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# **Back to a Sovereign Future?: Constitutional Pluralism After Brexit**

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## **Abstract**

To the extent to which the UK's decision to withdraw from the EU can be interpreted as a reassertion of the classic ideas of Westphalian sovereign statehood, it questions the relevance of constitutional pluralism as a resolutely 'post-sovereign' model of relations between state administrations and their supranational counterparts. This contribution will therefore examine the usefulness and relevance of the idea of constitutional pluralism after Brexit. It looks at the various features and relationships affected by the Brexit process analysing the relevance of constitutional pluralism to each relationship pre- and post- Brexit, concluding that, whereas Brexit clearly affects the different relationships involved, constitutional pluralism can and will remain relevant to EU/UK relations as well as within the EU, well into the future.

Key words: Brexit – Constitutional Pluralism – sovereignty – post-sovereignty.

## I. BREXIT AS CONSTITUTIONAL EVENT

As a constitutional event, Brexit is unprecedented in both the EU and UK's constitutional arrangements. From the UK's perspective, few events have had such a profound impact on the UK's legal infrastructure as the UK's accession to the EU's sophisticated legal order and the gradual implementation of the latter into the former over the decades by the UK courts. From the EU's perspective, no Member State – let alone an economically and militarily powerful one – has ever left the bloc thus posing potentially existential questions about the future security and viability of the integration project.

In this paper, one discrete aspect of the Brexit event touching on some of these questions will be analysed: namely the extent to which it challenges constitutional pluralism as both an analytical and normative account of the interactions between the EU and UK's legal and political orders.<sup>1</sup> Initiated in the work of Neil MacCormick,<sup>2</sup> constitutional pluralism involves the idea that two autonomous legal and political systems can interact at a high degree of intensity, making simultaneous claims to ultimate authority, without one being subordinated to the other (descriptive constitutional pluralism);<sup>3</sup> as well as the idea that conflicts between two systems interacting in this way should be resolved according to prudential judicial politics,<sup>4</sup> or principles, shared by,<sup>5</sup> or external to,<sup>6</sup> both systems (normative constitutional pluralism).<sup>7</sup> Key to the idea of constitutional pluralism in both its forms is that the systems are organised in a

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<sup>1</sup> See the introduction to the symposium.

<sup>2</sup> Neil MacCormick's writings on constitutional pluralism are primarily contained in Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *The Modern Law Review* 1; Neil MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259; N MacCormick, 'Risking Constitutional Collision in Europe?' (1998) 18 *Oxford Journal of Legal Studies* 517; N MacCormick, *Questioning Sovereignty* (Oxford University Press 1999).

<sup>3</sup> Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *The Modern Law Review* 317, 337.

<sup>4</sup> What MacCormick called 'radical pluralism'. MacCormick, 'Questioning Sovereignty' above note 2, 117.

<sup>5</sup> For example, Kumm and Maduro suggest that potential conflicts between EU law and state law can be resolved according to principles shared between the two orders; M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262; M. Póitres Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Walker, Neil (ed), *Sovereignty in transition* (Hart 2003).

<sup>6</sup> Such as the norms of public international law in MacCormick's 'pluralism under international law'; MacCormick, 'Questioning Sovereignty' above note 2, 117.

<sup>7</sup> Walker, above note 3, 337.

*heterarchical* rather than a *hierarchical* arrangement.<sup>8</sup> As such, a key premiss of constitutional pluralism is that the hierarchal concept of sovereignty is either no longer relevant to such relationships,<sup>9</sup> or is in transition from the ‘high sovereignty’<sup>10</sup> of the Westphalian world view of independent sovereign states to a model of ‘late sovereignty’.<sup>11</sup>

To the extent to which the vote for Brexit was about ‘taking back control’, it seems to suggest a ‘rewind’<sup>12</sup> to a classically Westphalian worldview, where states are the exclusive authorities over their territories, and alien norms, including those of supranational entities such as the EU, are valid only through the recognition of, and to the extent permitted by, the state legal order in the exercise of their (Westphalian) sovereign powers. From a legal perspective, then, Brexit seems to suggest a move from a ‘post-sovereign’ novel arrangement predicted on constitutional pluralism to a classic dualist or Westphalian understanding of the relationship between the UK and the EU. Moreover, the potential impact of Brexit on the European integration project has prompted calls for an end to the ambiguities of ‘post-sovereign’ models of organisation such as constitutional pluralism and a shift to a more unambiguous understanding of the relationship between the EU and its Member States by forging a clearer path to (hierarchical) EU federalism.<sup>13</sup> In these ways, Brexit seems to question constitutional

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<sup>8</sup> *ibid.*

<sup>9</sup> MacCormick, ‘Questioning Sovereignty’ above note 2, Ch. 8.

<sup>10</sup> Mac Amhlaigh, C, ‘Late Sovereignty in Post-Integration Europe: Continuity and Change in a Constitutive Concept’ in Rebecca Adler-Nissen and Ulrika Pram Gad (eds), *European integration and postcolonial sovereignty games: the EU overseas countries and territories* (Routledge 2013), 41.

<sup>11</sup> Walker, Neil, ‘Late Sovereignty in the European Union’ in Walker, Neil (ed), *Sovereignty in Transition* (Hart Publishing 2003).

<sup>12</sup> Walker, above note 3, 338.

<sup>13</sup> For an argument along these lines see the contribution to the current symposium by Pech and Kelemen. In the political sphere, Commission President Juncker’s 2018 State of the Union speech to the European Parliament called for a ‘European sovereignty’. See ‘The Hour of European Sovereignty’, 2018 State of the Union Speech available at: [https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech\\_en\\_0.pdf](https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf) Also the European Parliament’s chief Brexit interlocuter Guy Verhofstadt and French President Emmanuel Macron have come out vocally in favour of major EU institutional reform after Brexit: ‘Guy Verhofstadt: Brexit is a golden opportunity for the EU’ *Politico Europe* 30 January 2017 available at: <https://www.politico.eu/article/guy-verhofstadt-brexit-is-a-golden-opportunity-for-the-eu/>; ‘Macron lays out vision for ‘profound’ change in post-Brexit EU’ *The Guardian* 26 September 2017: <https://www.theguardian.com/world/2017/sep/26/profound-transformation-macron-lays-out-vision-for-post-brexit-eu>. Also, serious discussion on an EU army suggest a similar trajectory: ‘Merkel Joins Macron in Calling for a European Army ‘One Day’ *New York Times*, 13 November 2018: <https://www.nytimes.com/2018/11/13/world/europe/merkel-macron-european-army.html>

pluralism as a way of explaining the interactions between EU law and UK law and as a guiding political principle of European integration. This paper challenges both of these views, arguing that constitutional pluralism will (and should) remain relevant to the EU/UK law relationship and the future of integration long after Brexit.

