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### **Human Rights Law and the Challenges of Explicit Judicial Dialogue**

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## **HUMAN RIGHTS LAW AND THE CHALLENGES OF EXPLICIT JUDICIAL DIALOGUE**

By Cian C. Murphy\*

### **Abstract**

The rise of multiple legal systems in the same jurisdictional space has prompted a lively discourse on constitutional pluralism in recent decades.<sup>1</sup> Although this debate was instigated as a result of the relationship between the European Court of Justice (ECJ) and Member State constitutional courts it has developed an international dimension after the judgment in *Kadi*.<sup>2</sup> This paper considers the recent turn to ‘explicit judicial dialogue’ by the UK Supreme Court and the response of the European Court of Human Rights (ECtHR) in the *Horncastle/Al-Khawaja* saga. The explicit dialogue initiated by the UK Supreme Court in this saga may incorporate recognition of constitutional pluralism in the legal reasoning of UK human rights law. In doing so it may undermine the authority of both the UK Supreme Court and the legal system it serves. Section I of this paper examines the claims of constitutional pluralism and highlights judicial dialogue as the technique by which conflicting claims to authority are resolved in the European legal landscape. Section II applies the lessons of this critical exposition to the ‘open architecture’ of UK and European human rights law. It demonstrates the pluralist nature of the Human Rights Act 1998 and considers the manner in which the House of Lords took the case law of the ECtHR into account in its judgments. The reasoning of the House of Lords did not exploit the pluralist potential of the Human Rights Act but rather established a *de facto* hierarchical relationship between the ECtHR and the House of Lords. The establishment of the UK Supreme Court in 2009 gave the UK

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<sup>1</sup> See the various contributions to N. Walker, ed, *Sovereignty in Transition*, Oxford, Hart Publishing, 2003. See also J.H.H. Weiler and M Wind, eds, *European Constitutionalism Beyond the State*, Cambridge, Cambridge University Press, 2003.

<sup>2</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation. v. Council of the European Union* [2008] ECR I-6351. For a pluralism-conscious contribution to the debate see S. Besson, ‘European legal pluralism after *Kadi*’ *European Constitutional Law Review*, vol 5, no 2, 2009, 237-264. For an earlier contribution that implicitly rejects the pluralist approach while still foreshadowing the ECJ judgment in *Kadi* see P. Eeckhout, ‘Community Terrorism Listing, Fundamental Rights, and UN Security Council Resolutions. In Search of the Best Fit’, *European Constitutional Law Review*, vol 3, no 2, 2007, 183-206.

judiciary the chance to reassert themselves as an interpreter of the ECHR. Section III considers the *Horncastle* case, the leading judgment of the UK Supreme Court on the relationship between that court and the ECtHR, and the response from the ECtHR in *Al-Khawaja*. The *Horncastle* judgment is an invitation for an explicit judicial dialogue between the courts which may be disruptive to both UK human rights law and the Convention legal system. Section IV returns to the claims of constitutional pluralism to consider the extent to which explicit judicial dialogue may involve the incorporation of those claims into the system of reasoning of UK human rights law.

## **I. Constitutional Pluralism and Judicial Dialogue**

The idea of constitutional pluralism began as an academic attempt to explain the empirical fact of Europe's multiple legal orders. This first claim of constitutional pluralism, referred to as the explanatory or empirical claim, can be found in the classic work of Neil MacCormick. The explanatory claim holds that the only plausible explanation for the current state of the European legal landscape is that it contains 'multiple sites of constitutional discourse and authority'. This empirical fact remains salient today – while constitutional monists have challenged the claims of constitutional pluralists the monists' attempts to explain the conflicting claims to authority fail to convince. MacCormick's work also makes the second claim of constitutional pluralism, the normative claim, and thus sparked the debate on constitutional pluralism that has developed ever since. The debate's genesis is the contest between the ECJ and Member States' constitutional courts over ultimate legal authority (or, in the inimitable German, *Kompetenz-Kompetenz*). In an early work MacCormick notes that 'to escape from the idea that all law must originate in a single power source, like a sovereign, is thus to discover the possibility of taking a broader, more diffuse, view of law'. Such an understanding requires compatibility between overlapping constitutional systems to be maintained through political decisions based on 'a common interpretive tradition'.<sup>3</sup> Normative pluralism takes this claim further by arguing that not only is constitutional pluralism a plausible explanation it is also the most desirable constitutional settlement. The judgment of the German Federal Constitutional Court on the Maastricht Treaty prompted MacCormick to note that 'taking a pluralist view of the systems of law operative in Europe, the systems are distinct and partially independent of each other, but partially overlapping and interacting'.<sup>4</sup> The judgment, and MacCormick's reaction to

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<sup>3</sup> N. MacCormick, 'Beyond the Sovereign State', *Modern Law Review*, vol 56, 1993, p 8. See further J.H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, Cambridge, Cambridge University Press, 1999.

<sup>4</sup> N. MacCormick, 'The Maastricht-Urteil: Sovereignty Now', *European Law Journal*, vol 1, no 3, 1995, 259-266.

it, has been credited with instigating the rise of constitutional pluralism in European legal scholarship.<sup>5</sup>

### **The Rise of Constitutional Pluralism**

Since MacCormick sparked it into life, the discourse on constitutional pluralism has been predominantly, but not exclusively, focussed on the EU and its Member States. Within the EU context it is possible to identify multiple types of pluralism. Maduro, for example, argues that there are both internal and external pluralisms which impact upon EU law.<sup>6</sup> The former includes different constitutional frameworks, claims to legal authority and sources of power. The latter refers to the interaction between the EU and other international or foreign legal orders.<sup>7</sup> In addition to there being a plurality of systems there is also pluralism within the state wherein the idea of authority is contested by different actors. On this reading pluralism goes beyond constitutionalism and must be understood as a theory that encapsulates all forms of social power and social norms. This diffusion of authority and power situates the debate on pluralism in a broader discourse on political and social theory.<sup>8</sup>

Walker, looking more closely at the idea of constitutional pluralism, sets out three different dimensions or claims: the claim of explanatory pluralism, the claim of normative pluralism and the claim of epistemic pluralism. The latter claim, of epistemic pluralism, is the most difficult and posits that the different constitutional sites and their claims to authority are incommensurable. Epistemic pluralism therefore suggests that the European legal landscape could never be redrawn as a monist (ie non-pluralist) order. It is the most radical claim advanced by constitutional pluralism and marks Walker out as one of the most extreme advocates of the idea. Others do not go as far as

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<sup>5</sup> Baquero Cruz states that 'Pluralism can be seen as an attempt to come to terms with the German decision and with its underlying normative framework.' See J. Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement', *European Law Journal*, vol. 14, no. 4, 2008, 389-422, at p 413.

<sup>6</sup> M. Poyares Maduro, 'Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism', *European Journal of Legal Studies*, vol 1, no 2, 2007.

<sup>7</sup> See, for further discussion, M. Avbelj and J Komarek, eds, 'Four Visions of Constitutional Pluralism – Symposium Transcript', *European Journal of Legal Studies*, vol 2, no 1, 2008, 325-370.

<sup>8</sup> For a discussion placing constitutional pluralism in the broader context of social and political theory see J. Shaw, 'Postnational Constitutionalism in the European Union', *Journal of European Public Policy*, vol 6, iss 4, 1999, 579-597.

Walker but instead attempt to limit, or ‘constitutionalise’, the pluralist project. Kumm describes his work in this field as offering ‘a framework of principles that are then applied to specific contexts to provide pragmatic workable responses to a set of pressing practical questions’.<sup>9</sup> In a similar vein, Maduro has proposed harmonic principles of contrapunctual law to provide a framework for constitutional pluralism.<sup>10</sup> Constitutional pluralists have therefore been placed on a spectrum between ‘strong’ and ‘soft’ constitutional pluralism and divided into ‘radical’ and ‘constitutional’ categories.<sup>11</sup> It is therefore possible to accept the explanatory and normative claims without accepting the epistemic.<sup>12</sup>

Constitutional pluralism has become so popular a subject that it has birthed a new generation of scholars, or ‘apostles of constitutional pluralism’, committed to its study.<sup>13</sup> There is, nonetheless, a range of gospels available as the various accounts have depth and breadth in different degrees. The pluralist church also has its heretics. The central criticism of constitutional pluralism focuses on the indeterminacy of the law where there are multiple legal orders. This gives rise to potential problems of ‘clarity, certainty and effectiveness’.<sup>14</sup> The existence of multiple legal orders – each making a claim to authority – undermines the idea that the law establishes a system of determinate rules. As Letsas puts it, ‘if a mother orders her child to eat breakfast, the father instructs the child that it must keep an empty stomach for lunch, and the grandfather pronounces that the child is free to take its meals when it pleases, the child is bound to be confused’.<sup>15</sup> The response of pluralists is either to argue that constitutional pluralism reflects wider social and political pluralism and therefore that indeterminacy is inherent in the polity or to point to the convergence between the legal orders that affords a day-to-day certainty despite deeper constitutional tensions. For the monists the former

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<sup>9</sup> Kumm, in Avbelj and Komarek, eds, n 7 above, p 351.

