

# Who is Afraid of Radical Pluralism?

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The European Union seemed long set on a path of ever greater similarity to models of domestic politics, and a European constitutionalism along federal lines appeared to be the natural endpoint – intended or not – of the ever closer integration of the Union. This imagination has come to be disrupted, and not only because of the failed experiment of the constitutional treaty, but also because alternative visions have gained greater prominence over time. Central among them is a pluralist one – one that draws much inspiration and encouragement from Neil MacCormick’s path-breaking work of the 1990s<sup>1</sup>, and that soon provided an impetus for similar approaches beyond the European Union, in postnational law more broadly conceived.<sup>2</sup>

Yet MacCormick’s idea of pluralism in Europe changed significantly in the late 1990s, and in this paper I am interested in this shift – a shift that anticipated many later pluralist conceptions in its turn towards a softer form of pluralism. I try to inquire into why MacCormick changed his mind on this issue, and why others might be similarly afraid of the radical pluralism characteristic of his earlier phase. I will then begin to assess to what extent the fears at the core of this shift – fears about the rule of law and especially about the stability of the political order – are indeed justified, drawing on examples of pluralist orders from other contexts. The paper is very provisional and sketchy, but it suggests that the widespread skepticism of radical pluralism may be

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<sup>1</sup> N MacCormick, ‘Beyond the Sovereign State’, *Modern Law Review* 56 (1993), 1-18; N MacCormick, ‘The Maastricht-Urteil: Sovereignty Now’, *European Law Journal* 1 (1995), 259-66; N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford: Oxford University Press, 1999.

<sup>2</sup> By ‘postnational law’, I mean, in broad terms, the legal order that emerges as a result of the decline of the dichotomy between national and international law, triggered by increasing interlinkages in structures of regional and global governance. I take processes in Europe and beyond to reflect important similarities in this regard.

due less to empirically grounded insights than to unease in the face of new, unknown forms of order in the new, often still unknown space of politics and law beyond the state.

## I. The Pluralism of Pluralisms

Pluralism can have many meanings, and it is worth taking a closer look at the different phases of MacCormick's work in order to clarify the distinct understandings at play here. MacCormick sought to theorise the impact of the conflicting supremacy claims of the national and Union levels in the EU and came to regard the resulting legal structure as one in which both levels, as systemic units, had internally plausible claims to ultimate authority; their conflict was due to the fact that they did not agree on the ultimate point of reference from which they were arguing. For the national level, national constitutions remained the ultimate source of authority, and all exercises of public power (including by the EU) had to be traced back to them; for the EU, the EU treaty was seen as independent from, and superior to, national law including national constitutions. In MacCormick's view, there was thus no common legal framework that could have decided the conflict – the two views were (on a fundamental level) irreconcilably opposed; the two levels of law ran in parallel without subordination or external coordination. This description borrowed some of its ideas from sociological and anthropological accounts of legal pluralism that had become influential since the 1970s<sup>3</sup>, but took the idea beyond the relationship of official and non-official law (or norms) that those studies were interested in and applied it to the coexistence of different official systems of law, all with their own *Grundnormen* or rules of recognition. In this sense, MacCormick's approach was one of 'systemic' (or in his words, 'radical') pluralism.<sup>4</sup>

Whether consciously or not, this approach had ancestors not only in legal anthropology<sup>5</sup> and medieval thought<sup>6</sup>, but also in the early theory and practice of federalism.<sup>7</sup> Especially the situation in the United States after the constitution of 1787 had created an awareness that the classical categories – unitary state or federal union under international law – did not adequately reflect the character of federal polities. In the US, the constitution was described as “neither a national nor a federal Constitution,

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<sup>3</sup> See S F Moore, 'Law and Social Change: the Semi-Autonomous Social Field as an Appropriate Subject of Study', *Law & Society Review* 7 (1973), 719-46; J Griffiths, 'What is Legal Pluralism?', *Journal of Legal Pluralism* 24 (1986), 1-55; S E Merry, 'Legal Pluralism', *Law & Society Review* 22 (1988), 869-96.

<sup>4</sup> See N MacCormick, 'Risking Constitutional Collision in Europe?', *Oxford Journal of Legal Studies* 18 (1998), 517-32, at 528-32.

<sup>5</sup> On the complicated links between anthropological approaches to legal pluralism and theories of the global legal order, see Michaels, 'Global Legal Pluralism'.

<sup>6</sup> H J Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge: Mass.: Harvard University Press, 1983, 115-19.

<sup>7</sup> See O Beaud, *Théorie de la Fédération*, Paris: Presses Universitaires de France, 2007.

but a composition of both”<sup>8</sup>, and it certainly sought to balance the powers of the federal government and those of the states. More importantly perhaps, it left unsettled rival claims to ultimate authority: throughout the first half of the 19<sup>th</sup> century, such authority was claimed for both the federal and the state levels, and the contest was eventually settled only (though perhaps not even conclusively) through the civil war.<sup>9</sup> In Europe, parallel conceptions existed (and were influential until the late 19<sup>th</sup> century<sup>10</sup>), and it was Carl Schmitt who later captured them most cogently in his theory of federal union by placing the undecided, ‘suspended’ character of ultimate authority at its center.<sup>11</sup> Some contemporary strands of federal theory seek to revive this heritage.<sup>12</sup>

If MacCormick initially envisioned the EU in a similar way, he softened his account considerably in his later work, in which he came to see a greater potential for coordination in the overarching framework of international law. ‘Pluralism under international law’, as he termed it, is in fact a monist conception, but one that assigns EU law and domestic constitutional law equal positions and does not subordinate one to the other as a matter of principle.<sup>13</sup> This has been criticised for taking the edge out of the approach, and analytically it is indeed categorically distinct from the systemic pluralism MacCormick had initially diagnosed. It accepts pluralism not on the systemic level, but only in the institutional structure – different parts of one order operate on a basis of coordination, in the framework of common rules but without a clearly defined hierarchy, in a form of what I would call ‘institutional pluralism’. This is reminiscent of the ‘weak’ legal pluralism which for John Griffiths was analytically unremarkable because it operated in the framework of – and was mandated by – central state law.<sup>14</sup>

The tamed nature of institutional pluralism can be glanced when considering other articulations of it, for example Daniel Halberstam’s account of ‘interpretive pluralism’ under the US Constitution. Pluralism, in this view, denotes the fact that the authority to interpret the United States Constitution is ultimately undefined, and that

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<sup>8</sup> A Hamilton, J Madison & J Jay, *The Federalist Papers* (L Goldman, ed), Oxford: Oxford University Press, 2008, 192 (J Madison, *Federalist* no. 39).

