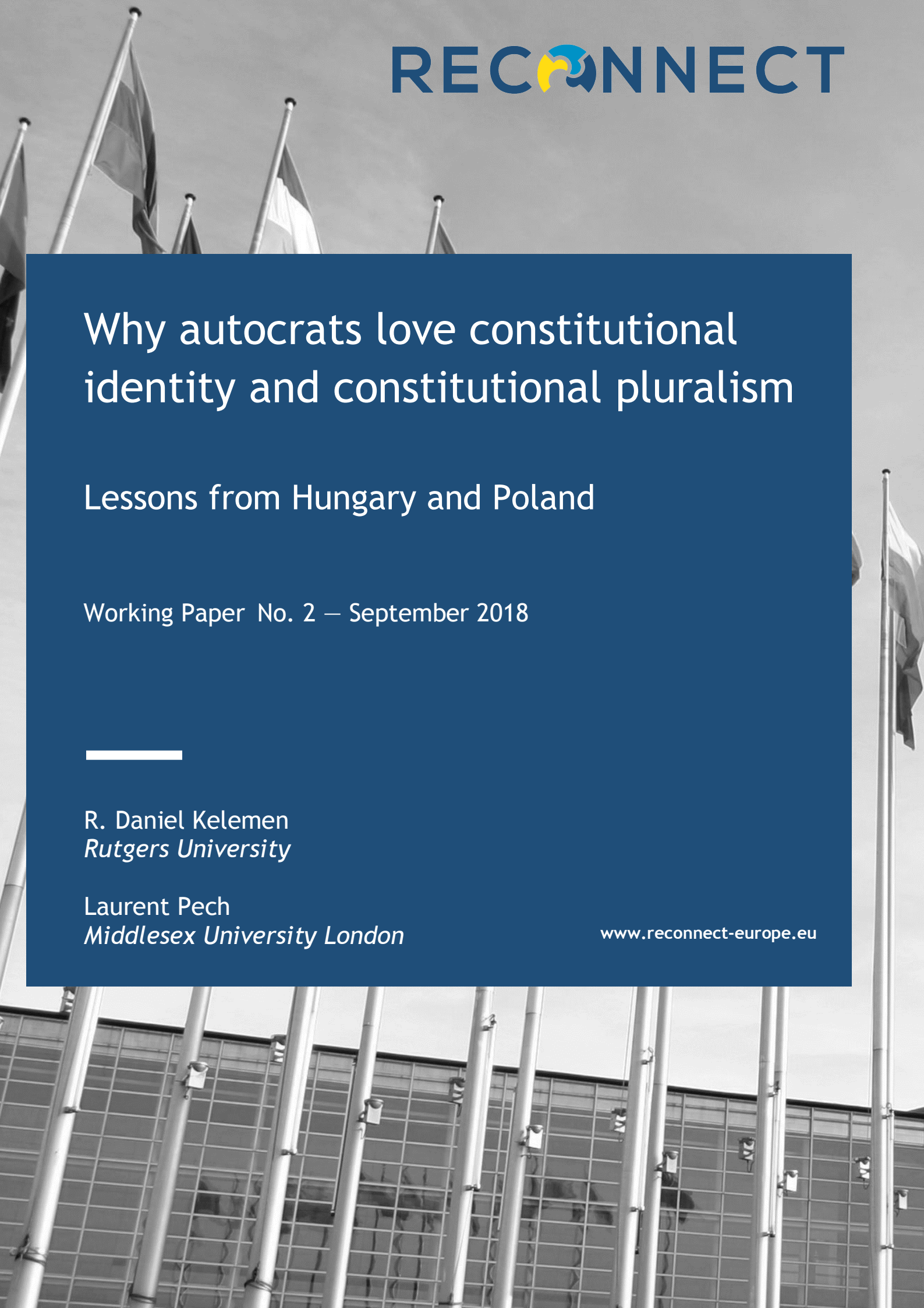

RECONNECT

Why autocrats love constitutional identity and constitutional pluralism

Lessons from Hungary and Poland

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Why autocrats love constitutional identity and constitutional pluralism: Lessons from Hungary and Poland

R. Daniel Kelemen
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Abstract

Though the theory of constitutional pluralism was developed with the best of intentions in mind, it is having destructive consequences that threaten the EU legal order. The theory of constitutional pluralism had inherent flaws, but could function as a serviceable fudge to avert inter-court conflict so long as all the courts involved engaged in sincere cooperation, dialogue and mutual accommodation. However, with the emergence and ongoing consolidation of competitive authoritarian regimes in Hungary and Poland, the days when one could assume all national judiciaries would engage in sincere cooperation have ended and the dangers that were always inherent in the concept of constitutional pluralism and the connected concept of constitutional identity have become manifest. In an effort to justify their dismantlement of checks on their power and to shield themselves against potential EU interventions, Hungary and Poland's governments have turned – quite predictably we argue – to the twin concepts of constitutional identity and constitutional pluralism. Constitutional pluralism is an inherently dangerous doctrine, prone to abuse by autocrats and their captured courts, and it should be replaced with a more traditional understanding of the primacy of EU law.

Keywords

Constitutional pluralism, constitutional identity, EU values, EU law, national identity, rule of law, authoritarianism, autocracy

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1. Introduction

In EU law – as so often in life – the road to hell is paved with good intentions. The scholars who developed the theory of constitutional pluralism had the best of intentions in mind, but their creation is having destructive consequences that threaten the entire EU legal order. Constitutional pluralism is a theory developed by scholars who sought to resolve the conflict between the European Court of Justice (ECJ) and some national constitutional courts (above all Germany's Federal Constitutional Court: the BVerfG) concerning whether the ECJ or national constitutional courts had the ultimate authority to rule in cases concerning the boundaries of the EU's legal competence. Though the ECJ and national constitutional courts accepted that each other were supreme on legal questions within their respective domains, this left open the question of "boundary disputes" between legal orders: which court had the competence to rule on the boundaries between EU's legal competences and a national system's competences? This so-called *Kompetenz-Kompetenz* debate centred around which court could rule on whether EU law had overstepped the bounds of its authority and trod onto some reserved area of national competence, including whether it had trod onto some sacrosanct area of national competence that constituted an inviolable aspect of a state's so-called "constitutional identity."[3] With the ECJ and national constitutional courts each asserting that they possessed *Kompetenz-Kompetenz*, there was a great risk of legal conflict. Scholars developed the theory of constitutional pluralism as a fudge to avoid the outbreak of a *guerre des juges* over who would have the final say in such boundary disputes between EU law and national constitutional law: the theory suggested that questions of *Kompetenz-Kompetenz* should be left unresolved in favour of a

[1] Quoted by G. Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43(1) *Review of Central and East European Law* 23, p. 36.

[2] Quoted by A. Brzozowski in "Poland's defence of contested judicial changes leaves EU unconvinced", *Euractiv*, 27 June 2018: https://www.euractiv.com/section/justice-home-affairs/news/polands-defence-of-contested-judicial-changes-leaves-eu-unconvinced/.

