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Constitutional pluralism: An oxymoron?

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Abstract: This article examines the origins of the concept of constitutional pluralism that has emerged in the last decade and it critically assesses the claims of its advocates. It argues that the claims made on behalf of the concept cannot be sustained and seeks to show that constitutional pluralism is an oxymoronic concept.

Keywords: constitutionalism; European Union; pluralism; sovereignty

Introduction

During the first two decades of the twentieth century the concept of political pluralism acquired considerable influence within Anglo-American political thought as an attractive *via media* between bourgeois individualism and absolutist statism. Recognizing both the social character of individual identity and the threat posed to freedom by the growth of the centralized administrative state, pluralism highlighted the vital role performed by various groups – local authorities, churches, guilds and trades unions – in contemporary political life. Challenging the monistic claims of state sovereignty, it contended that the political domain is intrinsically pluralist, and therefore federal rather than unitary in structure.

That movement is now considered to be of merely historical significance. It is regarded primarily as a symptomatic expression of a deep-seated cultural crisis of the period, of which the First World War was its most ignoble manifestation. This is because, imaginative though it might have been, political pluralism was soon subjected to telling criticism. If the political world is to be viewed as a multiplicity of group associations, it was asked, does it not project a vision of collectivism without limits?[1] And if the federal vision is to be conceived as eroding the centre's claim to

[1] WY Elliott, *The Pragmatic Revolt in Politics: Syndicalism, Fascism and the Corporate State* (Macmillan, New York, 1928) 149–50.

ultimate authority, how are conflicts between groups to be resolved? Recognizing eventually that no world could long sustain itself without some principle of closure or final authority, the pluralists were obliged to accept that a political regime is able to maintain its unity only through some notion of function. But since pluralists recognized that functional unity could not be achieved through acceptance of a common moral ideal, the movement seemed to implicitly acknowledge that this resolution could be effected only by the weighing of material interests.[2] And this concession suggested that, contrary to its initial aspirations, political pluralism was leading down the road of materialist determinism.

The fortunes of political pluralism are exemplified in the intellectual journey made by Harold Laski. Starting his career as one of the pioneering exponents of the movement, Laski produced a series of powerful books and essays that challenged sovereigntist conceptions of political authority.[3] During the 1920s, however, in recognition of the need for some institutional arrangement of closure, Laski felt obliged to bring the state back into his frame of analysis.[4] Laski initially felt that the state was needed only to perform some type of co-ordinative role. But after grappling unsuccessfully with the intrinsic difficulties that followed, he eventually abandoned pluralism altogether in favour of Marxist economic determinism.[5] Political pluralism disappeared, one is forced to conclude, 'because of very real limitations of the ideas themselves, limitations that became clear to their proponents as well as to their critics'.[6]

A century on and pluralist thinking is once again in the ascendancy. Once again, there is a background of cultural crisis, though today the concern is that the post-1989 period of apparent triumph of the constitutional state is also marked by the growth in governmental power exercised by international

[2] HJ Laski, *A Grammar of Politics* (5th edn, Allen & Unwin, London, 1967 [1925]) ch 7 (Authority as Federal), esp. 272: 'Postulating that ethical values are personal … it finds the principle of social systems in the idea of function. … It represents a want, the response to which means happiness. It does not argue that all functions can be reconciled into a synthesis which embraces them all. It admits that many are conflicting, sometimes through ignorance, sometimes through genuine and permanent incompatibility. It admits, also, the necessity of a scheme of co-ordination … It agrees that a coercive authority is necessary, but it is distrustful of a coercive authority.'

[3] See HJ Laski, *Studies in the Problems of Sovereignty* (Yale University Press, New Haven, 1917); HJ Laski, *Authority in the Modern State* (Yale University Press, New Haven, 1919); HJ Laski, *The Foundations of Sovereignty and Other Essays* (Harcourt Brace, New York, 1921).

[4] See Laski, *Grammar* (n 2); also at 80–5, where Laski accepts the need of the state to perform an organizational and co-ordinative role with respect to social groups and to promote the common good.

[5] See K Martin, *Harold Laski: A Biography* (Cape, London, 1953) 68–9.

[6] D Runciman, *Pluralism and the Personality of the State* (Cambridge University Press, Cambridge, 1997) 263.

agencies operating beyond the structures of constitutional accountability.[7] Once again, the pluralist movement has sovereignty in its sights, though now the focus is not so much on state sovereignty as political scientists tend to conceive it; rather, it is with the juridical concept of sovereignty through which legal expression is given to modern ideas of political authority. But in certain respects this contemporary rejuvenation of pluralism is markedly different. Rather than analysing an associative network of groups that operate within the frame of the nation-state, attention focuses primarily on the relationship between the European Union and those nation-states who have brought this arrangement into existence.

In light of these differences, the twenty-first century movement has given birth to a new concept, that of 'constitutional pluralism'. This paper examines the origins of the concept and assesses the main claims of its advocates. It suggests that, although the concept is first presented as legal rather than political analysis, advocates are obliged to make a claim about political authority. It therefore assesses whether it is better able than its predecessor movement to offer a coherent reconfiguration of the nature of political authority. The paper concludes by contending that although it may be going too far to treat the concept as an illustration of Marx's adage that history repeats itself first as tragedy then as farce, constitutional pluralism is no better able to resolve the issues that sundered the earlier incarnation of pluralist thought.

Positive public law

The origins of the concept of constitutional pluralism are commonly traced to the writings of two Scots public lawyers: Neil MacCormick, Regius Professor of Public Law at the University of Edinburgh until his retirement in 2008, and Neil Walker, MacCormick's successor in the chair. Before examining their innovative contributions in detail, the scale of the task they face might first be sketched. Since I suggest that the essential challenge constitutional pluralists are making is to the idea of ultimate authority, it is necessary to be clear about the central concept – the juridical concept of sovereignty – they seek to overcome.

