

**WHO HAS THE FINAL SAY?
THE RELATIONSHIP BETWEEN INTERNATIONAL,
EU AND NATIONAL LAW**

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*A key focus of much scholarly attention is on the (theoretical) relationship between legal orders. The practical question I intend to answer in this article is the following: how can we know who has the final say – international, European Union (EU) or national law? I proceed in three steps. First, I critically sketch major current theories – monism and dualism, as well as global legal pluralism and global constitutionalism. However, because none of them offers a satisfactory answer to the question posed, I move to the reconceptualization stage of the theoretical relationship between legal orders. In the second step, I offer my account of how to think about the relationship between legal orders by introducing the theory of the law creators' circle (TLCC). The TLCC provides a theoretical foundation for deciding on the source of the decisive norm. It does not, however, provide a general solution which fits any norm conflict stemming from overlapping legal orders. Thus, the purpose of this article is to develop a legal theory which facilitates the understanding of the interaction between international law, EU and national law. Third, I use a doctrinal analysis to show the results of the TLCC application. For instance, in the famous Kadi saga, according to the TLCC, the EU should have either claimed that the UN Security Council was acting *ultra vires* or considered the UN Security Council Resolution faulty because UN human rights (instead of EU human rights) had been violated.*

Keywords: Monism, Dualism, (Global) Legal Pluralism, (Global) Constitutionalism, TLCC, Relationship between legal orders, International – EU – national law

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*All truly wise thoughts have been thought already.
All one has to do is try to think them again.¹*

Johann Wolfgang von Goethe

I. INTRODUCTION

The relationship between international and national law has been debated for centuries. Generally, the floor has been divided between two approaches – dualism and monism. I argue that, in the light of major developments since

¹ Johann Wolfgang von Goethe, *Wilhelm Meisters Wanderjahre - Buch 2 oder die Entsagenden* (Zenodot 2016, originally 1829 2nd ed.) 239 (English translation by the author).

their inception, like the establishment of the European Union (EU), these theories can no longer comprehensively explain the relationship between international, EU and national law.² A key focus of my work is to re-conceptualize the theoretical relationship between legal orders.³ Even though some scholars have doubted the relevance of theoretical inquiries such as a dualistic or a monistic analysis of the relationship between legal orders, I cannot agree with those who trivialize this theoretical discussion by saying it would be 'unreal, artificial and strictly beside the point'.⁴ If we continue reading Fitzmaurice's view, it becomes clear that this is simply a dualistic argument. This is because he continued arguing that '[i]n the same way it would be idle to start a controversy about whether the English legal system was superior to or supreme over the French or vice-versa, because these systems do not pretend to have the same field of application'.⁵ This is also an implicit theoretical approach, which is in Fitzmaurice's case a dualistic standpoint.⁶ Yet, current developments, fundamental changes and new phenomena such as the massive increase in international institutions, actors, norms and tribunals as well as adjudicators make it imperative to seek new theoretical concepts. The so-called 'globalization of law'⁷ as framed in

² Lando Kirchmair, 'The 'Janus Face' of the Court of Justice of the European Union: A theoretical appraisal of the EU legal order's relationship with international and member state law' (2012) 4(3) *Göttingen Journal of International Law* 677-691.

³ See, for example, Lando Kirchmair, 'The Theory of the Law Creators' Circle: Re-Conceptualizing the Monism – Dualism – Pluralism Debate' (2016) 17 (2) *German Law Journal* 179-214.

⁴ Gerald G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 *Recueil des Cours de l'Académie de Droit Int'l.* 1 (71).

⁵ *Ibid* 71-72.

⁶ For a practical approach concerning the relationship between international and national law, see, for instance, Helen Keller, *Rezeption des Völkerrechts* (Springer 2003) 6. This practical approach, however, has been criticized by Stefan Griller, 'Völkerrecht und Landesrecht' in Robert Walter et al. (eds), *Hans Kelsen und das Völkerrecht – Ergebnisse eines Internationalen Symposiums in Wien* (Manz 2005) 84, n. 3.

⁷ In relation to this designation, see Jean-Bernard Auby, 'Globalisation et droit public' in *Gouverner, administrer, juger. Mélanges en l'honneur de Jean Waline* (Dalloz 2002) 135; Anne Peters, 'The Globalization of State Constitutions' in Janne Nijman and Andre Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007) 251; see also David J. Bederman, *Globalization*

the famous *Constitutionalization of International Law*,⁸ may be mentioned, among other developments, to elucidate the ever-growing importance of the debate on the final say between international, EU and national law.

I start from the assumption that it is essential to have a theoretical concept for the relationship between legal orders, because I hold, that we cannot intelligibly discuss this relationship without a theoretical concept. Without a theoretical concept, underlying assumptions often remain implicit and are not addressed clearly.⁹ My work is based on the conviction that a common (normative) denominator of international, EU and national law is fundamentally necessary to solve norm conflicts between overlapping legal orders.¹⁰ Without such a common (normative) denominator we are left with non-normative or unilateral solutions for norm conflicts between overlapping legal orders. I wish to offer new theoretical insights because I hold that the current approaches do not provide satisfactory accounts. After critically reviewing the current dominant theories (dualism, monism, pluralism and constitutionalism) in the first step (section II.), I depart from Goethe by providing my own theoretical account.

The practical question I intend to answer is the following: how can we know who has the final say – International, EU or national law? The way I try to respond to this question does not follow monism or dualism, nor pluralism or

and International Law (Palgrave 2008). Neil Walker, *Intimations of global law* (Cambridge University Press 2014).

⁸ Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926); Jan Klabbers, *The Constitutionalization of International Law* (Oxford University Press 2009); Oliver Diggelmann and Tilmann Altwicker, 'Is there something like a constitution of international law? A critical analysis of the debate on world constitutionalism' (2008) 68 *Heidelberg Journal of International Law* 623-50.

⁹ Compare in this regard also András Jakab, *European Constitutional Language* (Cambridge University Press 2016) 1 quoting John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Palgrave Macmillan 1936) 383 concerning economics: 'The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed, the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist'.

¹⁰ Lando Kirchmair, 'The Theory of the Law Creators' Circle: Re-Conceptualizing the Monism – Dualism – Pluralism Debate' (2016) 17 (2) *German Law Journal* 179-214.

constitutionalism.¹¹ I intend to answer this question by introducing the theoretical concept of the law creators' circle (TLCC) (section III.).¹² In short, TLCC aims at re-conceptualizing the monism-dualism-pluralism-constitutionalism debate. The aim is to establish whether it is up to national law to determine the effect and validity of international or EU law within the domestic (constitutional) legal order. In more general terms, I wish to provide a theoretical concept to answer the question as to how we can know who has the final say. It does not provide a general solution which fits any norm conflict stemming from overlapping legal orders. The purpose of this article is to develop a legal theory which facilitates understanding of the interaction between international law, EU and national law. TLCC shares its point of departure with most social contract theories. It is based on a hypothetical state imagined as a legal vacuum, denoted the 'legal desert'. However, in contrast to political philosophy, the hypothesis behind the law creators' circle aims solely to elucidate the structural relationship between legal orders, without saying anything about how legal orders in particular or society in general should be organized. The theory is thus based on an abstract definition of law (i.e. the necessary common (normative) denominator) as the binding consensus between natural persons.

On the basis of this theoretical ground, I wish to engage with practice (section IV.) – I apply TLCC to the relationship between international, EU and national law.¹³ I present a doctrinal analysis of relevant provisions at EU level on the basis of the TLCC. I am convinced that a theory-based argument on the relationship of EU and Member State (MS) law will fruitfully contribute to the key questions of EU law, such as the doctrine of direct applicability or the primacy question between EU law and fundamental constitutional law of the MS. It could provide for a convincing theoretical

¹¹ If you agree with me that current theories cannot offer a convincing account for norm conflict solution regarding the relationship between international, EU and national law you can skip the critique of current theories (II.) and proceed directly to III., TLCC.

¹² Lando Kirchmair, *Die Theorie des Rechtserzeugerkreises – eine rechtstheoretische Untersuchung des Verhältnisses von Völkerrecht zu Staatsrecht am Beispiel der österreichischen Rechtsordnung* (Duncker & Humblot 2013).

¹³ Kirchmair (n 10) for an extensive account thereof applied to the relationship of public international law and the Austrian legal order.

argumentation, solving potential tensions between the constitutional courts of MS and the Court of Justice of the EU (CJEU). For instance, arguments embedded in a sound theoretical explanation may help to clarify a potential stress ratio of European integration and the (German) 'constitutional identity' which, according to the German Constitutional Court, is resistant to integration.¹⁴

II. CURRENT THEORIES AND DOCTRINES AND THEIR FLAWS

1. Dualism & Monism

The relationship between international and national law is a topic of great importance. Generally, the floor has been divided between dualism, as developed by Heinrich Triepel, and monism, mainly formulated by Hans Kelsen, both of which need to be reviewed critically from today's perspective. I argue that these theories can no longer comprehensively explain the relationship between international and EU or EU and national law.¹⁵ And that due to their emergence almost a century ago, they must be understood in their historical context. Current challenges posed by international or supranational organizations like the European Union, and the development of international law in general, overburden these outdated theories.

A. Dualism

The international and national legal orders are 'two circles, which possibly touch, but never cross each other'.¹⁶ This is the famous statement by Heinrich Triepel which forms the cornerstone of the dualistic divide of international (or EU) and national law. Dualism's divide of legal orders was primarily based on the view that the law of the international (or EU) and the national legal orders emanates from different sources, leading to the

¹⁴ German Federal Constitutional Court, BVerfGE 123, 267 (Lisbon) 30.6.2009. For an overview, see Gerhard van der Schyff, 'EU Member State Constitutional Identity: A Comparison of Germany and the Netherlands as Polar Opposites' (2016) 76 Heidelberg Journal of International Law 167-91.

¹⁵ Kirchmair (n 2).

¹⁶ Heinrich Triepel, *Völkerrecht und Landesrecht* (C.L. Hirschfeld 1899) III (emphasis omitted) (translation in the text by the author).

supposition that international (EU law) and national law have arisen from different legal orders relying on different grounds for validity.¹⁷ Although it still holds true that international, EU and national law emanate from different sources, dualism also assumes that the addressees and content of international and national law cannot be identical.¹⁸ Thereby, dualism turns a blind eye towards the direct interaction between international law and individuals. It does so by stating that international law is purely inter-State law and can only stipulate obligations for States,¹⁹ which does not share the same addressees with EU or national law.²⁰ The division of the legal systems implies that international law may not derogate from national law, and national law may not derogate from international law.²¹ In order to give international law an effect within a national legal system, dualism demands a special procedure to transform or incorporate the international norm into a national norm.²² As a result, the ground of validity of international law within national law rests solely within national law, and the ground of validity of EU law within national law rests too solely within national law.

¹⁷ Dionisio Anzilotti, *Lehrbuch des Völkerrechts* (W. de Gruyter 1929, German translation by Cornelia Bruns and Karl Schmid) 38-39.

¹⁸ Triepel (n 16) 9, 11, 228-229; Anzilotti (n 17) 41-42.

¹⁹ Triepel (n 16) 228-229, 119-120, 271; Anzilotti (n 17) 41 ff; Gustav A. Walz, *Völkerrecht und staatliches Recht: Untersuchung über die Einwirkungen des Völkerrechts auf das innerstaatliche Recht* (W. Kohlhammer 1933) 238-239, who was considered to be a moderate dualist, yet he did not postulate the impossibility of international law addressing individuals, but stated in 1933 that the character of international law at the time was mediatized through municipal law.

²⁰ This criticism was already expressed by Alfred Verdross, 'Die normative Verknüpfung von Völkerrecht und staatlichem Recht' in Max Imboden et al. (eds), *Festschrift für Adolf Julius Merkl zum 80. Geburtstag* (Wilhelm Fink 1970) 425, 432 ff; Riccardo P. Mazzeschi, 'The Marginal Role of the Individual in the ILC's Articles on State Responsibility' 14 (2004) *The Italian Yearbook of International Law* 39, 42-43 with further references in footnote 12, 'This means that international law now regulates some relationships between States and individuals in a formal manner (and not only in a substantive one)'; ICJ, *LaGrand (Germany v. USA)*, Judgment, ICJ Reports [2001], 466, 494, para. 77.

²¹ Triepel (n 16) 257-258; Anzilotti (n 17) 38.

²² Anzilotti (n 17) 41, 45-46.

Dualism faces serious difficulties explaining the basis of international or supranational organizations, because, according to dualism, there would be one international and as many x-national grounds of validity of international or supranational organizations as there are Member States.²³ In other words, the validity of an international organization would have to be divided by its Member States instead of having a uniform validity. Equally hard to grasp is the concurrent (dualistic) assumption that international, EU and national law by default cannot have the same content or addressees.²⁴ This assumption is flawed, as it would make the norm conflicts between international, EU and national legal orders impossible, which, however, is not the case. Norms from overlapping legal orders conflict constantly. If for instance EU law would never conflict with national law, the supremacy of EU law would be meaningless.²⁵

While these flaws are obvious for us today, it was not so when dualism was emerging at the turn of the twentieth century. Think only of the dualistic assumption that international law (EU law at that time did not even exist) is purely inter-State law and so it can only oblige States but not individuals.²⁶ While this was certainly true when Heinrich Triepel was shaping dualistic thinking, this can no longer be perceived as an accurate depiction of international law today. International law nowadays also addresses individuals directly and shapes national law in many ways.²⁷ Moreover, trying to fit EU law and its relationship with international and national law under a dualistic scheme seems like squaring the circle, as the dualistic assumptions do not match our understanding of EU law, which has at its core supremacy and direct effect. If there is a conflict between EU and national law, EU law takes precedence over national law. Hence, EU law is binding on national

²³ Griller (n 4) 83, 97; see also the general criticism by Joseph G. Starke, 'Monism and Dualism in the Theory of International Law' 17 (1936) *British Yearbook of International Law* 66. For an attempt to save dualism, see Gaetano Arangio-Ruiz, 'International law and Interindividual law' in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007) 15, 22.