[3] G. Beck, 'The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz' (2011) 17 *European Law Journal* 471. As the Kompetenz-Kompetenz debate makes clear, the concepts of constitutional identity and constitutional pluralism are closely related. The claim made by some national constitutional courts that they must retain authority to safeguard their states' "constitution identity" provided a powerful argument supporting their claim to Kompetenz-Komptenz. The doctrine of constitutional pluralism accepts the legitimacy of constitutional identity claims, but suggests that conflicts between the ECJ and national constitutional courts should be resolved through dialogue and mutual accommodation rather than through uncompromising assertions of primacy.

"heterarchical" (i.e. non-hierarchical) system in which neither the ECJ nor national constitutional/supreme courts could claim definitive primacy on questions of *Kompetenz-Kompetenz* but instead would engage in ongoing dialogue, self-restraint and mutual accommodation.[4]

As we discuss below, the theory of constitutional pluralism had inherent flaws,[5] but it could function as a serviceable fudge so long as all the courts involved engaged in sincere cooperation, dialogue and mutual accommodation. However, with the emergence and ongoing consolidation of competitive authoritarian regimes in Hungary and Poland, the days when one could assume all national judiciaries would engage in sincere cooperation and mutual accommodation have ended and the dangers that were always inherent in the concept of constitutional pluralism and the connected concept of constitutional identity have become manifest for all to see.[6] Indeed, as this paper will show, in an effort to justify their dismantlement of any checks on their power and to shield themselves against potential EU interventions, Hungary and Poland's governments have turned – quite predictably we argue – to the twin concepts of constitutional identity and constitutional pluralism. Thus, for instance, when Hungary blatantly violates the EU asylum acquis and refuses to recognise the supremacy of EU law in this domain, it claims that control over migration is part of its constitutional identity. Likewise, when Poland attacks the independence of the judiciary, it claims that such matters fall within the exclusive bounds of its authority and cites scholars of constitutional pluralism and the EU's "national identity clause" (Article 4(2) TEU) to justify its stance.

Of course, most, if not all, scholars of constitutional identity/pluralism would be mortified to see their ideas abused in this way. Defenders of the concepts of constitutional identity and constitutional pluralism as limits on the ECJ's assertions of primacy and *Kompetenz-Kompetenz* could argue that the fact that their ideas are distorted and abused by legal miscreants need not discredit the ideas themselves. While it is true that any ideas, even the most noble or sound ones, can be manipulated and abused, some ideas are inherently dangerous, and constitutional pluralism/identity is certainly

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[4] See for instance, N. MacCormick, 'The Maastricht Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259; N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?' (1999) 36 *Common Market Law Review* 703; M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Hart, 2003), p. 502; M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009), p. 258–324; M. Avbelj and J. Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012); A. von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1; M. Goldmann, 'Constitutional Pluralism as Mutually Assured Discretion' (2016) 23 *Maastricht Journal of European and Comparative Law* 119; N. Walker, 'Constitutional Pluralism Revisited' (2016) 22 *European Law Journal* 333.

[5] For an extensive discussion of the inherent problems with the concept of constitutional pluralism, see R. D. Kelemen, 'On the Unsustainability of Constitutional Pluralism' (2016) 23 *Maastricht Journal of European and Comparative Law* 136. For critical responses to Kelemen's analysis, see for instance N. Walker, 'Constitutional Pluralism Revisited', op. cit.; A. Bobic, 'Constitutional Pluralism is Not Dead' (2017) 18 *German Law Journal* 1395.

[6] See supra note 3 and see also R. D. Kelemen, 'The Dangers of Constitutional Pluralism' in G. Davies and M. Avbelj (eds) *Research Handbook on Pluralism and EU law* (Edward Elgar, 2018), pp. 392-403.

one of them. To borrow reasoning from the field of tort law, constitutional pluralism is an abnormally dangerous product and its manufacturers should be held to a standard of strict liability for the damage it has caused. It is time for scholars of constitutional pluralism to issue a recall on the dangerous product they released into the marketplace of ideas: they should now recognise the dangers inherent in their concept and its susceptibility to abuse, and they should either refashion it to reduce its dangers and make it "autocrat proof" or, better yet, simply call for their flawed design to be replaced with a more traditional understanding of the primacy of EU law – namely that developed by the ECJ in a long line of jurisprudence since *Costa*.[7]

The remainder of this paper is organised as follows. We begin in Section 2 by analysing the inherent flaws in the theory of constitutional pluralism and explaining why it holds such appeal for autocrats. Section 3 details the abuse of the concepts of constitutional pluralism and constitutional identity by the governments – and their kangaroo courts – in Hungary and Poland. Section 4 concludes.

2. What is wrong with constitutional pluralism and why autocrats love it

It will be argued below that constitutional pluralism is a fundamentally flawed and unsustainable concept, inherently prone – alongside the notion of "constitutional identity" which is closely tied to it – to abuse by autocrats and other enemies of the rule of law.

2.1 Constitutional pluralism as a fundamentally flawed and unsustainable concept

Constitutional pluralism is built on an unsustainable foundation composed of a mix of wishful thinking[8] and evasion of tough choices. Insofar as a pluralist approach would allow member state constitutional/supreme courts to disapply within their countries EU rules they deem incompatible with their constitutions or particularly inviolable aspects of their "constitutional identity", this would lead to an outcome in which commonly agreed EU rules end up applying in some countries but not in others. The ECJ explained the consequences of this approach in stark terms in its early, landmark ruling on the primacy of EU law in *Costa v. ENEL* when it explained that if Community law were allowed to be overridden by domestic law, this would give rise to discrimination on the basis of nationality and would lead to Community law being "deprived of its character as Community law", and to "the legal basis of the Community itself being called into question".[9] As Federico Fabbrini has pointed out more recently, this scenario would also violate the EU law principle of equality of the member states, in that it would allow some member states to evade common EU obligations that bound others.[10] Ultimately,

[7] Case 6/64 *Costa v. ENEL*, p. 594.

[8] Similarly, see J. Baquero Cruz, 'Another Look at Constitutional Pluralism in the European Union' (2016) 22(3) *European Law Journal* 356, at 369, arguing that, "The discourse of constitutional pluralism is built on the basis of this unrealistic vision."

[9] Case 6/64 *Costa v. ENEL*, p. 594.

