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RESEARCH ARTICLE

Sovereignty, Difference & Constitutional Pluralism: The European Union and Canada in Dialog

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Abstract

Both Canada and the European Union feature multiple overlapping legal systems, each with independent sovereignty claims and distinctive cultural traditions. Courts in both settings have therefore been forced to reckon with 'constitutional pluralism'.

In Canada, the contested relationship between Indigenous and settler legal orders has been mediated largely through s35, which recognizes Aboriginal rights, and s25 which shields them from the Canadian *Charter*. The resulting jurisprudence has focused on protecting cultural difference by creating limited spaces of autonomy within the Canadian state but has largely neglected questions of sovereignty.

In Europe, the relationship between European Union and member-state law has been mediated through an emergent judicial dialog which allows each court to maintain its sovereignty claim by making its acceptance of the other's authority conditional. The resulting jurisprudence focuses on sovereignty without dealing as closely with questions of difference.

The two contexts therefore represent divergent approaches to shared conceptual and practical problems. To my knowledge, however, no scholarship has seriously compared the two. The following article takes a modest step towards filling this lacuna, introducing European thinkers to Canadian constitutional pluralism and vice versa before reflecting on some of the ways further comparative research can add depth to existing comparative literature, deepen our understanding of constitutional pluralism as a theory and, in particular, raise important questions about constitutional pluralism's relationship to liberalism.

Keywords: aboriginal law; Canada; constitutional pluralism; comparative constitutionalism; European Union

Introduction

During the constitutional debates of the 1980s and 1990s, the question of whether and how the Canadian *Charter of Rights and Freedoms* should apply to Indigenous governments was a recurrent and divisive topic. Some contended the prospective *Charter* should

not apply, both because Indigenous jurisdiction is inherent and independent of the state and because the *Charter* reflects a European tradition of thought and governance that clashes fundamentally with traditional Indigenous political, legal and social systems.[1] Others decried the potential for 'charter free zones' that would leave Indigenous people vulnerable to abuse[2] or insisted on the exclusive nature of Canadian sovereignty.[3] Ultimately, these debates resulted in S35, which recognized ill-defined Aboriginal rights, and s25, which 'shields' those rights from *Charter* scrutiny.[4] Subsequent jurisprudence has continuously wrestled with the relationship between Indigenous and settler legal orders.

Interestingly, a parallel debate was unfolding in the European Union. Here, the question was whether EU law is subject to the constitutions of the member-states. The European Court of Justice (ECJ) argued the EU was sovereign in its own domains and thus enjoyed supremacy over national law[5], while national courts insisted on their own sovereignty and duty to protect core constitutional identity from transnational encroachment.[6] Ultimately, the debate set in place an emergent process of judicial dialog and mutual condition-setting that continues to this day.[7] The resulting jurisprudence continues to be highly dynamic, as Europe too wrestles with the relationship between legalities.

In both contexts, actors are struggling with the coexistence of both competing sovereignty claims and divergent cultural identities in shared jurisdictional space. Both contexts evoke the contested possibilities of post-Westphalian political and legal community.[8] Scholars in both contexts have taken up the language of 'constitutional pluralism'.[9] To my knowledge, however, almost no scholarship has compared the practices of

[1]E.g. The Assembly of First Nations, *Memorandum Concerning the Rights of First Nations in Canada and the Canadian Constitution* (ANF, Ottawa, 16 June 1982).

[2]E.g. Native Women's Association of Canada, *Statement on the Canada Package* (NWAC, Ottawa, 1992).

[3]B Schwartz, 'A Separate Aboriginal Justice System?' (1990) 77 *Manitoba Law Journal* 1.

[4]R Hamilton, 'Self-Governing Nation or "Jurisdictional Ghetto"? Section 25 of the Charter of Rights and Freedoms and Self-Governing First Nations in Canada' (2022) 26 *Review of Constitutional Studies* 2; A Swiffen, 'Section 25 and Indigenous Legalities: Exploring Plurinational Federalism in Canada' (2023) 101 *Canadian Bar Review* 2; A Swiffen, 'Constitutional Reconciliation and the Canadian Charter of Rights and Freedoms' (2019) 24 *Review of Constitutional Studies* 1.

[5]*Van Gend en Loos v. Netherlands*, ECJ Case 26/62, [1963] ECR 1; *Costa v. ENEL*, ECJ Case 6/64, [1964] ECR 585.

[6]P Craig, 'The ECJ, National Courts and the Supremacy of Community Law' in I Pernice and R Miccu (eds), *The European Constitution in the Making* (Nomos, Bade-Baden, 2004).

[7]M Maduro, 'Contrapuntal Law' in Neil Walker (ed), *Sovereignty in Transition* (Publishing, Portland, 2003); K Cherry, 'Conditional Authority and Democratic Legitimacy in Pluralist Space' in J Tully et al. (eds), *Democratic Multiplicity: Perceiving, Enacting, and Integrating Democratic Diversity* (Cambridge University Press, Cambridge, 2022).

[8]For a comparative exploration see K Cherry, *Sovereignty and Contestation: Practices of Pluralism in Canada and the European Union* (University of Toronto Press, Toronto, 2025).

[9]E.g. K Ladner, 'Take 35: Reconciling Constitutional Orders' in AM Timpson (ed), *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (UBC Press, Vancouver, 2009), 2, 13, 18; M Papillon, 'The Two Faces of Treaty Federalism' in J Bickerton and AG Gagnon (eds), *Canadian Politics* (7th edn, University of Toronto Press, Toronto, 2020) 9, 10, 22; K McKerracher, 'Relational Legal Pluralism and Indigenous Legal Orders in Canada' (2023) 12 *Global Constitutionalism* 1, 146; P Macklem, 'Indigenous Peoples and the Ethos of Legal Pluralism in Canada' in P Macklem and D Sanderson (eds), *Recognition to Reconciliation* (University of Toronto Press, Toronto, 2016) 19.

Canadian and European courts or the literatures they have provoked, nor considered the possibility of reciprocally elucidating dialog between these fields.[10]

Indeed, while political and policy comparisons between Canada and the EU are increasingly common, these typically use the framework of federalism, comparing the federal/provincial relationship with the Union/member-state relationship.[11] While this comparison can be illuminating, it represents a highly selective engagement with Canadian pluralism, neglecting perhaps the most dynamic and contentious elements. This article's contribution is therefore to expand the comparative field by bringing in another set of relations – those between Indigenous and settler governance.[12] Such a comparison can allow Europeans to engage with the cutting edge of pluralist thought in Canada while also exposing Indigenous studies scholars to examples of pluralism beyond the colonial context, introducing both to new and productive literatures.

Admittedly, comparing EU/member-state relations to Canadian/Indigenous relations is in some ways an apples-to-oranges comparison[13] – Indigenous nations are not states, and the EU does not have competences in relation to Europe's Indigenous peoples. One form of pluralism challenges the state 'from above' while the other proceeds 'from below'. One context is colonial, the other is not. One is intra-civilizational and the other inter-civilizational. The power relations at play are distinct. Yet there are also important underlying similarities. Unlike federal/provincial relationships, which occur *within* a single constitutional order, both the EU/member-state relationship and the Indigenous/settler relationship feature pluralism *across* multiple constitutional orders. Both also involve *sui generis* participants – the EU is not quite a federation and not quite an international organization; Indigenous nations are not western-style nation-states but not minorities either. As a result, both relationships represent a *sui generis* sort of treaty-federalism[14] which challenges traditional conceptions of political community, sovereignty and constitutionalism.