The concept of sovereignty is today much misunderstood. It is now regularly confused with the ability of a nation-state to control its own material conditions and destiny. But this – analogous to political pluralism's treatment of 'state sovereignty' – is a construction of political science which has little bearing on the legal concept. The former is concerned with

[7] See P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010).

power, the power that a government is able to dispose (*potentia*). The latter is concerned with *authority*, the right of a government to be obeyed (*potestas*). Although the relation between the two is intricate, for the purpose of this analysis I suggest that in a conceptual sense, the authority of a government is unrelated to the power it is able to exercise.[8] A government might compel obedience, but this is not the same as establishing its right to be obeyed. Its right to be obeyed – its authority – derives not from its power but from its constitution.

This distinction is so deeply buried in modern legal thought that there is a danger of overlooking its significance. But because it is directly engaged whenever the claims of constitutional pluralism are raised the concept in question must be rendered explicit. The problem pluralists seem most concerned about is that of the contemporary limitations on the power of governments to command obedience and control the resources needed to meet the expectations of their citizens. This relates to power. The difficulty is that the issues raised in response to this problem are not so limited: they mainly concern questions of authority and this is a more complicated matter.

I shall begin, then, by stating 12 basic propositions of modern (positivist) public law. These are elementary propositions that establish the orthodox frame within which these matters have been conventionally addressed.

1. Sovereignty is the name given to the supreme will of the state. In a juristic sense, the state is treated as a volitional entity (a juristic person), and sovereignty expresses its condition of legal omnipotence.
2. State and sovereignty are expressions of principles of unity and closure: they signify ultimate authority. Sovereignty is the faculty the state is assumed to possess in order to express its will in the form of law.
3. Sovereignty is not a bundle of jurisdictional powers. It does not exist by aggregation of public powers (taxation, eminent domain, police, etc). These powers are sometimes considered to be inherent in the nature of sovereignty.[9] But this is a practical proposition, in the sense that these are the types of powers that any regime will need regularly to exercise

[8] For a reflexive analysis see M Loughlin, *Foundations of Public Law* (Oxford University Press, Oxford, 2010) esp. chs 3 and 6.

[9] Note e.g. Bodin's marks of sovereignty: J Bodin, *The Six Bookes of a Commonweale* (R Knolles trans. 1606, KD McRae (ed) Harvard University Press, Cambridge, MA, 1962), Bk I, ch 10. Cf T Hobbes, *Leviathan* (R Tuck (ed), Cambridge University Press, Cambridge, 1996), chs 18, 20 (one overarching mark, the authority to make law). Note also the ruling of the *Bundesverfassungsgericht* in the Lisbon treaty case, which makes a less than convincing foray into the esoteric field of *Staatsaufgabenlehre*: BVerfG, 2 BvE 2/08 vom 30.6.2009, sections 249–52.

in order to maintain its authority. Conceptually, all legal powers involve the exercise of sovereign authority in that they find their ultimate source in the sovereign will of the state.

4. This sovereign state is the source of law and it cannot be regarded as being bound by the obligations which that law creates.
5. The essential criteria for determining the existence of a sovereign state are that that state gives ultimate validity to all law and is able to determine for itself the scope of its own powers [*Kompetenz-Kompetenz*]. Any legal limit on sovereignty destroys sovereignty.
6. Sovereignty is to be distinguished from government. Ultimate authority vests in the state, not its organs of government. The competences of governmental institutions are determined by law; governmental institutions are vested with legal rights and are subjects of legal obligation. As a practical proposition, whether for reasons of effectiveness or to promote liberal political values, these sovereign powers are generally entrusted to different organs of government. Such a differentiation of governmental functions does not affect sovereignty. This is because sovereignty is not an agglomeration of powers; it is a principle of unity.[10]
7. Sovereignty is not impaired by the state entering into international obligations with other sovereign powers.
8. Constitutional laws are those laws which relate directly to the form of government and to the allocation of powers to, and limitations imposed on, these governmental institutions.
9. Constitutional law does not purport to control the state, but only its government. These laws are the creation of the state and the limitations they impose do not impose a limitation on the state.
10. Strictly speaking, there is no hierarchy of laws. All laws are the laws of the state. There may be rules of priority, but it is not necessary to establish a principle of hierarchy as though laws were to be categorized into different species. When a court resolves a dispute involving apparent conflicts in the authority of laws (e.g. between a constitutional law and an ordinary statute resolved in favour of the constitutional law) the court says only that the statute, although enacted in the usual form, is not law because its subject matter did not lie in the competence of the legislature.

[10] R Carré de Malberg, *Contribution à la Théorie générale de l'Etat* (Dalloz, Paris, 2004 [1922]), vol 2, 24: 'Il n'y a pas, dans l'Etat, trois pouvoirs, mais bien une puissance unique, qui est sa puissance de domination. Cette puissance se manifeste sous des formes multiples.' ('There are not three powers but truly one unique power, which is the power of domination. This power manifests itself under multiple forms.')

11. All law, whether public or private, imposes a limitation on the government of a state, but not upon the state itself. Being itself a principle of juristic reason, the state operates exclusively through legal processes. But, juristically conceived, the state itself is not and cannot be controlled by law, and logically cannot be regarded as the subject of legal rights and duties. The idea that 'the law is sovereign' or 'the constitution is sovereign' has no juristic significance other than that the state is able to speak its will only in the form of law and in accordance with its constitution.
12. The idea of 'popular sovereignty' does not mean that within an existing governmental regime, sovereignty remains in the people. It merely indicates the source that is treated as having established the authority of that governmental regime.