[10] See F. Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) 16 *German Law Journal* 1015.

constitutional pluralism invites a legal chaos in which national constitutional courts could – in Fabbrini's words "pick and choose"[11] – which EU laws their states need to follow and which they do not, an outcome which would unravel EU as a meaningful legal order.[12] Furthermore, this pick and choose approach is, we would argue, as potentially dangerous for the EU's legal order as the UK's "cherry-picking" approach is for the EU's internal market.[13] Finally, this situation would also violate fundamental rule of law principles, such as the requirements of legal certainty, and that law be "general" and "applied to everyone according to its terms."[14]

Constitutional pluralists, insofar as they recognised these risks, hoped such chaos could be avoided through a mixture of ongoing dialogue, sincere cooperation and mutual accommodation between national courts and the CJEU.[15] And indeed, until recently, head to head conflict and outright defiance of the CJEU by national courts was mostly avoided. But this tenuous situation was sustainable only so long as (*solange*!) the German *BVerfG* and the handful of other national constitutional courts who raised objections to the CJEU's interpretation of primacy and *Kompetenz-Kompetenz* exercised self-restraint and operated in a spirit of sincere cooperation.[16] But it was naïve to think that modus vivendi could last, and indeed it has been collapsing before our eyes.[17]

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[11] Ibid., p. 1016.

[12] Kelemen, 'The Dangers of Constitutional Pluralism"' see also Baquero Cruz, 'Another Look at Constitutional Pluralism in the European Union,' at 368 explaining that constitutional pluralism, "undermines the main objective of integration and the basic social function of law."

[13] As Michel Barnier has repeatedly pointed out, the integrity of the EU's single market must be preserved against any attempt by the UK to "cheery-pick" parts of it as the "Single Market is a package, with four indivisible freedoms, common rules, institutions and enforcement structures", Speech 17/4765 at the Centre for European Reform on "The Future of the EU", Brussels, 20 November 2017.

[14] For a presentation of the European Commission (and CJEU's) approach to the concept of rule of law, see European Commission, Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final. For a more general discussion of the tensions between rule of law and legal pluralism, see B. Tamanaha, 'The rule of law and legal pluralism in development' (2011) 3 *Hague Journal on the rule of Law* 1-17. For an early critique of constitutional pluralism in the EU from the perspective of legal philosophy, see G. Letsas, 'Harmonic Law: The Case Against Pluralism' in J. Dickson and P. Eleftheriadis *Philosophical Foundations of European Union Law* (2012).

[15] See Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N. Walker (ed.), *Sovereignty in Transition*, p. 501 (arguing that conflict can be avoided through mutual accommodation between constitutional courts and the CJEU).

[16] Importantly, some leading constitutional pluralists such as Neil MacCormick recognised that in some cases mutual accommodation would be unable to avoid conflict between courts and that a final resolution would be necessary. But rather than provide a legal answer to what should happen in the event of such irresolvable legal disputes, MacCormick suggests that politicians will need to intervene to provide a solution; as he puts it, "there will necessarily have to be some political action to produce a solution", 'The Maastricht Urteil', op. cit., p. 265. As will be shown in Section 3.2 infra, the Polish government has referred inter alia to Professor MacCormick's scholarship to argue that the EU should show self-restraint when it comes to Poland's (alleged) sovereign right to "reform" its judiciary.

[17] On the risks posed to the EU legal order by the trend of more national constitutional courts challenging the supremacy of EU law, see D. Sarmiento, 'The OMT Case and the Demise of the Pluralist Movement', 21 September 2015: https://despiteourdifferencesblog.wordpress.com/2015/09/21/the-omt-case-and-the-demise-of-the-pluralist-movement; R. Uitz, 'National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades', *Verfassungsblog*, 11 November 2016.

Though constitutional pluralism was ultimately unsustainable due its internal, logical contradictions,[18] its collapse has been hastened by the emergence of autocratic member state governments bent on using the concept to justify their defiance the rule of law and fundamental EU values. We discuss the specific ways the governments of Hungary and Poland have abused the concepts of constitutional pluralism and constitutional identity below in Section 3, but first it is worth considering in general terms why it is that constitutional pluralism is so appealing to autocrats.

2.2 Constitutional pluralism as a concept inherently prone to abuse by autocrats

The EU professes to be a union of democracies. Recognising that national democracies vary in many ways, EU leaders have not sought to impose anything approaching a uniform model of democracy. Yet, member states did commit themselves in the EU treaties to uphold a set of fundamental democratic values, embodied in Article 2 TEU, which declares that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." Since 2010 in Hungary and since 2015 in Poland,[19] however, governments have come to power that reject many of these core values and seek instead to entrench national level autocracies within the self-avowedly democratic EU.

Clearly, there is a profound tension between the EU's purported commitment to the defence of a core set of democratic values and the desire of certain member governments to defy those values. How then can an aspiring autocrat shield himself from federal intervention and succeed in maintaining an authoritarian enclave within a democratic federal union? In part, the survival of such regimes is a matter of politics.[20] As one of the present authors has argued elsewhere,[21] the same sort of partisan

[18] For a thorough exploration of the logical contradictions inherent in constitutional pluralism, see Kelemen, 'On the Unsustainability of Constitutional Pluralism', op. cit. Notably, even some prominent scholars who are critical of the ECJ's approach to the question of Kompetenz-Kompetenz agree that the doctrine of constitutional pluralism is based on an obfuscation of the fact that in cases of normative conflict, ultimately some judicial authority must have the final say. See e.g. G. Davies, 'Constitutional Disagreement in Europe and the Search for Pluralism', *Eric Stein Working Paper at the Czech Society of European and Comparative Law* 1/2010; and M. Loughlin, 'Constitutional pluralism: an oxymoron?' (2014) 3(1) *Global Constitutionalism* 9.

[19] While the descent towards authoritarianism is most advanced in these two member states, there are early signs that the autocratic blueprint pioneered by Orbán is now being deployed by leaders in Romania and Bulgaria. See e.g. Council of Europe Venice Commission, Opinion - Romania, No. 924/2018, 13 July 2018, and Opinion – Bulgaria, No. 855/2016, 9 October 2017.

[20] The persistence of authoritarian regimes at the state level within broadly democratic federal unions is common one around the world, from Latin America, to Asia, to the post-Civil War US. Partisan politics often plays a key role in the survival of these autocratic regimes, with national level parties protecting local autocrats if they contribute votes or seats to their national coalition. See E. Gibson, 'Boundary Control: Subnational Authoritarianism in Democratic Countries' (2005) 58 *World Politics* 101, 107; E. Gibson, *Boundary Control* (Cambridge University Press, 2012).

[21] R. Daniel Kelemen, "Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union" (2017) 52(2) *Government and Opposition* 211; R. Daniel Kelemen, "Europe's Authoritarian Equilibrium," *Foreign Affairs*, 22 December 2017 at https://www.foreignaffairs.com/articles/hungary/2017-12-22/europes-authoritarian-equilibrium.

political factors that explain the survival of subnational authoritarian enclaves in many federations also help explain the EU's tolerance of the rise of autocratic member state governments. But even if local autocracies can gain some political protection from action by federal lawmakers, they may still run into problems with federal courts – and this is where doctrines like constitutional pluralism and constitutional identity may prove important.

