



# **Constitutional Pluralism**

## Chronicle of a Death Foretold?

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## **Abstract**

What remains of constitutional pluralism in the wake of the Euro crisis? According to the new anti-pluralists, the recent Outright Monetary Transactions (OMT) saga signals its demise, calling to an end the tense stalemate between the European Court of Justice (ECJ) and the German Constitutional Court on the question of ultimate authority. With the ECJ's checkmate, OMT represents a new stage in the constitutionalisation of the European Union, towards a fully monist order. Since constitutional pluralism was an inherently unstable and undesirable compromise, that is both inevitable and to be welcomed. It is argued here that this is misguided in attending to the formal at the expense of the material dimension of constitutional development, which is not to say that constitutional pluralism is alive and well; on the contrary it is in a precarious state. The material perspective reveals a deeply dysfunctional constitutional dynamic, of which the judicial battle in OMT is merely a surface reflection. This dynamic now reaches a critical juncture, encapsulated in the debate over 'Grexit', and the material conflict between solidarity and austerity. Constitutional pluralism, in conclusion, may be worth defending, but as a normative plea for the co-existence of a horizontal plurality of constitutional orders. This requires radical constitutional re-imagining of the European project.

## **Keywords**

European Constitutional Law - European Integration - Legal Pluralism - Legal Theory - Political Pluralism

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## 1. Introduction

Is constitutional pluralism – so long a dominant referent in the constitutional theory of the European Union – another casualty of the Euro crisis? It has recently been argued that the Outright Monetary Transactions (OMT) ruling of the European Court of Justice (ECJ), in response to the first preliminary reference ever submitted by the German Constitutional Court, signposts its demise.<sup>1</sup> Specifically, the ECJ's strident defence of the supremacy of EU law over national law, and of its own authority to determine the boundaries of the EU's competence (the so-called judicial *Kompetenz-Kompetenz*) in the face, initially, of fierce resistance from the German court, has elicited its obituary.<sup>2</sup>

Developed in the wake of the German Constitutional Court's *Maastricht Urteil*, constitutional pluralism captured the uneasy but apparently functional compromise between the German court and the ECJ on the question of who has the ultimate authority to determine the validity of EU and by extension domestic law.<sup>3</sup> The answer of the pluralists, in short, was that both enjoy that authority within their own jurisdictions and, provided each treat their authority and the authority of the other with caution, respect and discretion, outright conflict could be avoided and openness (or ambiguity) on the question of the final arbiter retained.

This arrangement, thought to be based on mutual accommodation and informal dialogue, is now said to have been brought to a close, ironically, with the first ever 'formal' conversation between Karlsruhe and Luxembourg. After OMT, the new anti-pluralists contend, constitutional pluralism can be presumed dead, obsolete in the EU's present phase of integration.<sup>4</sup>

The current demise of constitutional pluralism is then read as a sign of its immanent dysfunctionality: a chronicle of a death foretold. The tense compromise between judicial authorities would inevitably have collapsed eventually; it would then be undesirable because the rule of law requires certainty and uniformity of application. This could only be guaranteed by an unequivocal acceptance of the supremacy of EU law and of the authority of the ECJ to interpret EU law and determine questions of legal validity decisively and *for all* member states, without national reservations. When

<sup>1</sup> See F. Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States', (2015) 16 *German Law Journal*, 1003-1024; D. Kelemen, 'On the Unsustainability of Constitutional Pluralism' in F. Fabbrini (ed.) 'The ECJ, the ECB and the Supremacy of EU Law: Special Issue', (2016) 23 *Maastricht Journal of European and Comparative Law*, 136-151.

<sup>2</sup> Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* EU: C: 2015: 400 (16 June 2015); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 2728/13 (14 January 2014, 21 June 2016).

<sup>3</sup> See N. MacCormick, 'The Maastricht Urteil: Sovereignty Now', (1995) 1 *European Law Journal*, 259-266; N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999); N. Walker, 'The Idea of Constitutional Pluralism', (2002) 65 *Modern Law Review*, 317-359. For a representative collection of essays on constitutional pluralism, including its later iterations, see M. Avbelj and J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart, 2012). See most recently, N. Walker, 'Constitutional Pluralism Revisited', (2016) 22 *European Law Journal*, 333-355.

<sup>4</sup> F. Fabbrini, D. Kelemen, op. cit.

contest spilled over into conflict, transnational legality would be threatened. Functional and normative arguments are thus conflated into one fierce indictment – constitutional pluralism is not only an ‘oxymoron’,<sup>5</sup> it is also based on an ‘illogical’ and even ‘immoral’ concession to domestic legal authority, permitting a form of national ‘cherry picking’ in a way that violates basic principles of member state equality.<sup>6</sup> The ECJ’s victory in OMT should therefore be celebrated and European constitutional monism fully embraced.<sup>7</sup>

It is argued here that the focus of these attacks on constitutional pluralism and their celebration of EU judicial supremacy is misplaced, one-sided in attending to the formal at the expense of the material dimensions of constitutional development. This elision obscures the *dysfunctional* evolution of the EU, particularly since the Euro crisis, a dysfunctionality that will not be resolved by judicial fiat alone and may well be aggravated by it.

To see why, we need to look beyond the judicial skirmish in OMT, which is but a surface reflection of more expansive and evolving political, institutional and ideological battles raging throughout the Eurozone and the EU as a whole. The Court in OMT rubber-stamps a central bank programme deemed essential to the Euro’s survival, but which has doubtful constitutional credentials and is based on a rationale that looks increasingly shaky, the ‘irreversibility’ of the Euro. However decisive OMT may be for the question of legal authority and judicial *Kompetenz-Kompetenz*, the wider battle for political authority over the Euro and over the EU continues to be fought. OMT is not incidental to the material outcome of this political contestation, but it is far from decisive.

This wider sense of unease is exposed by the fact that those advocating the ECJ’s unequivocal juridical supremacy, and celebrating its stark assertion in OMT, resort to balancing it against a crude reassertion of member state sovereignty: a constitutional balance is maintained because the ultimate political authority to withdraw (or renegotiate membership) remains vested firmly with the member states. If it was once held that exit was unthinkable, only a formal option, this authority, since the ‘Brexit’ referendum, no longer looks merely hypothetical. In the anti-pluralist account, in other words, OMT represents a purely juridical federal constitutional moment, supposedly balanced by a resolutely anti-federal political authority.

It is a curious form of integration that relies for its affirmation on the continuing possibility and (growing) threat of political disintegration. It tells us little about how political authority is materially transformed *in the interim* (including through membership of the Eurozone itself). Focusing on the assertion of judicial hierarchy not only ignores that what is at stake is a controversial programme of central bank fiat, it also overlooks the fragmentary and centrifugal forces generated by, and through the

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<sup>5</sup> M. Loughlin, ‘Constitutional Pluralism: An Oxymoron?’ (2014) 3 *Global Constitutionalism*, 9–30.

<sup>6</sup> D. Kelemen, *op. cit.*, 139.

<sup>7</sup> F. Fabbrini, *op. cit.*, 1023: ‘As much as the prospect of a nullification of the ECB OMT program by the BVerfG sheds dark clouds on the future of the EU, the case may serve as the opportunity to clarify once and for all that, in our Union of states, no state court is above the common law.’

response to, the Euro crisis. In the Eurozone, these were highlighted by the mooted suggestion of 'Grexit' from the single currency, casting into doubt the 'irreversibility' of the Euro which was used to justify OMT as well as the voluntariness of Euro membership.

Constitutional pluralism, in any meaningful sense, must capture this complex dynamic of constitutional change, formal and material, integrating national and supranational domains as part of a single movement.<sup>8</sup> With this in mind, the significance of constitutional pluralism, far from disappearing, is heightened in response to an increasingly asymmetric union, captured not only by the increasing dominance of executive powers in the EU and its member states (including the European Central Bank (ECB) itself), but by imbalances between larger and smaller, and creditor and debtor nations. It is also heightened by the ideological ruptures and anti-systemic backlashes across the region, both in the periphery and in the core of Europe.<sup>9</sup> Judicial relations are an important part of this picture, but they are just a part. The fact that even judicial relations are spilling over into outright conflict is a significant but surface reflection of these deeper material conflicts.

A fuller viewpoint suggests that, normatively, constitutional pluralism should not be abandoned but rather reframed as an ideal: the political co-existence of a 'horizontal plurality' of domestic constitutional orders. The challenge for constitutional pluralists, in other words, is different from that highlighted by many of its proponents (as well as detractors). Rather than a question of how national and European juridical authorities can coexist without formal hierarchy, the pressing question, revealed in force since the Euro crisis, is how national constitutionalisms can materially co-exist in a harmonious (and heterarchical) fashion. To put it crudely, how, within the political association, can the German constitution cohabit with the Greek, where one demands the austerity measures that the other proscribes? If the project of European integration was meant to provide a solution to this problem of material constitutional co-existence, it is a project in need of serious reassessment.

The paper proceeds as follows: First, it presents the case for OMT signalling the end of constitutional pluralism and signposting a new stage in the process of constitutionalisation of the European Union (part 2). Some internal doubts are then expressed about the force and coherence of this position, both functionally and normatively (part 3). More problematically, however, the position misrepresents constitutional phenomena by supposing an untenable dualism between legal and political authority (part 4). What is required to remedy this defect is a material account of constitutional change (part 5). This suggests an increasingly dysfunctional trajectory, amounting to a

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<sup>8</sup> See, e.g., N. Walker, 'The Place of European Law' in G. de Burca and J. H. H. Weiler (eds) *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2011). More recently, Walker notes that constitutional pluralism must 'reach beneath the legal topsoil to deeper political roots' and be considered, 'as much a matter of political theory as of legal theory', see N. Walker, 'Revisited', op. cit., 3.

<sup>9</sup> Anti-systemic pressures extend beyond the troubles associated with 'Brexit' and 'Grexit', as demonstrated by the concerns over constitutional developments in Poland and Hungary, specifically over the safeguarding of the rule of law. Those developments are largely beyond the scope of this article.

constitutional conjuncture in the present Euro crisis phase, which materially threatens constitutional pluralism (part 6). In response, I argue for a reframing of constitutional pluralism rather than for the abandonment of the idea altogether (part 7). Otherwise, I suggest in conclusion, the EU will struggle to maintain its animating ideals (part 8).