These are the basic propositions on which the modern positivist edifice of public law is erected. Some jurists are now suggesting that, given the nature, mode of operation and locus of contemporary agencies of government, this conceptual edifice is no longer able to present itself as a coherent narrative and consequently that its authority is on the wane. This type of claim is easy enough to grasp. But the challenge that those seeking to jettison this framework face is to offer an alternative conceptual apparatus through which to make their juristic claims. This is the challenge that those promoting constitutional pluralism are obliged directly to confront. I now turn to their argument.

Questioning sovereignty

The term 'constitutional pluralism' appears first to have been used by Neil MacCormick. MacCormick deployed the term in the context of his continuing inquiries into the constitutional implications of membership of the European Union. In a paper analysing the ruling of the *Bundesverfassungsgericht* in the Maastricht Treaty case, he argued that in the European context the 'most appropriate analysis of the relations of legal systems is pluralistic rather than monistic, and interactive rather than hierarchical'. This takes the form of conventional legal analysis. But in that review he elaborated on this point by claiming that domestic legal orders and the EU legal order not only form distinct and interacting systems; they also establish an arrangement which lacks any 'all-purpose superiority of one system over another'.[11] The point was expressed

[11] N MacCormick, 'The Maastricht Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259, 265.

ambiguously, but it suggested he was intending to move beyond the standard analysis of interaction between legal orders and offer a more basic challenge to the orthodox concept of sovereign authority.

That argument was advanced in 1999 in *Questioning Sovereignty*. It is here that the term 'constitutional pluralism' is first used. In this book, MacCormick contended that with the mutual recognition of domestic and EU legal orders 'we come to the frontier of the problem of legal pluralism' and are obliged to recognize the problem of constitutional conflict. The question thus becomes: how are such *constitutional* conflicts to be resolved? It is in pursuit of an answer to this question that MacCormick invokes the concept of constitutional pluralism.

The great virtue of MacCormick's analysis lies in the way he builds his argument from basic jurisprudential foundations. His argument proceeds in stages that need to be precisely specified.[12]

1. The genus of law is defined as institutional normative order and this leads logically to the conclusion that a plurality of distinct species of normative legal orders can co-exist.
2. This type of institutional normative order – or legal order – is discernible in each of the member states and in the EU.
3. The 'constitution' of an institutional normative order is 'defined in terms of the establishment and empowerment of the agencies … that perform the roles of enunciating, executing, administering or judging about the norms whose institutional character is itself achieved by institutional acts'. Provided there is an 'appropriately self-sufficient cluster of such norms of empowerment' there is a constitution.
4. An institutional normative order has a self-referential existence, such that powers originally acquired by custom and convention may subsequently be confirmed and redefined through formal legislation, 'whether or not in the form of a comprehensive "written constitution"'.
5. Those called on to act as judges 'under conventional or written norms can by their authoritative interpretation of their own powers and of other constitutional norms transform the character of the original empowerments involved'.
6. Some institutions have entirely dependent constitutions which have been established through state authority (e.g. a university) but others (e.g. a church with an international reach) have their own distinctive constitutions and legal order. In the latter case 'it would seem reasonable to say that there are two sets of constitutions, each of which is acknowledged valid,

[12] N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press, Oxford, 1999) 102–4.

yet neither of which does, or has any compelling reason to, acknowledge the other as a source of its validity'.

7. Where there is a plurality of institutional normative orders, each with a functioning constitution, 'it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges the constitutional superiority over another'. In this situation, constitutional pluralism prevails.

From these conceptual building blocks, MacCormick argues that constitutional pluralism obtains between the EU and its member states.

There are many difficulties with the way this argument develops. Starting with a rather general claim that law is institutional normative ordering, MacCormick seems to be suggesting that all normative orders are deserving of acknowledgement and even respect. And when he argues that a 'constitution' exists for all normative orders that have rudimentary governance arrangements, he is simply transforming the term 'constitution' into a synonym for a legal order. A constitution, he suggests, exists whenever there is a union of primary and secondary rules. This type of analysis makes sense as descriptive sociology where the objective is to sketch the 'power maps' through which the social world functions. It follows that Mafia groups, for example, can be conceived as normative orders and, possessing ruling bodies to enforce that order, they too have constitutions.[13] If this type of descriptive analysis is adopted, then it would appear that the interactions of a plurality of normative orders can be gauged only from a sociological perspective: they can be analysed only from the perspective of power (*potentia*).

This is not the route MacCormick wishes to take. If he did, he would not say, with respect to the relation between a state and an internationally-organized church, that each of their constitutions is 'acknowledged valid'. The question must then be asked: by whom? A state might well refuse to acknowledge the normative order of a church that, for example, condoned polygamy or racial discriminatory practices. A state might entirely proscribe a church on the ground that its activities are not conducive to good ordering of society. In such cases, the state surely refuses to acknowledge the validity of that church's constitution; there is no intrinsic mutual respect. An impartial observer might identify the existence of a plurality of normative orders for the purpose of trying to predict behavioural outcomes and, in the illustration given above, MacCormick might say that each institution remains 'empowered' to issue an edict subjugating one order to the dictates

[13] See e.g. L Paoli, *Mafia Brotherhoods: Organized Crime, Italian Style* (Oxford University Press, New York, 2003) 40.

of the other. But as descriptive sociology we would generally not need to expend much energy determining which edict is likely to prevail.

