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CLAIM-MAKING AND PARALLEL UNIVERSES: LEGAL PLURALISM FROM CHURCH AND EMPIRE TO STATEHOOD AND THE EUROPEAN UNION

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1. INTRODUCTION: RADICALIZING EUROPEAN LEGAL PLURALISM

When Neil MacCormick, in the wake of the launch of the Maastricht Treaty on European Union, went "beyond the Sovereign State" in 1993, he fundamentally challenged the heretofore dominant paradigm of legal ordering in the European context which considered law to be singular, unified and confined within sovereign nation states.[2] At the time of MacCormick's claim, legal pluralism had, of course, been *à la mode* for quite some time. Classical legal pluralism, mainly situated within legal anthropology, had focused on colonialism and the continued multiplicity of legal ordering in post-colonial settings which continued to feel the heavy impact of the colonial experience. A "new legal pluralism" taking insights originally developed in (post-) colonial settings to the "first world", the industrialized western world, also emerged from the 1970s onwards.[3] This new legal pluralism was split between sociological studies of law and a more jurisprudential version. Both of these versions were, however, seeking to combine insights from the classical (post-) colonial version of legal pluralism with equally classical European studies of "living law"[4] and "social law"[5] as developed in the first decades of the twentieth century and in doing so emphasized the existence of a plurality of normative orders and the fundamental power asymmetries which could often be observed between such orders.[6] For the vast majority of legal scholarship, this, however, remained a largely anthropological and sociological exercise with little direct contact with the dominating fields of law and, in particular, the public law fields of

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[2] Neil MacCormick, "Beyond the Sovereign State", [1993] 56 *Modern Law Review*, 1-18.

[3] Sally Engle Merry, "Legal Pluralism", [1988] 22 *Law & Society Review*, 869-896.

[4] Eugen Ehrlich, *Grundlegung der Soziologie des Rechts*, 4. Aufl. (Duncker & Humblot, 1989); see, also, Roger Cotterrell, *Living Law: Studies in Legal and Social Theory* (Ashgate, 2008).

[5] Georges Gurvitch, "The Problem of Social Law", [1932 (1941)] 52 *Ethics*, 17-40; Otto Kahn-Freund and Thilo Ramm (eds.), *Hugo Sinzheimer: Arbeitsrecht und Rechtssoziologie* (Europäische Verlagsanstalt, 1976).

[6] Poul F. Kjaer, Constitutionalism in the Global Realm – A Sociological Approach (Routledge, 2014).

constitutional and administrative law upon which MacCormick focused. As such, MacCormick's claim to fame might be located in his attempt to bring legal pluralist insights to the very centre of the public law universe.

The original insight of MacCormick might, however, be pushed even further, as a historical re-construction reveals that legal pluralism is not only a trademark of recent historical times, marked by the European integration process, but has also been at the very core of legal evolution in Europe throughout its modern history. The introduction of modern law in Europe can be traced back to the eleventh and twelfth century Investiture Conflict between the Church and the Emperor,[7] a conflict which solidified the existence of two parallel universes of law, one Church-based and one empire-based, both of which rested, in principle, upon mutually exclusive claims to superiority, but which nonetheless became institutionally stabilized in a manner which allowed for mutual co-existence between them.

This pluralist set-up broke down with the Reformation, which not only religiously but also legally, politically, economically and scientifically, put in motion forces which remain central to the shaping of modern society till this day.[8] One of the many consequences of the Reformation was that the legal claim of the Church of Rome to supremacy over the Christian Church received a second blow after the East-West Schism of 1054. As such, the Reformation implied a re-inforcement of legal pluralism in both Europe and beyond, as the claim of the Church of Rome to be the final source of legal authority was factually undermined. This move towards increased legal pluralism was seemingly remedied with the emergence of the post-reformation "Westphalian World", which was based upon the outlook that the world consisted of territorially-demarcated sovereign (nation) states constituted through singular forms of legal ordering, and that such state-based legal orders were the foundational structure of modern society. But, as will be argued below, not only the Papal claim but also this state-based claim to supremacy was nothing more than a mere claim, in so far as it never gained factual reality. Against this background, the claim to supremacy inherent to contemporary transnational ordering, as most notably visible in the legal claims of the Court of Justice of the European Union in relation to direct effect,[9] supremacy[10] and pre-emption,[11] can furthermore be understood as a continuation of this type of claim-making, unfolding within parallel legal universes, which has always been central to European legal ordering. But even when claims remain counter-factual, this does not imply that claim-making in relation to legal authority is of no importance. On the contrary, claim-making is an essential legal technique, just as the institutional stabilization of relations between legal orders relying on mutually-exclusive claims is central to the integration of society. Re-constructing European legal history as a history of pluralist claim-making and parallel universes thereby provides central insights into "how society is possible" in the absence of a unitary legal order.

