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## Pluralising Constitutional Pluralism

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### 1. Introduction

It is a commonplace in much contemporary political and legal thinking that global order is undergoing a transition from a ‘Westphalian’ era where law and politics operated, and was therefore studied, according to a neat dichotomy - domestic/international, constitutional law/public international law - to a more complex ‘post-Westphalian’ one where this dichotomy appears increasingly redundant. This ‘post-Westphalian world’ entails the demotion of the state from the centre of the political universe to one among a number of actors in a broader setting where international institutions rival states for authority and influence.<sup>1</sup> Sovereignty, if relevant to this worldview is of a ‘late’<sup>2</sup> form rather than the ‘high sovereignty’<sup>3</sup> of the Westphalian age.

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<sup>1</sup> N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP, 2010), 5.

<sup>2</sup> N. Walker, ‘Late Sovereignty in the European Union’ in N. Walker (ed) *Sovereignty in Transition* (Hart 2003).

<sup>3</sup> C. Mac Amhlaigh, ‘Late Sovereignty in post-integration Europe: Continuity and change in a constitutive concept’ in R. Adler-Nissen and U. Pram Grad (eds) *European Integration and Postcolonial Sovereignty Games* (Routledge 2013), 42.

Yet, even if the analytical tools of the Westphalian era, and particularly the overarching ‘metaprinciple’<sup>4</sup> of state sovereignty, are becoming increasingly redundant as analytical frameworks to capture an emergent post-Westphalian global order, we have yet to identify an organising analytical frame which would take its place. As such, the transition from the ‘Westphalian’ to the ‘post-Westphalian’ involves the replacement of a global *order* of legal orders based on the idea of state sovereignty to a global, in Walker’s memorable coining, *disorder* of legal orders.<sup>5</sup> Rather than one overarching metaprinciple to organise the array of legal orders co-existing in the contemporary world there are a variety of competing analytical frames which attempt to organise the co-existence of multiple legal orders in particular ways.<sup>6</sup>

Of particular interest to law and legal theory in this context of transition from a Westphalian to a post-Westphalian globe has been the growth of self-contained regimes beyond the state<sup>7</sup> involving some combination of administrative, legislative or judicial functions which more closely resemble the normative orders of states than the classic model of supranational<sup>8</sup> law; public international law with its attendant

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<sup>4</sup> N Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ (2008) 6 *International Journal of Constitutional Law* 373, 376.

<sup>5</sup> *Ibid.*, 376

<sup>6</sup> For example Walker identifies seven potential ‘global metaprinciples of legal authority’; state sovereigntist, global hierarchical, unipolar, regional, integrity, legal-field discursive and pluralist. Walker, above n 4, 386.

<sup>7</sup> B. Simma and D. Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’ (2006) 17 *European Journal of International Law*, 483-529.

<sup>8</sup> ‘Supranational’ in this chapter is taken to mean simply ‘beyond the state’. As such supranational law relates to any law or legal order beyond the state regardless of its classification as public international law or otherwise. Similarly ‘state’ will be used interchangeably with ‘national’, ‘domestic’ and ‘municipal’.

problems of effectiveness and enforcement<sup>9</sup> and its putatively ‘primitive’ nature.<sup>10</sup> The proliferation of these types of regimes as well as the fact that their jurisdictions frequently overlap have led to inevitable interaction and sporadic conflicts between them which, given their unusual nature, at least as compared with classic public international law, seem to resist analysis and resolution by reference to the classic monist or dualist mechanisms of mediating the relationship between state and suprapstate normative orders.

The idea of constitutional pluralism has become a popular ‘frame’ with which to analyse and organise the global disorder of legal orders and in particular the interaction and sporadic conflicts between them.<sup>11</sup> Originating in the work of Neil

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<sup>9</sup> See generally J. Tasioulas, ‘The Legitimacy of International Law’ in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (OUP, 2010).

<sup>10</sup> As asserted most famously by HLA Hart: ‘In form, international law resembles [...] a [primitive] regime of primary rules, even though the content of its often elaborate rules are very unlike those of a primitive society, and many of its concepts, methods, and techniques are the same as those of modern municipal law.’ HLA Hart, *The Concept of Law* (Clarendon, Oxford, 1994), 227. The debate has moved on considerably in recent years. See J. Waldron, ‘International Law: “A Relatively Small and Unimportant” Part of Jurisprudence?’ In L Duarte d’Almeida, J Edwards, A Dolcetti (eds), *Reading HLA Hart’s ‘The Concept of Law’* (Hart, Oxford, 2013), S. Besson ‘Theorizing the Sources of International Law’ in S. Besson and J Tasioulas (eds), *The Philosophy of International Law* (OUP, Oxford, OUP 2010), R. Dworkin, ‘A New Philosophy for International Law’ (2013) 41(1) *Philosophy and Public Affairs* 2-30, AL Paulus, ‘The International Legal System as a Constitution’ in JL Dunoff and JP Tractman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009).

<sup>11</sup> The literature on constitutional pluralism is increasing exponentially. For some representative examples see N MacCormick, *Questioning Sovereignty* (OUP 1999), Ch. 7; N. Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *MLR* 317; M. Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in N. Walker (ed) *Sovereignty in Transition* (Hart 2003); M.

MacCormick, and in particular his theorisation of the relationship between domestic constitutional law and the law of the EU, it has since developed and expanded beyond its traditional domicile of the relationship between EU law and national law to extend to a variety of different legal relationships globally.<sup>12</sup>

In this chapter, one feature of constitutional pluralism will be analysed and critiqued; namely constitutional pluralism's 'methodological monism'. This relates to the tendency in constitutional pluralist theorising to reduce the complex relationships between different legal orders to one single framework of pluralism, whether for analytical or normative purposes, in a post-Westphalian world. In particular it will focus on the problems this methodological monism poses for constitutional pluralism's explanatory ambition as well as its normative aims in understanding and managing interactions and conflicts between normative orders. It argues that given the reliance of constitutional pluralism on the statements of legal officials and the diversity of those statements in practice, that such a methodologically monist approach to regime interactions is untenable.

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Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *ELJ* 262; J. Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 *ELJ* 389; Krisch, *Beyond Constitutionalism* above n 1; C. Mac Amhlaigh, 'Concepts of Law in Integration Through Law' in D. Augenstein (ed) *Integration Through Law Revisited: The Making of the European Polity* (Ashgate, 2012); M Avbelj and J Komárek, *Constitutional Pluralism in the European Union and Beyond* (Hart, Oxford, 2012).

<sup>12</sup> See Krisch above n 1; N Walker, 'Constitutionalism and Pluralism in Global Context' in M Avbelj and J Komárek, *Constitutional Pluralism in the European Union and Beyond* (Hart, Oxford, 2012); M Kumm 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State' in JL Dunoff and JP Tractman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP, Cambridge, 2009).

The challenge will be mounted in a series of steps. Firstly, the methodological monist tendency in constitutional pluralism will be outlined. Then, drawing primarily on MacCormick's original writings on constitutional pluralism, the relevance of reconceptualising suprastate law to constitutional pluralism will be highlighted and the relationship between this reconceptualization and the statements of suprastate legal officials will then be established. The chapter will then pursue the claim that the statements of suprastate legal officials differ between different suprastate legal orders by reference to an example of two suprastate legal orders which interact heavily with domestic state law; EU law and the law of the European Convention of Human rights (ECHR). The chapter concludes that the methodological monist tendency in pluralism cannot be maintained in the light of the existence of diverse forms of suprastate law at least as evidenced by the differential claims to authority and effectiveness of suprastate normative orders by their legal officials in the emergent global (dis)order.