<sup>9</sup> See A R Amar, ‘Of Sovereignty and Federalism’, *Yale Law Journal* 96 (1987), 1425-520, at 1429-66; R Schütze, ‘Federalism as Constitutional Pluralism: “Letter from America”’, in M Avbelj & J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond*, Oxford: Hart Publishing, 2010, forthcoming.

<sup>10</sup> See, eg, S Oeter, ‘Souveränität und Demokratie als Probleme in der “Verfassungsentwicklung” der Europäischen Union’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 55 (1995), 659-707, at 664-70; M Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol 2, München: C H Beck, 1992, 365-68.

<sup>11</sup> C Schmitt, *Verfassungslehre*, 9<sup>th</sup> ed, Berlin: Duncker & Humblot, [1928] 1993, 371-75.

<sup>12</sup> See Beaud, *Fédération*; R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford: Oxford University Press, 2009; see also C Schönberger, *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht*, Tübingen: Mohr Siebeck, 2005, 124-27.

<sup>13</sup> MacCormick, ‘Risking Constitutional Collision’. On the monism of this conception, see [xx].

<sup>14</sup> Griffiths, ‘Legal Pluralism’, 5-8.

in the extreme case three organs compete for it – Congress, the President, and the Supreme Court.<sup>15</sup> This may indeed lead at times to similar political dynamics as in instances of systemic pluralism such as the EU where *Grundnormen* themselves diverge. In particular, as Halberstam points out, the actors in both cases may have recourse to comparable sources of political authority to bolster their claims.<sup>16</sup> But such similarities should not conceal the crucial difference that lies in the fact that interpretive pluralism operates with respect to a common point of reference – constitutional norms that form a background framework and lay the ground for arguments about authority – while in systemic pluralism such a common point of reference *within* the legal or institutional structure is lacking. In Halberstam’s example, conflict might not be fully regulated but occurs in a bounded legal and political universe that contains (some) resources for its solution. Practically, the extent of this difference will depend on how thick the common framework is – in this respect, institutional and systemic pluralism may differ only gradually. If foundational constitutionalism and systemic pluralism mark the extremes of a continuum, institutional pluralism may occupy some place in the middle. Analytically, however, the difference between institutional and systemic pluralism is one in kind, defined by the presence *vel* absence of a common frame of reference.

Other pluralist approaches to postnational law follow a similarly institutionalist route. In Miguel Maduro’s ‘counterpunctual law’, this is evident in the idea of an ‘internal’ pluralism in the EU context, in which courts have loyalties to both the national and the European levels and are required to strive for coherence and integrity in the overall order. It is only beyond Europe – in the ‘external’ dimension – that this requirement fades and a more radical version of pluralism becomes visible.<sup>17</sup> Other observers understand the global level, too, as part of an order of the institutional pluralist kind. Mattias Kumm’s ‘cosmopolitan constitutionalism’, for example, presents itself as pluralist as it does not seek to construct firm hierarchies between different levels of law.<sup>18</sup> But this pluralism is embedded in a thick set of overarching norms,

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<sup>15</sup> D Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’, in J L Dunoff & J P Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government*, Cambridge: Cambridge University Press, 2009, 326-55.

<sup>16</sup> *ibid.*

<sup>17</sup> See Poiares Maduro, ‘Courts and Pluralism’, 374-75. See also M Poiares Maduro, ‘Europe and the Constitution: What If This is as Good as it Gets?’, in J H H Weiler & M Wind (eds), *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press, 2003, 74-102; M Poiares Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in N Walker (ed), *Sovereignty in Transition*, Oxford: Hart Publishing, 2003, 501-38; M Poiares Maduro, ‘Courts and Pluralism: Essay on a Theory of Adjudication in the Context of Legal and Constitutional Pluralism’, in Dunoff & Trachtman, *Ruling the World?*, 356-79.

<sup>18</sup> See M Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’, in Dunoff & Trachtman, *Ruling the World?*, 258-324; see also M Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, *European Journal of International Law* 15 (2004), 907-31.

such as subsidiarity, due process or democracy, that are meant to direct the solution of conflicts. There may be no one institution to settle disputes, and such disputes may thus, as a matter of fact, remain undecided for a long time. This, however, is typical enough for all kinds of constitutional structures – after all, law or constitutions can never determine the outcome of conflicts, but only offer certain (institutional, normative) resources for their solution. Kumm’s proposal may indeed be institutionally pluralist, but structurally it retains (as its self-description as cosmopolitan *constitutionalism* suggests) a constitutionalist character: in his vision, it is rules of ‘hard law’ – constitutional rules – that guide and contain conflict resolution. To use another example, Paul Schiff Berman situates his own approach clearly on the pluralist rather than the constitutionalist side<sup>19</sup> and his account of the hybrid and contested nature of the global legal order is close to the systemic pluralism we see in the earlier work of MacCormick. Yet his discussion of the forms that may allow for managing the resulting conflicts recalls classical constitutionalist instruments for accommodating diversity *within* a common, established framework: limited autonomy regimes or subsidiarity principles reflect devolutionist ideas, while hybrid-participation regimes are close to models of consociationalism.<sup>20</sup> Even Mireille Delmas-Marty, the most influential French theorist of transnational legal pluralism, tames her initially radical-sounding vision by an eventual attempt to create order through overarching rules, softened by way of margins of appreciation and balancing requirements.<sup>21</sup> Just as the later MacCormick, Delmas-Marty seems to become afraid of the ‘messy’ picture she describes and clings to some degree of institutionalised harmony.

## II. Between Radical Pluralism and Pluralism under International Law

Which are the fears behind this reluctance to take the pluralist vision to its logical conclusion? Not all authors are explicit about their reasons; many depict their particular version of pluralism as a result of analysis rather than choice. This held also true for MacCormick’s defence of radical pluralism, which he portrayed as a result of the fact that both national law and European law had cut themselves loose from ulterior authorisations, especially those of international law.

[F]rom the ‘internal point of view’ ... of those who operate the system of Community law it has come to be considered a self-referential and independently valid legal order. There is accordingly no less reason to treat the Community’s

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<sup>19</sup> P S Berman, ‘Global Legal Pluralism’, *Southern California Law Review* 80 (2007), 1155-237.

<sup>20</sup> *ibid.*, 1196-235.