²⁴ Triepel (n 16) 9, 11, 228-229, 254 ff; Anzilotti (n 17) 41-42.

²⁵ Kirchmair (n 2) 684 with further references. See III.3.B.

²⁶ *Ibid* with further references.

²⁷ See III.2.(d)(iii).

authorities and the ground of validity of EU law is not dependent on national law.

Historically, dualism evinced progress as the separation of international and national law helped international law to become independent. Thus, dualism liberated international law from being understood as 'external State law',²⁸ and was even referred to as a 'cleansing thunderstorm' by the monist Alfred Verdross.²⁹ In sum, the legal landscape has changed drastically, and the core assumptions of dualism are no more correct. As a consequence, dualism fails to explain the relationship between international, EU and national law today.

B. Monism

The main characteristic of monism is the assumption of a single unified legal system. The monism theory was developed most prominently by Georges Scelle, Hans Kelsen and Alfred Verdross at the beginning of the 20th century.³⁰ Monism faces the criticism of having a highly fictitious understanding of the world: nothing less than the 'unity of the legal world order' is proclaimed.³¹ This understanding results from Kelsenian adherence to neo-Kantian epistemology, 'because it is only this method [the monist concept of law] and its focus on the *manner* of cognizance, not its *objects*,

²⁸ For the term 'äußeres Staatsrecht', see Georg W. F. Hegel, *Grundlinien der Philosophie des Rechts* (1821) §§ 330 ff; Kirchmair (n 2) 688.

²⁹ Alfred Verdross, *Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten* (Engelmann 1920) 34: ('[R]einigendes Gewitter').

³⁰ Hugo Krabbe, *Die moderne Staatsidee* (Nijhoff 2nd ed. 1919); Léon Duguit, *Souveraineté et liberté* (Éditions La Mémoire du Droit 1922); Georges Scelle, *Précis de droit des gens: Principes et systématique*, Vol. I (Librairie du Recueil Sirey 1932); Hans Kelsen, 'Les rapports de système entre le droit interne et le droit international public' 14 (1926) *Recueil des Cours de l'Académie de Droit International*, 227, 299; Alfred Verdross, 'Le fondement du droit international' 16 (1927) *Recueil des Cours de l'Académie de Droit International*, 247, 287; Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (Oxford University Press 2018); cf. for an overview Christine Amrhein-Hofmann, *Monismus und Dualismus in den Völkerrechtslehren* (Duncker & Humblot 2003) 152 ff.

³¹ Alfred Verdross, *Die Einbeit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (J.C.B. Mohr 1923); Hans Kelsen, *Reine Rechtslehre* (Deuticke 2nd ed 1960) 329; Arangio-Ruiz (n 23) 18, speaking of 'the natural unity of human kind ... [a]s a matter of pure speculation'.

which allows to ascertain *a priori* how positive law is even possible *qua* object of cognizance and *qua* object of the legal science'.³²

In cases of norm conflicts, the monistic doctrine needs to deal with the question as to which jurisdiction prevails. However, a monistic doctrine, with the so-called primacy of national law must be traced back to a very nationalistic view of international law, which no longer can be considered suitable.³³ In other words, how could popular sovereignty in the form of national law (and thus one people only) rule over international or EU law without denying their law's validity? How should the validity of, say, EU law be based on the popular sovereignty of a single member State legal order and the popular sovereignty of one nation instead of all member States' legal orders and their respective nations?³⁴ For the failure of answering these questions, the monistic conception with the primacy of municipal law is left aside here.

Monism with the primacy of international law, on the contrary, has attracted a lot more attention. In order to justify the primacy of international law, the monistic doctrine stipulated the premise of a hypothetical unity – being kept together by the 'chain of validity'.³⁵ The ultimate ground of validity is the famous basic norm of Hans Kelsen.³⁶ Briefly, the basic norm is a hypothetical

³² Paul Gragl, 'The Pure Theory of Law and Legal Monism – Epistemological Truth and Empirical Plausibility' (2015) 70(4) *Zeitschrift für Öffentliches Recht* 665-736, 668-669 (*italics* original; footnotes omitted) with further references.

³³ Kirchmair (n 2) 688. Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer Reinen Rechtslehre* (J.C.B. Mohr 2nd ed. 1928) 317, himself equated the monistic doctrine with the primacy of national law as the 'negation of all law'. However, later on he left the decision up to politics, see Kelsen (n 31) 339 ff.

³⁴ Compare also Walz (n 19) 40, who classified this perception of monism as 'pseudomonistic'; see also Starke (n 23) 77, where he stated, '[r]educed to its lowest terms, the doctrine of State primacy is a denial of international law as law, and an affirmation of international anarchy.'

³⁵ The term 'chain of validity' stems from Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Oxford University Press 2nd ed 1980) 105; Starke (n 23) 75; Catherine Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law' (1997) 16(4) *Law and Philosophy* 377, 388.

³⁶ Kelsen (n 31) 196 ff.

concept, which accounts for the unifying foundation of law and its validity.³⁷ The basic norm is a dazzling concept, which found many diverging interpretations by admirers³⁸ and critics.³⁹ The concept of the 'chain of validity' is even more troublesome.⁴⁰ Kelsen holds that '[a] norm of general international law authorizes an individual or a group of individuals on the basis of an effective constitution, to create and apply as a legitimate government a normative coercive order. That norm [of general international law], thus, legitimates this coercive order [of a 'state' in the meaning of international law] for the territory of its actual effectiveness as a valid legal order and the community constituted by this coercive order as a 'state' in the sense of international law'.⁴¹ Similarly Verdross argues from the viewpoint of an international basic norm from which also municipal law derives: 'The freedom of States is nothing else than a margin of discretion depending on

³⁷ For a brief explanation, see Gragl (n 32) 671-673.

³⁸ Robert Walter, 'Entstehung und Entwicklung des Gedankens der Grundnorm' in Robert Walter (ed), *Schwerpunkte der Reinen Rechtslehre* (Manz 1992) 47; Robert Walter, 'Die Grundnorm im System der Reinen Rechtslehre' in Aulis Aarnio et al. (eds), *Rechtsnorm und Rechtswirklichkeit: Festschrift für Werner Krawietz* (Duncker & Humblot 1993) 85; Heinz Mayer, 'Rechtstheorie und Rechtspraxis' in Clemens Jabloner and Friedrich Stadler (eds), *Logischer Empirismus und Reine Rechtslehre: Beziehungen zwischen dem Wiener Kreis und der Hans Kelsen Schule* (Springer 2002) 319; Ralf Dreier, 'Bemerkungen zur Theorie der Grundnorm' in Hans Kelsen-Institut (ed), *Die Reine Rechtslehre in wissenschaftlicher Diskussion* (Manz 1982) 38, 39, note the 'function of the basic norm stipulating unity'

³⁹ Norbert Hoerster, *Was ist Recht?: Grundfragen der Rechtsphilosophie* (C.H. Beck 2006) 134, 138 ff; Peter Koller, 'Meilensteine des Rechtspositivismus im 20. Jahrhundert: Hans Kelsens Reine Rechtslehre und H. L. A. Harts 'Concept of Law' in Ota Weinberger and Werner Krawietz (eds), *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker* (Springer 1988) 129, 157 ff; Griller (n 4) 87-89; Werner Schroeder, *Das Gemeinschaftsrechtssystem: Eine Untersuchung zu den rechtsdogmatischen, rechtstheoretischen und verfassungsrechtlichen Grundlagen des Systemdenkens im Europäischen Gemeinschaftsrecht* (Mohr Siebeck 2002) 75 ff.

⁴⁰ For criticism, see András Jakab, 'Problems of the Stufenbaulehre: Kelsen's Failure to Derive the Validity of a Norm from Another Norm' (2007) 20 (1) *Canadian Journal of Law and Jurisprudence* 35-67.

⁴¹ Hans Kelsen, *The Pure Theory of Law* (University of California Press M. Knight trans. of *Reine Rechtslehre*, 2nd ed. 1960, 1967, reprinted 1978), 193-215, 215.

international law'.⁴² According to him, the lawmakers of public international law are not States, but the international community, acting through an international organ with supranational power.⁴³

Following this idea that norms can only derive from other norms, the conclusion drawn would have to be that any national law is derived from EU law, and EU and national law from international law. This, however, is an argument, which does not reflect reality.⁴⁴ Indeed, the CJEU famously postulated the 'autonomy of the Community legal order'⁴⁵ and introduced the 'direct effect'⁴⁶ of EU law, which has been interpreted by some voices as a monistic approach.⁴⁷ Nevertheless, it would be, even for the most progressive EU Constitutional lawyers, a step too far to argue that all MS legal orders derive from EU law.

The fatal blow for monism with regards to EU law is the relationship between EU law and international law, which appears to show even dualistic elements.⁴⁸ This 'Janus face' is inconsequent—at least when trying to uphold the underlying assumptions of Monism *and* Dualism.⁴⁹

While it is important to consider the current dichotomy of legal sources of international, EU and national law, a common normative framework is equally important. Such a framework is necessary to acknowledge the intertwinements of those three legal orders and to enable a norm conflict solution for the norm conflicts arising from this intertwinement. Hence, the changes in the legal landscape forces us to leave behind the almost one-

⁴² Verdross (n 8) 35 (translated by the author).

⁴³ Verdross (n 8) 48 ff. But see Krabbe (n 31) 305-309.

⁴⁴ For criticism of the other monistic concept with the primacy of national law (which would consequently make international and supranational law governed by almost 200 diverging national laws), see Kirchmair (n 2) 681 note 12.

⁴⁵ Case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66; Case C-284/16 *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158 para 33.

⁴⁶ Case C-26/62 *Van Gend & Loos* ECLI:EU:C:1963:1.

⁴⁷ Kirchmair (n 2) 680 with further references in note 10.

⁴⁸ Compare only Case C-402 & C-415/05P, *Kadi v Commission* EU:C:2008:461: UN law and EU law 'originate from distinct legal orders'. Cf Kirchmair (n 2) 683-5 with further references.

⁴⁹ See for this conclusion in more detail Kirchmair (n 2) 685-90.

hundred-year-old theories of monism and dualism. Major developments force us to seek an adequate theoretical framework which fits the reality of our time.

Main claims of dualism and monism are summarized in the following table.

Table 1: Dualism & monism overview

	Dualism	Monism
Presuppositions	<p>International and national law have:</p> <ul style="list-style-type: none"> - different addressees; - different content (international law is purely inter-State law); - different sources. 	<p>Neo-Kantian epistemology ('manner of cognizance constitutes the object').</p> <p>Norms can only derive from other norms.</p>
Theoretical Outcome	<p>International and national legal orders are</p> <ul style="list-style-type: none"> - separated ('two circles, which possibly touch, but never cross each other', <i>Triepel</i>) and - based on different grounds of validity. 	<p>If international law is law, the logical consequence is that both national and international law must be seen as a unitary legal order ('unity of the legal world order', <i>Verdross</i>).</p> <p>Either international/EU law derives from national law or national law derives from international/EU law.</p>
Legal Consequences	<p>Norms must be incorporated from one legal order into another.</p> <p>Legal subjectivity of international organizations (be it the UN or the EU) would have one</p>	<p>Chain of validity ('<i>Stufenbau nach der rechtlichen Bedingtheit</i>').</p> <p>Ultimate ground of validity is the famous basic norm ('<i>Grundnorm</i>').</p>

	international and x-national grounds of validity.	
Failure	Presuppositions outdated.	Remains a theory focused on epistemology. Norm conflict solution is highly hypothetical.

2. Global Legal Pluralism

Another very prominent and more recent account of legal orders and their relationship is global legal pluralism.⁵⁰ Eugen Ehrlich studied, as he put it, the 'living law' of the Bukovina at the beginning of the 20th century.⁵¹ Because of his seminal studies Ehrlich is nowadays referred to as one, if not the founding father of legal sociology.⁵² Triggered by the findings of Ehrlich, a common understanding of pluralism is nowadays 'the presence in a social field of more than one legal order'.⁵³ From the vantage point of two different legal authorities present in the same social field, which can also be found to exist in colonial situations, 'legal pluralism' also became a key concept in

⁵⁰ Paul S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Oxford University Press 2012); Mireille Delmas-Marty, *Les forces imaginantes du droit (II): Le pluralisme ordonné* (SEUIL 2006); Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Hart Naomi Norberg trans 2009) 44; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010); giving an overview Ralf Michaels, 'Global legal pluralism' (2009) 5 *Annual Review of Law and Social Science* 243–262.

⁵¹ Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (Duncker & Humblot 1913) 313.

⁵² Manfred Rehbinder, *Die Begründung der deutschen Rechtssoziologie durch Eugen Ehrlich* (Duncker & Humblot 2nd ed 1986).

