

**CONFLICT OF NORMS IN EUROPEAN UNION LAW AND THE LEGAL
REASONING OF THE EUROPEAN COURT OF JUSTICE**

A thesis submitted for the degree

of Doctor of Philosophy

by

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Abstract: *This thesis examines the topic of conflict of norms in European Union (EU) law and the legal reasoning of the European Court of Justice (ECJ), arguing that the framework of conflict of norms provides conceptual insight into justification and the role of value choices in legal reasoning. After examining the theory of conflict of norms, which seems to have been relatively under-studied generally and especially in EU law, it examines three particular aspects of norm conflict resolution in the legal reasoning of the ECJ and EU law: conflict of interpretative norms, especially the opposition between conserving and innovative interpretation; conflicts of human rights norms, looking in particular at the idea of a hierarchy of rights and of specificationism in the articulation of rights; and conflicts of competence norms. It concludes that the scope exists for a fuller justification of the choice of norms in the legal reasoning of the ECJ and generally in EU law and offers a perspective on how the values articulated by the EU suggest particular approaches to norm conflict resolution by the ECJ in its decision-making in these fields, in particular, a greater resort to *lex specialis* and originalist or historical interpretation, in contrast to its current method.*

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- Style of citation of journal articles: the issue number of a journal, as well as the volume, is generally given in the references below, except for those journals whose house style is generally not to include the issue number in a citation (e.g.

CMLRev, *ELR*, *LQR*, *PL*); just the volume of the title is given before the abbreviated title for these journals.

Table of Abbreviations:

Case and Treaty Reports

AC – Appeal Cases

ALL ER – All England Reports

CMLR – Common Market Law Reports

ECHR – European Court of Human Rights

ECR – European Court Reports

ETS – European Treaty Series

HRLR – Human Rights Law Reports

ICJ – International Court of Justice

PCIJ – Permanent Court of International Justice

QB – Queen’s Bench

UNTS – United Nations Treaty Series

WLR – Weekly Law Reports

Journals and Yearbooks

**Note journals in foreign languages and non-law or non-political science journals referenced in the text are not abbreviated and are not included in the list below.*

AJCL - American Journal of Comparative Law

AJIL – American Journal of International Law

ALJ – Australian Law Journal

APSR – American Political Science Review

Bond LR – Bond Law Review

Boston ULR – Boston University Law Review

BYIL – British Yearbook of International Law

California LR – California Law Review

Canadian JIJ – Canadian Journal of Law and Jurisprudence

CLJ – Cambridge Law Journal

Colombia JEL – Columbia Journal of European Law

CMLRev – Common Market Law Review
CYELS – Cambridge Yearbook of European Legal Studies
Denning LJ – Denning Law Journal
ECLR – European Constitutional Law Review
EELR – European Environmental Law Review
EJCCLCJ - European Journal of Crime, Criminal Law & Criminal Justice
EJIL – European Journal of International Law
EJLE – European Journal of Law & Economics
EJLR – European Journal of Law Reform
EJLS – European Journal of Legal Studies
ELJ – European Law Journal
ELR - European Law Review
ERFA – European Review of Foreign Affairs
Fordham LR – Fordham Law Review
Georgetown JIL – Georgetown Journal of International Law
GLJ - German Law Journal
GYIL – German Yearbook of International Law
Harvard LR – Harvard Law Review
ICLQ - International and Comparative Law Quarterly
ICTLR - Information and Communications Technology Law Review
ILM – International Legal Materials
IJSemL – International Journal of the Semiotics of Law
IO – International Organization
Israeli LR – Israeli Law Review
JCMS - Journal of Common Market Studies
JEnvirL – Journal of Environmental Law
JEPP- Journal of European Public Policy
JFC – Journal of Financial Crime
JIEL – Journal of International Economic Law
JLS – Journal of Law and Society
J Pol. Id. – Journal of Political Ideologies
J Pol. Phil. – Journal of Political Philosophy
JWTL – Journal of World Trade Law
L and P – Law and Philosophy

LIEI – Legal Issues of Economic Integration
LQR – Law Quarterly Review
LS – Legal Studies
LT – Legal Theory
Leiden JIL – Leiden Journal of International Law
Michigan JIL – Journal of International Law
Michigan LR – Michigan Law Review
MLR – Modern Law Review
NoFo – No Foundations-Journal of Extreme Legal Positivism
NYIL – Netherlands Yearbook of International Law
OJLS – Oxford Journal of Legal Studies
PL – Public Law
RdC - Recueil des Cours
RJ – Ratio Juris
Stanford LR – Stanford Law Review
UChicago LF – University of Chicago Legal Forum
UColorado LR – University of Colorado Law Review
WEP – West European Politics
Yale LJ – Yale Law Journal
YEL – Yearbook of European Law

Treaties, International Organisations and Related Abbreviations

AFSJ – Area of Freedom, Security and Justice
PJCCM – Police and Judicial Cooperation in Criminal Matters
CFSP – Common Foreign and Security Policy
ECHR – European Convention on Human Rights
ECSC – European Coal and Steel Community Treaty
EC – European Community
ECT – European Community Treaty
EEC – European Economic Community
EU – European Union
EURATOM – European Atomic Energy Community (Treaty)

ICJ – International Court of Justice
ICTY – International Criminal Tribunal for the former Yugoslavia
ILO – International Labour Organisation
JHA – Justice and Home Affairs
NATO - North Atlantic Treaty Organisation
OECD – Organisation for Economic Cooperation and Development
OEEC - Organisation for European Economic Cooperation
TEU – Treaty on European Union
TFEU – Treaty on the Functioning of the European Union
UN – United Nations
WTO – World Trade Organisation

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Commission Regulation (EC) No. 2062/2001, amending for the third time Council Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freezing of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L 277/25, 19.10.2001, p. 25.

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European Council mandate for the 2007 Intergovernmental Conference:
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European Economic Community Treaty 1957 (EEC Treaty).

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European Community Treaty (ECT).

Treaty on the Functioning of the European Union (TFEU).

Treaty on European Union (TEU).

Treaty of Maastricht 1992.

Treaty of Amsterdam 1997.

Treaty of Nice 2001.

Treaty Establishing a Constitution for Europe, Brussels, 29th October 2004.

Treaty of Lisbon 2007.

Germany

German Code of Civil Procedure Code of Criminal Procedure or *Strafprozeßordnung* 1877 (as amended).

Constitution of the Federal Republic of Germany (the Basic Law or *Grundgesetz*, vom 23. Mai 1949 (BGBl. S. 1), zuletzt geändert durch Gesetz vom 28. August 2006 (BGBl. I S. 2034)).

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World Trade Organisation Agreement 1994, (1994) 33 ILM 1140.

UK

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Chapter 1: Values and Conflicts of Norms in EU Law and the Legal Reasoning of the European Court of Justice – Introduction and Framework

1.1 Introduction: Scope and Subject Matter

‘Fragmentation’ and ‘pluralism’ have become bywords for the phenomenon of a proliferation of norms in increasingly multi-level legal frameworks of governance, where norms at national, regional, and international level may overlap and conflict.¹ This is especially so in the European Union (EU), given the relative strength and breadth of regional obligations involved in both the EU and the Council of Europe systems. This overlap involves a potential for conflict broadly understood: (a) conflict in the classical sense of obligations simultaneously existing and containing contradictory elements² and (b) conflict in the sense of norms of different degrees of reach and breadth negating or overtaking other, differently sourced norms.³

The term ‘norm’ has a potentially wide range of reference to include any proposition in a legal system that has some valence or influence on actual law. Rules in the sense of conclusive, all-or-nothing requirements could be taken as the paradigmatic example of norms.⁴ At the other end of the spectrum of bindingness lie soft law instruments, such as formalised statements or programs of action with some definition of methods or ways of implementing policy, or material that may influence interpretation of norms, such as *travaux préparatoires*.⁵ For the purpose

¹ Recently, see, e.g. International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 13th April 2006; S. Besson, ‘How International Is the European Legal Order? Retracing Touri’s steps in the exploration of European legal pluralism’, 5 *No Fo* 50-70 (April 2008).

² W. Jenks, ‘The Conflict of Law-making Treaties’, 30 *BYIL* 401-453 (1953), 426.