<sup>10</sup> M. Poiares Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in N. Walker, ed, *Sovereignty in Transition*, Oxford, Hart Publishing, 2003.

<sup>11</sup> L. Zucca, ‘The Architecture of European Fundamental Rights’, in P. Eleftheriadis and J. Dickson, eds, *Philosophical Foundations of European Law*, Oxford, Oxford University Press, 2011; G. deBúrca, ‘The European Court of Justice and the International Legal Order after Kadi’, *Harvard International Law Journal*, vol. 51, iss. 1, 2010, 1-49, at pp 32-33.

<sup>12</sup> N. Walker, ‘The Idea of Constitutional Pluralism’, *Modern Law Review*, vol 65, no 3, 2002, 317-359.

<sup>13</sup> Maduro, in jest, in Avbelj and Komarek, eds, n 7 above, p329.

<sup>14</sup> See the comments of J. Baquero Cruz in Avbelj and Komarek, eds, n 7 above, p 333.

<sup>15</sup> G. Letsas, ‘Harmonic Law: The Case Against Pluralism and Dialogue’ in P. Eleftheriadis and J. Dickson, eds, *Philosophical Foundations of European Law*, Oxford, Oxford University Press, 2011.

response misunderstands the role of law in providing clear guidance on lawful behaviour whereas the latter point suggests that constitutional pluralism is but a mirage that will dissolve to reveal a monist order once more. The debate between monists and pluralists is therefore in part a legal-empirical one describing the topography of the European legal landscape and in part a normative one about the appropriate role and form of law in society.

A further, perhaps more fundamental problem, is the open involvement of the judiciary in making political rather than legal choices. At the outset of the pluralist project MacCormick argued that resolution of conflicts between legal systems is by political choice rather than legal principle.<sup>16</sup> Different terms have been used to describe the manner in which courts have avoided open conflict: 'deference' or 'comity' are but two examples. To critics of pluralism judicial politicking renders the explanatory claim of constitutional pluralism inaccurate and the normative claim of constitutional pluralism undesirable. The explanatory claim is thought inaccurate as pluralism must be based on some common ground that allows the different judiciaries to accommodate one another's case-law. The monists therefore deny that the judiciary are engaged in politics but instead claim that they are engaged in a deliberative exercise tending towards recognition of a new constitutional order with its own foundational norm.<sup>17</sup> The monists argue that the normative claim of constitutional pluralism is undesirable as it collapses the boundaries between law and politics and therefore, once more, opens up a debate about the role of law in the public sphere.

It is not necessary, for present purposes, to be either apostolic or heretical about the normative claim of constitutional pluralism. The explanatory claim of constitutional pluralism remains compelling. The existence of multiple legal systems in Europe is clear as Member State, EU and Council of Europe systems co-exist in precisely the fashion identified by MacCormick almost two decades ago. The attempts by monists to reconstruct a unified legal order, though perhaps admirable, fail to adequately account for the conflicting claims to authority that remain in the European legal landscape. Though monists may be proven correct in the future they are not correct today. The

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<sup>16</sup> MacCormick, n 3 above, p 9.

<sup>17</sup> See, for example, Zucca, n 11 above.

focus in this work is on the approach of the UK Supreme Court to constitutional pluralism – an approach that may be shifting towards open judicial acceptance of the normative claim of constitutional pluralism. This is, it is argued, evidenced by recent jurisprudence that acknowledges the multiple claims to authority in European human rights law and seeks to resolve any conflict through explicit judicial dialogue.

### **The Role of Judicial Dialogue in Constitutional Pluralism**

The, often unacknowledged, assumption that underlies the entire discourse on constitutional pluralism is that it falls to courts to resolve the competing claims to authority of the different legal order. Indeed, while these legal orders have been, by and large, created by political institutions their claims to authority have been made and defended by judicial institutions. The means by which the competition for authority has been resolved is through ‘judicial dialogue’ and the ‘mutual accommodation’ of legal systems.<sup>18</sup> Judiciaries are placing greater reliance on each other’s judgments in arriving at their own and increasingly seek to influence the deliberation of judiciaries in other jurisdictions. Discourse on constitutionalism is therefore becoming transnational – and even global – in particular in fields such as human rights law.<sup>19</sup> Two recent studies offer empirical evidence for this claim. In November 2009 Mak conducted a qualitative study of judges in the Netherlands and the UK.<sup>20</sup> She interviewed seven of the (then) eleven UK Supreme Court judges and one retired Law Lord. Mak’s respondents suggest that foreign law was used in human rights cases to aid in the interpretation of human rights texts and references to such law was thought to bolster the authority of a judgment.<sup>21</sup> Flanagan and Ahern carried out a study of 43 judges from common law jurisdictions on

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<sup>18</sup> See, for a recent acknowledgement of this point, A Stone Sweet, ‘A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe’ *Global Constitutionalism*, vol 1, no 1, 2012, 53-90. Stone Sweet sets out that ‘no single organ possesses the ‘final word’ when it comes to a conflict between conflicting interpretations of rights; instead, the system develops through inter-court dialogue, both cooperative and competitive.’ *ibid* at p 55. On the idea of ‘constitutional tolerance’ as an alternative to ‘constitutional pluralism’ see J.H.H. Weiler, ‘Federalism and Constitutionalism: Europe’s Sonderweg’ *Harvard Jean Monnet Working Paper 10/00*.

<sup>19</sup> Note the recent establishment of a new journal, *Global Constitutionalism*, by Cambridge University Press.

<sup>20</sup> E. Mak ‘Why Do Dutch and UK Judges Cite Foreign Law?’ *Cambridge Law Journal*, vol 70, no 2, 2011, 420-450.

<sup>21</sup> *ibid*, at p 438 and p 443.

the citation of foreign law in judgments on constitutional rights.<sup>22</sup> Almost a fifth of responding judges acknowledged that they consider the international community as part of the audience for the judgments while almost half of respondents considered foreign judges to be part of their audience.<sup>23</sup> Furthermore, a third of judges considered themselves responsive to their audience. Thus, Flanagan and Ahern conclude that judges are ‘a necessary element in the transnationalization of constitutional rights discourse’.<sup>24</sup> This confirms that judges are increasingly reliant on foreign sources of law and are indeed participants in a judicial discourse about human rights and constitutional law.

Although the basic idea behind the term ‘judicial dialogue’ is clear – courts are communicating with each other – the precise meaning of the term requires more careful examination. Consider three examples. First, judges from different courts in different jurisdictions are meeting, on a formal and informal basis, to discuss the law and the process of adjudication. Second, national and supranational courts cite each other’s case-law in the resolution of cases before them. Third, legal mechanisms such as the preliminary reference procedure in the EU provide a formal process by which two courts can co-operate. Each of these three examples could be considered ‘judicial dialogue’ and it is clear that each of the examples plays a role in explaining the globalisation of legal knowledge (and legal authorities).<sup>25</sup> This is particularly the case in a field such as human rights law which tends towards claims of universality. Nevertheless, the role played by ‘judicial dialogue’ in resolving conflicts of authority is too significant for the term to be subject to such conceptual confusion.<sup>26</sup> It is regularly invoked by those writing from the academy, by members of national and supranational courts, and by those who occupy

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<sup>22</sup> B. Flanagan and S. Ahern ‘Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges’, *International and Comparative Law Quarterly*, vol 60, no 1, 2011, 1-28.

<sup>23</sup> Flanagan and Ahern, n 22 above, p 16.

<sup>24</sup> Flanagan and Ahern, n 22 above, p 28.

<sup>25</sup> See W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge, Cambridge University Press, 2009.

<sup>26</sup> See L. Castellvi Laukamp, ‘Publication Review: Shaping Rule of Law Through Dialogue. International and Supranational Experiences’, *European Journal of International Law*, vol 22, no 1, 2011, 291-296 in which an overall positive book review laments the lack of a chapter dedicated to the idea of judicial dialogue itself.

both roles.<sup>27</sup> For some, judicial dialogue is not just the mechanism by which constitutional pluralism is made to work, it also serves to legitimate the supranational courts that are partly responsible for that pluralism.<sup>28</sup> If pluralism challenges law's claim to authority then, they claim, that authority can be re-established through the legitimacy afforded to legal rules that have emerged from a discursive, dialogic, process. This reliance on judicial dialogue as a source of legitimacy renders the lack of conceptual clarity all the more problematic. Judicial dialogue is understood here as the use of certain techniques by courts to refer to the decisions of other courts so as to mediate the conflicts between different constitutional systems – and specifically the way in which the UK House of Lords, and now the Supreme Court, has done so in dialogue with the ECtHR.