The paper proceeds as follows. Part two gives a brief account of how EU law has sedimented into the UK constitution in the years since the UK joined the organisation in 1973. In the absence of explicit statutory recognition of the primacy doctrine in the European Communities Act 1972, it provides an overview of the necessarily judicial negotiation of the balance between primacy and parliamentary sovereignty. Part three makes the case that this judicial negotiation of the status and effect of EU law is best captured by constitutional pluralism as a model of interacting legal orders, when compared to alternatives such as monism and dualism. Part four goes on to consider reforms in this relationship post-Brexit through an analysis of the key provisions of the European Union (Withdrawal) Act 2018, concluding that we can expect a relationship of constitutional pluralism to continue well into the future after the UK exits the EU based on the provisions of this Act. Part 5 turns to the EU level to consider the role that constitutional pluralism can play in future constitutional reform in the EU as a response to its multiple crises. Emphasising changes in the post-Brexit political landscape among the remaining EU 27, particularly in terms of enhanced support for the EU and the solidarity between the EU 27 during the Brexit process, it concludes that constitutional pluralism should continue to be a guiding principle of EU constitutional reform into the future.

## II. A NEGOTIATED UNSETTLEMENT: EU LAW IN THE UK CONSTITUTION

In order to assess the relevance of constitutional pluralism post-Brexit, it is necessary to revisit the story of the assimilation of EU law into the UK constitution *prior* to the UK's eventual withdrawal. As is well known, the European Communities Act 1972 ('ECA') created the structural links between the UK constitution and the EU's legal order, and between the UK

courts and EU courts. In particular, it gives expression to the unique features of the EU legal order; the fact that it is a ‘constitutional’ system which makes independent claims to validity and authority as expressed in the doctrines of direct effect and primacy.<sup>14</sup> Significantly, however, only one of these core features is expressly provided for in the Act itself. Section 2(1) of the Act, in providing that ‘[a]ll such rights, powers, liabilities, obligations and restrictions’ arising under the EU Treaties are ‘*without further enactment*’ to be given legal effect and ‘recognised and available in law’, clearly introduces the direct effect of EU law into the UK’s legal system.<sup>15</sup> That the primacy doctrine existed when the UK joined,<sup>16</sup> and was unambiguously incorporated in the UK’s legal order, is clear from its status as an ‘obligation and restriction’ created ‘by or under the Treaties’ under section 2 ECA. Moreover, as a judicially-developed doctrine embedded in the case law of the EU courts, UK courts are bound to apply it under section 3 ECA.<sup>17</sup> However, explicit mention of the doctrine itself is notably absent from the Act; an omission made all the more glaring in the light of the fact that its partner doctrine – that of direct effect – *is* given explicit recognition. As a consequence, the ECA is completely silent as to how conflicts between EU law and the UK legal order should be managed.<sup>18</sup> In the absence of any statutory guidance as to how, precisely, the doctrine of

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<sup>14</sup> *Van Gend en Loos v Nederlandse Administratie der Belastingen* C 26/62, EU:C:1962:42; *Costa v ENEL* C 6/64, EU:C:1964:34. The terms ‘supremacy’ and ‘primacy’ are used interchangeably in English. UK courts have, in the main, called it the ‘supremacy’ of EU law and this is the version which appears in the Withdrawal Agreement 2018 (see further below). However, as de Witte notes, the EU Courts have never actually used the term ‘supremacy’ and the only formal treaty-based recognition of the doctrine in Declaration 17 to the Lisbon Treaty uses the term ‘primacy’ which will therefore be used here. See generally B de Witte, ‘Direct Effect, Primacy, and the Nature of the Legal Order’ in P. Craig and G. de Búrca (eds), *Evolution of EU Law* (Oxford University Press, 2011). For a retelling and reappraisal of the well-known story 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, *Europe’s Constitutional Mosaic* (Hart Publishing, 2011).

<sup>15</sup> See, for example, the UK Supreme Court in *R(Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, para. 63.

<sup>16</sup> As was made clear by Lord Bridge in *R v. Secretary of State for Transport, ex p. Factortame (No. 2)* [1991] 1 AC 603. (see further below).

<sup>17</sup> A position that was made clear in the *Factortame* judgment where Lord Bridge noted that ‘[u]nder the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgement, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law’, *ibid* at 659.

<sup>18</sup> From the perspective of the UK constitution. The ECJ had, of course, developed its own view of the relationship between primacy and domestic constitutional law in its case law. See *Costa* above, note 14; *Nimz v. City of Hamburg* C-184/89 EU:C:199150. For discussion see de Witte, above n 14, 340 – 346.

the primacy of EU law was to be given expression within the UK's legal order, and in particular how it was to be reconciled with the foundational UK constitutional principle of parliamentary sovereignty, the negotiation of the relationship and the reconciliation of these two doctrines was left to the courts.

The first significant recognition and application of the principle of primacy in the UK constitution was in the celebrated *Factortame* decision.<sup>19</sup> However, notwithstanding its status as a major milestone in the accommodation of EU law into the UK constitutional order; the case, somewhat surprisingly, has little to say about the relationship between primacy and parliamentary sovereignty. Whereas the case confirmed that where an Act of Parliament and EU law conflicted, the Act should be set aside, it did little to clarify the relationship.<sup>20</sup> It does not stipulate the terms and conditions under which displacement should take place, whether there are limits to this statutory displacement, and, more generally, how EU law rearranges the UK's constitutional settlement based on the sovereignty of the Westminster Parliament.

The *Thoburn* case provided a little more clarification on this relationship by distinguishing between 'constitutional statutes' and ordinary statutes in the UK constitutional system.<sup>21</sup> As a constitutional statute the Court found that the ECA is immune from implied repeal.<sup>22</sup> However, at the same time as finding that the ECA, and therefore EU law, had an authoritative status in the constitution in this way, the court made clear that this authority did not displace or eradicate the constitutional authority of parliamentary sovereignty<sup>23</sup> and that

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<sup>19</sup> Above note 16.

<sup>20</sup> See, M Elliot, 'Sovereignty, Primacy and the Common Law Constitution: What has EU Membership Taught Us?' in M Elliot, J Williams and A Young (eds) *The UK Constitution After Miller: Brexit and Beyond* (Hart, 2018); M Gordon, 'Brexit: A challenge for the UK constitution, of the UK constitution?' (2016) *European Constitutional Law Review* 409-444.

<sup>21</sup> *Thoburn v. Sunderland County Council* [2002] EWHC 195 (Admin), [2003] QB 151. For discussion, see A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford, Hart Publishing), Ch. 2; F. Ahmed and A. Perry, 'The quasi-entrenchment of constitutional statutes' (2014) 73 CLJ 514.

<sup>22</sup> As illustrated in *Ellen St. Estates Ltd. V. Minister of Health* [1934] 1 KB 590.

<sup>23</sup> *Thoburn*, above note 21, paras. 68-9.

where parliament wished to override a provision of EU law it could do so in express statutory terms.<sup>24</sup>

The *HS2* decision provided further nuance to the relationship between the primacy doctrine and parliamentary sovereignty in the absence of any explicit direction by the ECA itself.<sup>25</sup> The UK Supreme Court found that where EU law required that one of the key manifestations of the doctrine of parliament sovereignty – the embargo on judicial scrutiny of legislative procedure<sup>26</sup> – be suspended, it would not be able to undertake such an investigation and that the doctrine of the primacy of EU law may have to give way to the doctrine of the supremacy of the UK legislature.<sup>27</sup>

Whereas a balance between the doctrine of primacy and parliamentary sovereignty was not directly at issue in the *Miller* case,<sup>28</sup> further clarification of the relationship was provided due to the fact that the Supreme Court, in order to answer the question involving the exercise of prerogative powers to trigger Article 50, was forced to consider the domestic constitutional status of EU law and the ECA. In answering this question, the Court found that the effect of EU law on the constitution was ‘unprecedented’,<sup>29</sup> such that the ECA made EU law not only a source of law in the UK but a ‘direct source of law’<sup>30</sup> which ‘takes precedence over all other sources of law, including statutes.’<sup>31</sup> Furthermore, and somewhat surprisingly, the Supreme Court found that whereas the ECA gave effect to EU law, ‘it was not itself the originating

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<sup>24</sup> Thoburn, above note 21, para. 45 endorsing Lord Denning’s dictum in *Marcarthys Ltd. v. Smith* [1979] 3 AER 325 where he found that ‘If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intention of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of the courts to follow the statute of our Parliament.’ Per Lord Denning, 329c-d.

