Is Constitutional Pluralism Really Pluralist?[1]

David Kopal[*]

Summary: This paper addresses two possible understandings of the relationship between European and national law which are represented by Miguel Poiares Maduro's and Mattias Kumm's conceptions of constitutional pluralism. The first section of the paper discusses the possible approaches to the relationship between national and European law generally, followed by a more detailed description of Maduro's and Kumm's theories. In the main section, it is argued that although both authors claim that their theories are pluralist, their true nature is actually based on the principles which are typical for monism.

Keywords: constitutional pluralism, relationship between European and national law, constitutionalism beyond the state, contrapunctual law, primacy of EU Law

1. Introduction

From the beginning of the European integration there were many theories which have tried to describe the character of EU law and its relationship to Member States' legal orders. Currently, we can distinguish between three general conceptions of such a relationship. The first one is the monism, the traditional approach which sees EU as an autonomous legal order independent from the Member States' national law and EU law as the law which has primacy over national law,[2] including constitutional law.[3] This approach was adopted by the Court of Justice of the European Union (CJEU) in its case law.

The second conception is the so-called statism and it is reflected in the case law of national constitutional courts, most famously Federal Constitutional Court of Germany (FCC).[4] According to it, EU cannot be autonomous since

[*] David Kopal, Ph.D. candidate at Faculty of Law, Palacky Univrsity in Olomouc, Czech Republic. Contact: kopaldvd@gmail.com.

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[2] Case 6/44, *Costa* v. *Enel*, [1964] ECR 585.

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

[4] E.g. 89 BVerfGE 155 (*Maastricht decision*).

there is no coherent and integral *demos* present at the EU level and the status of EU law is thus determined by the national constitution. Only the national constitutional law, as the law of the sovereign nation state, derived from the *demos*, can be supreme. The problem of each of these two conceptions is the adoption of one-sided perspective through which they describe the relationship between legal orders.

The third conception is represented by constitutional pluralism which introduced a more complex perspective that can be adopted by EU as well as by its Member States. Since it has many disguises,[5] it is difficult to provide an exact definition. Nevertheless, there are some major characteristics which distinguish it from the preceding two theories. As its title suggests, it stresses pluralism of legal orders or claims to constitutional authority. These orders or claims must not be in hierarchical but in the heterarchical relationship, which means that no legal order *a priori* prevails over another. Each legal order must respect the autonomous character of the other. This is the basic characteristic which distinguishes constitutional pluralism from monism and statism. But sometimes the difference between these approaches can be very delicate. It is thus important to define the fundamental characteristics which need to be satisfied for the particular conception to be described as constitutional pluralism and not monism or statism.

In this paper, I will analyze two theories of constitutional pluralism which are quite influential and also share some common characteristics, particularly Kumm's liberal constitutional theory and Maduro's contrapunctual law. I have chosen three articles from each author since they well illustrate the evolution and the development of each author's approach. I will also argue that although these theories are called pluralistic, they share some significant characteristics with the monist conception. The question of this paper thus is: Do these theories actually represent constitutional pluralism or rather monism?

2. Theories of Constitutional Pluralism

2.1 Liberal Constitutional Theory

Mattias Kumm introduced his theory as a clear reaction to several decisions made by national constitutional courts,[6] which challenged the claim that the

[5] Avbelj, M. Komárek, J. Introduction. In: Avbelj, Matej; Komárek, Jan (eds.). *Constitutional Pluralism in the EU and Beyond.* Oxford: Hart Publishing, 2012, p. 4.

[6] Kumm, M. Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court Justice [1999] 36 *C.M.L.Rev.* 351.

CJEU is the final authority of constitutionality in Europe regarding EU law.[7] Kumm is thus trying to determine which court has the *kompetenz-kompetenz* with regard to EU law. He analyzes two possible answers to this question – monism or statism.

The principle which lies at a heart of the monist conception is the "Principle of Expanding the Rule of Law" to supranational sphere. Its aim is to ensure uniform application and interpretation of EU law. In the case of statism, the underlying principle is the "Principle of Liberal Democratic Governance" which aims to establish "the highest possible level of fundamental rights protection and democratic legitimacy on each level of governance."[8]

Kumm criticizes both positions as unpersuasive since neither of them reflects the reality of the relationship between EU law and national law. As a solution to this unsatisfactory state of affairs he offers his own approach, the so-called "European Constitutionalism" approach. The main task of his conception is to refocus the debate from the question of the ultimate rule to the principles which are common to European constitutionalism.[9]

According to this conception there are three conflicting principles which are crucial to determine which legal order will prevail in the particular case. There is the vital "Principle of Constitutional Fit" which means that there are common normative principles which lie at a heart of European and national constitutional orders. This principle is the crucial since it has pluralistic nature according to which there is no one supreme law but only common principles.[10] Next two already mentioned principles are the "Principle of Expanding the Rule of Law" and the "Principle of Liberal Democratic Governance".

