



**Institute of European  
and Comparative Law**  
University of Oxford Faculty of Law



# **Constitutional Pluralism in the European Union and Beyond**

**20-21 March 2009  
St Anne's College, Oxford**

## **Programme**

**Convenors:** Matej Avbelj and Jan Komarek

**Topic:** Constitutional pluralism has become immensely popular among scholars who deal with the European integration and global governance. Fortunately, important challenges against this approach have been raised as well, questioning its compatibility with the very nature of law and the values which law brings to constitutionalism. The purpose of this conference is to enhance dialogue between these scholars and to test viability of the idea of constitutional pluralism in practice. Inviting the most prominent scholars in the field – indeed, some of them could be called “the founding fathers of constitutional pluralism” - together with a younger generation promises to create a dynamic and mutually engaging environment which will ideally transform into a collaborative community.

**Promoting Exchange of Ideas:** In order to promote the dialogic nature of the whole event, most of the papers should be made available in advance on a webpage of the conference, so that participants can familiarize themselves with their content and the presenters can focus on the main points of their papers. An emphasis will be put on discussion within each panel, inviting the participants to the conference to contribute actively to its outcome.

**Edited volume:** A selection of papers should be published in a book edited by Matej Avbelj and Jan Komarek

## Friday 20 March 2009

**9:30-10:00**      **Registration**

### **Panel 1: Constitutional Pluralism – The Essentials**

**Chair: Zdeněk Kühn** (Judge, Supreme Administrative Court of the Czech Republic and Assistant Professor, Faculty of Law, Charles University in Prague)

**10:00-10:20**      **Mattias Kumm** (Professor of Law, New York University)

***“Rethinking Constitutional Authority: On the Place and Limits of Constitutional Pluralism”***

*Why has the idea of constitutional pluralism become such a prominent idea in recent years? - that is the problem that constitutional pluralism suggests an answer to and what is its proper scope of application?*

**10:20-10:40**      **Franz Mayer** (Professor, University of Bielefeld)

***“The [German] Debate on Multilevel Constitutionalism - querelle allemande or querelle d'Allemand?”***

*The paper will be about the concept of multilevel constitutionalism as one approach relating to constitutional pluralism and the critique of this concept. The title refers to the French expression “querelle d'Allemand” which means a totally useless debate, and - querelle allemande - to the question whether the concept of multilevel constitutionalism can be explained by particularities of German constitutional psychology. The speaker will put this into the more general context of constitutional pluralism.*

**10:40-11:00**      **Daniel Halberstam** (Professor, University of Michigan Law School)

***“Constitutionalism and Pluralism in National, Supranational, and Global Governance”***

*The paper will begin by distinguishing between two kinds of constitutional pluralism: interpretive pluralism (pluralism of interpreters) and normative pluralism (pluralism of sources). It will then briefly examine the accommodation of constitutional pluralism in the United States and the European Union and what this teaches us about the nature of constitutional authority. Finally, it will explore the promise and limits of extending the idea of constitutional pluralism to the arena of global governance and what this means for the paradigm of global administrative law.*

**11:00-11:30**      **Coffee**

**11:30-12:30**      **Discussion**

**12:30-14:00**      **Lunch**

## **Panel 2: Constitutional Pluralism – The Critique**

**Chair: Monica Claes** (Professor, European and International Public Law Department, Tilburg University)

**14:00-14:20**     **Matej Avbelj** (Ph.D. Researcher, European University Institute, Florence)

***“Thou Shalt Not be Called Constitutionalism”***

*After the demise of the classical, revised and documentary constitutionalism, the tide in European integration has increasingly been turning in favor of constitutional pluralism. The constitutional nature of European integration, it has been averred, can and should be preserved by redefining constitutionalism along pluralist lines. The paper will argue that these attempts are bound to fail. A genuine pluralist (theoretical) understanding of European integration, which is the only one that is descriptively, explanatorily as well as normatively merited, but which the self-declared constitutional pluralists almost unexceptionally fall short of, with strong conceptual as well as normative reasons speaks against the employment of any constitutional narrative in European integration.*

**14:20-14:40**     **Julio Baquero Cruz** (Research Fellow, Centre of Political and Constitutional Studies, Madrid)

***“Pluralism, Disagreement and Disobedience”***

*This paper will explore the issue of whether constitutional pluralism in the European Union may be seen as a form of political or institutional disobedience, that is, whether disagreement on the part of national constitutional institutions such as constitutional courts may be characterised as a form of legitimate disobedience to Union law and under what conditions. The analysis will take into account the theory of civil disobedience, trying to adapt it by analogy to institutional disobedience in the European Union. The conditions and limits, both procedural and substantive, to this kind of disobedience, will be deduced from essential requirements related to the rule of law.*