Slaughter offers a typology of this type of judicial dialogue that examines the form, function, and reciprocity of the communication.<sup>29</sup> Three forms are possible: vertical, horizontal, and mixed vertical-horizontal. Despite appearances the relationship between the ECtHR and the Member States' highest courts is not necessarily vertical in form. Krisch has explored the 'open architecture of European human rights'.<sup>30</sup> His analysis of the German, Austrian, Spanish and French courts' approach to the jurisprudence of the ECtHR leads him to conclude that national courts seek to set limits on the interpretive authority of the ECtHR. He therefore portrays the relationship as one that is more 'horizontal' than 'vertical'. However, the different judiciaries adopt an approach of mutual accommodation to ensure that the practice of human rights law in Europe is more or less harmonious.

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<sup>27</sup> For judicial discussion of judicial dialogue see: F.G. Jacobs 'Judicial Dialogue and the Cross-Fertilisation of Legal Systems: The European Court of Justice' *Texas International Law Journal*, vol 48, 2003, 547-556; A. Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' *European Journal of Legal Studies*, vol 1, no 2; G. Luebbe-Wolff, 'Who Has the Last Word? National and Transnational Courts – Conflict and Cooperation', King's College London Centre of European Law Annual Lecture 2011 (copy with author).

<sup>28</sup> A. Torres-Pérez, *Conflicts of Rights in the European Union: A Theory of Transnational Adjudication*, Oxford, Oxford University Press, 2009, pp 97-140.

<sup>29</sup> A.M. Slaughter, 'A Typology of Transjudicial Communication', *University of Richmond Law Review*, vol 29, 1994, 99-138.

<sup>30</sup> N. Krisch, 'The Open Architecture of European Human Rights', *Modern Law Review*, vol 71, no 2, 2008, 183-216.

The different functions Slaughter refers to are both strategic and normative: ‘enhancing the effectiveness of supranational tribunals’; ‘enhancing the persuasiveness, legitimacy or authority of individual judicial decisions’; ‘collective deliberation’; ‘cross-fertilisation’; ‘assuring and promoting acceptance of reciprocal international obligations’. The first two of these are strategic, the next two are normative while the final function may be either or both. There is convergence here between Slaughter’s functions and Krisch’s sets of factors that determine judicial behaviour: ‘attitudinal’, ‘normative’ and ‘strategic’.<sup>31</sup> Both authors seek to explain *why* judges engage in particular behaviour – in this case why they engage in judicial dialogue.

The final aspect of Slaughter’s typology is the degree of reciprocity. The key element is whether or not a particular court is a ‘self-conscious participant in an ongoing conversation’ and whether they are willing to take into account the responses from the other participants. True dialogue, as opposed to a monologue, requires that the participants see themselves as ‘part of a common enterprise in which members mutually recognize and respect each other’.<sup>32</sup> It is clear that some degree of reciprocity – even just reciprocal restraint – is necessary for dialogue to adequately mediate conflicts between legal orders. The ECtHR has played its part through the use of the ‘margin of appreciation’ and the ‘evolutive approach’ to rights protection while different Member State courts have taken different approaches.<sup>33</sup> The degree of reciprocity of any judicial dialogue will vary depending on which court is in question.

The form, function and degree of reciprocity of the judicial dialogue between the House of Lords and UK Supreme Court and the ECtHR are key to the relationship between the Convention system and UK human rights law. They are considered in detail in sections III and IV below. However, the typology developed by Slaughter falls short in one respect. It is possible for a court to be a self-conscious participant in transjudicial communication without necessarily being explicit about doing so – without drawing

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<sup>31</sup> *ibid*, p 211.

<sup>32</sup> Torres-Pérez, n 28 above, p117. For Torres-Pérez there are six prerequisites for dialogue. In addition to the ‘common enterprise’, dialogue also requires: competing viewpoints; common ground for understanding; an absence of competence authority for either party; equal opportunity to participate; and a conversation over time.

<sup>33</sup> Krisch, n 30 above, at p 206-208.

attention to the dialogue itself.<sup>34</sup> In addition to Slaughter's three categories we may add therefore add the distinction between 'implicit' and 'explicit' judicial dialogue. In implicit judicial dialogue the courts engage in transnational judicial communication without being open or explicit about it. In explicit judicial dialogue the courts openly acknowledge that communication and the role it plays in resolving conflicting claims to authority. The extent to which a judgment engages in implicit or explicit dialogue is not a binary categorisation but rather something which exists in degrees of openness.

### **Implicit and Explicit Judicial Dialogue**

The distinction between implicit and explicit judicial dialogue is a means of acknowledging that such dialogue does not only take place when the judges are open about the conversation. Implicit judicial dialogue might, more simply, be described as the mutual citation of foreign law by judges of constitutional courts. However, to characterise it as such would fail to take account of a key aspect – the fact that the judges are, indeed, self-conscious participants in conversation about the law and legal principles – there is reciprocity. However, the more open the judiciary are about the dialogue the more they acknowledge the explanatory claim of constitutional pluralism. This recognition does not ordinary appear in actual judgments. Thus, Miguel Maduro, an advocate of constitutional pluralism and a former Advocate General of the ECJ, states:

Well, judges never talk about constitutional pluralism and in part that is inherent in the theories of constitutional pluralism itself. The actors that operate in the system are expected to adopt the internal perspective of that system. They have to remain faithful to the narrative that results from that internal perspective even if the narrative can be shaped and adapted to fit an external context of pluralism.... I do not expect a court to come and say, well we know that our authority will be challenged by this other court.<sup>35</sup>

Nevertheless, several members of European judiciaries have acknowledged judicial dialogue in their extra-judicial activities. In a speech at King's College London's Centre of European Law, Judge Luebbe-Wolff of the German Federal Constitutional Court

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<sup>34</sup> A similar type of dialogue has been described, in the EU context, as 'hidden dialogue'. See G. Martinico, 'A Matter of Coherence in the Multilevel Legal System: Are the "Lions" Still "Under the Throne"?', Jean Monnet Working Paper 16/08, New York University, New York.

<sup>35</sup> Maduro, in Avbelj and Komarek, eds, n 7 above, p 339.

declared that ‘dialogue is important’ and that it was important for national courts to critically engage with the rulings of supranational courts.<sup>36</sup> However, when the German Federal Constitutional Court engaged in the dialogue with the ECJ that is credited with giving rise to EU human rights law it acknowledged the particular duties of the ECJ and the Federal Constitutional Court itself. In *Solange I* it declared that to avoid a conflict of legal systems it is for ‘the two courts charged with reviewing law - the European Court of Justice and the Federal Constitutional Court - to concern themselves in their decisions with the concordance of the two systems of law’.<sup>37</sup> The Federal Constitutional Court took another step towards explicit judicial dialogue in its judgment on the lawfulness of Germany’s ratification of the Maastricht Treaty.<sup>38</sup> In upholding the validity of German ratification the Court makes reference to the ‘relationship of co-operation’ between the ECJ and the German Federal Constitutional Court in upholding fundamental rights – a field in which the courts are said to ‘complement’ each other.<sup>39</sup> However, it affirmed that the Member States remain the ‘Masters of the Treaties’. The decision in the Maastricht Treaty case was confirmed in the Federal Constitutional Court’s judgment on the Lisbon Treaty.<sup>40</sup>

The German Federal Constitutional Court did not further elaborate on the ‘relationship of co-operation’ that it outlined in its Maastricht Treaty judgment. Indeed, while the Court has highlighted its co-operation with the ECJ it has never made a preliminary reference to the EU court. Even in the *Solange* and Maastricht Treaty judgments the Federal Constitutional Court asserted its authority within its legal order while accommodating EU law. In its response, though the ECJ responded to the call for better human rights protection, it did not openly acknowledge the role the German Federal Constitutional Court played in prompting this shift. The dialogue between the two courts was therefore more implicit than explicit.

In summation on this point: Europe is the site of multiple legal systems which result in a state described as constitutional pluralism. This pluralism is a fact of the European legal

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<sup>36</sup> Luebbe-Wolff, n 27 above, p 13.

<sup>37</sup> BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß

<sup>38</sup> *Manfred Brunner and Others v The European Union Treaty* [1994] 1 CMLR 57.

<sup>39</sup> *ibid*, paras 13 and 23.