³ J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge Univ. Press 2003), 176; E. Vranes, ‘The Definition of ‘Norm Conflict’ in International Law and Legal Theory’, 17(2) *EJIL* 395-418 (2006), 412-415.

⁴ J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press 1993), 69.

⁵ See generally in an EU context: L. Senden, *Soft Law in European Community Law* (Hart Publishing 2004). Senden identifies in this study three main categories of soft law: preparatory and informative instruments, such as White Papers and Green Papers from the Commission; interpretative and decisional instruments, such as inter-institutional communications and interpretative communications and notices; and steering instruments, such as Council Recommendations and Commission Opinions (see, *ibid*, 188-119).

of the proposed study, the range of norms covers those that are legally binding,⁶ which would exclude purely soft law instruments, such as opinions from one of the EU institutions, but would not exclude material relevant for interpretation in so far as such material may by incorporation become binding because reference to it is required by or adopted through a norm of interpretation.⁷ By 'legally binding' is meant those which can be the basis of a judicial decision.⁸ As this indicates, the study encompasses both conflicts of substantive norms and conflicts of norms of interpretation. Against treating norms of interpretation as excluded from the general field of norm conflict is the fact that norms of interpretation, depending on how they are ranked and formulated, can alter the substance of other norms (i.e. the substantive norms being interpreted).

Pauwelyn excludes norms of interpretation from his study on the basis that interpretation should only apply rather than contradict existing norms, though at the same time he suggests interpretation is part of the process of development of the law:⁹

Unlike doctrine, [judicial decisions] must be presumed to be an accurate statement of what the law is, based on genuine sources of law, such as treaties or custom, as between two parties and as applied to a particular set of circumstances, at a particular point in time. Hence, at that point in time, and as between those states, there can, in theory, be no conflict between the judicial decision and the applicable norms of law since the judicial decision is presumed to apply those norms, not to contradict them.¹⁰

Pauwelyn's downplaying of the significance of norms of interpretation in his general typology of normative conflict may partly result from the context of his case study of the World Trade Organisation (WTO), where the decisions of the judicial organ are subject to authoritative interpretations of WTO agreements given by a three-quarters majority of the General Council or Ministerial Council and where the judicial organ follows relatively restrained and conserving methods

⁶ Pauwelyn (2003), op cit, 6.

⁷ Cf. *ibid*, 6.

⁸ *Ibid*, 6.

⁹ *Ibid*, 110.

¹⁰ *Ibid*, 93.

of interpretation. On the latter point, Ehlermann noted the differing approaches of the judicial organs of the EU and the WTO:

42. According to Article 31.1 of the Vienna Convention, “a Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Among these three criteria, the Appellate Body has certainly attached the greatest weight to the first, i.e. “the ordinary meaning of the terms of the treaty.” This is easily illustrated by the frequent references in Appellate Body reports to dictionaries, in particular to the Shorter Oxford dictionary, which, in the words of certain critical observers, has become “one of the covered agreements”. The second criterion, i.e. “context” has less weight than the first, but is certainly more often used and relied upon than the third, i.e. “object and purpose”.

43. For somebody having spent most of his professional life observing the European Court of Justice in interpreting European Community law, the difference in style and methodology could hardly be more radical. I do not remember that the EC Court of Justice has ever laid down openly and clearly the rules of interpretation that it intended to follow. What I do remember is that among the interpretative criteria effectively used by the EC Court of Justice, the predominant criterion was – and probably still is – “object and purpose”. While the Appellate Body clearly privileges “literal” interpretation, the EC Court of Justice is a protagonist of “teleological” interpretation....

47 ...This choice has given clear guidance to members of the WTO and to panels....The heavy reliance on the “ordinary meaning to be given to the terms of the treaty” has protected the Appellate Body from criticisms that its reports have added to or diminished the rights and obligations provided in the covered agreements (Article 3.2, third sentence, DSU). On a more general level, the interpretative method, established and clearly announced by the Appellate Body, has had a legitimising effect, and this from the very beginning of its activity.¹¹

¹¹ C-D. Ehlermann, ‘Some Personal Experiences as Member of the Appellate Body of the WTO’, *Robert Schuman Centre Policy Paper No. 02/9* (2002), paras. 43-47.

The quotation above well captures a fundamental feature of EU law, which is the central role the ECJ has played in the development of the EU legal system. The ECJ is widely noted for the creative nature of its teleological interpretation,¹² and although the Court has often been strongly defended in the literature,¹³ its central role in developing the norms of EU law in a way that goes beyond just applying existing norms is hard to deny (a role illustrated in more detail in Chapter 4). In an EU context, therefore, excluding norms of interpretation from a study of conflict of norms would substantially limit the relevance of the study and fail to capture the actual dynamics of norm conflict and their resolution in EU law.¹⁴

¹² Shaw, for example, noted that the central role of the ECJ in the furthering of integration has been widely acknowledged in the literature, noting in one piece that it “can hardly be denied by lawyers. ... The Court played its part [in integration] when it embarked upon a task of *sui generis* constitution building within the context of the process of economic integration. The importance of this is generally agreed upon.” (J. Shaw, ‘European Union Legal Studies in Crisis? Towards a New Dynamic’, 16(2) *Oxford Journal of Legal Studies* 231-253 (1996), pp. 232-233); Haltern acknowledged that the ECJ had “invented, out of thin air, unwritten European human rights” (U. Haltern, ‘Integration Through Law’, in A. Wiener & T. Diez (eds.), *European Integration Theory* (Oxford Univ. Press 2004), 183); Weatherill referred to “the (admittedly not entirely inaccurate) caricature of the European Court as driven to act audaciously in a manner apt to expand its influence and with it that of the other institutions of the European Community” (SR. Weatherill, ‘Activism and Restraint in the European Court of Justice’, in P. Capps, M. Evans & S. Konstadinidis (eds.), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing 2003), 255); Dickson has referred to the ‘notorious activism’ of the ECJ (J. Dickson, ‘How Many Legal Systems?: Some puzzles regarding the identity conditions of, and relations between, legal systems in the European Union’, *University of Oxford Legal Research Paper Series No. 40/2008* (2008), 5). Some of the judges themselves have acknowledged ‘a certain idea of integration’ motivating the caselaw (see Bengoetxea (1993), op cit, 99-101, referring to Judge Pescatore’s comment of ‘une certaine idée de l’Europe’, also referring to Judges Pescatore, Monaco, Kutscher, Lecourt, MacKenzie Stuart, Slynn, and Mancini).

¹³ Examples include Bengoetxea (1993), op cit; A. Arnall, ‘Interpretation and Precedent in European Community Law’, in M. Andenas & F. Jacobs (eds.), *European Community Law in the English Courts* (Oxford Univ. Press 1998); A. Albers-Llorens, ‘The European Court of Justice, More than a Teleological Court’, 2 *CYELS* 73-99 (1999); T. Koopmans, ‘The Theory of Interpretation and the Court of Justice’, in D. O’Keeffe & A. Bavasso (eds.), *Judicial Review in European Law: Essays in Honour of Lord Slynn* (Kluwer 2001); J. Bengoetxea, N. MacCormick & L. Moral Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’, in G. De Búrca & J.H.H. Weiler (eds.), *The European Court of Justice* (Oxford Univ. Press 2001); O. Pollicino, ‘Legal Reasoning of the Court of Justice in the Context of the Principle of Equality: Between Activism and Self-Restraint (Parts 1 & 2)’, 5(3) *GLJ* 283-317 (2004); MP. Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’, 1(2) *EJLS* (2007); G. Itzcovich, ‘The Interpretation of Community Law by the European Court of Justice’, 10(5) *GLJ* 537-560 (2009).

¹⁴ Despite not formally considering conflicts of interpretative norms in his typology of norm conflicts, Pauwelyn does in fact address the conflict between evolutive and conserving interpretations: Pauwelyn (2003), op cit, Chapter 5. He also address interpretation by contrasting reliance on substantive norms of general public international law as a fallback from WTO norms with interpretation of WTO norms with reference to general international law: *ibid*, 200-205, 251-274.