**14:40-15:00**     **René Barents** (Head of Unit Research and Documentation, European Court of Justice and Professor of European Community Law, Maastricht University)

***“The Fallacy of Multilevel Constitutionalism”***

*On the basis of a critical analysis of the main hypotheses underlying the theory on multilevel constitutionalism it is argued that this theory cannot offer an appropriate explanation of the structure of the EU and the nature of EU law as it stands at present.*

**15:00-16:00**     **Discussion**

**16:00-16:30**     **Tea Break**

### **Panel 3: Constitutional Pluralism – Some Theoretical Queries**

**Chair: Ulf Bernitz** (Professor of European Law, Stockholm University and Director of the Oxford/Stockholm Association in European Law, Institute of European and Comparative Law, University of Oxford)

**16:30-16:50**     **Julie Dickson** (Fellow and Tutor in Law, Somerville College, University of Oxford)

***“Whose Norms Are They Anyway?: the Status of Directives in European Union Legal Systems”***

*This paper builds on earlier work in which the speaker discussed how we should understand legal systems in the EU and the inter-relations between them. In particular, she will focus on whether directives relied on (in various senses) by individuals in national courts should be viewed as norms of an EU legal system which national courts have duties to enforce in certain ways under certain circumstances or whether such directives are better understood as being fully part of, in the sense of being norms of, national legal systems themselves. The aim is to discover whether any such distinction exists, matters, and sheds light on the nature of the EU, the legal systems which comprise it, and the nature of legal systems more generally.*

**16:50-17:10**     **Leonard Besselink** (Professor, Department of Constitutional and Administrative Law, Utrecht University)

***“The Limits of Pluralism, Heteronomy and Heterarchy in the EU Constitutional Order”***

*In order to be able to understand the constitutional order of the EU adequately, we have to give full recognition to the phenomena of constitutional pluralism, heteronomy and heterarchy. The paper explores their limits, which might be inherent in constitutional orders. For this purpose, the speaker takes his cue from two different and separate issues which are central to political society: the monopoly of violence and the protection of fundamental rights.*

**17:10-17:30**     **Pavlos Eleftheriadis** (Fellow and Tutor in Law, Mansfield College and University Lecturer, Faculty of Law, University of Oxford)

***“Pluralism and Integrity”***

*Is there value to constitutional pluralism? Or is it only an explanatory device for fragmented or not yet complete political societies? The latter is the better view. Among the considerations that underpin and justify constitutional law and government, pluralism (meaning the best conception of it) plays only a minor role. It is generally overshadowed by the value of integrity, i.e. the interpretive duty to make sense of a legitimate legal order as a public order or rules. In the EU context, the task of constitutional theory is to understand the structure of European law as a whole as a single such order, as something that can be both domestic and international without incoherence.*

**17:30-18:30**     **Discussion**

**19:30**             **Conference Dinner**

**Saturday 21 March 2009**

**Panel 4: Constitutional Pluralism in the Practice of the European Integration**

**Chair: Michal Bobek** (Ph.D. Researcher, European University Institute, Florence)

**9:30-9:50 Miguel Poiares Maduro** (Advocate General, ECJ and Professor of Law, EUI)

***“Courts and Pluralism - Essay on a Theory of Judicial Adjudication in a Context of Constitutional Pluralism”***

*There is an emerging body of literature which describes a context of constitutional pluralism, in particular by reference to the EU legal order and its relationship with national legal orders. Usually such constitutional pluralism identifies the phenomenon of a plurality of constitutional sources which creates a context of potential constitutional conflicts between different constitutional orders to be solved in a non-hierarchical manner. Such context affects the role of courts and the character of judicial adjudication. In this essay the speaker will focus on how constitutional pluralism impacts on different dimensions of judicial adjudication and interpretation. Moreover, he will undertake this analysis by reference to a broad notion of pluralism.*

**9:50-10:10 Jan Komárek** (D.Phil. Candidate, University of Oxford)

***“Judicial Precedent and European Constitutional Pluralism: A Framework of Analysis”***

*The paper examines what the central virtues of constitutional pluralism are and how they can be implemented by judicial precedent, understood broadly as a previous judicial decision that has normative implications beyond the context of a particular case. It is based on an institutional approach to constitutionalism, which sees constitution not only as a component of abstract norms, but also as a complex system of institutions and processes that make different normative claims based on different kinds of legitimacy which each of them possess. Making this institutional dimension “visible” is one of the features of constitutional pluralism. The visibility supports institutional involvement and communication that can both contribute to constitutional authority of the system. Precedent as a means of courts’ involvement and communication stemming from courts is then central. At the same time, however, such an approach opens up many questions traditionally not examined in relation to precedent.*

