

European Law and National Sovereignty: Exploring Europe's 'Constitutional Pluralism'

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Lecture Plan

- Background – European Integration and the question of Sovereignty
- The ECJ view
- The National Courts' views
- Constitutional Pluralism
- Implications for Canada & the World

Background

National Sovereignty

- Sovereign = total and exclusive power over a given territory
- What's the appeal?
 - By separating out discreet parcels of land and making sure there is only one authority on each parcel, we prevent conflicts between different authorities

Two Visions of the EU

- Inter-governmentalists — see the EU as a voluntary agreement between states. Sovereignty remains with the states, the EU is just a tool for them to use or not at they please.
- Federalists — see the EU more like a federation, a “United States of Europe”. It is not just a tool of member states, the EU is an independent entity equivalent to a federal government and the states are a subordinate entity equivalent to provinces. Sovereignty rests with the EU
- The original treaties do not resolve this question.

Compromise, Bracketing & Ambiguity

- Functionalism – if we start by making lots of small agreements in areas that are easy to agree on, this will begin to build trust and interdependence. Eventually, integration will “spill over” into areas that are harder to agree on too
- In the meantime, leaving contentious issues unresolved creates a union that is compatible with a wide range of outcomes, and can be supported by a wide range of actors

Empty Chair Crisis

- 1960s, proposals to expand role of the European Parliament and Commission and to move to majority voting in the Council (making the EU more federalist)
- DeGaulle, an intergovernmentalist, responds by boycotting the European council
- Without France nothing can be done — integration is paralyzed, and the European project is in crisis

EU law from Above: Sovereignty and The ECJ

Van Gend en Loos (1963)

- Van Gend & Loos imports a product from Germany and the Dutch government taxes it
- Van Gend & Loos goes to Dutch court and asks for their money back, arguing that the government has violated EU rules against import tariffs
- Government responds that the treaties are an agreement between states. Van Gend & Loos is not a state and so has no standing to ask a court to rule on the treaties
- Dutch court asks the ECJ a *reference question*
- ECJ says no, EU treaties are more than a deal between member states, they establish a new community
- Citizens have rights as members of the EU community, and those rights can be enforced in national courts

Costa v. ENEL. (1964)

- Italy nationalizes several energy companies
- An Italian citizen argues that this violates EU treaty provisions around competition
- Italian courts rule that because the energy nationalization bill is more recent than the treaties, Parliament implicitly abrogated those parts of the treaties
- ECJ says “no” - Italy is not free to pick and choose which EU laws it wants to obey. Italy has given up some of its sovereignty to the EU.
- In the areas that Italy has given up sovereignty, EU law is supreme over national law

Fundamental principles:

- Direct Effect – EU law creates a new community and new rights that can be enforced directly without the consent of national governments.
- Supremacy – EU law is supreme over national law – if the two conflict, EU law prevails.

This is Unique in International Law

- Usually, international law occurs between states – citizens cannot participate directly.
- Usually, international law is voluntary – states are free to take it or leave it.
- As a result, all of the power stays with the state.
- Under EU law, states are not able to control the flow of cases (direct effect) nor choose whether or not to accept the results (supremacy) – suddenly, international law becomes a challenge to, rather than an expression of, state power

EU law from Below: National Courts' Reactions

Ireland

- The Irish constitution makes any law essential to EU membership supreme over any Irish law, even the rest of the Irish constitution.
- So yes, EU law is supreme over national law...but only because national law says so!
- If Ireland were to amend its constitution, would EU law still be supreme? If not, isn't Ireland really in charge?

Poland

- Poland's Court argues that the national constitution must be supreme over any EU law that conflicts with it.
- Thus if an EU law conflicts with the Polish constitution, Polish law-makers must either amend the constitution or leave the EU.
- This is a way of saying “no no, we are in charge around here”! Your laws are supreme only so far as our legislature agrees to them

Germany

- Germany takes an innovative, compromise position halfway between accepting EU supremacy and asserting German supremacy.
- German courts rule that EU law is supreme, but only if it meets certain conditions. In other words – “you are supreme as long as you don’t do anything we think is totally nuts”.
- This approach, of accepting EU supremacy subject to certain conditions, has now spread to other countries.