<sup>25</sup> *R (HS2 Action Alliance Ltd.) v. Secretary of State for Transport* [2014] UKSC 3.

<sup>26</sup> Contained in the enrolled bill rule. See *Edinburgh and Dalkeith Railway Co v. Wauchope* (1842) 8 C1 & F 710.

<sup>27</sup> *HS2* above note 25, para. 207.

<sup>28</sup> above note 15.

<sup>29</sup> *ibid*, para. 60.

<sup>30</sup> *ibid*, para. 61.

<sup>31</sup> *ibid*, para. 60.



source of that law’;<sup>32</sup> EU law constituted an ‘independent and overriding source of domestic law.’<sup>33</sup> However, all of the exceptionalism surrounding the ECA as a constitutional statute and EU law as an ‘independent and overriding source of domestic law’, was ultimately subject to the power of the UK Parliament to withdraw the UK from the EU and repeal the ECA. Thus, notwithstanding its exceptional nature, the role of EU law in the UK constitution was still, ultimately, subject to the ‘rule of recognition’ which identifies Parliament as the ultimate source of law under the constitution.<sup>34</sup> Parliament could repeal the ECA and EU law would cease to be a source of law under the constitution. As such, EU law could only enjoy a status ‘in domestic law which the principle [of parliamentary sovereignty] allows.’<sup>35</sup>

In the absence of statutory guidance on the role and relevance of the primacy of EU law in the ECA, the judicial negotiation of the tensions between the primacy doctrine and the doctrine of parliamentary sovereignty can be characterised in the following terms, then. The primacy doctrine is clearly available and applicable in the UK constitution. EU law therefore is an important source of law in the UK constitution in that it owes its existence to law-making processes outwith the constitution and it enjoys an independent and original authority.<sup>36</sup> However, notwithstanding the original authority of EU law, its recognition within the UK constitutional system is not without conditions. First of all, the recognition of primacy occurs by virtue of the UK constitutional system itself. As such, the primacy of EU law is ultimately subject to the maintenance in force of the ECA. EU law cannot prevent Parliament repealing the ECA should it so wish. Moreover, even if Parliament does not exercise its ultimate sovereignty to repeal the ECA, there are still limits to the extent to which courts will apply the primacy doctrine. Where important constitutional foundations are at stake, the UK courts may

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<sup>32</sup> *ibid*, para. 65.

<sup>33</sup> *ibid*.

<sup>34</sup> *ibid*, para. 60.

<sup>35</sup> *ibid*, para. 67.

<sup>36</sup> *ibid*, para. 65.

subject the primacy doctrine to those constitutional principles including parliamentary sovereignty.

### III. REPRESENTING THE RELATIONSHIP BETWEEN EU LAW AND THE UK CONSTITUTION

Reviewing the key features of the case law of UK courts on the accommodation of EU law reveals an ambiguity as to the specific status of EU law in the UK constitution and the precise balance between the primacy doctrine and the doctrine of parliamentary sovereignty. There is no clear and simple ‘showdown’ where it can be definitively concluded that the doctrine of parliamentary sovereignty remains completely intact, nor the primacy doctrine given unconditional precedence. Whereas outer limits have been alluded to, such as in *HS2*, they have never been thoroughly explored nor precisely defined. The identification of the ECA as a ‘constitutional statute’ precludes simple readings of parliamentary sovereignty as being equated with the continuing sovereignty of all parliaments at least as far as the doctrine of implied repeal is concerned.<sup>37</sup> Furthermore, the ambiguity surrounding the nature and impact of EU law on parliamentary sovereignty is clearly in evidence in the Supreme Courts’ ambiguous comments in the *Miller* decision whereby it was simultaneously an ‘independent and overriding’ source of law under the UK constitution, yet also derivative and dependent on the ECA.<sup>38</sup> This nuanced and negotiated ‘unsettlement’<sup>39</sup> of the status of EU law in the UK illustrates quite clearly, it is argued, the relevance of the analytical model of constitutional pluralism to the UK/EU relationship. This can be appreciated by comparing constitutional

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<sup>37</sup> As primarily expressed in the idea that no parliament can bind its successors. On continuing v. self-embracing sovereignty see Hart, *The Concept of Law* (Oxford 1961), Ch. 6.

<sup>38</sup> For discussion, see M Elliot, ‘The Supreme Court’s Judgment in *Miller*: In Search of Constitutional Principle’ (2017) 76 *Cambridge Law Journal* 257.

<sup>39</sup> N. Walker ‘Our Constitutional Unsettlement’ (2014) 3 *Public Law* 529.

pluralism with the alternative extant models accounting for the relationship: monism and dualism.<sup>40</sup> Each one will be considered in turn.

Monism is, perhaps, the least plausible model. On a monist reading, the relationship between EU law and UK constitutional law would be ordered hierarchically such that UK law would always be subject to EU law in cases of conflict and that UK law owed its validity, not to the doctrine of parliamentary sovereignty, but to the EU's legal order.<sup>41</sup> This reading of the relationship between EU law and UK law has some affinity with the original 'constitutionalising' judgments of the European Court of Justice and could support the direct effect and primacy of EU law.<sup>42</sup> However, whereas the Court of Justice claimed that the 'special and original' nature of EU law necessitated the doctrines of direct effect and primacy, it never claimed that national law owed its *validity* to EU law. Moreover, as has already been seen from the statements of the UK courts, there is no evidence that this is how the relationship between the two operate within the UK constitution.<sup>43</sup> The one clear and consistent theme from the key cases on the question is that UK courts deem EU law to be valid and effective in UK law *by virtue of* an Act of Parliament and not by virtue of the 'special and original' nature of EU law itself.<sup>44</sup> Furthermore, as this relationship has developed, the courts have not

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<sup>40</sup> For a more in-depth exploration of this issue, see J. Dickson, 'How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations between, Legal Systems in the European Union' (2008) 2 *Problema* 9, 4.

<sup>41</sup> For an illustration of this possibility and other permutations and combinations of the relationship see C. Richmond 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law' (1997) 16 *Law and Philosophy* 377. There is an alternative model of monism which Kelsen included in his account. That is that the relationship between international law and state law can also be viewed from the perspective of state law. The vantage point from which the single monist legal system is viewed is, therefore, a matter of perspective dictated by political or ideological considerations rather than a matter of legal logic. H. Kelsen, *General Theory of Law and State* (Harvard University Press, 1945), 388. For discussion see L. Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, 2007), Chapter 6.

<sup>42</sup> Dickson, above note 40, 4.