MacCormick's argument commits the fallacy of equivalence in which all species of law (all normative orders) are assumed to possess a similar status and authority. He then extends this point to make a similar claim about the status of constitutions. But in the world in which he intends to make an intervention – that of the relationship between member states and the institutions of the EU – these claims engage the specific question of political authority. The relation between these institutional orders cannot be treated in a purely formal manner as normative constructs deserving of equal respect. At one point in his argument MacCormick appears to accept this point. He recognizes that in the European context we cannot be content merely to state that legal orders interact with one another. He also recognizes that we cannot be content to assess the situation purely from the perspective of the Court of Justice of the European Union and in particular from its own claim about the supremacy of EU law. This leads him to state that: 'the situation we study is one in which the issue of highest or ultimate authority is itself at stake'.[14]

At this point, then, it would appear that MacCormick acknowledges that the question of political authority – the question of sovereignty – is engaged. The difficulty is that, having opened up this issue, he immediately avoids it and returns entirely to the plane of courts, stating that 'the highest tribunals of the member states also belong within normative orders in which they claim ultimate authority to adjudicate'. What is never acknowledged is that courts are not the 'highest tribunals' on the essential constitutional question, that of ultimate authority. The highest authority is more likely to be a legislature, or the constitution,[15] or the constituent power.[16]

MacCormick's so-called constitutional pluralism turns out to be a form of legal pluralism. His essential claim is that there exists a number of non-hierarchical legal orders that intersect with one another in various ways. This is what he calls 'radical pluralism'.[17] All that is offered by way of resolution is the acceptance that 'radical pluralism entails that not every legal problem can be solved legally'. It requires 'political judgment'.[18] MacCormick here finds himself in the trap of the old political pluralists:

[14] MacCormick, *Questioning Sovereignty* (n 12) 109.

[15] Note here MacCormick's acceptance of the point that a constitution is not essentially the formal text (above pt 4).

[16] See M Loughlin, 'The Concept of Constituent Power' (2013) 12 *European Journal of Political Theory* (forthcoming).

[17] MacCormick (n 12) 118.

[18] Ibid 119.

adopting a descriptive analysis leads to acceptance of a position that power interests prevail and, uneasy with that outcome, he is obliged to shift register and invoke some notion of 'political judgment' rather than power interest. This notion is not elaborated, though he opts ultimately to give this a normative inflection: the Court of Justice 'ought not to reach its interpretative judgments without regard to their impact on national constitutions' and national courts 'ought not to interpret laws or constitutions without regard to the role of EU'.[19]

By the end of his analysis, MacCormick seems to have recognized that radical pluralism leads only to the erosion of any normative stance; it can result only in a descriptive statement of a state of affairs. This is a conclusion he is reluctant to accept. He therefore concludes by suggesting that, while he used to be persuaded by radical pluralism, in the context of the EU the thesis of 'pluralism under international law' is more persuasive.[20] This latter thesis turns out not to be pluralist at all: it is monist. It is an echo of Kelsen's idea that there is only one legal order in the world, formed of a system of international law read in conjunction with the totality of nation-state legal systems, the latter of which are conceived as subsystems of the overarching international legal order.[21] For MacCormick, once the supremacy of EU law is established by the Court of Justice and recognized by national courts, there would appear no longer to be a need for an elaborate theory about interaction of distinct systems. As he would prefer to express it, there are national legal orders and the legal order of the EU, neither of which is to be conceived as a subsystem of the other but both cohere 'within a common legal universe governed by the norms of international law'. This is a pluralistic relationship within a monistic framework of international law; this is 'pluralism under international law'.[22]

In this account, MacCormick fudges the issues of power and authority. He is compelled to fudge the issue of power (*potentia*) that the radical pluralist argument leads him towards because there is no question that the power of member states is considerably greater than the resources under the control of EU institutions; without the power of taxation or control of military forces, there can be no functional equivalence. But the construction of some power map of Europe is not part of his agenda. More significant

[19] Ibid 120.

[20] Ibid 121.

[21] Hans Kelsen, *Introduction to the Problems of Legal Theory* (*Reine Rechtslehre*) (BL Paulson and SL Paulson trans., Clarendon Press, Oxford, 1992) 61–2, 113–25.

[22] MacCormick (n 12) 117. See N Walker, 'Reconciling MacCormick: Constitutional Pluralism and the Unity of Practical Reason' (2011) 24 *Ratio Juris* 369–85; N Krisch, 'Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space' (2011) 24 *Ratio Juris* 386–412.

is the point that he also fails to deal adequately with the critical constitutional question: the question of political authority. A constitution is not simply a written document; it is the arrangement through which rulers and subjects express their beliefs about the authority of government. It seeks to answer the question: by what right is a governmental agency able to act? The answer, I suggest, is that this right flows ultimately from a set of beliefs held by its subjects about that government's authority to rule. This is an intensely practical matter. As Oakeshott noted, 'to be without an answer to it has often been, in modern Europe, the prelude to civil war'.[23]

On the basis of this test, few can deny that the answer today to the critical constitutional question can clearly be given: authority – continuing sovereign authority –remains vested in member states. There exists, in this political understanding, no constitutional pluralism. This could change over the course of time, but only once the citizens of Britain, Denmark, France, Greece, Ireland, Poland, etc. express fixed loyalty to a political regime that incorporates the EU and member states. If and when that happens, a new state (in a juristic sense) will have come into existence. However one views the matter, the concept of constitutional pluralism remains a misnomer.

Constitutional pluralism as political theory

The concept of constitutional pluralism receives more systematic consideration in Neil Walker's dense and nuanced paper on 'The Idea of Constitutional Pluralism'.[24] Walker's orientation differs significantly from MacCormick's: his focus is less on legal ordering and much more on the contemporary status of the modern concept of constitutionalism. Walker's analysis begins with a critique of the status accorded constitutions within the practices of certain nation-states. Criticizing the 'sacred' status given to constitutions and the associated practice of what he calls 'constitutional fetishism',[25] he draws on (political theorist) James Tully's work to argue that modern constitutionalism projects a particular 'normative bias', a bias towards what might be called 'liberal nationalism', founded on the promotion of equal rights within a culturally defined frame of public good.[26] Walker's

[23] M Oakeshott, *Lectures in the History of Political Thought* (Imprint Academic, Exeter, 2006) 427.