## 2. The end of the affair?

Did the compromise and accommodation between national courts and the ECJ come to an end with the first ever occasion on which Karlsruhe used the court-to-court procedure? The idea of a 'dialogue' between domestic and European courts was first inspired by its early *Solange* jurisprudence.<sup>10</sup> This was in reality less a dialogue than a standoff, each court insisting on the ultimate authority to determine the boundaries of legal validity, but holding off on pulling the trigger provided certain guarantees were met – relating in the first instance to fundamental rights. The post-*Solange* framework reconciled clashing claims to ultimate authority on the basis of provisional yielding: each court would yield to the other so long as a minimal threshold of respect for its basic values was upheld.<sup>11</sup>

Pluralist and experimentalist scholars viewed these competing authority claims in a potentially positive light.<sup>12</sup> In practice, formal divergence on the issue of *Kompetenz-Kompetenz* would be mitigated by the propensity to forge increasing points of material convergence, as the *Solange* jurisprudence was seen as a kind of legal educational tool.<sup>13</sup> In practice, the dynamic between domestic and European legal orders pushed the system as a whole to develop a greater concern for fundamental rights, omitted for historical reasons from the founding Treaties but incorporated by the ECJ into the unwritten general principles of law under pressure from German and Italian courts.<sup>14</sup>

Overall, a non-hierarchical constitutional arrangement could endure and even prosper, with no one constitutional system ultimately superior to the other but with each remaining autonomous and supreme within its sphere of influence – not ships passing in the night, but a flotilla coordinating, or fortuitously converging, in its path forward, without an overall captain. Metaphors of musical harmony were proffered to capture the overall coherence of the various parts.<sup>15</sup> The question of ultimate authority could thus be left open as long as a shared normative core or overlapping consensus could

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<sup>10</sup> *Solange* refers to the principles established by the German Constitutional Court in *Solange I* [1974] 2 CMLR 540 and *Wunsche Handelsgesellschaft* ('Solange II'), BverfG 1986 [1987] 3 CMLR 225.

<sup>11</sup> See e.g. A. Somek, *The Cosmopolitan Constitution* (Oxford: Oxford University Press, 2014), 19.

<sup>12</sup> See e.g. C. Sabel and O. Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 *European Law Journal*, 511-550.

<sup>13</sup> See e.g. M. Rosenfeld, 'Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism' (2008) 6 *International Journal of Constitutional Law*, 415-456.

<sup>14</sup> Cf. B-O. Bryde, 'The ECJ's Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism' in M. P. Maduro and L. M. Azoulay (eds) *The Past and Future of EU Law* (Oxford: Hart, 2010).

<sup>15</sup> See M. P. Maduro, 'Europe and the Constitution: What if this is as Good as it Gets?' in J. H. H. Weiler and M. Wind (eds) *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003), 98.

be maintained, based on the immanent rationality of shared liberal-democratic principle. 'Proportionality' would later emerge as the ubiquitous tool for solving any conflict or tension that might arise between these normative orders in their concrete application. The idea was even transferred upwards to the relation between the European and international order, offering the potential for a globalised *Solange* doctrine.<sup>16</sup>

It is worth recalling, however, that the judgment that launched constitutional pluralism in earnest and inspired its subsequent iterations was ultimately a feint.<sup>17</sup> The Maastricht Court, just like its Lisbon successor, in practice surrendered, albeit each time the gap between its rhetoric and its ruling grew ever wider. As Christoph Schönberger described its Lisbon Treaty decision: 'there is probably no other judgment in the history of the Karlsruhe Court in which the argument is so much at odds with the actual result'.<sup>18</sup>

They were clear signs that the compromise between national constitutional courts and the ECJ was reaching breaking point.<sup>19</sup> In particular, on the issue of extradition under the European Arrest Warrant, national constitutional courts increasingly struggled to reconcile domestic rights with their EU commitments, or had to insist on domestic constitutional amendments.<sup>20</sup> The problems were in reality even wider and deeper.<sup>21</sup> On the specific question of juridical authority, any truce had in fact already technically broken, the Czech court ruling a decision of the European Court of Justice *ultra vires* in a dispute over pensions but this was essentially a domestic battle of little consequence for the EU's overall constitutional authority and stability.<sup>22</sup>

OMT, however, appeared to represent a turning point. It was clear that the reference from Karlsruhe was not launched in the spirit of accommodation or judicial comity and in an area of tremendous political, economic and even existential significance for the EU. Finally, the German court's argument and its results seemed to match.

But why was OMT a watershed? For one thing, accusations of methodological nationalism against Karlsruhe, hitherto of greater theoretical than practical import, were now pregnant with moment, specifically its potential to empower the German organs of state in any bailout negotiations by offering them the opportunity to play

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<sup>16</sup> See Joined Cases C-402/05 P and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

<sup>17</sup> See J. Habermas, 'Remarks on Dieter Grimm's 'Does Europe Need a Constitution?' (1995) 1 *European Law Journal*, 303-309. See also J. H. H. Weiler, 'Demos, Telos and the Maastricht Decision' (1995) 1 *European Law Journal*, 219-258. It is curious that a judgment that had received so much initial opprobrium was retrospectively blessed with the imprimatur of a near-universally acclaimed doctrinal innovation.

<sup>18</sup> C. Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones at Sea' (2009) 10 *German Law Journal*, 1201-1218.

<sup>19</sup> See BVerfG, 2 BvR 2661/06 (6 July 2010).

<sup>20</sup> See recently BVerfG, Order No. 2 BvR 2735/14, (15 December 2015)

<sup>21</sup> For an examination of these tensions, see e.g. F. De Witte, 'Sex, Drugs and EU Law' (2013) 50 *Common Market Law Review*, 1545-1578.

<sup>22</sup> Case no. Pl. S 5/12, Slovak Pensions XVII, (31 January 2012)

the 'Karlsruhe card': 'our court won't let us!'<sup>23</sup> In a scenario where creditor power was becoming ever weightier in bargaining over loan conditionality, specifically in pressing for ordo-liberal principles of fiscal discipline, this was of considerable political-economic significance. The substantial subtext of OMT was apparent: the ECB must not subvert or bypass the conditionality ('austerity') imposed on debtor states under European Stability Mechanism (ESM) or the various bilateral and multilateral loans by a back-door programme of bond-buying, with the ECB offering itself as a *de facto* lender of last resort.

From the perspective of the ECB, the OMT programme was essential to maintaining the financial stability and 'singleness' of the currency, which had – rightly or wrongly – become a symbol of the success of the project of European integration itself. 'Draghi's bazooka', it should be recalled, alongside his announcement that the 'Euro is irreversible', had been credited with calming the financial markets, preventing contagion in other member states, especially Spain and Italy, and possibly saving the single currency.<sup>24</sup> At the very least, it performed the act of 'buying time', delaying the crisis of democratic capitalism unfolding across the Eurozone, and elsewhere, as Wolfgang Streeck has observed.<sup>25</sup> Additionally, if revamped along lines offered by the German court, OMT could be rendered ineffective, and the prospects dashed of economic stability in a very fragile polity.<sup>26</sup>

The German court compounded the difficulty by the manner of the referral and the particular intertwining of German constitutional law and EU legality. Karlsruhe indicated that if unchanged, the OMT programme should be declared illegal, not only on the basis only of EU law (OMT violating the division of competences between the EU and the member states, and specifically *ultra vires* the powers of the ECB), but of German constitutional identity (OMT violating the right of the German citizen to vote for the *Bundestag* due to its potential impact on budgetary autonomy and the 'democratic discourse' of German society).<sup>27</sup> The German court construed constitutional identity idiosyncratically, divorcing its own doctrine from the more holistic perspective offered in Article 4(2) Treaty of the European Union (TEU).<sup>28</sup> Core German constitutional identity, it claimed, is exclusive and non-negotiable,<sup>29</sup> not only

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<sup>23</sup> See F. Mayer, 'Rebels without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference' (2014) 15 *German Law Journal*, 111-146.

<sup>24</sup> See E. Jones, 'The Forgotten Financial Union: How You Can Have a Euro Crisis Without A Euro' in M. Matthijs and M. Blyth (eds) *The Future of the Euro* (Oxford: Oxford University Press, 2015), 63-64.

<sup>25</sup> See W. Streeck, *Buying Time: Reflections on the Delayed Crisis of Democratic Capitalism* (London: Verso, 2014)

<sup>26</sup> BVerfG, 2 BvR 2728/13, op. cit., para 100: conditions of judicial guarantees of limited purchasing, no debt restructuring and avoidance of market interference (which were anyway 'untestable', see K. Schneider, 'Questions and Answers: Karlsruhe's Request for a Preliminary Ruling to the Court of Justice of the European Union' (2014) 15 *German Law Journal*, 217- 239, 231).

<sup>27</sup> *Ibid.*, paras 26-30, 48.

<sup>28</sup> *Ibid.*, para 29.

<sup>29</sup> '[I]dentity review is not to be assessed according to Union law but exclusively according to German Constitutional Law', according to the German court, *ibid.*, para 103.

immune to balancing of any sort against other interests but also exclusively for the federal constitutional court to interpret.<sup>30</sup>

The double-pronged nature of this attack was significant, blurring the lines between the European and domestic legal orders, and putting the Luxembourg court in a difficult position. Even if declared by the ECJ to be within the powers of the ECB on a formal reading of EU law, the German court could declare it a violation of national constitutional identity. If so, OMT would be valid in the EU legal order with the exception of Germany (as a matter of German law). But without Germany's participation, i.e. without the support of the *Bundesbank*, which the German court could order to withdraw from OMT, the programme would be significantly less economically effective, if at all. Its credibility, which is what matters on the financial markets, would be shattered. The threat was clear: Germany's economic power threatened to turn into a quasi-constitutional authority for the Eurozone as a whole.

The ECJ, however, stood firm. On the question of the authority to determine the legality of acts of EU institutions, including of the ECB, the Court of Justice was adamant about its exclusive authority; its ruling would be 'definitive'.<sup>31</sup> On the material question of *ultra vires*, the Court of Justice granted a wide margin of discretion to the ECB, amounting to what might be called a 'featherweight' review of its actions. The ECJ determines that in a 'controversial' area like monetary policy, nothing can be required of the ECB except that it use its expertise 'with all care and accuracy'. Unsurprisingly, given this level of deference, the Court found no 'manifest error of judgment'.<sup>32</sup>

Karlsruhe did obtain rhetorical guarantees that fiscal discipline would be maintained in the context of any actual triggering of OMT. Rhetorical because in practice, OMT's effect on fiscal discipline were already very real, OMT reducing yields in Spain and Italy without them ever entering into any formal adjustment programmes, a point that needs to be kept in mind for understanding the broader political and economic context of this constitutional conflict.<sup>33</sup>

With the case returning to Karlsruhe, the fight was not over. But for the anti-pluralists, the ECJ's ruling signified that the curtain had been drawn on the play of constitutional pluralism, *whatever Karlsruhe's response*: if Karlsruhe conceded, it would signal concession of the *Kompetenz-Kompetenz* to the ECJ, and the triumph of the unqualified supremacy of EU law. If it fought back, refusing to comply, and ordering its organs of state to frustrate the OMT programme, by, for example, obstructing participation of the *Bundesbank*, Germany would be in breach of EU law and should be pursued

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<sup>30</sup> Ibid., para 29. For analysis, see M. Claes and J. Reestman, 'The Protection of National Constitutional Identity and the Limits of Integration at the Occasion of the Gauweiler Case' (2015) 16 *German Law Journal*, 917-970.