<sup>43</sup> Perhaps the closest the UK Courts have come to adopting this position is Lord Denning's notorious comments in *Bulmer v. Bollinger*, but even here the dominant influence of EU law is still predicated on the will of Parliament: 'when we come to matters with a European element [EU law] is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.' *HP Bulmer Ltd v. J Bollinger SA [1974]* Ch 401, 418.

<sup>44</sup> As confirmed in statute in the EU Act 20,11 s. 18.

accepted the Court of Justice’s understanding of the primacy doctrine that in all cases that domestic law – including core tenets of the domestic constitution such as those at stake in *HS2* – will be compromised in the application of EU law. This rules out any simple monist reading of the relationship between EU law and the UK constitution.

What of a dualist reading of the relationship? Dualism involves the positing of two legal orders operating and interacting in particular ways, where one, or possibly both make claims to primacy or hierarchy in cases of conflicts between them.<sup>45</sup> From the viewpoint of domestic courts, this has usually involved interactions between state law and international law, and dualism as a doctrine of domestic constitutional law usually posits the supremacy of the domestic constitution over conflicting provisions of international law.<sup>46</sup> In the context of EU-UK relations, then, dualism would find the British courts accepting that EU law was a distinct legal order which was autonomous from the UK constitution. However, its distinctiveness exists only by virtue of the UK constitution and its statutory recognition in the ECA. Moreover, in cases of conflicts between the EU and UK constitutional orders, the latter would prevail in all circumstances.

In some ways, dualism seems to provide a good account of the accommodation of EU law in the UK constitution outlined above. For example, the idea endorsed by the UK courts in the cases considered above that EU law is valid and has effects in UK law by virtue of the UK constitutional order itself and in particular the ECA, entails classically dualist overtones. However, beyond this, it is not clear that dualism offers a good account of the relationship. With regard to the authority of EU law, dualism would insist that its authority in the UK system is wholly attributable to that particular system. However, in *Miller* the Supreme Court

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<sup>45</sup> See, P.-M. Dupuy, ‘International Law and Domestic (Municipal) Law’ in *Max Planck Encyclopedia of Public International Law*, April 2011.

<sup>46</sup> *Ibid.* To this extent, dualism has an affinity with ‘reverse monism’ whereby state law is hierarchical to international law when the unitary legal system is viewed from the perspective of state law. See Kelsen, above note 41.

recognised that EU law was an original ‘independent and overriding’<sup>47</sup> source of law within the UK constitution, something which dualism cannot account for. Moreover, with regard to the question of conflicts, dualism would insist that any conflicts always be resolved in favour of conventional UK constitutional law, and in particular the doctrine of parliamentary sovereignty as conventionally understood including the doctrine of implied repeal. However, as the cases considered above show, the position between conflicts between EU law and UK constitutional are more complex than the dualist position allows. The *Factortame* decision is a testament to the fact that conflicts will frequently, and arguably predominantly be resolved in favour of EU law. Thus, while arguably an improvement on monism, it is submitted that dualism offers an unsatisfactory model to understand the relationship.

The deficiencies of dualism can be rectified by constitutional pluralism as an account of the interactions between EU and UK law. Like dualism, it posits two constitutional orders of equal standing, each making their own independent claims to constitutional authority, operating side-by-side and interacting in certain ways through a structural framework such as the ECA ‘portal’ in the UK.<sup>48</sup> Moreover, unlike monism or dualism, constitutional pluralism explicitly rejects any all-purpose resolution of one system over the other; rather the two orders are mutually accommodating without directly challenging the authority of the other.<sup>49</sup>

In analysing the extent to which constitutional pluralism provides a good account of this relationship a number of features can be emphasised. Firstly, the recognition of plural claims to constitutional authority. In the cases discussed above, the original constitutional authority of EU law was clearly recognised in a way which had practical consequences for the application of UK constitutional law. Furthermore, while these claims were recognised, the constitutional claims of the UK constitution were also recognised. Perhaps nowhere is this

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<sup>47</sup> Miller above n 15, para. 65.

<sup>48</sup> N Walker, ‘Constitutional Pluralism Revisited’ (2016) 22(3) *European Law Journal* 333.

<sup>49</sup> MacCormick ‘Questioning Sovereignty’, above note 2, 117

clearer than in the *Miller* case where the Supreme Court simultaneously upheld the original and independent nature of EU law as a source of UK constitutional law as well as the constitutional authority of the UK Parliament. Moreover, the definitive resolution of the question of ultimate authority in favour of one particular legal order is explicitly rejected by constitutional pluralism and is not, as noted above, a good account of the more nuanced accommodation of EU law within the UK constitution in the cases considered above. If *Factortame* appeared to provide an all-purpose resolution of EU law over the UK constitution in that EU law seemed to have subordinated the sovereignty of Parliament through the disapplication of an Act,<sup>50</sup> then *Thoburn* and particularly *HS2*, provide a counter-weight based on the constitutional authority of the UK constitution. Indeed, in explicitly stating that there were limits to the extent of the application of EU law in the constitution as set by key fundamental principles, and offering insights into what those principles might be, the Supreme Court's *HS2* decision seems to come directly from the playbook of the German Federal Constitutional Court (GFCC) which was one of the primary instigators of pluralist thinking between EU law and Member State constitutional law.<sup>51</sup> Perhaps most clearly, however, the ambiguity in the UK Supreme Court's reasoning in the *Miller* decision, where it simultaneously recognised EU law as an 'independent and overriding' source of law in the UK, as well as the recognition that its validity and effects were contingent upon their endorsement by the UK constitution in the form of a statute,<sup>52</sup> precisely reflects the ambiguity of co-equal constitutional authority claims and mutual accommodation captured by constitutional pluralism.

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<sup>50</sup> As argued, for example, by William Wade. See W. Wade 'Sovereignty – revolution or evolution?' (1996) 112(4) *Law Quarterly Review* 568.

<sup>51</sup> MacCormick, 'The Maastricht Urteil' above note 2. For discussion in the context of *HS2*, see A Young, 'Wilkommen zum Constitutional Pluralism' UK Constitutional Law Blog (17th February 2014) (available at <https://ukconstitutionallaw.org/>).

<sup>52</sup> For discussion, see Elliot, above note 38.

This reading of the approach of the UK courts to EU law shows how the idea of constitutional pluralism provides, it is submitted, a better account of the accommodation of EU law within the UK's constitutional order than the alternatives of monism or dualism.

#### IV. THE NEGOTIATED UNSETTLEMENT AND BREXIT

One of the fundamental constitutional changes wrought by Brexit will be the severing of the structural link between the UK constitution and the EU's legal order, and the UK courts and the EU courts, founded on the ECA. As section 1 of the European Union (Withdrawal) Act 2018 (WA) makes clear, the ECA will be repealed on 'exit day'. It seems then, that the pluralist relationship argued for above between EU and UK law will come to a shuddering halt when the ECA is formally repealed. We should therefore expect the future relationship to revert to an attenuated dualist one where only the parts of EU law unilaterally and explicitly implemented by the UK legislature will have effects within the UK's legal order. However, a number of features of the WA leave room for doubt as to the explanatory power of dualism in explaining the relationship between EU and the UK post-Brexit.