⁵³ John Griffiths, 'What is legal pluralism?' (1986) 24 *Journal of Legal Pluralism* 1–47; Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869–896; Jacques Vanderlinden, 'Le pluralisme juridique: essai de synthèse' in John Gilissen (ed) *Le Pluralisme juridique* (Université Libre de Bruxelles 1971) 19–56, 19.

international law.⁵⁴ Roughly from the 1990s onwards, legal scholarship began to embrace the notion of legal pluralism. Berman describes the shift from anthropologically orientated studies towards what he coins 'global legal pluralism' as follows: Formerly, studies were aimed at two distinct legal orders within the same territory, where usually one legal order was hierarchically superior to the other. Moving away from this hierarchical understanding, legal scholars started to understand these different legal orders as 'bidirectional, with each influencing (and helping to constitute) the other'.⁵⁵

Global legal pluralism correctly describes the massive increase in international actors, norms and tribunals as well as adjudicators. Following this descriptive analysis an important question is how we ought to deal with or even solve those legal conflicts resulting from plural, overlapping legal claims. In this regard, it is striking to see that pluralists tend to oversimplify and exaggerate contrasting positions: 'sovereignists' stand against 'universalists'⁵⁶ and are then mediated by a 'pluralist framework'. Such framework is for instance conceptualised by Berman through his 'jurisgenerative constitutionalism'.⁵⁷ In other words, 'instead of trying to erase conflict, [he] seeks to manage it'.⁵⁸ To 'manage' norm conflicts he reviews a series of 'principles' which are of a procedural nature, instead of being substantial; namely these are 'procedural mechanisms, institutions, and practices'.⁵⁹ Likewise the French pluralist, Mireille Delmas-Marty, contrasts

⁵⁴ Brian Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375–411, 390; Paul S. Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155–1238, 1170.

⁵⁵ *Ibid* 1171.

⁵⁶ See the exaggerations made by Berman (n 54) 1180 stating that sovereignists 'reject the legitimacy of all communities but the territorially-defined nation-state' and have (at 1180) 'intrinsic reason to privilege nation-state communities over others', contrasting it with a radical universalist position stating (at 1189) that '[i]n contrast to a reassertion of territorial prerogative, a universalist vision tends to respond to normative conflict by seeking to erase normative difference altogether.'

⁵⁷ Paul S. Berman, 'Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism' (2013) 20 (2) *Indiana Journal of Global Legal Studies* 665–695.

⁵⁸ Berman (n 56) 1192; Berman (50) 145.

⁵⁹ Berman (n 56) 1192, and esp. 1196 ff. as well as Berman (50) 145, and esp. 152 ff.

'utopian unity' with an 'illusion of autonomy'⁶⁰ in order to propose to solve or soften this disparity with national margins of appreciation to order pluralism.⁶¹ As an example she mentions the principle of subsidiarity in the law of the European Union.⁶² Even though the suggested solutions to manage or soften norm conflicts are rather restrictive and argue, for instance in the case of Berman, only in favour of some procedural rules (neglecting any hierarchical fundamental norms), such claims remain in the realm of *ought*. Prescriptive claims which hold that these rules should be valid in order to settle norm conflicts need to be well justified. By moving in the realm of *ought*, the suggested solutions are also confronted with such problems, that even reductionist procedural mechanisms might be accused of having a strong normative flavour. Thus, also proposals for thin procedural mechanisms are also somewhat overarching substantial value claims.⁶³

Samantha Besson in turn suggests that democracy 'ought rather to be the supercriterion' because of its superior legitimacy when 'deciding on the others'. Yet, also she is aware that identifying democracy in international and national norms 'remains extremely complex'.⁶⁴ And, one might wish to add, democracy is not always the super-criterion of legal orders whose norms

⁶⁰ Delmas-Marty (n 50) 44.

⁶¹ Delmas-Marty (n 50) 44.

⁶² Delmas-Marty (n 50) 45-46.

⁶³ For this critique of Berman, see Alexis Galán and Dennis Patterson, 'The limits of normative legal pluralism: Review of Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*' (2013) 11 (3) *International Journal of Constitutional Law* 783-800, esp. at 793 ff. For a response see Paul S. Berman, 'How legal pluralism is and is not distinct from liberalism: A response to Alexis Galán and Dennis Patterson' (2013) 11 (3) *International Journal of Constitutional Law* 801-808. C.f. further critically also Ralf Michaels, 'On liberalism and legal pluralism' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds.) *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press 2014) 122-142, 141: 'his [Berman's] managerialism also presupposes some superior position from which such management is possible.'

⁶⁴ Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Jeffrey L. Dunhoff and Joel P. Trachtman (eds.) *Ruling the world? Constitutionalism, international law, and global governance* (Cambridge University Press, 2009) 381-408, 405.

might be in conflict. In Krisch's account, a somewhat exaggerated⁶⁵ 'foundational constitutionalism' stands against 'softer network forms of international cooperation' which are, again, mediated by pluralism.⁶⁶ So even the most radical pluralist, Krisch, bases the norm conflict resolution—at least in some cases—upon what he calls 'the *construction* of interface *norms*'.⁶⁷ In his opinion, the pluralism is about orders which are linked and know certain forms of common decision-making.⁶⁸ Thus, also for him, there *ought* to be certain *norms* ('interface norms'), which 'regulate to what extent norms and decisions in one sub-order have effect in another'.⁶⁹ Yet, he immediately falls back on his radical pluralism when saying that these rules are established by each order for itself including steady risk of conflict.⁷⁰ His main argument is that in the post-national sphere '[u]nder conditions of strong fluidity and contestation, conflict rules face serious problems of adaptation to a changing environment' and 'are unlikely to be able to truly settle conflicts—they might remain ineffectual or even enflame conflicts further.'⁷¹ However, the consequence is that we actually lack a common (normative) norm conflict solution.

From this very brief overview we can conclude that most of the pluralists also think that there *should* be some kind of rules to assist norm conflict resolution. I argue in brief, that the question as to how we *ought to* deal with or even solve those legal conflicts (based on a (common) framework) resulting from plural, overlapping legal claims is quite different from a descriptive analysis. Already the identification of a conflict necessarily implies an overarching system.⁷² It is important to sharply distinguish between a

⁶⁵ See for this criticism Gregory Schaffer, 'A Transnational Take on Krisch's Pluralist Postnational Law' (2012) 23 (2) *European Journal of International Law* 565-582.

⁶⁶ Krisch (n 50) 300, 183.

⁶⁷ Krisch (n 50) 285 ff. [*italics* added by the author].

⁶⁸ Krisch (n 50) 288.

⁶⁹ *Ibid*, 285.

⁷⁰ *Ibid*, 286. However, note also that Krisch states later (p. 312) that these norms stem from the sub orders (at p. 286) and might clash.

⁷¹ Nico Krisch, 'Who is afraid of radical pluralism? Legal Order and Political Stability in the Postnational Space' (2011) 24 *Ratio Juris* 386-412, 407.

⁷² Alexander Somek, 'Monism: A tale of the undead' in Matej Avbelj and Jan Komárek (eds) *Constitutional pluralism in the European Union* (Hart 2012) 343-79.

descriptive analysis and a prescriptive proposal for norm conflict resolution. Moreover, I hold that such an overarching normative framework for norm conflict resolution needs to be a common normative framework of all overlapping legal orders.

Some pluralists might claim that they envision 'common' approaches. Still, I would answer that anything which is called plural can hardly provide for a genuinely common normative framework. I argue that it is more accurate to either stay within a purely descriptive analysis of current facts and describe them as pluralistic or move from descriptions to prescriptions. In other words, one must take account of arguing now in the realm of *ought*, by introducing, for instance, the thought that we *ought* to avoid conflicts, and, if they occur, that we *ought* to cooperate somehow to solve or mitigate them. This is what I think is the very first prescriptive step in the (global) legal pluralism debate.⁷³ Norm conflict identification and proper resolution must be based on a genuinely common normative framework which encompasses all affected legal orders. That means that a pluralistic picture without a common normative framework has no normative (legal) guidance for finding the final arbiter in legal norm conflicts.⁷⁴

Although global legal pluralism may provide a coherent descriptive account of current legal developments, it lacks a satisfying common prescriptive account. Accordingly, claims (for how to solve or why not to solve norm conflicts) which solely rest on the *description* of pluralistic orders do not suffice as a basis for a normative account. If approaches of legal pluralism resort to some sort of 'meta norms or principles' to solve norm conflicts,⁷⁵

⁷³ For a powerful critique of the hidden 'common point of reference' in pluralistic accounts see Klaus Günther, 'Normative legal pluralism – a critique', *paper presented at the 'Philosophical foundations of global law' conference* at the University of Cartagena, Colombia on 25 August 2016 (on file with the author). See also Klaus Günther, 'Normativer Rechtspluralismus: Eine Kritik' in Thorsten Moos, Magnus Schlette and Hans Diefenbacher (eds) *Das Recht im Blick der Anderen: Zu Ehren von Eberhard Schmidt-Aßmann* (Mohr Siebeck 2016) 43-62.

⁷⁴ Gragl (n 32) 693-695.

⁷⁵ Compare Berman (n 77) 665-95, with Delmas-Marty (n 50). With regards to constitutional pluralism, see Mattias Kumm, 'The Moral Point of Constitutional Pluralism' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 216, 220.

they too will need to justify these principles and to give reasons for such common accounts. Otherwise power asymmetries are difficult to avoid. The warning by Klaus Günther is pertinent in this debate: 'Historical experience teaches us that a pluralism of normative orders can rapidly become the victim of power asymmetries, or even bring forth such asymmetries'.⁷⁶

3. *Global Constitutionalism*

Before moving onto my own proposal, another brief section devoted to global constitutionalism is in order. Constitutionalism on a global, supranational, and national level is an important and wide-ranging concept. Due to the successful emergence of 'global constitutionalism' as a movement and interdisciplinary discipline many diverging issues are discussed under this influential label since its breakthrough in the 21st century.⁷⁷ Global Constitutionalism, as much as Constitutionalism, shares the aspiration of establishment as well as the normative guidance and limitation of governmental power. In other words, Constitutionalism 'refers to governance according to constitutional principles'.⁷⁸ We speak, thus, of a discourse which involves the 'framing, constituting, regulating, and limiting [of] power'⁷⁹ – be it either in a thin or in a thicker form.⁸⁰ The constitutionalization of international law is a project which is mainly interested in the substantial development of international law in the form of constitutional norms or principles (or of constitutional norms or principles of the EU for instance).⁸¹ Constitutionalism therefore is usually connected to certain key legal concepts such as the rule of law, human rights, democracy,

⁷⁶ Günther (n 73).

⁷⁷ Anne Peters, 'Constitutionalisation', Max Planck Research Paper Series No. 2017-08, 1, forthcoming in Jean d' Aspremont and Sahib Singh (eds) *Concepts for International Law - Contributions to Disciplinary Thought* (Edward Elgar).

⁷⁸ Jaako Husa, 'Global Constitutionalism – A critical view', Maastricht European Private Law Institute Working Paper No. 2016/11.

⁷⁹ Jean L. Cohen, *Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press 2012) 76.

⁸⁰ Wil Waluchow, 'Constitutionalism' in Edward N. Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2017).

⁸¹ For a critical overview of 'world constitutionalism', Diggelmann and Altwicker (n 8).

and inhibits a materially substantiated form of how law should be.⁸² Very often also a strong universal flavour is attached to such concepts on a global perspective.

Global Constitutionalism is facing a challenge brought by descriptive legal pluralism: solutions to norm conflicts might differ depending on the context. Thus, another context, so goes the main argument of contextualization, asks for different solutions as different conditions are in place.⁸³ Once we reveal that the very first prescriptive question is what we *ought* to do with norm conflicts, there are very likely to be very different solutions to different conflicts (and different legal orders involved) depending on the context.⁸⁴ This is acknowledged by understanding constitutionalism as a fragmented and contextualized concept,⁸⁵ 'a relatively consolidated form of global constitutionalism',⁸⁶ or to a certain extent also by Constitutional Pluralism.⁸⁷

⁸² For legal key concepts, see Jakab (n 9).

⁸³ For such a critique of the pluralistic account of Nico Krisch see also Schaffer (n 65) 579: 'The positive, empirically-grounded study of transnational legal ordering, in contrast, is important for building a normative approach grounded in philosophical pragmatism which recognizes the need for institutional variation in response to different contexts'.

⁸⁴ For a similar argument see also Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Ashgate 2009), ch. 3 relying on Robert M. Cover, 'The supreme court, 1982 Term-Foreword: Nomos and narrative', 97 (4) *Harvard Law Review*, 1983, pp. 4-68; and Robert M. Cover, 'Violence and the word', 95 *Yale Law Journal*, 1986, 1601-1629. However, it is important to highlight that my claim for contextualization is much simpler and thus less overladen than the claim Melissaris is making. While Melissaris's main target is a sceptical view of State law—or at least the link between State and law which is unnecessary in his eyes—my argument here is simply that when facing normative conflicts there are much likely to be various different solutions to deal with the conflict depending on the context. Thus I argue against a single — sometimes even not very clear prescriptive — claim of dealing with normative conflicts in the pluralistic world.

⁸⁵ Peters (n 77).

⁸⁶ Turkuler Isiksel, 'Global Legal Pluralism as Fact and Norm' (2013) 2 *Global Constitutionalism* 160-195, 190.

⁸⁷ See only Neil Walker, 'The Idea of Constitutional Pluralism' (2002) *The Modern Law Review* 65 (3) 317-359.

What still remains problematic is the specific request for *constitutional* norms, rules and principles. The relationship between legal orders must not always be of a constitutional dimension. Moreover, despite the fact that a relationship between different legal orders must not be guided by one specific constitution, there might still exist a legal relationship between certain legal orders. This holds true, even if we can speak of a Member State legal order as a constitutional order, and the EU legal order as a constitutional order. It is challenging to determine the relationship between these legal orders as it requires to establish which constitutional system has the final say.