Local autocrats operating within unions that guarantee the protection of fundamental rights and core democratic principles are naturally attracted to legal doctrines like constitutional pluralism that would provide them with a justification to ignore the union's common norms. Thus, it is no coincidence that racist autocrats and segregationists in the American South have a long history of attempting to invoke their own version of a constitutional pluralism doctrine, one that they have labelled nullification. In short, nullification is the theory that US states have the right to nullify federal laws they deem unconstitutional.[22] Though it can be traced back to the Virginia and Kentucky resolutions of the late 18th Century, nullification was most famously championed by John Calhoun in the early 1830s and versions of it have been resurrected in the 20th Century,[23] for instance by segregationists who sought to block school desegregation after *Brown v. Board*, or by (then) Alabama Supreme Court Chief Justice Roy Moore who declared that Alabama did not need to recognise same-sex marriages legalised by the US Supreme Court's *Obergefell v. Hodges* decision.[24] Such doctrines are particularly appealing to leaders of local authoritarian enclaves if – as has been the case with constitutional pluralism in the EU context – they come with a distinguished legal pedigree that lends claims based on them a patina of legitimacy. The attractiveness of such doctrines to autocrats is on evidence in the contemporary EU. As we will see in Section 3 below, theories of constitutional pluralism and constitutional identity championed in good faith by distinguished legal scholars like Neil MacCormick and respected courts like the *BVerfG* are now being cited by autocratic regimes and their captured courts to justify defiance of fundamental EU values and of the rule of law itself.

Sadly, all of this was predictable – and indeed some have been predicting it.[25] The issue is not simply that the Polish or Hungarian governments are using the arguments in bad faith (though they certainly are doing that). Rather, these autocratic governments are simply carrying arguments about constitutional identity to their logical conclusions.[26] If esteemed courts of committed democracies such as the *BVerfG* can use constitutional identity claims to justify defiance of EU law, then so can the captured constitutional courts in Hungary and Poland. In other words, the aspects of the concepts of

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[22] See Richard Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis*, Oxford University Press (1987).

[23] See Sanford Levinson, "The Twenty-first Century Rediscovery of Nullification and Secession in American Political Rhetoric" (2014) 67 *Arkansas Law Review* 17.

[24] Moore was removed from his position as chief justice of the Alabama Supreme Court as a result of his defiance of federal law. See Adler, Jonathan, "Roy Moore is Constitutionally Illiterate," *The Weekly Standard*, 15 Nov. 2017 (available at https://www.weeklystandard.com/jonathan-h-adler/roy-moore-is-constitutionally-illiterate)

[25] Kelemen, 'The Dangers of Constitutional Pluralism', op. cit.; Sarmiento, 'The OMT Case', op. cit., and Uitz, 'National Constitutional Identity in the European Constitutional Project', op. cit.

[26] It may be worth noting that they do so in a broader context where authoritarian populists have successfully capitalised on the amplification (if not fabrication in some instances) of identity-based narratives/fears and nationalist sentiments. See recently, Political Capital Institute, *Beyond Populism. Tribalism in Poland and Hungary*, 2018: http://www.politicalcapital.hu/news.php?article_read=1&article_id=2277.

constitutional pluralism and constitutional identity that have made them such useful tools for EU-based autocrats are not reparable bugs, but core features. And this is why no one should be surprised to see kangaroo courts under the sway of elected autocrats use the same ideas sincerely advanced by respected legal scholars and learned judges in Karlsruhe to advance their political masters' authoritarian agendas and brazenly defy EU law when instructed to do so.

3. The abuse of constitutional pluralism/identity by autocrats in Hungary and Poland

As William Dobson puts it in *The Dictator's Learning Curve*, "today's dictators and authoritarians are far more sophisticated, savvy, and nimble than they once were".[27] They understand, to quote Professor Gábor Halmai, "that in a globalized world the more brutal forms of intimidation are best replaced with more subtle forms of coercion. Therefore, they work in a more ambiguous spectrum that exists between democracy and authoritarianism, and from a distance, many of them look almost democratic, as the leader of Hungary, a Member State of the EU, does."[28] Focusing solely on the EU, a similar diagnosis may unfortunately already be offered regarding Poland where the ruling party has undertaken a systemic dismantlement of the country's checks and balances in plain sight and obvious breach of the national constitution and its international obligations.[29] At long last, EU institutions have woken up to the threat the consolidation of autocratic regimes poses for the EU's legitimacy and functioning if not its own existence: The EU Commission activated for the first time the Article 7 procedure against Poland in December 2017[30] and the European Parliament followed suit in September 2018 when it activated the same procedure against Hungary.[31]

To pre-empt or counteract external criticism as well as justify non-compliance with their European and international obligations, autocrats in both Hungary and Poland have relied on a number of similar

[27] *The Dictator's Learning Curve. Inside the Global Battle for Democracy* (Harvill Secker London, 2012), p. 4.
[28] G. Halmai, 'Legally sophisticated authoritarians: the Hungarian Lex CEU', *Verfassungsblog*, 31 March 2017: http://verfassungsblog.de/legally-sophisticated-authoritarians-the-hungarian-lex-ceu/.
[29] For a comprehensive overview, see L. Pech and K. Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3. For an introduction to the main issues at stake: L. Pech and K. Lane Scheppele, "Protecting the Rule of Law in the EU" (10-part Q&A), *Verfassungsblog,* March 2018, https://verfassungsblog.de/category/debates/protecting-the-rule-of-law-in-the-eu/.
[30] D. Kochenov, L. Pech and K. Lane Scheppele, 'The European Commission's Activation of Article 7: Better Late than Never?', *EU Law Analysis*, 23 December 2017: http://eulawanalysis.blogspot.co.uk/2017/12/the-european-commissions-activation-of.html; T. Koncewicz, The Polish Counter-Revolution Two and a Half Years Later: Where Are We Today?, *Verfassungsblog,* 7 July 2018: https://verfassungsblog.de/the-polish-counter-revolution-two-and-a-half-years-later-where-are-we-today.
[31] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)). For background and a critical analysis, see S. Carrera and P. Bárd The European Parliament Vote on Article 7 TEU against the Hungarian government, CEPS Commentary, 14 September 2018.

strategies and rhetorical devices.[32] This paper is dedicated to one of the concepts most favoured by those keen on setting de facto one-party states in the EU: the concept of constitutional pluralism which is often used in conjunction with the concept of constitutional identity, the latter being tangentially recognised in EU primary law via a reference to "national identities" in what is now Article 4(2) TEU:[33]

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

Notwithstanding what may be viewed as a rather ambiguous provision, it has been argued by Advocate General Maduro that the obligation for the EU to respect the constitutional identity of its Member States

> has actually existed from the outset. It indeed forms part of the very essence of the European project initiated at the beginning of the 1950s, which consists of following the path of integration whilst maintaining the political existence of the States. That is shown by the fact that the obligation was explicitly stated for the first time upon a revision of the treaties, a reminder of the obligation being regarded as necessary by the Member States in view of the further integration provided for. Thus, Article F(1) of the Maastricht Treaty […] provides that 'the Union shall respect the national identities of its Member States'. The national identity concerned clearly includes the constitutional identity of the Member State. That is confirmed, if such was necessary, by the explanation of the aspects of national identity put forward in Article I-5 of the Treaty establishing a Constitution for Europe and Article 4(2) of the Treaty on European Union as amended by the Treaty of Lisbon.[34]

Remarkably, Advocate General Maduro proved rather prescient as he simultaneously warned us in the very same Opinion of the potential abusive use of the notion of constitutional identity:

> [R]espect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules. Were that the case, national constitutions could become instruments allowing Member States to avoid Community law in given fields. Furthermore, it could lead to discrimination between Member States based on the contents of their respective national constitutions. Just as Community law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the Community legal order.[35]

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[32] For an overview of some of the main arguments used by autocrats to justify their actions and hide their intentions, see D. Kochenov and P. Bárd, "Rule of Law Crisis in the New Member States of the EU. The Pitfalls of Overemphasising Enforcement", RECONNECT Working Paper No. 1, July 2018; L. Pech and K. Lane Scheppele, "How to Build 'Democratorships' in the EU and Get Away with It: Lessons from Hungary and Poland", (forthcoming).