Firstly, perhaps the most striking feature of the WA in attempting to sever the close relationship between EU law and UK law is that it doesn't, as one might expect in repealing the ECA, repeal all of the EU law in force in the UK prior to exit. Rather it incorporates, in dualist fashion, all EU law in force prior to exit into the UK legal system in an explicit way through the maintenance in force of existing EU law prior to exit.<sup>53</sup> Moreover, much of the EU law retained in the UK's legal system under the Act will have effects analogous to the highest form of domestic law, an Act of the UK parliament.<sup>54</sup> The interpretation of retained EU law by the EU courts, moreover, is preserved in the WA such that the 'validity, meaning or effect' of any EU law in force in the UK legal order prior to exit is to be interpreted and

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<sup>53</sup> ss. 2-4 WA.

<sup>54</sup> S. 7.

applied according to the case law of the EU courts on those laws.<sup>55</sup> Thus, in terms of preserving the status quo post-exit for the purposes of continuity in the immediate aftermath of the UK's exit from the EU, the WA creates the closest alignment possible between the EU and UK legal orders once the UK leaves the organisation.

Furthermore, a substantive factor in the development of pluralism between courts outlined above was the obligation to recognise and apply EU law in the domestic system as well as recognise the authority of the Court of Justice of the European Union as the ultimate interpreter of EU law. The changes made to this situation in the WA are significant in that it makes clear that UK courts will not be bound by CJEU jurisprudence,<sup>56</sup> and cannot make preliminary rulings after exit.<sup>57</sup> However, as noted above, UK courts will be under an obligation to apply 'retained' EU law on exit day in a manner superior to pre-exit statutes for which the CJEU's case law will be binding.<sup>58</sup> Even more significantly, the link between EU courts and UK courts in matters of EU law produced after exit has not been completely severed. Section 6(2) WA provides that:

‘[...] a Court or Tribunal may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.’

Thus, as section 6 makes clear, the EU courts will not be completely cut out of the UK constitution after exit. There is still a *statutory link* between UK domestic courts and the EU courts in the WA. Whereas the link is much weaker than the comparable obligation under the ECA, the fact that UK courts have a statutory obligation to have regard to 'anything done' by

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<sup>55</sup> s. 6(3) WA.

<sup>56</sup> s. 6(1)(a)

<sup>57</sup> s. 6(1)(b)

<sup>58</sup> S. 6(3) WA. With the important caveat that the Supreme Court will not be bound by any retained case law. s. 6(4)(a) but when considering whether to depart from retained EU law, it must apply the same tests it uses when departing from its own case law. s. 6(5)



the EU courts if of relevance to ‘any matter’ before it retains a significant link between the two legal orders.

Moreover, and perhaps somewhat ironically, the WA in effectuating the UK’s exit from the EU has gone where not even the ECA and the subsequent European Union Act 2011 dared in, that for the first time explicit statutory recognition is given to ‘the principle of the supremacy primacy of EU law’ which will continue to apply ‘on or after exit day’ so far as relevant for applying pre-exit law.<sup>59</sup> As a judicial doctrine developed by the EU courts, rather than a direct provision of treaty law,<sup>60</sup> whose reception into the UK’s legal order was the product of judicial interpretation and accommodation rather than explicit statutory direction, the precise status and nature of the principle referred to in section 5 WA has been a matter of some discussion and debate.<sup>61</sup> Putting this judicially-developed principle on a statutory footing in UK constitutional law raises a whole host of questions regarding its status. For example, will this statutory rendering of the doctrine be ‘more catholic than the pope’ in that it goes above and beyond what domestic courts have been willing to ascribe to the principle in domestic law? Will it be a verbatim implementation of the principle as that intended by the EU courts? If so, how will it contend with the more recent nuanced rendering of the principle by the UK courts in recent cases such as *HS2* and *Miller*?<sup>62</sup> At the very least, we can anticipate a new chapter in the accommodation of the doctrine within the UK constitution, building on its incremental development in the UK over the past number of decades. Precisely how distinctive this chapter

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<sup>59</sup> Section 5(1) and (2).

<sup>60</sup> Albeit that it was recognised in a declaration to the Lisbon Treaty. See above n 14.

<sup>61</sup> See for example S. Douglas-Scott, ‘The Constitutional Implications of the EU(Withdrawal) Act 2018: A Critical Appraisal’, *QMUL School of Law Legal Studies Research Paper* No. 299/2019; available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3316710](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3316710); Craig, P. (2019), Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act (2018) *The Modern Law Review*, 82: 319-350; A. Young, ‘Status of EU Law Post Brexit: Part One’, *U.K. Const. L. Blog* (2nd May 2017); A. Young, ‘Status of EU Law Post Brexit: Part Two’, *U.K. Const. L. Blog* (4th May 2017) (available at <https://ukconstitutionallaw.org/>)).

<sup>62</sup> For discussion see A Young, ‘Status of EU Law Post Brexit: Part Two’, *UK Constitutional Law Blog* (4 May 2017).

will be, and how much it will depart from the previous understanding by the UK courts, remains to be seen.

#### V. CONSTITUTIONAL PLURALISM IN THE UK AFTER BREXIT

If, as argued above, constitutional pluralism provides a more attractive explanatory framework for the accommodation of EU law within the British constitution than its strictly monist or dualist counterparts *prior* to exit, then it is argued that in the light of the key features of the WA outlined above, it will continue to have an important explanatory power well *after* the UK exits the EU.

Of course, it remains to be seen precisely how these provisions of the WA will be interpreted but the framework it sets up is potentially even more constitutionally pluralist than the position of current EU membership. The fact that the EUWA creates a presumption in favour of the supremacy of UK law and ultimate authority of the UK courts to resolve such conflicts and claims, does not mean that they will automatically be resolved in favour of UK law in classically dualist terms, without any recognition of the validity and authority of EU law.

Firstly, we can expect the ‘living’ EU law developed by EU institutions, including the EU courts, to continue to have a role in a post-exit UK constitution. Where future EU laws or EU court judgments amend, revise or develop areas of EU law retained in the EUWA, both during the putative ‘transition period’<sup>63</sup> as well as afterwards, we can expect it to provide a sort of ‘shadow constitution’ to the interpretation and application of EU-related law in the UK constitution for the foreseeable future.<sup>64</sup> This is a natural result of the retention of valid EU law

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<sup>63</sup> As envisaged by Article 121 of the (unratified) withdrawal agreement. See *European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 28 February 2018. Available at: [https://ec.europa.eu/commission/publications/draft-withdrawal-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community\\_en](https://ec.europa.eu/commission/publications/draft-withdrawal-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community_en)

<sup>64</sup> Indeed, if it is the case, as many have argued, that much post-exit regulation developed autonomously by the UK will track EU regulation to a considerable degree, then the ‘shadow constitutional’ role that future EU law

in the UK system on exit. Where gaps, abeyances or ambiguities arise in the interpretation of this law, its authoritative interpretation by the EU courts cannot but have an effect on how UK courts interpret and apply retained EU, even where it seems to conflict with post-Brexit Acts of the Westminster Parliament.