[24] N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317–59.

[25] Ibid 324–7.

[26] Ibid 328–31. See J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995).

initial intention is therefore to place modern constitutionalism in question. Only after having done so, does he seek to retrieve a less hubristic idea of constitutionalism for the purpose of being able to draw on some of these constitutional values in the light of changing arrangements of government.

It should be said at the outset that Walker's critical analysis of recent constitutional fetishism fits straightforwardly into the frame of the modern conceptual edifice of public law: to the extent that such fetishism exists, it is attributable to the failure to maintain a clear distinction between state and government when undertaking constitutional analysis. So Walker's ostensible objective, that of relativizing constitutionalism and examining the degree to which constitutionalist values can continue to live on in a world in which an increasing proportion of governmental power is being exercised in arrangements established beyond the frame of the nation-state, is both important and conventional. The critical question raised by his essay is whether this relativization of constitutionalism – which at one level simply seeks to restore an appropriate balance in the modern public law framework – leads towards the pluralization of constitutionalism.

Walker's analysis focuses mainly on Europe, with respect to which he asserts that governing arrangements today can be adequately explained only 'if we posit a framework which identifies multiple sites of constitutional discourse and authority'. The 'European order', he claims, has developed beyond 'the traditional confines of inter-*national* law and now makes its own independent constitutional claims'. And he also states, ambiguously, that 'these claims exist alongside the continuing claims of states'.[27]

Accepting that these claims have so far been only asserted rather than explained, Walker outlines imaginatively a notion of constitutional pluralism based on such indices as discursive self-awareness, authority, jurisdiction, interpretive autonomy, institutional capacity and citizenship.[28] For Walker, constitutionalism is to be seen 'not only as a property of polities and political processes but as a medium through which they interconnect' and 'as a structural characteristic of the relationship between certain types of political authority'.[29]

I have tried to show that, although invoking the term 'constitutional pluralism', MacCormick was engaging in legal analysis. Walker's exercise, by contrast, is explicitly an engagement with political theory.[30] In one

[27] Walker (n 24) 337.

[28] Ibid 343–54.

[29] Ibid 340.

[30] Ibid 336–7: 'the idea of constitutional pluralism here defended should be distinguished from the various more general "legal pluralisms" which mark our academic landscape'.

sense it makes a 'modest' claim,[31] in that it re-envisages constitutionalism as an 'open-ended dynamic' and as involving an 'agonistic process of negotiation between and within different constitutional [sc. governmental] authorities'.[32] Its objective is to hold out the prospect of maintaining and reviving constitutional values in changing governmental circumstances and in ways that are 'less likely to invite and justify accusations of constitutional fetishism, normative bias, ideological manipulation' – charges that Walker recognizes have 'cast a long shadow over contemporary constitutional discourse as it ventures beyond its statist domicile'.[33]

This may be true, but this self-proclaimed modesty cannot entirely mask the great ambition of the endeavour. In tandem with Milward's argument that the European Community is to be viewed as an institutional arrangement that bolsters the authority of the post-war nation-state,[34] Walker now seems to be holding out the possibility of the European Union rescue of the constitutional state. MacCormick, I suggested, fudged the questions of power and authority. Walker, by contrast, does address them, but he does so only implicitly. Once it is recognized that the essential question is that of authority and that this rests ultimately on the existence of loyalty, then the critical question for Europe is: how can loyalty to the EU be generated? What Walker acknowledges (though, again, only implicitly) is that EU power – functional efficacy – is not enough. Authority can be built only by strengthening loyalty. Just as modern constitutionalism might be viewed as a state-building philosophy, so might it also be recognized that the authority of the EU can be enhanced only through the process of constitutionalization.

The question that remains is the one we started with: does relativization lead to pluralization? More explicitly: is Walker's essay to be read as an analysis of the current state of political affairs in Europe or does it amount to advocacy of constitutionalization of the EU for the purpose of strengthening its authority claims vis-à-vis member states? On this he wavers, claiming that his argument is essentially descriptive while acknowledging that sceptics might regard this merely as 'wishful thinking'.[35]

[31] Ibid 336.

[32] Ibid 359.

[33] Ibid 359.

[34] AS Milward, *The European Rescue of the Nation-State* (Routledge, London, 1992).

[35] See N Walker, 'Constitutionalism and Pluralism in Global Context' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart, Oxford, 2012) 17–37, 18. His stance is ambiguous because he suggests that the attraction of constitutional pluralism 'is a matter both of fact and of value – of the force of circumstance as well as of preference'. He continues: 'at least as the constitutional pluralist views the world, it becomes increasingly difficult if not impossible *not* to conceive of the environment of constitutionalism in non-unitary terms – as a place of heterarchically interlocking legal and political systems'.

The tenets of constitutional pluralism

Since 2002, the concept of constitutional pluralism has been actively promoted, invariably with a positive inflection, and it now seems to have achieved the status of a school, perhaps even a sect.[36] The tenets of this school appear to owe more to MacCormick than to Walker; indeed, far from taking their cue from Walker's critique of 'constitutional fetishism', these advocates raise it to new heights. They do so by making three mutually-reinforcing assertions: that the foundation of political authority lies in a constitution; that in the context of the EU political authority is constituted *autonomously* at the supranational as well as the national level and cannot be conceived in hierarchical terms; and that therefore the issue of ultimate authority either is to be left open (radical pluralism) or is re-integrated in a universal order of constitutional principles (pluralism under international law). Each element undermines the modern conceptual framework of public law: the first displaces the state in the name of the constitution; the second displaces sovereignty (unity) in the name of plurality; and the third displaces the political in the name of the legal/constitutional. Each should therefore be briefly examined.