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7 Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition, volume I (Harvard University Press, 1983); Hauke Brunkhorst, Critical Theory of Legal Revolutions: Evolutionary Perspectives (Bloomsbury, 2014).

8 Harold J. Berman, Law and Revolution, volume 2: The Impact of the Protestant Reformation in the Western Legal Tradition (Harvard University Press, new edition 2006); Hauke Brunkhorst, Critical Theory of Legal Revolutions: Evolutionary Perspectives (Bloomsbury, 2014).

9 ECJ, Judgment of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26/62, [1963].

10 ECJ, Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.* Case 6/64 [1964].

11 ECJ, Judgment of the Court of 31 March 1971, C*ommission v Council* (1971) Case 22/70 [1971].

2. THE CLAIM OF THE CHURCH

An essential component of law is the act of claiming. Legal actors claim jurisdictional competence, superiority *vis-à-vis* other legal actors, to be the bearer of justice, to uphold sovereignty and so on. Internally to the law, claim-making is part of a technique which allows for arguments to be constructed and judgments to be passed. Without a claim, a legal process cannot begin. In the Western context, the claim to Papal Supremacy over not only the entire Christian world, but also over all worldly powers is the mother of all legal claims. It was in the context of this dual Papal claim to supremacy that the structure of the legal argumentation characterizing the western world was developed.[12]

The factual realization of such internally developed claims is, however, a very different matter. From the outset, claims are contra-factual in nature and the question concerning their possible fulfilment remains a secondary matter. At least since the East-West Schism of 1054, the Papal claim to jurisdictional supremacy over the entire Christian Church has been nothing other than a mere claim. The Reformation drastically deepened the contra-factual nature of the Papal claim, but the claim has nonetheless been upheld and reconfirmed till this day in spite of its non-fulfilment, *i.e.*, at the First Vatican Council in 1870. Similarly, the Church of Rome, while gradually acknowledging the jurisdiction of states in temporal worldly matters from the Investiture Conflict onwards, maintain its claim to be the authority of last resort in cases of conflict between spiritual and worldly matters. In contrast, most states, including Catholic dominated states, such as France since the Declaration of the clergy of France of 1681, have claimed that the ultimate authority rests with the bearer of state sovereignty, be it the monarch, the parliament or the people. Factually, the relationship between Church and State has, therefore, been a conflict of laws relation.[13] Mutually-exclusive claims have been maintained by both sides, while institutional mechanisms has been developed in order to enable the legal order of the Church of Rome and the legal orders of worldly states to intersect and engage in legal transfers while operating as parallel universes.[14] A range of institutional models, typically enjoying constitutional status, representing different degrees of differentiation between Church and State has emerged thereby allowing for more or less close co-operation in matters such as education, health and tax collection, while the principle of separation between the spiritual and worldly domains is upheld.[15] The effects of this development remain visible to this day with the Church of Rome not only exercising substantial influence but also enjoying a legally-entrenched institutional standing in relation to many aspects of societal reproduction, as is most notably visible in contexts such as Ireland, Italy and Poland.