<sup>40</sup> German Federal Constitutional Court Judgment of 30 June 2009.

landscape which, though contested, is thought by some to be a desirable state of affairs. Europe's constitutional pluralism requires judiciaries to prevent open conflict between the competing legal systems. They have done so through judicial dialogue which seeks to achieve mutual accommodation of the competing claims to authority. Though this dialogue is often implicit, whereby courts assert their authority but defer on the substance of decision making, it may also be explicit. In legal discourse, constitutional pluralism should be understood as a form of theory that is external to the law – and there are dangers in making it internal to the law. Explicit judicial dialogue can be seen as an attempt to bring about – consciously or unconsciously – a 'unity of discourse'<sup>41</sup> between the academy and the judiciary. This is the danger of explicit judicial dialogue – to internalise normative constitutional pluralism: a theory of law that should remain external to legal reasoning. The turn towards explicit judicial dialogue therefore brings risks for the judiciary – as an examination of the *Horncastle/Al-Khawaja* saga will demonstrate.

## **II. The Human Rights Act's 'Open Architecture'<sup>42</sup>**

It is possible to understand the ECHR system as pluralist because of the manner in which individuals may take claims to the ECtHR and because of the means of incorporation of the Convention in the Member States' legal systems. The novelty of the ECHR system is to allow an individual bring a claim to an international court alleging that a Member State has violated their human rights. The individual petition mechanism makes the individual an actor on the international stage and thus renders the Convention as a different form of international law. It also affords the Convention a legal authority in respect of individuals that may cease to be dependent on the states that created the system and that positions the ECtHR as a site for constitutional discourse within Europe.<sup>43</sup> The creation of new authorities and new sites of discourse is the hallmark of constitutional pluralism. The manner of incorporation of the ECHR into national law also contributes to the pluralist understanding of European human rights law. The choice by the UK government and Parliament to incorporate the European

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<sup>41</sup> M. Dan Cohen 'Listeners and Eavesdroppers: Substantive Legal Theory and its Audience', *University of Colorado Law Review*, vol 63, 1992, 569-594.

<sup>42</sup> The debt to Krisch, n 230 above, in naming this section is obvious.

<sup>43</sup> Krisch, n 30 above, p185.

Convention on Human Rights by means of an Act of Parliament has been exhaustively examined in the literature.<sup>44</sup> The legislation has aptly been described as ‘a particularly promising candidate for understanding in dialogic terms’.<sup>45</sup> This description was a reference to the ‘constitutional dialogue’ that the Act required of the judicial, executive and legislative branches through the declaration of incompatibility.<sup>46</sup> However, it is an equally apt description in terms of judicial dialogue due to the requirement that UK courts ‘take into account’ the jurisprudence of the ECtHR. Section 2(1) of the Human Rights Act mediates the relationship between ECtHR case law and national law and therefore deserves particular attention.

### **Section 2(1) and the Duty to ‘Take into Account’**

Section 2(1) of the Human Rights Act requires that ‘a court or tribunal determining a question which has arisen in connection with a Convention right must take into account’ the judgments of the ECtHR and related authorities from the Convention system (such as the former European Commission on Human Rights and the Council of Ministers). The extent to which the UK courts should be compelled to consider, and follow, the case-law of the ECtHR was the subject of debate during the passage of the Human Rights Bill through Parliament.<sup>47</sup> The eventual use of the phrase ‘take into account’ is key to the idea that UK human rights law is pluralistic. On the one hand the UK is bound, by international law, to give effect to the judgments of the ECtHR. It cannot rely on a provision of its domestic law to escape this international obligation. Thus, the idea that the UK courts would give anything less than full legal effect to the ECtHR jurisprudence is somewhat wrongheaded. On the other hand the UK operates a dualist

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<sup>44</sup> See, for highlights, F Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights*, London, Penguin, 2000; C. Gearty, *Principles of Human Rights Adjudication*, Oxford, Oxford University Press, 2003; Lord Lester of Herne Hill, QC and K. Beattie, ‘Human Rights and the British Constitution’ in J. Jowell and D. Oliver, eds, *The Changing Constitution* 6<sup>th</sup> Edition, Oxford, Oxford University Press, 2007, pp 59-83.

<sup>45</sup> T. Hickman, ‘Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998’, *Public Law*, Summer, 2005, 306-335; ‘The Courts and Politics after the Human Rights Act’, *Public Law*, Spring, 2008, 84-100. The idea of constitutional dialogue has also birthed a rich literature in Canada, where the Human Rights Act 1985 also has a dialogic aspect. See: K. Roach, ‘Dialogue or defiance: Legislative reversals of Supreme Court decisions in Canada and the United States’, *International Journal of Constitutional Law*, vol. 4, no. 2, 2006, 347-370.

<sup>46</sup> s4 Human Rights Act 1998.

<sup>47</sup> J. Beatson, S. Grosz, T. Hickman, R. Singh and S. Palmer, *Human Rights: Judicial Protection in the United Kingdom*, London, Sweet & Maxwell, 2008, p 44.

legal system so international law obligations only form part of national law if, and to the extent, that Parliament so provides. Section 2(1) can therefore be read as the deliberate establishment of a second source of authority on the Convention within the UK. The source of authority is an Act of Parliament while the site of constitutional discourse established is human rights litigation before UK courts. Parliament has obliged the courts to take ECtHR interpretations into account but has not bound the courts to follow those interpretations. Thus, some commentators suggested that the UK courts might use section 2(1) to develop a municipal theory of human rights.<sup>48</sup> This has not been borne out in practice – or at least not yet. In terms of legal order the section 2(1) duty suggests that we cannot understand UK human rights law as strictly monist (wherein ECtHR judgments would be obeyed) or a strictly dualist one (wherein ECtHR judgments would be treated like any other foreign or international law) but one which is somewhere in between: a non-hierarchical relationship written into the constitution itself.

### **Application of the Duty under the House of Lords**

The early approach of the House of Lords to section 2(1) can be found in *Alconbury* in the judgment of Lord Slynn.<sup>49</sup> The case required the court to consider whether certain decision-making powers of the Secretary of State for the Environment were in compliance with Article 6(1) ECHR. The late Lord held that:

Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.<sup>50</sup>

The logic of Lord Slynn's statement is clear: first, it gives effect to the text of the Human Rights Act and thus respects the will of Parliament, and second, it pre-empts a petition to the ECtHR as that court is likely to follow its own jurisprudence. The decision can

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<sup>48</sup> R. Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' Under the Human Rights Act, *International and Comparative Law Quarterly*, vol 54, no 4, 2005, 907-931.

<sup>49</sup> *Alconbury* [2001] UKHL 23.

<sup>50</sup> *ibid*, para 26.

therefore be understood within the context of ordinary British constitutional law as it preserves the fundamental rule of the constitution (Parliament is sovereign) and also protects the UK system from adverse judgments from the ECtHR. This early approach is not dissimilar to the reception of EU law into the British legal system by Lord Bridge in *Factortame* – with the claim to authority of the supranational legal order accepted by the House of Lords without too much fuss in light of a Parliamentary instruction to do so.<sup>51</sup>

The section 2(1) test offered by Lord Slynn was followed and developed by Lord Bingham in *Ullah*.<sup>52</sup> Lord Bingham held that while ‘not strictly binding... courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence’ from the ECtHR. He justified the strong persuasive influence of the ECtHR by noting that the Convention ‘is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court’. Thus, a court should not lightly ‘dilute or weaken’ the ECtHR case law and nor should it seek to further develop it (though the legislature could, of course, act to ensure a higher level of protection). Rather, the ‘duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less’.<sup>53</sup> Brief concurring opinions from the rest of the court endorsed Lord Bingham’s conclusions. After *Ullah* it was clear that though the Lords did not consider themselves bound to follow ECtHR case-law they would do so in practice while reserving the power not to in case of ‘special circumstances’. This attitude was borne out by the interviews carried out by Mak in November 2009 wherein only one of the twelve judges interviewed is reported to have expressed a reservation about the state of section 2(1) jurisprudence.<sup>54</sup>

Despite the general acceptance of the requirements of section 2(1) the House of Lords did on occasion criticise the ECtHR case law. In *N v Secretary of State for the Home*

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<sup>51</sup> Though the *Factortame* judgment did challenge the orthodox understanding of Parliamentary sovereignty. See C.C. Murphy ‘Report on the UK & Ireland’ in G. Martinico and O. Pollicino, eds, *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective*, Groningen, Europa Law Publishing, 2010.

<sup>52</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26. The substantive issue in that case was whether it was unlawful to deport the applicant to a country where they would be subject to human rights abuses that did not amount to inhuman or degrading treatment.

<sup>53</sup> *ibid*, para 20.

<sup>54</sup> Mak, n 20 above, p 432.