[10]Culver and Giudice's focus is theoretical rather than comparative, but several pieces do connect European law with Indigenous/state relations in Canada. However, they reject analogy between the two, arguing the EU is an example of two distinct legalities each with their own supremacy claims while Canada is an example of 'entangled' legalities none of which makes a traditional supremacy claim. While sympathetic to their account, respectfully, I think they overstate the absence of supremacy claims in Canadian law and thus under-value the comparison. K Culver and M Giudice, *Legality's Borders* (Oxford University Press, Oxford, 2010) 57–9; K Culver and M Giudice, *The Unsteady State* (Cambridge University Press, Cambridge MA, 2017); K Culver and M Giudice, 'Entanglement of State and Indigenous Legal Orders in Canada' in N Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press, Cambridge MA, 2021) 94–5.

[11]E.g. JE Fossum, 'The European Union and Canada Compared' in C Duun (ed), *The Handbook of Canadian Public Administration* (Oxford University Press, 2018); JE Fossum, 'Multiheaded Federations: The EU and Canada Compared' (2023) 11 *Politics and Governance* 3; B Théret, 'The New Eu Social Policies in the Light of the Canadian Experience of Federalism' (2002) 47 *Sociétés Contemporaines* 3; A Verdun, 'The Federal Features of the EU: Lessons from Canada' (2016) 4 *Politics and Governance* 3; P Crowley, *Crossing the Atlantic: Comparing the European Union and Canada* (Routledge, 2004).

[12]Martin Papillon concepts derived from European pluralism, like multilevel governance, in his analysis of settler-Indigenous pluralism. His work is rarely explicitly comparative, however, and focuses on political rather than legal mechanisms.

[13]For an extended discussion of the case for comparison see Cherry, *Sovereignty and Contestation*, Chapter 1.

[14]E.g. JY Henderson, 'Empowering Treaty Federalism' (1994) 58 *Saskatchewan Law Review* 2; T Hueglin, 'From Constitutional to Treaty Federalism: A Comparative Perspective' (2000) 30 *Publius* 4.

The idea is not, therefore to suggest the two contexts are equivalent, but rather to leverage both the similarities and the pernicious contrasts[15] between them to help theorists and practitioners in both fields to see their own practices in new ways, expose them to new ideas and techniques, and ultimately push us all towards a more nuanced investigation of constitutional pluralism as a general theory.

The following article thus provides a (necessarily schematic) overview of constitutional pluralism in each setting, introducing scholars of each field to the fundamentals of the other. I show that each context is concerned with questions of sovereignty and cultural difference, but that each takes a contrasting approach – Canadian courts focus on protecting cultural difference while attempting to avoid questions of sovereignty[16] – while European discourse focuses primarily on questions of sovereignty without engaging as deeply with difference. The following section sketches some directions for future research, gesturing towards some of the ways that this comparison can contribute to both cases, deepen our theoretical understanding of the limits, potentials and dangers of constitutional pluralism, and add depth to existing comparative literature. In particular, I show that the Canadian and European approaches both, through distinct mechanisms, work to secure a privileged place for liberalism. Ultimately, I argue that the relationship between liberalism and constitutional pluralism is an important locus for further research in both contexts, and especially for scholars who seek to apply constitutional pluralism in transnational or global contexts.[17]

Constitutional pluralism in Canada

Charter debates and constitutional politics

The recognition of Indigenous self-governance, and its relationship to the settler-Canadian constitutional order, has been a perennial object of contestation. While early colonists recognized and treated with self-governing Indigenous nations, they also worked to gradually undermine their self-governing status and subordinate them to settler law, and forcibly absorb them into the settler polity, slowly repositioning erstwhile allies as subjects instead.[18] Indigenous peoples have fiercely and consistently resisted this shift. The issue was a major flashpoint during the Constitutional debates of the 1980s and 1990s[19] and it remains at the cutting edge of Canadian jurisprudence, legal scholarship and social contestation today.

[15]Tully, 'Discussing Wittgenstein' in J Tully (ed), *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge MA, 1995) note 87.

[16]For Mills, the court protects 'private life stuff that can be abandoned without anything more than private life consequence' A Mills, *'Miinigowiziwin: All That Has Been Given for Living Well Together' One Vision of Anishinaabe Constitutionalism* (PhD. Diss., University of Victoria, 2019) 205.

[17]E.g. M Avbelj and J Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart, New York, 2012); N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2010); N Walker, *Intimations of Global Law* (Cambridge University Press, Cambridge MA, 2015).

[18]*Report of the Royal Commission on Aboriginal Peoples – Volume 1*(Royal Commission on Aboriginal Peoples, Ottawa, 1996).

[19]E.g. J Webber, *The Constitution of Canada* (Hart, New York, 2021); P Russell, *Constitutional Odyssey* (University of Toronto Press, Toronto, 2004); E Feltes, '*We Don't Need your Constitution': Patriation and Indigenous Self-determination in British Columbia* (PhD. Diss., University of British Columbia, 2022).

The application of the Canadian *Charter* provides a useful example. The Assembly of First Nations (AFN) – the national political association of status Indians in Canada – argued Indigenous people retain an inherent, pre-contact right to self-government through their own culturally distinctive legal and political systems.[20] From this perspective, self-governance within the confines of the *Charter* fails to recognize both Indigenous sovereignty and Indigenous cultural difference.[21]

Conversely, the Native Women's Association of Canada, among others, argued that exempting Indigenous governments from the *Charter* would leave the most vulnerable members of Indigenous societies – especially women – at the mercy of their governments .[22] For these voices, self-determination must go hand-in-hand with *Charter* protections. Many settler Canadians raised similar arguments, while others focused on the idea that Canadian law must apply equally to all Canadians – including Indigenous people.[23]

Some suggested that Indigenous nations could square this circle by drafting their own *Charters*, which would protect individual rights without undermining collective autonomy.[24] For such documents to satisfy the concerns of the pro-*Charter* crowd, however, they would have to be functionally equivalent to the Canadian *Charter*. If this were so, they would fail to meet the cultural-difference-based concerns of the anti-*Charter* crowd.

Ultimately, the Constitution included s35, affirming the collective rights of Indigenous people.[25] However, it left these rights undefined and thus did not explicitly define the contours of a right to self-government. A separate clause provided for First Minister's conferences to define said rights, but these failed to come to any agreement. The *Charter* also contained S25, which states that 'the guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada'.[26] Whether s25 constitutes a 'shield' from *Charter* analysis or merely an interpretative framework was not clear.

In 1987, an attempt to amend the constitution was defeated in part for its failure to address self-governance.[27] In 1992, another package of constitutional amendments known as the Charlottetown Accords would have enshrined a right to Indigenous self-government, made it clear that the *Charter* would apply to Indigenous governments, and given Indigenous governments access to s33 – the notwithstanding clause that allows

[20]Assembly of First Nations, 'Memorandum' 17–8; The Assembly of First Nations, *To the Source: Commissioner's Report, First Nations' Circle on the Constitution* (Ottawa, 13 April 1992).

[21]M Boldt and JA Long, 'Tribal Philosophies and the Canadian Charter of Rights and Freedoms' (1984) 7 *Ethnic and Racial Studies* 4.