Moreover, we can expect this ‘shadow constitution’ to have a significant force on the UK constitution after exit given the arrangements between the UK and EU courts set up by the EUWA. The types of situations which gave effect to constitutional pluralism – a system or source of law claiming authority interacting and conflicting with others claiming authority – is maintained to an extent by the EUWA in the structural link set up between the courts under in section 6 of the WA. As noted, this provision provides that UK courts ‘may have regard’ to decisions of the EU institutions after exit provided it is ‘relevant to any matter before the court or tribunal.’ The scope for taking cognisance of EU decisions – and in particular rulings of the EU courts – is particularly broad given that it applies to “any matter’ before a court or tribunal and is not explicitly limited to the interpretation of application of retained EU law.<sup>65</sup> Moreover, the interpretation and meaning of the term “have regard’ is similarly broad and therefore open to much interpretative latitude by the UK courts. In considering how broadly (and therefore pluralistically) the provision could potentially be interpreted, two factors are worth bearing in mind; the evolution in the wording of the provision in its passage through Parliament, and the way the courts have previously interpreted a similarly broad interpretative mandate in the Human Rights Act 1998 (HRA). The original provision which led to section 7 involved a more convoluted formulation using a ‘may have regard’ formula.<sup>66</sup> The House of Lords Constitution Committee recommended amending the provision using stronger language; namely that courts

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will play in the UK constitution could be even more pronounced. See, for example, the UK’s wish to retain the EU scheme for data flows after exit. For discussion, see P. Craig, ‘*Miller*, EU Law and the UK’ in M Elliot, J Williams & A Young (eds) *The UK Constitution after Miller and Beyond* (Hart, 2018)

<sup>65</sup> s. 6(2).

<sup>66</sup> M Elliot & S Tierney, ‘Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018’ (2019) *Public Law*, Jan, 37-60, 44.

‘shall have regard’ to future EU court rulings.<sup>67</sup> In the event, the provision was amended but the ‘may have regard’ formula retained. However, as Elliot and Tierney argue, not much turns on the distinction.<sup>68</sup> The interpretation of ‘may’ will be predicated on a relevance test, such that a stronger statutory direction to have regard to future EU rulings is the intention and that therefore the structural link post-exit between UK courts and the EU courts is stronger than the use of the more discretionary term ‘may’ would suggest.

Furthermore, in considering the pluralist potential of this provision in terms of the future relationship between the courts post-exit, the experience of the HRA can provide some indication of just how broad the interpretation given – and the concomitant closer link between the courts following a broad interpretation – can be. As is well known, the HRA creates a duty on courts to ‘take into account’ ECHR case law where relevant to the case at hand.<sup>69</sup> However, the interpretation of this phrase has involved quite a far-reaching emulation of the Strasbourg case law in the protection of rights in the UK.<sup>70</sup> This approach reached its zenith in what became known as the ‘mirror principle’. According to the mirror principle, UK courts should follow the ‘clear and constant jurisprudence of the Strasbourg court’ unless there are ‘special circumstances’ not to do so.<sup>71</sup> Thus, as its label suggests, the domestic courts should, for all intents and purposes, ‘mirror’ the rulings of the EctHR.<sup>72</sup> The significance of this from a pluralist perspective is that this interpretation sets up a particularly strong structural link between the UK courts and the EctHR to set the stage for interactions which are inherently pluralist in character.<sup>73</sup> For example, the pluralist ‘dialogue’ which evolved out of this link

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<sup>67</sup> *ibid.*

<sup>68</sup> *ibid.*, Footnote 35.

<sup>69</sup> s. 2 HRA

<sup>70</sup> For discussion of the various formulations and interpretations of the principle, see H. Fenwick, ‘What’s Wrong with s. 2 of the Human Rights Act?’ UK Constitutional Law Blog, 2 October, 2012. Available at: <https://ukconstitutionallaw.org/2012/10/09/helen-fenwick-whats-wrong-with-s-2-of-the-human-rights-act/>

<sup>71</sup> *R(Ullah) v. Special Adjudicator* [2004] UKHL 26, para. 20 per Lord Bingham.

<sup>72</sup> See Fenwick, above note 70.

<sup>73</sup> For discussion, see C. Mac Amhlaigh, ‘Pluralising Constitutional Pluralism’ in N. Roughan and A. Halpin (eds) *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press, 2017). Indeed, the experience with the

was on display in the UK Supreme Court's decision in *Horncastle*.<sup>74</sup> In this instance, the Supreme Court stated that there were exceptional circumstances for not following the ECtHR's case law, while suggesting that this would be:<sup>75</sup>

'likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg court.'

This opportunity was taken up by the ECtHR in the subsequent *Al-Khawaja* case, where it responded directly to the Supreme Court's comments in *Horncastle*.<sup>76</sup>

The point here is that notwithstanding the formal severing by the WA of the structural links between the EU and UK courts contained in the ECA which supported a pluralist relationship between them, the statutory licence to have 'have regard' to future rulings has enormous pluralist potential. Add to this the strong 'institutional memory' of the pre-Brexit relationship with the Court of Justice among the UK judiciary and we can expect this relationship to continue in pluralist terms for some time. As such, the mechanism securing the UK's departure from the EU, somewhat paradoxically secures much of the status quo during membership at least as far as the characterisation of the relationship in pluralist terms is concerned. Indeed, if anything, the post-exit UK constitutional landscape will be even more pluralist than prior to exit.

Finally, to the extent to which constitutional pluralism provides an explanatory account of the internal pluralism in one legal system,<sup>77</sup> it can also provide better account of the UK's internal legal order after Brexit than dualism it is argued. Alongside the provisions setting up

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HRA shows that a form of constitutional pluralism persists under the UK constitution apart from its experiences with EU law.

<sup>74</sup> R v. *Horncastle & Others* [2009] UKSC 14.

<sup>75</sup> *ibid*, para. 11.

<sup>76</sup> *Al-Khawaja and Tahery v UK* 15.12.11 (Applications nos. 26766/05 and 22228/06)

<sup>77</sup> For example, the application of constitutional pluralism internally to the UK's legal system based on different sources of law has been explored by Barber. See N. Barber, 'Legal Pluralism and the European Union' (2006) 12(3) *European Law Journal* 306.

future EU law as a ‘shadow constitution’ post-Brexit, the WA essentially sets up four distinct sources of EU-related valid and enforceable law in the UK constitution: UK law passed prior to exit, EU law passed prior to exit, UK law passed after exit and the WA itself. Thus, the relationship between each of these types of law, whereas formally created according to the same constitutional authority - an Act of Parliament - will have to be negotiated and their precise constitutional status *inter se* unpacked in terms of some sort of hierarchy of sources, at the very least to provide certainty where their provisions conflict. In this sense, then, constitutional pluralism can potentially be internalised into the UK’s own constitutional order with four different types of law potentially conflicting and enjoying claims to constitutional authority. Whereas the Act does make some distinctions between types of retained EU law creating some hierarchy in the relationship,<sup>78</sup> this does not answer the many questions which will emerge before the courts on the different types of authority claims attached to each source. The later in time rule applying to statutes will probably be more prominent after exit, however conflicts between the different sources of law are unlikely to be fully resolved through the application of this rule.<sup>79</sup> If the justification for the creation of four distinct categories of law is certainty and continuity upon exit,<sup>80</sup> it is not clear that the constitutional authority of, for example, a post-exit Parliament will necessarily and automatically trump the constitutional authority of the previous Parliaments which passed the Withdrawal Act or previous pre-existing UK legislation which relates to, or attempts to incorporate EU law. This will especially be the case if a purposive interpretation is given to the WA and the goal of maximal legal certainty after exit becomes a prominent feature in the application of the Act. It is also likely that the ‘shadow constitution’ of the EU legal order will also have an influence in managing

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<sup>78</sup> Some indication of the order of priority of retained EU law is provided for in the statute. For example, the Act distinguishes between two types of retained EU law – ‘principal’ and ‘minor’. Moreover, minor retained EU law can be more easily amended than principal EU law. See section 7 WA.

