legal system, which, he asserts, does not deserve to be called a "constitutional" one,[136] need to be rejected. On the contrary, in a system in which the questions of the final arbiter and the absolute superior legal order do not exist, the participants in the EU judicial space need to be commended for their mature reasoning and behavior.

Fundamentally, all sets of keywords reflect both an attitude of mutual trust and the principle of sincere cooperation. While at times it is the Court of Justice that will take care of the national concerns and particularities,[137] at other times it will be national constitutional courts that will cautiously interpret matters that involve EU law—all with the same awareness of the importance of EU's pluralist nature and the balance it brings to these judicial interactions, both bilaterally and multilaterally.

A few final words need to be said about the first case in the history of the EU where a national constitutional court abandoned the mutually assured control of conflict and declared an EU act *ultra vires—Landtová*.[138] The case concerned a very specific issue of entitlements to pension rights after the break-up of Czechoslovakia. The case represented an unfortunate depiction of an internal struggle between the Czech Supreme Administrative Court and the Czech Constitutional Court.[139] It is important to note that the Czech Constitutional Court has never again applied its own reasoning,[140] particularly after the composition of the Constitutional Court changed drastically; it is now comprised of former members of the Supreme Administrative Court.[141]

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[135] Co-operative programs, conferences and networking events of these judicial networks play a role in the co-ordination of judicial activity and the unification of practices at the national level. One of their main advantages is precisely the level-playing field, where no judicial instance is in a hierarchical position to another. *See* Claes & de Visser, *supra* note 47, at 101.

[136] Kelemen, *supra* note 8, at 146.

[137] *See* Lord Neuberger and Lord Mance in UK Supreme Court, *HS2*, *supra* note 122, at para. 201.

[138] *Ústavní Soud České republiky* 31.12.2012 [Decision of the Constitutional Court of Dec. 31, 2012], Pl. ÚS 5/12 (Czech) [hereinafter Czech CC *Slovak Pensions*].

[139] For a more detailed analysis of the intricacies of the case, see Michal Bobek, *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Ruling Procedure*, 10 EUR. CONST. L. REV. 54 (2014).

[140] *Id.* at 66.

[141] *Id.*

The marginality of the case has been underlined by Advocate General Wathelet,[142] Fabbrini,[143] and Interviewee 4.[144] Moreover, the 2014 National Report for the Conference of European Constitutional Courts prepared by the Czech Constitutional Court itself does not mention this judgment among those relevant for the relationship between EU law and national constitutional law, but only mentions it as an example of a divergence in jurisprudence, stating that the Court of Justice "overlooked"[145] the facts of the case. What is most important is that the Czech Constitutional Court implicitly admitted its own mistake by never applying the judgment again and complying with the initial interpretation put forward by the Court of Justice.

III. The Pluralist Auto-Correct

This system of self-restraint and a self-imposed obligation to avoid conflict might not seem to be a feature of a mature constitutional order, particularly to scholars who use the classic State-centered standards for their assessment.[146] Contrary to these assertions, this Article rests on the assumption put forward by Neil Walker, who emphasized the need to analyze and judge the EU constitution—in the widest sense of the term[147]—in its own context and on its own merits.[148] Having concluded that Member States share the same idea of a peaceful character of interactions with the Court of Justice, I further argue that the pluralist system contains within itself an "auto-correct" function, which serves as a check and balance among constitutional jurisdictions on the national and on the EU level.[149]

In order to fully understand the pluralist auto-correct function, it is first necessary to address another feature of a pluralist legal order—incrementalism. Specifically, incrementalism accentuates the gradual development of institutional interactions (its procedural aspect),

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[142] *See* generally Wathelet, *supra* note 117.

[143] Federico Fabbrini, *The European Court of Justice, the European Central Bank and the Supremacy of European Law: Introduction*, 23 MAASTRICHT J. OF EUR. & COMP. L. 1, 2 (2016).

[144] Interviewee 4 stated that the case should not be taken into account as a representation of anything, as is it vitiated by numerous mistakes on behalf of both the Czech Constitutional Court and the Court of Justice.

[145] The exact wording used by the Czech Constitutional Court was: "The Constitution[al] Court inferred that the Court of Justice of the European Union had overlooked these facts, as it otherwise would have had to conclude that EU law was not applicable in the situation [at] hand." National Report, The Constitutional Court of the Czech Republic, *supra* note 114, at 18.