It follows from the above that legal pluralism has been the defining feature of modern European and Western society from the very beginning, in so far as the introduction of the separation between State and Church, as gradually developed since the Investiture Conflict, implied the existence of parallel legal orders, thereby making populations and geographical

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[12] Harold J. Berman, Law and Revolution, volume 2: The Impact of the Protestant Reformation in the Western Legal Tradition (Harvard University Press, new edition 2006); Hauke Brunkhorst, Critical Theory of Legal Revolutions: Evolutionary Perspectives (Bloomsbury, 2014).

[13] Christian Joerges, *Zum Funktionswandel des Kollisionsrechts* (Mohr Siebeck, 1971).

[14] For the concept of transfer, see Rudolf Stichweh, "Transfer in Sozialsystemen: Theoretische Überlegungen", 2005, Paper 12, available at: http://www.unilu.ch/deu/prof._dr._rudolf_stichwehpublikationen_38043.html.

[15] Aernout J. Nieuwenhuis, "State and Religion, a Multidimensional Relationship: Some Comparative Law Remarks", [2012] 10 *International Journal of Constitutional Law*, 153-174.

areas subject to more than one legal system. As such, legal pluralism might be considered to be a defining trademark of Western legal evolution from the beginning of modern times.

3. THE CLAIM OF THE STATE

The gradual emergence of modern states from the eleventh century onwards, symbolically manifested in the Peace of Westphalia of 1648, implied a transfer of the legal argumentation of claim-making from the Pope to the worldly monarchs exercising temporal power within the broader adaptation of a religious universe to increasingly secular circumstances.[16]

The logic of claim-making characterizing states is vested in the concept of sovereignty, in both its domestic and its external dimensions. States claim supremacy *vis-à-vis* competing institutional arrangements within jurisdictions which are symbolically delineated through references to territorial constructions and rights of non-interference from other states. In the domestic dimension, this process was a dual one which both implied a differentiation of the state from non-state segments of society[17] and a re-construction of the wider society in the image of the state.[18] Although conceptually developed and increasingly also legally formalized from Bodin and Hobbes onwards, the factuality of the claim to state superiority was a protracted affair. The formal abolition of all intermediary institutions and the privileges of the first and second estates in France in the wake of the Revolution provided for a direct relationship between state and society, legally grounded in the concept of the rights-bearing nation, which formally implied that the state became the sole constitutional object.[19] Factually, most Continental European states, however, struggled to achieve supremacy and to stabilize such relations institutionally. The vast majority of Europe maintained a conglomerate character, typically located within the framework of empires right up the end of WWI. "Societal" "private law"-based arrangements of social co-ordination and exchange remained vibrant and often dominant, serving as counterforces to "public law"-based claims to unitary statehood.[20] In addition, European capitals struggled to transpose their power out in society thereby making centrifugal centre/periphery conflicts a defining feature throughout Europe. The German *Reich* of 1871, for example, remained a conglomerate structure of 27 kingdoms, principalities, grand-duchies, duchies, principalities, free cities and imperial territories. The constitutional set-up of the *Reich* furthermore meant that formal power was skewed towards the rural-based nobility, which, to a large extent, was capable of maintaining its autonomy and privilege-based feudal prerogatives. Both from a

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[16] Ernst H. Kantorowicz: *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press, [1957] 1997).

[17] Chris Thornhill, "The Future of the State", in Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing, 2011); 357-393. More generally, see Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge University Press, 2011).

[18] Michel Foucault, Il faut défendre la société. Cours au Collège de France 1975-1976 (Editions du Seuil, 1997).

[19] Poul F. Kjaer, "Context Construction through Competition: The Prerogative of Public Power, Intermediary Institutions and the Expansion of Statehood through Competition", [2015] 16 *Distinktion: Journal of Social Theory*, 146-66.