[22]Native Women's Association of Canada, 'Canada Package'; Native Women's Association of Canada, *The Future Will Live with the Choices We Make Today* (NWAC, Oshweken, ON, 1992); T Nahanee, 'Dancing With a Gorilla: Aboriginal Women, Justice and the Charter' in *Aboriginal Peoples and the Justice System* (Supply and Services, Ottawa, 1993).

[23]Schwartz, 'Separate Aboriginal Justice'.

[24]T Isaac and MS Maloughney, 'Dually Disadvantaged and Historically Forgotten: Aboriginal Women and the Inherent Right of Aboriginal Self-Government' (1992) 21 *Manitoba Law Journal* 3.

[25]'35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.' Part 2 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

[26]*Canadian Charter of Rights and Freedoms*, s25, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

[27]I Peach, 'The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada' (2012) 16 *Review of Constitutional Studies* 1.

provincial and federal governments to temporarily override certain *Charter* protections.[28] However, these Accords also failed to be ratified.

As a result, the constitutional status of Indigenous self-government, the content of s35, and the question of to what degree such governments would be exempted from the *Charter* by s25, all remained open. After two failed Accords, politicians lost the taste for constitutional politics. Indigenous advocacy, both within and beyond Canadian law, has continued and the task of answering these questions has fallen increasingly to the courts.[29]

The s35 jurisprudence

Initially, many expected the courts to find that s35 included a general right to self-government.[30] Discourses of 'Treaty Federalism'[31] or 'Treaty Constitutionalism'[32] made the case that Indigenous peoples were already in possession of sovereignty when settlers arrived, and thus that treaties should be understood as a sort of constitution through which Indigenous nations transferred certain jurisdictions to the Crown while retaining others. According to this logic, the purpose of s35 and 25 is to recognize independent Indigenous jurisdictions, sovereign in their own spheres just as the provincial and federal governments are in theirs.[33]

The Supreme Court has repeatedly declared that the purpose of s35 is to 'reconcile' the fact that Indigenous nations were already exercising sovereignty when settlers arrived with the contemporary reality of Crown sovereignty.[34] However, the Court has been extremely hesitant to discuss s35 in jurisdictional terms.[35] Instead, it has generally approached the task of reconciliation by creating a series of *Charter*-like rights that hedge in settler sovereignty.[36]

In *Van Der Peet*, the court ruled that s35 protects practices that are 'integral to the distinctive culture' of the claimant nation.[37] These practices do not need to be unique, but

[28]N Metallic, 'Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments' (2022) 31 *Constitutional Forum* 2, 7.

[29]A beleaguered modern treaty process has also played an important role. E.g. A Woolford, 'Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process' (2004) 29 *Canadian Journal of Sociology* 1.

[30]G Christie, 'Struggles against Domestication: The United Nations Declaration on the Rights of Indigenous Peoples and Constitutional Pluralism' in A Swiffen and J Nichols (eds), *Indigenous Peoples and the Future of Federalism* (University of Toronto Press, Toronto, 2024) 61.

[31]JY Henderson, 'Empowering Treaty Federalism' (1994) 58 *Saskatchewan Law Review* 1.

[32]Tully, *Strange Multiplicity*,184.

[33]Ladner, 'Take 35', 13.

[34]*R. v. Van der Peet* [1996] 2 SCR 507 at 31. For a review of various expressions of the 'reconciling' function of aboriginal rights see R Rarihokwats, 'Reconciliation: Resolving Conflict Between Two Absolute but Opposing Rights: First Nation "Sovereignty" versus Crown "Sovereignty' *Four Arrow Background Papers* IV (2010); H Wyile, 'Towards a Genealogy of Reconciliation in Canada' (2018) 51 *Journal of Canadian Studies* 3. For shifting approaches to sovereignty specifically see R Beaton, 'De facto and de jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada' (2018) 27 *Constitutional Forum* 1.

[35]R Beaton, R Hamilton, and J Nichols, 'Aboriginal Title, Self-Government, and Indigenous Jurisdiction in Canadian Law' (2022) 73 *University of New Brunswick Law Journal* 95–6.

[36]S Morales and J Nichols, 'Reconciliation beyond the Box: The UN Declaration and Plurinational Federalism in Canada' in *6 Degrees-CIGI Special Report* (CIGI, Waterloo, 2018) 3.

[37]Van der Peet, para 45–6.

they must be an important part of what makes the culture what it is.[38] In *Sparrow*, it found that the Crown retains sovereign power to infringe Aboriginal rights provided it can 'justify' the infringement to the satisfaction of a settler court.[39] Thus, the Crown is positioned as sovereign and Indigenous peoples as minorities with a right to cultural difference.

Where self-government claims have arisen, the court has adopted a similarly culturalist approach. In *Pamajewon*, it found s35 precludes a broad, general right to self-government, grounding only specific jurisdictions that pass the *Van Der Peet* test.[40] In *Reference in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, the Quebec Court of Appeal took a distinct but similar approach, recognizing a generic right to self-government, but presenting it as grounding specific jurisdictions connected to 'cultural continuity and survival'.[41] Thus self-government, like other rights, must be connected to the culture of the claimant nation and can be infringed by the Crown.

Without a general Aboriginal right to self-government, some have attempted to ground jurisdiction as an incident of land ownership. In *Delgamuukw*, the claimants explicitly sought recognition of their 'jurisdiction and ownership'. As Chief DelgamUukw put it – '[w]e are not interested in asserting [A]boriginal rights – we are here to discuss territory and authority'.[42]

Nevertheless, the court modified their pleadings into a case for Aboriginal title, which it defined as an essentially proprietary interest subject to the Crown's underlying title and legislative authority.[43] Even the associated proprietary rights are subject to infringement.[44] In *Campbell*, however, the court found both that the division of powers between the federal and provincial governments is non-exhaustive and that the right to hold land communally implies a right to make collective decisions about the land, providing a potential back-door to broad jurisdictional recognition.[45] In *Tsilhqot'in*, the Court emphasized that title includes the ability to 'use', 'control', and 'manage' lands collectively – but stopped short of explicitly jurisdictional language.[46] It also affirmed the Crown's underlying title and legislative authority and expanded the ability to infringe title rights to cover the provincial, as well as the federal Crown.[47] Ultimately, *Tsilhqot'in* leaves it unclear whether the title amounts to much more than the normal management rights associated with property ownership.[48]

[38]Van der Peet, at 71.

[39]*R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1106.

[40]*R v Pamajewon*, [1996] 2 SCR 821, at 24–7.

[41]Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premiè res Nations, des Inuits et des Métis, 2022 QCCA 185; Catherine Dunne, '"Sui Generis" Self-Government: The Lasting Impacts of the Doctrine of Discovery in the Reference to the Quebec Court of Appeal in Relation with the Act Respecting First Nations, Inuit and Métis Children, Youth and Families' (2023) 56 *UBC Law Review* 2.

[42]Gitksan and Wet'suwet'en Hereditary Chiefs, *The Spirit in The Land: The opening statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia* (Reflections, Gabriola, 1989) 9.

[43]*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at 7.

[44]*Delgamuukw*, at 113, 161.

[45]Ibid.

[46]*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014]

[47]*Tsilhqot'in*, at 77–88, 147–52.