[146] *See* Kelemen, *supra* note 8, at 146.

[147] *See generally supra* note 13 for the discussion and the relevant literature.

[148] *See* Walker 2003, *supra* note 3, at 40. *See generally* Rodin's argument, *supra* note 14.

[149] *See* Weiler, *supra* note 16, at 419 (discussing "persuasion pull" and "compliance pull" as the drivers behind the implementation of the case law of the Court of Justice).

and the creation of rules and principles (its substantive aspect).[150] Incrementalism may be regarded as stemming from an understanding of law as process, where the lines between *lex lata* and *lex ferenda* are becoming increasingly blurred, as the use of analogy and contextual interpretation take center stage.[151] With these premises in mind, the lack of legal norms on the resolution of constitutional conflict among national constitutional jurisdictions and the Court of Justice seem overstated. In addition, the recent critics of the pluralist theory have overlooked incrementalism, both as a feature of the system and in how it contributes to its sound functioning.

Let us recall briefly the *Solange* saga to depict both the procedural and substantive aspects of incrementalism—influencing intra-EU judicial interactions and contributing more broadly to the development of EU constitutional law.[152] In its first *Solange* judgment,[153] the *Bundesverfassungsgericht* retained the right to exercise judicial review in matters of protection of fundamental rights, as long as the European integration process did not reach a level whereby it would guarantee a satisfactory level of protection. If we were to use the arguments of those criticizing pluralism today and apply them to the *Solange* situation, this judgment would probably be seen as the demise of the entire European project, while judicial interactions would be characterized at their absolute low. Conversely, subsequent events[154] demonstrated the gradual, step-by-step[155] development of the protection of fundamental rights on the EU level,[156] but also the contribution to the relationship between national constitutional jurisdictions and the Court of Justice.[157] It has also demonstrated how

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[150] *See* Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 314 (1997); Krisch, *supra* note 3, at 247.

[151] *See* Higgins, *supra* note 119, at 10. *See also* CLAES, *supra* note 82, at 713.

[152] *See* Shaw, *supra* note 4, at 14, 19, 24; *see also* Zenon Bañkowski & Emilios Christodoulidis, *The European Union as an Essentially Contested Project*, 4 EUR. L.J. 341, 342 (1998).

[153] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], May 29, 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (BGHZ) 271 (hereinafter *Solange I*).

[154] In its response, the Court of Justice used the common constitutional traditions of Member States as the source of inspiration and the level of protection of fundamental rights that will be accorded on the Union level. *See* ECJ, Case C-4/73, J. Nold, Kohlen- und Baustoffgroßhandlung *v. Commission* of the European Communities, at para. 13, Judgment of May 14, 1974. Finally, the German Constitutional Court accepted such a level of protection in the *Solange II* judgment. *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Oct. 22, 1986, 73 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 339 [hereinafter *Solange II*].

[155] Krisch, *supra* note 3, at 247 onwards.

[156] The area of fundamental rights is an excellent example of how the EU has evolved as a constitutional legal order not comparable to nation states. *See* Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. EUR. & COMP. L. 168, 169 (2013).

[157] *See* Alec Stone Sweet, *The Structure of Constitutional Pluralism: Review of Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Post-National Law*, 11 INT. J. CONST. L. 491, 500 (2013).

such a gradual development contributed to the avoidance of an outburst of conflict or the activation of Kelemen's predicted doomsday device.[158] Therefore, in order to make a conclusion about the applicability of the theory of constitutional pluralism to the EU constitutional setting, one needs to take a step back from individual judgments and ground the analysis with regard to the relevant jurisprudence as a process.[159] It is precisely because of incrementalism that a broader examination of the relevant case law confirms the main premises of the pluralist theory. Furthermore, it prevents future conflicts from taking place through the auto-correct function.