*Department* Lord Steyn declared that the Strasbourg case law on the deportation of an AIDS sufferer to a state with poor medical facilities 'lacks its customary clarity'.<sup>55</sup> The essence of the problem was that the ECtHR had, in its judgment in *D v United Kingdom*, extended the protection provided by the absolute prohibition on inhuman treatment to an 'exceptional' case which has proven to be far from exceptional.<sup>56</sup> The ECtHR has had to distinguish subsequent applications on their facts – an approach which lacked clarity. After going to great lengths to extract guidance from the ECtHR case law the House of Lords found that deportation in the instant case would not breach Article 3 ECHR.<sup>57</sup> The applicant subsequently sought relief from the ECtHR. However, the European Court followed the approach of the House of Lords. It summarised its own case law since *D v United Kingdom* and drew from it the same principles as the House of Lords. The application was thus dismissed.<sup>58</sup> *N* may therefore be an example of implicit judicial dialogue between the House of Lords and the ECtHR. Both courts referred to the case law of the other and while neither purported to be engaged in dialogue the convergence in their reasoning is plain to see. Though this convergence may be coincidental it seems reasonable to infer that there is implicit dialogue at work. The effect, of course, was a restriction of human rights protection in this particular field.

The final significant case heard by the House of Lords on section 2(1) was *Secretary of State for the Home Department v AF (No 3)*.<sup>59</sup> The case related to Article 6 ECHR and the process for imposing non-derogating control orders. Immediately before the House of Lords heard the case the ECtHR handed down its judgment in *A v. United Kingdom*. The principle that emerged was that a detainee must be given sufficient information about the case against him (the 'gist') to instruct a special advocate. If the detention is based 'solely or to a decisive degree' on closed materials and the open materials are

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<sup>55</sup> *N v Secretary of State for the Home Department* [2005] UKHL 31, para 14.

<sup>56</sup> *D v United Kingdom* (1997) 24 EHRR 425.

<sup>57</sup> See in particular the judgment of Lord Hope, paras 25-50. For a discussion see: S. Palmer, 'AIDS, expulsion and Article 3 of the European Convention on Human Rights', *European Human Rights Law Review*, no 5, 2005, 533-540.

<sup>58</sup> *N v United Kingdom* (2008) 47 EHRR 39.

<sup>59</sup> *Secretary of State for the Home Department v AF* [2009] UKHL 28.

mere general assertions then due process rights will have been violated.<sup>60</sup> Lord Phillips, in the leading judgment, held that ‘the clear terms of the judgment in *A v United Kingdom* resolve the issue raised in these appeals’.<sup>61</sup> Lord Hoffmann agreed with the judgment but noted that he followed the decision of the ECtHR ‘with very considerable regret’ as he considered it to be ‘wrong’. While he argued that the House of Lords was free to prefer its own interpretation he pointed out that this would leave the UK in breach of its international law obligations. There was ‘no advantage’ in such a course of action.<sup>62</sup> Lord Carswell agreed that ‘the authority of a considered statement of the Grand Chamber is such that our courts have no option but to accept and apply it’.<sup>63</sup> This idea of the ‘authority’ of a Grand Chamber judgment has resurfaced in the recent case law of the UK Supreme Court and is returned to below. *AF (No 3)* marks the high watermark of the House of Lords’ willingness to give effect to ECtHR case law even when it openly disagrees with that case law. The application of section 2(1) by the House of Lords can thus be summarised in the words of the late Lord Rodger: ‘argutorum locutum, iudicium finitum – Strasbourg has spoken, the case is closed’.<sup>64</sup> Though somewhat blunt this statement does capture the essence of the approach by the House of Lords until its jurisdiction transferred to the Supreme Court in 2009.

### **Understanding the House of Lords Case-Law**

The Government White Paper, *Rights Brought Home: The Human Rights Bill*, clearly sought to empower the British judiciary to play a greater role in the development of European human rights jurisprudence. It stated that the Human Rights Act would enable them ‘to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe’.<sup>65</sup> How then do we explain the reticence of the

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<sup>60</sup> *A v United Kingdom* (2009) 49 EHRR 29. For a discussion see C.C. Murphy, ‘Counter-Terrorism and the Culture of Legality: The Case of Special Advocates’, IACL-T Workshop, December 1-2 2011, Università Bocconi, Milan.

<sup>61</sup> *AF (No 3)*, para 65.

<sup>62</sup> *AF (No 3)*, para 70.

<sup>63</sup> *AF (No 3)*, para 108.

<sup>64</sup> *AF (No 3)*, para 98.

<sup>65</sup> *Rights Brought Home: The Human Rights Bill* Cm 3789 (2007), para 1.14. See further para 1.18: ‘Enabling courts in the United Kingdom to rule on the application of the Convention will also help to influence the development of case law on the Convention by the European Court of Human Rights on the basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the United Kingdom. Our courts’ decisions will provide the European Court with a useful source of information and

House of Lords to stray too far from the case law of the ECtHR? Krisch suggests that the Human Rights Act left the House of Lords in a 'tempting but slightly uncomfortable position' by empowering it to review legislation and by opening the possibility of developing its own human rights jurisprudence. Fearful that it would be seen as lacking in legitimacy and seeking to avoid politicisation the House of Lords took the comparatively safe path.<sup>66</sup> A 2009 empirical study has also suggested that the House of Lords was keen to safeguard its jurisprudence from criticism in Strasbourg.<sup>67</sup> The Lords' reticence to depart from ECtHR case law has led to the criticism that 'English human rights law finds itself to be nothing more than Strasbourg's shadow'.<sup>68</sup> However, the study conducted by Mak concluded that 'the Strasbourg case law is considered to fit the British Court's ideological framework regarding human rights protection relatively well'.<sup>69</sup> Looking at the interpretation and application of section 2(1) by the House of Lords from the point of view of constitutional pluralism it is clear that whatever dialogue was engaged in was implicit judicial dialogue. This is evidenced by *N v United Kingdom*. The pluralist potential of section 2(1) was not exploited by the House of Lords which operated in a largely hierarchical manner with the ECtHR. Thus, while the House of Lords was willing to query Strasbourg jurisprudence it did not seek to establish itself as a competing authority, although the case law suggests a reservation of the right to do so in the future. Krisch, re-publishing *Open Architecture* in 2010, concluded that it remains to be seen 'whether in the new UK Supreme Court the judges will feel on more stable ground, and what consequences this might entail'.<sup>70</sup> It is to this question that the analysis now turns.

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reasoning for its own decisions. United Kingdom judges have a very high reputation internationally, but the fact that they do not deal in the same concepts as the European Court of Human Rights limits the extent to which their judgments can be drawn upon and followed'.

<sup>66</sup> Krisch, n 30 above, pp205-206.

<sup>67</sup> S. Shah and T. Poole, 'The Impact of the Human Rights Act on the House of Lords', *Public Law*, April, 2009, 347-371, p371.

<sup>68</sup> J. Lewis, 'The European Ceiling on Human Rights', *Public Law*, 2007, 720, p 730.

<sup>69</sup> Mak, n 20 above, p 432.

<sup>70</sup> N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, Oxford University Press, 2010, at p 139.

### **III. The UK Supreme Court: From Implicit to Explicit Judicial Dialogue<sup>71</sup>**

If the House of Lords' jurisprudence was cautious about the pluralist potential of the Human Rights Act then the recent UK Supreme Court case law may be read as openly embracing that potential. Indeed, through explicitly inviting a judicial dialogue with the ECtHR, the Supreme Court may have incorporated the normative claim of constitutional pluralism itself into UK human rights law. The appeal in *Horncastle* gave the Supreme Court the opportunity to examine the relationship between the newly-established constitutional court and the ECtHR. The ECtHR in its Grand Chamber judgment in *Al-Khawaja* answered the judgment in *Horncastle*. Together the cases may demonstrate a shift to a more explicit judicial dialogue between the British and European judiciaries.

#### ***Horncastle* and section 2(1)**

In *Horncastle* the Supreme Court had to consider appeals by several individuals convicted of serious criminal offences. In each case the conviction had been based, in part, on evidence from witnesses who were not called to appear in the trial. The appellants claimed that conviction based 'solely or to a decisive extent' was in breach of Article 6 rights to a fair trial and to examine evidence and witnesses. It is the Supreme Court's approach to section 2(1) of the Human Rights Act and the decision of the ECtHR in *Al-Khawaja v United Kingdom* that is of immediate interest.<sup>72</sup> In *Al-Khawaja* the ECtHR had considered two cases where the petitioners had been convicted based on hearsay evidence. It held that where a conviction was based 'solely or to a decisive extent' on such evidence there was a breach of Articles 6(1) and 6(3)(d) ECHR. The judgment, handed down on 20 January 2009, was referred to the Grand Chamber following a request from the United Kingdom government. The reference was put on hold pending the outcome of the appeal to the Supreme Court in *Horncastle*. Counsel for Mr Horncastle invited the Supreme Court to continue the previous approach to section 2(1) of the Human Rights Act and follow the decision of the ECtHR in *Al-Khawaja*. However, Lord Phillips, giving the judgment of the Court, rejected the submission:

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<sup>71</sup> For a critical introduction to the Supreme Court's early years see K. Maleson, 'The Evolving Role of the Supreme Court', *Public Law*, 2011, 754-772.