[20] Poul F. Kjaer, "From the Crisis of Corporatism to the Crisis of Governance" in Poul F. Kjaer and Niklas Olsen (eds), *Critical Theories of Crises in Europe: From Weimar to the Euro* (Rowman & Littlefield, 2016), 125-39; Chris Thornhill, "The Constitutionalization of Labour Law and the Crisis of National Democracy" in Poul F. Kjaer and Niklas Olsen (eds), *Critical Theories of Crisis in Europe: From Weimar to the Euro* (Rowman & Littlefield, 2016), 89-106.

constitutional perspective and in terms of political *praxis*, the German *Reich* remained a semi-private structure characterized by a factual absence of clear-cut demarcations between the private and the public spheres and, as such, the German state conglomerate remained characterized by a limited degree of systemic autonomy since no clear-cut and institutionalized sphere of public power and authority existed.[21] Modern statehood in the German and most other European contexts emerged, in other words, gradually from within feudal orders, making hybrid ordering partly consisting of "feudal privilege"-based and "modern rights"-based ordering the central characteristic of nineteenth and early twentieth century Europe.

As pointed out by Eugen Ehrlich in the context of the Austrian-Hungarian Empire, the "living law" of local custom furthermore remained a defining feature of society, just as the reconstruction of the rest of society in the image of the state, in most European settings, did not materialize "on the ground" sometime in twentieth century.[22] Unitary societies characterized by the capability of the coupling of law and politics to provide for a "synchronisation of time throughout society" was not a central feature Europe.[23] At the turn of the nineteenth century, Denmark and Switzerland were, for example, the only European countries where stable nationwide public law-backed institutional arrangements for the regulation of labour markets and the stabilization of relations between the economic and political dimensions of society were in place,[24] just as France did not obtain a factual unitary character before the early twentieth century and WWI.[25] The paradigmatic switch from empire to unitary nation states, foreseen and advocated by Hegel and others in the beginning of the nineteenth century did not, in other words, unfold until the end of WWI with the implosion of the Austrian-Hungarian, German, Ottoman and Russian empires.

The emergence of nation states as the paradigmatic form of statehood after WWI furthermore did not imply that they obtained a coherent legal set-up and a sustainable level of institutional stability. Within 15 years of their establishment, essentially all of the newly-established states, with Czechoslovakia being an important exception, had turned autocratic or totalitarian factually leading to a (re-) privatization of the state.[26] A key element here was that the cartelization of the economy was greatly expanded in many European settings leading to a factual erosion of the distinction between public and private power, thus allowing both for arbitrary state intervention into the economy and the factual exercise of public authority by private actors. This is particularly easy to observe in Weimar Germany which was characterized by feeble functional and normative capacities to impose its power on strong privately-organized societal forces ranging from the nobility to big business and the trade unions. Although the consequences ended up being more disastrous in the German

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[21] Franz L. Neumann, "The Decay of German Democracy", in William E. Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (University of California Press, [1933] 1996), 29-43.

[22] Eugen Ehrlich, *Grundlegung der Soziologie des Rechts*, 4. Aufl. (Duncker & Humblot, 1989).

[23] Niklas Luhmann, *Recht der Gesellschaft*, (Suhrkamp Verlag, 1993), 427ff.

[24] Colin Crouch, *Industrial Relations and European State Traditions* (Oxford University Press, 1994), 80ff.

[25] Arno J. Mayer, The Persistence of the Old Regime: Europe to the Great War (Pantheon Books, 1981), and Eugen Weber, Peasants into Frenchmen: The Modernization of Rural France, 1870-1914, (Stanford University Press, 1976).

[26] Franz L. Neumann, "The Decay of German Democracy", in William E. Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, (University of California Press, [1933] 1996), 29-43.

context than elsewhere, this picture was reproduced in many other European settings from Austria and Hungary to Spain and Poland. Rather than indicating a *Sonderweg*, the development path of Weimar Germany might, therefore, be seen as a paradigmatic case of weak public law based statehood in Europe.[27]