A particular conception of norm conflict is essential for addressing human rights conflicts, and here differing approaches to interpretation are decisive. As Zucca has observed, traditional norm conflict maxims such as *lex superior*, *lex specialis*, and *lex posterior* often do not apply to conflicts of human rights.¹⁵ Legal protection of human rights is generally enacted simultaneously through the adoption of a catalogue of relatively abstract statements of rights: they are usually equally ranked (although such catalogues occasionally contain some internal hierarchy, they do not do in a comprehensive way, thereby largely precluding the application of *lex superior*), equally abstract (precluding the application of *lex specialis*), and simultaneously effected (precluding the application of *lex posterior*). The task of filling out the abstraction and of determining priority so as to render rights clauses applicable to concrete fact scenarios is thus the task of interpretation.

Norm conflict is important for what could be called ‘low-order’ reasons and ‘higher’ order reasons. A low-order reason relates to minimal requirements of consistency in the narrow sense of non-contradiction; it is necessary to decide which of two conflicting norms applies. Higher order reasons relate to the question of the appropriateness of choosing one norm over another norm, i.e. and not just with the question of arriving at a or at any single un-contradicted norm. This relates to the role of values in the choice of applicable norms. One of the aims of the study is to examine the values behind the application of norm-conflict rules and processes as exist in EU law and the legal reasoning of the ECJ. Finally, there is a normative examination of what values should inform norm conflict rules and whether EU norm conflict rules might be modified or developed in light of that. The ‘values’ that are the focus of the analysis are those articulated by the EU Treaties: primary amongst them are integration, the rule of law, democracy, human rights, and subsidiarity. The analysis will examine how these various values interact in norm conflict in EU law both descriptively and normatively.¹⁶ The conceptual perspective is that the existence of a conflict of norms necessarily

¹⁵ L. Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford Univ. Press 2007), 54-55.

¹⁶ Conflict of norms is distinct from conflict of laws as a field in that conflict of norms relates to norms or laws that are part of the same legal system: *ibid*, 8.

entails a choice of norms, which opens up the question of values choices in legal reasoning.

The normative argument in this thesis is that the range of values articulated in the Treaties is not adequately reflected in the caselaw of the ECJ, which still, generally, tends to privilege the value of enhanced integration over virtually all other values. The critique of the ECJ for privileging the value of integration is not new, it has been quite a consistent criticism in the literature,¹⁷ although it has not translated into a normative debate about differing methods of interpretation. The thesis seeks to contribute and add to existing scholarship by analysing in greater depth the normativity of legal reasoning by the ECJ through the conceptual framework of norm conflict.

The overall aims of the study thus are:

- (1) To map a field of conflict of norms within EU law, meaning rules and principles for resolving conflicts between (legally binding) norms and differences between overlapping norms that have become part of EU law, to determine to what extent there are systematic norm conflict rules found in EU law, and to what extent the issue is adequately articulated in EU law;
- (2) To examine how values in the EU legal system are reflected in rules and techniques of norm conflict resolution in EU law and the legal reasoning of the European Court of Justice (ECJ);
- (3) To offer a normative perspective on norm conflict rules and techniques in EU law and the legal reasoning of the ECJ and how they could be developed.

¹⁷ Most famously, see H. Rasmussen, *On Law and Policy of the European Court of Justice* (Martinus Nijhoff 1986). As Schepel noted: “Rasmussen’s criticism ... cut deep into the very heart of what still constitutes the rhetorical fabric of Community law. It questioned the status of the Court’s case law as the inevitable and necessary precondition of ‘integration’”: H. Schepel, ‘Reconstructing Constitutionalization: Law and Politics in the European Court of Justice’, 20(3) *OJLS* 457-468 (2000), 457. See further Shaw (1996), op cit; T. Hartley, ‘The European Court, Judicial Objectivity and the Constitution of the European Union’, 112 *LQR* 95-109 (1996); A. Stone Sweet, ‘The Juridical *Coup d’État* and the Problem of Authority’, 8(10) *GLJ* 915-928 (2007).

Generally, it appears that norm conflict is very much under-articulated in EU law and legal reasoning and that the conceptual framework of norm conflict offers insight into the dynamics of decision-making and legal reasoning, and the values that underlie them, in a way that is often not acknowledged in caselaw.

The focus of the study is on analysing legal reasoning, and central to its concern is justification, which is widely considered a legitimising and characteristic feature of legal reasoning.¹⁸ Justification as a concept ties in with key attributes of adjudication: rationality, social and public legitimation, equity between competing parties. Relatively little has been written on this general topic of conflict or choice of norms in EU law, despite its potential to provide conceptual insight into what matters and is decisive in judgments. The most relevant book-length work appears to be by Torres Pérez¹⁹ specifically on human rights conflicts and Klabbers²⁰ on the relationship between EU law and international treaties. In a number of articles, Joerges has proposed conflict of laws as a framework for understanding EU constitutionalism, which would focus on the legitimacy of legal intervention and thus address the perceived democratic illegitimacy of EU law.²¹ The EU needs to respond to diversity, but not by eliminating it. A normative framework is thus needed for addressing the continuing conflict between the paradigm of State sovereignty and that of EU supranationalism,²² a framework which would both recognise the primary democratic legitimacy of Member States and the need for shared approaches to problem solving in the context of the impact on citizens outside a State's border of the decisions of that State (in other words, the 'normative fact of inter-dependence'²³).

¹⁸ See generally on the role of justification in legal reasoning, R. Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (trans. by R. Adler & N. MacCormick) (Clarendon Press 1989), 221 et seq.; N. MacCormick, 'Argumentation and Interpretation in Law', 6(1) *RJ* 16-29 (1993), 100-101; J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press 1993), 130 et seq 159-160.

¹⁹ A. Torres Pérez, *Conflicts of Rights in the European Union* (Oxford Univ. Press 2009).

²⁰ J. Klabbers, *Treaty Conflict and the European Union* (Cambridge Univ. Press 2009).

²¹ See, e.g. C. Joerges (with comments by D. Chalmers, R. Nickel, F. Rödl, R. Wai), 'Rethinking European Law's Supremacy', *EUI Working Paper Law 2005/12* (2005), 6-7. More recently, see, also e.g. C. Joerges & F. Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', 15(1) *ELJ* 1-19 (2009).

²² Joerges (2005), *ibid*, 9.

²³ *Ibid*, 14.

Joerges identifies the mutual recognition principle of the ECJ, developed from *Cassis*²⁴ on, representing a meta-norm for conflict resolution that is mutually acceptable to Member States, while furthering the aims of the Community.²⁵ This conceptual framework, inspired by private international law, proposes openness to foreign laws and their experiences of regulation and to the impact of national law on citizens in other Member States,²⁶ which points towards inclusive deliberation directed at common problem-solving. The approach focuses on the *ex ante* level of political decision-making. The present work focuses on legal reasoning, but the normative framework of ‘deliberative supranationalism’ highlights the concern with values in EU political and legal processes and with reconciling the sometimes competing legitimacy claims of the Member States (primarily democratic legitimacy) and the EU (primarily problem solving or output legitimacy). These competing values also play themselves out in formal legal reasoning and norm conflict in EU law.

In comparison, more has been written about the subject of norm conflict in the law of the WTO: e.g. Marceau, Pauwelyn, Vranes.²⁷ Pauwelyn argues in general for a greater openness to general international law in the WTO system, although not in all respects.²⁸

This chapter first examines the reasons for norm conflict in EU law, both those that can be generalised to any legal system and those that are particular to the EU and organisations of regional cooperation. Not all norm conflict, which to some extent is pervasive throughout all law, can be examined in the present work. The focus is on norm conflict internal to EU law: (1) conflicts of norms of interpretation, (2) conflicts of human rights norms, and (3) conflicts of competence

²⁴ Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* (*‘Cassis de Dijon’*) [1979] ECR 649.

²⁵ Joerges (2005), op cit, 19.

²⁶ Ibid, 26-267, and see the discussion of Comitology, 22-27.

²⁷ G. Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The relationship between the WTO Agreement and MEAs and other Treaties’, 35(6) *JWTL* 1081-1131 (2001); Pauwelyn (2003), op cit; Vranes (2006), op cit. See further Chapter 2 below.