<sup>72</sup> *Al-Khawaja v United Kingdom* (2009) 49 EHRR 1.

The requirement to ‘take into account’ the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is 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 is such a case.<sup>73</sup>

The first observation should be that the statement in *Horncastle* is not, strictly speaking, a departure from precedent. In *Ullah*, Lord Bingham had referred to ‘special circumstances’ that might lead the UK courts to depart from ECtHR case law even after they took it into account as per the Human Rights Act’s requirement. The Supreme Court went to great efforts in *Horncastle* to ‘take into account’ the decision in *Al-Khawaja*. The central problem the Supreme Court had with the ECtHR decision was that it amounted to an absolute rule that precluded conviction where the ‘sole or decisive’ evidence was hearsay evidence. Such a rule, which did not allow for counterbalancing factors to be taken into account, was deemed not to be in the interests of justice. Four annexes accompanied the Court’s judgment. One of these, compiled by Lord Judge, involved the application of the ‘sole or decisive’ test in comparison to the domestic legal rules contained in the Criminal Justice Act 2003. The Court held that in most cases the more nuanced domestic rules led to the same result as the absolute rule advocated by the ECtHR. As such it concluded that UK law did not violate Article 6 ECHR notwithstanding the refusal to follow *Al-Khawaja*. It is clear that the Supreme Court intended its judgment to carry much weight – Lord Phillips, the President of the Court, drafted a single opinion with which the whole Court agreed. In a brief concurring judgment Lord Brown distinguished *Horncastle* from the decision in *AF (No 3)*, in which the House of Lords had felt obliged to follow the ECtHR, as the Strasbourg

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<sup>73</sup> *R v Horncastle and Others* [2009] UKSC 14, para 11.

judgment in the latter case was from the Grand Chamber, was clear, and articulated a coherent position.<sup>74</sup>

The decision in *Horncastle* has since been confirmed in *Manchester City Council v Pinnock*. The latter case, decided in 2010, saw the Supreme Court decide that when asked by a local authority to make an order for possession of a home the court must consider the proportionality of the order to avoid a violation of Article 8 ECHR. To come to that conclusion the Supreme Court had to depart from House of Lords precedent and instead follow the case law of the ECtHR. Giving the opinion of the Court Lord Neuberger stated that:

This Court is not bound to follow every decision of the [ECtHR]. Not only would it be impractical to do so: *it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue ... which is of value to the development of Convention law*. Of course, we should usually follow a clear and constant line of decisions ... But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber ... Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.<sup>75</sup>

*Pinnock* thus confirms not just the more robust test for taking into account the ECtHR case law – it also confirms the Court’s interest in ‘constructive dialogue’ with the ECtHR.<sup>76</sup> This appears to be a tacit endorsement of the normative claim of constitutional pluralism and an invitation for an explicit judicial dialogue – a remarkable evolution in the decade since Lord Slynn’s statement in *Alconbury*. The ECtHR Grand Chamber had the opportunity to respond to the *Horncastle* judgment in its own judgment in *Al-Khawaja*. The Grand Chamber judgment is a lengthy one and reverses the decision of the Fourth Section of the Court insofar as the Fourth Section had required the ‘sole or decisive’ test to be applied as an absolute test. The Grand Chamber examined counterbalancing factors that may safeguard against the use of hearsay evidence. It

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<sup>74</sup> *Horncastle*, paras 117-120.

<sup>75</sup> *Manchester City Council v Pinnock* [2010] UKSC 45, para 48 (emphasis added).

<sup>76</sup> *Pinnock* itself has been further discussed, albeit on matters of substantive human rights protection, in *London Borough of Hounslow v Powell* [2011] UKSC 8.

determined that the Fourth Section had been wrong to find a violation of due process in the case of Mr Al-Khawaja but upheld the violation in the case of the co-applicant, Mr Tahery. In a concurring judgment Judge Bratza (the UK judge) described the *Horncastle/Al-Khawaja* saga as ‘a good example of ... judicial dialogue’. The separate opinion of Judges Sajo and Karakas also stated that the *Horncastle* judgment merited ‘due consideration to enable a *bona fide* dialogue to take place’. Although these opinions made explicit reference to dialogue the judgment of the Grand Chamber does not – despite discussing *Horncastle* at length.<sup>77</sup>

### **Explaining the *Horncastle/Al-Khawaja* Saga as Judicial Dialogue**

The *Horncastle/Al-Khawaja* saga can be understood as an example of judicial dialogue and analysed using the four-fold typology introduced by Slaughter and further developed above. The four categories are form, function, degree of reciprocity and extent of openness. In terms of form *Horncastle* suggests that the Supreme Court does not view its relationship with the ECtHR in purely hierarchical terms. In the earlier case of *AF (No 3)* the House of Lords was willing to follow the ECtHR notwithstanding its concerns about the law. In *Horncastle* the Supreme Court choose a different approach. Lord Brown’s opinion highlights the distinction between the cases – which includes differences in the clarity and coherence in the ECtHR case law but also the (likely crucial) distinction that while *A v United Kingdom* was a decision of the Grand Chamber, *Al-Khawaja* was a decision of the Fourth Section of the Court. Gearty suggests that there may be an emerging distinction between decisions of a section of the ECtHR and decisions of the Grand Chamber - with the latter being considered more authoritative than the former.<sup>78</sup> Further evidence for this proposition can be found in *Rabone v Pennine Care NHS Foundation Trust* in the judgments of Lord Brown and Lord Mance. Lord Mance, in particular, notes that ‘individual section decisions of the

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<sup>77</sup> *Al-Khawaja v United Kingdom* Judgment of the European Court of Human Rights Grand Chamber of 15 December 2011.

<sup>78</sup> C. Gearty, ‘The View from the Academy’, Presentation at *Towards a Unified System of Protection in Europe? The European Convention on Human Rights & the EU Charter on Fundamental Rights*, Centre of European Law King’s College London, 1 July 2010.

court are not, and may not respond well to the same close linguistic analysis that a common lawyer would give to, binding precedents'.<sup>79</sup>

In terms of the function of the dialogue it is difficult to come to a definitive conclusion. Judicial dialogue may have both strategic and normative goals. On the one hand it is clear that the UK Supreme Court, like the Court of Appeal before it, is quite concerned with the substantive legal matter in *Horncastle* – with a normative goal. It had serious reservations about the introduction of an absolute 'sole or decisive' test. Indeed, the Court's criticism of *Al-Khawaja* can be read as building on its criticism of the similar 'sole or decisive' test in *A v United Kingdom*. While it is clear that the Court's concerns have merit it is worth highlighting that its own solution has not also gone without criticism. Indeed, the balance of academic commentary that examines the decision from the point of view of the law of evidence is critical of *Horncastle*. Requa laments the Court's defence of the Criminal Justice Act 2003 that she considers to be an unprincipled approach to the problem of hearsay evidence and one that may well be in contravention of human rights.<sup>80</sup> Jones is also critical and suggests that the Court may have been influenced by criminal justice policy concerns which motivated Parliament when adopting the 2003 legislation.<sup>81</sup> Of course flaws in the domestic legislation do not render the Supreme Court's critique of the ECtHR case law any less salient. They do, however, suggest that there was more at work in *Horncastle* than a difference over the law of evidence. Thus, it may be that the resistance to *Al-Khawaja* was not solely the result of normative objections, there may also have been a strategic function to the invitation to dialogue: to assert the autonomy of domestic law and the authority of the Supreme Court in interpreting it.

Turning to the third category in the typology there is clear reciprocity involved in this line of cases – enough to render the decision in *Horncastle* part of an ongoing judicial

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<sup>79</sup> *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2. See Lord Brown at paras 111-114 and Lord Mance at para 123. Lord Walker, at para 90, expressed agreement with Lords Brown and Mance. The leading judgment was delivered by Lord Dyson, with whom all of the other members of the Court, including also Baroness Hale, agreed.

<sup>80</sup> M. Requa, 'Absent witnesses and the UK Supreme Court: judicial deference as judicial dialogue?', *International Journal of Evidence and Proof*, vol 14, no 3, 2010, 208-231.