The auto-correct mechanism functions in the following context: In the EU as we know it, issues prone to constitutional conflict arise regularly.[160] Both the Court of Justice and national constitutional jurisdictions are able, through their respective procedural avenues, to control the extent of the conflict. There are also two legal imperatives driving this dynamic in two opposite directions—the principle of primacy of Union law on the one hand, and the obligation to respect the national identity of Member States on the other. An explicit primacy clause that would serve as a resolution of this inherent conflict failed to come into force as part of the Constitutional Treaty after its signature in 2004. This failure implied that the sentiment among Member States was and is against any such a conclusive provision.[161] In the following Treaty amendment in 2007, the provision on the obligation of the EU to respect national identities of Member States was expanded in its wording, but it also fell under the jurisdiction of the Court of Justice from that time onward.[162]

Support for the auto-correct function can be found in the most recent Order of the *Bundesverfassungsgericht*, in a case where the European Arrest Warrant was to be applied to an American citizen, and he was to be extradited to Italy, where he was sentenced *in*

[158] Kelemen, *supra* note 8, at 141, 148–149.

[159] Similarly, Rodin differentiates among the immediate and the future impact of the case law of the Court, arguing that the latter is based on the changed societal context, gradually transforming a judgment into a landmark. *See* S Rodin, Dumb and No More Here, Address at the Conference on Central and Eastern European Judges Under The EU Influence: The Transformative Power of Europe Revisited on the 10th Anniversary of the Enlargement, 12–13 May 2014, EUI, Florence, Italy [cited with the author's permission], at 10, 14.

[160] Stone Sweet argues that the possibility of a conflict is a "manifestation, probably permanent, of a pluralist structure of EU law." Stone Sweet, *supra* note 20, at 65.

[161] This is not to diminish the importance of the principle of primacy in the case law of the Court of Justice, but rather to emphasize the importance of the "political" in relation to the "legal." Moreover, it also serves to reiterate the importance of the national constitutional setting and its ability to constrain national constitutional jurisdictions.

[162] Barbara Guastaferro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, JEAN MONNET Working Paper 01/12 at 4 (2012).

absentia.[163] The German Court emphasized that any conflict that may arise would be an exception, and would not harm the uniform application of Union law, as each individual case would be handled with restraint and in a manner open to European integration. This judgment confirmed that individual judgments do not prejudice the relationship between the legal orders.[164]

It is necessary to underline that the auto-correct function does not challenge or undermine the parallel sovereign claims of the 28[165] national constitutional systems as well as the primacy claim put forward by the Court of Justice. It is precisely in the acknowledgment of these claims that the auto-correct takes center stage. As the keyword analysis has shown, a clash between parallel sovereignty claims is avoided through the application of self-restraint and mutual accommodation. More particularly, the analysis has shown that each of the systems has built-in conditions for the application of the auto-correct, such as the principle of EU-friendly interpretation, or the national identity clause. It is only through interactions between the systems, however, that the auto-correct function takes place and brings about a balance among the different individual systems claiming sovereignty. Thus, while the conditions for the utilization of the auto-correct are contained within each of the systems, its consequences affect the system as a whole—namely its balance.

In such a setting, the auto-correct would prevent an outbreak of conflict between either of the constitutional jurisdictions involved—in the EU judicial architecture, an awareness on the part of all the actors involved of the benefits of a pluralist setting results in conflict management and control. The result of a given case will sometimes be on the side of national concerns,[166] and at other times on the side of integration.[167] In any event, the outcome will be reached after careful balancing, conducted by applying both self-restraint and the strong will to avoid conflict,[168] and also an EU-friendly interpretation on behalf of national

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[163] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Dec. 15, 2015, Order No. 2 BvR 2735/14 [hereinafter *EAW Order*].

[164] The same was underlined by the Austrian Constitutional Court, where it stated that should a conflict arise, this should not be developed beyond an individual case. National Report, The Constitutional Court of Austria, *supra* note 128, at 9.

[165] Soon to be 27.

[166] *See generally* Case C-36/02 *Omega*, *supra* note 68; Case C-208/09, *Sayn-Wittgenstein*, *supra* note 69; Case C-391/09 *Runevič-Vardyn*, *supra* note 70.

[167] *See generally* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2007–560 DC , Dec. 20, 2007 (France) [hereinafter *Treaty of Lisbon*]; *Honeywell*, *supra* note 105; *Gauweiler*, *supra* note 34.