<sup>79</sup> Especially if the WA is deemed to be a constitutional statute and therefore immune from implied repeal.

<sup>80</sup> See White Paper of 30 March 2017, Legislating for the United Kingdom’s withdrawal from the European Union (Cm 9446).

internal conflicts between the different sources of law identified by the EUWA, each imbued with a distinctive constitutional authority.

## VI. CONSTITUTIONAL PLURALISM WITHIN THE EU POST-BREXIT

A final crucial dimension of constitutional pluralism post-Brexit is the role it will have, and continue to have, in an EU of 27 Member States. Whereas the impact of Brexit will, of course, largely be felt within the UK, the withdrawal of a large member state from the bloc does raise profound constitutional questions about the future trajectory of integration. Thus, whatever final shape the relationship between the EU and the UK takes after the exit process is complete and the future relationship agreed, the process and its aftermath provides an opportunity for serious thought about institutional reforms within the bloc itself. Besides Brexit, the euro-crisis, the migration crisis, authoritarian regimes sprouting up within its own borders such as in Hungary and Poland as well as the Catalan secession crisis have prompted a proliferation of proposals for institutional reform.<sup>81</sup>

Three features of Brexit as a political event in European integration stand out as potentially shaping future reforms which distinguish it from other recent political and economic events however; the timeframe; the remarkable solidarity between the remaining 27 Member States in the process of the Brexit negotiations; and the impact on public opinion and perceptions of the EU in the remaining EU 27. These factors, it is argued, present a novel set of circumstances as compared with previous crisis which should be factored into any post-Brexit EU institutional reform agenda and ultimately, it is concluded, support constitutional pluralism as a guiding principle of future institutional reforms.

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<sup>81</sup> See Walker, above note 48.

One of the key features of Brexit in terms of EU constitutional reform was the ability of the EU to manage the process in a controlled timeframe. The two-year timeframe in Article 50 TEU, extendable by agreement, allowed for an important ‘breathing space’ to form a common position on Brexit internally to effectively manage the exit process as well as to reflect upon institutional reform in a measured way. This can be contrasted with the ‘pressure-cooker’ atmosphere of recent reforms in migration and the euro.<sup>82</sup> In the case of these latter events, the timing and management of the process were dictated as much by external events and actors – bond markets and large external population flows – as they were about internally set deadlines making good reform more difficult.<sup>83</sup>

Another feature of Brexit is the much-vaunted solidarity between the remaining EU 27. Predictions of dis-union due to special-interest lobbying within specific Member States and a stampede for the exit door among other Member States post-Brexit have not materialised. Rather the remaining 27 have shown a particularly marked level of solidarity – even on thorny issues such as the Irish border - in the withdrawal negotiations. This solidarity and discipline has enhanced the agency and efficiency of the EU as a political actor.<sup>84</sup>

Another significant feature of the post-referendum EU political landscape is the perceptible change in public opinion about the EU across the remaining 27 member states. The EU, has enjoyed, paradoxically, a remarkable bump in its popularity since the vote among the remaining 27 member states.<sup>85</sup> This shift in public opinion has also, it seems, impacted upon

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<sup>82</sup> See C Mac Amhlaigh, ‘10 (pro-EU) reasons to be cheerful after Brexit’, *Verfassungsblog* 22 July 2016 available at: <https://verfassungsblog.de/10-pro-eu-reasons-to-be-cheerful-after-brexit/>

<sup>83</sup> Of course, this doesn’t mean that Brexit doesn’t have the potential to become a chaotic crisis for the EU to manage. The domestic disarray in the UK as to what, precisely, Brexit should mean as well as the deep political cleavages as to what the future relationship with the EU should look like have led to two extensions to the Brexit deadline at the time of writing. However, this political ‘extend and pretend’ could end up scuppering the EU’s unity on Brexit on display hitherto. See ‘Macron gets on everyone’s nerves with Brexit hard man act’ Bloomberg, 11 April 2019: <https://www.bloomberg.com/news/articles/2019-04-11/macron-gets-on-everyone-s-nerves-with-brexit-hard-man-act>

<sup>84</sup> Again, something that cannot be taken for granted, not least given the possibilities of the UK’s domestic political crisis spilling over into the EU.

<sup>85</sup> ‘Brexit causes resurgence in pro-EU leanings across continent’, *The Guardian*, 8 July 2016: <https://www.theguardian.com/world/2016/jul/08/brexit-causes-resurgence-in-pro-eu-leanings-across-continent>



populist movements in the remaining 27 who might have pushed for a similar Brexit-style disruption to the integration project. Since Brexit, populist anti-EU movements in other Member States have subtly changed their rhetoric. Whereas the anti-EU rhetoric is still there, the focus has shifted from demands for exit from the bloc<sup>86</sup> to demands for internal EU reform to satisfy their populist agendas.<sup>87</sup> For example, Le Pen's proposals for a 'Union of European Nations',<sup>88</sup> Salvini's bid to 'save Europe',<sup>89</sup> Varoufakis' launch of a pan-European movement for reform for the 2019 European elections,<sup>90</sup> or Orban's claims to be fighting for the restoration of a 'Christian Europe'<sup>91</sup> are all noteworthy in virtue of the fact that they do not contain an explicit push for exit from the bloc. Even if these developments are still in their infancy, they do show that populism and euro-scepticism are not necessarily genetically linked and that an internal EU populism is possible. It is also evidence, at least for now, that the loss of a member (and a large and strategically significant member at that) is not ultimately fatal to the integration project. Moreover, these developments also provide some, however tentative, evidence of some sort of pan-European politics taking hold in national politics in the remaining Member States.<sup>92</sup> Of course the depth and extent of post-Brexit support for the EU cannot be exaggerated nor the effective management and solidarity evident in the Brexit process taken for granted. Nonetheless, it is submitted that these features of the post-Brexit political

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<sup>86</sup> See for example, 'Populists Sweden Democratic ditch 'Swexit' ahead of EU elections, *Reuters* 6 February 2019, <https://www.reuters.com/article/uk-sweden-politics-eu/populist-sweden-democrats-ditch-swexit-ahead-of-eu-elections-idUKKCN1PV28Q>

<sup>87</sup> A. Clarkson, 'Thought populists want to kill the EU? It's worse than that', *Politico* 8 January 2019: <https://www.politico.eu/article/populist-attitude-to-eu-matteo-salvini-far-right/>

<sup>88</sup> 'Marine Le Pen re-emerges whistling the same old tune', *Irish Times*, 16 January 2018, <https://www.irishtimes.com/news/world/europe/marine-le-pen-re-emerges-whistling-the-same-old-tune-1.3356619>

<sup>89</sup> 'Matteo Salvini: I believe in Europe', *Politico*, 12 March 2018: <https://www.politico.eu/article/matteo-salvini-i-believe-in-europe/>

<sup>90</sup> <https://diem25.org/>

<sup>91</sup> 'Viktor Orbán: our duty is to protect Hungary's Christian culture' 7 May 2018: <https://www.theguardian.com/world/2018/may/07/viktor-orban-hungary-preserve-christian-culture>

<sup>92</sup> Which is, again tentatively, supported by the reversal of the decline in turnout for European parliamentary elections. The European Parliamentary elections which took place on the weekend of May 24-26, 2019 saw the highest turnout in 20 years and constituted the first time that a decline in turnout had been reversed. See <http://www.europarl.europa.eu/news/en/headlines/eu-affairs/20190523STO52402/elections-2019-highest-turnout-in-20-years>

landscape are more conducive to favourable reform, particularly reform which is more democratically engaged with enhanced popular buy-in than previous reforms. The question then remains whether and what role the normative ideals of constitutional pluralism can play in a post-Brexit reform agenda.