<sup>31</sup> Gauweiler, op. cit., para 14. Unlike the Advocate General, the ECJ did not even make reference to Article 4(2) TEU or of any process of balancing between the authority of EU law and national constitutional identity.

<sup>32</sup> Ibid., para 75.

<sup>33</sup> See E. Jones, op. cit. See further, M. Wilkinson, 'The Euro is Irreversible! ... Or is it? On OMT, Austerity and the Threat of Grexit' (2015) 16 *German Law Journal*, 1049-172.

through infringement proceedings.<sup>34</sup> Either way, therefore, OMT signalled the end of the compromise that had been embraced by so many constitutional scholars of European integration. OMT, in other words, signposted a new stage in the process of the *constitutionalisation* of the European Union.

The reality was more muddled. Although the German court held off on an outright rejection of the legality of the programme, it maintained serious objections to the way the case was treated by the ECJ. It insisted on the Federal Government and the *Bundestag* retaining surveillance over conformity with the stipulated conditions, placing both 'under a duty to monitor closely any implementation of the OMT programme'.<sup>35</sup>

According to the anti-pluralists, however, the affair between Karlsruhe and Luxembourg needs to end, in order for the EU to reach constitutional 'maturity'.<sup>36</sup> Judicial disagreement on who has the ultimately authority to decide issues as basic as the validity of an EU measure is unsustainable in the long run. Constitutional pluralism is a conceptual 'fudge', designed to obfuscate the fact that 'ultimately, in any constitutional order worthy of the name, some judicial authority must have the final say'.<sup>37</sup> At some point, the delicate compromise between domestic and European courts would inevitably collapse, and, when it did, equilibrium would need to be restored in one of two ways: either by national courts (and ultimately member states) conceding to the ultimate authority of the European Court of Justice, or by a reversion to domestic authority and the unravelling of the constitutional construction of EU law.<sup>38</sup> In case of the former, the EU would have witnessed its federal moment. In case of the latter, the EU would return to the ordinary international law route of state responsibility, counter-measures and reciprocity.<sup>39</sup> In either case, its *sui generis* status would be lost.<sup>40</sup>

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<sup>34</sup> F. Fabbrini, op. cit. To buttress this point, Advocate General Cruz Villalón's Opinion in *Gauweiler* is relied on. According to the Advocate General, unilateral reservations of authority such as that demanded by Karlsruhe would soon lead to constitutional disintegration and it would become 'an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States', Opinion in Case C-62/14 *Gauweiler*, EU:C:2015:7, para 59.

<sup>35</sup> 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 (Judgment of 21 June 2016). See Bundesverfassungsgericht, 'Constitutional Complaints and Organstreit Proceedings Against the OMT Programme of the European Central Bank Unsuccessful', Press Release No. 34/2016, 21 June 2016.

<sup>36</sup> See D. Kelemen, op. cit., 139.

<sup>37</sup> D. Kelemen, op. cit., 139. Cf. A. Somek, 'Monism: A Tale of the Undead' in M. Avbelj and J. Komarek (eds) op. cit, 343 – 381.

<sup>38</sup> D. Kelemen's solution is in fact a declaration of incompatibility between the domestic constitution and continuing membership of the EU. It would lead to one of three calls: for constitutional amendment to make the offending domestic constitution conform, for the offending EU measure to be challenged and changed through the political process (or the state to secure an opt-out), or, the 'nuclear option', to demand withdrawal from the EU. Raising the constitutional stakes, would, according to Kelemen, actually stabilise the EU legal order, by 'upping the stakes and increasing the costs of missteps, but at the same time reducing the chance of war', *ibid.*, 150.

<sup>39</sup> Unilateral derogation would 'destroy the EU legal order', leading only to 'chaos', *ibid.*

<sup>40</sup> Cf. B. De Witte, 'The European Union as an International Legal Experiment' in G. De Burca and J. H. H. Weiler (eds), op. cit.

There is, an additional, normative case offered by the anti-pluralists against any pluralist status quo. The existence of separate, and diverging authorities, potentially leading to a situation in which an EU measure would be declared invalid in one member state, but remain valid in the other twenty seven, violates the principle of Member State *equality*.<sup>41</sup> Legal uniformity in Europe, in other words, must resist any particular assertions of constitutional identity, holding an independent and over-riding value on this view. Disagreement on the question of judicial *Kompetenz-Kompetenz* is such an affront to a basic principle of the rule of law (that law should be applied comprehensively and universally within its jurisdiction), that it should trump any countervailing concerns.<sup>42</sup> There is no place, on their view, for dissent, or for ‘institutional disobedience’; not even for provisional disagreement.<sup>43</sup> Not a marriage of equals, but a clear hierarchy must be installed between national and supranational courts, albeit a hierarchy that is justified in the name of equality.

### 3. It’s complicated!

Complex questions can look more facile with the luxury of hindsight. To be sure, a strong case can be made against the wisdom of the German court’s referral, attempting to use its leverage in a way that left little option for the ECJ but direct confrontation.<sup>44</sup> Although the German court continues to speak of maintaining its ‘friendliness’ towards EU law, this understates the point: the German court is also under a *duty* of loyal co-operation laid down in Article 4(3) TEU. This requires the Court to consider its responsibility not in isolation but as both a national *and* a European court, and one whose judgements reverberate throughout the Union.<sup>45</sup> The German Basic Law commits Germany to European integration and international obligations. It is also holding itself out as the Guardian of the European Constitution, protecting against the illegitimate incursions of a powerful (and also counter-majoritarian) supranational institution, the European Central Bank. But if it therefore adopts the broader perspective of a European Court, it must take into account values beyond those it traditionally protects as a national court. To fail to do so carries the risk of ‘constitutional hazard’, the risk that the European construct will be conditioned and

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<sup>41</sup> See F. Fabbrini, *op. cit.*, 1015. But the question of course is precisely what they have agreed to.

<sup>42</sup> Cf. M. Kumm, ‘How does European Union Law Fit Into the World of Public Law?’ in A. Weiner and J. Neyer (eds) *Political Theory of the EU* (Oxford: Oxford University Press, 2011).

<sup>43</sup> Cf. T. Isiksel, ‘Fundamental Rights in the EU after Kadi and Al Barakaat’ (2010) 15 *European Law Journal* 551-557.

<sup>44</sup> As persuasively argued in dissenting judgements by Justices Gerhard and Lübke-Wolf.

<sup>45</sup> As F. Mayer puts it: ‘apparently there is not much room for solidarity beyond the borders of the nation-state in the German Constitutional Court’s worldview. Some would even detect a lack of constitutional empathy here, considering the fact that concepts the German Constitutional Court invokes quite naturally such as self-determination, budgetary autonomy, etc., are not available to other Member States anymore [...]’ *op. cit.*, 143.

even determined by the constitutional power of a domestic court expressing purely domestic concerns.<sup>46</sup>

Co-operation, however, cuts both ways. The ECJ too must be sensitive to national constitutional autonomy, something it is not always seen to have successfully achieved. As Fritz Scharpf recently put it, 'the perceived role of the ECJ is still that of a promoter of integration rather than that of a neutral umpire between the EU and its Member States.'<sup>47</sup> OMT strongly confirms this perception albeit at a time when the EU constitution has never looked more fragile.

The 'new argument' of respecting member state equality, supposedly violated by Karlsruhe in the eyes of the anti-pluralists, is not a new argument at all. In response to Karlsruhe's earlier Lisbon decision, Scharpf had long argued that the German court's jurisprudence fails a test of universalisability. Its Lisbon decision, he argued, is 'fundamentally flawed', failing 'to consider its generalised implications in the light of the Kantian categorical imperative.'<sup>48</sup> The Constitution, on this Kantian account, is 'founded upon a universal rather than particular principle of democratic sovereignty.'<sup>49</sup> Karlsruhe fails, in other words, a version of the golden rule of ethics; constitutional power must be subject to the moral law.<sup>50</sup>

The normative argument is not new, but is it persuasive? On its own, the claim that each domestic court deciding unilaterally on opt-outs from European law would automatically offend a principle of equality does not follow. One could just as well say, on the contrary, that it protects equality by permitting each court to make domestic reservations; moreover, in doing so it not only protects formal equality, but also respects a deeper sense of constitutional or cultural diversity (in turn respecting a fuller principle of substantive equality). Local concerns are better protected by those who understand local constitutional culture – this is why constitutional resistance has been valued in the EU as a potentially constructive form of institutional disobedience.

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<sup>46</sup> M. Wilkinson, 'Economic Messianism and Constitutional Power in a German Europe: All Courts are Equal, But Some Are More Equal Than Others', 2014 (26) *LSE Law, Society and Economy Working Paper Series*.

<sup>47</sup> F. Scharpf, 'Sovereignty and Democracy in the European Polity: Reflections on Dieter Grimm's Essay "Sovereignty in the European Union"' in J. Van der Walt and J. Ellsworth (eds) *Constitutional Sovereignty and Social Solidarity in Europe* (Baden-Baden: Nomos, 2015), 58.

<sup>48</sup> See F. Scharpf, 'The Asymmetry of European Integration: Or Why the EU Cannot be a Social Market Economy' (2010) 8 *Socio-Economic Review*, 211-250.

<sup>49</sup> F. Scharpf, *ibid.* See also M. Everson, 'An Exercise in Legal Honesty: Re-Writing the Court of Justice and the Bundesverfassungsgericht' (2014) *Institute For Advanced Studies Vienna, Political Science Series*. See also M. Kumm, *op. cit.*, 211.