[33] For the genesis of this provision, see L. Besselink, National and constitutional identity before and after Lisbon (2010) 6(3) *Utrecht Law Review* 36.

[34] Opinion of Advocate General Poiares Maduro in Case C-213/07, 8 October 2008, para 31.

[35] Ibid., para 33.

The Advocate General's worry has become today's reality. As will be shown below, Hungary and Poland's autocratic authorities have found the interrelated concepts of constitutional pluralism and constitutional identity particularly helpful as they give a veneer of conceptual respectability to their "reforms" which also makes it more difficult for international bodies such as the EU to challenge what amounts in fact to a systemic hollowing out or dismantlement of these countries' democratic and rule of law norms and institutions.

3.1 Constitutional pluralism to justify state-sponsored xenophobia and non-compliance with EU immigration and asylum law: The example of Hungary

Having been able to secure a two-third majority in the Parliament following free but plainly unfair legislative elections held in April 2018,[36] Hungary's ruling party recently resuscitated the failed constitutional amendment on constitutional identity, which was initially justified as follows in 2016:

> The European Union is trying to use a compulsory quote to distribute those arriving in Europe among Member States. The government of Hungary was the first in Europe to initiate a referendum on this. On the October 2nd referendum, 98 percent of those who cast a valid vote rejected the forced settlement … The unanimous will of the 98 percent requires the National Assembly to move forward with law.[37]

In its 2018 iteration, the constitutional amendment was justified using a broadly similar rhetoric with however less restraint as the Government was now more openly than ever mixing conspiratorial claims and advertising its xenophobia:[38]

> The mass immigration affecting Europe and the activity of the pro-immigration forces are threatening the national sovereignty of Hungary. Brussels intends to introduce a mandatory, automatic quota-based distribution of migrants residing in and coming to Europe, which endangers the safety of our country and would permanently change the population and culture of Hungary.

[36] OSCE, Hungary Parliamentary Elections, 8 April 2018: ODIHR Limited Election Observation Mission Final Report, 27 June 2018, p. 2: "The campaign was animated, but hostile and intimidating campaign rhetoric limited space for substantive debate and diminished voters' ability to make an informed choice. The ubiquitous overlap between government information and ruling coalition campaigns, and other abuses of administrative resources, blurred the line between state and party, at odds with OSCE commitments … However, the ability of contestants to compete on an equal basis was significantly compromised by the government's excessive spending on public information advertisements that amplified the ruling coalition's campaign message. With no reporting requirements until after the elections, voters were effectively deprived of information on campaign financing, key to making an informed choice. The overall lack of transparency challenged international standards." See also N. Cheeseman, B. Klaas, "How to steal an election in broad daylight", *Foreign Policy*, 21 May 2018.

[37] B. Novak, "Hungary's constitutional identity is whatever Viktor Orbán says it is", *Budapest Beacon*, 28 March 2018: https://budapestbeacon.com/hungarys-constitutional-identity-is-whatever-viktor-orban-says-it-its/.

[38] Unofficial translation of Bill number T/332, Seventh amendment of the Basic Law of Hungary, Budapest, May 2018 provided by the Hungarian Helsinki Committee: https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf. See also Ministry of Justice, The chief goal of the seventh amendment to the Constitution is the protection of national sovereignty, 29 May 2018: http://www.kormany.hu/en/ministry-of-justice/news/the-chief-goal-of-the-seventh-amendment-to-the-constitution-is-the-protection-of-national-sovereignty.

> As the main body of the representation of the people, it is the obligation of the Parliament to enforce the will of the Hungarian people. At the parliamentary elections held on 8 April, the Hungarian people repeatedly made it clear that they do not want Hungary to become an immigrant country … Therefore the Government of Hungary submits its amendment of the Basic Law to the Parliament.

In the words of the Hungarian Prime Minister, amending the Hungarian constitution would be necessary so as to enable him to oppose EU law on migration and in particular the EU-wide refugee resettlement quota,[39] and protect Hungary's "sovereignty and cultural identity" against an influx of "Muslim invaders".[40] Leaving aside the politics of this constitutional amendment, the primary legal aim of such a move is to give the Hungarian government a legal fig leaf to disobey EU law when convenient using a legal concept recognised by EU law itself.

Before briefly exploring the content of the new "constitutional identity" provisions of the Hungarian's Fundamental Law, it is important to stress that the Hungarian government's failure to get its constitutional amendment adopted in 2016 did not ultimately matter. Indeed, Hungary's Constitutional Court, providing further evidence it is no longer operating independently from the ruling party, held in its ruling 22/2016 that

> If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercise of competences based on Article E) (2) of the Fundamental Law, the Constitutional Court may, in the course of exercising its competences, examine the existence of an alleged violation on the basis of a relevant petition. [41]

As noted by Professors Kochenov and Bárd, the Court's understanding of constitutional identity is "so vague that it can be considered as an attempt at granting a *carte blanche* type of derogation to the executive and the legislative from Hungary's obligations under EU law."[42] More broadly speaking, and as compellingly argued by Professor Halmai, the Court's ruling is "nothing but national constitutional parochialism" which hides "an attempt to abandon the common European constitutional whole" under the guise of the notion of constitutional identity,[43] which, as the Hungarian justices are keen to strongly emphasise, has been relied upon by a number of foreign courts and in particular, the German Federal Constitutional Court in its Lisbon judgment. This comparative law aspect is worth stressing. Indeed, the (selective) use of comparative law is not unusual for would-be autocrats or fully-fledged ones. It has been noted that "many incumbent officeholders who deploy stealth authoritarian practices attempt to deflect criticism by citing democratic foreign countries that have adopted the same criticized legal mechanisms. That provides some legitimacy to those mechanisms before domestic

[39] Hungary lost the annulment action it brought alongside Slovakia against the Council of the EU's decision of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece: see Joined Cases C-643/15 and C-647/15, EU:C:2017:631.