<sup>21</sup> M Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, Oxford: Hart Publishing, 2009, 149-65. For an earlier proposal, see M Delmas-Marty, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism* (N Norberg, trans), Cambridge: Cambridge University Press, 2002.

foundational norms as constitutional in purport than there is reason to so treat the foundational norms of national law.’<sup>22</sup>

When MacCormick softened his pluralism, though, he no longer saw the result as dictated by observable facts:

‘There seem to be ... two reasonably arguable analyses of the situation that obtains among the states and the Community and Union [: ...] “pluralism under international law” and “radical pluralism”.’<sup>23</sup>

Here, the choice between the two was no longer preordained; it had to be made on other, presumably normative grounds.

For MacCormick, two main factors were normatively decisive, one with a focus on the individual, the other centred on the political order. Both related to the multiplicity of potentially conflicting rules which in radical pluralism are left uncoordinated – to the multiplicity of answers the law could thus give to the same problem. For MacCormick,

‘[this] problem is not logically embarrassing, because strictly the answers are from the point of view of different systems. But it is practically embarrassing to the extent that the same human beings or corporations are said to have and not have a certain right. How shall they act? To which system are they to give their fidelity in action?’<sup>24</sup>

I shall call this, broadly, the *rule-of-law critique* of radical pluralism. I will not pursue it further in this paper, even though many other critiques of pluralism in general, and radical pluralism in particular, focus on it.<sup>25</sup> In my view, it is not as cogent as it seems at first sight. For one, full predictability and legal orientation are typically lacking also in unitary legal orders, as norm conflicts often do not have clear solutions until a final court judgment decides them (if it does). Secondly, most commentators on the rule of law today accept the limitations of claims to legal certainty and predictability. They either see them as part of a broader conception of the rule of law, in which they have to be balanced with other, more substantive considerations, such as fairness, rights, or procedure.<sup>26</sup> Or they construe the rule of law more narrowly as comprising primarily formal criteria but then do not grant it absolute status. Instead, they accept that other political values, such as welfare, may take precedence over considerations of legal

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<sup>22</sup> MacCormick, *Questioning Sovereignty*, 141 (the chapter was originally published in 1997).

<sup>23</sup> MacCormick, ‘Risking Constitutional Collision’, 528.

<sup>24</sup> *ibid*, 530.

<sup>25</sup> See, eg, J Baquero Cruz, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’, *European Law Journal* 14 (2008), 389-422; P Eleftheriadis, ‘Pluralism and Integrity’, in M Avbelj & J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond*, forthcoming, 2010.

<sup>26</sup> See J Waldron, ‘The Concept and the Rule of Law’, *Georgia Law Review* 43 (2008), 1-61; G Palombella, ‘The Rule of Law Beyond the State: Failures, Promises, and Theory’, *International Journal of Constitutional Law* 7 (2009), 442-67.

certainty.<sup>27</sup> In both these approaches, we would thus have to inquire into the weight of competing factors in our context – something I have done elsewhere but will not pursue further here.<sup>28</sup> Suffice it to note that, thus reframed, the force of the rule-of-law critique of radical pluralism is weaker than it might initially seem.

I am mainly interested here in MacCormick's second main argument against radical pluralism (and in favour of 'pluralism under international law'). This second argument is more systemic and concerns 'the potential conflicts and collisions that can in principle occur as between Community and Member States'.<sup>29</sup> Unlike in radical pluralism, in pluralism under international law, these conflicts 'do not occur in a legal vacuum, but in a space to which international law is not only relevant but indeed decisively so...'<sup>30</sup>:

'[P]luralism under international law suggests that we need not run out of law (and into politics) quite as fast as suggested by radical pluralism.'<sup>31</sup>

The hope here is to diminish normative conflict and, if it nevertheless occurred, to ensure that 'there would always on this thesis be a possibility of recourse to international arbitration or adjudication to resolve the matter.'<sup>32</sup>

Let us leave aside here the underlying (and largely unwarranted) optimism about the availability of international judicial institutions, and also the problem that international law – being as state-centric as it has traditionally been – may not provide neutral ground between the EU and its member states. What is important here is the general thrust of the argument – MacCormick's assumption that law and judicial bodies are more likely than political mechanisms to create order and stability in society, that they stand a greater chance to successfully address the risk of collision and normative conflict. Let me call this the *stability critique* of radical pluralism.

This critique reflects a distrust of politics, an anxiety not to 'run out of law' and 'into politics', which is in some contrast to MacCormick's earlier views and perhaps holds a key to understanding his eventual shift away from radical pluralism. In his first main argument for a pluralist understanding of European law, he held out hope that such a pluralist order, although depending 'on a relatively high degree of willing cooperation and a relatively low degree of coercion', 'would create space for a real and serious debate about the demands of subsidiarity'.<sup>33</sup> This picture of politics was thus guardedly optimistic, associating pluralism with the possibility of negotiation and

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<sup>27</sup> See J Raz, 'The Rule of Law and its Virtue', in J Raz, *The Authority of Law*, Oxford: Oxford University Press, 2<sup>nd</sup> ed, 2009, 210-29.

<sup>28</sup> Krisch, *Beyond Constitutionalism*, ch 8; see also N Krisch, 'The Case for Pluralism in Postnational Law', *LSE Law, Society & Economy Working Paper* 12/2009, <http://ssrn.com/abstract=1418707>.

<sup>29</sup> MacCormick, 'Risking Constitutional Collision', 531.

<sup>30</sup> *ibid*, 531.

<sup>31</sup> *ibid*, 531.

<sup>32</sup> *ibid*, 532.

<sup>33</sup> MacCormick, 'Beyond the Sovereign State', 17.

dialogue.<sup>34</sup> This becomes even clearer in a piece on the British constitution, in which he contrasted pluralism with

‘traditional centralizing theories about sovereignty, its absoluteness and its essential quality for securely established law. In place, we can put ideas about subsidiarity, negotiation, balance between different forms and levels of government and self-government.’<sup>35</sup>

MacCormick acknowledged, though, that this was not ‘an easy way of looking at law, or of running a society’:

‘The problems about societal insecurity that lie at the heart of Hobbes’s vision of the human condition, and that continue to animate Bentham and Austin, are real problems. The diffusionist [pluralist] picture is a happy one from many points of view, but its proponents must show that the Hobbesian problems can be handled even without strong central authorities, last-resort sovereigns for all purposes.’<sup>36</sup>