<sup>50</sup> F. Scharpf: 'The authority claimed by the German court could of course not be denied to the courts in all member states. And while these would surely be equally sensitive to the specific and diverse concerns of national autonomy and identity, there is no reason to expect that their understandings of the "Europe-friendliness" of their national constitutions would converge, or that they would all assign the same relative weights to the European concerns at stake. The overall result might be a chaotic form of differentiated integration through an accumulation and perhaps escalation of unilateral national opt-outs', 'Asymmetry', *op. cit.*, 242.

As Joseph Weiler long argued, constitutional tolerance - the judicial as well as political *self-discipline* to respect the values of the other<sup>51</sup> - is a demanding but more legitimate basis for a community of equals than a hierarchy of formal norms and authority imposed from above. As long as the EU's constitutional authority is largely parasitic upon more robust national versions, this will remain the case.

It would not, of course, be wise, prudent or ethical for a court to adopt a reservation in complete ignorance of the impact of its decision on its fellow courts and on the harmony of the project of European integration. Careful exercise of judgment here would be necessary, and of course the power could be abused. But whether or not an 'acceptable balance' could be achieved is contingent and complex. It requires attention to a substantive notion of equality between states, a concern for asymmetry in a Union in which not all courts (and not all states) are equally powerful; indeed, most obviously, to the fact that not all Member States have constitutional courts at all.<sup>52</sup> This kind of judgment may not be an appropriate one for any court to have to make.<sup>53</sup>

To understand the full complexity of the constitutional question of authority, we need, in other words, to go beyond an examination of the formal relations between the European Court of Justice and domestic constitutional courts and survey the evolving material constitution of the European Union.

#### 4. A problematic dualism

The anti-pluralist argument misses its target because it disaggregates the juridical aspect of constitutionalism from its political aspect, resting entirely on an implicit but untenable form of dualism. In doing so, the anti-pluralist in fact mirrors much of the constitutional pluralist literature it is positioning itself against, a 'myopic view', which fails to consider the broader context of judicial decisions.<sup>54</sup> OMT's ramifications are far wider than the formal ruling on the supremacy of the Court's authority. They go to the whole constitutional architecture of the Eurozone, as well as its socio-economic ideology, and its current political fragility.<sup>55</sup>

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<sup>51</sup> Joseph Weiler, although advancing the idea of constitutional tolerance, never endorsed the concept of constitutional pluralism and was a notable sceptic of the constitutional project. See e.g. J. H. H. Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg' in J. H. H. Weiler and M. Wind (eds) *European Constitutionalism Beyond the State* (Cambridge: Cambridge University press, 2003).

<sup>52</sup> See M. Wilkinson, 'Economic Messianism', *op. cit.*

<sup>53</sup> This, indeed, was not Scharpf's solution either, preferring a more political solution, allowing Member States to appeal to their peers in the European Council against a judgment of the ECJ, F. Scharpf, *op. cit.*, 243. More recently, Scharpf has proposed a more radical set of changes in response to the Euro crisis, see F. Scharpf, 'After the Crash: A Perspective on European Multi-Level Democracy' (2015) 21 *European Law Journal* 384-406.

<sup>54</sup> J. H. H. Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay' (2011) 9 *International Journal of Constitutional Law*, 678-694. He adds that, 'there has been a refusal to see the way in which the essential legal order of constitutional jurisprudence is part and parcel of the political democratic legitimacy crisis', at 689. See also M. Wilkinson 'Political Constitutionalism and the European Union' (2013) 78 *Modern Law Review*, 191-222.

<sup>55</sup> See M. Wilkinson, 'The Euro is Irreversible..!', *op. cit.*

In short, the (anti-) pluralist literature takes note of a formal without a material constitutionalism.<sup>56</sup> Constitutional claims must be materially *credible* because they are claims over the lived world of experience, not only the formal world of legal rules. Otherwise, the divide between formal system and life-world can foment political and social disorder, and even grow to breaking point. Legal formalism then is in danger of looking like legal fetishism, divorced from the realities of political power and authority.

If the new anti-pluralists are card-carrying legal fetishists, this is not, to be sure, a new phenomenon in the history of European integration.<sup>57</sup> After the failure of early attempts at political union, there was, it has been argued, an ‘opportune’ replacement of legal for political avenues towards integration, spearheaded by the European Court of Justice at the vanguard of a community of activist lawyers.<sup>58</sup> European integration long masked an over-reliance on its juridical face: this was largely how the European Union ascended to ‘constitutional’ status in the academy. This legal fetishism worked to conceal the material weakness and brittleness of its political foundations and social supports.

Yet implicit in the anti-pluralist account is in fact the claim that political foundations and social supports are maintained at a purely domestic level, and as long as membership is voluntarily continued this will continue to hold true. The basis for this claim is a crude version of the argument from consent.

In order to examine this argument further, it is necessary to shift register, and consider constitutionalism through the lens of political authority. It is ironic here that the anti-pluralists draw in their support on another critic of constitutional pluralism, but one whose argument is directed against the notion that constitutionalism is to be determined by judicial claims at all.<sup>59</sup> This serious objection to certain strands of constitutional pluralism advanced by Martin Loughlin is now harnessed, co-opted, by the anti-pluralists.<sup>60</sup> In Loughlin’s reconstruction of the foundations of public law, constitutional development takes place through the dialectic of authority (*potestas*) and power (*potentia*); the generation of a belief in the authoritative ‘right to rule’ in conjunction with the actual *capacity* to compel obedience or attract allegiance to the political community. In modernity, this dialect involves material and subjective

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<sup>56</sup> The notion of a material constitution is developed in M. Goldoni and M. Wilkinson ‘The Material Constitution’, (2016) 20 *Law, Society and Economy Working Paper Series*.

<sup>57</sup> The fetishisation of constitutionalism in legal scholarship on European integration is warned about in Walker’s brand of constitutional pluralism, see N. Walker, ‘The Idea of Constitutional Pluralism’, *op. cit.*

<sup>58</sup> See e.g. A. Vauchez, ‘The Transnational Politics of Judicialization: *Van Gend en Loos* and the Making of the EU Polity’, (2010) 16 *European Law Journal*, 1-28; A. Cohen, ‘Constitutionalism without Constitution: Transnational Elites Between Mobilisation and Legal Expertise in the Making of a Constitution For Europe (1940’s-1960’s)’ (2007) 32 *Law and Social Enquiry*, 109-135.

<sup>59</sup> See M. Loughlin, ‘Constitutional Pluralism: An Oxymoron?’ (2014) 3 *Global Constitutionalism* 9-30.

<sup>60</sup> See D. Kelemen, *op. cit.*

elements associated with the apparatus of *statehood* and the set of beliefs on which it rests, central to which is the ‘autonomy of the political domain’.<sup>61</sup>

Loughlin’s reconstruction of this dialectic, essential to the foundations of public law as well as its modern evolution, need not be rehearsed in full here. Applied to the EU, the argument can be put in short form. For Loughlin, the combination of political *incapacity* and *illegitimacy* is decisive in rejecting constitutional claims for the EU’s governing authority. On the question of power (*qua potentia*) the claim proceeds by contrasting the material elements of statehood at the domestic level with their absence in the EU, particularly with regard to its lack of resources for the essential tasks of providing for the *salus populi*: welfare and warfare.<sup>62</sup> There can be no ‘functional equivalence’ in light of the EU’s lack of powers of taxation and control of military forces, Loughlin argues.

To this functional dimension, Loughlin adds a subjective element, which goes directly to the question of the governing relation between the rulers and the ruled. This demands a move beyond the legal text to consider by what ‘political right’ a governmental agency is able to act; to consider the set of arrangements ‘through which rulers and subjects express their beliefs about the authority of government’ and about that government’s ‘right to rule’. In short, there is the question of political loyalty and identity, which precedes any account of governmental powers and the way they are channelled through the constitution. In this foundational regard, the EU is similarly lacking, expressed by Loughlin through a version of the well-known ‘no demos thesis’.<sup>63</sup>

In other words, Loughlin rejects constitutional pluralism not because ultimate legal authority is – or must become – vested uniquely in the ECJ, as the anti-pluralists contend, but because political authority remains uniquely vested in the Member States (as the anti-pluralists implicitly concur). Loughlin criticises the pluralist literature for falling into the normativist trap of conflating sovereignty and government: what is pooled or divided in the EU is the exercise of governmental powers, not sovereignty.

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<sup>61</sup> See M. Loughlin, *The Foundations of Public Law* (Oxford: Oxford University Press, 2010); M. Loughlin, ‘Political Jurisprudence’ (2016) 16 *Foundations of Public Law*, available at <http://juspoliticum.com/article/Political-Jurisprudence-1105.html>

<sup>62</sup> According to Loughlin: ‘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’, ‘Oxymoron’, op. cit., 18.

<sup>63</sup> Ibid. Loughlin adds that ‘[o]n 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 is a surprising claim for Loughlin to make, as he elsewhere develops a more dialectical or ‘reflexive’ account of the relationship between constitutional power and authority, fact and norm. See e.g. M. Loughlin, ‘On Constituent Power’ in M. Wilkinson and M. Dowdle (eds) *Constitutionalism Beyond Liberalism* (Cambridge: Cambridge University Press, 2017). This is acknowledged by Loughlin himself, ‘Oxymoron’, op. cit., 12.

Sovereignty, understood as ‘the ultimate power of the people to determine the form of constitution of the State’, can ‘entail membership of the EU or withdrawal from it’.<sup>64</sup>

What we are to make of the project of integration in constitutional theoretical terms is then left rather underspecified in Loughlin’s account.<sup>65</sup> The new anti-pluralists, although rejecting the natural conclusion that constitutionalism is the wrong conceptual language to capture the nature of the EU, seize on his argument from ‘ultimate authority’. Political authority does not drop out of their picture entirely; it is simply divorced from judicial authority and formalised as a preserve of the domestic constitutional state’s continuing right to ‘leave’. Their position seems, despite appearances, to be a sovereigntist one, in the sense of basing the legitimacy of integration on a formal notion of nation state consent and if necessary the complete withdrawal of that consent. There is little or no room for strong forms of contestation or dissent *within* the Union, at least from domestic courts; judicial normativism at the supranational level must prevail.<sup>66</sup>

So despite arguing for an up-scaling of constitutional (*qua* juridical) authority the anti-pluralists make no claim that political authority has fully (or even partially) shifted upwards in unison, or that a new European demos has emerged (or should emerge to accompany the juridical construct). On the contrary, whilst craving supremacy of supranational juridical authority, they fall back on the claim that political authority remains essentially domestic. Indeed, key to the anti-pluralist justification for unconditional EU juridical supremacy is that this is constitutionally balanced *because* ultimate political authority remains with the member states, as evidenced in their right to withdraw (formalised since the Lisbon Treaty in Article 50 TEU). Their point, put bluntly, is that if a member state objects to EU juridical supremacy, there is an obvious route: the exit door.