It follows form the above that the claim inherent to the concept of sovereignty concerning the domestic supremacy of the state was factually never realized in most European settings. The public law based claim to formal supremacy and substantial control was always unfolded in a sea of private power which the state struggled to control. Certain variations can of course be detected: In general the United Kingdom, the Netherlands and the Scandinavian countries, *i.e.*, those states where the Reformation manifested itself most clearly, were also those where the establishment of generalized and abstract "public law"-based regimes capable of factually structuring social exchanges in a manner which enjoyed a high level of consistency throughout their jurisdictions gained the strongest hand. As indicated, even the French state, often considered the strong state *par excellence*, struggled to obtain a level of institutional stability and autonomy comparable to the north-western European states. This indicates that the politics/religion cleavage which emerged in the wake of the Investiture Conflict, rather than the politics/economy cleavage, was the defining cleavage in relation to the emergence of modern statehood in Europe. Since Marx and especially retrospectively during the twentieth century, "political economy" came to be considered the central field in which modern state and society relations were established. But, especially in the Catholic dominated parts of Europe, the nineteenth century was primarily dominated by a politics/religion *nexus* due to the sustained and only slowly materialized attempts of states to expel the Church from the public domain. The French debate leading up the separation of State and Church in 1905 and the establishment of state secularism as the official state doctrine is a case point. Moreover, the status of the Papal State and, more generally, the Church was a central conflictual element in the Italian *Risorgimento*, again making the expulsion of the competing authority of the Church a central, if not *the* central, focal-point of state-building efforts.

4. THE CLAIM OF EMPIRE

On the continent, the gradual emergence of modern states, from Prussia to Piedmont-Sardinia, unfolded *within* an imperial frame. The end of the *Heiliges Römisches Reich Deutscher Nation* (the Holy Roman Empire) in 1806 meant the beginning of the end of empires at the same time as the torch of transcendental imperial universalism was picked up and carried on until 1918, in so far as the Austrian-Hungarian Empire, the First and the Second French empires/Republics, the German *Reich* of 1871, and the Ottoman and Russian empires, all in different ways and with different degrees of intensity, considered themselves the successors to the heritage of either the Western or the Eastern Roman Empire. In other words, the claim to a single, overarching, worldly authority which, in principle, was universal and therefore boundaryless, has, together with the claim of the Church, been the most constant feature of Europe throughout its history. Clearly, the multiple homes of the universalist claim, as expressed from Russia to France, made it into a mere claim. In addition, it was a claim which was institutionally bound upon what, in contemporary parlance, is called "multi-level governance",[28] as the very notion of empire implied conglomerate institutional

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[27] For this argument, see Chris Thornhill, "The Constitutionalization of Labour Law and the Crisis of National Democracy", in Poul F. Kjaer and Niklas Olsen (eds), *Critical Theories of Crisis in Europe: From Weimar to the Euro*, (Rowman and Littlefield, 2016), 89-106.

[28] Simona Piattoni, "Multi-level Governance: A Historical and Conceptual Analysis", [2009] 31 *European*

and, indeed, constitutional formations operating on several levels. Recently re-discovered by political scientists, multi-level governance is therefore not a new thing, but rather a defining feature of Europe throughout its history.

Much like the European Union of today, the central trademark of empire was, in other words, a paradoxical unity between, on the one hand, singular transcendental claims, and, on the other, a *de facto* existing conglomerate institutional and constitutional set-up characterized by a complex bundling of legal regimes. The period between 1918 and 1952 might, therefore, be seen as unique in Europe, not only because of the rise of totalitarianism, the Second World War and the *Shoah*, but also because of the relative degree of absence of institutionalized forms of transnational ordering bound upon a cosmopolitan claim. It is not that transnational legal formations did not exist in this period, but that the majority were "private law"-based frameworks, for example, in relation to international cartels such as the International Steel Cartel, which operated without being bound upon claims of transcendental universality. The ill-fated League of Nations, largely operating as a euro-centric organization after the abstention of the United States, was the only exception, indicating the metamorphosis of the idea of transcendentalism away from empire and towards new transnational constellations.