²⁸ e.g. Pauwelyn rejects fall-back on secondary norms (i.e. norms governing change in the law, adjudication or the resolution of disputes, and norms governing what constitutes law) of international law as a way of supplementing the secondary rules of the WTO, i.e. he considers the WTO to be a ‘self-contained regime’ so as to exclude international law countermeasures: Pauwelyn (2003), op cit, 231-236.

norms. It does not examine conflicts between EU law and international law, which have been the subject of existing studies.²⁹ Interpretation is a prior, conceptual dimension of any norm conflict (since in order to determine the existence of a conflict, the meaning, or range of meaning, of the norms in question must first be determined). Human rights touch in a very direct way on questions of fundamental values, while competences touch on questions of the definition of a polity or legal entity. All three areas are of fundamental importance in a legal system.³⁰

After discussing the reasons for the existence of norm conflict, this chapter then examines the articulation of norm conflict in the dominant writings in contemporary Anglo-American legal theory in order to situate the argument in the present work for a more systematic and rule-bound understanding of norm conflict rules and solutions. Finally, it summarises the rest of the chapters.

The central argument of the thesis is that the framework of norm conflict offers conceptual insight into understanding how different approaches to legal reasoning reflect different normative concerns. This approach opens up a critical perspective on the long-standing approach of the ECJ to privilege the value of integration in EU law and its own legal reasoning. Two points in particular are developed: the role of speciality and the contrast between conserving or historical/originalist interpretation and evolutive interpretation. Conserving interpretation is marginalised in ECJ caselaw (although the ECJ occasionally does resort to it), but the normative case for it has not been fully considered either in caselaw or in academic literature. Chapter 3 argues that conserving or originalist interpretation, despite what might seem its relatively radical character in EU law, is both epistemically feasible and normatively desirable in light of rule of law and democratic concerns.

²⁹ See FE. Dowrick, 'Overlapping European Laws', 27(3) *ICLQ* 629-660 (1978); R. Schütze, 'EC Law and International Agreements of the Member States – An Ambivalent Relationship?', 9 *CYELS* 387-440 (2006-2007); T. Joris & J. Vandenberghe, 'The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?', 15(1) *Columbia JEL* 1-41 (2008-2009); Klabbbers (2009), op cit.

³⁰ Klabbbers (ibid, p. 13) notes that international treaty conflicts generally involve questions of higher values, e.g. the importance of trade relative to human rights. On this issue, see further Chapter 5 below.

Chapters 5 and 6 move on to examine conflicts of substantive norms. Chapter 5 argues that specificationism as a theory of rights articulation is preferable to the quite ambiguous treatment of the normative character of rights in ECJ caselaw. Specificationism, which can be understood as *lex specialis* applied to the human rights context, renders feasible the definition and generality of rights as concepts with normative priority for guiding both human behaviour and legal reasoning. Chapter 6 argues that competence norms and the differing approaches to addressing them have been greatly under-articulated in the legal reasoning of the ECJ and proposes the *lex specialis* versus *lex generalis* distinction as a key to understanding how they are treated in legal reasoning. The approach of the ECJ in adopting meta-teleological interpretation has often been to implicitly sideline *lex specialis*, preferring *lex generalis* either in the form of broad Treaty teleology or in preferring the general competence provisions in what are now Article 114 and 352 TFEU. Further, competence as a concept can be elaborated so as to understand that the principle of conferral is inherent in it, and this helps clarify why *lex specialis* and historical interpretation generally should be preferred in interpreting EU competence norms given a conception of the EU Member States as ‘Masters of the Treaties.’

The framework of norm conflict calls forth the need for justification of the discretionary choice of norms in legal reasoning, and this facilitates the normative argument in the thesis as to how the ECJ should engage in choice when confronted with a conflict of *prima facie* valid legal norms.

1.2 Summary of Content of Chapters

Chapter 2 analyses the reasons for conflict of norms, both in legal systems generally and in the EU legal system in particular. Norm conflict is inevitable to some extent in any legal system, but the potential and actuality of it are greatly increased because of the complex and exceptional nature of the EU as an organisation of States that have, to some extent, pooled sovereignty.

Chapter 3 defines the concepts of norms (e.g. when do norms relate to the same subject matter and what does ‘speciality’ mean?) and values (distinguishing in some detail, for example, ‘norms’ and ‘normativity’) (in an EU context, relevant values are those set out in the Preamble of the TEU and the Charter on Fundamental Rights of the EU: integration or an ‘ever-closer Union’, democracy, the rule of law, human rights, subsidiarity and Member State sovereignty). The chapter further discusses a typology of different types of norms, e.g. substantive norms, norms of competence, norms of conduct, prescriptive norms, permissive norms, norms of interpretation, and traditional maxims of norm conflict (*lex superior*, *lex posterior*, *lex specialis*).³¹ It does so first in light of Wesley Hohfeld’s typology of legal concepts and then in light of works specifically on norm conflict.³² Hohfeld’s analysis of legal concepts is assessed to see if it can offer conceptual clarity to the question of norm conflict, and in a number of respects it appears to do so. It seeks to further locate the general issue of norm conflicts in general theories of legal reasoning beyond those of Dworkin and Raz discussed above, following a discussion of the difference between rules and principles in legal reasoning.

Chapter 4 examines in more detail the reasons and values behind different interpretative rules/principles or norms and how these interpretative norms and values (a) are worked out, explicitly or implicitly, in EU law and (b) how they might be differently ordered. In particular, the chapter focuses on the values behind the contrast between dynamic or evolutive approaches to interpretation and conserving (or historical/originalist) approaches to interpretation. The chapter includes (b) a case study on evolutive as opposed to conserving or originalist/historical interpretation, examining caselaw on the development of the doctrine of non-discriminatory obstacles to free movement, and (b) a survey of leading constitutionalising cases from the ECJ. The question of conserving or historical/originalist interpretation versus evolutive interpretation reflects an important conceptual issue in the study of norm conflict: to what extent can collective law-making bodies have a coherent, identifiable intention. If the latter is

³¹ See generally, e.g. C. Perelman (ed.), *Les Antinomies en Droit* (Bruylant 1965); Vranes (2006), *op cit*, discussing WTO law.

³² W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale Univ. Press 1946).

not an epistemic possibility, the potential for norm conflict seems greatly increased; conversely, if it is epistemically possible, norm conflict can be avoided to a much greater degree. Chapter 4 focuses on this issue.

Chapter 5 deals with norms conflict of fundamental rights and values. It takes as an initial framework a well-known academic debate in the 1990s between Coppel & O'Neill, charging the ECJ with instrumentalising human rights in the EU legal order, and Weiler & Lockhart, defending the Court. It seeks to revisit the analysis in light of some more recent leading cases from the ECJ on human rights in order to assess what normative priority has developed in the area of human rights. Finally, the Chapter considers the possibility of (a) of a more pronounced hierarchy of rights and (b) specificationism of rights as a way of avoiding conflicts of fundamental rights.

Chapter 6 examines the question of competence norms. Despite the call in the Declaration of Laeken³³ for greater clarity in the definition of the competences of the EU relative to those of the Member States, there seems to have been relatively little conceptual study in EU law on understanding the broad question of competence³⁴ (Vranes suggests the definition of competence has also been understudied in international law³⁵). The notion of 'competence' has recently been the subject of study in jurisprudence.³⁶ This chapter examines how the ECJ addresses the question of competence between the Member States and the EU in its legal reasoning: how do norms of competence relate to norms of conduct,³⁷ is this a useful distinction in EU law?; is integration a meta-norm that is satisfactorily related to other values in the context of questions of competence?; and to what extent does and should *lex specialis* and other interpretative considerations (e.g. on speciality in international law, see Lindroos³⁸) govern questions of competence in EU law?. The chapter includes three case studies: (a) the first examines recent

³³ *The Future of the EU: Declaration of Laeken*, document of the Belgian Presidency, 15 December 2001, part 11A.

³⁴ See further Chapter 6 below.

³⁵ Vranes (2006), op cit, 398.

³⁶ T. Spaak, *The Concept of Legal Competence* (Ashgate 1994); T. Spaak, 'Norms that Confer Competence' 16(1) *RJ* 89-104 (2003).

³⁷ Vranes (2006), op cit, 407-412.

³⁸ A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*', 74(1) *NJIL* 27-66 (2005).

caselaw concerning the interaction of free movement with the right to strike; (b) caselaw on external relations; and (c) the provisions in the Treaty of Lisbon for the establishment of a European Public Prosecutor.

The conclusions seek to synthesise the results of other chapters and argue for a more articulated approach to the problem of norm conflict on the basis that the EU as a legal system, perhaps more than any other, must for reasons of legitimacy confront this problem of legal reasoning in many aspects of its institutional activity.