[40] R. Staudenmaier, "Hungary's Orban tells Germany: 'You wanted the migrants, we didn't'", *DW*, 8 January 2018: http://p.dw.com/p/2qV1w?tw.

[41] Quoted and translated by G. Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43(1) *Review of Central and East European Law* 23, p. 34-35.

[42] Kochenov and Bárd, op. cit., p. 12.

[43] Halmai, "Abuse of Constitutional Identity", op. cit., p. 41.

audiences, but also raises the costs to the global community of detecting their abuse and resisting their adoption."[44] The Hungarian Constitutional Court's judgment "which rubberstamped the government's constitutional identity defense"[45] on the basis inter alia of foreign case law also shows that captured institutions, including courts, have also deployed similar tactics. The paradox in this instance is that foreign courts' case law was used to justify nativist not to say xenophobic migration policy of the regime. It is also difficult not to be struck by the Orwellian nature of the (captured[46]) Court's reasoning, which refers inter alia to Hungary's nature as a "democratic rule-of-law State" to justify the imposition of pre-emptive limits on EU action while it has been busy looking the other way while the rule of law has been systematically dismantled by Hungarian authorities.[47]

Be that as it may, thanks to its newly-found constitutional majority, Orbán has now been able to amend once again Hungary's Constitution after the 2018 election. As far as constitutional identity is concerned three changes are worth noting:[48]

1) The text "We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation" in the National Avowal shall be supplemented with the following text: "We hold that it is a fundamental obligation of the state to protect our self-identity rooted in our historical constitution."

2) Article (E) Section (2) of the Basic Law is to be replaced with the following provision: "(2) Based on an international treaty, Hungary may exercise its certain powers jointly with the other Member States via the institutions of the European Union to the extent necessary for the exercise of its rights deriving from the founding treaties and for the performance of its obligations, in order to take part in the European Union as a Member State. The exercise of its powers pursuant to this Section shall be consistent with the fundamental rights and freedoms laid down in the Basic Law, and shall not limit Hungary's inalienable right of disposal related to its territorial integrity, population, form of government and governmental organisation."

3) Finally, Article (R) of the Basic Law is to be supplemented with the following Section (4): "All bodies of the State shall protect the constitutional self-identity of Hungary."

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[44] Ozan O. Varol, 'Stealth Authoritarianism' (2015) 100 *Iowa L. Rev.* 1673, p. 1734.
[45] Halmai, "Abuse of Constitutional Identity", op. cit., p. 25.
[46] Further evidence of which was recently displayed when the Hungarian Constitutional Court suspended its (alleged) examination of the constitutionality of the so-called Lex CEU and Lex NGO under the pretext that it should wait for the ECJ to issue its preliminary rulings with respect to these two extremely controversial not to say totally arbitrary pieces of legislation which have been submitted to its attention by the European Commission following its failure to convince the Hungarian government to remedy the multiple violations of EU law it has identified. See G. Halmai, "The Hungarian Constitutional Court betrays Academic Freedom and Freedom of Association", *Verfassungsblog,* 8 June 2018: https://verfassungsblog.de/the-hungarian-constitutional-court-betrays-academic-freedom-and-freedom-of-association/.
[47] For a brief recent overview, see L. Pech and K. Lane Scheppele, "Why Poland and not Hungary?", *Verfassungsblog,* 8 March 2018: https://verfassungsblog.de/why-poland-and-not-hungary/.
[48] Unofficial translation of Bill number T/332, Seventh amendment of the Basic Law of Hungary, Budapest, May 2018 provided by the Hungarian Helsinki Committee: https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf.

In the absence of any definition of Hungary's constitutional "self-identity" (or of its "historic constitution" for that matter), one may be left wondering about the exact contours of such identity. To quote the title of a newspaper article, the lack of definition should not surprise as "Hungary's constitutional identity is whatever Viktor Orbán says it is".[49] And when it comes to the country's identity, Orbán's views are very much reminiscent of an approach which was dominant in certain European countries in the 1930s:

> There is no strong culture without a cultural identity … there is no cultural identity in a population without a stable ethnic composition. The alteration of a country's ethnic makeup amounts to an alteration of its cultural identity.[50]

What never ceases to amaze with Hungary's descent into full blown authoritarianism is how the country's autocrats have always sought to rely on EU law itself to undermine both Hungary's and the EU's foundational values such as the rule of law. The 2018 constitutional amendment bill for example, in line with previous instances, explains that Article 4(2) TEU itself would allegedly mean that Hungary is not only entitled to define its national identity "which appears primarily, but not exclusively, in its constitution" but also entitled to oppose to the EU itself its "choice of political and social values considered as significant from the aspect of the national and political self-identity".[51]

This is a line of reasoning which is as cunning as it is (deliberately) misguided. As the European Parliament put it perfectly in its resolution of 3 July 2013 regarding its first (out of a now long series) significant resolution on the concerning situation in Hungary, "the European core values set out in Article 2 TEU result from the constitutional traditions common to the Members States and cannot therefore be played off against the obligation under Article 4 TEU, but make up the basic framework within which Member States can preserve and develop their national identity".[52] This means that within "the framework of the Treaties, respect for 'national identities' (Article 4(2) TEU) and the 'different legal systems and traditions of the Member States' (Article 67 TFEU) are intrinsically associated with the principles of sincere cooperation (Article 4(3) TEU), mutual recognition (Articles 81 and 82 TFEU) and thus mutual trust, as well as with respect for cultural and linguistic diversity (Article 3(3) TEU)".[53] It follows that

> a violation of the Union's common principles and values by a Member State cannot be justified by national traditions nor by the expression of a national identity when such a violation results in the deterioration of the principles which are at the heart of European integration, such as democratic values, the rule of law or the principle of mutual recognition, with the consequence that a referral to

[49] op. cit.

[50] Viktor Orbán's speech at the 28th Bálványos Summer Open University and Student Camp, 22 July 2017, Tusnádfürdő (Băile Tuşnad, Romania): https://visegradpost.com/en/2017/07/24/full-speech-of-v-orban-will-europe-belong-to-europeans/.

[51] Article 2, detailed reasoning, Unofficial translation of Bill number T/332, op. cit.

[52] European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), OJEU 2016 C 75/09, recital K.

[53] Ibid., recital L.

> Article 4(2) TEU is applicable only in so far as a Member State respects the values enshrined in Article 2 TEU.[54]

The Polish case, as we shall see below, shows however that autocratic authorities care little about conceptual logic and a balance, honest reading of EU law, and continue to find in the dual concepts of constitutional pluralism and identity, a very useful conceptual veneer to oppose to EU institutions and any critical voice while they are, as in the case of Poland, busy annihilating the national judiciary's independence.