## **2. Constitutional Pluralism and Methodological Monism**

Constitutional pluralism attempts to capture the increasingly complex global order and in particular the interactions between normative orders by establishing an analytical framework for interactions which departs from the classic 'Westphalian' account of interactions between state and suprastate law. The classic model of interaction between state law and suprastate law was dominated by the view that these forms of legal order were always necessarily in a *hierarchical* relationship to one another. As such, the relationship between domestic constitutional law and public international law was primarily understood and regulated according to the idea of dualism, presupposing the prioritization of domestic law over public international law

in a vertical or hierarchical relationship. The alternative, and rarer in practice, account of interacting legal systems – monism – operated according to this hierarchical mind-set, albeit in this case the positions were inverted such that suprapstate law (essentially public international law) was hierarchical to state law;<sup>13</sup> a position resurrected in the context of EU law.<sup>14</sup> Constitutional Pluralism effectuates a shift from this Westphalian hierarchical ordering of the interaction between legal orders by collapsing the ‘verticality’ of traditional thinking about the relationships between legal orders to one of ‘horizontality’. That is that constitutional pluralism encourages us to think about the relationships between state and suprapstate law in a *heterarchical*<sup>15</sup> rather than hierarchical way; that is as operating side-by-side without the presumptive authority of one over the other.

By collapsing the interaction between legal orders from a vertical plane to a horizontal one, from a ‘y axis’ to an ‘x axis’, constitutional pluralism aims at providing a more nuanced and accurate account of interacting normative orders in an emergent post-Westphalian global (dis)order than the conventional hierarchical Westphalian account. Whereas this was initially aimed at understanding and exploring the relationships between EU law and state law in the work of Neil MacCormick, it has since been employed to explain interactions and conflicts

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<sup>13</sup> As promoted primarily by Hans Kelsen. See H. Kelsen, *General Theory of Law and State* (A. Wedberg trans.) (Harvard University Press 1945), Ch. VI. However, subsequent more ‘sociological’ accounts of law such as HLA Hart’s have tended to relegate public international law to a lesser form of law at least when compared with municipal law. See above n 10.

<sup>14</sup> See Case 14/64 *Costa v. ENEL* (1964). For the application of monism in the EU context see C. Richmond ‘Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law’ (1997) 16 *Law and Philosophy* 377.

<sup>15</sup> Walker ‘Idea of Constitutional Pluralism’, above n 11, 337.

between other legal orders up to, and including, between suprastate legal orders themselves.<sup>16</sup> On top of this analytical function, constitutional pluralism also has a normative function which builds on these analytical insights to either critique or endorse interactions and conflicts between normative orders by lending normative support to either their resolution or persistence. With regard to the question of resolution of conflicts, many accounts of constitutional pluralism attempt to provide a method of resolving conflicts between interacting legal orders to ensure consistency, certainty, fairness and the values associated with the rule of law and the protection of fundamental rights in judicial decision-making involving conflicting normative orders.<sup>17</sup> This is usually done by fashioning a series of ‘conflict principles’ to be applied to regime interactions and conflicts to ensure the optimisation of these values where interactions and conflicts occur.<sup>18</sup> Others endorse conflicts and their *irresolution* as *per se* normatively desirable. Krisch, for example, has advanced a normative defence of pluralism based on the pluralist ‘virtues’ of adaptation, contestation and checks and balances.<sup>19</sup> Unlike those normative accounts prescribing principles for the resolution of conflicts, Krisch celebrates their absence in interactions and conflicts between orders, as the absence of such conflict principles helps to attain the contestational virtues of pluralism.<sup>20</sup>

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<sup>16</sup> Such as the application of pluralism to the legal orders of the European Union and the United Nations; see G. de Búrca, ‘The ECJ and the international legal order: a re-evaluation’ in G. de Búrca and J. H. H. Weiler (eds) *The Worlds of European Constitutionalism* (CUP, 2012).

<sup>17</sup> For salient examples of this see Kumm, ‘Jurisprudence’ above n. 11, Maduro above n. 11.

<sup>18</sup> *Ibid.* See also C. F. Sabel and O. Gerstenberg, ‘Constitutionalising and Overlapping Consensus: The ECJ and the Emergency of a Coordinate Constitutional Order’ (2010) 16:5 *ELJ* 511.

<sup>19</sup> Krisch, above n. 1, Ch. 3

<sup>20</sup> *Ibid.*



Notwithstanding the dual functions of constitutional pluralism, most accounts of constitutional pluralism are methodologically monist in the sense that they assume that one analytical framework of pluralism, or one set of pluralist principles or values is apt to capture, understand or legitimize the entire post-Westphalian order.<sup>21</sup> There are many examples which could be offered in this regard; for example, constitutional pluralism's originator, Neil MacCormick, originally sketched out two possible models of pluralism, yet still assumed that only one would be necessary to give an account of interacting legal orders in the post-Westphalian context.<sup>22</sup> However few constitutional pluralists rival Mattias Kumm's work on constitutional pluralism for the breadth of its ambition and its unalloyed methodological monism.<sup>23</sup>

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<sup>21</sup> Given that normative accounts of pluralism rely on the presupposition of interacting and conflicting normative orders based on analytical accounts of pluralism, the two are inextricably linked and many accounts of constitutional pluralism straddle the analytical/normative divide. As such analytical or explanatory dimension of pluralism are 'lexically prior' to the normative accounts. The focus in this chapter will be primarily on constitutional pluralism's explanatory functions, however given that its normative dimensions rely on these explanatory accounts, the challenge to constitutional pluralism raised here will also impact upon normative accounts of constitutional pluralism.

<sup>22</sup> See MacCormick, 'Questioning Sovereignty' above n 11, 116-7. See also the contributions to Avbelj and Komárek (above n 11) virtually all of which assume this methodological monist approach to constitutional pluralism.

<sup>23</sup> Kumm's work on pluralism is wide-ranging. Following MacCormick, he began by looking at pluralism between municipal law and EU law; see 'Who is the Final Arbiter of Constitutionality in Europe?', (1999) 36 *Common Mkt. L. Rev.* 351, 'Jurisprudence' above n 11; before moving to view pluralism in a more global context; 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis,' (2004) 15 *Eur. J. Int'l L.* 907; 'Cosmopolitan Turn' above n 12; 'The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection' in J. Dickson and P. Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (OUP, 2012), 'Rethinking Constitutional Authority: On the Structure and

Kumm argues that the transition from a Westphalian to a post-Westphalian world requires a ‘Copernican turn’<sup>24</sup> in constitutionalism from a Westphalian ‘statist paradigm’<sup>25</sup> regarding the relationship and interaction between state and supranational law. This Copernican turn involves reconceptualising supranational law in ‘post-Westphalian’ *constitutional* terms as well as rejecting the privileging of the ‘statist paradigm’ in viewing the relationship between international law and state law;<sup>26</sup> in other words rejecting the state-sovereignist paradigm as the ‘metaprinciple’ of global order. In the place of state sovereignty Kumm argues for a form of constitutional pluralism which he calls ‘cosmopolitan constitutionalism’<sup>27</sup> to understand and manage interactions between orders.<sup>28</sup> This framework of constitutional pluralism both explains as well as provides normative benchmarks for interaction and conflicts between state and supranational legal orders according to the principles of legality, subsidiarity, due process, democracy and constitutional rights protection.<sup>29</sup>

Most significantly from the viewpoint of methodological monism are Kumm’s claims regarding the model of constitutional pluralism he advances and what it does in the context of an emergent post-Westphalian (dis)order. He argues that his

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Limits of Constitutional Pluralism’ M Avbelj and J Komárek, *Constitutional Pluralism in the European Union and Beyond* (Hart, Oxford, 2012); ‘The Cosmopolitan Turn in Constitutionalism: An Integrative Conception of Public Law’ (2013) 20 *Ind. J. Global Legal Stud.* 605. Here ‘Cosmopolitan Turn’ will be relied on in the main as a paradigm of his account of constitutional pluralism.