At that point, he professed to be a diffusionist, but in the same year, the radical pluralist picture came to appear to him as too risky, leading him to turn to international law to frame and tame it. I suspect that this reflects a deeper ambivalence in MacCormick’s thinking about law and its value. On the one hand, he sees law as deeply connected to morality, as a normative order linked with but structurally very different from politics, which is identified centrally with power. On the other hand, law also appears to him as highly problematic, especially when it expresses structural bias or relations of dominance, as with respect to the Scottish position in the United Kingdom. He seeks to remedy these latter problems by reinterpreting UK law so as to reflect a stronger place of Scotland within the Union, but he recognises that this is not the prevailing view – that UK law has for centuries demoted Scotland.<sup>37</sup> In a sense, this may reflect an unresolved duality of autonomy and heteronomy in MacCormick’s idea of law.<sup>38</sup>

Whatever the particular sources for MacCormick’s ambivalence, the stability critique of radical pluralism is widespread among commentators. A pluralist order not tamed by some form of normative or institutional framework is widely regarded as breeding instability and friction, even by those commentators who otherwise emphasise pluralism’s normative virtues – for example, as I have mentioned above, Maduro, Berman and Delmas-Marty. In assessing this critique, we should not lose sight of the fact that similar concerns have long been raised at constitutionalist orders themselves which, by limiting (and often dividing) government, have departed

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<sup>34</sup> See also H Lindahl, ‘Sovereignty and the Institutionalization of Normative Order’, *Oxford Journal of Legal Studies* 21 (2001), 165-180, at 170.

<sup>35</sup> MacCormick, *Questioning Sovereignty*, 78.

<sup>36</sup> *ibid.*

<sup>37</sup> See especially the tension between the views in MacCormick, *Questioning Sovereignty*, ch 1 and 4.

<sup>38</sup> See N MacCormick, ‘The Concept of Law and “The Concept of Law”’, *Oxford Journal of Legal Studies* 14 (1994), 1-23, at 16-19.



radically from Hobbesian visions of providing stability through a strong, unfettered, truly sovereign actor.<sup>39</sup> Pluralism goes a step further, and in the remainder of the paper I seek to analyse whether in the particular circumstances of European – and more broadly, postnational – politics, pluralism may have a more positive effect on stability than meets the eye.

### III. The Stability Critique of Radical Pluralism

Any claim that pluralism might have the potential to foster stable cooperation faces an uphill battle: it has to cope with the widespread view that undecided supremacy claims tend to breed instability and chaos. This conviction is held by thinkers from very different backgrounds: Carl Schmitt thought that such indecision could only work in homogeneous societies<sup>40</sup>; H.L.A. Hart held that a multiplicity of rules of recognition represented a ‘substandard, abnormal case containing with it the threat that the legal system will dissolve’.<sup>41</sup> And most pertinently perhaps, Stanley Hoffmann famously maintained that ‘[b]etween the cooperation of existing nations and the breaking in of a new one there is no stable middle ground. ... [H]alf-way attempts like supranational functionalism must either snowball or roll back.’<sup>42</sup>

The European Communities – Hoffmann’s focus – survive even forty years later, but many believe that their continued success depends on an ability to assimilate to a statal form; the drive towards a European constitution can be seen as a step in this direction. Yet Hoffmann’s main concern was less about institutional structures than about their social grounding – and loyalties in Europe still lie mostly (though not solely) with nation-states. As Peter Katzenstein and Jeffrey Checkel note:

“The number of unambiguously committed Europeans (10-15% of the total population) is simply too small for the emergence of a strong cultural European sense of belonging. The number of committed nationalists (40-50% of the total) is also too small for a hegemonic reassertion of nationalist sentiments. The remaining part of the population (35-40% of the total) holds to primarily national identifications that also permit an element of European identification.”<sup>43</sup>

Short of a wholesale transformation of such loyalties, the challenge lies in devising structures most apt for stable cooperation under the circumstances, with an awareness of the potential for challenge the fragmented structure of postnational society represents.

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<sup>39</sup> See, eg, Schmitt’s critique.

<sup>40</sup> C Schmitt, *Verfassungslehre*, 9<sup>th</sup> ed, Berlin: Duncker & Humblot, [1928] 2003, 375-79.

<sup>41</sup> H L A Hart, *The Concept of Law*, 2<sup>nd</sup> ed, Oxford: Oxford University Press, 123.

<sup>42</sup> S Hoffmann, ‘Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe’, *Daedalus* 95 (1966), 862-915, at 910.

<sup>43</sup> P J Katzenstein & J T Checkel, ‘Conclusion – European Identity in Context’, in J T Checkel & P J Katzenstein (eds), *European Identity*, Cambridge, Cambridge University Press, 2009, 213-27, at 215-16. For a very similar assessment, see Fligstein, *Euroclash*, 250.

## *Unitary and Pluralist Orders*

What options are we comparing then? Between radical pluralism, pluralism under international law and more straightforward constitutionalist approaches, we are faced with gradual differences on mainly two dimensions: hierarchy and integration. Common, overarching rules – the hallmark of constitutionalism, important in pluralism under international law – unify an order through the acceptance of a higher law; in radical pluralism they are absent, which leaves the overall order fragmented and the different parts of it in a heterarchical relationship.

In postnational governance, more integrated, hierarchical modes will often be preferred because they lengthen the shadow of the future and stabilise cooperation beyond the immediate cost-benefit calculation of the actors involved. Constitutionalist structures will typically be associated with these latter benefits: they set up institutions and assign powers in a way that abstracts from immediate situational pressures and interests. Yet this abstraction only works up to a point: like other institutions, constitutions (and other overarching rules) can shift some incentives in favour of cooperation, especially through the creation of focal points and enforcement mechanisms. But beyond that, they have to be self-enforcing even in the domestic context: they have to rest on matching social structures and cannot stray too far from actors' preferences.<sup>44</sup>

All the while, tightly legalised, constitutionalised regimes are difficult to set up and create particular problems of adaptation later on. The same is true for the international legal rules which MacCormick believes should govern the relationship between European and national law – to positively erect them is cumbersome; to change them later faces enormous hurdles. In situations of uncertainty, actors will often choose to create more flexible institutions to cope with future shocks.<sup>45</sup> Yet flexibility is not easily institutionalised or framed in common rules. From the study of domestic constitutions, we know only too well about the dilemmas involved: the right balance between rigidity and adaptability is often elusive and typically requires an interplay of formal amendment procedures and informal, often judicially-driven processes.<sup>46</sup> In the postnational setting, this problem is exacerbated in two ways. First,

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<sup>44</sup> See R Hardin, 'Why a Constitution?', in B Grofman & D Wittman (eds), *The Federalist Papers and the New Institutionalism*, New York: Agathon Press, 1989, 100-20; J Bedner, W N Eskridge Jr & J A Ferejohn, 'A Political Theory of Federalism', in J A Ferejohn, J N Rakove & J Riley (eds), *Constitutional Culture and Democratic Rule*, Cambridge: Cambridge University Press, 2001, 223-70; Filippov, Ordeshook & Shvetsova, *Designing Federalism*.