Chapter 2 – Reasons for Norms Conflict in EU Law

Norm conflict appears to be an inevitable feature of legal systems. Some causes of norm conflict arise in any legal system, while features particular to a given legal system may amplify the inherent potential of law for conflict of norms. This chapter examines both the reasons for norm conflict in any legal system and those particular to the EU. From the inevitability of norm conflict in a legal system follows the necessity for tools of norm conflict resolution to render a legal system satisfactory from the point of view of minimal standards of coherence and rationality. A thicker normative analysis relative to particular system, such as the EU, may then add to the basic conceptual analysis of norm conflict tools, an issue taken up in Chapter 3 below. The final parts of this chapter explain the methodology of the study and examine the general treatment of norm conflict in contemporary Anglo-American legal theory to give context to the discussion of norm conflict resolution developed in Chapter 3.

2.1 Reasons for Norm Conflict Inherent in any Legal System

2.1.1 The Temporal Element

Some degree of norm conflict, e.g. the prosaic example of a contradiction between later and earlier norms, is inevitable in any legal system, even a primitive one. The simple example of a later law repealing an earlier law is an instance of norm conflict, even if its resolution is normally very simple through a *lex posterior* maxim. Any legal system must contend with competing pulls of unity and specificity,¹ between, for example, hierarchically higher norms and hierarchically lower, between more general and more specific norms, and between substantive norms and systemic or secondary norms.²

¹ G. Guillaume, 'The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order', Speech to the Sixth Committee of the UN General Assembly by His Excellency Judge Gilbert Guillaume, President of the ICJ, 27th October 2004, p. 4, available online at < <http://www.icj-cij.org/presscom/index.php?p1=6&p2=1&pr=85&search=%22nagymaros%22> > (last visited 7th December 2009) and cited in Pauwelyn (2003), op cit, 1.

² i.e. the distinction between substantive primary rules and the secondary rules (rules of change, rules of adjudication, rule of recognition) that govern how (substantive) primary rules come into

2.1.2 Vagueness and Generality

Vagueness and different degrees of specificity can create ambiguity as to which law is most applicable. A degree of vagueness is inevitable in any legal system in that it is difficult or impossible for a law to comprehensively enumerate in detail every factual situation to which it is applied. Laws, therefore, have a degree of generality. The level of generality that determines the scope of a provision is related to reasoning by analogy.³ To characterise the level of generality more broadly is to extend the analogical scope of a provision. However, analogy is not a concept that can be explained in purely formal logical terms; it is a question of judging real and substantive resemblance between what is compared.⁴ In other words, it is related to perceptual experience in a way that cannot be generalised *ex ante*. The scope of analogical reasoning is, as a result, to some extent a matter of judicial discretion, although this discretion will be limited by the plausibility of analogical reasoning in a given cultural context and more generally in light of common human experience. For example, it may be difficult to determine the precise scope of the term vehicle when used in legislation: is a bike or a wheelbarrow a vehicle? There are borderline cases at the edges of a concept that can be difficult to define.⁵

being and are changed, enforced, and judged. The distinction is of course attributable to Hart: HLA Hart, *The Concept of Law* (Clarendon Press 2nd ed. 1994), 80-81.

³ See generally, e.g. G. Lamond, 'Precedent and Analogy in Legal Reasoning', *Stanford Encyclopaedia of Philosophy* (Winter 2006 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/entries/legal-reas-prec/>> (last accessed 29th January 2009); J. Yovel, 'Analogical Reasoning as Translation: The Pragmatics of Transitivity', 13(1) *IJSemL* 1-27 (2000); JH. Farrar, 'Reasoning by Analogy in the Law', 9(2) *Bond LR* 149-176 (1997); C. Sunstein, 'On Analogical Reasoning', 106(3) *Harvard LR* 741-791 (1993); J. Mayda, *Francois Gény and Modern Jurisprudence* (Louisiana State University Press 1978), 39-40. More generally, see S. Vosniadou & A. Ortony (eds.), *Similarity and Analogical Reasoning* (Cambridge Univ. Press 1989).

⁴ Ekelöf noted the connection between teleological reasoning and analogy: P. O. Ekelöf, 'Teleological Construction of Statutes' 2 *SSL* 76-117 (1958), 80-81. See generally Farrar (1997), op cit, quoting S. Simitis, 'The Problem of Legal Logic', 3 *Ratio* 60-94 (1960), 78 (Farrar, ibid, 175). See also A. Stone Sweet & M. McCowan, 'Discretion and Precedent in European Law', in Wiklund (ed.), *Judicial Discretion in European Perspective* (Kluwer 2003), 99-102.

⁵ See T. Endicott, 'Law is Necessarily Vague', 7(4) *LT* 379-385 (2001), 383-383; W. Lucy, 'Abstraction and the Rule of Law', 29(3) *OJLS* 481-509 (2009), 488-489.

2.1.3 Complexity of Subject Matter

Legal systems are relatively complex, governing as they do whole societies, or schemes of cooperation between whole societies at the international or transnational level. In most legal systems, there exists more than one source of law, e.g. both legislative norms and judicial decisions interpreting those norms. Where more than one source of law exists, some mechanisms for relating differently sourced norms to each other are necessary. Even when a norm comes from the same source, when greater consistency might be expected as compared to differently sourced norms, the possibility of a temporal conflict of norms is obviously present as is the possibility of conflict between more general as compared to more specific norms. This is because of the complexity of the subject matter that most legal systems must address.

2.1.4 Value Pluralism

While social complexity might be thought to vary greatly between legal systems in primitive societies and those in the pluralistic West, the fact of value pluralism is becoming increasingly pervasive in many jurisdictions globally, and it is probably now justified to consider it as a cause of norm conflict inherent in contemporary legal systems generally. Value pluralism⁶ creates norm conflict in at least two respects: (1) it increases the likelihood of disparate values being reflected in different laws, resulting in a reduction of overall or global coherence of the law and making more likely conflicts in the event of overlapping laws; (2) it renders more contestable the judicial role in filling in gaps in the law, in that the value choices that are entailed in judicial creativity are less likely to reflect societal consensus.

A good example of judicial creativity in many contemporary systems relates to the under-determination of the concrete application of abstract human rights

⁶ See generally J. Waldron, *Law and Disagreement* (Oxford Univ. Press 1999); S. Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Hart Publishing 2006). See also Pauwelyn (2003), op cit, 102-103.

clauses in Bills of Rights. The latter often do not lend themselves to a clear, relatively incontestable interpretation, compared to rule-like and clear-cut provisions such as those relating to the organisation of institutions⁷ or to procedural rights in the criminal process. A Bill of Rights will generally not explain how to prioritise competing rights and values embodied in the text, yet many cases before the courts call for just such a prioritisation. As Fiss has well articulated the problem, Bills of Rights are both abstract and comprehensive: they purport to apply across the full range of public law and at the same time to encompass all values or interests considered to be of fundamental importance.⁸

As a consequence, the interpretation of fundamental rights can be highly controversial.⁹ The theory of legal reasoning must supplement the texts of Bills of Rights, for example, which embody generality and comprehensiveness to a high degree, to determine how their under-determined content is to be interpreted and applied *in concreto*. Interpretative norms, however, differ, and can yield different result to the same ‘raw material’ of legal text: which interpretative methods are to prevail and how they are ranked are of much practical importance in determining the practical content of conflicting rights and legal interests.

Apart from modalities of interpretation, value pluralism is subject to some structuring or determination through the concept of a hierarchy of rights. Some signs of hierarchy are apparent in public international law, including in the concept of *jus cogens* in general international law and in the concept of ‘non-derogable’ rights under the European Convention on Human Rights (ECHR)¹⁰ and International Covenant on Civil and Political Rights.¹¹ These developments indicate recognition that not all human rights norms are of the same level of

⁷ O. Fiss, ‘Objectivity and Interpretation’, 34(4) *Stanford LR* 739-763 (1982), 743 and passim; H. Wechsler, ‘Toward Neutral Principles of Constitutional Law’, 73(1) *Harvard LR* 1-35 (1959), 25 and passim.

⁸ Fiss (1982), *ibid*, 742-743. See also, F. Schauer, ‘The Generality of Rights’, 6(3) *LT* 323-336 (2000).