Very likely, we will fall back to a sort of non-hierarchical relationship of the involved constitutional systems in order to avoid a subordination of one order under another. Trying to resolve these questions on a constitutional level might thus very likely lead to a 'constitutional stalemate'.

Therefore, I am sceptical about constitutionalism being a helpful concept with regard to the challenge of resolving norm conflicts between overlapping international, EU, and national legal orders. I doubt that constitutionalism is an appropriate concept to guide legal norm conflict resolution of those overlapping but different legal orders. On a global scale, we are well advised to take the descriptive account of global legal pluralism seriously. The massive increase in international actors, norms and tribunals, as well as adjudicators, simply makes it very difficult to speak of constitutionalism *de lege lata* (without definitely excluding the possible existence of a thin layer of global constitutionalism). A cautious assessment is that constitutionalism presumes too many substantial values for the envisaged common normative denominator in order to be a helpful concept for norm conflict solution arising out of the relationship between international, EU and national law.⁸⁸

⁸⁸ Michael Perry, *A global political morality: Human rights, democracy, and constitutionalism* (Cambridge University Press 2017), which envisages 'agapic sensibility' as the foundation for human dignity. Perry's statement illustrates how difficult such universal legal standards are 'this book is about the *political morality* of human rights [...] not about the *international law* of human rights' (*italics* original), p.2. For a critical account of the current state of EU 'constitutionalization', see Dieter Grimm, 'The democratic costs of constitutionalization: The European case' in Dieter Grimm, *Constitutionalism. Past, present, and future* (Oxford University Press 2015) 295.

If we agree that norm conflicts from different but overlapping legal orders should be avoided and if they appear that they should be resolved, then we need to look for appropriate concepts for such a task. I argue that we are in need of a common normative (legal) framework for resolution. Common in the sense that this normative framework is brought about in agreement by all affected legal orders. In other words, if we agree that 'stronger state[s should not be able to] lawfully force a constitutional position on another state or a stronger court on a weaker court, without any legal redress'.⁸⁹ Then, we are in need of such a common normative concept. Still, this article takes the stand that constitutionalism is not directly helpful for our question of the relationship of legal orders either.⁹⁰ Constitutionalization is more interested in the substantial development of international law in the form of constitutional norms or principles (or of constitutional norms of principles of the EU for instance) than in explaining the relationship between international, EU and national law.⁹¹

Table 2: Global Legal Pluralism & Global Constitutionalism overview:

	Global Legal Pluralism	Global Constitutionalism
Presuppositions	<ul style="list-style-type: none"> - Norm conflicts are positive. - Focus on a descriptive account. 	<ul style="list-style-type: none"> - Common values (and further necessities for constitutional unity). - Universality (at least for the claimed legal orders).
Theoretical Outcome	- <i>Description</i> of pluralistic orders as the basis for a normative account for norm conflict solution.	- The Constitution guides all embraced legal orders/norm conflicts.

⁸⁹ Pavlos Eleftheriadis, 'Cosmopolitan Legitimacy', *paper presented at the 'Philosophical foundations of global law' conference* at the University of Cartagena, Colombia on 25 August 2016 (on file with the author).

⁹⁰ Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) writing in the preface that 'Greater 'constitutionalization' of supranational or even international law threatens to rob constitutionalism of its political core.'

⁹¹ Klabbers (n 8) simply presuming it; Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht* (Springer 2012), refraining from strong normative claims. For a critical overview of 'world constitutionalism', Diggelmann and Altwicker (n 8).

Legal Consequences	- Potential norm conflicts without a common solution (individuals might face contradictory claims).	- Always constitutional (depending on the content of the constitution).
Failure	- No satisfactory common account for norm conflict solution. - Descriptive accuracy, but normatively wanting. - Praise of norm conflicts without a common solution.	- Presuppositions are too demanding ('burden of universality'). - Not flexible enough for diverging contexts.

4. *An Intermediate Conclusion*

A critical approach towards the theories of dualism and monism is now quite common.⁹² However, this does not mean that some elements of these theories cannot be applied in a meaningful way and thereby they might still be useful tools to understand specific processes of the relationship between international, EU and national law.⁹³ And, despite all the criticism these theories faced, their persistence is remarkable. Dualism as well as monism are still referred to in many textbooks, they are present in case law,⁹⁴ and in scholarly work.⁹⁵ Also in practice, many (national) legal orders are still often referred to as being 'dualistic' or 'monistic'. Thus, there is a need to make the critical points as clear as possible in order to explain why they are of no help in answering the question posed by this article.

⁹² Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *ICON* 397, 400 denoting those theories 'intellectual zombies'; Kirchmair (n 2); Lando Kirchmair, 'Is the EU legal order the tombstone of the dualistic and the monistic doctrine?' in Michael Thaler and Michel Verpeaux (eds), *La recherche en droit constitutionnel comparé* (L'Harmattan 2014) 71-86.

⁹³ Jakab (n 40).

⁹⁴ The German Constitutional Court, BVerfGE, III, 307 (Görgülü).

⁹⁵ Gragl (n 32); as well as Paul Gragl, 'In defence of Kelsenian Monism: Countering Hart and Raz' (2017) 8(2) *Jurisprudence* 287-318.

Moreover, this article holds that (global) legal pluralism cannot offer a satisfying normative account for norm conflict resolution between international, EU and national law either. Hence, prescriptive proposals to solve legal conflicts arising from different legal orders on the global plane are better not termed 'pluralistic'. I shall suggest in this article that it is more precise to refer to a necessarily *common* framework which addresses the question as to how those conflicts should be resolved *together* or at least in a way acceptable to all parties.

Finally, this article holds that this common framework depends hugely on the context. Thus, solutions are more likely to be found if we focus on specific contexts instead of trying to provide universal solutions for different situations. This is the reason why global constitutionalism or global law cannot provide universal solutions for norm conflict resolution between international, EU and national law. They do not take the 'burden of universality' seriously enough or end in a 'constitutional stalemate'. Broadly speaking, this is because it is usually far too difficult in our highly complex and dynamic world to come up with global or truly universal solutions.

If my analysis so far is correct, then all major theories on the relationship between legal orders suffer from serious flaws when trying to answer the question as to where to find the decisive source in legal norm conflicts. At the same time, a sound theoretical concept is essential for the relationship between legal orders. Hence, I propose my own theoretical concept: the theory of the law creators' circle. Arguably, this concept provides a sound theoretical foundation without becoming ensnared in the flaws attributed to the existing theories, and it should provide a correct answer to the question posed.

III. TLCC – A STRUCTURAL ANSWER

My aim, with what I call the theory of the law creators' circle, is to conceptualize in a very abstract way how we could principally design or, rather, understand the structural relationship between legal orders in general. The goal is to obtain a common denominator which is abstract enough to capture principal issues of relationships between legal orders but still provides enough normative guidance in order to bring about concrete results. How particular situations are analyzed might then differ significantly

depending on which context we are looking at. Only then we are able to answer the question as to how we can know who has the final say.

1. *The Underlying Understanding of Law*

In order to analyze the relationship between international, EU and national law properly, I establish a working hypothesis: a common denominator of international, EU and national law must be stipulated to enable a transparent and methodologically coherent analysis of the relationship. The legal concept underlying the theory of the law creators' circle⁹⁶ concentrates on those legal aspects especially relevant for the relationship between international, EU and national law. Because international law, EU law and national law are different legal fields to a certain extent, an abstract understanding of law is necessary in order to include all three fields under one common denominator. The common denominator is vital because it enables a comparison of those different fields. In order to avoid using sociological, anthropological, psychological or other reasoning embedded in natural sciences,⁹⁷ a hypothetical basis is assumed.⁹⁸

⁹⁶ For an extensive account of this theory as applied to the relationship between public international law and the Austrian legal order, see Kirchmair (n 12). For an introduction to the theory (and further references) and its application to international treaties and their relationship to the Austrian as well as the Hungarian legal order as well as the former abbreviation TREK, from the German term 'Die Theorie des Rechtserzeugerkreises', see Kirchmair (n 10), which is an early version of chapter III of this Article.

⁹⁷ Jan Klabbers, *An introduction to international institutional law* (Cambridge University Press 2002) 34; Lando Kirchmair, 'How (not) to argue for the relation between natural sciences and law: Why the thesis of an innate 'Universal Moral Grammar' and its relevance for law as argued by John Mikhail fails' (forthcoming) *Archiv für Rechts- und Sozialphilosophie*.

⁹⁸ See also Loos arguing that legal science as much as social sciences pursue meaningful consequences based on hypothetically presumed values (which makes them normative sciences), Fritz Loos, *Zur Wert- und Rechtslehre Webers* (Mohr Siebeck 1970) III. For the change from a real to a hypothetical contract, see Koller (n 99) 14, who quotes Immanuel Kant, *Über den Gemeinspruch: 'Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis'* (Berlinische Monatsschrift 1793) 153 as the first to express the fiction of a social contract.

The definition of law as well as its origins start in the 'legal desert'.⁹⁹ The legal desert shall be understood as a legal vacuum: a neutral, pre-legal state without any further specifications. Of course, such a starting point provokes reflexive associations to social contract theories. The legal desert was considered empirically as an anarchic state in which everyone is at war with everyone else, famously expressed as the 'state of nature' by Thomas Hobbes.¹⁰⁰ Natural rights were conceived to be already existing and just to be protected by a social contract by John Locke.¹⁰¹ Jean-Jacques Rousseau thought it necessary to discard everyone from their property in order to enable the formation of the '*volonté générale*',¹⁰² which is considered to be a prerequisite for the formation of common interests in the first place.

As I do not focus on how a just society can be conceived, the following assumption shall suffice: in the legal desert, a consensus between two or more individuals is widely considered to be *the* possibility which allows the establishment of a binding legal rule to organize cohabitation.¹⁰³ Consensus thereby is understood to serve as a tool for objectification of individual interests¹⁰⁴ and does not aim to establish any values or tools that might

⁹⁹ Compare the theories of the social contract summarized by Peter Koller, *Neue Theorien des Sozialkontrakts* (Duncker & Humblot 1987).

¹⁰⁰ Thomas Hobbes, *Leviathan* (1651, *Leviathan*, German translation by *J. Schlösser* 1996) 96 ff.

¹⁰¹ John Locke, *Zwei Abhandlungen über die Regierung* (1690 *Two Treatises of Government*, German translation by *H. J. Hoffmann* 1977) 201 ff.

¹⁰² Jean-Jacques Rousseau, *Vom Gesellschaftsvertrag oder Grundsätze des Staatsrechts* (1762, *Du contract social; ou principes du droit politique*, German translation by *H. Brockard* 1986) 1. book, 6. chapter, 17 f.; Koller (n 99) 25.

¹⁰³ Kirchmair (n 12) 46 ff. Compare thereto also *Weinberger's* argument aiming at disclosing natural law based theories arguing that legal positivism originates from non-cognitivism holding that it is impossible to cognize right law and justify norms cognitively Otta Weinberger, *Norm und Institution – eine Einführung in die Theorie des Rechts* (Manz 1988) 72 f.

¹⁰⁴ The notion of objectivity therefore refers only to an approximation to objectivity. Compare also discourse theory Robert Alexy, 'Diskurstheorie und Menschenrechte' in Robert Alexy (ed), *Recht, Vernunft, Diskurs – Studien zur Rechtsphilosophie* (Suhrkamp 1995) 127, 129 who circumscribes discourse theory as a procedural theory of practical validity. Jürgen Habermas, *Die Einbeziehung des Anderen* (2nd ed. Suhrkamp 1997) 299f; Jürgen Habermas, *Die postnationale Konstellation* (Suhrkamp

indicate how a just society shall be organized. While the point of departure is very similar to most social contract theories—the 'legal desert'—the aim of this analysis contrasts sharply with the aim of political philosophy as the goal of this article is much more moderate.

Choosing this hypothesis behind the law creators' circle aims at only elucidating the structural relationship between international, EU and national law without saying how society or the State should be organized (or without arguing, for instance, whether the EU has a constitution or not). Yet, it is not a descriptive theory basing the law on sociological facts. The TLCC is a proposal for normative guidance of norm conflict resolution between different legal orders. Whether the hypothetical legal desert is best understood by imagining a natural disaster or other events is left to the reader's imagination. This hypothetical starting point shall guarantee a consistent definition of law. That is, the definition of international *law*, EU *law*, and national *law* must be uniform. For if it is not, the norm conflict resolution between the different legal orders cannot work properly.¹⁰⁵ Analogous to the historical idea of social contract theory, the consensus element is based on the abstract principles of *pacta sunt servanda* and *pacta*

1998) 175; and id., *Faktizität und Geltung – Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992) 138 stating that those regulations are legitimate which alle possibly affected persons might approve as participants in rational discourse. Seyla Benhabib, 'Another Universalism: On the Unity and Diversity of Human Rights' 81 (2007) *Proceedings and Addresses of the American Philosophical Association* 7, 21. This, however, is not meant to suggest that international, EU or national law are the result of a power free rational discourse. It merely shall indicate the need to objectify individual interests.