[48]Beaton, Hamilton, and Nichols, 'Aboriginal Title', at 115–8.

Thus, the s35 jurisprudence reflects a 'thick' conception of Crown sovereignty which positions Indigenous nations as non-sovereign communities within the Canadian state.[49] As the court wrote in *Gladstone*, Aboriginal people 'exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign'.[50] As a result, the court's approach to reconciling Crown sovereignty with pre-existing Indigenous sovereignty does not revolve primarily around recognizing broad modern-day governing authority for Indigenous communities, but rather consists of granting specific rights designed to ensure that the exercise of Crown sovereignty does not unduly prevent Indigenous people from remaining distinct cultural communities.[51]

The s25 jurisprudence

The purpose of s25 has been cast in a similar light. In an influential concurring opinion in *Kaap*, Bastarache J. explained that section 25 is engaged when 'Charter protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group'.[52] In *McCarthy*, the court concurred that rights attract s25 protection when they go to 'the distinctive, collective and cultural identity of an Aboriginal group'.[53]

What protection do these culturally distinctive activities enjoy? There have been two broad approaches in the academic literature and jurisprudence. The first approach sees s25 as a rule of construction that requires courts to 'harmonize' *Charter* and Aboriginal rights wherever possible.[54] The second approach sees s25 as a 'shield' which prevents the *Charter* from being applied to Indigenous governments at all.[55]

There are also mixed approaches. For example, Macklem slots the acts of Indigenous governments into two categories: 'external protections' – acts which impact non-Indigenous peoples' rights – and 'internal restrictions' – acts which impact the rights of members of the Indigenous community.[56] For external restrictions, the courts should seek a harmonious interpretation and, if none is available, the *Charter* rights of settler Canadians should prevail. For internal restrictions, the judiciary should seek a harmonious interpretation and, if none is available, s25 should provide a shield.

The jurisprudence has generally treated s25 as some sort of shield. In concurring reasons in *Kaap*[57], Bastarache J. suggested that s25 should be triggered once a *prima facie*

[49]J Nichols, 'A Narrowing Field of View: An Investigation into the Relationship Between the Principles of Treaty Interpretation and the Conceptual Framework of Canadian Federalism' (2019) 56 *Osgoode Hall Law Journal* 2; Robert Hamilton and Joshua Nichols, 'The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult' (2019) 56 *Alberta Law Review* 3.

[50]*R v. Gladstone*, [1996] 2 SCR 723 at 73; *Sparrow* at 1103; *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.* BCSC 15. [2022] 198.

[51]Christie, 'Struggles against Domestication' at 67–8.

[52]*R. v. Kapp*, [2008] 2 S.C.R. 483 at 89.

[53]*McCarthy* at 148; *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 5, at 89.

[54]W Pentney, 'The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982*: Part I — The Interpretive Prism of Section 25' (1988) 22 *UBC Law Review* 2; D Milward, *Aboriginal Justice and the Charter: Realising a Culturally Sensitive Interpretation of Legal Rights* (UBC Press, Vancouver, 2012).

[55]K Wilkins, '…But We Need the Eggs: The Royal Commission, the Charter of Rights, and the Inherent Right of Aboriginal Self-Government' (1999) 49 *University of Toronto Law Journal* 1; K McNeil, 'Aboriginal Governments and the Canadian Charter of Rights and Freedoms' (1996) 34 *Osgoode Hall Law Journal* 1.

[56]P Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, ON, 2001).

[57]*R v Kapp*, at 89.

Charter violation has been found, and if it applies, should prevent further *Charter* analysis. *Dickson*[58] and *McCarthy* applied the same approach.[59]

The Canadian approach to constitutional pluralism

In sum, the jurisprudence generally treats Indigenous communities as cultural communities subject to both Crown sovereignty and *Charter* review. Settler sovereignty is, however, constrained by Indigenous rights, such that distinctive cultural practices can be shielded from both legislative infringement and *Charter* scrutiny.

At least two major lines of contestation help define Canadian debates, one concerning difference and the other sovereignty.

The first focuses on what degree of difference is acceptable. For example, doe s25 protect only relatively shallow differences – the sort of differences that can be 'harmonized' away through culturally sensitive interpretation; or does it also protect 'irreconcilable' differences that cannot be interpreted away? If so, are such differences acceptable only for 'internal' restrictions, or also 'external' protections? Stanley Fish suggests that such debates leave liberal pluralists in a bind – they can either impose the *Charter* on Indigenous governments without their consent, or else they must sacrifice the idea that rights are universal.[60] Either way, a core tenet of liberalism is compromised. This dilemma appears to drive much of the Canadian jurisprudence and constitutional debate.[61] Two types of mechanisms help mediate the tension. The first consists of rules of harmonious interpretation, 'Indigenous' *Charters*, Indigenous interpretation of the Canadian *Charter* – in essence, tools which soften the imposition of a settler legal framework by casting it in 'culturally sensitive' ways. The second consists of shielding mechanisms like s25 or s33, which protect Indigenous legal orders, under limited circumstances, from the ordinary need to conform to settler standards. Together, such mechanisms attempt to blunt Fish's dilemma.

The second axis of debate involves the question of the degree to which Aboriginal rights encompass governance rights or jurisdictional authority. Most contemporary scholars agree that Indigenous claims demand a more robust governance dimension. Scholarly discourse can be loosely organized around two different approaches to that goal.[62] The first approach, typically called 'reconciliation', involves Indigenous nations exercising governance within the settler constitutional framework. By asserting rights, encouraging settler judges to draw on Indigenous legal traditions,[63] exercising powers delegated from settler governments, negotiating modern treaties, self-government agreements and the like, Indigenous nations can grow their governance capacity without directly challenging – indeed, by participating in – settler sovereignty. The second approach, 'resurgence'[64] contests settler sovereignty more

[58] *Dickson v. Vuntut Gwitchin First Nation* 2024 SCC 10.

[59] *McCarthy v. Whitefish Lake First Nation* #128, 2023 FC 220.

[60] S Fish, 'Boutique Multiculturalism, or Why Liberals Are Incapable of Thinking about Hate Speech' (1997) 23 *Critical Inquiry* 2, 383.

[61] See the discussion of 'constitutional capture' in Mills, 'Miinigowiziwin' 35–8.

[62] J Tully, M Asch, and J Borrows (eds), *Resurgence and Reconciliation* (University of Toronto Press, Toronto, 2018).

[63] J Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, Toronto, 2010); J Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, Toronto, 2002).

[64] e.g. T Alfred, *Wasáse* (Peterborough: Broadview, 2009); J Corntassel, 'Re-envisioning Resurgence: Indigenous pathways to decolonization and sustainable self-determination' (2012) 1 *Decolonization* 1; G Coulthard, *Red Skin, White Masks* (University of Minnesota Press, Minneapolis, 2014); A Simpson, *Mohawk*

directly and is critical of participating in the forms of recognition that reaffirm it. Instead of seeking accommodation from the state, resurgence scholars advocate 'turning away' from the state, revitalizing traditional Indigenous institutions and practices, then enacting Indigenous autonomy directly, outside of and even against state institutions.[65] Most envision eventually negotiating some form of nation-to-nation arrangement that recognizes Indigenous nations as distinct constitutional orders.[66] Increasingly, this debate defines the legal and political landscape as Indigenous people exert agency both within and beyond settler sovereignty.