⁹ Torres Perez (2009), *op cit*, 80.

¹⁰ ETS no. 05, e.g. the right to life excepting death resulting from lawful action in war (Article 2); the ban on torture or inhuman or degrading treatment (Article 3); the prohibition on slavery or servitude (Article 4(1); and the prohibition on retroactive criminal penalties (Article 7).

¹¹ 999 UNTS 171; 6 ILM 368 (1967). Article 4 of the ICCPR mentions the prohibition on torture (article 7), the prohibition on retroactive criminal penalties (Article 15), and recognition of every person before the law (Article 16) as non-derogable.

importance and that some have normative priority over others. The questions thus posed are what rights should get priority and how should that priority be determined? In the context of contemporary moral pluralism, this is a considerable challenge, and it poses an important question of the procedural character of the determination of priority of rights: who is to decide on the priority, e.g. is it a matter of *ex ante* legislative determination (or determination by the constituent power) or an ongoing constructive engagement led by the judiciary?

In other words, as well as the substantive question of priority, there is the matter of comparative institutional analysis¹² and design as to how procedurally and institutionally the determination of priority is made. Answering this question will to a significant extent depend on what systemic values are important, e.g. democracy versus good governance. The question of values, and how they relate to norm conflict, is discussed in Chapter 3. Chapter 5 examines the issue of an *ex ante* hierarchy or priority of rights.

2.1.5 Discontinuity in the Identity of the Law-Maker

The lack of continuity of the identity of the law-maker is another reason for norm conflict. A single, continuous law-maker is more likely to demonstrate consistency of views and knowledge of the potential of new law for conflict with existing law. And although the inculcation and habituation to obedience of the law that comes from experience internal to the legal system can ensure that a sense of duty to obey the law outlasts a current sovereign to continue into the period of power of the succeeding lawful authority,¹³ change in the composition of the law-maker produces changing political and legislative priorities, reduces sensitivity to the existing breadth of legal rules, and can dissipate the continuity of knowledge and awareness of the full extent of existing rules.

¹² See generally, N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press 1994).

¹³ Hart (1994), *op cit*, 58-61.

Especially in modern democracies, the composition of the law-making authority changes quite frequently. And although a permanent civil service provides greater continuity and may, therefore, help compensate for the relative inexperience of the current political leadership relative to the existing body of legal rules, it too will inevitably undergo changes of personnel. Even in a period of relative political stability and continuity, the composition of the lawful authority may change according to the type of law in question. International treaties, for example, may be ratified by the executive, but are often also subject to debate and approval by a parliament prior to ratification and may in fact be negotiated mainly by civil servants, while private interest groups may impact on the process at different stages in seeking to influence it in favour of their preferred outcomes.¹⁴ Conflict can, therefore, easily arise through inadvertence.¹⁵

These differing actors may have different motivations, which can impact on the degree of coherence of ‘intention’ behind the adoption of international treaties, especially if these actors self-servingly advance their own views irrespective of (a) their awareness of the views of the other relevant national actors or of their own subordinate authority in the case of officials and (b) legal coherence in general or the consistency of an instrument under negotiation with the surrounding body of law.¹⁶ Further, compromise between differently motivated actors, which may be necessary to secure agreement to allow the passing of a law, may create ambiguity in the resulting text.¹⁷

Differing motivations behind the adoption of laws has been much debated in the context of the notion of legislative or original constitutional intention. Difficulties attributed to the epistemic possibility of there being a single, coherent intention amongst a group of law-makers that might inform the interpretation of legal instruments are related to a rejection of historical or originalist interpretation in favour of a more constructivist or systemic approach to interpretation. The

¹⁴ Pauwelyn (2003), op cit, 15-16, citing E. Benvenisti, ‘Exit and Voice in the Age of Globalization’, 98(1) *Michigan LR* 167-213 (1999), 169.

¹⁵ See, e.g. Klabbers (2009), op cit, 3.

¹⁶ Jenks (1953), op cit, 452; Pauwelyn (2003), *ibid*, 15.

¹⁷ Pauwelyn (2003), *ibid*, 93.

conflict here is between different conceptions of original intention in the context of interpretative ambiguity, an issue taken up in Chapter 4.

2.2 Reasons for Norm Conflict Particular to EU Law

Within EU law, in particular, several factors may operate to increase the likelihood of norm conflict.

2.2.1 Linguistic Diversity:

Relative to a national legal system, an obvious distinct feature of the EU is the linguistic diversity of the Member States and of the official languages of the organisation. The EU has 23 official or working languages, which entails that documents may be sent to EU institutions and a reply received in any of these languages and that EU regulations and other legislative documents are published in all of them, as is the Official Journal.¹⁸ At a practical level, this can result in different language versions bearing a different meaning, with a need to resolve the linguistic diversity in favour of a single meaning. From the point of view of the theory of norm conflict, what is significant is the means chosen to resolve linguistic conflict and the underlying rationale for that means as compared to alternative resolutions of the problem.

¹⁸ Council Regulation No 1158 determining the languages to be used by the European Economic Community, OJ 34, 29.05.1959, Article 3 of which provides that “Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be worded in the language of such State.” See recently, e.g. K. McAuliffe, ‘Enlargement at the European Court of Justice: Law, Language and Translation’, 14(6) *ELJ* 806-818 (2008), 807-808 and passim for background references and discussion.

2.2.2 The ‘Supranational’ Doctrines of Direct Effect and Supremacy and the Logic of the ‘Integration Imperative’ relative to Traditional Public International Law:

From relatively early in its caselaw, the ECJ sought to mark out the European Communities as substantially different from general public international law, as a new departure constituting ‘a new legal order’:

...the Community constitute a new legal order of international law.¹⁹

... By contrast with ordinary international treaties, the EEC Treaty has created its own legal system.²⁰

...The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.²¹

What marked out the Communities as distinctive were the doctrines of direct effect²² and supremacy,²³ and latter, parallelism and pre-emption.²⁴ An important implication drawn from this characterisation is a move away from reciprocity as the founding structural principle, as remains the case for much of general international law, to an integralist view of the Communities. In particular, the reference to a ‘permanent transfer’ of sovereignty by the Member States departs from State consent and reciprocity. This concept of what can be described as ‘integral obligations’²⁵ conceives of the new legal order as having an inherent importance that transcends the legal interests of the Member States individually, hence the apparent impossibility of withdrawal by a Member State (at least if ‘permanent transfer’ is to be taken at face value). Although the suggested

¹⁹ Case 26/62, *Van Gend en Loos* [1963] ECR 1, at 12.

²⁰ Case 6/64, *Costa v. ENEL* [1964] ECR 585, at 593.

²¹ *Ibid*, at 594.

²² Established in Case 26/62, *Van Gend en Loos*, supra n. 57.

²³ Established in Case 6/64, *Costa v. ENEL*, supra n. 58.

²⁴ i.e. the doctrine that the Community has a parallel power externally to its internal powers and that the Community’s power can exclude any operation by the Member States of their external power: Case 22/70, *Commission v. Council (Re European Road Transport Agreement)* [1971] ECR 263 (‘ERTA’). See further Chapter 6.5.2 below.

²⁵ For detailed discussion of the distinction between integral and reciprocal obligations, see Pauwelyn (2003), op cit, 53-87.

impossibility for a Member State to withdraw from the Communities was perhaps always contestable and withdrawal is now expressly provided for,²⁶ it points to the potential and actual conflict between the Community legal order as articulated by the ECJ and traditional international law based on State consent as the defining structural principle of the international legal system.²⁷

This move towards integral obligations and away from merely reciprocal obligations is not unique to the European project, though institutional rhetoric on the imperative of integration seems especially strong. In general international law, for example, *jus cogens* or peremptory norms have an integral character that renders their legal status immune from a failure of acceptance or recognition by some States.²⁸ More generally, the international law of State responsibility recognises a category of treaty clauses that are not subject to suspension by States as a countermeasure in their dealing toward another State who has breached the treaty; self-help through suspension is prevented because of the particular or fundamental status of the clause.²⁹ The exclusion of self-help generally in an EU context has been strongly asserted by the ECJ:

Above all, it must be pointed out that in no circumstances may the Member State rely on similar infringements by other Member States in order to escape their own obligations under the provisions of the Treaty.³⁰

Perhaps the strongest statement of the limitations on the competences and faculties of the Member States under general international law that results from

²⁶ Articles 49-50 TEU.