<sup>81</sup> I. Jones, 'A political judgment? Reconciling hearsay and the right to challenge', *International Journal of Evidence and Proof*, vol 14, no 3, 2010, 232-252.

dialogue. The decision was a response to a prior judgment of the ECtHR and indeed several judgments have considered the substantive issue of hearsay evidence.<sup>82</sup> Furthermore, the Grand Chamber had put its proceedings on hold pending the outcome of the appeal of *Horncastle* to the Supreme Court. Prior to its delivery, the Grand Chamber judgment in *Al-Khawaja* was described as ‘long awaited’ by Lord Brown.<sup>83</sup> That Grand Chamber judgment clearly, as Judge Bratza (if not the Court as a whole) acknowledges, ‘takes account of the views of the Supreme Court on the sole or decisive test’. The reciprocity is therefore plain to see. However, the most salient aspect of the *Horncastle/Al-Khawaja* saga for present purposes is the explicit reference to a ‘valuable dialogue’ by the Supreme Court and thus the significant degree of openness in that dialogue.

The invocation by the Court of the idea of dialogue marks *Horncastle* out as an example of ‘explicit judicial dialogue’ whereby the domestic judiciary have acknowledged that they are participants in transjudicial communication in the judgment of the court itself. This can be read, at its most ambitious, as an endorsement of the normative claim of constitutional pluralism. By endorsing the idea of a ‘valuable dialogue’ the UK Supreme Court is acknowledging the authority of the Strasbourg Court over the interpretation of human rights law. In doing so explicitly it may weaken its own authority. Of course, an open invitation to dialogue may be seen as a more robust stance than Lord Rodger’s Latin lament in *AF (No 3)*. However, it is notable that although the ECtHR responded to the invitation to dialogue it did not explicitly recognise in its judgment that it was doing so. In this respect the position of Judge Bratza may be significant. Judge Bratza, now the President of the Court, had to reverse his own position as expressed in the Fourth Section on both matters of principle and the application of the principles to the case of Mr Tahery. If his concurring opinion can be considered as an authoritative ‘interpretation’ or ‘explanation’ of the Grand Chamber’s actions then it renders the judicial dialogue in the case all the more explicit.

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<sup>82</sup> See *Al-Khawaja*, paras 34-38.

<sup>83</sup> *Al-Rawi v Security Service* [2011] UKSC 34, para 78.

## The Struggle for Authority in Human Rights Law

It is useful to put *Horncastle* in broader context. The UK Supreme Court appears to be growing in confidence – in particular in relation to human rights adjudication. The manner in which the Supreme Court’s attitude to the ECHR system has evolved is similar to the approach to the reception of EU law in the UK legal system. When Lord Bridge accepted the supremacy of EU law in *Factortame* he did so apparently without reservation.<sup>84</sup> It was not until Laws LJ delivered his judgment in *Thoburn v Sunderland City Council* that the UK courts suggested that there might be constitutional limits on the powers granted to EU law.<sup>85</sup> The development of the case law on section 2(1) can be read as analogous to the line of cases on EU law. In *Alconbury*, and for much of the next decade, the House of Lords followed ECtHR case law to adjust to its new powers under the Human Rights Act. Now that it is well established, and indeed re-established, as a supreme court it is more confident and therefore more willing to engage with its counterpart in Strasbourg and its case law.<sup>86</sup> In the recent case of *McCaughey* the Supreme Court had to consider the temporal jurisdiction of human rights protection in particular in relation to the obligation to investigate deaths under Article 2 ECHR. Lord Hope set out the test established by Lord Bingham in *Ullah* before claiming that ‘only the most starry-eyed admirer of the Strasbourg court could describe the guidance that the Grand Chamber offered ... in *Šilih* as clear’.<sup>87</sup> However, Lord Hope went on to extract the relevant principles from *Šilih* and apply them to the case at hand. In this way he, and the majority of the Supreme Court (Lord Rodger dissenting), were able to constructively engage with the ECtHR case law and allow the appeals sought. Lord Hope concluded that he was certain as to ‘how the matter would be viewed in Strasbourg’ and that ‘further guidance’ was not needed.<sup>88</sup> The statements of Lords Brown and Mance in *Rabone* further evidence this growing confidence – though the former did acknowledge

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<sup>84</sup> *Factortame Ltd v Secretary of State for Transport (No. 2)* [1991] 1 All ER 70.

<sup>85</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195.

<sup>86</sup> There may also be a more robust approach to the reception of EU law in the UK. Arnull states that a ‘UK Supreme Court which sees itself as the guardian of values inherent in the common law which it is prepared to assert against Parliament and the executive is unlikely to tolerate Union initiatives which fail to respect those values.’ See A. Arnull, ‘The Law Lords and the European Union: Swimming with the Incoming Tide’, *European Law Review*, vol 35, no 1, 2010, 57-87, p86.

<sup>87</sup> *McCaughey* [2011] UKSC 20, paras 72-73.

<sup>88</sup> *ibid.*, para 78.

that it is 'for Strasbourg alone definitively to interpret the Convention'.<sup>89</sup> There is an intrinsic tension in the Supreme Court's approach. Although it asserts the right to depart from a section judgment it appears to will bow to the Grand Chamber, even though judgments of the latter may also suffer from flaws. This ambiguous position may be a consequence of the inherent difficulty of a court without a constitution asserting its authority and the Supreme Court remains such a court – despite the passage of the Human Rights Act and the Constitutional Reform Act.<sup>90</sup>

The growing opposition to the Human Rights Act, the Convention and the ECtHR in British politics may also be influencing the Supreme Court. The Human Rights Act has been subject to criticism from both the current and the previous Government. The Governments' attitude likely both reflects and contributes to public opinion. A Ministry of Justice poll published in January 2008 found that the term 'human rights' has more positive than negative associations amongst the general public. However a significant number of respondents - 43% - believed that too many people 'take advantage of the Human Rights Act'.<sup>91</sup> In February 2011 Lord Hoffmann wrote a foreword to a policy report entitled *Bringing Rights Back Home*. The Law Lord's opening salvo was characteristically provocative: 'human rights have become, like health and safety, a byword for foolish decisions by courts and administrators'. He claims that 'the Strasbourg Court has taken upon itself an extraordinary power to micromanage the legal systems of the member states of the Council of Europe' and that it is time to 'repatriate' human rights law.<sup>92</sup> The Government has now commissioned a review of the operation of the Human Rights Act with a view to replacing it with a British Bill of Rights.<sup>93</sup> In addition, the UK used its Presidency of the Council of Europe to encourage judicial

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<sup>89</sup> *Rabone*, para 113, per Lord Brown.

<sup>90</sup> The Constitutional Reform Act 2005 established the UK Supreme Court and transferred the jurisdiction of the Judicial Committee of the House of Lords to the new court.

<sup>91</sup> Ministry of Justice, *Human Rights Insight Project*, Ministry of Justice Research Series 1/08 January 2008, pp 8-9.

<sup>92</sup> M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK*, London, Policy Exchange, 2011, pp 7-8.

<sup>93</sup> Ministry of Justice, 'Commission on a UK bill of rights launched' 18 March 2011. On 12 March 2012 M. Pinto-Duschinsky announced his resignation from the Commission after his seven fellow Commissioners expressed reservations about his work on the Commission.

restraint – and even to attempt to reform the ECtHR itself.<sup>94</sup> The Act is therefore operating in an at best sceptical political climate.

How might all of this affect the work of the Supreme Court in human rights cases? On the one hand the recent Supreme Court judgments might be viewed as judicial support for the resurgence in constitutional nationalism exhibited by the Government and Parliament.<sup>95</sup> *Horncastle* and *Pinnock* might be considered examples of the judiciary taking steps to ‘bring rights back home’ – and the exasperated tone of the judgments of Lords Hoffmann and Rodger in *AF (No 3)* suggest that there is some sympathy for the political institutions amongst the judiciary. However, if the Supreme Court was merely engaging in legal nationalism it would hardly have gone to such lengths to emphasise the importance of dialogue with the ECtHR. The better view therefore is that *Horncastle* represents an attempt to safeguard the role of both the Supreme Court and the ECtHR in developing the protection of human rights in an adverse political climate while ensuring that Convention case law does indeed take into account the nuances of the common law criminal justice system (and its law of evidence). Nonetheless, in doing so so openly the Supreme Court may have – intentionally or unintentionally – endorsed the normative claim of constitutional pluralism and left itself open to criticism from constitutional monists.

#### **IV. Pluralism Revisited: The Challenges of Explicit Judicial Dialogue**

If the *Horncastle/Al-Khawaja* saga is explicit judicial dialogue then it also confirms the pluralist potential of the Human Rights Act. The Supreme Court did not, as it might have, simply assert its authority to depart from the ECtHR case law. If it had done so, and come to the same conclusion, then *Horncastle* might have been a case of implicit

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<sup>94</sup> ‘Leaked proposals set out Britain’s tough line towards Strasbourg’ *guardian.co.uk* 28 February 2012.

