The legal world beyond the state: constitutional and pluralist?

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The paper examines constitutional pluralism as a theory of the 'legal world beyond the state'. It firstly maps the development of the idea of constitutional pluralism in the context of the European constitutional debate and discusses Mattias Kumm's suggestion that constitutional principles (which come under different names in his various writings) provide an alternative conception of legitimate constitutional authority to popular constitutionalism. The paper argues that this is true only when constitution is understood in instrumental terms – as framing the government. When it comes to its symbolic function, providing a symbolic foundation of a political community (regardless of its actual foundation), the principles alone are insufficient. This however should not mean that the language of constitutionalism is inappropriate in relation to the legal world beyond the state or that Kumm's insights would be irrelevant. Its grounds, however, lie in the idea of delegation of authority, which allows pluralism – in the sense espoused here. Understood in this way, it can move beyond Europe.

Constitutional pluralism

The concept of constitutional pluralism seems to be in fashion today, especially in relation to the study of the European Union and the nature of its legal order. But, it has paid a price for its popularity. It has gained so many meanings that the participants in the debate often talk past each other, each endorsing a different understanding of what constitutional pluralism actually means.[1]

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[1] Introductory notes in M Avbelj and J Komárek (eds), 'Four Visions of Constitutional Pluralism – Symposium Transcript', (2008) 2 *European Journal of Legal Studies* 325 (a transcript of a symposium organised by the editors with contributions by Julio Baquero Cruz, Mattias Kumm, Miguel Poiares Maduro and Neil Walker), 325.

As I understand it, constitutional pluralism presupposes that various constitutional authorities can compete over the same territory and the same legal relationships. Plural*ism* differs from a mere plural*ity* in that these authorities have equally plausible claims to constitutional authority as perceived by those who are subject to them. As a normative theory, constitutional pluralism suggests that irreconcilability of the competing normative claims is desirable. The competing claims to constitutional authority are therefore equally legitimate.

Understood in this way, it seems to provide an accurate description of what we have today in the European Union. In fact, the very concept emerged as a sophisticated response to the *Maastricht Decision* of the German Federal Constitutional Court[2] by the leading legal theorist late Neil MacCormick.[3]

As is well known, the German court, together with other highest courts in the Member States, has never accepted claims made by the European Court of Justice, according to which 'the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed'.[4] The 'rules of national law, however framed' included, according to the Court of Justice, 'fundamental rights as formulated by the constitution of [the Member States] or the principles of a national constitutional structure'.[5] This is what European lawyers know as principle of primacy or supremacy of European law. Contrary to the Court of Justice's assertions, national highest courts have always conditioned primacy of European law by its conformity with national constitutions or at least some of their provisions.[6]

MacCormick's article was a defence of the German Constitutional Court's approach towards authority of European law against criticism of lawyers specializing in the law of European integration, who seemed to accept the orthodox view of the Court of Justice. These lawyers perceived the approach of national highest courts a misconception, a misunderstanding of what the European integration truly entailed. *Legally* speaking, it made sense to say that once the Member States concluded an international agreement, they could not derogate from it on

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[2] Case 2 BvR 2134, 2159/92 *Maastricht* [1993] BVerfGE 89, 155, published in English as [1994] 1 CMLR 57.

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

[4] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3.

[5] Ibid.

[6] See M Claes, *National Courts' Mandate in the European Constitution* (Hart 2006).

the basis of their internal legal arrangements. Primacy of European Union law would be eventually defended on the basis of *pacta sunt servanda* principle. That is why some scholars claim that European integration can be understood in terms of 'classical' international law.[7] The Court of Justice did not require more than any international court would have, had it jurisdiction to answer the questions that the Court of Justice encountered in cases that led to the formulation of the principle of primacy. MacCormick presented an alternative, quite sophisticated understanding of the relationship between European and national legal systems, which was rather rare at the time when he published it.