These principles are not concerned with a clash of absolutes but instead, they can be implemented to the higher or lower degree. According to Kumm, the best set of conflict rules is that which ensures the realization of these principles to the highest degree possible. He stresses that this conception is applicable to the national legal orders of the Member States as well as to the European legal order. Furthermore, it is more complex than monism and statism since it does not reflect only one limited perspective.[11]

Kumm also introduces a practical application of his approach to the FCC's case law. According to him, the FCC plays a double role in a case of constitutional conflict between EU law and national law. Firstly, the FCC acts as a subsidiary guardian of the European legal order. This means that the FCC's review

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[7] Maastricht decision*, op. cit.*, note 4.

[8] Kumm, *op. cit.*, note 6, p. 375 – 376.

[9] Kumm, *ibid.*, p. 374 – 375.

[10] Kumm, *ibid.*, p. 375.

[11] Kumm, *ibid.*, p. 358.

and decision must be compatible with other Member States' courts practices and must not undermine the coherence of the European legal order. The basis for this position is the principle of expanding the Rule of Law which gives a presumptive weight to EU law over national law.

However, this presumption can be rebutted if there is a manifest and grave violation of EU law. In such a situation, the principle of liberal democratic governance comes into play and the FCC acts as the highest guardian of the principles contained in the national constitution.[12]

According to Kumm, the CJEU has *kompetenz-kompetenz* at the EU level and national constitutional courts have it at the Member States' level. Thus, the question of final authority in Europe is not an issue in his conception of constitutional pluralism.

Several years later, Kumm developed his theory even more.[13] His conception remains very similar, although its name changes to "Constitutionalism Beyond the State." Kumm from now on recognizes not only three but five relevant principles which come to play in a case of constitutional conflict between legal orders. The essential one is still the "principle of fit." Next is "the formal principle of legality" which establishes a strong presumption for national courts to apply EU law even over national constitutional provisions. However, this presumption might be rebutted if one of the following countervailing principles prevails.

First is the "substantive principle of the protection of basic rights". Second is the "jurisdictional principle of subsidiarity" which protects jurisdictional limits of the EU. Third is the "procedural principle of democracy" which stresses the democratic deficit of the EU.[14] Kumm considers the last principle as the likeliest source of potential constitutional conflict if the violated fundamental national constitutional provision is clear and specific since democratic deficit was, is and will be a persisting problem of the EU.

According to Kumm, these are the principles of liberal democratic constitutionalism which reflect legal and political practice at the Member States' as well as at the European level. Therefore, they might provide the best solution to possible constitutional conflict between EU law and national law. He also stresses the important role of cooperation between national courts and CJEU as well as between national courts themselves when they are addressing constitutional conflict. He calls this "mutual deliberative engagement."[15]

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[12] Kumm, *ibid.*, p. 380 – 383.

[13] Kumm, M. The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty [2005] 11 *European Law Journal* 262.

[14] Kumm, *ibid.*, p. 299 – 300.

[15] Kumm, *ibid.*, p. 301.

In his later works,[16] Kumm broadened his theory to the relationship between EU law, UN law and national law. He presented it on the CJEU's *Kadi*[17] case, where he compared whether the CJEU's approaches in *Costa v ENEL* and *Kadi* are consistent. At first sight, these decisions contradict each other just like *Costa* and decisions of some national constitutional courts.[18] It is again Kumm's own approach, in this case called "Cosmopolitan Constitutionalism," through which both *Costa* and *Kadi* cases can be understood as consistent.[19]

At the time of delivery of *Costa* judgment, primacy claim of EC was not fully persuasive primarily due to the lack of fundamental rights protection and competence boundaries. However, EU gradually improved these deficits by responding to decisions of national constitutional courts. According to Kumm, similar evolution has taken place in *Kadi*. His reading of this decision suggests that the CJEU's approach is the one of constitutional pluralism, where the relationship between UN and EU is of mutual dialogue. EU has reviewed implemented UN resolution because of the manifest deficits on the UN level, just as national courts have reviewed EU acts according to Kumm's theory. He is certain that EU, just like national courts, would be deferential if the deficits were not so manifest. Approach adopted by the CJEU in *Kadi* might therefore improve UN' deficits just as national courts decisions improved EU's. Kumm therefore concludes that shared constitutional principles contributed to the evolution of EU law, UN law and also national constitutional law.[20]