The first contention, that the foundation of political authority lies in the constitution, seems at first glance uncontroversial. We have seen that public authority is established by a constitution and cannot exist outside a constitution: governmental competences are established by constitutional laws. But the underlying claim here being made is in fact highly controversial. This is because it conflates the concepts of the constitutional regime of a state and the constitution as institutional normative order. Under the pluralist conception, constitution as textual constitution is the highest authority and all reference to the concept of the state must now be jettisoned.

The significance of this contention is highlighted by considering the ruling of the *Bundesverfassungsgericht* in its Maastricht Treaty judgment of 1993. There, the court invented a new term, *Staatenverbund* (an association or alliance of states), to distinguish the EU–member state relationship from that of a confederation (*Staatenbund*) or federation (*Bund*). Their ruling indicated that the Union remains an entity both created and regulated

[36] See JHH Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts' in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, Cambridge, 2011) 8: 'Constitutional Pluralism is today the only party membership card which will guarantee a seat at the high table of the public law professoriate.' For a comprehensive overview of the state of the play with respect to this concept see Avbelj and Komárek (n 35).

by member states. In direct response, Ingolf Pernice invented the term *Verfassungsverbund* to explain the nature of the EU arrangement, a term introduced into English in 1998 as multi-level constitutionalism.[37] By substituting *Verfassungsverbund* for *Staatenverbund*, Pernice rejected the concept of an association of states (within which the EU is a derived order) and replaced it with that of an association of constitutions (within which the EU constitution acquires the status of a separate order within an interdependent arrangement).

This claim raises a fundamental problem. In the modern conceptual edifice, the constitution establishes the office of government; it does not establish the state. Its foundational character can therefore most easily be asserted by abandoning altogether the concept of the state. This is what seems to be intended. But in the state tradition, the constitution expresses a set of beliefs through which *political* authority is established. The question is: are these self-proclaimed constitutions able to perform a similar role?

Far from being resolved, these problems are compounded with respect to the second basic contention. Having replaced state with constitution, constitutional pluralists argue that in the EU context (and perhaps beyond), public authority is now to be conceived as autonomously constituted at a multiplicity of sites. Given this variety of claims to constitutional autonomy, political authority can no longer be framed in hierarchical terms. The autonomy thesis thus seems to be an essential ingredient of the claims of constitutional pluralism: if the EU is a derived order then it is formed as an association of (sovereign) states and if it is a fused order then it is a federation (i.e. a state). The pluralist thesis can be maintained only if autonomy means that each site of government is an independent source of authority. But from where does this claim to autonomy of these constitutions derive? Is this an empirical claim or a conceptual assertion? Though the claim does nothing less than signal the death of the juristic concept of sovereignty, we are offered no answers to these questions.

The third contention logically follows: it is claimed that the question of ultimate authority must now be left open. Pluralists sometimes suggest that sovereignty has now been 'divided' or 'pooled'. This is conceptually incoherent: sovereignty is not a bundle of jurisdictional powers. The claim must be that sovereignty has now to be abandoned. But even the pluralists are able to glimpse the critical point that a multiplicity of normative orders without any means of integration means that there is no legal order, and that a plurality of constitutional claims undermines the constitutional character of any claim. They therefore tend to baulk at this stark contention

[37] I Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?' (1999) 36 *Common Market Law Review* 703–50.

and at this point reveal themselves as closet monists. With respect to this difficulty, the argument takes one of two forms. Sometimes it is claimed that this interdependence flows from the common will of European citizens (as the ultimate source) to divide governmental authority between states and EU.[38] Often a more ambitious claim is made, which is that the 'constitution' is not a thing but an ideal: it is a set of overarching constitutional principles and values of constitutionalism which is now the source of all political authority.[39] Instead of the state acting as the source of law, an ideal set of legal norms is the source of the state, or whatever governmental forms are ushered into existence to replace the idea of the state.[40] In place of a politically-generated scheme of intelligibility, we are offered the positing of a universal legal order.[41]

Apotheosis?

The three basic contentions of constitutional pluralism suggest that the concept is being used to make a full-fronted assault on the conceptual edifice of public law. But even on the briefest of examinations, it is shown that their claims involve assertions rather than arguments, reveal layers of ambiguity, and offer no robust alternative narrative of political authority. Since it might be felt that at this level of generality I am skewing the arguments of constitutional pluralists for the purpose of critique, I should examine the argument in more detail. Having previously engaged with the arguments of Pernice[42] and Kumm,[43] I turn to the claims of another leading constitutional pluralist, Miguel Poiares Maduro.

Maduro, former Advocate-General at the ECJ and now Professor at the EUI, has recently propounded three basic claims of constitutional pluralism, which he labels the empirical, the normative and the thickly normative. Suggesting that there is a consensus over the fact that the EU is governed by 'a form of constitutional law' and that the problem today is that 'the

[38] This is Pernice's (highly implausible) argument: see Pernice, ibid 710.

[39] Kumm's (equally implausible) 'paradigm-shift': see M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, Cambridge, 2009) 258–324.

[40] This amounts to the pursuit of Walker's innovative claim that constitutionalism is to be treated as a medium to its ultimate point: see text at (n 29).

[41] On the state as a scheme of intelligibility, see Loughlin, *Foundations* (n 8) ch 7.

[42] M Loughlin, 'In Defence of *Staatslehre*' (2009) 48 *Der Staat* 2–27.