It wasn't just strict 'legalists' who would see the national highest courts' position as illegitimate. One of the most influential accounts of the European integration of the time, Joseph Weiler's 'The Transformation of Europe'[8] explained why such a legally strict understanding of authority of European law was possible: it was complemented by political processes that remained intergovernmental. In other words, the Member States (or more precisely, their governments) kept control over their commitments. Weiler did not theorize in his article the response of national highest courts in a way that would defend what they were doing. Instead, he compared the discipline required by the law of the European integration from the Member States to that of a federal state,[9] which did not leave much room for constitutional pluralism as originally conceived by Neil Mac Cormick.[10]

However, even the Court of Justice did not limit itself to such the legalized understanding of the authority of European law. The Court further supported its claims by the direct relationship between the law of European integration and the people in the Member States.[11] For Miguel Maduro, another constitutional pluralist, it was therefore 'clear' that the law of European integration 'was to be constructed autonomously from national and international legal orders and that its basic legal framework should be based on constitutional law and not

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[7] See Bruno De Witte, 'The European Union as an International Legal Experiment', forthcoming in G de Burca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press).

[8] (1991) 100 *Yale Law Journal* 2403.

[9] Joseph H Weiler, 'Federalism without Constitutionalism: Europe's Sonderweg', in K Nicolaidis (ed), *The Federal Vision, Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001), at 56.

[10] See also Weiler's critique of the *Maastricht Decision*: 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision', (1995) 1 *European Law Journal* 219.

[11] Case 26/62 *Van Gend en Loos* [1963] ECR 1, 12.

international law'.[12] This, in Maduro's view, distinguished the Foundational Treaties from ordinary international treaties that states conclude among themselves.

To bestow European law with constitutional authority did not mean automatically that the constitutions of the Member States would have been automatically subordinated to it. This was MacCormick's suggestion: 'the most appropriate analysis of the relations of [the European and national] legal systems is pluralistic rather than monistic, and interactive rather than hierarchical'.[13] Having constitutional authority, European law would therefore compete with national constitutions on equal terms – none of them would have prima facie claim to primacy in case of conflict, since both were 'constitutional' properly speaking. But what the 'constitutional' actually meant?

The 'c' word

This question became relevant beyond academic legal circles when the official European politics set its heart on the idea of a formal, written constitution of the European Union.[14] While some feared that its adoption would end the independent existence of the Member States, others downplayed its importance saying that even golf clubs have their constitutions. The concept was used rather differently for different purposes.

One of the attempts to provide 'analytical clarification' in the confused European debate was Mattias Kumm.[15] There are of course far more attempts to define the meaning of the constitution and constitutionalism which is *really* at stake in the European debate and I will get to some of them later. But because Mattias Kumm seems to belong to the 'constitutional pluralist' camp, I will use his analysis to bring home my own points.

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[12] Miguel Poiares Maduro, 'How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union', in JHH Weiler and CL Eisgruber (eds), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper No 5/04, http://www.jeanmonnetprogram.org/papers/04/040501-18.html, 9. For a critical assessment of this link between law of European integration and individuals and its implications for constitutionalisation of the former see Marco Dani, 'Constitutionalism and Dissonances: Has Europe Paid Off Its Debt to Functionalism?' (2009) 15 *European Law Journal* 324.

[13] MacCormick, n 3 at 265.

[14] See D Castiglione et al, *Constitutional Politics in the European Union: The Convention Moment and its Aftermath* (Palgrave Macmillan 2007).

[15] See particularly 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly So Called' (2006) 54 *American Journal of Comparative Law* 505.

According to Kumm, it was quite appropriate and uncontroversial to talk about the EU constitution in at least two senses: either in a *formal sense* (textually entrenched set of documents, having the highest rank in the legal system and a comparatively burdensome procedure for its amendment) or in a *material (functional) sense* (establishment and organization of public institutions, their objectives, as well constraints of these institutions in the form of fundamental rights guaranteed to citizens; making public institutions subject to judicial review).[16] The 'real debate' concerned, in Kumm's opinion, something else – a constitution which

> makes a claim to establish a legally independent authority, an independent legal system that structures and legitimates a political process. Its independence lies in the fact that it does not derive its authority from any other legal authority. Here lies the connection between the existence of a constitution properly so called and the highly disputed claim that European law establishes the supreme law of the land. European law can make a plausible claim to authority only, if it has a constitution in the strong sense and does not derive its authority from the will of Member States.[17]

It was a constitution in 'a strong normative sense to refer to the establishment of a legitimate constitutional authority'[18] that was at stake in the heated European debate according to Kumm.

The most prominent accounts of legitimate constitutional authority, Kumm suggested, start from the 'emphatic republican tradition'.[19] In this tradition 'we the people', as the *pouvoir constituant* - the ultimate source of all legal and political authority – have established their own constitution. I assume that many people would call this conception 'popular constitutionalism'.