Constitutional Variety

- Many courts, each with its own ideas about who is in charge, whose law is supreme, under what conditions, and why.
- Sometimes these positions are directly contradictory, other times courts find innovative compromises.

So who exactly is in charge here?

- Well, it depends who you ask!
- Every court in Europe envisions the relationship between member countries and the EU differently – there is no consensus on how the whole thing works or who is ultimately running the show.

Constitutional Pluralism

Order and Contestation

- Because people are divided on the question, resolving the issue of federalism v integovernmentalism one way or the other would probably cause the system to collapse.
- The only way to keep the system going is by leaving the question open to constant (re)negotiation
- The system doesn't work *despite* contestation, it works *because of* contestation

Example:

Internationale Handelsgesellschaft (1970)

- The ECJ rules that EU law is supreme even over national constitutions
- German courts are concerned because EU law has no human rights protections
- In order to make sure human rights are respected, Germany will consider certain provisions of its own constitution supreme
- The ECJ's position is that it is supreme with or without human rights protections
- But it develops its own human rights standards anyway, in order to avoid the conflict
- German courts respond by accepting EU supremacy
- *both courts can keep their conflicting opinions about who is in charge, because they have found a compromise which satisfies them both and allows them to work together.*

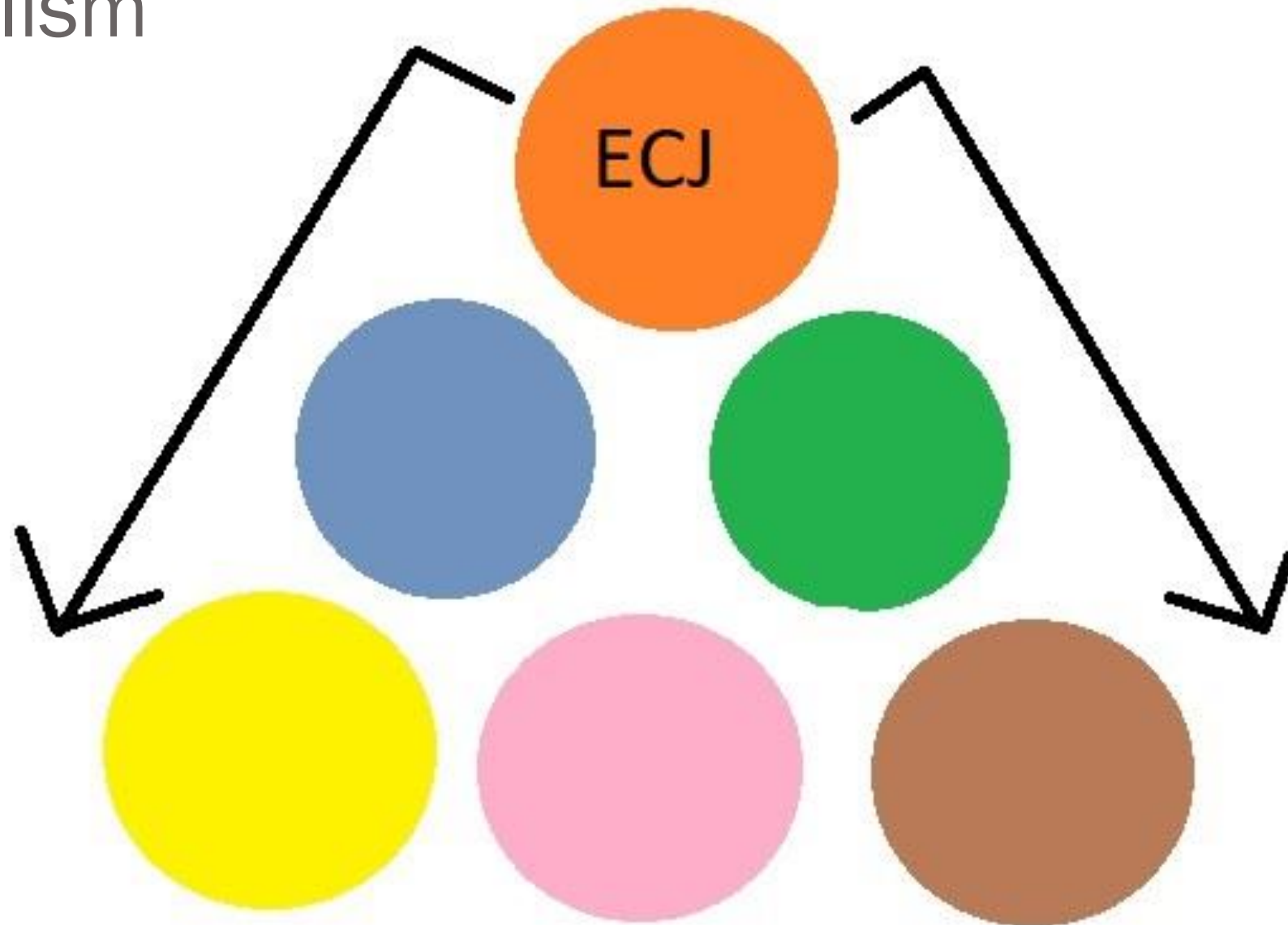
Mutual Accommodation

- Multiple actors believes they have sovereignty (supremacy).
- This creates the potential for serious conflict, conflict that could tear the EU apart.
- In order to keep conflict from becoming too severe, national courts agree to the supremacy of EU law, but place conditions upon it.
- The ECJ knows this, and avoids violating those conditions.
- Each court accommodates the claims of the other, without ever resolving the fundamental differences between them

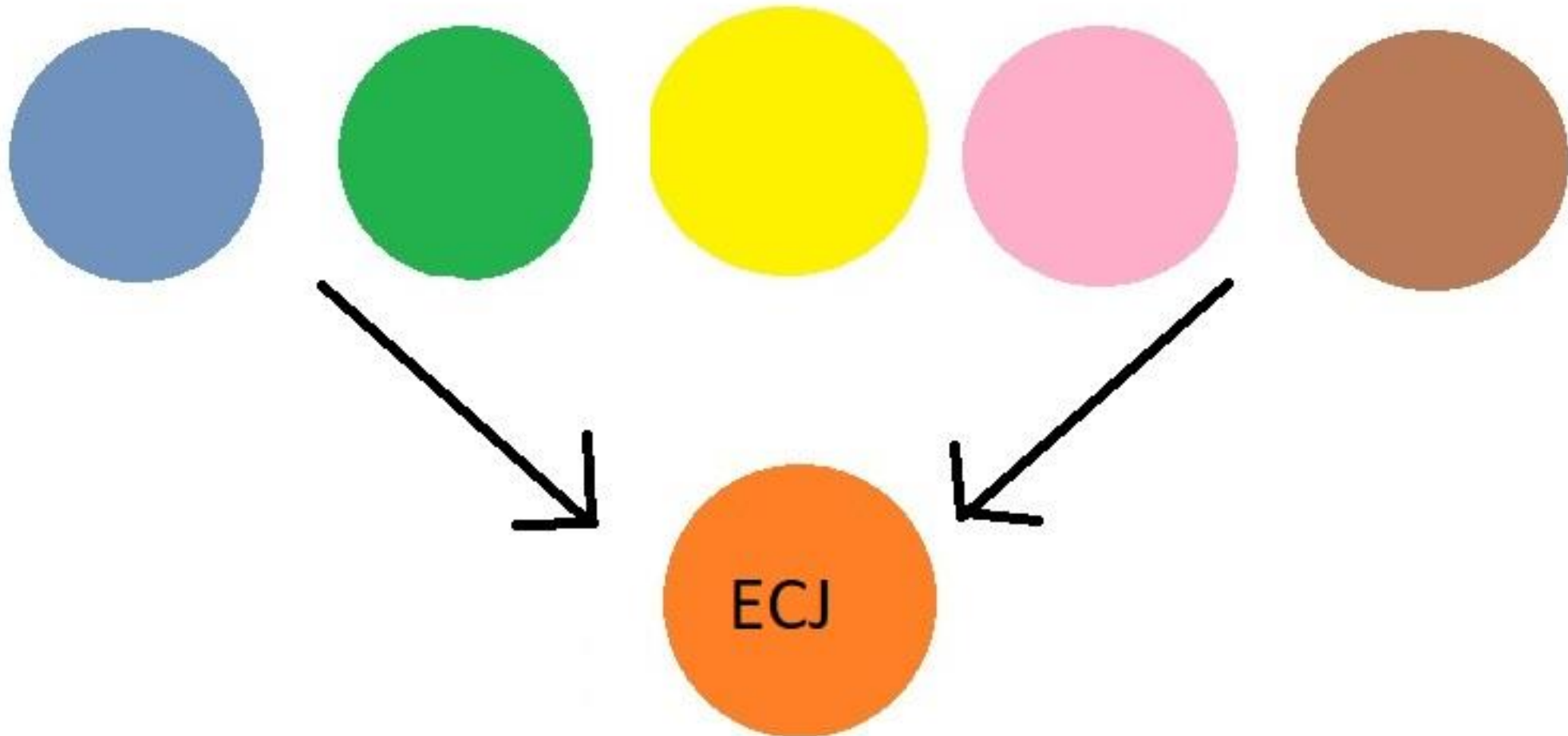
How can we Conceptualize this System?