3.2 Constitutional pluralism to justify the end of judicial independence and non-compliance with EU rule of law standards: The example of Poland

Poland's so-called White Paper[55] on the so-called "judicial reforms"[56] puts forward a number of historical, political, managerial and legal claims to justify the adoption of "13 consecutive laws" (situation as of December 2017) which, within a period of two years, have affected "the entire structure of the justice system in Poland: the Constitutional Tribunal, the Supreme Court, the ordinary courts, the national Council for the Judiciary, the prosecution service and the National School of Judiciary".[57]

Not unsurprisingly, the Polish government has relied inter alia on the twin concepts of constitutional pluralism and constitutional identity to justify "legislative changes" which, to follow the European Commission's diagnosis, have enabled the executive or legislative powers to systematically "interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies":[58]

> 169. The legal system of the European Union is based on constitutional pluralism of the member states … Each country has specific constitutional solutions that are rooted in its history and legal traditions and these differences are protected by the treaty law of the [EU] …

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[54] Id., recital M.

[55] The Chancellery of the Prime Minister, White Paper on the Reform of the Polish Judiciary, Warsaw, 7 March 2018: https://www.premier.gov.pl/en/news/news/the-government-presents-a-white-paper-on-the-reforms-of-the-polish-justice-system.html. However, as noted on the UK Parliament's website, White Papers normally set out "proposals for the future legislation" and "may include a draft version of a Bill that is being planned" which then "provides a basis for further consultation and discussion with interested or affected groups and allows final changes to be made before a Bill is formally presented to Parliament": https://www.parliament.uk/site-information/glossary/white-paper. In this instance, no consultations were undertaken and the "reforms" were rushed through the Polish parliament with the "White Paper" only providing a posteriori justifications for changes which have been quasi-unanimously criticised for their misleading nature.

[56] The use of quotation marks is required as the changes adopted by the Polish authorities are not "reforms" but rather a set of unconstitutional measures whose main effect if not main goal "has been to hamper the constitutionally protected principle of judicial independence" so as "to enable the legislative and executive branches to interfere with the administration of justice", UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, A/HRC/38/38/Add.1, 5 April 2018, para. 72.

[57] European Commission, Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, COM(2017) 835 final, 20 December 2017, para. 173.

[58] Ibid.

While the second paragraph of Article 4 TEU, as previously noted, does provide that the EU shall respect its Member States' national identity, its third paragraph simultaneously requires from each EU Member State compliance with the principle of sincere cooperation, an aspect which the White Paper conveniently ignores... The reasoning above is in any event particularly deceitful as we are talking about *legislative* and not constitutional "solutions" being implemented by Polish authorities in obvious violation of Poland's own constitution. To quote the First President of Poland's Supreme Court, before she was unconstitutionally retired in July 2018, "the recent legislative initiatives are of concern not because of the powers of the Polish legislator to structure the judicial system in Poland but because the Polish legislator abuses such powers in violation of clear constitutional standards and in conflict with their interpretation laid down in the case law of the Constitutional Tribunal, the Supreme Court and the legal doctrine that has developed since the adoption of the 1997 Constitution of the Republic of Poland."[59] It evidently follows that "breaking a state's constitutional rules by the parliamentary majority cannot be justified by the principle of constitutional autonomy,"[60] an obvious point which however appears to have eluded the Polish government. If anything, therefore, the European Commission may be viewed as the one defending "constitutional pluralism" as described by the Polish government in the above paragraph and which, not unsurprisingly, it seems to equate with a legal obligation on the sole EU not to undermine Poland's "constitutional identity".

> 170. Constitutional identity, a core value of each national community, determines not only the most fundamental values and resulting tasks for state authorities, but also sets the limit for regulatory intervention of the European Union.

Right after the first significant reference to constitutional pluralism, the Polish government refers to constitutional identity. Oddly or perhaps not so oddly, the Polish government appears to think that constitutional identity imposes "limits" solely on the EU's "regulatory intervention" but no limits whatsoever on national authorities... The sentence itself is awkwardly phrased if not absurd as constitutional identity is presented as a "core value" which would determine all the other "most fundamental values". The drafters of Poland's White Paper seem here to have confused the notion of constitutional identity with the notion of constitution while however forgetting to mention the obligation for national authorities to comply with their constitutional obligations. This is a crucial point as "the autonomy of constitutional identity presupposes that the Member State respects the *patere legem quam ipse fecisti* principle, especially towards its own constitution."[61]

> 171. Defence of constitutional identity is a key matter for the German Constitutional Tribunal …
>
> 173. This special character of the European legal system – comprised both of national systems AND *acquis communautaire* was best described by a Scottish law philosopher, Neil MacCormick. In his commentary to the German Federal Constitutional Tribunal in its ruling over the Treaty of Maastricht

[59] First President of the Supreme Court, *Opinion on the White Paper on the Reform of the Polish Judiciary*, Warsaw, 16 March 2018 (on file with the authors).
[60] Iustitia, Polish Judges Association, *Response to the White Paper*, Warsaw 2018, VIII.2.A, p. 106.
[61] Ibid.

> (case Brunner) where one can find roots for the nowadays ample and developed theory of constitutional pluralism.

This line of defence, as the example of Hungary shows, is not original. Viktor Orbán is known to have responded "to criticisms against the laws and constitutional provisions adopted by his government by citing similar laws and provisions in democratic states."[62] The Polish government is following suit with its own strategic cherry-picking of foreign courts' case law. What the White Paper unsurprisingly fails to mention is that the BVerfG made clear that "the constitution-amending legislature" cannot violate "the identity of the [German's] free constitutional order".[63] This omission is not surprising as what we have seen in Poland is a "legislative-amending legislature" violating repeatedly Poland's Constitution not only procedurally but also substantively. This naturally led some key members of the ruling party to argue that it does not matter as the democratic will of the People, which they would be the only ones with the capacity to decipher, justifies violations of the rule of law.

One should assume the drafters of the White Paper did not read or understand the paragraph of the BVerfG's ruling where it held that "the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution",[64] and made clear that the rule of law is one of the structural principles of the state which the BVerfG found "not amenable to any amendment because of their fundamental quality".[65] As for the references to Professor MacCormick's work, the Polish government draws from it the need for both the EU and its Member States to show self-restraint and mutual respect when it has shown none before misleadingly implying that it is the EU which is disrupting the "peculiar construct" of the European legal system by objecting to its "own sovereign institutional solutions" regarding Poland's judiciary.

> 189. This is exactly why the reforms that cut down the long shadow of communism in the Polish justice system are in line with European standards and embrace the values on which the European Union is founded. **Not consenting to the evil of 20th century totalitarianisms is also an insuperable element of the Polish constitutional identity.** [in bold in the original]

The first sentence is such an obvious example of Orwellian doublespeak it does not deserve any specific rebuttal. As for the second sentence where a reference is made to Polish constitutional identity, it is not clear what the drafters meant to say by "insuperable element" or can one possibly connect 20th century totalitarianisms with changes made to Poland's judiciary in the 21st century (possibly it is the translation rather than the original text which makes no sense). What is in any event striking is the absence of any attempt to offer any details on what this Polish constitutional identity may consist of.

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[62] Ibid., p. 1717

[63] Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08 (English version: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html), para 216.

[64] Ibid., para 218.

[65] Ibid., para 217.