¹⁰⁵ Yet, it is important to clarify that this definition of law is not supposed to be superior to any other definition of law. Particularly consent as a source of law has been criticised recently. See only Andrew T. Guzman, *Against Consent* 52 (2012) *Virginia Journal of International Law* 747-790. My response regarding this so-called consent problem is twofold. First, I argued elsewhere (see, Lando Kirchmair, *What came first: the obligation or the belief? A renaissance of consensus theory to make the normative foundations of customary international law more tangible* 59 (2017) *German Yearbook of International Law* 289-319) that there is still something beneficial in consent as a source of (customary international) law. Second, the definition of law made in this article is due to the task of finding a definition of law abstract enough to serve as a common denominator of international, EU and national law.

tertiis.¹⁰⁶ Those principles apply due to pre-legal, reasonable¹⁰⁷ reasons. These pre-legal principles must not be chosen arbitrarily. Their origin needs to be disclosed, because the assumed fiction should not deviate from conceivable or even already scientifically proven pre-conditions. The pre-legal application of the *pacta sunt servanda* rule is based on the assumption that all individuals participating in a consensus must not deviate from the adopted compromise in order not to violate the achieved compromise.¹⁰⁸ Another motivation not to violate the achieved compromise is that any violation could endanger the successful adoption of a future compromise, which, for individuals, would again be positive.¹⁰⁹ Irrespective of the difference between compromise and consensus (not every consensus must be a

¹⁰⁶ Koller (n 99) 12f.

¹⁰⁷ John Rawls, *Politischer Liberalismus* (1998, German translation by Wilfried Hinsch, Political liberalism, 1993) 120, note 1.

¹⁰⁸ Norbert Hoerster, *Was ist Recht? Grundfragen der Rechtsphilosophie* (C. H. Beck 2006) 133 holding that justification of legal evaluation is reliant to ethical premises which in turn are related to a compromise of individual interests.

¹⁰⁹ Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre* (1797) II. main part 2. Chapter § 19 especially 100 f stating that holding a promise is a postulate of pure reason. Compare also John L. Brierly, *The law of nations* (Oxford University Press 1963) 56: 'The ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.'

C.f. [even though relating to *pacta sunt servanda* and international treaties] Georg Dahm, *Völkerrecht*, Vol. I (De Gruyter 1958) 12, especially n. 17 holding that the minimum set of international legal order must include *pacta sunt servanda*, which holds true for practical reasons. See also Jost Delbrück, 'Begriff, Geltung u. Erscheinungsformen des Völkerrechts' in Georg Dahm et al. (eds), *Völkerrecht*, Vol. I/1 (2nd ed De Gruyter 1989) 27, 37, by saying who counts consens as a source of law implies *pacta sunt servanda* C.f. id., 'Verbindlichkeit und Geltungsbereich der Verträge' in Georg Dahm et al. (eds), *Völkerrecht*, Vol. I/3 (2nd ed De Gruyter 2002) 600, 600 f, stating that *pacta sunt servanda* and *pacta tertiis* are self-evident 'ius necessarium'. See also Jules Basdevant, 'Règles generals du droit de la paix' 58 (1936) *Recueil des Cours* Vol. IV 471, 642. C.f. Hans Wehberg, 'Pacta sunt servanda', 53 (1959) *American Journal of International Law* 775, 782 and providing an overview Kirsten Schmalenbach, 'Article 26' in Oliver Dörr/Kirsten Schmalenbach (eds), *Vienna convention on the law of treaties – A commentary* (Springer 2012) para. 13-22 with further references.

compromise), these notions are used as synonyms here. This includes the assumption that individuals have a reciprocal interest in forming legal rules to coordinate cohabitation and to act cooperatively.¹¹⁰ The compromise is thus based on the general assumption of creating positive effects for all participating individuals. This assumption seems to be justified precisely because, without it, a binding consensus would be senseless. Contrary to social contract theories, these assumptions are not made in order to establish principles of justice¹¹¹ or to legitimize specific forms of a societal organization.¹¹² Without proposing a material content of *just* law, structural arguments regarding the connection of individuals through consensus—in other words, law—shall dominate the articulated understanding of law.

A situation where all individual interests are not represented equally can no longer be considered a consensus according to this definition. This would be the case, for instance, in situations in which individuals are discriminated or a minority lacks acceptance. The disadvantaged individual or minority has the *de facto* possibility of revolting against this imposed consensus. This is reflected in the pre-legal principle *pacta tertiis nec nocent nec prosunt*, which is analogous to the *pacta sunt servanda* principle, held to be pre-legally valid. If these principles are also reflected in positive law, they become a declaratory regulation, which renews but does not establish their validity. However, it

¹¹⁰ For an interesting analysis arguing that rules are a cognitive phenomenon based on an inborn (moral) competence similarly to the language faculty brought up by Chomsky, see Matthias Mahlmann, *Rationalismus in der praktischen Theorie – Normentheorie und praktische Kompetenz* (2nd ed Nomos 2009). See also an overview of the current debate in evolutionary psychology given by Michael Tomasello and Amrisha Vaish, 'Origins of Human Cooperation and Morality' (2013) *Annual Review of Psychology* 231 ff. Lando Kirchmair, 'Morality Between Nativism and Behaviorism: (Innate) Intersubjectivity as a Response to John Mikhail's John Mikhail's 'Universal Moral Grammar' 37(4) (2017) *Journal of Theoretical and Philosophical Psychology* 230-260.

¹¹¹ John Rawls, *Eine Theorie der Gerechtigkeit* (1975 German translation by H. Vetter, A theory of justice, 1971); id., *Das Recht der Völker* (2002 German translation by W. Hirsch, The law of peoples, 1999).

¹¹² Koller (n 99) 17, who indicates that social contract theories have—on the one hand—to determine an acceptable starting point allowing for a fair agreement. On the other hand, these social contract theories aim to show which principles find reasonable acceptance by all participants.

reinforces the importance of these principles and therefore strengthens the pre-legal assumptions made. In this regard, the choice for consensus seems to be justified to a certain extent by the fact that consensus has been positivized as an important source of law in international law.¹¹³ Moreover, EU law is actually the prime example of a legal order which is based on a real (founding) consensus: the treaties.

Another parallel to social contract theories is the assumed equality between all individuals. This assumption was based on Thomas Hobbes's argument of empirically equal human beings¹¹⁴ and John Locke's presupposed equality among individuals as a natural right.¹¹⁵ Jean Jacques Rousseau also acknowledged equality of people as a fundamental precondition for his version of the social contract,¹¹⁶ as did John Rawls in his famous 'veil of ignorance'.¹¹⁷ Being aware of the importance of equality amongst individuals, this article will assume that equality.

In order to analyze the relationship between international, EU and national law, it is necessary to outline the underlying concept of law. Following the aforementioned conditions, law is simply defined as a binding consensus (*Willensübereinkunft*) of all participating individuals. The consensus element may be fulfilled by different actions, such as explicit, implied or tacit acceptance.¹¹⁸ However, only consensus between two or more individuals

¹¹³ Art. 26 and 35 VCLT.

¹¹⁴ Compare Hobbes (n 100) 102 on the empirical equality of humans in the state of nature. See for criticism Koller (n 99) 18 f.

¹¹⁵ Locke (n 101) 203.

¹¹⁶ Rousseau (n 102) 1. book, 6. chapter, 17 f, who argues even for expropriation in order to achieve equality.

¹¹⁷ Rawls (n 111) 36. However, see also criticism of the idea of equality by Robert Nozick, *Anarchie, Staat, Utopie* (1974 Anarchy, State, and Utopia, German translation by H. Vetter 1976) 214 ff. James M. Buchanan, *Die Grenzen der Freiheit, Zwischen Anarchie und Leviathan* (1975 The Limits of Liberty, Between Anarchy and Leviathan, 1984) 1 ff, who also designed his social contract theory without individual equality. Koller (n 99) 19, 188. Nevertheless, see Buchanan (n 117) 2 on the necessity for methodological individualists to recognize fellow human beings.

¹¹⁸ Compare for such an understanding of consensus also Rüdiger Wolfrum and Jakob Pichon, 'Consensus' in Rüdiger Wolfrum (ed), *MPEPIL online edition* (2010) para 3.

may produce an objective, i.e. common legal rule.¹¹⁹ The consensus produces objectivity because it unifies the individual interests of the participants. The resulting overlapping interest, for example, a common rule to organize cohabitation, becomes objective through the binding consensus. Consensus is furthermore understood in an abstract way, with collective will being the central idea. How this common will is ascertained, however, shall not be analyzed. On the contrary, it will be assumed as a starting point. The conviction of the individuals concerned with whether they can establish a positive compromise is assumed to be a sufficiently stabilizing element for this legal concept and its binding character.¹²⁰ The pre-legal, reasonable *pacta sunt servanda* principle reflects this.

2. *The Theory (of the Law Creators' Circle)*

A. Definition

The law creators' circle is defined as the circle of two or more individuals, which originates in the creation of one single binding consensus. In other words, the law creators' circle originates through the creation of law, which rests upon the consensus of individuals. If the very same individuals create another consensus, this is to be considered as a supplement to the same law creators' circle. As a consequence, individuals may only create a binding consensus for themselves.¹²¹ Accordingly, law creators are only the individuals, who are simultaneously the creators and the addressees of the consensus.

In terms of their relationship to each other, the individuals who do not share a single law creators' circle remain in the legal desert. Figure 1 below, illustrates two law creators' circles which are constituted by wholly different

¹¹⁹ Weinberger (n 103) 73.

¹²⁰ The binding character is considered to be an implied element of the consensus. Eugenio Bulygin, 'Das Problem der Geltung bei Kelsen' in Stanley L. Paulson and Michael Stolleis (eds), *Hans Kelsen – Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* (Mohr Siebeck 2004) 80, 88f with further references at p. 95; Matthias Knauff, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem* (Mohr Siebeck 2010) 25, who speaks of a specific characteristic of law that legal validity rests on useful conventions.

¹²¹ See the above-mentioned pre-legal *pacta tertiis* principle, II.

individuals — for example, individuals A, B and C on the one hand and D, E and F on the other hand.

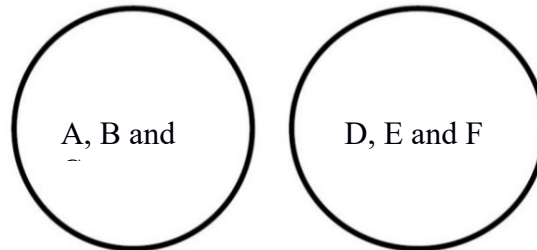


Figure 1

However, this does not imply any judgment of the legal desert. The legal desert is a neutral, pre-legal status. Furthermore, there is the need to stress once again: one single consensus on a specific matter suffices to constitute a law creators' circle between the participating individuals.

B. Conflicts between Different Law Creators' Circles

Individuals who do not share the same law creators' circle are, in relation to each other, in the legal desert (see Figure 2 below; the different colours illustrate that these two law creators' circles established rules with non-identical content). However, this is just theoretically relevant because nowadays *ius cogens* rules — even though in a very fundamental and limited sense — provide practically for universal fundamental rules by the largest possible law creators' circle. Naturally, the status of a legal desert regarding a specific subject matter lasts only until individuals join a law creators' circle and consent upon this specific subject matter.

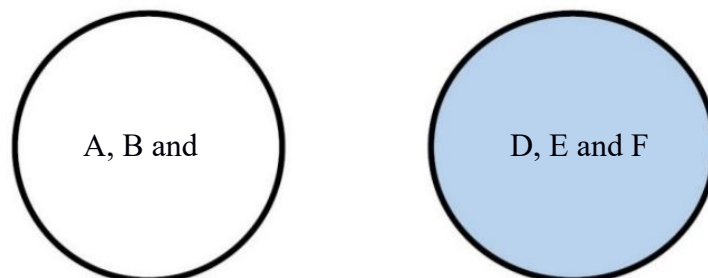


Figure 2

Different law creators' circles are less of a concern. Yet if they overlap, problems may arise. Law creators' circles overlap if an individual is, at the same time, a member of two different circles whose total members are not fully identical (see Figure 3 below). This would be the case, for instance, if the white circle includes individuals A, B, and C and the blue circle includes individuals C, D, and E. Recall that individuals participating in one law creators' circle are by definition creators and addressees of the consensus.

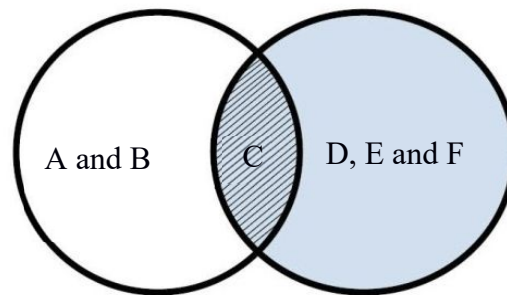


Figure 3

Overlapping circles are unproblematic if they include completely diverging subject matters (see the different colours of the circles in Figure 3 above, which indicate that the white and the blue circles relate to different subject matters). However, if one or more individuals are at the same time members of different but partly overlapping law creators' circles regulating the same subject matter, they are possibly conflicting (see Figure 4 below).