- Multiple national legal orders all shaping EU law, putting conditions on it.
- At the same time EU law shapes each of them through supremacy.
- The system is one where multiple legal systems are all influencing one another.

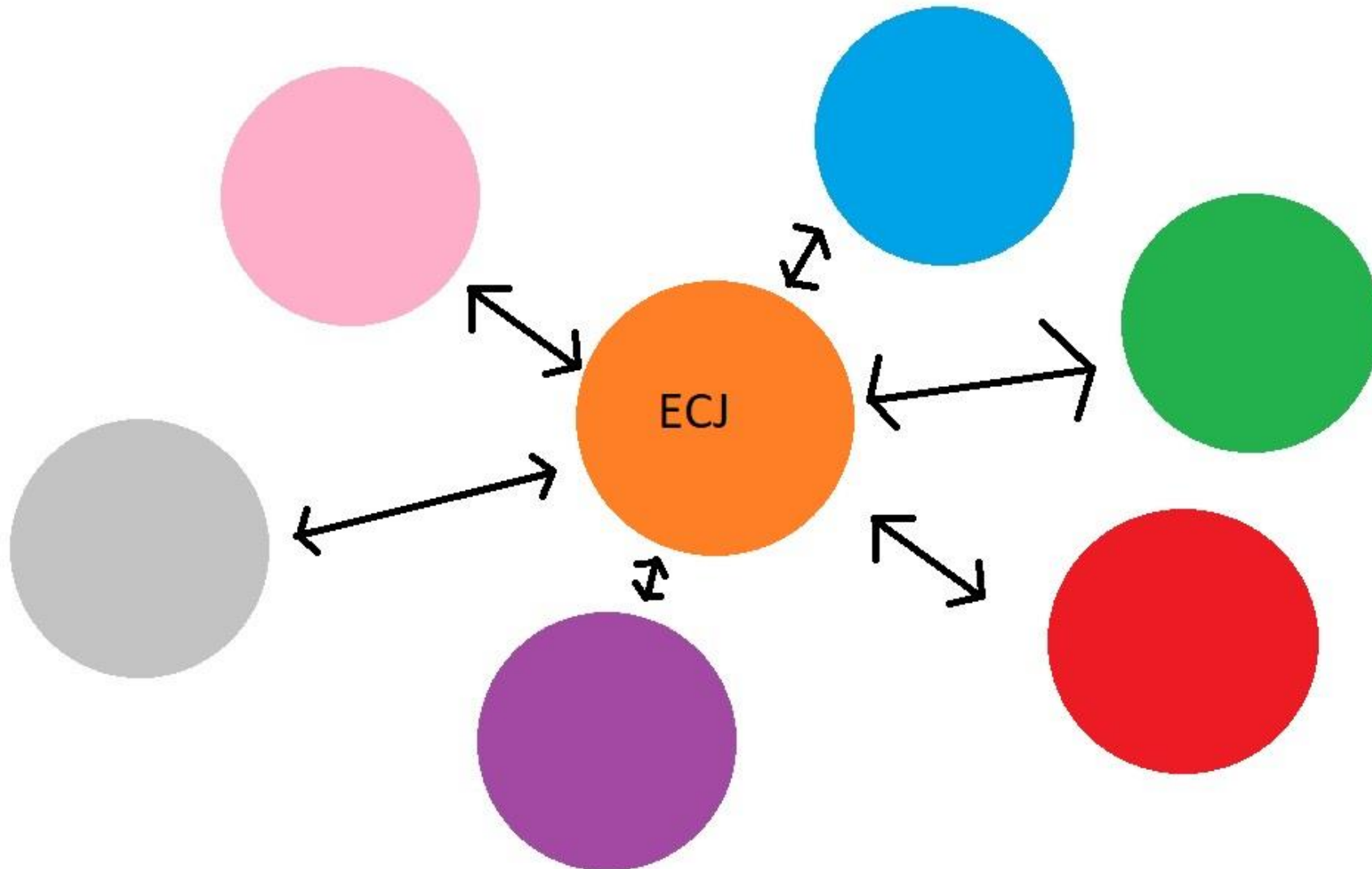
Federalism



Intergovernmentalism



European Legal System:



Constitutional Pluralism

- No court enjoys exclusive or absolute power
- But all courts enjoy the ability to influence one another (heterarchy instead of hierarchy)
- This incentivizes mutual accommodation, allowing courts to cooperate without ever establishing a shared vision of who is in charge

Sovereignty and Pluralism

So What?

Well, this challenges the way we think about law and order.

- The traditional story European philosophers tell about law goes like this:

Once upon a time, humans lived without any form government and everybody was always killing, stealing from, and raping one another – life was nasty and short.

In response, humans decided to give all their power to one all-powerful individual (the Sovereign) who could then use their overwhelming power to create a set of rules: “law and order”.

- The story suggests social order depends on a) a clear set of rules b) a single authority to make the rules. If either of these conditions is absent we will have total chaos

So there!

- Constitutional Pluralists argue that European legal system challenges this belief — there is no one in charge, the rules are contested, and yet, there isn't chaos either.
- Instead, we find a well-functioning, orderly society that is maintained through negotiation between several sites of authority, rather than through the total dominance of just one authority.

Two Different Views of the Law

	Traditional Legal System	Constitutional Pluralism
Human Nature:	Humans are violent savages who need a strong leader to keep them in line	Humans are naturally cooperative and actually quite good at sorting out their differences
Nature of Law:	Law is a non-negotiable source of order in an otherwise violent and chaotic world	Law is a place where important social questions are negotiated through compromise and adjustment