<sup>24</sup> Kumm, above n 12, 266.

<sup>25</sup> Kumm, above n 12, 261.

<sup>26</sup> Kumm, above n 12, part 2.

<sup>27</sup> Kumm, above n 12, 272.

<sup>28</sup> Kumm, above n 12, 274.

<sup>29</sup> Kumm, above n 12. Part 2.

paradigm of cosmopolitan constitutionalism describes the ‘deep structure of public law’,<sup>30</sup> including the ‘basic structural features of international and domestic constitutional law practices in liberal constitutional democracies’.<sup>31</sup> ‘Cosmopolitan constitutionalism’ establishes an ‘integrative basic conceptual framework’<sup>32</sup> for a ‘*general theory of public law that integrates national and international law.*’<sup>33</sup> As such, Kumm argues, this model of constitutional pluralism provides a ‘*unifying*’<sup>34</sup> framework for the different interactions between state and supranational law as well as a host of other features of the post-Westphalian world including the increasing complexity of global governance, the ‘functional reconceptualization’ of sovereignty, as well as basic structural features of contemporary human rights practice.<sup>35</sup>

In the remainder of this chapter it will be shown how these grand claims are unsustainable in the global context, not least by constitutional pluralism’s own lights through its reliance on the statements of (particularly supranational) legal officials as evidence of the emergence of a post-Westphalian (dis)order, the transformation of supranational law and the relevance of constitutional pluralism to that (dis)order.

### **3. Constitutional, not legal, pluralism.**

The idea of pluralism in law predates the current flurry of attention from lawyers and legal theorists focusing on interactions between state and supranational law. In the 1960s and 1970s, legal anthropologists and sociologists, looking primarily at non-European, often post-colonial, states conceptualised a pluralist universe of official and

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<sup>30</sup> Kumm, above n 12, 262.

<sup>31</sup> *Ibid.*

<sup>32</sup> Kumm, above n 12, 264.

<sup>33</sup> Kumm, above n 12, 264. *Emphasis in original.*

<sup>34</sup> *Ibid. Emphasis Added.*

<sup>35</sup> Kumm above n 12, 262.

unofficial legal orders which presupposed the ‘coexistence within a social group of legal orders which do not belong to a single ‘system’.<sup>36</sup> Central to these accounts of law and legal system was the debunking of the ‘myth’ that only formal municipal legal systems, the object of study of analytical positivism, could be classified as law and legal system properly so-called.<sup>37</sup>

MacCormick’s influential initial exploration of constitutional pluralism in suprapstate law, which has informed subsequent thinking on the topic, seemed to track these anthropological and sociological accounts of legal pluralism.<sup>38</sup> However, MacCormick’s pluralism envisaged pluralism between ‘institutional normative orders’, an account of law and legal system drawing on the core tenets of analytical positivist accounts of law including the idea of legal officials, official sources and a hierarchy of norms.<sup>39</sup> As such a key difference between MacCormick’s (and subsequent accounts of) constitutional pluralism and previous accounts of legal pluralism was that constitutional pluralism envisaged pluralism between *official* forms of law; while simultaneously shifting the level of analysis from forms of normative

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<sup>36</sup> J. Griffiths, ‘What is legal pluralism?’ (1986) *J. Legal Pluralism and Unofficial Law* 1, See also S. E. Merry, ‘Legal Pluralism’ (1988) *22 Law and Society Review* 869.

<sup>37</sup> Griffiths, *ibid.* 4. For a critique of this charge against legal positivism, see V. Muniz-Fraticelli, *The Structure of Pluralism* (Oxford 2014), Chapter 5.

<sup>38</sup> I say ‘seemed’ because nowhere in his writing that I could find did MacCormick explicitly refer to these writings or to these ideas advanced by legal pluralists. Krisch seems to suggest that he was inspired by these accounts but I have not found explicit evidence of this. See N Krisch, ‘Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space?’ (2011) *24 Ratio Juris* 386, 388. Walker seems to have been the first to explicitly distinguish constitutional pluralism from other forms of legal pluralism. See Walker ‘Idea of Constitutional Pluralism’, above n 11 336-7.

<sup>39</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, Ch. 1; N. MacCormick, *Institutions of Law* (OUP 2007).

order at and beneath the state level, to normative orders at and beyond the state level. Therefore, on a jurisprudential spectrum of accounts of forms of law and legal orders from the very informal such as the ‘self-regulation of a ‘semi-autonomous social field’<sup>40</sup> to the very formal as exemplified by the analytical positivist tradition, constitutional pluralism tended strongly towards the latter form.

As well as marking a break with other forms of legal pluralism, MacCormick’s approach also marked a departure from conventional ways of theorising law and legal systems in analytical jurisprudence. Conventional approaches to theorising law and legal systems tended to rely on the traditional Westphalian dichotomy of municipal law/international law; the latter popularly characterised as a lesser or more ‘primitive’ form of law.<sup>41</sup> However, MacCormick eschewed this conventional Westphalian dichotomy in legal theory to conceptualise a form of law which did not recognise the boundary between the state and international levels by severing the link between law and the state.<sup>42</sup> All that was required for the existence of an institutional normative order for MacCormick, was a system of norms that was autonomous, involved judgment which was institutionalized and was systemic in character.<sup>43</sup> For MacCormick, even if states were a ‘paradigmatic’<sup>44</sup> or ‘principal’<sup>45</sup> example of an institutional normative order it was but a ‘species’ of the

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<sup>40</sup> S. Falk Moore, ‘Law and Social Change: The semi-autonomous social field as an appropriate subject of study’ (1973) 7(4) *Law & Society Review* 719.

<sup>41</sup> Hart, above n 10.

<sup>42</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 17. See also N. MacCormick, ‘Beyond the Sovereign State’ (1993) 56 *MLR* 1.

<sup>43</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 6-7

<sup>44</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 1.

<sup>45</sup> *Ibid.*

‘genus’.<sup>46</sup> Thus, MacCormick concluded: ‘law is institutional order, and state-law is simply one form of law.’<sup>47</sup>

As such, a particular conception of formal or official law, and particularly a reconceptualization of the nature of suprastate law in ‘constitutional’ terms beyond the classic theoretical formulations of public international law as a species of ‘primitive’ legal order, was a crucial step in theorising interacting orders in constitutional pluralist terms. This was explicitly acknowledged by MacCormick himself in that he claimed that that certain conceptions of law (in his case law as ‘institutional normative order’) *admitted* a particular form of pluralism.<sup>48</sup> This, in turn, meant that it would interact with another institutional normative order - in particular municipal law – in a manner distinct from the conventional methods of international law dualism; as capable of interacting heterarchically rather than hierarchically.