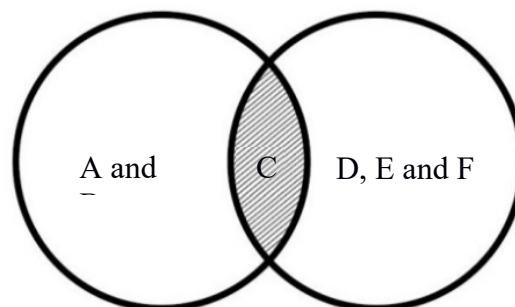


Figure 4

A norm conflict arises if the application of any right or duty in one circle is contradictory to any right or duty in the other circle of which the same individual is also a member (see Figure 4 above).¹²² Once a consensus has been established by a law creators' circle, it must not be infringed upon by a single individual, either by simply breaching the consensus without the acceptance of the other members of this law creators' circle, or by stating a conflicting consensus with other individuals (*pacta sunt servanda* as well as *pacta tertiū*).¹²³ In other words, if A, B, and C agree that x is a forbidden action, B, C, and D must not allow x either. However, regarding the solution of this conflict of norms, we remain in the legal desert. As far as different law creators' circles are concerned, the well-known norm conflict solution rules like the maxim *lex posterior* and *lex specialis* do not provide a solution. It is important to emphasize that these norm conflict solution rules may only provide for a solution within one and the same law creators' circle. This, however, does not

¹²² Hans Kelsen, *Allgemeine Theorie der Normen* (Manz 1979) 99; Similarly Kelsen (n 31) 209. See also Ewald Wiederin, 'Was ist und welche Konsequenzen hat ein Normkonflikt' 22 (1990) *Rechtstheorie* 311, 318, who specifies this by stating that also conflicts between commanding and permitting norms are norm conflicts at 324. This also applies in cases of de facto inability (316). See also Erich Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory', 17 (2006) *European Journal of International Law* 395, 418 who also argues in favor of a broad definition of norm conflicts. See also Kirsten Schmalenbach, 'Article 53' in Oliver Dörr/Kirsten Schmalenbach (eds), *Vienna convention on the law of treaties – A commentary* (Springer 2012) para 54. Cf. Karl Engisch, *Die Einheit der Rechtsordnung* (Winter 1935), p. 46; and *id.*, *Einführung in das juristische denken* (7th ed. Kohlhammer 1977) 162. Cf. Thomas Zoglauer, *Normenkonflikte – zur Logik und Rationalität ethischen Argumentierens* (Frommann-Holzboog 1998) 125 ff. For a more narrow definition, which is often used on the international level, see Wilfred Jenks, 'The conflict of law-making treaties', 30 (1953) *British Yearbook of International Law* 401, 426: 'A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.' And also Gabrielle Marceau, 'Conflicts of norms and conflicts of jurisdictions: The relationship between the WTO agreement and MEAs and other treaties', 35 (2001) *Journal of World Trade* 1081, 1084.

¹²³ Erich Vranes, 'Lex superior, lex specialis, lex posterior – Rechtsnatur der 'Konfliktlösungsregeln'', 65 (2005) *Heidelberg Journal of International Law* 391, 402, n. 48.

prevent a norm conflict solution circle from being created which embraces both conflicting circles (see Figure 5 below).

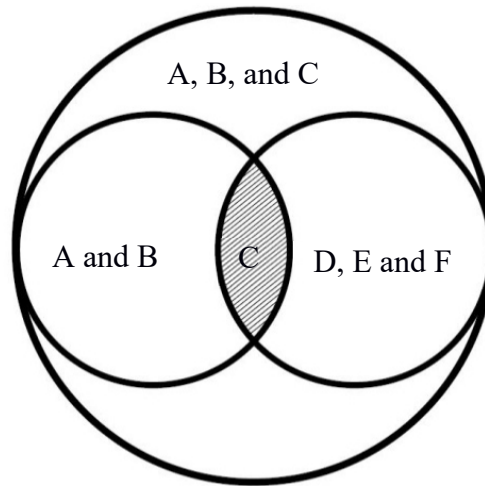


Figure 5

But if there is no embracing conflict solving circle, those individuals remain in the norm conflict solving legal desert. Of course, this does not mean that conflicts might not be solved peacefully and satisfactorily. But there is no legal norm conflict solution rule. The theory of the law creators' circle does not provide any solution for the constellation of partly overlapping and conflicting law creators' circles either.

C. The Theory of the Larger Law Creators' Circle

The theory of the larger law creators' circle is based on the aforementioned pre-legal assumptions, which are the principles *pacta sunt servanda* and *pacta tertiis*. According to these pre-legal principles, the TLCC is fundamental for all agreed consensuses. If a legal rule has been created by a consensus, unilateral abrogation is no longer possible. The rule of the larger law creators' circle always prevails over the rule of the smaller circle, *if* — and this is important — *all* members of the smaller circle are also members of the larger circle — which means that the smaller circle is absorbed by the larger circle. (See figure 6 below, which illustrates that A, B, and C constitute the smaller

circle that is completely absorbed by the larger circle of A, B, C, D, and further individuals and so on and so forth).

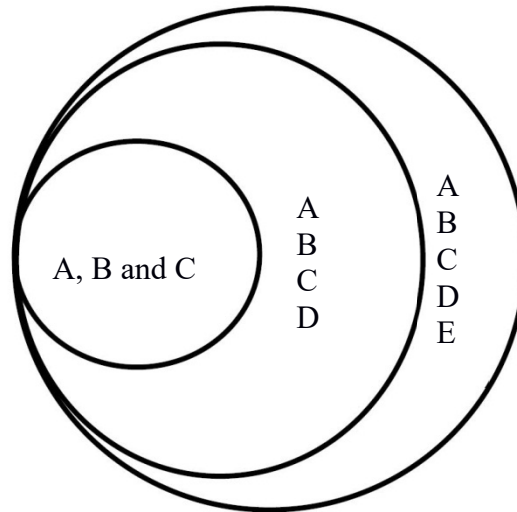


Figure 6

To illustrate this, I will discuss an example: if A, B, and C (the larger law creators' circle) ban smoking in their shared flat, then A and B alone (the smaller law creators' circle) may not re-instate smoking or smoke in their flat without C's acceptance. Consequently, the content of the agreed rule is decisive. The consensus of the larger law creators' circle must not be violated or hindered by a conflicting rule set up by the smaller law creators' circle. If the consensus were to be violated by one or more individuals, this would be a clear breach of the consensus of the larger circle and would thereby violate the pre-legal principle *pacta sunt servanda*.

If the smaller circle does not break a rule of the larger circle, then the smaller circle is free to agree on whatever rules its members would like. For instance, it may agree upon further, more specific rules as long as they do not conflict with a rule of the larger circle. To illustrate this, I re-visit the 'smokers' example: in this scenario, A, B, and C ban smoking again, not only in their flat but also in the pub they frequent. At first glance, it seems less likely that A and B should not be allowed to smoke a cigarette in the pub if they wish to do so when going out one evening without C. To understand this, it is important to take a close look at the consensus agreed upon between A, B, and C. It is

essential to know whether they agreed to stop smoking in general or just when in each other's company. If the agreed consensus aims at preventing them from smoking in general — regardless of the place and whose company they are in — it is only possible for all three of them together to change or end their agreed consensus.

The change of location from their flat to a public bar is intended to show that the content of the agreed consensus is crucial. It is much more likely that they would agree to a ban on smoking in their flat, even if for different reasons, than they would do so in general (also in the pub). Therefore, one might think that A and B are free to smoke in the bar if the consensus agreed upon by A, B, and C does not contain any specifications or any explicit command forbidding them to deviate from this. But if it does include a specification or an explicit command and it is clear that the consensus is a general ban on smoking, they may only override or change it by all three acting together. The command not to deviate from the agreed consensus might, furthermore, be implicitly found in the smoking ban in relation to the shared flat. Without any further specification of the consensus, we can only assume that the command not to deviate originated from the consensus itself. In the pub example, an explicit command stating that a deviation from the agreed ban is or is not allowed might be seen as necessary in order to clarify that A or B, alone or together, might deviate from the ban. Without this explicit command, one could assume that A and/or B are allowed to smoke when C is not present. However, if an explicit command not to smoke in the pub, whether alone or with others, has been agreed on by all three, it is clear that, according to the theory of the larger law creators' circle, any agreement by A and/or B (the smaller circle) to allow smoking in the pub would violate the consensus of A, B, and C (the larger circle). Consequently, it is paramount to know whether the smaller circle has simply established a more specific rule which does not conflict with the consensus of the larger circle, or whether the smaller circle rule directly violates the consensus of the larger circle.

While a mere specification of a rule is not problematic, a norm conflict is. A norm conflict caused by the rule of the smaller circle conflicting a rule of the larger circle contravenes the theory of the TLCC and the pre-legal, reasonable principle of *pacta sunt servanda* which it is based on. If the larger law creators' circle gives a material command, the smaller law creators' circle

must obey this command. If the larger circle agrees on a certain consensus, this same consensus may only be changed or deviated from on the same level as it was agreed on (the larger circle). This also applies to the legal consequences and effects of the consensus on the members of the smaller circle.

According to the TLCC, if the members of the different law creators' circles are not identical or fully included in a larger circle, it is not possible for the smaller law creators' circle to be overruled by the larger circle. This larger circle is not related to the smaller circle because the members of the different circles are not identical (see Figure 7 below). Therefore, it does not matter if those circles include conflicting rules regarding their subject matters because both apply the *pacta tertii* principle. The circles are, in relation to each other, in the legal desert.

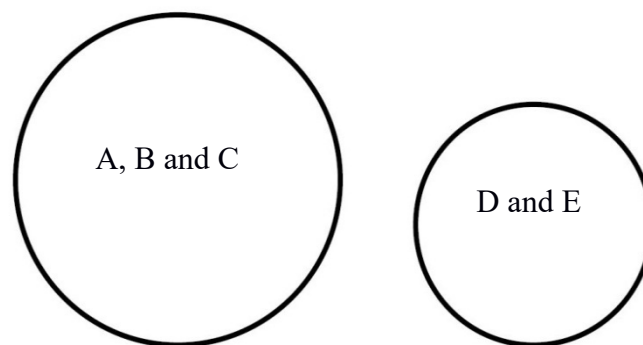


Figure 7

If some, but not all, of the members of both circles with conflicting subject matters are identical, the case is different (see Figure 8 below). The constellation of Figure 8 is very close to the constellation of Figure 4. The question is whether the size difference between constellation 4 and constellation 8 is relevant. It is important to note that the constellation in Figure 8 is impossible with regards to the relationship between international and national law because the State (the smaller law creators' circle) participates in the making of law in the international sphere (the larger law creators' circle) as a unity, acting on behalf of its individuals. Yet, theoretically speaking, it is important to note that the case of Figure 8 is not the primary application of the theory of the larger law creators' circle. The difference from the constellation illustrated in Figure 4 is too insignificant.

Therefore, either a larger circle embracing both circles governs the conflict (see Figure 5 above) or the individuals concerned remain in the legal desert with regards to the solution of the norm conflict.

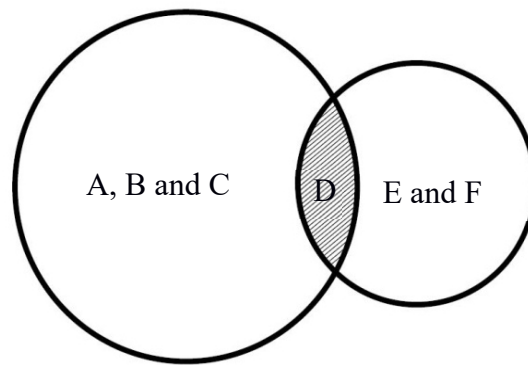


Figure 8

D. Legal Consequences Resulting from a Violation of the Consensus of the Law Creators' Circle

In terms of the relationship between international, EU, and national law, the TLCC forces us to analyze the contents of the rulings of the larger, international (or EU with regards to national) law creators' circle. Contrary to prevailing theories on this relationship, there is no general, blanket legal consequence leading to an absolute or otherwise standardized legal consequence or effect of international law within the national legal order. Consequently, the TLCC does not stipulate a single absolute legal consequence. Generally speaking, the smaller law creators' circle lacks the ability to create a rule that conflicts with any rule of the larger circle (*rechtliches Können*). The larger circle is free to change this general situation.

With regards to the relationship between EU and Member State law, the supremacy of EU law stipulates that Member States can make law conflicting with EU law (*rechtliches Können*). However, they are not allowed to make such law and in case they do anyhow, conflicting Member State law is not applicable (*rechtliches Dürfen*).¹²⁴ In order to identify the effect of EU law

¹²⁴ Case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

within the Member State legal orders, the doctrine of direct effect is very well known.¹²⁵

Before coming to the peculiarities of the supranational EU legal order, a brief discussion of the relationship between international and EU or national law shall further illustrate what I have in mind. Using the relationship between international and EU or national law as an example, EU law or national law (the smaller law creators' circle) lacks the ability to create rules conflicting with *ius cogens* norms. EU or national rules conflicting with *ius cogens* are null and void *ex tunc*. The existence of *ius cogens*, however, suggests that the smaller law creators' circle (EU law or national law, both with regards to international law) has the ability to create EU or national rules that conflict with general international law without *ius cogens* character (*rechtliches Können*), but lacks the authorization to do so (*rechtliches Dürfen*). This implies that the focus should be on the emergence of international law. More recent EU or national law lacks the authorization to subsequently change — or even deviate from — international law by incorporating it into the EU or national legal order via reception theories. Therefore, it becomes crucial to analyze the content of the international rulings of the larger law creators' circle. The consensus of the larger, international circle is decisive when the legal consequences or effects of international law are analyzed in relation to national law.

Having said this, it is important to note that most of the international rules do not stipulate a far-reaching effect on national law: (i.) Solely applicable (*schlicht anwendbare*) international rules must, therefore, be differentiated from (ii.) directly applicable (*direkt anwendbare*), and (iii.) individualizing (*individualisierende*) rules.