In general, Kumm is trying to develop a common language which can be applied to the relationship between courts that share the same normative principles, according to which constitutional conflict between different legal orders can be resolved. Moreover, this theory allows national constitutional court derogate from the EU obligation as a matter of national law, which is one of the more pluralist features of this conception. However, the deficit of Kumm's theory is that it aims only on constitutional conflicts, which means that his approach covers only part of the complex relationship between legal orders. Compared to Maduro, as will be shown below, he is dealing only with the relations between EU and national courts but not with the relations between EU's and national actors in general.

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[16] Kumm, M. Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism. In: Avbelj, Matej; Komárek, Jan (eds.). *Constitutional Pluralism in the EU and Beyond.* Oxford: Hart Publishing, 2012, p. 39 – 65.

[17] Joined Cases C-402/05 P and C-415/05 P *Kadi and AI Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

[18] Maastricht decision*, op. cit.*, note 4.

[19] Kumm, *op. cit.*, note 16, p. 54.

[20] Kumm, *ibid.*, p. 61 – 62.

2.2 Contrapunctual Law

Miguel Poiares Maduro introduced his model of constitutional pluralism in 2003.[21] The starting point of his conception is the understanding of constitutionalism as a mechanism for balancing competing interests. He was led by an idea to set up a concept of European constitutionalism which can help to solve EU's existing constitutional problems whose origin actually lies in national constitutionalism. He defines three paradoxes of constitutionalism (the polity, the fear of the few and the fear of the many, who decides who decides). Each of these paradoxes represents countervailing values and none of them is superior, *i.e.* there is no single solution to be adopted.[22] However, national as well as EU constitutionalism do not reflect these paradoxes. They are examples of the so-called single constitutionalism since they concentrate often just on the one part of the problem and do not reflect the other countervailing issues. According to Maduro, it is therefore dubious to consider the national or EU constitutionalism as the model which is error free and which can solve problems inherent in it.[23] There is no reason why national constitutionalism should have higher claim than European constitutionalism, if the source of EU's constitutional problems lies in national constitutionalism.

On this basis, Maduro builds his conception of constitutional pluralism, where the question of ultimate authority has different answers in the EU and national legal orders. He stresses the fact that one of the essential characteristics of constitutionalism is the concept of divided powers which requires the decision on who has the ultimate authority to be left unresolved. By this statement he rejects any hierarchical conception of European constitutionalism, because it would undermine this basic mechanism.[24]

Maduro's aim is to construct a theory that can be applied to the relationship between EU and national legal orders and which focuses on constitutional questions generally and not only on who has the *kompetenz-kompetenz*. He analyzes approaches taken by national constitutional courts and concludes that their review of the EU acts aims mainly on the protection of the national constitutional identities. According to him, the FCC's *Solange*[25] doctrine can be read not only as a challenge to the authority of EU law but also as a preservation of uniformity

[21] Maduro, M. P. Europe and the Constitution: What if This is as Good as it Gets?. In: Weiler, J.H.H.; Wind, Marlene (eds.). *European Constitutionalism Beyond the State*. Cambridge: Cambridge University Press, 2003, p. 74 – 102.

[22] Maduro, *ibid.*, p. 81 – 100.

[23] Maduro, *ibid.*, p. 88, 100.

[24] Maduro, *ibid.*, p. 96 – 97.

[25] Judgment of 29 May 1974, *Solange I*, 37 BVerfGE 271; judgment of 22 October 1986, *Solange II*, 73 BVerfGE 339.

of EU law with some FCC's constitutional control aimed only on the protection of constitutional essentials. Maduro sees similar approaches also in decisions of other national courts such as Italian Constitutional Court[26] or Belgian *Cour d'arbitrage.*[27] Thus, although there are claims of the CJEU and some national constitutional courts to the ultimate authority, these courts actually only made necessary constitutional arrangements to prevent collisions between them.[28]

Maduro sees his conception not only as a pluralism of legal orders in one European legal order, but also as a pluralism of different legal actors. In fact, the construction of the EU legal order was a process of cooperation between national and EU actors. It is this cooperation that lies at a heart of the success of European integration. Hierarchical construction of the European legal order is not suitable also since there is still a shadow of veto by national courts with regard to the EU law.[29] Thus, there is a reciprocal relationship, on the one hand of national courts which have a responsibility of interpretation and implementation of EU law, and on the other hand of EU law which is dependent on national actors.