The two lines of debate also interpenetrate. Indeed, the question of sovereignty within or beyond the state is intimately tied to the question of cultural incommensurability.[67] If settler and Indigenous worldviews are commensurable, then some sort of hybrid state may be a viable solution. If they are not, then only independent, traditionalist institutions can properly recognize Indigenous difference. Different conceptions of difference can therefore drive different approaches to sovereignty. Conversely, the courts' steadfast commitment to avoiding Indigenous sovereignty drives it both to focus on difference instead, and to consider itself empowered to set the terms of recognition unilaterally.

Ultimately, the jurisprudence treats s35 and 25 as tools to protect Indigenous culture and largely skirts the question of Indigenous sovereignty. Justifying their ability to unilaterally determine the scope of difference, however, inevitably draws the courts into questions of sovereignty, which continue to haunt contemporary jurisprudence. Indeed, constitutional scholar Kent McNeil calls the sovereignty issue an 'unresolved constitutional conundrum'.[68]

Constitutional pluralism in Europe

EU supremacy and national constitutions

The earliest treaties of what would become the European Union did not clearly establish the relationship between European and national law.[69] Some viewed the nascent transnational community as sovereign over its members; others saw it as merely a voluntary agreement between sovereign states.[70] At the time, the issue did not seem to need definitive resolution, both because integration was largely limited to steel and coal production and so community law was a relatively minor and discreet field of law, and because the integration process was enjoying a period called the 'permissive consensus',

Interruptus (Duke University Press, Durham, 2014); L Simpson, *Dancing on Our Turtles Back* (Arbeiter Ring, Winnipeg, 2011).

[65]Coulthard, *Red Skin* 154–55.

[66]M Elliot, 'Indigenous Resurgence: The Drive for Renewed Engagement and Reciprocity in the Turn Away from the State' (2018) 51 *Canadian Journal of Political Science* 1.

[67]For a discussion of resurgence and reconciliation's respective approaches to identity see A Mills, 'Rooted Constitutionalism' in J Tully, M Asch, and J Borrows (eds), *Resurgence and Reconciliation*, (University of Toronto Press, Toronto, 2018).

[68]K McNeil, 'First Nations Sovereignty and the Legality of Crown Sovereignty: An Unresolved Constitutional Conundrum' (2017) 320 *Osgoode Digital Commons* 2.

[69]The Constitutional Treaty would later include such a provision, but it was never successfully ratified. The following Lisbon Treaty finally recognized the primacy of EU law, but without completely resolving the issue of sovereignty. Craig and de Burca, *EU Law*, 266.

[70]Cherry, *Sovereignty and Contestation* especially chapter 5.

where integration was largely depolitisized.[71] As the Coal and Steel Community expanded, however, integration both spread into more policy areas and became more politically contentious, making the relationship between national and European law increasingly difficult to ignore.

During the 1960s, nationalist governments and courts alike were treating EU law as a voluntary commitment subject to state sovereignty.[72] The European Court of Justice (ECJ) took the opposite position, ruling that member-states had forgone a portion of their sovereignty and that EU law is supreme over national law.[73] In *Internationale Handelsgesellschaft*, the ECJ extended its claim of supremacy over national legislation to cover national constitutions as well.[74] National courts, although largely receptive to supremacy over national legislation, began to contest the ECJ's claims to supremacy over local constitutional orders.[75]

In a now famous pair of cases, the *Solange* decisions, the German Constitutional Court first ruled that because European law did not contain its own internal human rights protections, German courts may need to review EU laws for compatibility with German rights protections.[76] In this way, EU supremacy was subjected to certain conditions. This represented a clear challenge to the authority of the ECJ. Rather than confront the German court directly, however, the ECJ busily developed a human rights jurisprudence of its own. In *Solange* II, the German Constitutional Court responded, finding that the EU system now provided internal protections essentially equivalent to those in German Law.[77] As a result, German courts would not review EU laws unless evidence could be presented that the EU system as a whole no longer provided equivalent rights protection.

These decisions have been euphemistically referred to as the So-long-as decisions: so long as the EU maintains systemic protections essentially equivalent to the German constitution, EU law will be considered supreme by German courts.[78] The German Constitutional Court has built on this conditional approach since. In *Maastricht*, it introduced a form of *ultra vires* review, holding that EU law may not be treated as supreme if German courts found that the EU had exceeded its jurisdiction.[79] In *Lisbon*, it ruled that EU law could not affect the core identity of the German federation.[80] These 'counter-limits', or 'locks' as they are sometimes known[81], represent a clear counter-claim – while the ECJ believes that member-states are no longer at liberty to set aside EU law, the German Court clearly believes otherwise.

[71]M Moland, 'Constraining Dissensus and Permissive Consensus: Variations in Support for Core State Powers' (2013) 46 *West European Politics* 6.

[72]JM Palayret, H Wallace and P Winand (eds), *Visions, Votes, and Vetoes: The Empty Chair Crisis and the Luxembourg Compromise Forty Years On* (P.I.E.-Peter Lang, Brussels, 2006).

[73]*Van Gend en Loos*; *Costa v. ENEL;* K Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, Oxford, 2001).

[74]C11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; C-573/93 [1996], *Commission v. Luxemburg* ECR 1–3207; C-224/97 [1999] *Ciola v. Land Vorarlberg* ECR I-2517.

[75]Craig, 'The ECJ, National Courts' at 35–52; Maduro, 'Contrapunctual Law'.

[76]2 BvL 52/71 *Solange I* [(29 May 1974].

[77]2 BvR 197/83 *Solange II* [22 Oct. 1986].

[78]M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty' (2005) 11 *European Law Journal* 3, 262–307.

[79]2 BvR 2134/92 & 2 BvR 2159/92 *Maastricht Treaty* [12 Oct 1993], para 388, 422. See also 2 BvL 1/97 Bananas [7 June 2000].

[80]2 BvE 2/08 *Lisbon* [30 June 2009].

[81]P Craig, 'The European Union Act 2011: Locks, Limits and Legality' (2011) 48 *Common Market Review.*

This issue (nearly) came to a head in cases like *Outright Monetary Transactions* (OMT).[82] The German court had concerns regarding the European Central Bank's bond-buying program. It made a reference to the ECJ, suggesting that it found the legality of OMT dubious without further limits and hinting that if the ECJ did not find it to be contrary to EU law, the German court may find it to be contrary to one of its locks. The ECJ upheld the program, but introduced additional criteria which, while not mirroring German suggestions, did speak to some degree to German concerns.[83] Apparently satisfied with the new criteria – or at least unwilling to press the issue – the German court declined to follow through on its threat to declare the program unconstitutional. In this way, Germany was able to leverage its locks to encourage the ECJ to introduce certain limits on the OMT program, in exchange for which it continued to support ECJ supremacy.

This conditional approach to supremacy has since spread around the continent, with most national courts asserting conditions of some sort on EU supremacy.[84] As in *OMT*, these conditions are articulated, monitored and enforced through a 'constitutional dialogue' – when a national court has concerns that an EU law may run afoul of one of its conditions, it can send a reference question to the ECJ asking it to clarify the doctrine, suggesting that it may violate one of the national court's conditions, explaining why and sometimes implicitly suggesting an interpretation of EU law that would avoid the conflict.[85] The ECJ answers the reference, suggesting an interpretation which it hopes the national court will find acceptable. This process repeats until the two courts have co-constructed a result that satisfies them both.