The strength of this position lies in its simplicity. But therein also lies its weakness. There may be no ‘knock-down’ argument against equating the voluntariness of the association with its lack of ultimate political authority (although some particular caveats to this will be explored below). The EU is not yet a federal state in which secession would be forcefully prevented. It may never become one, which is not to say that elements of cajoling and coercing have been lacking in respect of those considering exit, from ‘Grexit’ to ‘Brexit’. We will return to these critical constitutional phenomena in the next part, as they suggest that any formal approach to consent and coercion miss the transformational character of European integration.

But for the moment, consider that this ‘dualist’ argument – supranational normative authority is balanced by national political authority – is a new, if less nuanced, version of an older account of the dynamics of integration, presented by Joseph Weiler in ‘The

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<sup>64</sup> See, M. Loughlin, ‘Why Sovereignty?’, in R. Rawlings, P. Leyland and A. Young (eds) *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford: Oxford University Press, 2013), 34–50, 47.

<sup>65</sup> See M. Loughlin, ‘What is Constitutionalisation?’ in P. Dobner and M. Loughlin (eds) *The Twilight of Constitutionalism* (Oxford: Oxford University Press, 2010), 47–73. See also the final chapter of M. Loughlin, *Foundations*, op. cit, which hints at integration as a feature of the rise of the administrative state in the 20<sup>th</sup> century.

<sup>66</sup> Although, as noted earlier, Kelemen’s position allows for a declaration of incompatibility.

Transformation of Europe' in 1992. In Weiler's account, building on Hirschmann's scheme of 'exit, voice and loyalty',<sup>67</sup> European integration initially developed along the lines of a two-track process, a fortuitous duality of normative supranationalism and political inter-governmentalism, which had a propensity to achieve an equilibrium.<sup>68</sup> Accordingly, the EU functioned with an idiosyncratic but productive split between normative authority, which became strongly centralised through the ECJ's jurisprudence, and political power, which remained predominantly with the component national units of the Member States. It was precisely because the Member States remained in control of the basic *contents* of the arrangement that they were willing to surrender control of its legal *enforcement*, which anyway depended not only on the ECJ, but also on national courts' acquiescence as a feature of the uniquely decentralised judicial architecture. In short, political voice prevented the need for exit (rather than the possibility of exit mitigating the absence of voice).<sup>69</sup>

Even on its own terms, Weiler's framework was meant to explain the maintenance of equilibrium without resorting to 'exit', not to fall back on the possibility of exit as evidence of an imaginary current equilibrium. Equilibrium was maintained by preserving the domestic 'voice' of national political authority through formal and informal mechanisms internal to the EU's constitutional architecture, through its multi-dimensional institutional set-up and procedures of law-making and law-applying – including the continuing authority of domestic (constitutional) courts.<sup>70</sup> The point is that these various features protected the authority of member states formally as well as informally, and paid some attention to the material discrepancies in power *between* member states. These various mechanisms, intended to facilitate voice, would permit the suspension of the question of exit, and of sovereignty itself.

To fall back on positing that the ultimate authority to leave (or renegotiate membership) remains with the member states tell us nothing about the material conditioning of political authority – the other face of constitutional development – *in the interim*. Can we say no more about political authority than that it is held in store for a moment of exceptional and final decision: to remain and accept juridical hierarchy or to leave and reject it?

The argument of the anti-pluralists here echoes the language of Schmitt's constitutional theory of the 'federation' (or '*Bund*') – an entity in between a loose confederation of sovereign states, on the one hand, and a fully-fledged federal state on

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<sup>67</sup> For the classic statement of this duality and its evolution in the early years of integration, see J. H. H. Weiler, 'The Transformation of Europe' (1992) 100 *Yale Law Journal*, 2403–2483. See also J. H. H. Weiler, explaining the early equilibrium and balance achieved through this duality, 'The Community System: The Dual Character of Supranationalism' (1981) 1 *Yearbook of European Law*, 267–306.

<sup>68</sup> *Ibid.*

<sup>69</sup> Note that formal legal avenue of exit only existed as a matter of EU law with the Lisbon Treaty, Article 50 TEU.

<sup>70</sup> The BVerfG has been described as a missing channel for German's to voice their Euro-scepticism, see e.g. K. F. Garditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' (2014) 15 *German Law Journal*, 183–201.

the other (between a *Staatenbund* and *Bundesstaat*).<sup>71</sup>In this arrangement, sovereignty does not disappear; neither is it pooled or divided; rather it is suspended. But this is a provisional status. It will inevitably reappear in a time of crisis or in the moment of exception: the federation is an inherently unstable phenomenon and will eventually dissolve downwards or evolve upwards. Which way it is resolved is determined for Schmitt by the political condition of homogeneity; it is this that will determine whether political unity will be re-asserted at the level of the federation or of its member states.<sup>72</sup>

Did OMT signify the moment at which the federation either turns into a federal state where the central unit is sovereign, or disintegrates into a confederation where the members are sovereign? The reality was more prosaic, Karlsruhe again backing down subject to retaining its overall authority over the way the programme is handled, were it to be triggered in practice. The compromise on ultimate authority is, once again retained in theory, at least for the time being.

But for the anti-pluralists this can only delay the inevitable. Constitutional pluralism is eventually bound to fail and the EU will either mature into a federal unit or dissolve into a con-federal one. With Schmitt, any third alternative is ultimately consigned to the graveyard, the chronicle of a death foretold. Characteristic of the prevailing normativism in the legal academy, this momentous decision, however, is now entirely subsumed into the juridical question of *Kompetenz-Kompetenz*. Judicial authority alone is up-scaled, political authority is untouched. It is an odd echo of Schmitt, transfigured into a realm where norms and facts, law and politics, are entirely uncoupled.<sup>73</sup>

The notion that the EU's own constitutional future has been definitively settled by the OMT ruling is belied by any constitutional reality check. There are immense centrifugal as well as centripetal forces acting on the process of integration. OMT hardly resolves this; it is a stop-gap solution to cover deeper structural design flaws in Economic and Monetary Union (EMU). The notion that the EU has 'matured' into a federal unit as a result of its recent evolution is hard to reconcile with its increasingly fractious divisions and existential uncertainties.<sup>74</sup> These of course extend far beyond even the problems in the Eurozone, as the 'Brexit' referendum as well as constitutional

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<sup>71</sup> C. Schmitt, *Constitutional Theory* [trans. J. Seitzer] (Durham: Duke University Press, 2008). See also O. Beaud, *Théorie de la Fédération*, 2<sup>nd</sup> ed, (Paris: Presses Universitaires de France, 2009); C. Schönberger, 'Die Europäische Union als Bund' (2004) 1 *Archiv des öffentlichen Rechts*; R. Schütze, 'Federalism as Constitutional Pluralism: "Letters from America"' in M. Avbelj and J. Komarek (eds), op. cit.; M. Avbelj, 'Theory of European Union' (2011) 36 *European Law Review*, 818-836.

<sup>72</sup> For discussion see S. Larsen, 'United in Diversity: Humanism, Homogeneity and Hegemony' in G. Baruchello, J. D. Rendtorff and A. Sorenson (eds) *Ethics, Democracy and Markets: Nordic Perspectives on World Problems* (Aarhus: Aarhus University Press, 2016). This was the term picked up by the German court in its Maastricht *Urteil*, albeit citing Heller rather than Schmitt, see J. H. H. Weiler, 'The Maastricht Decision' op. cit.

<sup>73</sup> It is a mirror image of the approach taken by Dieter Grimm, see D. Grimm 'Sovereignty in the European Union' in J. Van der Walt and J. Ellsworth (eds), op. cit.

<sup>74</sup> For a compelling account based on political economic dysfunctions in the Eurozone, see W. Streeck, *Buying Time*, op. cit.; and F. Scharpf, 'After the Crash', op. cit. For a dissection of the various crises constituting the Euro crisis, see A. Menéndez, 'The Existential Crisis of the European Union' (2013) 14 *German Law Journal*, 453-526

crises in Poland and Hungary demonstrate, in different ways.<sup>75</sup> But the significance of the single currency should not be understated; its fate has been linked to the survival of the project of integration itself ('if the Euro fails, Europe fails').<sup>76</sup> Underlying the OMT conflict was a *material* dispute over the meaning of this symbolic unity.

## 5. Constitutionalism: a material phenomenon

Any rigid distinction between judicial and political authority is tenable only in a perfectly stable and concrete constitutional order, where a division of powers has been set in stone. It is doubtful that any such order exists outside of the normative jurist's imagination. In its absence – i.e. for the purposes of capturing constitutional *dynamics* – a relational conception of the *interdependence* of law and politics, power and authority, fact and norm, is essential.<sup>77</sup> This is particularly significant in a compound polity where the division of authority between component and relatively autonomous entities struggling for power and recognition is deeply contested.

The implicit dualism adopted by the anti-pluralist conceals the dynamism of integration as a matter of material constitutional change. Its form of political voluntarism ignores the transformations of statehood and political authority that have occurred through the process of integration, and especially in the Eurozone since Maastricht.<sup>78</sup> The narrative of a split between political and normative authority, even if plausible as an account of the early foundation of European integration from the 1960's to the 1980's, struggles with the growing complexity and intertwinement of the normative and political pillars that occurs from the Single European Act onwards. The project of the Economic and Monetary Union, where far more than merely 'normative' authority is supranationalised – monetary authority transferring to a central bank and in the absence of any formal route of exit from the single currency – changes the material dynamic irrevocably.

These are not merely 'superstructural' transformations of governmental powers, leaving a statist 'base' untouched, to borrow the old Marxian terminology. This does not mean that the governing arrangements of the EU are fixed and permanent and any authority to withdraw is entirely illusory. It is that, *pace* Loughlin, these governing arrangements reflect a process of state transformation, the result of changes to the dynamic of *potentia* and *potestas*. There is a point at which a delegation of power

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<sup>75</sup> For a broad overview of the existential problems facing Europe, see e.g. C. Gearty, 'The State of Freedom in Europe' (2016) 21 *European Law Journal*, 706–721.

<sup>76</sup> See e.g. *Der Spiegel*, 'If Euro Fails, So Will the Idea of European Union', 13 May 2010, available at: <http://www.spiegel.de/international/germany/merkel-warns-of-europe-s-collapse-if-euro-fails-so-will-the-idea-of-european-union-a-694696.html>

<sup>77</sup> See e.g. Loughlin, *Foundations*, op. cit., chapter 10.