[168] Two further examples that highlight the auto-correct function are: (1) the decision of the *Bundesverfassungsgericht* in relation to the European Arrest Warrant (EAW). In this decision, the German Court was in a position to enter into a discussion on the compatibility of the EAW with the Basic Law. Instead, the Court only focused on interpreting the national law that implemented the EAW, and avoided entirely having to entertain the idea of declaring an EU act contrary to the national constitution. Bundesverfassungsgericht [BVERFGE] [Federal

jurisdictions and/or the accommodation of national identity claims by the Court of Justice.[169] Over time, the pluralist setting will inherently work to auto-correct any imbalance, and prevent the activation of the doomsday device.

D. Conclusion

This Article was written while awaiting the decision from the "*Rashomon* in Karlsruhe,"[170] and its subsequent decision may very well have activated the doomsday device had it decided to kill the OMT mechanism. Conversely, and in line with the main argument of this Article, it was the obligation of sincere cooperation, based on mutual respect among all the constitutional adjudicators in the EU, that drove the *Bundesverfassungsgericht*'s most recent decision.[171] The argument in this Article has been that the pluralist auto-correct function—the self-restraint of individual actors—was central in steering the *Bundesverfassungsgericht*'s decision.

The Court of Justice has given precedence to keeping the OMT mechanism in place, and has refrained from entering a confrontation on the interpretation of the German constitutional

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Constitutional Court], July 18, 2005, Decision No. 2 BvR 2236/04, [hereinafter *EAW Constitutionality*]. *See also* Alicia Hinarejos, *Case Comment: Bundesverfassungsgericht (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04) on the German European Arrest Warrant Law*, 43 COMMON MKT. L. REV. 583 (2006); and (2) the decision of the Polish *Trybunał Konstytucyjny* on the constitutional complaint concerning Article 45 of the Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. *See* 2012 O.J. (L 12) 1 (Jan. 16, 2001). The Polish *Trybunał Konstytucyjny* provided a broad interpretation of the term "normative act" and assumed jurisdiction to review secondary acts of EU law against the Constitution. In addition, the Tribunal stated that its jurisdiction to do so is only subsidiary to that of the Court of Justice in relation to EU primary law (§2.6). Nevertheless, it found the provision to be in accordance with the Polish Constitution. I argue that, regardless of expanding its jurisdiction to review secondary EU acts, the Polish Constitutional Tribunal was aware and intentionally exhibited self-restraint in order to avoid conflict. *See generally Brussels Regulation*, *supra* note 117.

[169] See the Opinion of Advocate General Maduro in Joined cases C-402/05 P and C-415/05 P *Kadi* 2008, §44. *See also* Claes, *supra* note 82, at 37.

[170] As Franz Mayer famously named the *Bundesverfassungsgericht*. Franz Mayer, *Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union*, 9 INT. J. CONST. L. 757 (2011).

[171] Claes and Reestman were correct to point out that the Court of Justice was particularly wise not to engage in the debate on the difference between national and constitutional identity, but rather focused on solid arguments to assess the legal basis for, and in the event preserve, the OMT. Claes and Reestman, *supra* note 32, at 970. In July 2017, the *Bundesverfassungsgericht* submitted its second request for a preliminary reference to the Court of Justice, engaging in a more profound debate on the limits of the monetary policy mandate of the ECB, and the mechanisms used to redress the Euro crisis. The reference is an excellent illustration of the procedural and substantive aspects of incrementalism, developing and building the constructive conversation between the two courts, and a parallel refinement of the standard of review of ECB's activity in resolving the Euro crisis. Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], July 18, 2017, Order No. 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

identity. The Court of Justice has itself demonstrated in a highly mature manner[172] how the pluralist system works; the question of the ultimate authority was indeed irrelevant in the preliminary reference it received from the *Bundesverfassungsgericht.* What was relevant for the Court of Justice was the function performed by the OMT mechanism in securing the stability of the Eurozone, and how to preserve that mechanism in the current scheme of the Treaties. In the same fashion of self-restraint, for the purposes of preserving the situation of mutual respect—not only between the EU and Germany bilaterally, but also multilaterally among all Member States—the *Bundesverfassungsgericht* was most prudent when reaching its final decision and upholding the OMT mechanism as interpreted by the Court of Justice.

[172] This is contrary to Kelemen, who underlines the immaturity of the system that needs to be overcome by a final resolution of the quest for the ultimate judicial authority in the EU. *See* Kelemen, *supra* note 8, at 136.