For example, when the ECJ found French data collection laws violated fundamental rights, the Conseil d'État declined to find its review *ultra vires*, instead drawing selectively and creatively on the ECJ judgment to construct a more friendly outcome.[86] It also ruled that EU supremacy could potentially be set aside temporarily for national security purposes – implicitly threatening a more assertive stance if the ECJ pushed back. Thus, in an act of 'loyal resistance', the *Conseil d'État* proposed a policy compromise, affirmed EU supremacy and maintained its own claim as the arbiter of if, when and how supremacy operates all at the same time.

Typically, this sort of dialog allows the parties to find mutually agreeable arrangements without open judicial conflict. Occasionally, however, national courts have defied the ECJ outright.[87] When this occurs, compromise-seeking often moves to the political sphere. For example, In *PSPP*, the German court found an ECB policy and the ECJ's judgment upholding it *ultra vires* and of no effect in Germany for lack of a proportionality review.[88] The ECB conducted such a review, the German government swiftly accepted it, disavowed

[82]2 BvR 2728/13 *Gauweiler* [21 June 2016].

[83]A Steinbach, 'All's well that ends well? Crisis policy after the German constitutional court's ruling in Gauweiler' (2017) 24 *Maastricht Journal of European and Comparative Law* 1, 141.

[84]G Martinico, 'Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23 *European Journal of International Law* 2, 419–22.

[85]There are proposals to make these suggestions more formal, e.g. X Groussot, 'Constitutional Dialogues, Pluralism and Conflicting Identities' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart, New York, 2012) 341.

[86]CE Ass., 21 April 2021, French Data Network and others, nos. 393099,94922, 397844, 397851, 424717, 424718 ECLI:FR:CEASS:2021:393099.20210421.

[87]Compare *Højesteret*, C15/2014 *Dansk Industri* [6 Dec. 2016]; *Ústavní soud České republiky, Pl. ÚS 5/12 Slovak Pensions* [31 Jan 2012].

[88]2 BvR 859/15 *PSPP* [5 May 2020].

its own court's judgment and vociferously re-affirmed it's commitment to EU law, defusing the conflict, though not addressing the underlying clash of supremacy claims.[89]

Other cases have required more coercion. In the Polish rule-of-law saga, the populist government undertook judicial reforms designed to take control of its courts, the ECJ found the reforms contrary to EU law and the constitutional tribunal declared the ECJ review *ultra vires*.[90] The government supported the court, but a mixture of adverse ECJ rulings, political pressure, fines and withholding EU funds ultimately caused the government to partially reverse its reforms.

According to Sabel and Gerstenberg, the resulting system of conflicting supremacy claims and judicial dialog has 'no final decider and no Archimedean point. Private litigation at the behest of aggrieved individuals sets in motion a process in which each court must explain its concerns, and its respective law, in terms that can be understood and shared across plural legal regimes'.[91] This arrangement is polyarchic, in that decisions are made horizontally with no final power, and deliberative, as each order is called upon to explain itself in a manner cognizable to the others.[92] While this approach can be fractious and often appears precarious, it has enabled unprecedented legal integration for decades.

The EU charter and member-state law

Thus, we might say that member-state constitutions apply to EU law, but not in the normal, direct way. Only the most essential parts are treated as counter-limits or locks; they apply with a certain margin of acceptable difference, and enforcement happens primarily through dialog and voluntary mutual adjustment, rather than unilateral pronouncement.

Since the EU has its own rights jurisprudence – and since the Lisbon treaty, its own *Charter* – the question also arises in reverse: does the EU *Charter* bind only EU institutions or does it also apply to member-state laws?[93] In its pre-*Charter* jurisprudence, the ECJ had held that member-states were subject to EU fundamental rights whenever they act within the 'scope' of EU law.[94] Article 51 of the *Charter* reframed the matter slightly, making the *Charter* applicable only where member-states 'implement' EU law, suggesting a desire for more constricted application. In *Åkerberg Fransson*, the ECJ resisted this narrowing, finding s51 in fact confirmed its earlier jurisprudence.[95] Some national courts signalled uneasiness.[96] In *Siragusa*, the ECJ responded with a position more restrictive than *Åkerberg Fransson* but not quite limited to implementation -

[89]T Giegerich, 'All's well that Ends Well? – European Commission Closes Infringement Procedure Against Germany on PSPP Judgment of the Federal Constitutional Court', *Saar Briefs* 03.12.2021.

[90]P 7/20 [14 July 2021]; K 3/21 [7 October 2021].

[91]C Sabel and O Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 *European Law Journal* 5, 526.

[92]Ibid., 546.

[93]For a typology see B Pirker, 'Mapping the Scope of Application of EU Fundamental Rights: A Typology' (2018) 3 *European Papers* 1. See also CI Nagy, 'The Diagonal Application of the EU Charter of Fundamental Rights: From "Displacement" through "Agency" to "Scope" and Beyond' (2024) 25 *German Law Journal* 2.

[94]C-299/95, *Kremzow* [1997] ECR I-2629; C-309/96 *Annibaldi* [2007] ECR I-7493.

[95]C-617/10, *Åklagaren v Hans Åkerberg Fransson* [2013], ECLI:EU:C:2013:105; Emily Hancox, 'The Meaning of "implementing" EU law under Article 51(1) of the Charter: Åkerberg Fransson' (2013) 50 *Common Market Law Review* 5.

[96]BVerG, 1 BvR 1215/07 [2013], at 88–91; Filippo Fontanelli, 'Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog' (2013) 9 *European Constitutional Law Review* 2.

member-state laws are subject to the *Charter* if they directly implement an EU law, EU law defines specific rules for the subject in question, there is substantive impact on EU law, or the goals of the legislation overlap substantially with EU law.[97] Once again, inter-institutional dialog is shaping the application of constitutional law.

In *Melloni*, the question was not whether member-states can violate the *Charter* but rather whether they are free to apply a domestic standard in place of the *Charter* when the national constitution provides more rigorous protections. If they are, the EU *Charter* would act much like national counter-limits, setting minimum human rights conditions on the constitutional autonomy of the member-states in certain areas. The ECJ found that national courts do retain such freedom – provided the primacy, unity and effectiveness of EU law are not compromised.[98] Where EU law provides exhaustive standards, however, deviating from them could allow some states to strike down *Charter*-compliant measures using domestic standards while others do not, undermining the unity and primacy of EU law.[99] This requirement too can be understood as a sort of counter-limit. In a now familiar pattern, the Spanish court effectively adopted the EU *Charter's* standard rather than its own, but did so on the basis of national law, all the while insisting on its own status as the ultimate arbiter of rights protection.[100]

In *RTBF* I, the German Constitutional court pushed a little further, ruling that where EU standards are not exhaustive, national courts can substitute their own standards without showing they provide higher protection, based on the (rebuttable) presumption that they provide at least equivalent protection.[101] In *RTBF* II, it affirmed that, where EU law is fully harmonized, EU rather than national right regimes should be applied – but it also asserted its own ability to review how domestic courts apply EU law, giving itself an independent interpretative role alongside the ECJ.[102] Again, the national court both affirms ECJ primacy and asserts its own agency simultaneously. As above, the ECJ has asserted primacy, national courts have negotiated the boundaries of that primacy and found mutually agreeable results without actually conceding their own sovereignty claims. Ultimately, in discretionary areas national charters must meet or exceed EU standards, while in fully harmonized areas the EU Charter must meet or exceed national standards, effectively creating a system of co-regulation.[103] As long as each party respects the conditions of its peers, the question of which order is 'sovereign' does not need a definitive answer.