<sup>78</sup> See C. J. Bickerton, D. Hodson and U. Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (2015) 54 *Journal of Common Market Studies*, 703–722.

materialises into its surrender, or to adopt Weiler's metaphor, the Golem turns on its own creators.<sup>79</sup>

To insist on the right of 'exit' as evidence of ultimate domestic political authority (suggestive of any provisional 'equilibrium') singularly fails to capture the dynamic of European and state constitutional development as part of a *single movement*. This interdependence is central to the trajectory of the post-war European state and its reconstitution over time.<sup>80</sup> In focusing on the retention of an untrammelled political authority to withdraw, this transformation – a profound, albeit uneven, constitutional transformation of the post-war European state – is elided.

To get a firmer conceptual purchase on this process, we can turn to the work of Chris Bickerton, who captures the transformation in the post-war European state from a 'nation state' to a 'member state'.<sup>81</sup> Bickerton's account largely tracks the transformation in the political constitution of the state in the period following the 'golden age' of economic prosperity, which coincides with the beginning of the period usually characterised as 'neo-liberal'. This process of rewriting the terms of the post-war social contract accelerates after the Treaty of Maastricht, cementing the disconnect between state and society, opening up a growing 'void' in the ruling arrangements.<sup>82</sup> Bickerton's analysis is invaluable because of the way it captures European integration as integral to the change in state-society relations.<sup>83</sup>

But the marks of material and ideological transformation pre-date the Treaty of Maastricht and even the neo-liberal turn of the mid 1970's. Most significantly, the domestic constitution in the immediate post-war period, particularly in those countries devastated by the interwar breakdown of liberal constitutionalism and the turn to fascism, is re-founded on a commitment to internationalism and a European Union that is integrated, and even entrenched, in the domestic constitutional culture as well as in formal constitutional obligations. In the idiom of constitutional theory, the language of constitutional rights and constitutional identity increasingly subsumes the idea of constituent power. Social democracy is replaced by 'restrained democracy', as Jan-Werner Müller explains. The project of European integration is central (if far from exclusively relevant) to these substitutions.<sup>84</sup>

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<sup>79</sup> J. H. H. Weiler, 'Editorial – 60 Years Since the First European Community: Reflections on Political Messianism' (2011) 222 *European Journal of International Law*, 303, 308.

<sup>80</sup> See M. Wilkinson 'The Reconstitution of Post-war Europe: Liberal Excesses, Democratic Deficiencies' in M. Dowdle and M. Wilkinson (eds) *Constitutionalism Beyond Liberalism* (Cambridge: Cambridge University Press, 2017)

<sup>81</sup> C. J. Bickerton, *European Integration: From Nation-state to Member State* (Oxford: Oxford University Press, 2013).

<sup>82</sup> This claim builds on P. Mair, *Ruling the Void: The Hollowing of Western Democracy* (London: Verso, 2013).

<sup>83</sup> As C. J. Bickerton puts it: 'in contrast to traditional nation states, national governments of member states understand their power and identity as dependent upon their belonging to a wider group or community', *European Integration*, op. cit., 12. This account is also able to explain the more recent backlash against this political disconnect, exemplified by 'Brexit' but far from restricted to the UK. See C. J. Bickerton, 'Europe in Revolt', *Prospect Magazine*, December 13 2016, available at <https://www.prospectmagazine.co.uk/magazine/europe-in-revolt>

<sup>84</sup> J-W. Müller, *Contesting Democracy: Political Ideas in Twentieth Century Europe* (Princeton University Press, 2011).

Leaving the EU, in other words, is just not part of the domestic constitutional imagination for many, if not most, European states (the United Kingdom is a significant exception to this, not least due to the inherent flexibility of its own constitutional arrangements and distinct constitutional culture).<sup>85</sup> European integration is not like any other international treaty commitment; it is constitutional in kind, as even the Supreme Court in the UK recognised in its Miller judgement.<sup>86</sup> If commitment to integration in core countries, such as any of the ‘founding 6’ or those whose entry into the EU signalled a transition from dictatorship to liberal democracy, were to end, it would signal a radical material constitutional change. It could well mark the end of the era of ‘restrained democracy’, or ‘post-sovereignty’ that begins with post-war reconstruction.<sup>87</sup> To put it differently, it would mark the return of a classical understanding of sovereignty that was thought to have been superseded in the post-war constitutional era.

To be sure, continuation of the project of integration should not be taken for granted, as growing Euro-scepticism even in core states demonstrates. But simplistic appeals to political voluntarism (a formal authority to exit) elide the constitutional transformation that integration reflects, and entails. For the countries of the Eurozone especially, crucial levers of power-generating authority have in effect been surrendered, without any full-fledged replacement at the EU level. This is increasingly asymmetric, reflecting the powers of debtor and creditor countries in the bargaining over conditionality. Voice has been retained, but only by some; for others, neither voice nor exit is straightforwardly available.<sup>88</sup> The ideological commitment to European integration must be kept in view as reflecting a change not only in capacity but also in the set of beliefs about the nature of the ruling relationship.

The significance of this approach is to impress that there is no ‘zero sum game’ in terms of the generation of power and authority between the domestic and supranational sites. *Potestas* and *potentia* are *interdependent*. To the extent that the OMT saga (along with other transformations in the Eurozone) reflects a new set of beliefs about the governing relationship between rulers and ruled, they go not only to the issue of judicial authority of the ECJ but also of the monetary authority (and capacity) of the ECB in response to the sovereign debt crisis and to the continuing sovereign authority of the member states.

OMT, in other words, along with other developments in the Eurozone, contributes to a restructuring of the material constitutional dynamic, in this case by empowering the ECB as an effective ‘lender of last resort’, whilst maintaining its concurrent role in

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<sup>85</sup> See M. Wilkinson, ‘The Brexit Referendum and the Crisis of Extreme Centrism’ (2016) 17 *German Law Journal*, 131–142.

<sup>86</sup> In the recent Miller judgment, the Supreme Court made clear that becoming a member of the European Union entailed a constitutional change for the United Kingdom, and thus so would it renouncing membership, thereby requiring the authorisation of Parliament. See *R v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>87</sup> ‘Post-sovereignty’ is the description given by N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 142.

<sup>88</sup> See M. Wilkinson, ‘Economic Messianism’, *op. cit.*

economic policy as part of the 'Troika' in the European Stability Mechanism.<sup>89</sup> It augments the discretionary power of an increasingly powerful institution but one that looks increasingly *political* and *geo-political* in its manner of interference and even coercion of member states seeking financial rescue, both in its role in the Troika, and in its control of the money supply.<sup>90</sup>

The formal voluntariness of the association of the EU cannot disguise the fact that there is no formal legal avenue for voluntary exit (or involuntary expulsion) from the Eurozone itself. It was in fact on this 'irreversibility' of the currency that Draghi insisted in order to justify the rationality of the OMT programme.<sup>91</sup> Bearing in mind subsequent developments in the case of Greece – specifically the 'Oxi' referendum of 2015 followed by capitulation to the creditors' demands and the tabling of an involuntary 'Grexit' by Wolfgang Schäuble – we have to question the extent to which this justification remains credible.<sup>92</sup>

## **6. A constitutional conjuncture: the threat to constitutional pluralism**

Far from reaching constitutional maturity or experiencing a federal moment as the anti-pluralists contend, the present period is more appositely characterised as a constitutional conjuncture. This captures a complex matrix of opposing material forces and a series of potential 'constitutional moments'. It may prove to be a decisive point in the future trajectory of the project of integration but as of yet, the final destination is unclear.

What is clear is that constitutional pluralism is indeed under threat in this period, albeit not for the reasons advanced by the anti-pluralists. Much more than competing judicial authority is at stake; the entire edifice of liberal constitutionalism is threatened, as sovereignty, populism and political extremism return, now in relation not only to the Euro crisis but also in reaction to the security crisis and the migrant crisis as well as the 'Brexit' referendum. The disintegration of the European project is mooted in a way that would have been inconceivable only a decade ago.

There is no place here to evaluate the full impact of these multiple crises or even only of the Euro crisis on the constitution of the EU, or the mutation that has arguably taken place in its governing arrangements and the impact of this on the exercise of legitimate authority in the Eurozone.<sup>93</sup> But if we focus on OMT from a material constitutional

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<sup>89</sup> Which the Advocate General Cruz Villalon in OMT cautioned against, Gauweiler, opinion, op. cit.

<sup>90</sup> Most obviously in its threats to freeze liquidity during the Greek crisis of 2015.

<sup>91</sup> The justification for intervention in OMT was the irrationality of the spreads on government bonds, irrational because based on the non-existent risk of convertibility in case of break-up of the single currency. This logic was rejected by the German court.

<sup>92</sup> For a fuller narrative of these events, see M. Wilkinson, 'The Euro is Irreversible', op. cit.

<sup>93</sup> See e.g. C. Kilpatrick, 'On the Rule of Law and Economic Emergency: the Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 *Oxford Journal of Legal Studies*, 325–353; A. Menéndez, 'The Crisis

perspective, it provides an illuminating test case for the constitutional politics of crisis in the Eurozone, a microcosm of the broader tensions.

The first thing to note is that there is nothing unusual in governmental branches resorting to extraordinary measures – formal as well as informal – in times of crisis or emergency in an attempt to restore order, security, or a return to economic normality; nor in a relatively compliant judiciary.<sup>94</sup> The situation in the compound polity of the EU is more complex, as there is no single ‘Guardian of the European Constitution’ to reassert its identity in times of crisis, but numerous and competing contenders: the Commission, the ECJ, domestic constitutional courts, the European Parliament, national parliaments, the ECB, the *Bundesbank*, the Franco-German political axis, or at least one half of it – no doubt others could be imagined. The decision of the ECB to pursue the OMT is an example of how a ‘non-political’ (or technocratic) institution took up the slack, suspending normal rules (the division between monetary and economic authority) and using extraordinary measures, offering itself in effect as a lender of last resort in an attempt to restore and maintain normality *qua* currency stability and financial stability more generally, serving the second order *telos* of survival ‘of the euro as a whole’.<sup>95</sup>

But all of this tells us little about the *substantive* nature of the constitutional crisis in the Eurozone. At root, OMT reflects in miniature the material conflict between the need to keep the ‘singleness’ of the currency *and* also to avoid the solidarity required to sustain it. We need to turn to this dimension of the crisis to appreciate the full significance of the current constitutional conjuncture.