**10:10-10:30 Daniel Sarmiento** (Associate Professor, University Complutense of Madrid and Référendaire in the ECJ)

***“The Silent Lamb and the Deaf Wolves. Discursive Pluralism, Preliminary References and Empty Judgments in a Brave New World”***

*This paper will develop a particular aspect of legal pluralism in action: the ECJ’s decisions in preliminary reference procedures, in cases when the Court decides in an open-ended fashion with the aim of granting a wide margin of action to the referring national court. It will be argued that this approach can be flawed from the perspective of discursive pluralism, and in fact it can become the most damaging form of judicial discourse for current European Law. Pluralism is a methodology that introduces legitimacy in the ECJ’s decision-making process by giving a role to other institutional actors, mainly national courts. However, it will be argued that pluralism deserves to be put into action in specific contexts, mostly in areas of constitutional relevance.*

*Also, the manner in which pluralism is exercised can portray the main risks that such methodology entails. Thus, open-ended judgments in preliminary reference procedures can eventually develop into interpretative conflict and, finally, divergence in the law. National courts are authoritative interlocutors of the ECJ, but their decisions must be attained in a clearly defined normative context. The consequences of this good-willed but damaging form of pluralism will be studied in the light of judgments such as Kozłowski and Unión General de Trabajadores.*

**10:30-11:00**      **Coffee**

**11:00-12:00**      **Discussion**

**12:00-13:30**      **Lunch**

## **Panel 5: Constitutional Pluralism and the Construction of the European Union**

**Chair: Siniša Rodin** (Jean Monnet Professor of European Public Law, University of Zagreb)

**13:30-13:50**      **Gareth Davies** (Professor, Free University of Amsterdam)

### ***“Pluralism in Practice; From Proportionality to Politics”***

*What are the visible signs of a pluralist legal system? How can a system be pluralist? This paper looks at three concepts of pluralism: pluralism as a principle of enforcement, pluralism as a principle of policy, and pluralism as an element of politics. It finds pluralism to lie in the existence within the system of principles that oppose each other, creating an internal balancing process. Proportionality is therefore the central pluralist principle in a legal context, and the degree of pluralism has much to do with the variety and type of interests which the system is capable of internalising. This is a view of pluralism which places it internal to the system, by contrast with views which oppose pluralism to supremacy, and find pluralism to lie in the tense and unresolved legal relationship between different legal orders. This, it is suggested, is more a description of a simple breakdown of legal authority than of pluralism. Since plural rights, like other rights, rely on a coherent and predictable legal system for their usefulness, an uncompromising rule of supremacy, as an essential part of legal ordering, is in fact necessary for a pluralist legal system.*

**13:50-14:10**      **Ola Zetterquist** (Göteborg University)

### ***“A European Res Publica”***

*The paper analyses the fundamental constitutional enigma of the European Union (EU), namely whether the EU can be considered as a (from its Member States) separate and independent constitutional legal order. The EU does not fulfil the requirements for being a state but neither is it adequate to define it as an international organisation of the traditional kind. Hence it is that the EU is often referred to as a legal order sui generis, i.e. of a unique character that defies traditional definitions and which is thus irreconcilable with constitutional law, at least if the doctrine of supremacy of EC-law is to be taken seriously. More specifically, the notion of an independent and separate EU is at odds with*