(i) Solely Applicable Rules

Solely applicable rules, also called inter-State laws, leave it up to the discretion of the national legal order to decide how to implement these rules domestically. Typical wording for such provisions is quite abstract, formulating only general obligations, which are then subject to further specification by national laws. Even today, most of the international rules are

¹²⁵ Andreas Th. Müller, *Effet direct. Die unmittelbare Wirkung des Unionsrechts* (Mohr Siebeck forthcoming).

still solely applicable, which means that they do not have a direct effect within the national legal order. Therefore, further specification of the international rule, for instance by national acts, is necessary. The EU or national act concretises and thereby 'implements' the general, i.e. solely applicable, international rule. The TLCC does not challenge this. The TLCC is not an ideological project aiming at advancing international law to have more effect within national law. With regards to the relationship between EU and Member State law this category, very roughly speaking, fits directives in EU law (Article 288 TFEU).¹²⁶

(ii) Directly Applicable Rules

In contrast, directly applicable rules — in other words, self-executing rules — give no discretion to the national legal order in deciding how to implement these rules domestically. Directly applicable norms take effect within the EU or national legal order without any EU or national act except for ratification, and consequently simply do not leave discretion to the national legal order.¹²⁷ In this case no further national act is needed and EU or national law-applying organs — such as the courts — have to apply it directly.¹²⁸ If an international

¹²⁶ However, as is well known: badly implemented or too late implemented directives can, nevertheless, have direct effect. C-6/90 and C-9/90 *Francovich v Italy* EU:C:1991:428. Yet, a detailed analysis of the legal acts of EU law on Member States' legal orders when thinking with the TLCC must be postponed due to a lack of space.

¹²⁷ Alfred Verdross and Bruno Simma, *Universelles Völkerrecht – Theorie und Praxis* (3rd ed Duncker & Humblot 1984) 550; Stefan Griller, *Die Übertragung von Hoheitsrechten auf zwischenstaatliche Einrichtungen* (Springer 1989) 355, who defines direct applicability [even related to the EU] as national validity of individual international law norms with direct legal effect without any interference of an additional national act. Compare furthermore August Reinisch, 'Zur unmittelbaren Anwendbarkeit von EWR-Recht' (1993) *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung* 11, 15, with further references in n. 40; and Yuji Iwasawa, 'The doctrine of self-executing treaties in the United States: A critical analysis' 26 (1986) *Virginia Journal of International Law* 627, 632, n. 27; compare also Thomas Buergenthal, 'Self-executing and non-self-executing treaties in national and international law' 235 (1992) *Recueil des Cours* Vol. IV 303, 317.

¹²⁸ Karen Kaiser, 'Treaties, direct applicability' in Rüdiger Wolfrum (ed), *MPEPIL online edition* (2011) para. 1; Karel Vasak, 'Was bedeutet die Aussage, ein Staatsvertrag sei 'self-executing'? – Zum Erkenntnis des Verfassungsgerichtshofs vom 27.6. 1960, B 469/59' 24 (1961) *Juristische Blätter* 352, 352.

treaty or a provision of it is directly applicable, the smaller (EU or national) circle has already accepted this effect by agreeing to the consensus at the international level. A subsequent unilateral EU or national derogation of the deliberately consented direct applicability of the international treaty is opposed according to the TLCC. Again, very cautiously, this category relates best to EU regulations (Article 288 TFEU).

(iii) Individualizing Rules

A third category of international rules, which can be distinguished from solely and directly applicable rules, is individualizing rules. Individualizing rules are those international rules that directly address individuals, without the need for an EU or national organ to enforce or apply them. They bind or grant rights to individuals directly without the EU or a State intervening (again, except for the making of this international norm).¹²⁹ Individualizing international rules are rules which are not directed towards the EU or the State, but directly towards the individual without using the EU or the State as a mediator. Several international criminal law norms or—with regards to national law only—also Article 34 of the European Convention on Human Rights as well as similar provisions constitute examples for individualizing rules. In this case again, there is no need for any incorporation, adoption or transformation of the international rule into the EU or national legal order. The Charter of Fundamental Rights of the EU as well as the possibility of individuals to launch actions for annulment (Article 263 (4) TFEU) come to mind when speaking about individualizing rules of EU law.

E. The Connection between Law Creators' Circles¹³⁰

Based on the analysis in the previous sections, the larger the law creators' circle, the thinner the regulation density becomes. The consensus also tends to be more abstract and fundamental the larger a circle becomes. However, this is not a theoretical restriction on the regulatory possibility of the larger

¹²⁹ Compare the enumeration made by Jost Delbrück, „Das Individuum im Völkerrecht“ in Georg Dahm et al. (eds), *Völkerrecht* Vol. I/2 (2nd ed De Gruyter 2002) 259, 263f with further references. Griller (n 4) 96, 98 ff; Anne Peters, *Jenseits der Menschenrechte: Die Rechtsstellung des Individuums im Völkerrecht* (Mohr Siebeck 2014).

¹³⁰ Of Those Circles of Which the Larger Circle Includes All Members of the Smaller Circle, See Figure 6.

or even largest possible law creators' circle. Rather, this is a practical phenomenon. The more individuals that are involved, the more difficult it becomes to reach a consensus. But, theoretically, if all legal rules stemmed from the same largest conceivable law creators' circle embracing all individuals, no smaller law creators' circles would exist. Practically, this is not (yet) the case. Therefore, many subject matters are not embraced by an international, or even a very large EU, law creators' circle. Hence, only the most fundamental rules are embraced by the largest possible law creators' circle. All but these rules are left to smaller law creators' circles at the next smaller level. This continues until the smallest possible level of two individuals. The TLCC's only condition is that the rules of the smaller law creators' circle must not conflict with a rule of the larger law creators' circle.

In reading this, one might be tempted to compare the thoughts articulated here with the *Kelsenian* 'chain of validity'¹³¹ (in German, *Delegationszusammenhang*, on which the hierarchy of norms, *Stufenbau nach der rechtlichen Bedingtheit*, is based).¹³² The main characteristic of this chain of validity is that a norm can derive its validity only from another norm.¹³³ As a consequence of this conviction, monism with primacy of international law stipulates that all national law derives validity from the higher international law.¹³⁴ Similarly the 'competence-theory' of Verdross holds that State-sovereignty is a competence derived from international law and thereby the existence of an international constitution is assumed.¹³⁵ Besides other crucial

¹³¹ Raz (n 35) 105; Starke (n 23) 75.

¹³² Kelsen (n 31) 196 ff, 221-222.

¹³³ Ibid; For a critical account of the *Stufenbaulehre* see, for example, Jakab (n 40).

¹³⁴ Kelsen (n 122) 221; Verdross (n 8) 35. Compare for criticism thereof (using the legal order of the EU as an example) Lando Kirchmair, 'Die autonome Rechtsordnung der EU und die Grenzen von Monismus und Dualismus' in Matthias C. Kettmann (ed), *Grenzen im Völkerrecht – Grenzen des Völkerrechts* (Jan Sramek 2013) 275.

¹³⁵ Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (Mohr Siebeck 1923) 31-35. This assumption of the 'Kompetenz-Kompetenz,' located at the international sphere becomes even more clear by the statement of Alfred Verdross, 'Le fondement du droit international' 16 (1927) *Recueil des Cours* Vol. I 247, 319. Compare generally concerning the 'competence-theory' of Verdross Anke Brodherr, *Alfred Verdross' Theorie des gemäßigten Monismus* (Herbert Utz 2004) 75 ff.

differences between the 'chain of validity' and the TLCC, it is especially important to emphasize that the connection between the larger and the smaller law creators' circle according to the TLCC requires only that the smaller circle must not infringe any rule of the larger circle. If a specific subject matter is not regulated by a consensus at the level of the larger law creators' circle, the smaller circle is free to agree upon any consensus as its members wish. Consequently, the smaller law creators' circle is not derived from the larger circle and the validity of the rule of the smaller circle does not stem – at least not theoretically – from the larger circle.

In a graphical nutshell:

Table 3: The Theory of the Law Creators' Circle:

	TLCC
Presuppositions	<ul style="list-style-type: none"> - Pre-legal pacta sunt servanda. - Common understanding of the law (however, only in case we want norm conflict solution).
Theoretical Outcome	<ul style="list-style-type: none"> - Common denominator for norm conflict solution. - Authorization for norm creation of the smaller circle in the larger circle.
Legal Consequences	<ul style="list-style-type: none"> - Larger circle's consensus trumps (identical) smaller circle's consensus. - Smaller circle must not unilaterally derogate from the consensus of the larger circle. - Content is decisive (in terms of analysing whether the smaller circle is bound by a consensus of the larger circle).
Failure	?

3. Practical Application of the TLCC

Now that the theory has been spelled out, the final Section aims at testing its applicability with the example of the European Union and its relationship to its Member States (III.3.a.) as well as towards other (international) legal orders (III.3.b.).

Here, I apply the TLCC to the relationship between EU law and Member State law as well as EU law and international law. I am convinced that a theory-based argument analyzing the relationship between international, EU and Member State law will fruitfully contribute to key issues in EU law such as the doctrine of direct applicability or the primacy question between EU law and the fundamental constitutional law of its Member States as well as to the relationship between EU and international law. It could provide convincing theoretical argumentation, solving potential tensions between the constitutional courts of some Member States and the CJEU as well as other international courts and tribunals. For example, arguments embedded in a sound theoretical explanation may help to clarify such questions as the tension between European integration and the (German) 'constitutional identity' which, according to the German Constitutional Court, is resistant to integration.¹³⁶ Moreover, the famous 'Kadi saga'¹³⁷ could be seen in a slightly different light as well.

A. EU Law and Member State Law

According to the TLCC, the EU is the larger law creators' circle with regards to its Member States. All EU Member States in turn are independent smaller law creators' circles which are also part of the EU circle. This is illustrated by Figure 6 above. The consensus established at the level of the larger EU law creators' circle must not be violated unilaterally by a smaller Member State law creators' circle. However, it only concerns the content that has been consented to. For any further consensus, the smaller law creators' circles remain free to consent on what they wish. This stands in contrast to a monist understanding of the relationship between EU and Member State law. The TLCC does not hold that Member State law is delegated from EU law. Nor does the TLCC assume that in order to conceive EU law and Member State law both as law, it is logically necessary to conceive them as a unitary legal

¹³⁶ Mattias Kumm, 'Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of 'Chicken' and What the CJEU Might do About It' (2014) 15(2) German Law Journal 203-215.

¹³⁷ C-402 & C-415/05P *Kadi v Commission* EU:C:2008:461; C-584, C-593, & C-595/10P *Commission v Kadi* EU:C:2013:518. C.f. Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2014).

order.¹³⁸ The TLCC only states that once a consensus has been reached at the level of a larger law creators' circle (which in our case here is EU law), then it must not be derogated unilaterally by a smaller law creators' circle. If the aim is to solve norm conflicts as defined above, then and only then is a common denominator, i.e. a common definition of law, necessary. In contrast to dualism or pluralism the TLCC provides an argument for where to look for such common ground. It is the consensus at the level of the larger circle.

Reaching a consensus at the level of the larger circle might be eased by formal procedures such as majority ruling or the authorization of certain specific organs to create law and so on and so forth. This has often happened in the EU by now as it has developed into a supranational organization with constitution-like character traits.¹³⁹ Law making in the EU shows roughly all the basic rule-of-law criteria. However, it is important to emphasize that the TLCC is not about triggering yet an(other) argument as to whether the EU is truly a constitutional community or what is missing in order for it to become one. The TLCC is simply a structural argument which indicates where to look to answer questions such as who has the final say about certain subject matters. Hence, it is of utmost importance to understand clearly what the EU treaties and further legal life within the EU actually involve.

The EU competence regime is decisive in this regard. It is vital to pinpoint exactly which competences have been shifted to the European level. To answer this question, it is important to define where the competence regime is regulated and who decides in case of a dispute about specific competences. The competences in Articles 2-6 TFEU are the starting point and in the case of conflict, the CJEU has the final say on matters of competences (Article 19 TEU). Member States are referred to an action for annulment before the CJEU in case they think the EU lacks competence because they themselves are not authorized to void EU acts.¹⁴⁰ Roughly speaking, if the EU has competence for a specific subject matter, the EU law creators' circle may

¹³⁸ Gragl (n 32) 674, 685; Gragl (30).

¹³⁹ Case 294/83 *Parti ecologiste 'Les Verts' v European Parliament* EU:C:1986:166, para 23 'the basic constitutional charter, the Treaty'. See also recently Case C-284/16 *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158, para 33: 'the constitutional structure of the EU'.

¹⁴⁰ Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452.

adopt legal acts. EU legal acts within the framework of EU competences are legally binding and in the case of conflict with MS law they enjoy supremacy.¹⁴¹ This is largely uncontested.

The question is whether this supremacy has limits, i.e. whether there is a core of a national 'constitutional identity' which is resistant to this supremacy. Similarly, as the TLCC does not say anything about the question as to which political system or which specific norm might be just, neither does it say whether there should or should not be something like a core resistant to integration. The TLCC is neutral towards the content. It does, however, say that once a consensus has been taken at the level of a larger law creators' circle, this consensus must not be violated unilaterally by a smaller circle. Therefore, it is crucial to analyze the norms of the smaller circle which authorize consensus formation in the larger circle. These were national norms on the *authorization* to conclude and ratify international treaties at the very beginning of the EU.¹⁴² By now, the EU autonomously regulates how its own legal edifice changes (Article 48 TEU on ordinary and simplified revision procedures). Major changes like the introduction of completely new treaties, for instance, are subject to ratification by all Member States.¹⁴³ In effect, this means that they have to be ratified unanimously by the larger EU law creators' circle (in the sense of the abolishment of the old consensus at this level). A unilateral derogation by only a few Member States would clearly violate the consensus of the larger law creators' circle (which, of course, is not to say that this is not possible). An 'integration resistant core', on the one hand, must not violate any consensus which has been obtained at the level of the larger EU law creators' circle. On the other hand, the larger law creators' circle must not autonomously add competences without authorization by all of the smaller

¹⁴¹ See Case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66; as well as Case C-10/97 *IN.CO.GE.'90 and others* EU:C:1998:498; Case C-409/06 *Winner Wetten GmbH* EU:C:2010:503, para 55.