#### **4. Legal Officials and Constitutional Pluralism.**

Perhaps unsurprisingly given the shift in MacCormick’s account of pluralism in law from pluralism involving unofficial forms of law, to pluralism between official forms of law, legal officials have played a prominent role in this reconceptualization of suprastate law. Indeed, the main catalyst for reconceptualising suprastate law beyond the Westphalian hierarchical model to a post-Westphalian heterarchical one in constitutional pluralism has been the statements of particular suprastate legal officials; namely courts and tribunals. This is clear in MacCormick’s original exploration of

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<sup>46</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 1.

<sup>47</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 15.

<sup>48</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 102.

the idea through the problematization of the relationship between EU law and state law in the light of particular judgments from the German Federal Constitutional Court (GFCC) on the effect of EU law within the German Constitutional order,<sup>49</sup> but it is also true for the majority of subsequent theorising of constitutional pluralism.<sup>50</sup>

In attempting to theorise EU law in a post-Westphalian way, and particularly in an attempt to understand its relationship with other orders, MacCormick focused on the statements of the legal official *par excellence* of the EU legal system, the Court of Justice of the European Union (CJEU) and in particular its early decisions on the authority, nature and effects of EU law. Key to the CJEU's activities in this regard was the distinction between EU law and conventional public international law by insisting on the autonomy and hierarchy of the former, which was not contingent upon how the law of EU Member States chose to implement it. In MacCormick's words:<sup>51</sup>

'The Court's initiative was a decisive one when it interpreted the juridical character of the entity brought to birth through the foundation treaties as being a distinct legal order. This was an order of a new and hitherto unique kind, one whose norms were directly applicable and directly effective [which] were to be accorded supremacy in each state over national law. These decisions necessarily imply that the foundation treaties [...] amount effectively to the constitutional framework of a quite special entity, this 'European commonwealth'.'

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<sup>49</sup> See particularly N. MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 *ELJ* 259. See also MacCormick, 'Questioning Sovereignty' above n 11.

<sup>50</sup> See references at n 11 above.

<sup>51</sup> MacCormick, 'Questioning Sovereignty' above n 11, 97.

These developments, MacCormick argued, had a profound impact upon how EU law was theorised. In applying legal theory to understand EU law *qua* law, he argued that ‘the [CJEU’s] decisions on the juridical character of Community and Union have *particular importance*.’<sup>52</sup> As such, a ‘post-Westphalian’ conceptualisation of EU law, distinct from a ‘Westphalian’ understanding of EU law as public international law, was needed in the light of the statements of the EU’s primary legal official. In this way, the CJEU’s statements effectively ‘caused’ the Westphalian ‘y axis’ to fall to a post-Westphalian ‘x axis’ in conceptualising EU law as a particular (post-Westphalian) form of law which had significant implications for how it interacted with other legal orders and therefore for constitutional pluralism. This reconceptualization of suprastate law in ‘post-Westphalian’ terms through the reliance on the statements of suprastate legal officials is a key feature of most subsequent pluralist theorising of normative orders, albeit that the precise conceptions of law extrapolated from – sometimes the same – set of legal officials have differed.<sup>53</sup>

Of course in relying on the statements of suprastate legal officials as the foundation of constitutional pluralism, constitutional pluralists are drawing on a venerable tradition of foregrounding the role of legal officials, and almost always

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<sup>52</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 97. *Emphasis Added*.

<sup>53</sup> For example, Kumm, Maduro and Sabel and Gerstenberg in their writings on pluralism have employed a less positivist understanding of EU law in theorizing the relationship between EU law and national law in pluralist terms. Kumm explicitly draws on the work of non-positivists such as Ronald Dworkin and Robert Alexy in his model of pluralism, Kumm ‘Jurisprudence’ above n 11; Maduro draws on the constitutional theoretical work of Cass Sunstein to characterize principles of pluralism in terms of ‘incompletely theorized agreements’, Maduro above n 11; Sabel and Gerstenberg draw on the political theories of John Rawls, above 18.



courts, in theorising the concept of law.<sup>54</sup> For example, Hart, famously, placed legal officials at the centre of his concept of law and legal system.<sup>55</sup> In particular, the existence of the secondary ‘rule of recognition’, which established the validity of all the other norms of the system, was evidenced by its acceptance as such by the officials of the legal system.<sup>56</sup> Such was the centrality of legal officials to his concept of a legal system that they were included as one of two necessary conditions for the existence of a legal order.<sup>57</sup> Whereas the notion of legal officials was reasonably broadly construed, it was clear that with respect to the rule of recognition, it was primarily courts that Hart had in mind.<sup>58</sup>

In a similar vein, Raz emphasises the centrality of legal officials and particularly courts to the concept of law and legal system. Distinguishing between norm-applying institutions and norm-creating institutions, he argues that only norm-applying institutions are necessary for the existence of a legal order.<sup>59</sup> These institutions are primarily concerned with ‘the *authoritative* determination of normative situations in accordance with pre-existing norms’,<sup>60</sup> of which the paradigmatic example are courts. A key feature of primary norm-applying organs in a

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<sup>54</sup> In this regard Raz attributes court-centric theories of law to a ‘large number of authors - among them Holland, Gray, Salmond, Holmes, Llewellyn, and Hart.’ J. Raz, *The Authority of Law*, (OUP 1979), 89.

<sup>55</sup> Hart, above n 10.

<sup>56</sup> Hart, above n 10, 115.

<sup>57</sup> Hart above n 10, 117.

<sup>58</sup> H Sheinman, ‘The Priority of Courts in the General Theory of Law’ (2007) 52 Am J Juris. 229, 237.

<sup>59</sup> Raz above n 54, 105.

<sup>60</sup> Raz above n 54, 110.

legal order for Raz is their authority; that is that their decisions and determinations of normative situations are *binding*, even where they are mistaken.<sup>61</sup>

Even legal theorists who distance themselves from the positivist tradition rely heavily, if not exclusively, on institutional practice, and particularly the institutional practices of courts in developing their conceptions of law. For example Ronald Dworkin's well-known non-positivist conception of law infused with moral principles nonetheless relies on the institutional practices of courts, and particular legal statements, to argue for the centrality of principles in any concept of law.<sup>62</sup>

As such, in taking the first step to a constitutional pluralist understanding of interacting legal orders, that is by positing a conception of suprastate law distinct from the conventional 'Westphalian' understanding of 'primitive' public international law, pluralists can be seen to be following in the tradition of main-stream legal theory (both positivist and non-positivist) in relying on the statements of suprastate legal officials, and particularly courts in developing particular theories of suprastate law.<sup>63</sup>

However, although constitutional pluralist accounts of suprastate law based on the statements of suprastate legal officials follow in the tradition of mainstream legal theory, their reliance on legal officials involves an additional function to theorising suprastate law when compared with the statements of legal officials in theorising

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<sup>61</sup> Raz above n 54, 108.

<sup>62</sup> R. Dworkin, *Taking Rights Seriously* (Duckworth 1978), R. Dworkin, *Law's Empire* (Duckworth 1986).