<sup>45</sup> B Koremenos, C Lipson & D Snidal, 'The Rational Design of International Institutions', *International Organization* 55 (2001), 761-99, at 793; B P Rosendorff & H V Milner, 'The Optimal Design of International Trade Institutions: Uncertainty and Escape', *International Organization* 55 (2001), 829-57, at 832-35.

<sup>46</sup> See, eg, D S Lutz, 'Toward a Theory of Constitutional Amendment', *American Political Science Review* 88 (1994), 355-70; S Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Princeton: Princeton University Press, 1995; R Simeon,

because of contestation about the sites of decision-making, constitutional authority is not located on any one level; as a result, change cannot be reliably steered in a commonly accepted institutional process. Secondly, because of the fluidity of postnational politics, institutional change usually comes at a rapid pace; but because of the strength of disagreement on substantive issues, it tends to imply significant costs for some states.<sup>47</sup> Strong contestation and fluidity, key characteristics of politics beyond the state, make it difficult to conceive rules open enough to allow for adaptation yet firm enough to provide the benefits we expect from overarching, constitutional rules.

This recalls some of the difficulties of constitutionalism in multicultural settings. When acceptance of a common level of constitution-making is lacking, processes of constitutional change will often provoke serious backlash; Canada's constitutional crisis in the 1980s and 1990s is an example.<sup>48</sup> In the postnational context, with loyalties further fragmented, the situation is even more difficult. Because of the distribution of costs, attempts at change will often provoke significant resistance. If change is undertaken in spite of it, it will easily overstretch the authority of the respective decision-making site, thus undermining the stability of the overall order. Decision-making rules can prevent this through high thresholds for amendments, but these also prevent adaptation to changing environments, thereby undermining the effectiveness of the institutions concerned.<sup>49</sup> The EU's reform difficulties of the last decades are an example. Yet softer, networked alternatives are not always helpful either. They do not come with the strict authority claims of a constitutional framework and may therefore accommodate change more easily, but they can also not provide the cooperative benefits often required to provide solutions to problems of regional or global scope.

In this quandary, radical pluralism's virtue (as well as its vices) derives from the fact that it represents a *hybrid* between hierarchical and network forms of order. It allows for regimes with an internally hierarchical structure, but denies them ultimate supremacy, and thus navigates between routine hierarchies and exceptional disruptions, to be solved eventually only through consensual forms. This interplay can be observed in many instances of pluralism, most prominently in the general acceptance, coupled with warning shots, of EU law by national constitutional courts. It is also on display in other cases, ranging from the European human rights regime to

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'Constitutional Design and Change in Federal Systems: Issues and Questions', *Publius: The Journal of Federalism* 39 (2009), 241-61.

<sup>47</sup> On the distributional challenges that arise even in coordination games, see S D Krasner, 'Global Communications and National Power: Life on the Pareto Frontier', *World Politics* 43 (1991), 336-66.

<sup>48</sup> See Krisch, 'Case for Pluralism'.

<sup>49</sup> See McKay, *Designing Europe*, 150; on the federal context, B Galligan, 'Comparative Federalism', in R A W Rhodes, S A Binder & B A Rockman, *The Oxford Handbook of Political Institutions*, Oxford: Oxford University Press, 2006, 261-80, at 269-70.

the regime complex around GMOs.<sup>50</sup> The conflicts of principle all these instances involved remained unresolved; but in most of them, actors found ways to bracket them and work around them in a pragmatic, largely consensual fashion.

To some extent, pluralism thus provides a safety valve constitutionalism is lacking<sup>51</sup>: it creates an opening that can be used to signal a need for change as well as the point when the direction of the regime becomes unacceptable to some actors. At the same time, it allows for hierarchies and possibilities of close integration whose absence typically places limits on network forms of coordination. Pluralism oscillates between hierarchy and network, but this also means that it shares not only in the benefits but also in the deficits of both. In particular, by opening hierarchies up, it relativises the strength of a regime – in the worst case, rival supremacy claims can become excuses for non-compliance whenever a rule or decision goes against the interests of an actor. Here, pluralism risks creating a slippery slope.

### *The Domestic Angle*

A key difference between constitutionalism and pluralism, when it comes to containing non-compliance, emerges if we focus on the domestic side of postnational regimes – the national side of European politics. This is central in part because studies of the creation and consolidation of supranational as well as federal authority typically find that key sources of stability lie in domestic politics and institutions.<sup>52</sup>

Constitutionalism and pluralism are distinguished by the different extent to which they formally link the various spheres of law and politics. While pluralism regards them as separate in their foundations (despite tight links in practice), constitutionalism, properly understood, is a monist conception that integrates those spheres into one.<sup>53</sup> ‘Pluralism under international law’ is situated on the monist side too.<sup>54</sup> In a fully integrated order, rules about the relationship of national, regional and global norms are immediately applicable in all spheres, and neither political nor judicial actors can justify non-compliance on legal grounds. In the EU, for example, this tight legal

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<sup>50</sup> See N Krisch, ‘The Open Architecture of European Human Rights Law’, *Modern Law Review* 71 (2008), 183-216; N Krisch, ‘Pluralism in Postnational Risk Regulation: The Dispute over GMOs and Trade’, *Transnational Legal Theory* 1 (2010), 1-29.

<sup>51</sup> See also L R Helfer, ‘Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking’, *Yale Journal of International Law* 29 (2004), 1-83, at 56, on regime shifting as creating a safety valve.

<sup>52</sup> See, eg, Filippov, Ordeshook & Shvetsova, *Designing Federalism*, on the importance of domestic party structures for the stability of federal orders; B A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge: Cambridge University Press, 2009, 371-73, on the effectiveness of human rights treaties.

<sup>53</sup> See also M Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’, in J L Dunoff & J P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press, 2009, 258-324, at 279, fn 34.