The OMT programme of the ECB is an attempt to plug the political gap created by EMU, which established an incomplete structure of monetary without fiscal union. This arrangement was based on a combination of market logic (no bail-out or monetary financing) and soft power (the stability and growth pact) to ensure that fiscal responsibility would be maintained by member states on the one hand and belief in the irreversibility of the currency, which led to the levelling of sovereign spreads on the other. When the sovereign debt crisis hit, it seemed that one of these had to give.

OMT, in conjunction with ESM, in effect, performs the job of ensuring that the market logic on which EMU was based (the market setting rates on the basis that member states would default in their debts to private creditors) would *not* run its course, or at least would be seriously mitigated. Thus, the no bailout clause became a conditional bailout clause with ex post formal modification of the Treaty. But in order to put into effect what would be required by market logic, to act *as if* the market were in charge, austerity is demanded. Market ‘justice’ therefore prevails in spite of all the promises

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of Law and the European Crises: From the Social and Democratic Rechtsstaat to the Consolidating State of (Pseudo-)technocratic Governance’ (2017) 44 *Journal of Law and Society*, 56–78.

<sup>94</sup> See generally V. Ramraj, ‘No Doctrine More Pernicious? Emergencies and the Limits of Legality’ in V. Ramraj (ed.) *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2008), 3–29.

<sup>95</sup> See K. Tuori and K. Tuori, *The Euro-Crisis: A Constitutional Analysis* (Cambridge: Cambridge University Press, 2013). The notion of justifying OMT as an exceptional measure in order to return to normality was prominent in the Advocate General’s opinion in OMT, Gauweiler, opinion, op. cit.

to the contrary in the written and unwritten principles of European integration, from solidarity to the protection of social rights.

The ECJ, in its OMT ruling, was confronted with a genuine dilemma. The dilemma, however, is not merely juridical or formal; it reflects a material constitutional struggle between austerity and solidarity. On the one hand, there is the risk of violating market logic (creating 'moral hazard') that arises in the case of assistance.<sup>96</sup> On the other hand, there is the risk of break-up of the single currency and contagion if there were no rescue of countries in financial difficulty. The teleological justification for the ECB's bond-buying programme – the 'irreversibility' of the Euro – came up against the ordo-liberal commitment to market rationality.<sup>97</sup>

Considered in broader constitutional context, the OMT saga thus reveals the precariousness of two structural edifices of the Economic and Monetary Union: fiscal discipline and the irreversibility of the Euro. If the first pushes against solidarity because assistance incentivises imprudent economic management, the second pulls in its favour, at least as far as rescue is necessary to avoid default or exit. So far, the duty of rescue has prevailed, partly because it has been considered expedient to do so for political-economic reasons and partly on the basis of a higher duty to protect the Euro as a whole. But above all it has prevailed because the tension has been resolved on terms – influenced by a Euro-group led by Germany, along with the 'Troika' of institutions (ECB, Commission and IMF) – that have been able to maintain the ideology of 'austerity'.<sup>98</sup>

OMT threatens this tense balance because, in practice, it threatens rescue *without* conditionality, having effects (particularly in Spain and Italy) without ever having to be triggered and therefore unaccompanied by any formal 'rescue programme'. And it shifts control over this terms of this balance from the creditor Member States and the 'Troika' to an essentially EU institution, perhaps the sole truly federal institution, the ECB. But the ECB's programme works in a manner that is insensitive to the demands of powerful creditor states or at least functions outside of their strict control and management. This is the key to understanding its challenge in the German constitutional court.

The ECJ does its best to assuage both concerns, to avoid having to make a political decision in favour of functionalist discretion on the one hand or ordo-liberal rule-following on the other. It defers to the ECB's expert rationale for its mandate to do

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<sup>96</sup> It is notable that the discourse on moral hazard tends to be one-sided, focusing on the risk in dis-incentivising prudent economic management on the part of the public debtor and neglecting the risk in incentivising the reckless private creditor. See e.g. M. Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis' (2016) 53 *Common Market Law Review*, 1237-1282. It is this way of presenting the narrative that contributes to the bait and switch that justifies austerity, as M. Blyth notes, *Austerity: The History of a Dangerous Idea* (Oxford: Oxford University Press, 2013).

<sup>97</sup> On the rationality and irrationality of market logic in this area see H. Schepel, 'The Bank, the Bond and the Bail-Out: On the Legal Construction of Market Discipline in the Eurozone' (2017) 44 *Journal of Law and Society*, 79 - 98. .

<sup>98</sup> See e.g. C. Kaupa, 'Has (down-turn) Austerity Really Been Constitutionalised in Europe? On the Ideological Dimension of Such a Claim' (2017) 44 *Journal of Law and Society*, 32-55.

'everything it takes' to save the Euro, but insists that the ECB's bond-buying promise does not jeopardise the commitments to fiscal discipline and avoidance of moral hazard, because the link between rescue and conditionality can be maintained if the programme were actually to be triggered.

These tensions have yet to be fully resolved. The ECJ's ruling in OMT merely prolongs the tense stalemate over this political economic battle, fudging the issue so both functionalism and ordo-liberalism can live to fight another day. On its final return to Karlsruhe, the German court's message was clear: less deference to the ECB, more surveillance over the use of its discretion.<sup>99</sup> Far from representing a decisive federal moment, it therefore serves the aim of 'kicking the can down the road' or 'extending and pretending'.

There is, however, an indication as to how the impasse between functionalism and ordo-liberalism might ultimately be traversed, revealed through close attention to the management of the Greek crisis of 2015. The election of Syriza in Greece in January 2015 tested the impasse, and indirectly the capacity of Europe to defend constitutional pluralism, pushing the tension between austerity and irreversibility (nearly!) to a breaking point. The authority of the Euro areas leading powers to pursue austerity was contested in a domestic setting in which it had been unequivocally rejected by an electorate. On the other hand, in Schmittian fashion, an enemy of the ordo-liberal ideology had been explicitly identified, those 'bad Europeans' who disregard the economic stability criteria.<sup>100</sup> What was an impersonal contest between ideas was in danger of turning into a political and geo-political contest of ideologies with clearly marked constituencies, pitting nation against nation.

The outcome was less determined by the ECJ's insistence on juridical authority and more by the EU's insistence (as articulated by the Euro-group, the ECJ, the ECB and the President of the European Council) on ordo-liberalism as the ideological touchstone of the Eurozone.<sup>101</sup> 'Grexit' could then be used less as a threat by the Greeks to regain authority and more as a threat by the Eurozone to maintain control. We therefore have to consider the other possibility in the constitutional politics being played out behind the juridical battles: the possibility that a state *might effectively be forced to leave*.<sup>102</sup> In the immediate context of OMT, this casts doubt on the ECJ's substantive agreement with the ECB's rationale for the OMT programme: the irreversibility of the Euro, at least for one member state.

The political placing of 'Grexit' on the table in the context of the recent Greek debacle thus threatens to alter the nature of the project of integration, dispelling the illusion that the Euro is irreversible for each and every country. It was this claim, in the view of the ECB, which justified interfering in sovereign spreads, which were irrationally pricing in the threat of 'Grexit', and the concomitant possibility of debt

<sup>99</sup> 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, op. cit.

<sup>100</sup> See U. di Fabio, 'Karlsruhe Makes a Referral', (2014) 15 *German Law Journal*, 107–110.

<sup>101</sup> See 'The Donald Tusk Interview: the annotated transcript', *Financial Times*, 16 July 2015, available at <http://blogs.ft.com/brusselsblog/2015/07/16/donald-tusk-interview-the-annotated-transcript/?mhq5j=e1>

<sup>102</sup> See M. Wilkinson, 'The Euro is Irreversible! ... Or is it? On OMT, Austerity and the Threat of 'Grexit' (2015) 16 *German Law Journal*, 1049–1072.

redenomination. If 'Grexit' is a real possibility, then the ECB's (and ECJ's) justificatory rationale for OMT is shattered. Although it is too early to say precisely where this will end, it signposts an as yet uncharted mutation in the constitution of EMU: the Euro is irreversible not in its composition, but in its ideology.<sup>103</sup> In other words, when push comes to shove, austerity wins. The Euro is reversible, at least for some; what is not reversible is its ordo-liberal commitment to price stability, competitiveness and the avoidance of moral hazard. In practice, however, this begins to look less like functionalism or ordo-liberalism, and more like a new version of imperialism.

Does this signal the end of constitutional pluralism in the material, political sense? Resolution of the dilemma was ultimately deferred, since the Greeks capitulated on their own accord after the 'Oxi' referendum and Greece remains, hanging by its threads. The non-event of 'Grexit' laid bare the apparent intransigence of the domestic constitutional imaginary that binds the state to the project of European integration. OMT contributed to prolonging this story, less in Greece than in Spain and Italy, as now does the QE that has come to replace it. The ECJ's ruling simply confers an added longevity to a status quo which looks increasingly unsustainable, 'buying time', but at what long-term cost?

The story continues. However, on the management of the crises it is difficult to disagree with the perception of Jürgen Habermas: the treatment of Greece looked like an 'act of punishment' against a left-wing government that dared openly to rhetorically oppose austerity whilst promoting its continuing belief in the project of European integration.<sup>104</sup> It was this management that pushed the limits of constitutional tolerance and called seriously into question the possibility of constitutional pluralism in the European Union as currently configured. Constitutional theory now has to take into account the increasing material *dis-equilibrium* in the project of integration.

## 7. Reframing constitutional pluralism

What then can be said of constitutional pluralism after these reconfigurations of political power and authority? Constitutional pluralism is needed now more than ever, but in a different sense from that advanced by its protagonists. It should be reframed as a response to the question of how a 'horizontal plurality' of political orders and heterogenous political economies can constitutionally co-exist. If, in the thinnest sense, OMT keeps constitutional pluralism barely alive by retaining the possibility of

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<sup>103</sup> On the mutation of the EU's constitution since the Euro crisis, see K. Tuori and K. Tuori, *op. cit.*; A. Menéndez, 'The Crisis of Law', *op. cit.*; Cf B. de Witte, 'Euro-crisis responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) 11 *European Constitutional Law Review*, 434–457.