[43] M Loughlin, 'Public Law and Its Discontents', *Global and Comparative Public Law Theory Colloquium*, NYU, Sept 2011, available at <http://www.law.nyu.edu/academics/colloquia/globalcomparativepubliclaw/index.htm>.

constitution of Europe has developed without a constitutional theory', Maduro seeks to show how constitutional pluralism can supply that gap. Constitutional pluralism is 'the theory that can best embrace and regulate the nature of the European Union polity'.[44]

His empirical claim is opaque: with respect to the EU, he states that constitutional pluralism 'best describes the current legal reality of competing constitutional claims of final authority among different legal orders (belonging to the same legal system) and the judicial attempts at accommodating them'.[45] What can this mean? Are we in a world exhibiting a plurality of legal orders? Or is this a world of competing constitutional claims to ultimate authority? And what does it mean to say that there can be competing constitutional claims within the 'same legal system'?

One central problem is that, despite using the term 'constitutional', Maduro presents his empirical claim entirely in terms of legal rather than constitutional analysis. He states, for example, that 'we can conceive of the EU and national legal orders as autonomous but part of the same European legal system'.[46] And to Alexander Somek's objection that 'constitutional pluralists give up precisely where an answer is most needed: what happens when the constitutional conflict cannot be prevented or solved?', Maduro offers an inadequate response: 'it is enough to state that one of the purposes of constitutional pluralism is precisely to legitimate leaving that question open and that, at an empirical level, the fact that the question remains open is a simple description of the constitutional status quo in Europe and only serves to reinforce the value of constitutional pluralism'.[47] It is difficult to unravel this convoluted statement, not least its unexplained shift from legal to constitutional language. What is clear is Maduro's assertion that constitutional pluralism serves to 'legitimate' irresolution. Whatever else this might be, it is not an empirical claim. It might be an empirical claim about interacting legal orders, but it cannot be – other than in a trivial sense – a claim about constitutions. But perhaps these questions are answered and ambiguities resolved by his normative claims.

Maduro's normative claims are best presented as four main propositions, the last of which is his 'thick' normative claim. The first proposition is that the question of final authority 'ought to be left open' because 'heterarchy is superior to hierarchy as a normative ideal in circumstances of competing

[44] M Poiares Maduro, 'Three Claims of Constitutional Pluralism' in Avbelj and Komárek (n 35) 67–84, 67, 68.

[45] Ibid 70.

[46] Ibid 70.

[47] Ibid 73. Somek's question is posed in A Somek, 'Monism: A Tale of the Undead?' in Avbelj and Komárek (n 35) 343–79.

constitutional claims of final authority'. Maduro compounds this already entirely circular argument by adding that 'those competing constitutional claims are of equal legitimacy'.[48] This is pure assertion, a choice on unspecified grounds for keeping the constitutional question open. From this statement, it would appear that Maduro wishes to promote the claim of ultimate authority of the EU but lacks the conceptual resources to do so. Yet he also notes that 'constitutional pluralism recognizes that there is a constitutional claim of final authority on the part of the European Union'.[49] Consequently, the question is whether this claim to final authority is legitimate.

This question brings us to Maduro's second proposition: 'Wherever there is power there ought to be constitutional limits. As a consequence: since the Union has developed autonomous forms of power it ought to be subject to constitutionalism.'[50] This is a clear illustration of question-begging: the answer is (for the most part) already given in the formulation of the issue. Even so, we could accept the thrust of the first statement but write (more accurately): 'where there is [public] power there ought to be *legal* limits'. But how is the transition made from legal to constitutional? And that is not all: it is 'for the most part' question-begging because between the first and second statements an elision is made between 'constitutional' and 'constitutionalism'. In this short statement (i) the autonomous power of the EU is, without explanation, simply asserted, (ii) a sensible claim about legal limitations on powers is transformed into an unjustified claim about constitutional limitations and (iii) the need for a constitutional limitation is silently transformed into one of institutional subjection to the values of constitutionalism.

Having by slight of pen elevated constitutionalism into a pivotal position, Maduro then advances his normative claim by stating the third proposition:

> A deeper justification and legitimacy of European constitutionalism must be derived from its constitutional added value with respect to national constitutionalism. It is this that authorises the former to be opposed to the latter and explains constitutional pluralism.

So, *pace* Walker, the claim is not merely that constitutionalization of the EU enhances the authority of the EU vis-à-vis nation-states or that it compensates for loss of constitutional authority at the national level: it is

[48] Maduro (n 44) 75
[49] Ibid 75
[50] Ibid 76

that 'European constitutionalism' actually strengthens constitutionalism at the national level. This astonishing argument rests on four main claims:

(i) 'European constitutionalism promotes inclusiveness in national democracies by requiring national political processes to take into account out-of-state interests that may be affected by the deliberations of those political processes.'[51] There is, Maduro argues, a 'logic of inclusion inherent in constitutionalism'. Since the argument is pitched at a high level of generality, this is not easily assessed. EU constitutionalism, exemplified by the free movement of persons, might indeed follow a logic of inclusion, but to claim that this promotes 'inclusiveness in national democracies' is strained. I doubt whether the removal of nationality-based restrictions on access to medical schools in Austria – whatever other values it might serve – supports any version of democracy.[52]

(ii) 'European constitutionalism allows national democracies to collectively regain control over transnational processes that evade their individual control'.[53] Does Maduro perhaps have in mind the *Viking* case,[54] in which the constitutionally-protected rights of a Finnish trade union were overridden by a ruling of the Court of Justice protecting freedom of establishment?

(iii) 'European constitutionalism can also constitute a form of self-imposed external constitutional discipline on national democracies.'[55] This is true, but if it is 'self-imposed' it is not the subject of an autonomous authority. And while it is undoubtedly a discipline, it is – as the two examples above indicate – the sort of discipline that limits rather than enhances democratic action.