*the idea of the sovereign state. The speaker's claim is that the notion of the EU as a legal order sui generis is overly simplistic and too much influenced by the models of the sovereign state and sovereignty (as these are defined in the vein of Thomas Hobbes). The key component in the Hobbesian idea of sovereignty is freedom as non-interference (regardless of the reasons for the interference). A sovereign state is consequently a state that is free from, i.e. not interfered with by, external actors like, for example, the EU. Put differently, either the EU is sovereign or the Member States are sovereign. By shifting the perspective to a neo-Roman republican understanding of freedom as non-domination the constitutional picture of the EU will become more nuanced. Res publica is best understood as what citizens hold in common and above their narrow self-interest. Res publica departs from an idea of the legal order as a species of moral dialogue based on reason thereby appealing to the rational assent of its members. Viewed as an ongoing moral dialogue striving for coherence and rationality in the law, res publica is better understood as a dynamic concept than as a fixed and unalterable set of values. According to a republican notion of the constitution the purpose of the law is to eliminate the possibility of arbitrary domination rather than merely securing non-interference. For that reason, not all interference is to be considered as a restriction of freedom but only those restrictions that cannot be justified according to the res publica. Republican legal theory thus places strong emphasis on the moral quality of the law and its conformity with reason (recta ratio) and it invariably requires a system of checks and balances in order to avoid arbitrary domination. Viewed through the republican prism it can be argued that the EU indeed does represent an important advancement in securing freedom as non-domination without implying that the EU must become a state. Put differently, it is one thing to be free from the laws of the EU and another one to be free by them. This is a theme that recurs in the constitutional case law of the ECJ and it is striking that practically all the constitutionalising cases have been justified with reference to the legal protection of the individual. The fundamental enigma can thus be rephrased as a clash between two diverging concepts of freedom. Whereas the EU will always be at odds with the idea of sovereignty (however framed) it will be much easier to reconcile with the republican ideal.*

**14:10-14:30** **Xavier Groussot** (University of Lund)

***"The EU Charter of Fundamental Rights and Constitutional Pluralism"***

*The EU Charter of Fundamental Rights, though not binding yet, has been extensively mentioned by the European Court of Justice and the national courts in the recent years. But what can be the place and role of a binding EU Charter of Fundamental Rights in the future? This paper will put the Charter in the context of discursive legal pluralism. It will mainly explore whether the EUCFR constitutes an instrument for preventing constitutional conflicts and promoting a vertical discourse between the Court of Justice and the national courts. Its relationship with the European Convention of Human Rights, which is described by the Strasbourg Court in Bosphorus as a constitutional instrument of the European public order, will also be examined.*

**14:30-15:30** **Discussion**

**15:30-16:00** **Tea**

## **Panel 6: Constitutional Pluralism – The Broader Transnational Mosaic**

**Chair: Suvi Sankari** (Centre of Excellence in Foundations of European Law and Polity, University of Helsinki)

**16:00-16:20**     **Neil Walker** (Professor of Public Law and the Law of Nature and Nations, University of Edinburgh School of Law)

### ***“First Order and Second Order Pluralism in Transnational Law”***

*Second-order pluralism – i.e. recognition and acceptance of an irreducible plurality of claims to authority at the level of the legal order and, more specifically, in the overlap between different transnational legal orders and their corresponding polities - has tended to suffer from a descriptive bias. That is to say, the relevant literature has concentrated on the institutional fact, and, arguably, the inevitability of second order pluralism, with comparatively little attention to its normative justification. If we turn to that normative justification, an obvious if neglected candidate is the theoretical position or range of theoretical positions associated with first order pluralism – i.e., the idea that the co-existence and reconciliation of a multiplicity of functional or cultural groups within a polity should be recognized or encouraged as an axiomatic feature of the polity. The paper asks to what extent, if at all, second-order pluralism can draw upon the resources of first-order pluralism for its normative justification.*

**16:20-16:40**     **Gunu Tiny** (Research Affiliate, London School of Economics)

### ***“Constitutional Pluralism and the Global Trading System”***

*This paper is about the various ways the WTO, regional trade agreements, domestic states, corporations and individuals interact in the framework of the global trade. It is about the nature of the interplay between the players that shape the legal and institutional character of the global trading system. The paper will then offer a pluralist constitutional view as one of the many narratives that can illustrate the relationship between these several players, departing therefore from the conventional canon. The view underlying the paper is that, from an analytical point of view, the pluralist constitutional narrative provides powerful tools to tackle some of the fundamentals normative challenges posed by the interplay of the various actors of the global marketplace.*

**16:40-17:00**     **Nico Krisch** (Professor, Hertie School of Governance, Berlin)

### ***“The Case for Pluralism in Postnational Law”***

*Pluralism is increasingly regarded as a fitting description of the postnational legal order, sometimes as an inevitable product of global politics and society, but its normative credentials are rarely examined thoroughly. This is all the more surprising as the appeal of its most prominent counterpart - postnational constitutionalism - is typically seen to lie in the normative dimension, and especially in its superiority when it comes to establishing a just and stable postnational order. This paper tries to advance a normative argument for a pluralist structure of postnational law based on two central pillars: the recognition of cultural and political diversity, and the ideal of self-government. It argues that, if we want to take seriously the ideal of political self-government under the conditions of radical diversity that characterise the postnational order, a pluralist order presents significant advantages over rival approaches.*

**17:00-18:00**     **Discussion**