<sup>95</sup> In the UK political opposition to the ECHR system as a whole has come to focus on the issue of prisoners voting. In its judgment in *Hirst* the ECtHR held that the failure but the UK to permit prisoners to vote was a violation of Article 3 of Protocol 1 to the ECHR – which enshrines the right to free and fair elections. *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41. The UK Government failed to remedy the violation of rights and the change in Government in 2010 did nothing to alter the political climate. The debate on prisoners voting has drawn in the Government, Parliament, but also the ECtHR itself – with its President Jean-Paul Costa declaring that UK disobedience of the Court would be a ‘disaster certainly for the Council of Europe and the court but also a disaster for the United Kingdom’. For discussion of this matter see C.R.G. Murray, ‘A Perfect Storm: Parliament and Prisoner Disenfranchisement’, Working Paper available at: <http://ssrn.com/abstract=1898188>.

judicial dialogue. Of course, convergence between judgments would not, of itself, be enough to demonstrate an implicit dialogue. It is, nonetheless, an indication that such dialogue may be in process. The Court did not consider itself free to dismiss that case law though nor did it hold itself to be bound to follow it. The will of Parliament merely requires the case law to be taken into account – something the Supreme Court could have done before ultimately rejecting it. Instead, the Supreme Court considered the ECtHR case law, concluded that it was not satisfactory, and openly and explicitly invited the Grand Chamber to engage in ‘valuable dialogue’. In doing so the Supreme Court might be said to recognise not just the authority of the ECtHR but the limits on its own interpretive authority. It has also made the idea of dialogue part of legal reasoning of UK human rights law. Lord Brown has since made this plain when, in *Rabone*, he referred to the *Ullah* principle as promoting ‘two frequently expressed aims: engaging in a dialogue with Strasbourg and bringing rights home’.<sup>96</sup> To understand the danger posed by explicit judicial dialogue it is necessary to revisit the two key criticisms of normative constitutional pluralism: first, that it advocates indeterminacy in the law and second, that it politicises the judiciary. While implicit judicial dialogue is open to criticism on these grounds explicit judicial dialogue is even more challenging for legal order.

The problem of indeterminacy arises from explicit judicial dialogue as the Supreme Court has acknowledged precisely what a constitutional court should not: that they are not necessarily the only arbiter of what is considered lawful in the legal system.<sup>97</sup> Judges are expected to hold to the internal view of their legal system and assert its validity. When they engage in implicit judicial dialogue they do precisely that – they assert the validity and authority of their own legal system but find a means to accommodate the other legal system. The dialogue is therefore external to their legal reasoning. Legal certainty remains because an observer can expect the court to ultimately uphold its own authority and prefer its own interpretation of the law. Explicit judicial dialogue undermines this legal certainty because it embraces the ensuing uncertainty as part of the substance of the law. This can be distinguished from appeals in a hierarchical order of courts. If a lower court offers an interpretation of law then it establishes with

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<sup>96</sup> *Rabone*, para 114, per Lord Brown.

<sup>97</sup> Maduro, in Avbelj and Komarek, eds, n 7 above, p 339.

certainty, albeit a ‘defeasible certainty’, what the law is.<sup>98</sup> If a superior court subsequently rules that the lower court’s interpretation is incorrect then a new certainty is established. At each point it is possible to state, within reason, what the law is, because the system seeks to provide determinate answers to questions of interpretation at each stage. The same can be said for the ‘dialogue’ triggered by a declaration of incompatibility under the Human Rights Act because it is clear that until the political institutions act the impugned legislation remains valid law.<sup>99</sup> Explicit judicial dialogue undermines that determinacy as it places consensus amongst courts before the resolution of the legal dispute before it. In *Horncastle* the Supreme Court claims to have arrived at the correct solution to the legal problem but has invited the ECtHR to consider the matter once more. The Grand Chamber judgment in *Al-Khawaja* was, from the Supreme Court’s point of view, satisfactory – but it might have been otherwise. Consider a scenario whereby the Grand Chamber ignores the Supreme Court’s arguments and confirms the judgment of the ECtHR section chamber. If the Supreme Court had merely engaged in implicit judicial dialogue it too could choose to prefer its own opinion. But by referring to ‘valuable dialogue’ it has vested that dialogue with a degree of authority and would therefore find it hard to resile from its position should it need to do so in the future. The problem is particularly acute if the Supreme Court has interpreted the law to restrict the rights of the applicant. This may force the applicants to take the case to the ECtHR to vindicate their rights.<sup>100</sup> Of course this would also be the case had the Supreme Court engaged in implicit judicial dialogue. But if judicial dialogue is explicit then the court is openly acknowledging that it may not have arrived at the correct answer but is nonetheless imposing a lengthy application to the ECtHR on the applicant for the purpose of vindicating their rights.

The problem of open politicisation is an even greater one. The problem of authority may become more pronounced if the courts begin to acknowledge, through explicit references to judicial dialogue, that they are offering one of several possible interpretations of the law. They would be entirely open to the accusation that the choice

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<sup>98</sup> N. McCormick, *Rhetoric and the Rule of Law – A Theory of Legal Reasoning*, Oxford, Oxford University Press, 2005, p 28.

<sup>99</sup> s 4 Human Rights Act 1998.

<sup>100</sup> I am grateful to Sofia Marques da Silva for spotting this point.

of one interpretation over the other is informed by discretion rather than legal rules or principles. Far from upholding the autonomy of the legal system and the court's authority within it the effect could be to damage both.<sup>101</sup> This is not blind to the politics of the judiciary on a day-to-day basis or the fact that laws are, as JAG Griffiths famously wrote, 'merely statements of a power relationship'.<sup>102</sup> However, if the law is to maintain its value as an independent site for deliberation on public goods it must remain inherently 'legal' - a system of rules that aspires to rationality - and supreme courts have an obligation to deliver that rationality. There are no clear rules to ensure a rational interaction between the UK Supreme Court and the ECtHR through explicit judicial dialogue (unlike, for example, through the preliminary reference procedure in EU law). Monists would prefer the development of a single legal order while pluralists would maintain multiple orders but would develop meta-principles to ensure coherence. In the absence of a single order or principles to govern the relationship between orders then dialogue should be limited by a strong assertion of the autonomy of each legal order and its validation in accordance with its foundational norm. The danger with relying on judicial dialogue to legitimise the decisions of courts is that it may undermine another source of legitimacy for the judiciary – the rationality of legal reasoning and the principles of the legal system. Furthermore, if the UK Supreme Court is seen to invite the European Court of Human Rights into a 'dialogue', to the detriment of the level of human rights protection, then there is little to prevent constitutional courts in more illiberal states from doing so. The result would likely be to the detriment of the level of protection in the Convention system as a whole.

## **V. Conclusion**

The idea of constitutional pluralism, first developed as a theory external to the law to explain the empirical fact of Europe's overlapping legal systems, could be made part of the legal reasoning of those systems. The 'apostles' in the academy must face the implications of judicial acceptance of the normative claim of constitutional pluralism. If explicit judicial dialogue amounts to a *de facto* acceptance then the apostles whose

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<sup>101</sup> For an analysis which reaches a similar conclusion albeit from a different starting point and by travelling a different path see Letsas, n 15 above.

<sup>102</sup> J.A.G. Griffith, 'The Political Constitution', *Modern Law Review*, vol 42, no 1, 1979, 1, p 19.

gospel has been spread need to further address the potential problems that acceptance causes for the authority of the law. The potential success of the normative claim to constitutional pluralism makes the work of those such as Maduro and Kumm – who seek to put the ‘constitutional’ into constitutional pluralism – central to the success of that project. Ultimately judicial dialogue must be acceptable not just to those who write the judgments, or those who read them, but also to those who are subject to them. The legitimation of constitutional pluralism should therefore be a key concern for the apostles in the future.

If the academy must go further to find solutions then perhaps the judiciary need to be more cautious. An open acceptance of the claims of constitutional pluralism might bring about a ‘unity of discourse’ between the judiciary and the academy in the field of European public law. However, the judge-as-judge is required to be the arbiter of what is lawful within the legal system and this is especially the case where the court in question is a supreme court. The judge-as-academic may be able to play a freer role in discourse about the law and about legal systems. Nonetheless, the key criticisms of normative constitutional pluralism – of indeterminacy and the politicisation of the judiciary – are more potent when the judges incorporate explicit references to dialogue in their judgments. The first rule of successful constitutional pluralism may well be that judgments should not talk about it. Judges may be pluralists when they speak in a lecture hall – but in the courtroom they must take a more pragmatic view.<sup>103</sup>

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<sup>103</sup> For recent skepticism on constitutional pluralism see the contributions to G. de Burca and J.H.H. Weiler, eds, *The Worlds of European Constitutionalism*, Cambridge, Cambridge University Press, 2011.