<sup>54</sup> Lindahl, ‘Sovereignty’, 166; see also N Walker, ‘Legal Theory and the European Union: A 25<sup>th</sup> Anniversary Essay’, *Oxford Journal of Legal Studies* 25 (2005), 581-601, at 593.

integration has helped mobilise domestic actors, especially courts, so as to bolster and stabilise the postnational regime significantly. Lower domestic courts were empowered by the direct effect of European law, stipulated by the European Court of Justice, and enforced it in political and legal systems otherwise reluctant to respond.<sup>55</sup> Likewise, studies of human rights instruments in Europe and beyond suggest that their anchoring in domestic law, with the possibility of using domestic courts for enforcement, were important factors in achieving compliance.<sup>56</sup>

Pluralism does not automatically imply such a tight connection, and this might reduce its chances to ensure norm-compliance – and allow actors to abuse its openness for opportunistic reasons. Yet as the European example shows, pluralism also does not rule out the direct effect of regional or global norms in other orders. The EU legal order has a pluralist character because of rival supremacy claims of the different levels, and still we can observe a tight integration and mobilisation of domestic actors. Likewise, in the European human rights regime we can observe domestic courts using the European Convention of Human Rights and judgments of the European Court of Human Rights as a matter of course – despite their insistence that national constitutions remain the ultimate point of reference.<sup>57</sup> And the ECJ may have distanced EU law from WTO law in principle, but this has not prevented it from making ample use of the latter.<sup>58</sup>

Even if it is a contingent, not a necessary component in pluralism, a tight integration of the different layers of law might help to keep resistance and non-compliance exceptional. On the other hand, the focus on the domestic side reveals particular benefits of pluralism's openness, its accommodation of (occasional) resistance. For it shifts our attention to the alterations in the domestic political process brought about by postnational governance. One of them is a shift towards the executive as the primary actor, partly due to the traditional executive preponderance in foreign affairs which has now gained a broader ambit; partly due to functional reasons that make it difficult to include other actors in what typically are already overloaded and cumbersome negotiation processes. Even in the relatively small and well-structured European Union, the participation of national parliaments in law-making at the Union level remains limited.<sup>59</sup>

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<sup>55</sup> Weiler, 'Transformation', 2426; Burley & Mattli, 'Europe before the Court', 62-4; Alter, *Establishing the Supremacy*.

<sup>56</sup> Simmons, *Mobilizing for Human Rights*, 355-63. See also H Keller & A Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems', in H Keller & A Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford: Oxford University Press, 2008, 677-710, at 683-86.

<sup>57</sup> See Krisch, 'Open Architecture'.

<sup>58</sup> See Krisch, 'Pluralism in Postnational Risk Regulation'.

<sup>59</sup> See P Kiiver, 'The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity', *Maastricht Journal of European and Comparative Law* 15 (2008), 77-83.

The resulting 'executive multilateralism'<sup>60</sup> leads to a relegation of parliaments and courts in the law-making process – a relegation that is hardly remedied by requirements of ratification and implementation, which have long been of limited impact<sup>61</sup> and have become ever weaker as a result of delegated law-making at the European and global levels, factual pressures to ratify, and more direct channels of implementation in which administrative and regulatory actors bypass parliaments.<sup>62</sup> But this relegation reduces the information of domestic actors and individuals at the law-making stage, and it limits the likelihood of signals about domestic interests and values that might be affected by new rules. What interests and values are affected, may in any event not be foreseeable at that stage; it might only crystallise later in the life of a regime when domestic actors are even further excluded from its processes.

The more postnational governance deals with matters of public interest, the more it comes to affect deeply held convictions and entrenched interests in domestic society. And as it acts increasingly through precise and concrete obligations – often enacted by bodies with delegated rule-making powers – it provokes stronger resistance once domestic actors become aware of the impact. European and international institutions become 'politicised' as a result.<sup>63</sup> In the context of the WTO, for example, increasing legalisation has been seen to mobilise domestic interest groups in opposition to trade liberalisation. This can lead to a destabilisation of the regime if options to accommodate such opposition are foreclosed. As Judith Goldstein and Lisa Martin put it, '[l]egalization can increase social resistance to new cooperative agreements by reducing the number and types of instruments available to politicians to deal with a rise in antitrade sentiment.' They suggest that 'trade regimes need to incorporate some flexibility in their enforcement procedures; too little enforcement may encourage opportunism, but too much may backfire ...'.<sup>64</sup>

Pluralism may contribute to such flexibility by allowing for a limited escape from the regime. In the example of the GMO dispute we can see how such an escape can be used to cope with strong and widespread opposition in Europe – by recourse to norms of European supremacy, the actual impact of WTO rules was buffered and strong sentiments about acceptable food and feed within Europe could find expression.<sup>65</sup> Similar processes are at work in the European reaction to rights issues in the UN sanctions regimes. By depicting the European legal order as the ultimate, constitutional

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<sup>60</sup> M Zürn, 'Global Governance and Legitimacy Problems', *Government & Opposition* 39 (2004), 260-87, at 264-65.

<sup>61</sup> See, eg, E Benvenisti, 'Exit and Voice in the Age of Globalization', *Michigan Law Review* 98 (1999), 167-213, at 184-89, 200-1.

<sup>62</sup> See B Kingsbury, N Krisch & R B Stewart, 'The Emergence of Global Administrative Law', *Law & Contemporary Problems* 68:3 (2005), 15-61, at 18-27.

<sup>63</sup> Zürn et al., 'Ordnungsbildung', 149-58; W Mattli & N Woods, 'In Whose Benefit? Explaining Regulatory Change in Global Politics', in Mattli & Woods, *The Politics of Global Regulation*, 1-43, at 21-39.

<sup>64</sup> Goldstein & Martin, 'Legalization, Trade Liberalization, and Domestic Politics', at 631. For a similar appraisal, see Rosendorff & Milner, 'Optimal Design'.

<sup>65</sup> See Krisch, 'Pluralism in Postnational Risk Regulation'.

point of reference, the European Court of Justice in *Kadi* could bring European conceptions of rights to the fore – conceptions that in the executive-driven processes in and around the UN Security Council typically find little attention. In this vein, pluralist structures also open up channels for signalling strong preferences of key domestic actors that otherwise might not find institutional expression. Without such signals, the potential of creating stable postnational regimes would be severely limited.

### *The Politics of Authority*

This potential is also linked, to an important extent, with the ‘authority’ of these regimes and their institutions. Authority and legitimacy, as ideational frameworks, are widely seen as important to account for broader patterns of political change.<sup>66</sup>

The construction of such authority may not be strictly necessary for institutional structures to emerge – indeed, they may often be based on mutual gains or coercion in the first place. But it helps them persist and be effective over time; they are more resistant to challenge when interest constellations change or coercive instruments become too costly.<sup>67</sup> The stability of federal orders, for example, has often been linked to loyalties that transcend the calculation of interests.<sup>68</sup> This is particularly so because authority facilitates processes of institutional evolution: actors will more easily accept adverse changes if an institution is based on a deeper sense of legitimacy.