Those who deny constitutional nature of the European Union claim that the Union does not have its own 'we the people'. It cannot therefore have its own constitution in the strong normative sense. It only has a set of foundational international treaties, whose normative force

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[16] Ibid at 507-509.

[17] Ibid at 509.

[18] Ibid. Kumm does not seem to make a distinction between 'constitution' and 'constitutionalism' and in the further text uses the term 'legitimate constitutional authority'. I follow his terminology and explain below why it can cause some confusion in the debate on the nature of the 'legal world beyond the state'.

[19] Ibid.

is ultimately derived from national constitutions. National constitutions only are linked to the true source of authority and legitimacy: the people of the particular Member States.[20] Because of its derivative nature, European law can never trump national constitutions, unless they would expressly provide so.[21]

Kumm suggested that there are conceptions of legitimate constitutional authority that provide genuine alternatives to popular constitutionalism.

The first was 'legitimacy as constitutional legality'. According to Kumm, those who argue for primacy of European law over national constitutions on the basis of the need for securing uniform and effective enforcement of EU law, in fact (although perhaps implicitly) propose a particular conception of legitimate constitutional authority, which does not take 'we the people' as its basis:

> There may not be a European People and a European democracy in a meaningful sense, but the value of constitutional self-government is not absolute. The idea of Europe as a legal community – a Rechtsgemeinschaft – integrated by European institutions and European law in the service of prosperity and peace trumps the limitations this imposes on constitutional self-government.[22]

However, those who argue for constitutional authority of European law can simply assume that European 'we the people' do exist. In fact, the Court of Justice itself refers to 'the people in the Member States' in its foundational judgments. For some, we have seen, it was precisely this direct link to the people that justified claims made by the Court of Justice. Sure, theorizing the European 'we the people' would present a considerable task, but it did not mean that popular constitutionalism – as a concept of legitimate constitutional authority - was completely abandoned. It only requires a new understanding of what 'popular' should mean.[23]

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[20] The so called "no demos thesis", expressed most famously by the German Federal Constitutional Court in its Maastricht decision (n 2). For a critical appraisal of the decision see JHH Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision', (1995) 1 *European Law Journal* 219.

[21] Kumm (Beyond Golf Clubs), n 16 at 510. One may add that some constitutional courts (including the German one) interpret their constitution as excluding such a possibility – at least with regard to some essential provisions of the constitution.

[22] Ibid at 515.

[23] This understanding of the grounds of the EU constitutional authority is illustrated by Maduro's criticism of the Court of Justice's approach to disputes concerning competences, where the Court favours legal bases that give more power to the European Parliament. In his Opinion in Case C-411/06 *Commission v Parliament and Council*

Another alternative, in Kumm's view, was 'constitutionally tolerant dualism', clearly referring to Joseph Weiler,[24] but other scholars would, according to Kumm, fall under this label as well, either conservative Paul Kirchhoff or as liberal as Weiler – e.g. Dieter Grimm. However, also in these conceptions constitutional legitimacy and authority of the EU were still ultimately derived from national constitutions, which in the name of the peaceful coexistence of European nations *themselves* imposed some limitations on their authority. These limitations ascertain mutual tolerance in the European constitutional space and are justified by the need to prevent repeating evils caused by the nation states in the course of the first half of the 20th century, particularly during the Second World War.[25] The ultimate source of this limitation does not lie in an independent EU constitution, but in the constitutions of its Member States – their constitutionally tolerant approach to constitutional authority that transcends them. So again, this is not a true alternative to popular constitutionalism.

The same logic applies in my view to economic constitutionalism, not discussed by Kumm: supranational governance adds rationality to the market governance executed on the national level and assists in overcoming the latter's limitations of the state authority, which cannot tackle all problems of the globalised trade. This is partly what Maduro seems to suggest in his early work *We the Court*.[26] Similarly, arguments supporting constitutional authority of the European Union by its ability to remedy defects of constitutionalism limited to the state,[27] ultimately point to the people, albeit these 'people' can be different from 'we the people' of the state.