> 206. The European legal system is founded on the recognition of constitutional pluralism enshrined in Article 4 of the Treaty on European Union which also guarantees that each member state may shape its own judicial system in a sovereign manner, as long as it does not threaten judicial independence.
>
> 207. Tensions between the executive and the judiciary lie in the nature of democratic systems, yet their very existence does not mean that judicial independence is endangered. The Treaty on European Union safeguards constitutional identity of the member states as their exclusive national competence, which means that reforms of the judiciary should be assessed at the national level by competent authorities.

The two paragraphs above are to be found in the concluding section of the Polish government's mislabelled White Paper. Again, the Orwellian nature of the analysis developed therein is nothing short of extraordinary. To speak for instance of tension between the executive and the judiciary to describe a situation where the executive is arguably guilty of a constitutional coup d'Etat[66] – albeit a slow-motion type – is quite something. To quote the First President of Poland's Supreme Court, "the current situation is not one of tensions between different branches of power, as the White Paper claims; rather, this is a genuine revolution in the judicial system which annihilates the independence of the judiciary in breach of the provisions of the Constitution."[67]

As for the first paragraph, it misrepresents Article 4 TEU which does not explicitly refer to constitutional pluralism or any right to shape one's judicial system "in a sovereign manner". What it does, as explained by AG Maduro, is that national governments can rely on their country's constitutional identity to justify, in principle, a restriction of the obligations imposed by EU law. A case-by-case analysis is required, subject to the ultimate scrutiny of the CJEU, to assess the reasonable and proportionate nature of any restriction adopted by national authorities in the name of "constitutional identity". And while the EU may not have any legislative competence regarding the organisation of national judiciaries, no "reform" can undermine judicial independence as the White Paper itself accepts and a point which was made crystal-clear by the Court of Justice in a ruling issued ten days before the White Paper was published:

> The Member States are therefore obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields.[68]

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[66] M. Steinbeis, Interview with W. Sadurski, *"What is Going on in Poland is an Attack against Democracy", VerfBlog,* 15 July 2016: https://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy

[67] First President of the Supreme Court, Opinion on the White Paper on the Reform of the Polish Judiciary, Warsaw, 16 March 2018 (on file with the authors).

[68] Case C-46/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, para. 34. For analysis, see L. Pech and S. Platon, "Rule of Law backsliding in the EU: The Court of Justice to the rescue?", *EU Law Analysis blog*, 13 March 2018: http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html.

What Hungarian and Polish autocrats tend to conveniently forget is that while Article 4 does impose on the EU an obligation to respect its Member States' national identities, which can be reflected inter alia in their constitutional structures, it certainly does not give a blank cheque to national governments and legislatures to adopt so-called "reforms of the judiciary" designed to violate fundamental EU values such as the rule of law and judicial independence, and to unilaterally decide on their compatibility with the national constitution and EU rules.

With the benefit of hindsight, one can now more easily see how the inclusion of a "national identity" clause in the European Treaties was a mistake which has been further compounded by a number of senior courts in countries such as Germany or France[69] relying on the open-ended and abuse-prone concept of constitutional identity. The worm has been in the fruit ever since. As noted by Vlad Perju, the European Court of Justice has an essential role to play here as it "can contain and control the effect of national identity by centralizing its meaning", for instance, by "defining a range of acceptable meanings of the concept of national identity".[70] We would submit in this respect that a good starting point would be for the Court of Justice to adopt and enforce the balanced position of the European Parliament, whereby a referral to Article 4(2) TEU can only be considered legitimate and reasonable "only in so far as a Member State respects the values enshrined in Article 2 TEU"[71] and behaves in full compliance with the principle of sincere cooperation laid down in Article 4(3) TEU.

4. Conclusion

Constitutional pluralists were well-intentioned and their theory was nuanced, but they were naïve. Constitutional pluralism is a theory designed for polite society, but we live in brutal times. Many young legal scholars in recent years rejected the first generation of EU legal scholarship saying that too many scholars acted more as cheerleaders of the ECJ than as sober critics. According to this accusation, too many EU legal scholars simply applauded and parroted the doctrines – such as supremacy and direct effect – enunciated by the ECJ rather than engaging in critical legal scholarship. These scholars had a point. A number of historians and sociologists[72] have done fascinating studies of the tight networks of

[69] CC, 27 juillet 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, n° 2006-540 DC, spéc. cons. 19: « Considérant, en premier lieu, que la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti ». See E. Dubout, "Les regles ou principe inhérents à l'identité constitutionelle de la France": une supra-constitutionnalité (2010) 3 *RFDC* 224.

[70] "On the (De-)Fragmentation of Statehood in Europe: Reflections on Ernst-Wolfgang Böckenförde's Work on European Integration" (2018) 19(2) *German Law Journal* 403, p. 433.

[71] European Parliament resolution of 3 July 2013, op. cit., recital M. With respect to the ongoing attacks on the rule of law in both Poland and Hungary, there is already a precedent on which to build so as to protect national judiciaries from being decimated in the name of a country's "constitutional identity" as understood by the relevant country's Great Leader. Faced with the ludicrous argument raised by the Latvian government that the application of EU law regarding part-time work to the judiciary would have "the result that the national identities of the Member States are not respected, contrary to Article 4(2) TEU", the Court held that the application of the relevant EU rules with respect to part-time judges "cannot have any effect on national identity, but merely aims to extend to those judges the scope of the principle of equal treatment." Case C-393/10, O'Brien, 1 March 2012, para. 49.

[72] See for instance, A. Vauchez, The Force of a Weak Field: Law and Lawyers in the Government of the European

lawyers, judges and scholars who formed the early "European legal field" and who in many cases worked quite intentionally to build the EU legal order. So, perhaps a counterbalancing was in order and the emergence of scholarship on legal pluralism was part of a general trend amongst scholars to become more critical of ECJ assertions of unquestioned supremacy. But things have gone too far and now, as we describe above, the dangers of constitutional pluralism have become clear. In their rejection of Luxembourg's perceived arrogance, many scholars embraced Karlsruhe's assertions of constitutional identity without considering where all this might lead in more dangerous times. Constitutional pluralism is a bit like nuclear power. It has beneficial peace-time uses, but it is inherently dangerous and can easily be weaponised in times of war. In an age when liberal, constitutional democracy is facing a clear and present danger, the time has come to dismantle constitutional pluralism.

Union (2008) 2 *International Political Sociology* 128; A. Cohen, Constitutionalism Without Constitution (2007) 32(1) *Law & Social Inquiry* 109; M. Rasmussen, "Constructing and Deconstructing 'Constitutional' European Law", *in Europe: The New Legal Realism* 639, 650–51 (Henning Koch et al. eds., 2010); B. Davies, *Resisting the European Court of Justice. West Germany's Confrontation with European Law, 1949-1979* (CUP, 2012); M. Pollack, *The New EU Legal History: What's New, What's Missing?* (2013) 28 *American University International Law Review* 1257.

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