A European approach to constitutional pluralism

As in Canada, European constitutional pluralism is concerned with both difference and sovereignty. The relative emphasis and the relationship between them, however, play out differently.

[97]C-206/13, *Cruciano Siragusa v Regione Sicilia* [2014], ECLI:EU:C:2014:126; Filippo di Fontanelli, 'Siragusa and the Eternal Recurrence. Reviving Old Tests to Apply the EU Charter of Fundamental Rights to National Measures' (2014) *Diritti Comparati*; Pirker, 'Scope of Application'.

[98]C-399/11, *Stefano Melloni v. Ministerio Fiscal* [2013], EU:C:2013:107, at 60.

[99]For discussion see AT Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10 *European Constitutional Law Review* 324–9.

[100]Pérez, 'Melloni', 321–3.

[101]1 BvR 16/13, *Right to be Forgotten I* [6 November 2019].

[102]1 BvR 276/17, *Right to be Forgotten II* [16 November 2019].

[103]P Friedl, 'A New European Fundamental Rights Court: The German Constitutional Court on the Right to Be Forgotten' (2020) 5 *European Papers* 1.

The main debate driving European literature and jurisprudence is the question of who is sovereign, the state or the Union. Their contradictory supremacy claims create a potentially high stakes conflict. Resolving these claims one way or the other is sure to alienate at least one party and thus could easily destroy the European integration project. No court wants to bear responsibility for this outcome, and this creates a strong mutual incentive to develop practices that do not require directly addressing the issue.[104]

The European practice of constitutional pluralism is therefore centrally concerned with the mechanisms of dialog that allow questions of hierarchy to go unresolved, and by the question of what would or should happen if these practices ever fail. Counter-limits or locks allow national courts to lay out minimal conditions of cooperation and reference questions allow them to trigger dialog around those conditions, which in turn generates national support for EU supremacy that does not necessarily entail conceding their own sovereignty claims.[105] Likewise, the ECJ accepts national constitutional autonomy subject to its own counter-limits regarding fundamental rights and the unity and effectiveness of EU law. Each court is both a condition-setter and a condition-receiver. As long as its conditions are respected, each court can accept the authority of the other without compromising its own sovereignty claim.

Rather than relying on exceptions to supremacy, as Canadians have, Europeans have placed conditions on supremacy instead. While some scholars continue to advocate for either national or EU sovereignty, many have come to celebrate current arrangements, arguing that the resulting dialog is normatively superior to vesting final power in either party.[106]

Another axis of debate concerns difference. Walker places theories of European pluralism along a spectrum from 'thick' to 'thin' approaches[107], where thick accounts posit shared normative meta-principles that play a key role in allowing questions of sovereignty to go un-resolved,[108] while thin accounts posit only a pragmatic *modus vivendi* rooted in a balance of political power.[109] Similarly, Hesselink sorts the various theories into 'radical' pluralist accounts, which do not posit any normative overlap between the systems, and 'constrained' approaches which see the parties and/or the process of dialog itself as structured by shared meta-principles.[110]

A number of mechanisms reflect this tension. Article6(3) of the Treaty on European Union (TEU) recognizes – and ECJ jurisprudence constructs – a common constitutional

[104]M Goldman, 'Constitutional Pluralism as Mutually Assured Discretion' (2016) 32 *Maastricht Journal of European and Comparative Law* 1.

[105]EG Maduro, 'Three Claims'; Maduro, 'Contrapunctual Law'; Kumm, 'Jurisprudence of Constitutional Conflict'; M Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *Common Market Law Review* 2; N MacCormick, 'Beyond the Sovereign State' (1993) 56 *The Modern Law Review* 1; N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 1; N Walker, 'Constitutional Pluralism Revisited' (2016) 22 *European Law Journal* 3.

[106]Maduro, 'Three Claims'.

[107]N Walker, 'Constitutionalism and Pluralism' in Anthony Lang and Antje Wiener (eds), *Handbook of Global Constitutionalism* (Elgar, Cheltenham, 2023) 576.

[108]Maduro, 'Three Claims'; Kumm, 'Jurisprudence of Constitutional Conflict'; D Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, Cambridge MA, 2009).

[109]N MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1; N Krisch, 'Who's afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space' (2011) 24 *Ratio Juris* 4.

[110]M Hesselink, 'Knowing EU Law: How Epistemic and Ontological Commitments Shape Different Understandings of European Law and Why it Matters' (2024) *EUI LAW Working Paper* 2024/6 33.

tradition to which all members are, in their own distinct ways, committed.[111] In other words, it posits a set of meta-norms which constrain difference. At the same time, Article4(2) requires the Union to respect the member-states' 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.[112] Scholars debate whether this clause recognizes *constitutional* identities – that is to say, the specific ways shared constitutional values are institutionalized – or *national* identities that might include deeper normative differences.[113] Illiberal member-states have taken the lead in pushing for a more robust conception of national difference, while the ECJ has largely insisted that difference must fall within a constrained range.[114] As in Canada, potential clashes between distinctive cultures and protected rights are coming to the fore.

As in Canada, difference and sovereignty exist in relation to one another. Indeed, the assertion of a substantial normative overlap plays an important role in allowing participants to bracket questions of sovereignty – so long as all parties pursue largely compatible legal projects, the question of who is in charge does not really need a definitive answer. In turn, the resulting processes of dialog facilitate the emergence and maintenance of shared norms.[115] Conversely, a thick approach to difference is increasingly used to justify a nationalist approach to sovereignty and vice versa.[116]

Overall, dramatic tensions around supremacy have created a jurisprudence that focuses on sovereignty and has, for the most part successfully, found ways to leave that question unresolved. In so doing, however, the EU has – perhaps inadvertently – made a constrained approach to difference a linchpin of the system. As actors increasingly contest difference, they in effect contest sovereignty as well,[117] showing again how interdependent these axes of debate are.

Constitutional pluralisms in conversation – A research agenda

Canadian and European constitutional discourses both share a concern with difference and sovereignty but have approached these issues in diverse ways rooted in their own

[111]*Consolidated Version of the Treaty on the Functioning of the European Union*, 2012 O.J. (C 326) 47, Article 6(3); Pietro Faraguna and Tímea Drinóczi, 'Constitutional Identity in and on EU Terms', *VerfBlog*, 2022/2/21, available at <https://verfassungsblog.de/constitutional-identityin-and-on-eu-terms/>

[112]Ibid., Article 4(2).

[113]D Fromage and B de Witte, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives' (2021) 27 *European Public Law* 3; P Faraguna, 'Constitutional Identity in the EU—A Shield or a Sword?' (2017) 18 *German Law Journal* 7.

[114]When Hungary and Poland challenged conditioning budgetary funds on rule-of-law criteria, the ECJ ruled that national differences in institutional design must fall within a common concept of the rule of law shared by all member states. C-156/21, *Hungary v Parliament and Council* [2021], ECLI:EU:C:2021:974; C-157/21, *Poland v Parliament and Council* [2021] ECLI:EU:C:2021:978; J Lawrence, 'Constitutional Pluralism's Unspoken Normative Core' in *Cambridge Yearbook of European Legal Studies* (Cambridge University Press, Cambridge MA, 2019) 21, 24–40.