Our Relationship to Law:	Laws should always be obeyed and never challenged, because it is the only thing stopping all hell from breaking loose	Resistance and differences of opinion are a healthy part of what law is

Conclusions

Lecture Summary: The Take-Home Points

- The ECJ has been a major driver of the integration process, responding to crisis by pushing Europe in a more federalist direction
- Many National Courts have resisted this, asserting a more intergovernmentalist position
- As a result, the question of who is sovereign is contested, different courts have different opinions.
- This has given rise to a system where courts accommodate one another and negotiate solutions *without resolving the question of who is in charge* (constitutional pluralism)
- The resulting system of Constitutional Pluralism challenges the way we traditionally think about law and order, suggesting forms of social order that don't rely on sovereignty at all

Implications for 'Canada'

Kunst'aa Guu – Kunst'aayah Reconciliation Protocol

The Parties hold differing views with regard to sovereignty, title, ownership and jurisdiction over Haida Gwaii, as set out below. Notwithstanding and without prejudice to the aforesaid divergence of viewpoints, the Parties seek a more productive relationship and hereby choose a more respectful approach to coexistence by way of land and natural resource management on Haida Gwaii through shared decision-making and ultimately, a Reconciliation Agreement.

The Haida Nation asserts that: Haida Gwaii is Haida lands, including the waters and resources, subject to the rights, sovereignty, ownership, jurisdiction and collective title of the Haida Nation who will manage Haida Gwaii in accordance with its laws, policies, customs and traditions.

British Columbia asserts that: Haida Gwaii is Crown land, subject to certain private rights or interests, and subject to the sovereignty of her Majesty the Queen and the legislative jurisdiction of the Parliament of Canada and the Legislature of the Province of British Columbia.