The only true alternative to popular constitutionalism seems to be Kumm's own conception: 'Principles of Common European Constitutionalism'.[28] According to it, the EU Founding

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[2009] ECR I-7585, fn 5, Maduro notes: 'The balance between the powers conferred on the European Parliament and the other institutions as expressed in the different legislative procedures has evolved over time and reflects the balance which the peoples of Europe have wanted between national and European means of giving legitimacy to the exercise of power at European level'.

[24] Kumm (Beyond Golf Clubs), n 16 at 515-517. For the principle of constitutional tolerance see Joseph HH Weiler, 'In defence of the status quo: Europe's constitutional *Sonderweg*', in JHH Weiler and M Wind, *European Constitutionalism Beyond the State* (CUP, Cambridge 2003), 7-23 (hereafter "Sonderweg") at 18-23.

[25] This ethos of the European integration is stressed e.g. in Weiler (Does Europe Need a Constitution?), op. cit. n. 20.

[26] *We the Court. The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Hart 1998).

[27] Miguel Poiares Maduro, 'Europe and the Constitution: *What if this is As Good As It Gets?*', in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press 2003).

[28] Kumm (Beyond Golf Clubs), n 16 at 517 et seq.

Treaties may be understood as the constitution in a strong normative sense since they make 'a claim to legitimate authority that is grounded in republican principles'.[29] These principles 'are a common heritage of the European constitutional tradition as it has emerged in the second half of the 20th century'.[30] The EU, 'in its self-presentation, is neither founded on the will of a European 'We the People', nor is it founded on the 'will of the Member States"'.[31]

A truly legitimate authority must, according to Kumm, treat these principles (together with human rights) as mutually complementary and find solution which satisfies them in the best way.[32] According to Kumm:

> The principle of legality and its extension beyond the nation state has an important role to play to support the authority of EU Law, but concerns relating to democracy and human rights may provide countervailing reasons for limiting the authority of EU Law in certain circumstances. Furthermore, the republican principles that govern the relationship between national and EU Law do not themselves derive their authority from either the national constitution or EU Law. The relative authority of EU and national constitutions is a question to be determined by striking the appropriate balance between competing principles of constitutional republicanism in a concrete context.[33]

Kumm has used the same framework beyond the European Union. 'Emphatic republicanism', the original target of Kumm's criticism, became either 'statist paradigm' of constitutionalism[34] or 'democratic statism';[35] Kumm's own conception either 'cosmopolitan

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[29] Ibid at 517.

[30] Ibid.

[31] Ibid.

[32] This Kumm's idea is linked to his other work, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', (2005) 11 *European Law Journal* 262, where he presented the 'principle of best fit' as a meta principle, guiding courts in the process of balancing republican principles (called slightly differently there; Kumm also adds the principle of subsidiarity, which he does not mention in his 'Beyond Golf Clubs').

[33] Ibid at 527.

[34] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in JL Dunoff, JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2010).

[35] Mattias Kumm, 'The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia' in P Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010).

paradigm'[36] or 'practice based conception of constitutionalism'.[37] One is tempted to call Kumm's conception 'unpopular constitutionalism', since as I understand his work, Mattias Kumm argues constantly against popular constitutionalism.

Other approaches that theorize constitutional authority of the European Union (some of them mentioned above)[38] are not easily transposable beyond that context, since they (although implicitly) assume that the European Union has qualities that distinguish it from both federal states on the one hand and international organizations on another. At the heart of these assumptions, I suspect, is the unexpressed conceptual tie between constitutions and the people – as manifested by the fact that these theories do not really present alternatives to popular constitutionalism. Neil Walker therefore sees the European Union as a 'regional comfort zone for the ideas of constitutional pluralism'.[39]

Before I come back to this question, I need to explore what pluralism entails.

Pluralism

It is possible to argue against Kumm's conception of constitutionalism on different grounds. One can, for example, wonder whether the establishment of a constitution that 'makes a claim to establish a legally independent authority, an independent legal system that structures and legitimates a political process'[40] was really the main issue in the European constitutional debate.

Not only do constitutions constitute political systems and frame the system of government in it, they can also be constitutive of a political community – which at the same time adopts the constitution and is formed by the constitution.[41] Establishing 'a legally independent authority'

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[36] Kumm (Cosmopolitan Turn), n 34.

[37] Kumm (The Best of Times), n 35.

[38] For a more complete overview see M Avbelj, 'Questioning EU Constitutionalisms' (2008) 9 *German Law Journal* 1.