<sup>104</sup> See P. Oltermann, 'Jürgen Habermas' Verdict on the EU/Greece Debt Deal – Full transcript', *The Guardian*, 16 July 2015, available at <http://www.theguardian.com/commentisfree/2015/jul/16/jurgen-habermas-eu-greece-debt-deal>. This aspect of Eurozone politics is not often addressed. Conditionality (austerity) is what M. Blyth calls a 'class-specific put-option'. It protects the top 70 per cent who have assets, and hurts the bottom 30 per cent who most depend on public services, *op. cit.*, 258. On contextualising the German lead on austerity, see A. Newman, 'The Reluctant Leader: Germany's Euro-experience and the Long Shadow of Reunification' in M. Matthijs and M. Blyth (eds) *The Future of the Euro*, *op. cit.*

competing visions of integration, it does so by leaving unresolved the constitutional conundrum inherent in the tension between ordo-liberalism and solidarity.

The challenge for constitutional pluralism, in other words, is different from that highlighted by many of its proponents (as well as detractors). Rather than a question of whether national constitutionalism can coexist with a putative European constitutionalism, as determined by claims to ultimate authority of their respective judicial branches, the pressing question, revealed in force since the Euro crisis, is how national *constitutionalisms* can materially co-coexist with each other in a European Union that does more than pay lip-service to its foundational values of democracy and solidarity, not to mention the various proclamations of social rights.<sup>105</sup> With rescue funds viewed in zero-sum terms, a constitution that protects democratic authority in Germany can conflict with one that protects social rights in Greece or Portugal, as well as conflict with the ‘constitution’ of EU law defended by the ECJ.

What this means in practical terms is to ask the following: what kind of institutional arrangements and substantive commitments are required of European integration in order to permit and foster collective co-existence? How, to put it crudely, can German constitutional values co-exist with Greek constitutional values, where one seems increasingly to proscribe what the other demands and vice versa? ‘Tolerance’ alone will no longer be sufficient to deal with this; solidarity is required.

If we accept that the European Union is a constitutional unit, however divided and fractured, but one in which the autonomy of the component parts are equally valued, and indeed continue to form the basic political and social material out of which integration evolves, then constitutional pluralism remains of paramount importance. Its significance can be illustrated with an example germane to the OMT dispute, taken from the vexed issue of the constitutionality of austerity programmes in light of their alleged incompatibility with socio-economic rights.<sup>106</sup> A great deal of attention has thus been given to the problems of ESM and OMT from the perspective of the creditor states, or at least one creditor state. These programmes have been challenged for violating the budgetary autonomy of the *Bundestag* and therefore the right to vote of the German citizen, guaranteed ultimately by virtue of the Eternity Clause of the German Basic Law. Recall that the concern of the *Bundesverfassungsgericht* was the potential that OMT could bypass conditionality, a concern rhetorically assuaged by the ECJ. But what about the effect of the very same conditionality on the debtor states? As Claire Kilpatrick puts it, ‘imagine if these cases concerning breaches of fundamental rights had come before German courts [...]’<sup>107</sup>

Constitutional *plurality*, where constitutionalism can continue to be understood through the lens of political authority (and not determined by geo-political power or economic rationality), requires a reconfiguration of political – and specifically democratic – power at all levels of government. Constitutional plurality, in other

<sup>105</sup> See e.g. E. Christodoulidos, ‘Social Rights Constitutionalism: An Antagonistic Endorsement’ (2017) 44 *Journal of Law and Society*, 123–149.

<sup>106</sup> C. Kilpatrick, ‘Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Enquiry’ (2015) 34 *EUI Working Paper LAW*.

<sup>107</sup> *ibid.*, 22.

words, requires quite particular material conditions of European *unity and solidarity*; but until a pan-European democratic unity emerges, which at present looks unlikely, this requires sensitivity to the question of political authority in an asymmetrical community of member-states, to the material conditions of possibility of constitutional pluralism within the project of European integration.

To get a firmer grasp of the concrete conditions for constitutional 'plurality in unity' to be maintained it is helpful to turn to Schmitt's protagonist in the battles of late Weimar, Herman Heller. In Schmitt's view, recall, the federation as a mid-way between the loose confederation and the federal state was an inherently unstable construct. What would ultimately determine its fate would be the question of political homogeneity; in the exceptional moment when the presence or absence of homogeneity would determine whether the federation would dissolve into a loose confederation or evolve into a federal state.<sup>108</sup>

Heller, however, had offered a quite different understanding of the necessary condition of homogeneity, as an issue of relative socio-economic equality (or inequality); for political unity to be maintained, at least the prospect of socio-economic equality must be credibly offered as possible goal within the parameters of the constitutional order. Nationalism, in Heller's view, was an antidote to the tendency of a capitalist economy towards inequality, offering a sense of unity that would conceal (rather than resolve) class divisions. But this could only be a temporary fix.<sup>109</sup>

As equality seems increasingly unachievable in conditions of advanced capitalism; indeed, on Piketty's analysis, is structurally precluded in the normal run of capitalist development, it might turn out that constitutional democracy is incompatible with capitalism and some alternative to one or the other will have to emerge (if it hasn't already).<sup>110</sup> In the EU, the question of equality, or at least the prospect of such, matters not only within but also between states: within the EU is there a regional construct, which aspires to transcend the merely formal sovereign equality that pertains in international relations.<sup>111</sup>

The aspiration to maintain a politically equal association may of course prove to be disappointed. If so, the likely scenario is a disintegration of the project in conditions that would leave constitutional pluralism hanging entirely on the threads of a de-institutionalised, regional geo-political and global market system, or, from a constitutional perspective, a disorder (or non-system). A return to a situation of radical pluralism between nation states might bring opportunities, but it would surely bring more or as many risks.

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<sup>108</sup> See Schmitt, *Constitutional Theory*, op. cit.

<sup>109</sup> See further M. Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2015) 21 *European Law Journal*, 313-339.

<sup>110</sup> See T. Piketty, *Capital in the 21<sup>st</sup> Century* (Cambridge, MA: Harvard University Press, 2014).

<sup>111</sup> On dominant liberal theories of justice, there are not even obligations of social justice (beyond humanitarian minimums) that could arise in the transnational domain. See e.g. T. Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy and Public Affairs*, 113-147; Cf. J. Cohen and C. Sabel, 'Extra Republicam Nulla Justitia' (2006) 34 *Philosophy and Public Affairs*, 147-175.

Paying serious attention to questions of complex inequalities in order to maintain a transnational constitutional order based on political autonomy looks like an uphill task from where the EU is right now. The long-term trajectory remains unclear. But what is clear is that polarising between formal legal equality guaranteed by ECJ supremacy at one end, and the political right to withdraw at the other, is insufficient. A balance must exist not only vertically, between national and supranational authority, but horizontally, between domestic constitutional authorities.

In any quasi-federal system where the identity not only of the individual person, but also of the constituent parts matters and is considered necessary to protect through formal mechanisms, there are *two* fundamental principles which remain in delicate tension with one another: equality of persons *and* equality of states.<sup>112</sup> Without a genuine sense of member state equality, the federation is liable to shade into a hegemonic entity, dominated by a single state, or a bloc of states, and even to evoke imperialism in its political form.<sup>113</sup>

To highlight this challenge is to suggest that we are, in a significant way, back to where we started, at the post-war origins of the integration process, where the issue of reconciling and strengthening the political authority of the states assumed greater significance than that of creating a supranational substitute. This was largely because of the historical condensation of political and social forces that emerged through the post-war settlement; the situation now is quite different in its particulars, and the challenges much greater in a Union of 28, but the basic issue remains the same.

## 8. Conclusion

If constitutional pluralism has been suspended, or seriously injured through the reaction to the financial crisis, this may not be for the reasons suspected by its gravediggers. Focusing only on the judicial theatre of OMT, they have missed the more significant material constitutional play occurring in the background. The final act is yet to pass; but if not the chronicle of a death foretold, the project of integration increasingly resembles a dead man walking.

Europe, it must be noted in conclusion, has never been as *disunited* as it is now: not only voluntary 'Brexit' but also involuntary 'Grexit' has been mooted. There are also increasing concerns about respect for basic constitutional values of democracy and the rule of law in Hungary, and more recently, in Poland, which have led to arguments over whether the EU has the authority as well as the institutional capacity to intervene domestically in areas of basic constitutional concern.<sup>114</sup> It is worth noting too, that in contrast to the apparent willingness of the EU to micromanage the perceived threat to austerity in Greece, it appears rather impotent to manage the growing threat to the rule of law from the authoritarian illiberalism in Hungary and Poland, which has been left to emerge without facing effective constraints. This poses a threat not just to the principles of economic and monetary union

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<sup>112</sup> For discussion, see C. Lord and J. Pollack, 'Unequal but Democratic? Equality according to Karlsruhe' (2013) 20 *European Journal of Public Policy*, 190–205.

<sup>113</sup> See e.g. U. Beck, *German Europe* [trans. R. Livingstone] (London: Polity Press, 2013)

<sup>114</sup> See J-W. Müller, 'Should the EU Protect Democracy and the Rule of Law Inside Member States?' (2015) 21 *European Law Journal*, 141-160.

but also to the foundational values of the EU as protected in Article 2 TEU. It may prove a greater challenge to the project than the voluntary exit of the United Kingdom.

These divisions will not be resolved – but could quite possibly be aggravated – by unqualified judicial assertions of the supremacy of EU law or normativist proclamations of the overwhelming force of legality. If, for example, German ordo-liberal constitutional ideology, operationalised to preclude solidarity (under the rubric of avoiding moral hazard), no longer seems compatible with constitutional democracy in *other* parts of the Eurozone, particularly when Germany makes having trade surplus a '*de facto* reason of state', then this will not be overcome by judicial fiat.<sup>115</sup> It will only be addressed by serious institutional reform and social mobilisation that lends credence to a democratic transnational solidarity.

If democracy in the EU must be understood no longer as a right, but as a reward for fiscal discipline, it needs to be made clear that this is a reward that could realistically only ever be offered to some under current political and economic conditions. The immovable object of ordo-liberalism threatens to meet head-on the irresistible force of functional economic integration, neither shows any concern for the value of democratic constitutionalism nor of constitutional pluralism across the EU. This will only lead to further backlashes against the project.

The idea of constitutional pluralism alone will not be able to resolve problems of a material, geopolitical and political-economic nature. However, it can be reframed in a way that demands more sensitivity to the material dynamics of political authority and complex political equality in the compound polity that is the European Union. Without serious attention to the demands of constitutional pluralism the European Union will struggle to maintain the levels of political solidarity and social support that are required for the survival of its animating ideals.

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<sup>115</sup> H. Thompson, 'Austerity as Ideology: The Bait and Switch of the Banking Crisis', (2013) 11 *Comparative European Politics*, 729-736, 730.

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