This state of affairs is reflected in Maduro's "contrapunctual law" which serves as an instrument for heterarchical organization of the European legal order. This constitutional pluralism "constitutes a form of checks and balances in the organization of power in the European and national polities."[30] The idea that underlies this conception is to organize national application and interpretation of EU law into a coherent system, where national courts would justify their decision with regard to the broader European context. As a consequence, this should reduce possible conflicts between the national legal order and EU law. Furthermore, contrapunctual law protects identity of the national legal orders as well as of the European legal order by requiring respect of European and national courts to each other, especially by respecting their constitutional boundaries.[31]

Principles of contrapunctual law ensure on the one hand the respect to competing claims of different legal actors and on the other hand the coherence of EU legal order. In Maduro's conception of constitutional pluralism, these principles must be respected by all EU and national actors. The first principle

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[26] E.g. Case no. 170/84, *Granital v Amministrazione delle Finanze dello Stato.*

[27] E.g. Case no. 12/94, *Ecoles Europeenes.*

[28] Maduro, M. P. Contrapunctual Law: Europe's Constitutional Pluralism in Action. In: Walker, Neil (eds.). *Sovereignty in Transition*. Oxford: Hart Publishing, 2003, p. 509 – 510.

[29] Chalmers, D. Judicial Preferences and the Community Legal Order [1997] 60 *Modern Law Review*, 164.

[30] Maduro, *op. cit.*, note 21, p. 98.

[31] Maduro, *ibid.*, p. 99 – 100.

is "pluralism" which stresses the importance of plurality of equally legitimate claims of authority as well as equal participation of the different actors. That means that neither of the legal orders is supreme over another. The second principle is the "consistency" where the commitment to the vertical and horizontal discourse is needed by all the actors. Third principle is "universalisability" which means that national decisions concerning EU law must be justified in universal terms. The last principle is the "institutional choice," according to which legal orders must be aware of institutional choices in any possible instance of the broad European community.[32]

In his newer article,[33] Maduro develops his conception further by claiming that his theory of constitutional pluralism can contribute to the development of a constitutional theory of the EU. He stresses that constitutional pluralism is what best reflects the relationship between national and EU legal orders, that there is no answer to the question of final authority and finally that constitutional pluralism is what best pursue the ideals of constitutionalism. According to Maduro "constitutional pluralism does nothing more than adapt constitutionalism to the changing nature of the political authority and the political space."[34]

Compared to Kumm's theory, Maduro's contrapunctual principles apply not only to the constitutional conflict, but also to the relationship between EU and Member States as a whole.

3. Pluralism or monism?

It is clear that Maduro's and Kumm's conceptions of constitutional pluralism has much in common. Even Maduro himself, notwithstanding his previous criticism of Kumm for the lack of integrity and coherence,[35] accepts this similarity.[36] Although both authors have developed their theories of constitutional pluralism consistently, the question remains whether they done this in a way which still reflects constitutional pluralism.

To answer this question, we need to determine whether these two conceptions are truly pluralist, in a sense advocated by authors, or whether they share

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[32] Maduro, *op. cit.*, note 28, p. 526 – 530.

[33] Maduro, M. P. Three Claims of Constitutional Pluralism. In: Avbelj, Matej; Komárek, Jan (eds.). *Constitutional Pluralism in the EU and Beyond.* Oxford: Hart Publishing, 2012, p. 67–84.

[34] Maduro, *ibid.*, p. 82.

[35] Maduro, *op. cit.*, note 21, p. 100 and Maduro, M. P. The Heteronyms of European Law [1999] 5 *European Law Journal* 166 – 167.

[36] Maduro, *op. cit.*, note 33, footnote 68.

characteristics typical for monism as well. If the conclusion would be that they do not reflect pluralism of legal orders, we would need to stop labeling them as constitutional pluralism. In the following, we will analyze major problems relating to the description of these theories as pluralist.

In the case of monism, which both authors reject, EU law trumps even national constitutional law and "national deviations from that rule are only conceived as pathological instances".[37] To achieve this hierarchical nature, the monist legal order needs to be unified. The question is whether this unified nature is present in Kumm's and Maduro's pluralism. If this is the case, then there might be a contradiction between the formal titles of the theories and their actual material content.

According to both authors, there is a common background which is shared by the EU legal order as well as by the national legal order. Maduro considers, with the reference to Tuori,[38] "the EU and national legal order as autonomous but part of the same European legal system."[39] Furthermore, he emphasizes the interlocked character of the EU and Member States legal orders with a reference to how these two orders influence each other and to the institutional connections between them.