[39] Neil Walker, 'Constitutionalism and Pluralism in Global Context', forthcoming in M Avbelj and J Komarek (eds), *Constitutional Pluralism in Europe and Beyond* (Hart).

[40] See n 17.

[41] See Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010), 27-68. This is what makes foundations of modern constitutions paradoxical. See M Loughlin and n Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008).

of the European Union is one thing, and establishing a new political community on the level of the European Union is another. The real debate could well have been about the latter. This seems to be confirmed by a rather lighthearted confirmation by all Member States of the European Court of Justice's claims in the Declaration concerning primacy, which is now annexed to the Treaty of Lisbon.[42]

Kumm denies that this understanding of constitutionalism – 'foundational constitutionalism', as some people call it – should ground legitimate authority of constitutions and refers to several instances where the process of establishing the Constitution could hardly be linked to 'we the people' – including the German one.[43]

This, however, ignores the symbolic function of constitutions – which is as important as their role in establishing and framing the political system, which can be called instrumental.[44] It is not important how constitutions were actually established, but what they represent in the imagination of those who are subject to them and who believe to be constituted by them. Even if the link to the past is consciously erased from the imagination of 'we the people', what matters is that they believe that the Constitution holds them together a political community. It is the German Constitution which expresses what it means to be German – regardless of the fact that it originated as a document drafted by experts, not representatives of the people, which was subject to approval of Allied Powers, and not Germans, and which is not, after all, called the Constitution but just the Basic Law. It is constitutional patriotism, if you will.[45]

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[42] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, [2007] OJ C 306/1 at 256. The declaration concerning primacy reads: 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law […]'. The Declaration then refers to a legal opinion prepared by the Council legal service, which is even more explicit and refers to Case 6/64 *Costa* [1964] ECR 585, from which it quotes: ''It follows (…) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question'.

[43] Kumm (The Best of Times), n 35 at 207-208.

[44] Martin Loughlin, 'What is Constitutionalisation?' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010) at 52.

[45] Kumm discusses this concept of constitutionalism in 'Why Europeans will not embrace constitutional patriotism' (2008) 6 *International Journal of Constitutional Law* 117 and argues that to provide for a thick constitutional identity, there must be a meaningful electoral politics – which does not exist in the European Union.

In that way, it may well be that it is not possible to have a constitution beyond the state, which would be fulfilling such a symbolic, or foundational role, unless we wanted to create a political community beyond the state – some sort of 'beyond the state people'. We are back to the questions that have been debated in the European Union for years. This led Nico Krisch to move the debate 'Beyond Constitutionalism' and use pluralism without the 'c-modifier' as the right conceptual tool to grasp the 'legal world beyond the state'.[46]

But apart from *this* debate, is it possible to talk of constitutional pluralism beyond the state in some *other* meaningful sense?

Constitutional pluralism as an extension of constitutionalism *within* the state

Martin Loughlin has recently suggested that at the moment when modern constitutions were born (referring to the French and the US revolutions), two rival articulations of constitutionalism existed. They both sought to address the problem that 'once adopted, the Constitution must be protected from the people… Notwithstanding the rhetorical claim that government receives its authority from the people, the government must possess the capacity to control and manage the people'.[47] This refers to the instrumental function of the constitution, concerning framing of the government of an existing political community, as opposed to its symbolic function, which is linked to the existence of that community.

One conception, which Loughlin calls 'republican-political constitutionalism', takes the establishment of checks and balances as a primary mechanism. 'The Constitution is thus conceived as establishing an elaborate institutional configuration through which all political action is channelled, but is held in tension – in a state of irresolution'.[48] The competing conception, 'liberal-legal constitutionalism', puts 'greater importance on the role of a small elite in maintaining political power and constitutional stability'.[49] The 'small elite' was of course the Supreme Court; judicial review was critical for the ultimate success of the liberal-legal conception of constitutionalism. The Constitution became 'what the Court said it was'.

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[46] N. 41. This does not make the task anyhow easier, since there seems to be as many understandings of pluralism as there are of constitutionalism. See ibid at 69-105.

[47] Ibid at 56.

[48] Ibid.

[49] Ibid at 57.