(iv) 'It is the constitutional added value arising from the mutual correction of each other's constitutional shortcomings that requires pluralism to be maintained between the national and European constitutional orders.'[56] Although this statement asserts 'parity' and 'mutuality', no examples of any 'constitutional shortcomings' of the 'European constitutional order' that nation-states might be able to correct are offered.

It is evident that this third normative proposition considerably thickens the normative claim of 'EU constitutionalism', and it does so (to my mind) without adequately explaining any of the controversial assumptions being made. Are these difficulties alleviated by his final proposition, the 'thick

[51] Ibid 76–7.
[52] Case C-147/03 (7 July 2005).
[53] Maduro (n 44) 77.
[54] Case C-438/05 (11 December 2007).
[55] Maduro (n 44) 77.
[56] Ibid.

normative claim'? This claim is concisely stated: presently constitutional pluralism 'provides a closer approximation to the ideals of constitutionalism than either national constitutionalism or a form of EU constitutionalism modeled after state constitutionalism'.[57] So here we have it: whatever the empirical realities, the 'ideal of constitutionalism' is that to which we should aspire. It is constitutionalism, rather than any conception of democracy understood as the will of the people, that provides the essential legitimating instrument of modern politics.

Surely Maduro does not intend such a direct attack on democracy? Although promoting the principle of constitutional supremacy, he does recognize the concept of 'the people'. 'The Constitution', now mysteriously capitalized, 'both defines and presupposes a polity or political community whose members are bound by such constitution'.[58] And it is 'from this political community and its people that the democratic process draws its legitimacy'.[59] Here we find clear recognition of the importance of constitutional democracy. But then Maduro asks:

> [W]ho has the right to be considered as part of the people? And why should participation and representation be limited by the requirement of belongingness to such a polity? … Isn't a national demos a limit to democracy and constitutionalism? In fact … participation in national democracies is not granted to all those affected by the decisions of the national political process but only to those affected which are considered as citizens of the national polity. It is not the existence of democracy at national level that is contested but the extent of that democracy. There is a problem of inclusion faced by national polities.[60]

This amounts to a direct attack on the inclusionary–exclusionary dynamic that lies at the core of any political understanding. It is a direct attack on the concept of the political. And like many foundational attacks it deploys the tactic of impossibilism:

> National polities are often closed to many which would accept their political contract. National polities tend to exclude many which would accept their political contract and are affected by their policies simply because they are not part of the *demos* as understood in a certain ethno, cultural or historical sense. In this way, if national polities can be seen as an instrument of constitutionalism, they also limit its ambitions of full representation and participation.[61]

[57] Ibid 77–8.
[58] Ibid 78.
[59] Ibid.
[60] Ibid 78–9.
[61] Ibid 79.

For Maduro, we should not continue to talk about 'closed political spaces subject to an ultimate source of political authority' because we currently live in 'the postnational context'.[62] It would be difficult to find a clearer expression of what has been called the 'class consciousness of frequent travellers'.[63] Only once that world-view is adopted is the question resolved: 'constitutional pluralism does nothing more than adapt constitutionalism to the changing nature of the political authority and the political space'.[64]

The old manifestation of political pluralism was criticized for taking us down the path of total collectivism. This new manifestation leads us down the path of total liberal individualism or of total legalization, albeit a total legalization masquerading as total constitutionalism.

Conclusion

I have tried to show that the concept of constitutional pluralism that has emerged over the last decade as the core tenet of a 'school' of analysis of the 'European political space' is unable to sustain the claims made on its behalf. Constitutional pluralism fails both to provide evidence for its claims about the nature of existing relations between member states and the EU and to offer a coherent account of a sustainable future state. Its so-called empirical claims amount to a catalogue of unsubstantiated assertions about the 'autonomous' nature of EU institutional arrangements and a conflation of the concepts of legal with constitutional ordering. Its normative claims lead either to a radical claim of openness that undermines the basis of its own authority or to a modified 'pluralism under international law' that turns out to be monist rather than pluralist in nature.

The political domain is, without doubt, made up of a plurality of institutional arrangements and a plurality of beliefs and values. Since the political realm exists to enable us to negotiate differences (individual and collective) without resorting to violence, it might even be said that such pluralism is a precondition for the very existence of the political realm. The error that constitutional pluralists make is to assume that a pluralism of values or institutions can also be extended to a pluralism of foundations. Once the trivial claim – that every institution has a constitution – is set aside, constitutional pluralists are seen to offend against one of the basic laws of politics. That law has been expressed in a variety of formulations, ranging from Schmitt's friend–enemy distinction to what de Jouvenel called the

[62] Ibid 82.

[63] C Calhoun, 'The Class Consciousness of Frequent Travelers: Toward a Critique of Actually Existing Cosmopolitanism' (2002) 101 *South Atlantic Quarterly* 869–97.

[64] Maduro (n 44) 82.

'law of conservative exclusion'.[65] Destroy this basic law – the precondition for the establishment of political authority – and the domain of the political is destroyed. This is not an entirely inconceivable state of affairs to hypothesize. But to pretend that we have already reached this condition – a condition in which the collective association which possesses ultimate political authority no longer presents itself as a unitary entity able to take extreme collective action whenever its way of life is threatened – is to refuse to engage in serious political or legal analysis. From this perspective, constitutional pluralism, like 'dogmatic scepticism', is an oxymoron.

[65] C Schmitt, *The Concept of the Political* (G Schwab trans., University of Chicago Press, Chicago, 1996); B de Jouvenel, *The Pure Theory of Politics* (Cambridge University Press, Cambridge, 1963).