<sup>63</sup> Of course MacCormick himself had a considerable stake in this 'mainstream', having been a legal theorist of note prior to examining the relationship between interacting legal orders. See for example N. MacCormick, *Legal Reasoning and Legal Theory* (Clarendon 1979); N. MacCormick and O. Weinberger, *An Institutional Theory of Law* (Kluwer 1986).

municipal law. In municipal legal theory a central, if not the primary, function of legal officials is to determine the validity and status of individual norms by reference to particular standards of validity within a particular legal system, or to identify the principles of the relevant legal order.<sup>64</sup> However, theorists of suprastate law tend to take questions of the validity of suprastate norms for granted, instead focusing primarily on the *type* of (official) law in question, that is the type of *authority* and *effectiveness* particular (suprastate) norms, and systems, enjoy. This is not to say that questions of authority and bindingness are irrelevant to the theorisation of municipal law. Rather, law's pre-emptive authority and bindingness is usually taken for granted at the state level where there is an assumption that law, properly so called, and once identified as a system, is *ipso facto* binding and authoritative.<sup>65</sup> In the suprastate legal context, however, on top of assuming questions of validity and/or principles in suprastate law from the statements of legal officials, constitutional pluralists rely on the statements of legal officials as *evidence of the transition from suprastate law as 'primitive' public international law to suprastate law as an authoritative and effective normative order*, that is as 'constitutional' post-Westphalian suprastate law, capable of interacting according to a constitutional pluralist framework.

Again, MacCormick's writings on the topic are instructive in this regard. As well as foregrounding legal officials in developing his theory of law as 'institutional normative order', legal officials also have a fundamental role in allowing for a transformational reading of suprastate law beyond conventional public international law. For MacCormick, judgment was crucial to idea of normative order in that being subject to a norm was to have one's actions open to judgment as to whether one's

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<sup>64</sup> Hart above n 10, Dworkin above n 62.

<sup>65</sup> Raz above n 54, Ch. 2 & 8.

actions conformed with a norm or not.<sup>66</sup> In an *institutional* normative order, this judgment is institutionalised or ‘organised’.<sup>67</sup> Once judgment is institutionalised, MacCormick argues, there must be some rule about finality of judgment within the system which in turn leads to the systemic ordering of norms.<sup>68</sup> The key question of validity is entailed in MacCormick’s account in that the finality of judgement within a system involves ‘final authority on the question of *what counts as a binding norm* and how it bears on the case’,<sup>69</sup> which is ‘itself one which can only be pronounced with final effect by an appropriate judge or court.’<sup>70</sup> So far, so conventional legal theory. However, in cases of normative order whose status or authority was ambiguous or disputed, either because it was not conventionally a form of law which was considered binding like municipal law or because of its ‘*sui generis*’ nature, the question of its empowerment, authority and effects could itself be achieved, MacCormick argued, through ‘*institutional acts*’.<sup>71</sup> A clear example of this development would be where the judges of a normative order ‘by their authoritative interpretation of their own powers and of other constitutional norms *transform* the character of the original empowerments involved’<sup>72</sup> to one of a binding and authoritative normative order akin to municipal law. As such, the question of whether the normative order was authoritative and binding itself was one to be determined by legal officials themselves (along with questions of validity). This was the case even if

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<sup>66</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 6.

<sup>67</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 7.

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

<sup>69</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 8.

<sup>70</sup> *Ibid.*

<sup>71</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 102. *Emphasis Added.*

<sup>72</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 103.

the determination was *transformative* of conventional understandings of the authority and bindingness of the relative order. This highlighted the ‘self-referential’<sup>73</sup> quality of such systems.

This additional role for the statements of legal officials in theorising suprastate law can be explained by the fact that the ‘post-Westphalian world’ or its emergence, is still *very much a work in progress*. If we are ‘still trying to find our way through the maze, or ‘mystery’, of global governance’<sup>74</sup>, then the clear and categorical statements of legal officials about the nature of suprastate normative orders in terms of their ‘post-Westphalian’ authority and effectiveness provide a measure of certainty, clarity and familiarity in an otherwise uncertain, unclear and unfamiliar world.

#### *Municipal Legal Officials*

However, it is not only with respect to the reconceptualization of suprastate law in a post-Westphalian way that the statements of suprastate legal officials are important to constitutional pluralist theorising of the interaction of state and suprastate legal orders. If the claims of authority and effectiveness of suprastate legal actors were taken at face value vis-à-vis state law then the ‘post-Westphalian world’ wouldn’t look particularly post-Westphalian at all. For example, the claims of the CJEU regarding the supremacy, direct effect and *Kompetenz-Kompetenz* of EU law would have replaced Westphalian theories of hierarchical dualism, where national law was in a hierarchical relationship to suprastate law, with a Westphalian hierarchical monism, where suprastate law is in a hierarchical relationship to state law as

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<sup>73</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 7.

<sup>74</sup> Krisch above n 1, 26.

envisaged by Kelsen in his theorisation of international law.<sup>75</sup> This would remain within a resolutely hierarchical mind-set, where suprastate (EU) law would take precedence over state law in cases of conflicts. However, as noted, constitutional pluralism involves a particular interpretation of a ‘post-Westphalian world’ whereby the emphasis shifts from hierarchical modes of interaction between orders to *heterarchical* modes. As such, the statements of legal officials with which a particular system is interacting are also relevant to conceptualising interactions in heterarchical rather than hierarchical terms. That is that the statements of legal officials of the other interacting order (often municipal legal orders) are also central to a post-Westphalian pluralist understanding of interacting orders.

In the context of interactions between suprastate law and state law, the statements of the legal officials of state law have tended to be *reactive*; that is reacting to the statements of suprastate legal officials regarding the authority and effectiveness of suprastate law; usually denying or conditioning the claims of suprastate legal officials.<sup>76</sup> For example, in the EU context, the statements of domestic courts, most

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<sup>75</sup> Kelsen above n 13. Indeed, some authors have argued that constitutionalism pluralism involves the mere resurrection of monism in contemporary legal theory. See for example, A. Somek, ‘Monism: A Tale of the Undead’ in M Avbelj and J Komárek, *Constitutional Pluralism in the European Union and Beyond* (Hart, Oxford, 2012), Chapter 15.

<sup>76</sup> In this regard it is worth noting a potential shift among municipal legal officials with regard to the concept of municipal law. As noted, theories of municipal law, including those which relied on the statements of legal officials/courts, tend to assume the authority and effectiveness of the norms of these legal orders. This was usually in the absence of explicit statements from legal officials to this effect. It is interesting to speculate on whether the necessity of articulating the authority and effectiveness of municipal law by legal officials in the light of the global ‘disorder of legal orders’, not least EU law, would have any effect on how municipal law is conceptualized. It could be argued, for example, that

famously but hardly exclusively the GFCC<sup>77</sup>, tended to explicitly refute much of the authority claims of CJEU regarding the effects and status of EU law in national legal orders. These statements from domestic legal officials made clear that EU law and national law were not part of one single system with EU law at the apex, or orders interacting according to the priority of EU law, but rather distinct interacting legal orders which looked at different sources of their own validity. In MacCormick's account of the EU context, it was the statements of municipal legal orders, and particularly their *rejection* of the authority claims of EU law vis-à-vis state law that forced legal thinking to view interactions in constitutional pluralist terms. For MacCormick, the statements of the CJEU regarding the authority and effectiveness of EU law, alongside the *reaction* by state legal officials posed a 'profound challenge to

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the articulation of authority and effectiveness of law in this way presupposes or recognizes a plurality of forms of law and legal orders in a way that conventional accounts of law and legal system may not have.