The basis of the Kumm's conception is the principle of constitutional fit which reflects that there are common normative ideals which are shared by EU and national legal orders. According to Kumm, these principles constitute basis for constitutional pluralism and thus reflect the pluralistic conception of the legal orders.[40]

In other words, in Maduro's and Kumm's conceptions the national legal order and the European legal order constitute coherent and harmonious system, respectively the system based on shared principles, which emphasizes heterarchy between legal orders. However, the question is whether this claimed heterarchy is even possible in the case of such connected legal orders and whether such a connection between them can be still considered as constitutional pluralism.

If the space between different legal orders is so paved by the common principles as asserted by authors, then there is no space for broader diversity, which must be present in the theories whose basic principle is the equality of different legal orders. Since this equality is missing from both conceptions, the relationship between legal orders presented by Kumm and Maduro cannot be called heterarchical. In reality EU law and the EU interests will prevail in

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[37] Maduro, *op. cit.*, note 28, p. 503.

[38] Tuori, K. The Many Constitutions of Europe. In: Tuori, Kaarlo; Sankari, Suvi (eds.). *The Many Constitutions of Europe.* Farnham: Ashgate Publishing, 2010.

[39] Maduro, *op. cit.*, note 33, p. 70.

[40] Kumm, *op. cit.*, note 6, p. 375.

most cases over national ones since the coherence of the EU legal order, which is advocated by both authors, cannot be achieved by prioritizing the constitutional principles of Member States, *i.e.* by establishing heterarchical relationship. This inequality between legal orders is more visible in Kumm's theory which explicitly states that EU law has the strong presumptive weight over national law which needs to be rebutted for the national law claim to be taken into account. According to Kumm, this approach is justified by the functional argument that EU needs to secure the common market. Although the stability of the common market is essential for the functioning of the EU, it is also the exact claim which lies at a heart of the arguments presented to justify monist conception by the CJEU in its case law.

The application of both theories would therefore lead to the situation in which national constitutional courts would affirm their constitutional authority only in the marginal cases as it is today. This would mean that the question of which law is the supreme law in Europe is, contrary to what both authors claim, actually resolved since EU law will prevail in the majority of cases with some marginal national deviations. Since constitutional pluralism should be pluralistic and should therefore establish heterarchy between legal orders which would cover much more than just these marginal cases, the Kumm's and Maduro's conceptions are *de facto* still hierarchical.

Both theories are trying to define a conception for the relationship between European and national legal orders which would establish a harmonious and predictable relationship. It would be desirable to have European legal space where everything works as perfectly as these theories claim,[41] where everybody simply talks to each other and where everyone recognizes the same universal principles. Nevertheless, these theories see the relationship between orders unified to such a degree that their underlying principles are more monist in nature than pluralist. It was even claimed that the application of Maduro's contrapunctual principles may in the end result in the primacy of EU law.[42]

4. Conclusion

The aim of this article was to answer the question whether Kumm's and Maduro's conceptions of constitutional pluralism are actually pluralistic or rather

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[41] Komárek, J. European Constitutionalism and the European Arrest Warrant: In Search of the Limits of „Contrapunctual principles“ [2007] 44 *C.M.L.Rev.* 9. Author highlights problems of application of these theories to decisions of national constitutional courts.

[42] Komárek, *ibid.*, p. 33.

monistic. We have shown some deficits regarding the pluralist labeling of the discussed theories. However, our aim was not to criticize the way how these theories describe European integration or some of its aspects, since we understand that these conceptions might have many advantages when applied to the European integration.

We particularly wanted to highlight that even theories which on the first sight respect equality of legal orders and establish heterarchy between them, can be, in the material sense, much closer to the monist conception. This conclusion might be also applied to other theories which call themselves constitutional pluralist but in reality they are only mutations of the monism, statism, and/or pluralism. This situation might also be a result of some fashion.[43] The theory, which aim is to define the relationship between EU and national legal orders, should be labeled as constitutional pluralist only if the characteristics of pluralism prevail over the characteristics of other conceptions.

Another question is to which extent the deeper pluralism might reflect the actual state of affairs in contemporary Europe. Sometimes theories such as liberal constitutional theory or contrapunctual law might be more suitable. However, that does not mean that they can be titled as pluralist, if their real content reflects monist conception.

Although that both authors are trying to avoid taking positions where one legal order is to some degree supreme over another, they are still, as many others, rooted in the monist conception.

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[43] Baquero Cruz, J. The Legacy of the Maastricht Judgment and the Pluralist Movement [2008] 14 *European Law Journal* 389.