5. THE CLAIM OF THE EUROPEAN UNION

It is only retrospectively, *i.e.*, since the 1970s, that the European Union came to be seen as the central institutional repository of transnational ordering in contemporary Europe. From the establishment of the *Commission Centrale pour la Navigation du Rhin*, initiated at the Congress of Vienna in 1815, onwards, a whole string of "public"- and "private-law"-based modern international organizations emerged. Throughout the nineteenth century, the number of international organizations grew slowly but steadily. The International Telegraph Convention (now the International Telecommunication Union) was established in 1865 and the General Postal Union (now the Universal Postal Union) in 1874 and the United International Bureau for the Protection of Intellectual Property (now the World Intellectual Property Organization) in 1893, just as wide range private-based organizations emerged, starting with the International Committee of the Red Cross (now the International Red Cross and Red Crescent Movement) in 1863. The modern version of both international public and international private law furthermore emerged in the same period, thereby indicating that extensive forms of transnational ordering emerged hand in hand with modern nation states. Thus, the protracted emergence of modern statehood and that which today is called transnational or global governance regimes emerged simultaneously in a process which implied a gradual replacement of empire with such transnational or global governance formations. Both modern statehood, which first became a global phenomenon in the wake of the de-colonization processes of the second half of the twentieth century, and transnational regimes have furthermore kept expanding ever since, thereby indicating that, at least at a structural level, there seem to be no contradiction between the emergence and strengthening of modern statehood and the existence of extensive transnational regimes.[29]

This dual development was, as already indicated, further re-inforced by the emergence of a dense network of internationally organized cartels, such as the private law-based International Steel Cartel, in the interwar period. The launch of the European Coal and Steel Community (ECSC), and, with it, the European integration process, was therefore based

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Integration, 163-180.

[29] For a more detailed unfolding of this argument, see Poul F. Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (Routledge, 2014), 31ff.

upon a considerable institutional legacy which provided the essential backdrop for its formation. The essential change introduced with the launch of the ECSC was therefore not the emergence of extensive forms of transnational collaboration, but rather a switch in the organizational and legal form of collaboration from a primarily private law- to a primarily public law-based form of collaboration, a switch which furthermore allowed for the re-emergence of the cosmopolitan and boundaryless claim of empire within a new framework.

The ECSC emerged within and was part of a far more fundamental re-configuration of (trans-) national society which unfolded from the end of WWII until the mid-1950s, and thus a dual (trans-) national constitutional moment which profoundly reshaped society on a European-wide and a partly-global scale unfolded.[30] Strongly backed by the resources and power of the United States, an intense level of transnational "founding acts" occurred, from Bretton Woods in 1944, through the establishment of the United Nations in 1945, the GATT in 1947 and the OEEC in 1948 (and, with the latter, the Marshall Plan, which ran from 1948 to 1952) to the Council of Europe in 1949. But the allied occupation of Germany from 1945-55 was also a transnational endeavour, which included a vast amount of countries and led to the emergence of complex institutional frameworks aimed at overcoming differences and co-ordinating policies. The realization of the Hegelian vision of modern nation states centred on a singular source of legal authority and enjoying a high and sustained level of coherency was a child of transnational developments.[31] The realization of modern statehood in post-WWII Western Europe was, in other words, to a large extent a transnational affair. The external dimension of sovereignty was therefore not only bound upon the mutual recognition logic, to wit, that a state is a state which is recognized *as* a state *by* another state. Instead, from the Allied occupation regime in Germany through the consecutive enlargements of the European Union to the *Troika* in Greece, the claim to external sovereignty remained largely a mere claim, as the re-configuration of statehood in Europe and the realization of modern statehood has, to a large extent, been transnationally organized. Not surprisingly, those parts of Europe where strong statehood was already in place, *i.e.*, the Protestant parts of Europe, have therefore been the most reluctant in terms of accepting transnational intrusion.

The gradual construction of a specific European legal order, as highlighted in the establishment of the claims concerning direct effect, supremacy and the pre-emption clause of EU law *vis-à-vis* the legal orders of the Member States from the 1960s onwards reflects the legal embodiment of this transnational state constituting endeavour.[32] Within the framework of the integration process, the claim-making exercises of law were re-formulated making the stand-off between the claims of national sovereignty and the EU legal order the central fault-line of Europe. In other words, the moment of the realization of unitary statehood in Europe marked the emergence of a new kind of legal pluralism. The EU legal order manifested itself as an autonomous and separate legal order which does not consist of the sum of its Member State legal orders, but instead runs parallel to those of the Member States. The operational validity concerning direct effect, supremacy and pre-emption has been accepted by the

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[30] Hauke Brunkhorst, Critical Theory of Legal Revolutions. Evolutionary Perspectives (Bloomsbury, 2014), 436ff, and John Erik Fossum and Agustín José Menéndez, The Constitution's Gift: A Constitutional Theory for a Democratic European Union (Rowman & Littlefield, 2011), 78ff.