[115]Sabel and Gerstenberg, 'Coordinate Constitutional Order', 545.

[116]H Canihac, 'Defending Sovereignty in the Name of Post-sovereignty: Liberal and "Illiberal" Constitutional Idioms in the EU' in J Rone, N Brack, R Coman, A Crespy (eds), *Sovereignty in Conflict. Palgrave Studies in European Union Politics* (Palgrave Macmillan, London, 2023); DK Laurent Pech, *Why Autocrats Love Constitutional Identity and Constitutional Pluralism: Lessons from Hungary and Poland* (European Commission, Leuven, 2018); Christian Demmelbauer, 'Illiberalism and the Law' unpublished (2023).

[117]Fromage and de Witte, 'National Constitutional Identity', 413, 420; Ruslan Akhundov, *Protection of National Identity in the CJEU* (LLM Diss., University of Vilnius, 2023) 16; Fromage and de Witte, 'National Constitutional Identity,' 422; Akhundov, *Protection of National Identity*, 17, 21.

contexts. Because of its colonial foundations, Canadian courts have shied away from Indigenous sovereignty, focusing instead on the protection of cultural difference. As a result, they position Indigenous governments as non-sovereign entities subordinate to the settler constitutional framework but use shielding mechanisms to carve out cultural protections. Because difference cannot be neatly reduced to the private sphere and severed from self-governance[118], however, the Canadian jurisprudence is continually haunted by the underlying question of sovereignty.

In the EU, questions of pluralism have been expressed primarily as a matter of which legal order is sovereign. European courts have responded to this potentially destabilizing political dilemma by developing practices of dialog which effectively allow questions of sovereignty to go unresolved, but which assume a shared set of normative commitments. Thus, they avoid hierarchy in part by assuming only a constrained form of difference. Growing political and constitutional illiberalism, however, is bringing the issue of normative difference increasingly to the fore – and threatening to resurrect issues of sovereignty at the same time.

Of course, neither case represents an ideal-type, focusing on one element of pluralism to the exclusion of the other. Both contexts wrestle with both sovereignty and difference. Still, the difference in focus is notable. To oversimplify, where the Canadian system accepts difference on the condition that it be subordinated, the European system accepts non-subordination on the condition of non-difference. These differences are instructive, showing two potential meanings of constitutional pluralism – a system can be pluralist in the sense that it recognizes multiple sovereign sources of authority, or it can be pluralist in the sense of recognizing deeply different normative and ontological worlds – or both.

The two cases also center different mechanisms – while the Canadian approach focuses on securing (or denying) spheres of autonomy, the European approach focuses on condition-setting, dialog and mutual influence. Thus, the comparison clarifies how competing claims can be accommodated both through self-rule and shared-rule – what we might call pluralism-as-mutual-autonomy and pluralism-as-mutual-influence. This raises interesting questions about the connection between approaches and methods – do sovereignty-focused approaches lend themselves better to dialog and difference-based approaches to autonomy? Can we imagine mixing and matching? This suggests fertile ground for comparative work exploring the relative advantages and disadvantages of each model, as well as the capacity for blending or borrowing across models.[119]

Underlying similarities between the two cases are equally instructive. Indeed, despite their differences, both approaches ultimately work to secure a privileged place for liberalism within the pluralist framework.[120] Thus, Canada is willing to recognize

[118]As Christie puts it, 'There can only be such a thing as Indigenous law if there are Indigenous legal and political authorities…To cut away the possibility these legal and political authorities exist and exercise their authority through their laws and policies is to move directly into a world where the colonial project has been completed'. Gordon Christie, 'Indigenous Legal Orders, Canadian Law and UNDRIP' in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (CIGI, Waterloo, 2017) 49.

[119]E.g. K Cherry, 'Constitutional Pluralism and the Shared-Rule Gap: Rethinking the Relationship between Indigenous Self-Government and the Charter' *Review of Constitutional Studies*, forthcoming.

[120]J Kekes, 'The Incompatibility of Liberalism and Pluralism' (1992) 29 *American Philosophical Quarterly* 2. For Constitutional Pluralism specifically see A Galán and D Patterson, 'The Limits of Normative Legal Pluralism: Review of Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law beyond Borders' (2013) 11 *International Journal of Constitutional Law* 3; P Schiff Berman, 'How Legal Pluralism Is and Is Not Distinct from Liberalism: A Response to Dennis Patterson and Alexis Galán' (2013) 11 *International Journal of Constitutional Law* 3.

difference but only so long as it is subordinate to a liberal sovereignty, while Europe can recognize competing sovereignties but only so long as they are internal to a liberal normativity – in either case, accepting one form of pluralism without the other allows liberalism to act as the framework within which pluralism is contained. In this sense, the differences between Canadian and European pluralism can be understood as divergent routes to shared destinations.

From the point of view of non-liberal actors, either form of 'pluralism' amounts to little more than a wolf in sheep's clothing – an updated form of liberal imperialism that accepts only thin and impoverished forms of the claims they wish to posit. Thus, a problem for both forms of constitutional pluralism – and arguably for the concept itself – is that existing practice largely accommodates difference *or* sovereignty, while non-liberal participants are generally committed to claiming some form of both. Indeed, in practice, the two become difficult to disentangle. This raises a profound normative and conceptual question – is it possible, or even desirable, for a constitutional system to bridge regimes which are both sovereign and deeply different? To put the question another way, what is the desired relationship between constitutional pluralism and liberalism? Do we imagine constitutional pluralism as a means to secure liberalism against non-liberal others, or as a means to render liberalism contestable by including non-liberal legalities in mutually transformative dialog?

This question will likely have very different resonance in Canada, where liberalism is oft seen as an oppressive and imperialist structure imposed on Indigenous peoples, and in Europe, where liberalism is oft viewed as an embattled bastion defending liberty from authoritarian and intolerant others. Indeed, the comparison reminds us to be clear-eyed that rendering liberalism contestable carries both risks and opportunities. If we refuse those risks, however, constitutional pluralism may never amount to more than the latest and most sophisticated stage of liberal hegemony. For those committed to the idea that constitutional pluralism can be something more – and, in particular, those who seek to use the theory in intracultural contexts, those who favour EU expansion into less stolidly liberal eastern Europe, or those who wish to explore the theory at global scales – this question is inescapable.[121]

Hazarding answers to these questions is, unfortunately, considerably beyond the scope of this article. Given the existing scholarly lacunae, I aspire only to sow the seeds of comparative engagement between these discourses, providing a preliminary introduction that allows European and Canadian theorists to explore one another's praxis and see it as a divergent approach to closely related practical and theoretical problematics. In so doing, I make the case for a research agenda which builds on the burgeoning comparative literature connecting Canadian and European pluralism, complimenting existing provincial/federal comparisons by drawing in an additional dimension of pluralist practice. My hope is that both the underlying similarities and the pernicious contrasts such engagement reveals can help theorists and practitioners in both fields to see their own practices in new ways, expose them to new ideas and techniques, and ultimately push us all towards a more nuanced investigation of constitutional pluralism as a general theory.

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[121] *Supra* note 17.

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