²⁷ See generally on reciprocity B. Simma & D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17(3) *EJIL* 483-529 (2006).

²⁸ See, e.g. Vienna Convention on the Law of Treaties 1155 UNTS 331, 8 ILM 679, entered into force 27th Jan. 1980, Article 53 of which states that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law" and Article 60(5) of which prohibits the termination and suspension of treaty obligations "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties".

²⁹ Article 50 of the International Law Commission's Draft Articles on State Responsibility (*Yearbook of the International Law Commission, 2001*, Vol. II, Part Two (2001)) states that "1. Countermeasures shall not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; (d) other obligations under peremptory norms of general international law."

³⁰ Joined 142 & 143/80, *Amministrazione delle Finanze Dello Stato v. Essevi* [1981] ECR 1413, at 1431.

membership of the Communities is found in *Opinion 1/91*. This concerned a proposal by the Member States to create a new court for wider economic integration under the European Economic Agreement (EEA). In *Opinion 1/91*,³¹ the ECJ held that the creation of such a court was contrary to Community law:

3. ... Although, under the agreement, the Court of the European Economic Area is under a duty to interpret the provisions of the agreement in the light of the relevant rulings of the Court of Justice given prior to the date of signature of the agreement, the Court of the European Economic Area will no longer be subject to any such obligation in the case of decisions given by the Court of Justice after that date. Consequently, the agreement's objective of ensuring homogeneity of the law throughout the European Economic Area will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law.

It follows that in so far as it conditions the future interpretation of the Community rules on the free movement of goods, persons, services and capital and on competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community. As a result, it is incompatible with Community law.³²

Norm conflict here operates between general international law and special regimes or sub-systems that exclude the secondary rules of general international law in specific instances. This takes effect at the level of competence in precluding certain international acts by Member States of the EU. Practically, the issue revolves around the use of countermeasures in general international law for breaches by another Member State of EU law. Despite the absolute exclusion by the ECJ of the logic of reciprocity as applicable to EU law, it is open to debate whether the EU has entirely severed itself from general international law and it seems untenable to entirely exclude reciprocity.³³ Chapter 6 below examines the general issue of competences and their interpretation in the context of the

³¹ *Opinion 1/91 Re European Economic Area Agreement I* [1991] ECR 6079.

³² *Ibid.*, at 6081-6082.

³³ More recently, see Simma & Pulkowski (2006), *op cit.*, 516-519.

boundary line between the EU's general external relations power and the Common Foreign and Security Policy (CFSP), the CFSP being a half-way house between the residual powers of the Member States in international law and the Union.³⁴ Dashwood identifies here a paradox underling the EU polity, which is that it consists of a 'constitutional order of States': an organisation consisting of States that are sovereign entities in public international law, yet which have limited that sovereignty as a consequence of their participation in the EU.³⁵

The issue is further complicated in EU law because of the twin avenues of cooperation existing alongside each other, namely: (1) the specific 'Community' or 'supranational' method in what has until 2009 been the First or Community Pillar of the pre-Lisbon three-Pillar EU, with its doctrines of supremacy, direct effect, parallelism and pre-emption, qualified majority voting in the Council of Ministers, and a legislative role for a directly elected European Parliament; and (2) the intergovernmentalism of the pre-Lisbon Second and Third Pillars, which amounts to traditional international law cooperation (with an absence of the aforementioned attributes of supranationalism) except through the institutions of the Community/Union. Both the Second and Third Pillars had their own specific types of legislative instruments (which, although denominated by different terminology, appear essentially to be equivalent to traditional public international law treaties or conventions).³⁶

The potential for norm conflict here might be thought limited by (1) the application of a straightforward *lex superior* rule in Article 47 TEU as it had been pre-Lisbon, giving priority and competence to Community/First Pillar legislation in the event of a conflict between Community/First Pillar measure and a Second or Third Pillar measures and (2) the abolition of the Pillar structure by the recently

³⁴ For reasons of space, it is not possible to address the full extent of the issue of the external powers of the EU relative to the Member States, which is a large topic in itself, the focus in Chapter 6 is on situations where there is likely to be a conflict, actually or potentially, between the CFSP and other Union competences. An additional issue in this context is to what extent self-help by the Member States under international law is precluded in their relations with other EU Member States in breach of EU law: on this issue see G. Conway, 'Breaches of EC Law and the International Responsibility of Member States', 13(3) *EJIL* 679-695 (2002); Simma & Pulkowski (2006), *op cit*, esp. 516-519.

³⁵ A. Dashwood, 'The Limits of European Community Powers', 21 *ELR* 113-128 (1996), 114.

³⁶ B. de Witte, D. Hanf & E. Vos (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia 2001).

adopted Lisbon Treaty. However, two aspects of the Lisbon Treaty resurrect a potential for norm conflict between supranationalism and intergovernmentalism: the priority of what has heretofore been the Community Pillar is no longer retained (it had previously been set out in Article 47 TEU); and, second, although the Pillar terminology has been abandoned, cooperation in what was the spheres of the Second and Third Pillars, foreign policy and criminal law respectively, retains important intergovernmental elements, especially in the case of foreign policy.³⁷ The question of the priority between instruments in the latter two areas and other legal instruments seems, therefore, somewhat open.³⁸ However, the Lisbon Treaty enhances clarity if only by reducing the number of distinct legal instruments, adopting a generic instrument called a ‘decision’.³⁹

2.2.3 The Continuing Question of EU Competence in the Context of Enduring Member State Sovereignty:

As noted above, complexity is a cause of norm conflict in legal systems generally, and complexity is certainly a feature of EU law in the matter of the division of competences between the Union and the Member States. The previous section noted that the issue arises, for example, in determining the relative scope of

³⁷ In criminal matters, the Commission will not have an exclusive right of initiative (see Article 76 of the Treaty on the Functioning of the European Union or TFEU, which gives one quarter of the Member States a right to make a proposal) and this area of competence is also subject to the ‘emergency break’ procedure whereby a Member State can exercise a veto (Article 82(3) and 83(3) TFEU). Article 24 TEU characterises the CFSP as distinct and provides for a general rule of unanimity, and excludes legislative acts from the scope of the CFSP: “The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded.” Article 275 TFEU provides that the ECJ shall not have jurisdiction over the provisions relating to the CFSP or over acts adopted on the basis of those provisions. Article 352 TFEU (replacing Article 308 ECT), which provides a general legislative power to adopt acts to pursue the objectives of the Union, is stated not to apply to the CFSP (see Article 352(4) TFEU). It is textually unclear whether supremacy applies to what were previously Second and Third Pillar matters, i.e. criminal law and the CFSP, although it hardly arises under the CFSP, which is executive-dominated in excluding legislative instruments, as is the case generally in national systems. The formal supremacy clause contained in the Treaty establishing a Constitution was dropped from the Lisbon Treaty, which instead has attached Declaration No. 17 annexed to the Final Act and which refers to caselaw of ECJ and Council Legal Service’s opinion on supremacy of *Community* law (which, on the face of it, only covers what were previously First Pillar matters, i.e. the common market).

³⁸ See, e.g. M. Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’, 45 *CMLRev* 617-703 (2008), 626, suggesting the adoption of a *lex specialis* rule in this situation.

³⁹ *Ibid*, 625, arguing that decisions under the CFSP will remain distinct due to the different overall character of the CFS, i.e. its intergovernmentalism.

application of the Union's general external power and the CFSP. The general issue of delineating competences is not unique to the EU, as it arises in any federal or multi-level system, which will need some definition of the competences of the different units in the federal or multi-level entity. It is probably fair to say, however, that the division of competences is more problematic in the EU, especially given that the EU does not have the level of legitimacy associated with States. From its earliest days, it contained the ambiguous programme of developing a common market between previously disparate and competing national economies. In practice, it has become difficult to distinguish between the fundamental principles of the common market and other competences.⁴⁰

Given this phenomenon of 'competence spill-over'⁴¹ and even though the extent and degree to which the EU now constitutes an 'ever-closer Union' so as to encompass the ambition to a federal 'super-State' is much contested, the competences of the EU have undeniably extended beyond a common market narrowly understood to encompass an increasing range of other economic, social, and political matters, including, e.g. criminal law cooperation and to some extent foreign policy: "the EU... provides for the possibility of some form of governmental activity across a remarkably wide range of societal tasks".⁴² The range of legislative matters within the remit of the Union legislature is now thus very extensive and includes matters relating to complex and continually competing value and policy choices. For example, since the Single European Act 1986 and the Treaty of Maastricht 1992, EU competences have been extended to cover all or aspects of⁴³ monetary policy (money supply and interest rates), environmental

⁴⁰ G. Davies, 'Subsidiarity: The Wrong Idea, In the Wrong Place, At the Wrong Time', 43 (1) *CMLRev* 63-84 (2006), 63, 65. See further below Chapter 6.