This liberal-legal conception of constitutionalism seems to dominate the current debate of 'constitutionalisation'. It is dominantly understood as 'processes by which an increasing range of public life is being subjected to the discipline of the norms of liberal-legal constitutionalism'.[50] Loughlin argues that

> [t]he concept of constitution here being invoked is much closer to that of constitutional text than the way of being of a people. But the concept of constitution in this new account refers not so much to the text itself but rather the set of norms that are assumed to underpin it: it asserts a concept of constitution as a set of rational principles. Questions about the source of authority of these principles tend to be avoided; the norms of right conduct prescribed in these texts acquire their authority from precepts of reason rather than approval of 'the people'.[51]

This clearly refers to Mattias Kumm's account of constitutionalism. Kumm does not explain what the source of authority of the Principles of Common European Constitutionalism would be. Instead, he refers to the actual practice of various highest courts, the German Constitutional Court most prominently.[52] After all, one of the (many) titles he uses for his conception is 'practice based conception of constitutionalism'.[53] Kumm invokes instances where national highest courts faced conflicts between their own constitution and another legal authority and suggests that the best interpretation of their decisions corresponds to his theory.

One of Kumm's central claims is that these courts reached decisions that did not depend on their constitutions. In Kumm's opinion, within the 'statist paradigm' of constitutionalism, the German Constitutional Court could either accept the European Court of Justice's contention that European law was the new 'supreme law of the land' or to maintain that the foundational treaties should be treated like any other international treaty, thus incapable to override domestic constitution.[54] It was only within Kumm's framework that the German court could

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[50] Ibid at 61.

[51] Ibid.

[52] See particularly 'Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *Common Market Law Review* 351.

[53] See n 37.

[54] Kumm, n 35 at 215-216.

adopt ‘an intermediate solution’ and to assess the claims made by European law in the light of the ‘Principles of Common European Constitutionalism’.[55]

However, I think that Kumm’s argument can be reformulated in the light of the distinction between the instrumental and symbolic function of constitutions. Sure, the German court interpreted relevant provisions of the Constitution in a way that was not obvious from its express terms. Kumm points out that at the time when the German court issued its first decisions that allowed for a possibility of European law to override the Constitution, the Constitution itself contained no specific provisions concerning the European integration (although its Preamble mentioned Germany’s commitment to strive for peace in a united Europe). However, to interpret the Constitution in a way the German court did not mean to change the symbolic understanding of the Constitution suggested above and to abandon the Constitution as a point of reference completely. It is still the link of the German constitution to the German people that ultimately legitimates authority of European law, which can change the instrumental function of the constitution to a significant extent: to change the internal division of powers or exclude judicial review in certain fields.

On the other hand, it does not mean that Kumm’s framework would be totally irrelevant. In so far as national constitutional courts need to engage with legal authority that comes from ‘beyond the state’, Kumm’s ‘Principles of Common European Constitutionalism’ provide the framework within which they can interpret the limits of delegation made by the Constitution. Kumm is right, it is not important what the actual source of authority that competes with the Constitution is, since that authority can obtain an equal standing within the framework of national constitution. This is what the Polish Constitutional Tribunal recognized when it refused to invalidate provisions of ordinary domestic legislation that implemented requirements of the European Arrest Warrant Framework Decision.[56] The Tribunal referred to Article 9 of the Polish Constitution, which states that Poland ‘shall respect international law binding upon it’. A mere annulment of the provision implementing Poland’s obligations stemming from the EAW Framework Decision would have inevitably led to a breach of this constitutional principle.

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[55] Ibid at 216-218.

[56] Case P 1/05, published in English as [2006] 1 CMLR 36. See Jan Komárek, ‘European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles", (2007) 44 *Common Market Law Review* 9.

However, 'Principles of Common European Constitutionalism' are not in competition with foundational constitutionalism, since they operate at a different level: the level of practice, which concerns the instrumental, not the symbolic function of the constitution. They therefore make it possible to interpret national constitutions without undermining their function as a symbolic foundation of the political community. This can sometimes lead to international obligations' overriding provisions of national constitutions, depending on how the national constitutional court balances the competing provisions. Such balancing is excluded only as regards those constitutional provisions that are linked to the symbolic function of the constitution.