This makes the creation of authority particularly relevant in our context. As I have noted above, fluidity and change are key features of politics beyond the state – institutional structures as well as normative understandings are far more in flux here than is usually the case in domestic orders. How then does the structural framework – unitary or radically pluralist – affect the likelihood that such deeper legitimacy and authority may emerge and stabilise cooperation? A constitutionalist response would be straightforward: because rules about hierarchies and the relationships of different layers of governance flow from reasoned construction, they are more likely to generate acceptance than rules or processes flowing from political whim. This may be true, but it does not confront a main difficulty of postnational politics, namely disagreement over what a ‘reasonable’ construction of such relationships might imply. For those with strong loyalties to national communities, regional or global decision-making may be anathema; for those who believe global problems need to be tackled globally, and

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<sup>66</sup> See, eg, J G March & J P Olsen, ‘The Institutional Dynamics of International Political Orders’, *International Organization* 52 (1998), 943-69; A Wendt, *Social Theory of International Politics*, Cambridge: Cambridge University Press, 1999; T J Biersteker & C Weber (eds), *State Sovereignty As Social Construct*, Cambridge: Cambridge University Press, 1996.

<sup>67</sup> I Hurd, ‘Legitimacy and Authority in International Politics’, *International Organization* 53 (1999), 379-408, at 383-89.

<sup>68</sup> See T M Franck, ‘Why Federations Fail’, in T M Franck (ed), *Why Federations Fail*, New York: New York University Press, 1968, 167-99; J Johnson, ‘Inventing Constitutional Traditions: The Poverty of Fatalism’, in Ferejohn, Rakove & Riley, *Constitutional Culture*, 71-109. See also the emphasis on historical groundings in M Burgess, *Comparative Federalism*, London: Routledge, 2006, ch 11.

European problems in a European framework, it will appear as a moral imperative.<sup>69</sup> In order to build a stable political order, such identifications cannot be ignored; they need to find reflection in the institutions themselves.<sup>70</sup>

Tackling this gap, bridging this disagreement, requires processes of normative change that are largely independent from grand structural frameworks such as constitutionalism or pluralism.<sup>71</sup> We are only beginning to understand socialisation processes – persuasion and social influence – in the postnational realm, but it is often assumed that socialisation is facilitated by deliberation in small settings, face-to-face interaction, the acculturation to norms in the surrounding culture or in attractive groups, and by processes of backpatting and opprobrium.<sup>72</sup> It is also linked to norm entrepreneurs that gather support and initiate norm cascades.<sup>73</sup> Larry Helfer and Anne-Marie Slaughter have shown how some of these tools – especially face-to-face interaction and the creation of familiarity – have been of use in the processes of authority creation for the ECJ and the ECtHR.<sup>74</sup> Such processes are possible in both constitutionalist and pluralist frameworks, yet pluralism seems to have an edge in one respect: the space it creates for incrementalism.

### *Incrementalism*

Incrementalist approaches are widely regarded as useful for building and developing postnational institutions. Moving step by step, rather than through initial grand designs or big leaps, may be helpful because it affects states' interests only to a limited extent at each turn. As a result, the costs of exit for states will often enough be higher than the new costs arising from a single step, and states will typically not be driven to fully reassess the costs and benefits of their participation in a regime. A similar dynamic may pertain at the level of domestic actors: those actors that stand to lose from a stronger role of regional and global governance structures are less likely to stage strong resistance if the new threat to their authority with each step is relatively small. And in a neofunctionalist vein, incrementalism reflects the gradual adjustment of interests and expectations in the process of integration.

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<sup>69</sup> See Krisch, 'Case for Pluralism'.

<sup>70</sup> See McKay, *Designing Europe*, 145-46.

<sup>71</sup> On varied channels of norm diffusion, also apart from socialisation-based ones, see B A Simmons, F Dobbin & G Garrett (eds), *The Global Diffusion of Markets and Democracy*, Cambridge: Cambridge University Press, 2008.

<sup>72</sup> See A I Johnston, 'Treating International Institutions as Social Environments', *International Studies Quarterly* 45 (2001), 487-515; R Goodman & D Jinks, 'How to Influence States: Socialization and International Human Rights Law', *Duke Law Journal* 54 (2004), 621-703; also J T Checkel, 'Why Comply? Social Learning and European Identity Change', *International Organization* 55 (2001), 553-88, at 560-64. See also IO symposium issue 2005, [xx].

<sup>73</sup> See M Finnemore & K Sikkink, 'International Norm Dynamics and Political Change', *International Organization* 52 (1998), 887-917; T Risse, S C Ropp & K Sikkink, *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge University Press, 1999.

<sup>74</sup> Helfer & Slaughter, 'Effective Supranational Adjudication', 290-336.



This may go some way to explain, for example, why domestic supreme courts (and political actors) have not shown firmer, and earlier, reactions to the gradual expansion of authority by the ECJ and the ECtHR.<sup>75</sup> Yet the full importance of incrementalism here, as more broadly in the construction of postnational governance, comes into view only through an appreciation of the role of ideas. First, a step-by-step approach can lead to change in the acceptance of regional or global institutions via a process of *entrapment*. If actors fail to protest against new authority claims, they may later find themselves entrapped in this initial (if tacit) acceptance: in a context of path dependence, a shift of the argumentation framework is difficult to undo at a later stage.<sup>76</sup> It is a typical strategy of courts to wrap fundamental shifts in their jurisprudence in decisions that favour those actors most affected by the shift. This softens the blow, makes strong reactions in the case at hand less likely and later resistance more difficult.

A second, further-reaching advantage of incrementalism emerges when we return to processes of *socialisation*. Theorists generally find that socialisation is most successful when new norms resonate with existing ones or do not run up against entrenched normative convictions; unsurprisingly, actors change their minds more easily when their views on issues are not fully settled.<sup>77</sup> This suggests some skepticism about the potential for deep authority in postnational governance structures – its construction will typically have to confront well-established assumptions in favour of national institutions, as we have seen, for example, in domestic courts' attitudes towards the European human rights regime.<sup>78</sup> This may lead us to assume, in a rationalist vein, that interest- rather than authority-based forms of cooperation promise greater success in this realm.<sup>79</sup> But it also has implications for the conditions under which the construction of postnational authority is likely to succeed. It suggests that processes that can avoid head-on confrontations on entrenched issues hold greater promise for limiting large-scale resistance and thus for inducing change over time. Incrementalist approaches that bracket issues of principle and are able to respond to feedback and resistance run a lower risk of antagonising key actors and may be able to shift understandings about sites of authority more effectively.