<sup>77</sup> The list of 'copy-cat' decisions from the apex Courts of other EU Member states is continually expanding. However two recent intriguing additions to this list include the Czech Constitutional Court, which in its judgment Pl. US 5/12, Judgment of 31 January 2012 'Slovak Pensions' carried out the threat to defy the CJEU in a way that the GFCC only ever threatened. For Comment see R. Zbiral, 'Case Comment: A legal revolution or negligible episode? Court of Justice decision proclaimed *ultra vires*, (2012) 49 CMLR 1475-1492, J. Komárek, 'Case Note: Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*' (2012) 8(2) *European Constitutional Law Review* 323-337. Also, the UK Supreme Court can now be said to have joined the ranks of 'EU constitutional pluralist courts' in the light of its decision in *R(HS2 Action Alliance Ltd) v. SS for Transport* [2014] UKSC 3. For comment see A. Young, 'Wilkommen zum Constitutional Pluralism' U.K. Const. L. Blog (17th February 2014) (available at <https://ukconstitutionallaw.org/>)

our understanding of law and legal systems’<sup>78</sup> and brings us to the ‘frontier of legal pluralism.’<sup>79</sup> The result, then, in the light of the statements of supraplural and municipal normative orders was one of constitutional pluralism:<sup>80</sup>

‘two sets of constitutions, each of which is acknowledged valid, yet neither of which does, or has any compelling reason to, acknowledge the other as a source of validity. Where there is plurality of institutional normative orders, each with a functioning constitution (at least in the sense of body of higher-order norms establishing and condition relevant governmental powers), it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional superiority over another.’

In such a scenario, MacCormick concluded, ‘constitutional pluralism’ prevails’.<sup>81</sup>

## **5. Constitutional Pluralism and the Problem of Methodological Monism**

It is the centrality of the statements of legal officials to theorise constitutional pluralism between state and supraplural legal orders that poses a challenge to the ‘methodological monist’ tendencies of constitutional pluralists; that is, the tendency to assume that one model of constitutional pluralism can be used to explain the variety of interacting formal legal orders in the global disorder of legal orders. As noted, in the Post-Westphalian context, not only are legal officials central to the identification of law and understanding law as a system whether according to a criteria of validity or the identification of principles, but they also make further, explicit, claims to the

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<sup>78</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 102.

<sup>79</sup> *Ibid.*

<sup>80</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 104.

<sup>81</sup> *Ibid.*



authority and effectiveness of the norms of the system. Moreover, these claims elicit counter-claims from the legal officials of the systems at which those claims are addressed, usually municipal state legal systems. However, given that the ‘post-Westphalian’ world is very much still ‘under construction’, there is no fixed view of the nature, authority and effects of suprastate law as a post-Westphalian reconceptualization of law beyond the state. As such, the global ‘disorder of legal orders’ is made up of a ‘global disorder’ of suprastate legal officials making a ‘global disorder’ of claims to the authority and effectiveness of the legal. These claims, in turn, provide the foundation for the understanding of these systems as post-Westphalian suprastate normative orders.

This can be illustrated by contrasting the development of EU law and the law of the European Convention of Human Rights *qua* post-Westphalian suprastate normative orders. These two legal orders entail different claims to the authority and effectiveness of their norms, different interactions with municipal law based on these claims, and therefore necessitate different models of constitutional pluralism to explain that interaction.<sup>82</sup>

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<sup>82</sup> As will be by now clear, interactions between EU law and state law are the ‘paradigm case’ of constitutional pluralism in post-Westphalian world and have attracted the attentions of many constitutional pluralists. See for example the contributions in Avbelj and Komárek above n 11. Pluralism between state law and ECHR law has attracted less attention but the relationship is being increasingly theorized in pluralist terms. See N. Krisch, ‘The Open Architecture of European Human Rights Law’ (2008) 71(2) *MLR* 183, S. Greer and L. Wildhaber, ‘Revisiting the Debate about ‘constitutionalising’ the European Court of Human Rights’ (2013) 12(4) *HRLR* 655, C. Mac Amhlaigh, ‘“Even Children Lisp the Rights of Man”: International Human Rights Law and National Minority Jurisdictions’ in S. Tierney (ed) *Nationalism and Globalisation* (Hart 2015).

The relevance of the CJEU's statements and impact on theorising EU law has already been outlined above. The key aspects of the CJEU's 'constitutionalisation' of the EU Treaties were the autonomy of EU law, its authority as a form of law through the supremacy doctrine,<sup>83</sup> and its effects in municipal legal orders through its direct effect doctrine and its claims to its own *Kompetenz-Kompetenz*, the ability to determine the limits of EU law.<sup>84</sup> These statements have led both to a reconceptualization of EU law as a form of law distinct from public international law, as well as eliciting robust counter-reactions from national courts claiming the supremacy of their municipal constitutional law and their own *Kompetenz-Kompetenz*. This experience can be contrasted with the development of the ECHR system by its Court (ECtHR).

The ECHR's trajectory differed from that of EU law in that its evolution to a suprapstate legal order occurred later, and less invasively, than that of EU law. There were a series of 'constitutionalising' judgments from the Court in the 1970s when the key 'post-Westphalian' characteristics of the ECHR were established: the margin of appreciation doctrine, the use of the principle of proportionality and the development of particular interpretive doctrines by the Court including the 'evolutionary approach' and the use of a 'European consensus'.<sup>85</sup> These developments, combined with landmark high-profile judgments finding convention violations against prominent

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<sup>83</sup> See Mac Amhlaigh above n 11.

<sup>84</sup> See C. Mac Amhlaigh, 'The European Union's Constitutional Mosaic: Big 'C' or Small 'c', Is that the Question?' in N. Walker, J. Shaw and S. Tierney (eds) *Europe's Constitutional Mosaic* (Hart 2011).

<sup>85</sup> See generally A. Follesdal, B. Peters, G. Ulfstein, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013), L. R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 *EJIL* 125.

signatory states of the Convention,<sup>86</sup> marked a shift from Westphalian ‘legal diplomacy’<sup>87</sup> to a more post-Westphalian ‘constitutional’ character both of the norms of the convention as well as court itself.<sup>88</sup> However, what is noticeable in the development of the ECHR from a Westphalian order to a more post-Westphalian one is the absence of any robust claims to the authority and effectiveness of ECHR law akin to the supremacy of EU law or the *Kompetenz-Kompetenz* of the CJEU. There is a distinct absence of the idea of the ‘supremacy’ of the ECHR over norms of national law in the development of the ECHR system. Rather than insisting upon the supremacy of the provisions of the Convention in municipal law, their interaction was, according to the Court, to be managed by the political organs of signatory states according to their own constitutional arrangements as and when they saw fit.<sup>89</sup> This

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<sup>86</sup> Such as, for example, the Court’s seminal decision in Case No. 5310/71 *Ireland v. U.K.*, Judgment of 18 January 1978.

<sup>87</sup> MR Madsen, ‘The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence’ in J Christoffersen and MR Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011), 44.

<sup>88</sup> See A Stone Sweet, ‘On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court’ (2009) *Revue trimestrielle des droits de l’homme*, A Stone Sweet, ‘A cosmopolitan legal order: Constitutional Pluralism and rights adjudication in Europe’ (2012) 1 *Global Constitutionalism* 53.