There is another indication that Kumm's interpretation of the 'legal world beyond the state' is not entirely correct. According to Kumm, European law makes the claim to be 'Supreme Law of the Land' – which would suggest that it is European law, not national constitutions, that are the ultimate source of validity of the law applicable in the Member States – including national constitutions. This understanding is further suggested by the label, which Kumm gives to this view: European or legalist monism.[57] But this is not what the European Court of Justice claims. Its requirements are much more modest: it only claims that European law's authority is to be independent from national constitutions. Its position seems 'monist' from one perspective, because it concerns the legal orders of all Member States. But this follows from the fact that the scope of application of the EU Treaties covers all Member States. It does not mean, however, that the European Court of Justice would want to claim that from the moment when the Treaties were concluded, they also provide the universal foundation of all law of the Member States – including their constitutions.[58]

This understanding of EU law is further confirmed by the nature of European law. This may not be popular among some European constitutionalists, but the scope of the Treaties is, or at least was until recently, very limited. If we look at what the EU is actually doing, it is not so much democracy, fundamental rights and other noble principles listed in Article 6 TEU and invoked by Kumm. The core function of the EU was economic integration, not creation of a

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[57] It is the interpretation summarized above at n 22. See also Mattias Kumm, 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism', forthcoming in M Avbelj and J Komárek (eds), *Constitutional Pluralism in Europe and Beyond* (Hart 2011).

[58] There is a more sophisticated understanding of monism, advocated by Alexander Somek. See 'Monism: a Tale of the Undead', forthcoming in M Avbelj and J Komárek (eds), *Constitutional Pluralism in Europe and Beyond* (Hart 2011) (available at http://ssrn.com/abstract=1606909).

new political community based on those values.[59] Just have a look at what kind of legislation is being adopted by the EU and what kind of cases dominates the jurisprudential output of the European Court of Justice.[60] Sure, quantity should not obscure fundamental nature of relatively few cases, but the economic logic still seems to dominate actual outcomes of the cases – despite all the rhetoric.[61]

One strategy of making it possible for European law to compete with provisions of national constitutions is to re-interpret these core functions of the EU so as they in fact link to national constitutions, be it in form of remedying deficits of constitutionalism limited to the state or in the form of constitutional tolerance.[62]

Another, equally plausible, strategy, I think, is to accept that the authority of the EU is ultimately grounded in the delegation clauses of national constitutions and not in principles that are independent from that source.

This brings us back to the idea of republican-political constitutionalism, connected to the belief that the public authority of the state can be controlled by dividing its powers among different institutions. As we have seen, the competing conception, liberal-legal constitutionalism granted the exclusive power to interpret the Constitution to the Supreme Court and had for a significant time dominated the constitutional discourse in the United States. To admit, on then other hand, that legal norms which belong to the legal order to which national constitution delegated authority can compete with other provisions of the Constitution, combined with the existence of an institution that can interpret the legal norms belonging to that delegated legal system independently from national highest courts (most prominently the European Court of Justice) can bring the idea of liberal-political constitutionalism back to the fore. It is in this sense that Daniel Halberstam suggests that pluralism is inherent to constitutionalism – by establishing heterarchy, not hierarchy.[63]

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[59] For an elaborate expression of this argument see Dani, n 12.

[60] On this see Damian Chalmers, 'Judicial Authority and the Constitutional Treaty' (2005) 3 *International Journal of Constitutional Law* 448, 454-458.

[61] Some people, that despite the formal abandonment of the 'constitutional concept' by the highest political circles in the EU, the Lisbon Treaty in fact represent a fundamental reconfiguration of the EU. See Opinion of Advocate General Sharpston in Case C-34/09 *Ruiz Zambrano*, not yet reported, paragraphs 151-177.

[62] See the text accompanying nn 24-27.

[63] See Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government* (Cambridge University Press, Cambridge 2009).

Delegation is its extension beyond the state, which makes it functioning at the time when domestically, it is liberal-legal conception that dominates.

The unsettledness at the same time prevents the liberal-legal conception to dominate beyond the state. While in practice it is highly unlikely that any branch of the US Government would openly challenge the Supreme Court's final word on matters concerning interpretation of the Constitution, the unsettled authority of the European Court of Justice, challenged by national highest courts and occasionally also national politicians, is a living reality. The same can apply to other legal orders to which national constitution delegate authority – be it the European Convention, UN sanction regime or global risk regulation.[64] In this way then, the legal world beyond the state can be understood as constitutional and pluralist at the same time.

[64] On the analysis of these legal regimes and their interaction with national constitutions and other legal regimes see Krisch, n 41 at 109-222.