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<sup>75</sup> On the ECJ, see Weiler, 'Transformation', 2447-48; Burley & Mattli, 'Europe before the Court', 55-6, 67-9.

<sup>76</sup> See, eg, A Stone Sweet, 'Path Dependence, Precedent, and Judicial Power', in M Shapiro & A Stone Sweet, *On Law, Politics, and Judicialization*, Oxford: Oxford University Press, 2002, 112-35.

<sup>77</sup> Johnston, 'International Institutions as Social Environments', 496-99; Checkel, 'Why Comply?', 562-64; see also A Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism', *International Organization* 58 (2004), 239-75.

<sup>78</sup> See Krisch, 'Open Architecture'.

<sup>79</sup> See, eg, J Kelley, 'International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions', *International Organization* 58 (2004), 425-57.

Accordingly, incrementalism is often seen as a key element in the construction of postnational authority.<sup>80</sup> The slow process by which the European human rights bodies came to assert their independence and expand their scope of action is probably the clearest example here: taking cues from domestic politics about potential limits, they reassured political and judicial actors that their authority was not under serious threat. And they moved to bolder assertions only once their status was more settled.<sup>81</sup>

In principle, incremental processes are possible in both unitary and radically pluralist settings. But they face tighter limits in the presence of overarching norms: a framework that determines relations and hierarchies may provide some *marge de manoeuvre* through vague norms, and it may allow for gradual reinterpretations of once-settled concepts. Yet if it is – as in MacCormick’s later version of pluralism – designed to reduce and settle conflicts, it needs a certain fixed content and some rigidity. Moreover, the very point of the constitutionalist endeavour is to legally fix these relations: to remove them from the political process, to immunise them from constant readjustment. As mentioned above, constitutions vary in the extent to which they accommodate change; but for large-scale shifts, they typically require either formal amendments or something akin to Bruce Ackerman’s ‘constitutional moments’.<sup>82</sup> And it is very difficult for them to simply bracket issues of principle: the claim to institutionalise the forces of reason as against ‘accident and force’<sup>83</sup> can only be upheld if those issues are somehow settled through identifiable – reasonable – rules.

Radical pluralism allows for greater flexibility here. Bracketing hierarchies is its very characteristic: between the supremacy claims of competing regimes, it does not pretend to offer a resolution. In this way, it allows for processes of mutual accommodation by which suborders react to each other’s signals. Such processes are typically incremental, in that actors take in feedback from other sites and adjust their behaviour accordingly. The integration of human rights norms in the EC, aided and spurred by the challenges of national constitutional courts, is an example. In this framework, actors are not forced to confront the issues of principle – they can either maintain their own supremacy claims or leave their views about hierarchies undefined. In this way, pluralism can protect itself from overreaching and can tie itself more closely to processes of social change. And it can establish an order of mutual tolerance<sup>84</sup> by avoiding the confrontation of deeply entrenched convictions of principle that we have seen to hinder socialisation processes.

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<sup>80</sup> Eg, Helfer & Slaughter, ‘Effective Supranational Adjudication’, 314-17; Goodman & Jinks, ‘How to Influence States’, 701-2.

<sup>81</sup> See Krisch, ‘Open Architecture’.

<sup>82</sup> B Ackerman, *We the People*, vol 1: *Foundations*, Cambridge, Mass.: Harvard University Press, 1991.

<sup>83</sup> A Hamilton, J Madison & J Jay, *The Federalist Papers* (L Goldman, ed), Oxford: Oxford University Press, 2008, 11 (A Hamilton, *Federalist* no 1).

<sup>84</sup> See J H H Weiler, ‘In Defence of the Status Quo: Europe’s Constitutional *Sonderweg*’, in J H H Weiler & M Wind (eds), *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press, 2003, 7-23, at 15-23.

## IV. Conclusion

The postnational space, in the EU and beyond, is characteristically different from domestic politics, especially those of the nation state. Fluidity, diversity, and contestation on fundamental issues are stronger, and this creates particular challenges for the stability of political order. The typical response is to contain such political openness through institutional closure – to replicate unitary forms of order based on domestic models in order to establish conflict rules, adjudicate and enforce them and thereby avoid open friction.

As we have seen in this brief (and admittedly sketchy) paper, this is also the ultimate tack Neil MacCormick took when he stepped back from his initial conception of a radical pluralism within the EU and turned to the more moderate vision of a ‘pluralism under international law’. Many other scholars have followed a similar path. Even those who favour a broadly pluralist, decentralised institutional order for politics and law beyond the state, often seek to tame this order through overarching rules that set out powers and establish mechanisms for conflict resolution.

I have tried to suggest in this paper that this strategy is more problematic than it may seem. Under conditions of strong fluidity and contestation, conflict rules face serious problems of adaptation to a changing environment, and they face challenges from those they place at a disadvantage. Because they do not rest on a societal consensus on the scope of the relevant polity and the procedures for decision-making, they are thus unlikely to be able to truly settle conflicts – in fact, they might enflame them further. In such a situation, stability may be achieved more easily by a truly, ‘radically’ pluralist structure in which fundamental questions – about the scope of the polity, ultimate supremacy norms, key values – are bracketed and worked around. Such a pluralism favours pragmatic, incremental processes of mutual accommodation and potentially convergence, without overstressing the authority of the norms and institutions that form the regime. Because it allows the different layers of law to maintain their own fundamental, supreme norms, it also allows for meaningful signals about the limits of cooperation, thus anticipating political challenges. For the creation and consolidation of European and global political and legal institutions, this may be more beneficial than the existence of an overarching framework which will often antagonise actors and fail to match its social environment.

Radical pluralism will not eliminate conflict and friction altogether, but in the rugged, contested terrain of the postnational, no institutional structure would. Unitary, constitutionalist models may seem to hold out hope for a more reasoned, more civilised political order beyond the state<sup>85</sup>, but in the non-ideal world of European and global politics they are likely to backfire. Here, less well-known, more irregular structures may be more appropriate. MacCormick could well have placed some more trust into his very own ‘radical pluralism’.

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<sup>85</sup> P Allott, ‘Epilogue: Europe and the Dream of Reason’, in Weiler & Wind, *European Constitutionalism*, 202-25.