One implication of the post-Brexit EU political and popular landscape might be that it clears the way for further and deeper integration in a more federal direction thereby spelling the end of constitutional pluralism as a normative principle relevant to the EU. If Brexit has resulted in the greater acceptance of the project among its remaining citizens, and the inevitability of the project among its harsher euro-sceptic critics, then it would seem that further developments in a more federal direction would be the natural trajectory of constitutional reform in the immediate term. Add to this the fact that one of its more awkward members is departing, and a more robust federalisation of the EU seems almost inevitable. This is certainly the interpretation of the lessons of Brexit among some of the EU's more vocal characters.<sup>93</sup> In this scenario, constitutional pluralism could be dispensed with, a regrettable necessity in the journey to further integration which has now outlived its purpose.<sup>94</sup>

However, it is not clear that we should dismiss the role of constitutional pluralism in future reform so swiftly. If it is the case that we can expect more favourable political winds in respect of the acceptance and popularity of the integration project for the foreseeable future among the remaining 27 Member State which is accompanied by increased popular interest and engagement with the EU, arguably constitutional pluralism is a more appropriate approach to further reform than an elite-driven federal blueprint.

Firstly, it is not clear that the bump in support for the EU such as it is can be translated into an unambiguous desire for a federal European future. Admittedly, writing before the

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<sup>93</sup> See above note 13.

<sup>94</sup> See Kelemen and Pech in the current volume.

Brexit vote, Walker has argued, that there is still a lack of real social and political demand for a federal Europe,<sup>95</sup> and it is not clear that much has changed in this regard in the Brexit aftermath. Furthermore, if support for the integration project is sustained and experiments cultivating further citizen engagement such as a the *Spitzenkandidaten* procedure do mature into more robust democratic engagement with the EU level,<sup>96</sup> including up to the level of popular constitutional reform, none of this means that a federal Europe is the inevitable and inexorable *finalite politique* of a post-Brexit EU.<sup>97</sup> Capitalising on increased popular engagement with, and understanding of, the EU post-Brexit does not, necessarily, require a full constitutionalisation and federalisation of the project; in short an EU sovereignty. A more informed and engaged citizenry may balk at what has already been achieved at the EU level and demand some repatriation of power from the centre to the Member States. As with any multi-level governance system, especially one as contested as the EU, we can expect an emergent pan-European politics to involve good-faith disagreements about how to resolve tensions between political identity and appropriate levels of governance for the achievement of common goods alongside conventional disagreements on substantive matters of policy.<sup>98</sup>

In this regard, then, perhaps the ‘placeholder’ of constitutional pluralism can, as Walker suggests it should, mature into a more permanent guiding principle of EU constitutional reform. Walker ultimately calls for a ‘reconstitutionalisation’ of the EU in a resolutely pluralist direction - ‘a new kind of constitutional dualism’<sup>99</sup> – where constitutional pluralism provides

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<sup>95</sup> Walker, above note 48.

<sup>96</sup> See S. Hobolt, ‘A vote for the President? The role of *Spitzenkandidaten* in the 2014 European Parliament Elections’ (2014) 21 *Journal of European Public Policy* 1528-1540; T. Christiansen, ‘After the *Spitzenkandidaten*: fundamental change in the EU’s political system?’ (2016) 39:5 *West European Politics* 992-1010; D. Braun and S. A. Popa, ‘This time it was different? The salience of the *Spitzenkandidaten* system among European parties’ 41:5 (2018) *West European Politics* 1125-1145.

<sup>97</sup> See J Verhaeven, ‘European integration and *finalité politique*’ in K. Liebscher, J. Christl, P. Mooslechner and D. Ritzberger-Grünwald, *The Economic Potential of a Larger Europe* (Elgar 2004).

<sup>98</sup> For a recent in-depth examination of these issues, see R. Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge: Cambridge University Press, 2019).

<sup>99</sup> Walker, above note 48, 352.

the guiding ethos of constitutional reform at the EU level such as to stabilise and enhance its autonomy, yet at the same time does not challenge its Member States as original political communities. Only once this form of genuine constitutional dualism takes hold in EU constitutional processes, he concludes, can we ‘envisage how the overlap of heterarchically related constitutional authorities of the common part and the local parts, rather than undermining or eroding the legitimacy of each such authority, becomes a condition of legitimacy of the combined whole.’<sup>100</sup> The flexibility of the idea and its studied rejection of a resolution of the question of hierarchy and ultimate authority may therefore be a more apt framework principle for a fragile emerging pan-European politics, and indeed may itself become endorsed by such politics, than the federalism that many proponents of pan-European politics assume.<sup>101</sup>

## VII. CONCLUSION

Brexit poses considerable challenges at many levels, both UK and EU. However, as argued here, constitutional pluralism as a ‘post’ or ‘late’ sovereign model of legal interaction and supranational governance will continue to have particular analytical and normative purchase in the aftermath of the UK’s exit from the bloc. One of the justifications of Brexit was the desire to ‘take back control’ and project British sovereignty at a global level. However, the method through which this is to be done somewhat ironically, is a ‘post’ or ‘late’ sovereign one as manifested in the constitutional pluralist features of the post-Brexit constitutional framework at UK and EU levels. This seriously questions whether sovereignty of the classic or Westphalian kind retains its analytical and aspirational purchase in an increasingly interdependent globe. This is primarily because the fundamental reasons which underpin

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<sup>100</sup> *ibid*, 352. For a similar argument applied to the legitimacy of authorities more generally, see N. Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theory* (Oxford University Press, 2013)

<sup>101</sup> J Habermas, ‘Democracy in Europe: Why the Development of the EU Into a Transnational Democracy Is Necessary and How It Is Possible’ (2015) 21 *European Law Journal* 546

constitutional pluralist structures in the first place – increasing global interdependence combined with resilient national political communities and the mismatch between citizen expectation and the capacity of states to manage problems alone – will not disappear after Brexit. Brexit won't 'uninvent' the internet, put a stop to cheap 'jet-age' travel, quell the desire of peoples to migrate to escape violence or simply seek a better life, or halt the warming of the climate. However, nor will it quell the need for a sense of communal and political identity to which support for Brexit is partly attributable. The political and constitutional challenges of the contemporary world, therefore, involve increasing interdependence and the necessity of communal identity; the solving of common problems such as global warming while at the same time fulfilling the human need for communal belonging. Constitutional pluralism is uniquely suited to support the institutional arrangements to optimise these ends in the form of interacting legal orders as well as providing normative guidance for institutional reforms well into the future.