<sup>89</sup> Of course this doesn’t mean that the Court hasn’t recommended changes to domestic practices deemed to be causing human rights violations. In particular, the introduction of ‘pilot judgments’ by the court has also led to prescriptions from the court on how to better comply with the convention. See *Broniowski v. Poland* 2002-X; 40 EHRR 21; *Hutten-Czapska v. Poland* 2006-VIII: 45 EHRR 4. For discussion and analysis of this practice, see W. Sadurski, ‘Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments’ (2009) 9:3 *HRLR* 397. Nonetheless, even if these developments result in a more invasive scrutiny of domestic practices and

was in line with the Court's insistence on its 'subsidiary' role in protecting the rights contained in the Convention.<sup>90</sup> For the ECtHR, it was states, and not the Court, which had the primary responsibility for protecting the relevant rights within their own systems.

Furthermore, the ECtHR has never made claims regarding the effectiveness of ECHR comparable with those of the CJEU. Rather than claiming the direct effect of the norms of the ECHR, the Court found that states had autonomy as to how precisely they wished to give effect to the rights of the Convention within their domestic orders.<sup>91</sup> This deferential approach to the questions of the authority and effectiveness of the Convention was particularly clear in the Court's adoption of the well-known 'margin of appreciation' doctrine; a much more flexible and deferential tool to manage the interactions between ECHR law and domestic law, and the relationship between their legal officials which did not have an equivalent in EU law.<sup>92</sup>

Of course this more deferential approach to interactions by the ECtHR, did not avoid conflicts between ECHR law and national law. National legal officials in the form of Supreme or constitutional courts have reacted to the ECtHR's decisions by making more explicit the precise nature and effect of the ECHR's norms, and, perhaps

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recommendations for legislative change, it is still much 'softer', more dialogic than the direct effect and supremacy of EU law.

<sup>90</sup> '[The Court] reiterates that the supervision machinery set up by the Convention is subsidiary to the national human rights protection systems.' *Salik v. Greece*, 24 EHRR (1996) 323, 339.

<sup>91</sup> See generally Helfer, 'Redesigning the European Court of Human Rights' above n 85.

<sup>92</sup> The preliminary reference procedure of the EU system does not open up court dialogue in the same way. Rather it operates to ensure the CJEU's exclusive jurisdiction in matters of EU law rather than a softening or delegation of the CJEU's jurisdiction. See generally P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (OUP 2015), Chapter 15.

more importantly, their interpretation by the ECtHR in municipal legal orders, notwithstanding the ECtHR's views on the issue.<sup>93</sup> On some occasions this has led to national courts explicitly rejecting a decision or interpretation of the Convention by the ECtHR.<sup>94</sup> However the nature and tone of these reactions to the ECHR and its court by national courts is markedly different from national court reactions' to the nature and authority of EU law. Even in the most extreme forms of conflict, where domestic courts have explicitly gone against a clear judgment from the ECtHR, the reaction has not involved the rejection of the relevance of the rights and values contained in the ECHR within domestic legal orders. Rather the conflicts have emerged from disagreements about precisely what those rights mean and how they should be protected.<sup>95</sup> In no instance has a domestic Court rejected the norms of the Convention themselves, the Court's role in interpreting them, nor found that in cases of conflict that the national constitution would subordinate fundamental rights protections in a manner similar to the threats from national courts with regard to the application of EU law.

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<sup>93</sup> See for example the GFCC's *Gorgulu* decision, Judgment of 14 October 2004, 2 BvR 1481/04 where the GFCC stated that the Convention could not be applied in such a way that would violate the German basic law.

<sup>94</sup> See for example, the UK Supreme Court in *R. v. Horncastle and others* (SC(E)) [2010] 2 AC 373 where the Court refused to follow the ECtHR's lead on the interpretation of the right to a fair trial under Article 6 of the ECHR.

<sup>95</sup> In refusing to follow the ECtHR in *Horncastle* (*ibid.*), the UK Supreme Court did comment that it hoped that its decision would result in a 'valuable dialogue between the domestic court and the Strasbourg court' (para 11) within which the latter would 'take account of the reasons that have led [the UKSC] not to apply [the ECtHR's interpretation]' (para 108).

The primary reason for this difference in evolution between ECHR law and national law when compared with EU law is the subject-matter of the relationship between the ECHR and national law; the protection of fundamental rights. These rights and values are, according to the officials of *both* state and supranational systems, an integral part of those systems, which creates a significant commonality between ECHR law and municipal state law and provides a basis for interaction in a less conflictual way. In this way, the ‘suprapositive’<sup>96</sup> values of ECHR law act as a ‘bridge’ between the two legal orders, a common set of shared values which provide a basis of agreement between the legal officials of both systems, about which disagreement about their meaning and effects can subsequently emerge. Indeed, some courts have identified the role of the legal officials of *both* legal orders, municipal and ECHR, as ‘*promoting a joint European development of fundamental rights.*’<sup>97</sup>

As such, unlike with respect to the relationship between EU law and municipal law, the relationship between ECHR law and national law entails a common bond in the rights and values protected by the Convention itself. Although the legal officials of each system may disagree as to their meaning and effects, this has not undermined agreement on the rights themselves and their value. When compared with conflicts involving EU law, these interactions and conflicts seem of a much softer sort.

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<sup>96</sup> G. Neuman, ‘Human Rights and Constitutional Rights: Harmony and Dissonance’ (2003) 55(5) *Stanford Law Review* 1863, 1868.

<sup>97</sup> Görgülü, above n 93, para. 62. *Emphasis Added*. Perhaps even more pointedly, this statement came from the GFCC, the court which had so robustly refuted the authority claims of the CJEU in respect of its application under the German constitution in its Maastricht and Lisbon decisions. 2 BvR 2134/92 and 2159/92 JZ 1993, 1100; [1994] 1 CMLR 57; BVerfGE, 2 be 2/08, Judgment of 30 June 2009.

## 6. Which Pluralism?

Within the ‘global disorder’ of legal officials making differing claims to the authority and effectiveness of suprastate law, then, some legal orders may be best theorised as a form of municipal ‘constitutional’ law, others may still more closely resemble ‘Westphalian’ accounts of public international law and others may resemble neither, warranting a ‘sui generis’ conception of law. Furthermore, different concepts of law may better explain different suprastate orders based on the claims of their legal officials. As such, the global disorder of legal orders, given its emergent and uncertain state, may accommodate co-existing, yet conflicting accounts of law based on analytical positivism, interpretivism or others as yet to be theorised.<sup>98</sup> Indeed, in the light of a global disorder of suprastate authority claims, such a scenario is inevitable if the idea of a post-Westphalian conception of law as well as the idea of constitutional pluralism upon which it relies, are to make good on their explanatory claims, and as a corollary, the plausibility of their normative claims. What this tells us, then, is that the Westphalian ‘y axis’ does not fall to a post-Westphalian ‘x axis’ in the same way, and to the same extent, across the post-Westphalian global ‘disorder of legal orders’.