¹⁴² For the designation authorization (instead of incorporation, implementation or the like) compare Kirchmair (n 10).

¹⁴³ Dieter Grimm, 'The role of national constitutions in a united Europe' in Dieter Grimm, *Constitutionalism. Past, present, and future* (Oxford University Press 2015) 274, who holds 'that within the purview of European law the latter [national law] can no longer act in a self-determined manner'. Nevertheless, 'the EU has not yet acquired the right to determine its own legal basis'.

law creators' circles. This also holds true for the interpretation of the scope of application of EU law, which essentially must be reflected in the consensus of the larger law creators' circle. This refers to the question on the scope of applicability of the Charter of Fundamental Rights,¹⁴⁴ the rule of law crisis in the EU and judicial independence,¹⁴⁵ as much as to the scope of autonomy of the EU legal order.¹⁴⁶

The TLCC also puts emphasis on the question as to how to interpret the content of a consensus. The Vienna Convention on the Law of Treaties (VCLT) offers rules for the interpretation for international treaties. Again, by now, the CJEU, based on Article 19 TEU, has developed its own array of interpretation techniques (as there is no provision clearly stipulating which

¹⁴⁴ Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105; Case C-206/13 *Siragusa* ECLI:EU:C:2014:126 regarding the scope of applicability of the Charter of Fundamental Rights and the general recurring debate about judicial activism. See, for instance, Allan Rosas, When is the Charter of Fundamental Rights applicable at national level? (2012) 19(4) *Jurisprudence* 1269-1288, 1270 holding that the 'introduction of a fundamental rights regime into EU law is essentially a story of judge-made law'.

¹⁴⁵ Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117 holding basically that the CJEU is competent—relying on the principle of effective judicial protection enshrined in second subparagraph of Article 19 (1) TEU—to evaluate the guarantee of independence of national courts and tribunals if this 'may concern the application or interpretation of EU law' (para 39). This is too prime example of the fine line of how to understand the competence regime of the EU as the appointment and removal of judges actually is an exclusive MS competence.

¹⁴⁶ See only recently Case C-284/16 *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158 and the confirmation that investment arbitration in an intra EU context is part of EU law (and, thus, within the competence of the EU and the jurisdiction of the CJEU). Therefore, investment tribunals in such a context lack jurisdiction as Art. 267 and 344 TFEU preclude provisions establishing arbitral tribunals (para 62) as they could 'interpret or indeed apply EU law' (para 42) and thereby endanger unity, primacy and effectiveness of EU law. While also this decision has caused an upheaval in academia and the 'arbitration world', the TLCC suggests actually simply to look at the competence of the larger law creators' circle, the EU legal order and whether there we find sufficient support for the approach taken—in the case at hand—by the CJEU. If one does so, it seems indeed, that EU law covers the approach taken.

interpretation technique shall be used or be supreme in case of conflict¹⁴⁷).¹⁴⁸ The interpretation techniques employed by the CJEU largely correspond to 'classical techniques' well known in national law or those mentioned in the VCLT.¹⁴⁹ I will not go into details here. For now, this indication shall suffice.

B. International Law and EU Law

The TLCC is based upon natural persons who reach a consensus. If A, B, and C agree upon a consensus, this must not be violated subsequently by B and C without A. What has just been said about the relationship between EU and Member State law also applies to the relationship between international and EU law. Once the law creators' circle of the EU has agreed upon a consensus with a larger, international law creators' circle, it must not violate it unilaterally. It is thus decisive to, first, clearly identify how the EU law creators' circle can establish a consensus at the larger international level (Article 216-219 TEU). Second, it is important to determine the content of the consensus. This interpretation process is primarily the task of the level at which the consensus has been agreed. This is the international level. For instance, in *Achmea BV*, the CJEU confirmed that in principle EU law allows for an international agreement establishing a court which interprets the provisions of such an agreement with a binding nature for the CJEU.¹⁵⁰ This is accurate also when thinking with TLCC. Yet, the CJEU added the conditionality that this holds true 'provided that the autonomy of the EU and its legal order is respected'.¹⁵¹ I would add — again thinking with the TLCC — that this condition must be respected from those organs authorized by the EU legal order when concluding international agreements (and international law more generally). This conditionality, however, might not serve as an excuse for breaches of the concluded international agreements for instance

¹⁴⁷ Giulio Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' 10(5) (2009) *German Law Journal* 539.

¹⁴⁸ Koen Lenaerts and José A. Gutiérrez-Fons, 'To say what the law of the EU is: Methods of interpretation and the European Court of Justice', *EUI Working Paper AEL* 2013/9, available at http://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1&isAllowed=y.

¹⁴⁹ *Ibid.*

¹⁵⁰ Case C-284/16 *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158 para 57.

¹⁵¹ *Ibid.*

in form of unilateral subsequent derogations, because international law as such also does not allow for invoking provisions of internal law as justification for a failure to perform a treaty (Art. 27 VCLT). Third, depending on the consensus, the effect of this consensus on the level of the smaller law creators' circle depends on whether the norm of the international law creators' circle is solely applicable, directly applicable or individualizing.¹⁵²

The international law creators' circle knows four different types of legal sources. These are, according to Article 38 of the Statute of the International Court of Justice (ICJ), (a) international conventions, (b) international custom, and (c) general principles of law. In addition, by now also (d) legal acts of international organizations can be a source of international law.¹⁵³ Depending on each source, different rules about their making, interpretation, and their legal effect are applicable. In order to determine their effect within the level of the smaller, in our case, the EU law creators' circle, it is necessary to look closely at the process of making and interpreting them. Unfortunately, there is not enough space to do so here. What I would like to emphasize is that the TLCC is not about the content but about the structural relationship between law creators' circles. If there is a consensus at the larger law creators' circle, the smaller circle must not unilaterally violate this consensus.

For instance, in the famous Kadi saga, the CJEU annulled an EU regulation because this regulation implemented United Nations Security Council resolutions sanctioning suspected terrorists without respecting *EU* fundamental rights.¹⁵⁴ The individual Yassin Abdullah Kadi was associated with Usama bin Laden or the Al-Qaeda network and therefore was enlisted by the UN Sanctions Committee, which was installed in the aftermath of

¹⁵² III.2.d.i)-iii).

¹⁵³ Jörg Polakiewicz, 'International law and domestic (municipal) law, law and decisions of international organizations and courts' in Rüdiger Wolfrum (ed), *MPEPIL* online edition (2012), para 1.

¹⁵⁴ Joined Cases C-402/05 P and C-415/05 P *Kadi v Council and Commission* EU:C:2008:461 (Kadi I); and C-595/10 P *Commission and others v Kadi* EU:C:2013:518 (Kadi II). For an overview, Clemens Feinäugle, 'Kadi Case' (2014) *Max Planck Encyclopedia of Public International Law*; Peter Hilpold, 'EU Law and UN Law in Conflict: The Kadi Case' (2009) 13 *Max Planck Yearbook of United Nations Law*, 141-182.

terrorist attacks on the embassy of the USA in Kenya and Tanzania in 1998. A consequence of this listing was the freezing of Mr. Kadi's and other individuals' or entities' European assets, which was implemented by an EU Regulation in 2002.¹⁵⁵ Kadi challenged this listing in front of EU courts due to alleged violations to use his property freely, the breach of the right to effective judicial review as well as the right to a fair trial according to Art. 6 ECHR. The Court of First Instance, however, decided in 2005 that the Court has no authority to call in question the lawfulness of UN Security Council Resolutions.¹⁵⁶ While this judgment was associated with a monist understanding of the relationship between EU and international law, the CJEU did not follow this direction. On 3 September 2008 the Court annulled the regulation concerning Mr. Kadi finding that the CJEU has jurisdiction to review the lawfulness of the contested regulation as it has to ensure full review of the lawfulness of all EU acts 'in the light of the fundamental rights forming an integral part of the general principles of Community law'.¹⁵⁷ By so doing the CJEU found a breach of 'the rights of defence, especially the right to be heard, and of the principle of effective judicial protection'.¹⁵⁸ Moreover, the Court found also that Mr. Kadi's fundamental right to respect for property had been violated.¹⁵⁹ Following this decision the UN Sanctions Committee provided Mr. Kadi with reasons for his listing and gave him the possibility to comment. Thereafter the Sanctions Committee decided to list Mr. Kadi again, which has again, implemented by Committee Regulation.¹⁶⁰ Mr. Kadi also brought a case against this regulation before the General Court.¹⁶¹ Now the General Court followed the reasoning of the CJEU, conducted a full review of the challenged regulation and annulled it on 30 September 2010. The reasons given were that the information and evidence regarding the

¹⁵⁵ Council Regulation 881/2002 of 27 May 2002.

¹⁵⁶ Case T-315/01, *Kadi v Council and Commission*, 21 September 2005, ECLI:EU:T:2005:332, 225.

¹⁵⁷ Joined Cases C-402/05 P and C-415/05 P *Kadi v Council and Commission* EU:C:2008:461 (Kadi I) 326.

¹⁵⁸ *Ibid* 353

¹⁵⁹ *Ibid* 371.

¹⁶⁰ Commission Regulation (EC) 1190/2008 28 November 2008 amending Council Regulation (EC) No 881/2002.

¹⁶¹ Case T-85/09 *Kadi v Commission* ECLI:EU:T:2010:418.

reasons for Kadi's listing had not been disclosed to him and so his right to defence and effective judicial review and to property were still violated. Even though the Sanctions Committee delisted Mr. Kadi on 5 October 2010, the European Committee, the Council of the European Union and the UK appealed. Finally, the CJEU held on 18 July 2013 that the improvement of the UN Sanctions Committee procedure was not enough to change his holding in *Kadi I*.¹⁶²

Very briefly, according to the TLCC, the smaller law creators' circle should have invoked either an ultra vires competence of the larger law creators' circle, stating that the UN Security Council (to put it delicately) overstated its competence. Alternatively, it should have considered the resolution faulty because UN human rights had been violated (which would have necessarily implied—admittedly difficult—arguments for the application of human rights, in this case, effective judicial protection, at UN level).¹⁶³ This is really just a superficial indication of what the TLCC implies in contrast to the grand old theories. However, I hope that the direction in which an application of the TLCC goes has been made visible and understandable.

IV. RESUMÉ

In this paper, I have argued that the TLCC provides a theoretical foundation for finding a decisive source in a norm conflict situation. It is, however, important to emphasize that the TLCC does not offer an absolute and invariable solution which fits any norm conflict arising between overlapping

¹⁶² C-595/10 P *Commission and others v Kadi* EU:C:2013:518, 66.

¹⁶³ C.f. for such an argument (albeit without TLCC as a basis) Martin Scheinin, 'Is the ECJ Ruling in *Kadi* Incompatible with International Law?', (2009) 28 (1) *Yearbook of European Law* 637-653. Gráinne De Búrca, 'The ECJ and the International Legal Order: A Re-Evaluation' in Gráinne de Búrca / Joseph H.H. Weiler (eds), *The Worlds of European Constitutionalism* (2012) 140. Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' 17 (2007) *European Journal of International Law* 881-919. Juliane Kokott and Christoph Sobotta, 'The *Kadi* Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23(4) *European Journal of International Law*, 1015-1024 arguing that the Court indicated a possible opening towards the precedence of Security Council measures if human rights enjoy sufficient safeguards.

international, EU, and national legal orders. This is a sharp contrast to grand old theories such as dualism and monism, which are considered unable to face major recent developments of international, EU, and national legal orders. While also the predominant stream of global legal pluralism is restricted when answering the question behind this article as it does not offer a satisfactory prescriptive account, global constitutionalism suffers from major shortcomings too. Global Constitutionalism presumes too many substantial values for the envisaged common normative denominator in order to be a helpful concept for the relationship between international, EU and national law. While global constitutionalism cannot carry the 'burden of universality', with constitutional pluralism we likely end in a 'constitutional stalemate'. The TLCC aims to re-conceptualize the current debates that are based on monism, dualism, pluralism, and constitutionalism. Thereby I also aim at avoiding the pitfalls of global legal pluralism and global constitutionalism concerning their appropriateness for norm conflict solution between international, EU, and national legal orders. The goal is to answer the question as to whether it is within the competence of national law to determine the effect and validity of international or EU law within the domestic (constitutional) legal order and the international within the EU legal order or not.

In a nutshell, a law creators' circle is defined as a circle of two or more individuals, which originates in the creation of one single binding consensus. The TLCC is based on pre-legal assumptions, which are the principles *pacta sunt servanda* and *pacta tertiis*. According to these pre-legal principles, TLCC is fundamental for all agreed consensuses. If a legal rule has been created by a consensus, unilateral abrogation is no longer possible. The rule of the larger law creators' circle always prevails over the rule of the smaller circle (A and B), *if*—and this is important—*all* members of the smaller circle are also members of the larger circle. In other words, the smaller circle is absorbed by the larger circle.

What I have outlined so far might be disappointing, given the grand question I dared to ask in the title of this article. However, I am convinced that this complex and enormously important question as to how we can know who has the final say – international, EU or national law? – cannot be answered in an easy and universally uniform way. The vast array of massively diverging

theories and doctrines on the table are proof of that. Yet, I believe that it is important at least to attempt a sort of reconciliation between them. The TLCC is exactly that, with the focus on a structural analysis. I hope I succeeded at least in awakening the reader's curiosity pending the completion of the next necessary step for the TLCC, i.e. providing concrete answers for the current relationship of International, EU or national law. This forthcoming work includes a detailed analysis of the TLCC and the validity and effect of sources of international law in the EU legal order. Moreover, I will aim at expanding the application of the TLCC on the EU competence regime in order to shed some light on questions of constitutional identity and final supremacy.