[31] Alexandre Kojève, Introduction à la lecture de Hegel: leçons sur la Phénoménologie de l'Esprit (Gallimard, [1947] 1980).

[32] ECJ, Judgment of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26/62, [1963]; ECJ, Judgment of the Court of 15 July 1964, Flaminio Costa v E.N.E.L. Case 6/64 [1964]; ECJ, Judgment of the Court of 31 March 1971, Commission v Council (1971) Case 22/70 [1971].

Member State (constitutional) courts, at the same time as these courts, most notably the German *Bundesverfassungsgericht*, have maintained the claim to act as the ultimate authority in the event of conflict. A carefully developed conflict of laws framework has emerged which allows for mutual recognition and stabilization between the EU legal order and the Member State legal orders without the central claim concerning the supremacy of either part being factually realized.

Organizationally, a whole string of institutional mechanisms has emerged in order to stabilize such relations institutionally. The Comitology system, with its *circa* one thousand committees is a case in point here.[33] The Comitology system serves as a transmission belt through which the legal transfer from the EU legal order to those of the Member States unfolds, just as other frameworks focus upon the transmission of Member State preferences into the law-producing machinery of the EU. Comitology committees are the "no-man's-land" between legal orders. While both parties, the Commission on behalf of the European Union, and the Member States, claim ownership and act *as if* they have ownership, it still remains to this very day unclear who, in fact, "owns" the committees. Comitology, a secret and technocratic construct and other limited institutional constructs thereby come to act as hinges of societal integration, in so far as the committees act as contact-points between otherwise separate legal orders. Comitology procedures are *rites de passage* which allow for legally-structured and condensed transfers from one world to another.[34] It is an "in-between worlds" construct which allows for both worlds to construct legal claims to supremacy and coherency, while factually serving as a framework for exchange and transfer between these worlds.[35]

6. PERSEPCTIVES: LEGAL PLURALISM AS THE DEFINING FEATURE OF EUROPE

The European Union is a new construct which does, however, rely on a legal template which is as old as modern Europe itself. Modern Europe emerged through the installation of a dual universe between church and empire, which was subsequently transformed into a dual relation between Church and State. Modern nation states and modern transnational ordering, as mainly manifested in the European Union today, emerged hand in hand and in a mutually-reinforcing manner, respectively substituting localistic feudal ordering and imperial cosmopolitan ordering. Legal pluralism, understood as being characterized by multiple sources of legal authority and parallel legal universes which symbolically refer to the same geographical space, has, therefore, always been a central feature of Europe.

In contrast to the dominating post-colonial discourse on legal pluralism, which focuses on the interaction between, on the one hand, colonial law and the legacies of colonial law, and, on the other, traditional legal frameworks in (post-) colonial settings, Europe might be considered as itself being inherently legally pluralist. Europe has always been characterized by parallel universes of legal ordering and the sort of conflicts which can be observed in (post-) colonial settings replicates processes and conflicts which are not unknown

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[33] Poul F. Kjaer, Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation (Hart Publishing, 2010), 50ff.

[34] Arnold van Gennep, *The Rites of Passage* (University of Chicago Press, [1909] 1960).

[35] Marc Amstutz, "In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning", [2005] 11 *European Law Journal*, 766-784; Marc Amstutz, "Métissage. Zur Rechtsform in der Weltgesellschaft", in Andreas Fischer-Lescano, Florian Rödl and Christoph U. Schmid (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*, (Nomos Verlag, 2009), 333-351.

to European history. Legal pluralism is, therefore, not only a necessary point of departure from which the study of legal ordering in Europe must depart from, but rather the very essence of what Europe is about.