At the very least, then, in the light of the differential claims to authority and effectiveness of suprastate legal officials, different models of constitutional pluralism will be required to explain interactions between different types of legal orders based on the different types of claims and counter-claims of legal officials. MacCormick

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<sup>98</sup> One potential move in this direction is Culver and Giudice’s ‘inter-institutional’ account of law see K. Culver and M. Giudice, *Legality’s Borders: An Essay in General Jurisprudence* (OUP 2010); ‘Not a System but an Order: An Inter-Institutional View of European Union Law’ in J. Dickson and P. Eleftheriadis, *Philosophical Foundations of European Union Law* (OUP, 2013).

identified two distinct types of pluralism which have provided a template for models of constitutional pluralism more generally; radical pluralism and monist pluralism.<sup>99</sup> Radical pluralism entails the idea that two legal orders such as state and supranational, interact on a horizontal plane, each self-referentially relying on their own validity without any ‘all purpose superiority of one system over the other.’<sup>100</sup> Significantly for radical pluralism the management of the relationships between normative orders and in particular conflicts between them is not (nor should be) subject to common or shared norms between the two systems. Rather, management of interaction and conflict is a ‘matter for circumspection and for political as much as legal judgment.’<sup>101</sup>

Monist pluralism, on the other hand, ‘triangulates’ the relationship between normative orders on a horizontal plane to include a third dimension. This third dimension to the relationship takes the form of a series of norms external to, or shared by, both systems which provide a normative resource for the management of interactions and conflicts. This third dimension to interacting legal orders can be another legal system or a series of principles which serve to manage the relationship and conflicts between different legal orders. An example of this type of ‘monist’ pluralism is MacCormick’s ‘pluralism under international law’ where the norms of public international law would constitute the apex of a triangular relationship between national law and EU law and provide the normative resources for the management of

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<sup>99</sup> It should be noted that what I here call ‘monist’ pluralism, MacCormick called ‘pluralism under international law’ although he did recognize its ‘monist’ characteristics. MacCormick, ‘Questioning Sovereignty’ above n 11,117

<sup>100</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 118.

<sup>101</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 120.



the conflicts between them, meaning that ‘we need not run out of law (and into politics) quite as fast as suggested by radical pluralism.’<sup>102</sup>

In thinking about how to theorise the relationships between interacting legal orders in a post-Westphalian heterarchical rather than Westphalian hierarchical way, then the statements of legal officials, and particular their *diversity* must feature prominently in choosing between these models (and developing potential new models of pluralism). As MacCormick noted in the EU context, when deciding upon the most relevant model of pluralism to capture the interactions between EU law and national law, we must be ‘sensitive to the weight attached to the *sui generis* interpretation of [EU] law in the jurisprudence of the ECJ.’<sup>103</sup>

Notwithstanding the alternatives on offer in constitutional pluralism, the methodological monism persists in the sense that one alternative – either radical or monist or a variation thereof – is usually marshalled to explain all of the interactions between legal orders in the post-Westphalian context.<sup>104</sup> However, in the light of the ‘global disorder’ of legal officials’ statements and global disorder of forms of suprapstate legal order, a ‘*global disorder of constitutional pluralism*’ necessarily follows as evidenced by the differences between the types of claims made about EU law and ECHR, the different reactions from domestic legal officials and the differences in the resulting constitutional pluralist relationship. A first step in capturing the global disorder of constitutional pluralism would be to employ different constitutional pluralist alternatives *simultaneously* to describe different relationships

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<sup>102</sup> *Ibid.*

<sup>103</sup> MacCormick, ‘Questioning Sovereignty’ above n 11, 110.

<sup>104</sup> For example, as noted above, Kumm sees in pluralism a ‘unifying framework’ Kumm, above n 12, 262. Similarly, Krisch argues that pluralism provides an ideal for ‘postnational society’ *tout court*. Krisch above n 1, 69-70.

in a post-Westphalian disorder of legal orders. Thus, for example, in the light of the robust authority claims of EU law and the invasiveness of its effects in domestic law, and the equally robust negation of these effects by domestic courts, it might be best to theorise the interaction and conflicts between EU law and domestic law in *radical* pluralist terms. The robust and seemingly categorical nature of the claims on either side seem to leave little room for an explanatory account of pluralism based on the ‘triangulation’ of the relationship by some overarching normative resource which could apply to, and manage, conflicts between them.<sup>105</sup> On the other hand, it would appear that the interactions between ECHR law and national law might be better explained by reference to a monist model of pluralism. The ‘softer’ nature of the ‘constitutionalisation’ of the ECHR, at least when compared with EU law, as well as the ‘softer’ pluralism which has emerged from national courts, calls for a more consensual or dialogic account of pluralism than is the case with EU law. As such monist pluralism seems to fit the bill, involving the interaction of two legal orders on a horizontal plane but whose interaction is, in turn, based on a common set of ‘suprapositive’ values or principles which provide the basis for the resolution of conflicts between them. These values and principles provide the framework of agreement within which disagreements, conflicts and pluralism can emerge as to their precise meaning and application. Moreover, the various tools and doctrines employed by the ECHR, and particularly the ‘margin of appreciation’ doctrine, seem to support this ‘monist’ pluralist reading of the interactions between ECHR law and domestic law.

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<sup>105</sup> Quite a common feature of constitutional pluralist accounts of the relationship between EU law and state law. See, for example, Kumm, Maduro above n 11, and Sabel and Gerstenberg, above n 18.

Of course, one doesn't have to agree with the characterisation of the concept of suprastate law and/or constitutional pluralism between these systems outlined here to accept the argument against methodological monism in constitutional pluralism. The methodological monism which dominates constitutional pluralist thinking cannot be reconciled with the state of affairs upon which constitutional pluralists themselves rely. It is not coherent with the assumptions that constitutional pluralists make about post-Westphalian concepts of suprastate law as well as the form and nature of interactions between suprastate law and other legal orders. If post-Westphalian accounts of suprastate law, and particularly their authority and effectiveness – that is their 'post-Westphalian' credentials - are disproportionately determined by the statements of legal officials (at least when compared with that of municipal law) and the conceptualisation of suprastate law is determinative of the type of constitutional pluralist relationship that ensues, then the diversity of statements of suprastate legal officials and corresponding reactions by state legal officials must be encapsulated in constitutional pluralist frameworks. In order to achieve this, constitutional pluralism's methodological monism must be abandoned and a 'global disorder of constitutional pluralism' embraced.

## **7. Conclusion**

As a candidate 'frame' for ordering the global 'disorder of legal orders', pluralism provides a more flexible, more nuanced account of global legal ordering than some of its rivals such as the outmoded Westphalian state-sovereigntist account or some of the more rigid hierarchical accounts of global ordering such as global constitutionalism or

the constitutionalisation of international law.<sup>106</sup> However in order to capitalise on these particular ‘pluralist virtues’ of explanatory accuracy and nuance in the context of the complexity the current post-Westphalian ‘unsettlement’,<sup>107</sup> the methodological monist tendency in pluralism must be resisted. Approaches to interactions between legal orders must diversify to truly reflect the diversity itself in a global constellation of interacting normative orders as evidenced by the statements of the legal officials, both state and suprapstate, engaged in constructing the realities of the post-Westphalian world. In short, we need to pluralise constitutional pluralism.

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<sup>106</sup> J Klabbbers, A Peters and G Ulfstein, *The Constitutionalization of International Law*, (OUP, Oxford, 2009), E. de Wet, ‘The Constitutionalization of Public International Law’ in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, Oxford, 2012), A Wiener, A Lang, J Tully, M Poiares Maduro and M Kumm, ‘Editorial: Global Constitutionalism: Human Rights, democracy and the rule of law’ (2012) 1:1 *Global Constitutionalism* 1-15.

<sup>107</sup> N. Walker, ‘Our Constitutional Unsettlement’ (2014) *Public Law* 529.