⁴¹ The term is associated with neo-functional theory, which supposes that functional activities of Community or Union institutions tend to lack clear, limiting definition and expand into associated areas in an incremental manner: originally, see E. Haas, *Beyond the Nation State. Functionalism and International Organization* (Stanford Univ. Press 1964), 48.

⁴² J. Shaw, 'Process and Constitutional Discourse in the European Union', 27(1) *JLS* 4-37 (2000), 13.

⁴³ In relatively limited areas, EU has exclusive competences, but more commonly has shared competence or 'supporting', 'coordinating', or 'complementary' competences with the Member States. Under Article 3 TFEU, the areas of exclusive competence are: the customs union, competition law, economic and monetary policy, conservation of marine biological resources, and the common commercial policy. Under Article 3(2) TFEU, the EU has also exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope. See further Chapter 6 below.

policy, research and technology, social policy, culture, consumer protection, education, tourism, and development cooperation, asylum and immigration policy, criminal justice, foreign policy.

The underpinning principles of the common market have a potential reach that encompasses almost any divergences in national law on any matter: almost any divergence in national laws could be construed in an abstract way as an obstacle to free movement or as a distortion on competition. The ECJ itself recognised the latter principle, i.e. undistorted competition, as a possible basis for competence overreach in this way:

106. In examining the lawfulness of a directive adopted on the basis of Article 100a of the Treaty, the Court is required to verify whether the distortion of competition which the measure purports to eliminate is appreciable (*Titanium Dioxide*, cited above, paragraph 23).

107. In the absence of such a requirement, the powers of the Community legislature would be practically unlimited. National laws often differ regarding the conditions under which the activities they regulate may be carried on, and this impacts directly or indirectly on the conditions of competition for the undertakings concerned. It follows that to interpret Articles 100a, 57(2) and 66 of the Treaty as meaning that the Community legislature may rely on those articles with a view to eliminating the smallest distortions of competition would be incompatible with the principle, already referred to in paragraph 83 of this judgment, that the powers of the Community are those specifically conferred on it.⁴⁴

In the above passage, the ECJ indicates that the adoption of a minimum threshold has the effect of restricting Community/Union competence. However, the ECJ has not adopted such a threshold in the area of free movement and has specifically rejected the idea in some caselaw,⁴⁵ though the same logic of potentially unlimited Union competence applies. This vagueness as to the scope of Union competences is in conflict with the principle of conferred powers in Article 5 of the Treaty on

⁴⁴ Case 376/98, *Germany v. Parliament* [2000] ECR I-8419, paras. 106-107.

⁴⁵ See Joined Cases 177 and 178/82, *van de Haar and Kaveka de Meern* [1984] ECR 1797, para. 13.

European Union (TEU), namely, that the Union can only act on the basis of the limited powers accorded in the Treaty:

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

In these passages, the Treaty recognises both that Union competence is limited in not applying to areas that remain the exclusive preserve of the Member States and that in areas of shared competence (the principle of conferral), the exercise of Union competence depends on the achievement of better results, by reason of scale or effects, than if the Member States acted individually (the principle of subsidiarity). Both the principles of conferral and subsidiarity thus sit uneasily with and can be opposed to the ‘conceptual pull’ of the common market principles of the abolition of obstacles to free movement and undistorted competition.

As one commentator strikingly put it, this potential could lead to the ‘infantalisation’ of the Member States:

In order to prevent a complete infantilization of national governments with the inevitable consequent political backlash, there is a pressing need to have a system that defines and contains the legitimate scope of Community power and legislation. ... Alas, as every Community lawyer knows, there could hardly be more open-ended and ambiguous competences than those assigned to the Community. As if the individual policies, notably the legislative competence for the internal market, were not open enough, there is a mop-up clause allowing legislation that may be necessary “in the course of the operation of the common market” to achieve “one of the objectives of the Community”? These objectives include “the raising of the standard of living and quality of life” in the Community. What kind of rules might be necessary in operating an international common market? Shared criminal law, at least concerning fraud? Common tax rules? A common contract code? Harmonized education systems to ease migration of persons? A single language? All are arguable.⁴⁶

How conflict in the matter of competence is and can be addressed in EU law is discussed in Chapter 6: an attempt is made to demonstrate how the principles of conferral and subsidiarity could be more fully respected in the legal reasoning of the ECJ.

2.2.4 Pluralistic Membership of the EU Legislatures:

It was noted above that the identity of the law-making authority changes over time, and this is a factor of especial significance in the EU, given that the composition of what can be compared to the upper chamber of a bicameral parliament,⁴⁷ i.e. the Council of Ministers, is continually changing according to the electoral cycles unique to each Member State and the variations of and changes of cabinet

⁴⁶ Davies (2006), op cit, 63, 65.

⁴⁷ K. Lenaerts, ‘Some Reflections on the Separation of Powers in the European Community’, 28 *CMLRev* 11-35 (1991), 16; L. Allio & G. Durand, ‘Montesquieu Wakes Up: Separation of Powers in the Council of Ministers’, *Working Paper of the European Policy Centre 02/2003* (2003), 9.

appointees in those Member States, the latter often being more frequent than electoral cycles. This relates to the epistemic question of collective intention behind law-making and the possibility of coherent, shared intention as a function of law-making discourse notwithstanding changes in the actors within that discourse (a point taken up in Chapter 3).

2.2.5 The Sources of EU Law:

Compared with most other legal systems, EU law has more sources of law. These include the founding and amending Treaties ('primary legislation'), legislative acts of the Union institutions ('secondary legislation'), general principles of law as developed by the ECJ, international law, and national laws and constitutions of the Member States. Set out in Article 249 ECT pre-Lisbon, the three main type of binding legislative instruments of the institutions listed there being regulations, directives, and decisions.⁴⁸ Prior to the coming into effect of the Lisbon Treaty, distinct legal instruments existed under the Second and Third Pillars⁴⁹ and these remain valid legal instruments post-Lisbon.⁵⁰ The EU is monist with respect to international law, in that international agreements concluded by the EU have direct effect in EU law.⁵¹ The ECJ or the Court of First Instance (now the 'General Court') have at various times adopted as a source of EU law public international

⁴⁸ Now in Article 288 TFEU. Senden suggests that this list is incomplete in that a number of other '*sui generis*' instrument are recognised in other provisions of the Treaties, including regulations concerning the Ombudsman and inter-institutional agreements: Senden (2004), op cit, 53-54.

⁴⁹ Under the Third Pillar (police and judicial cooperation in criminal matters), Article 34 TEU (pre-Lisbon), the legal instruments were labelled framework decisions, decisions, and conventions, and appear to have been in effect typical public international law treaties or conventions, i.e. agreements between sovereign States binding in international law: see B. de Witte, 'Legal Instruments and Lawmaking in the Lisbon Treaty', in S. Griller & J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism Without a Treaty* (Springer 2008), 88-90.

⁵⁰ See, e.g. Dougan (2008), op cit, 683.

⁵¹ Prior to the passing of the Treaty of Lisbon, it was more correct to say that the European Community, i.e. the First Pillar, had legal personality, as it was only the Community that was expressly attributed with legal personality in the Treaties: see Article 282 ECT (pre-Lisbon) and Article 47 TEU post-Lisbon (the latter attributes legal personality to the newly integrated Union structure). For caselaw on the direct effect of international agreements in Community/Union law, see Case 181/73, *Haegmean v. Belgium* [1974] ECR 449, at 459-460 (the first such decision), and among more recent cases, see, e.g. Case C-262/96, *Sürül v. Bundesanstalt für Arbeit* [1999] ECR I-2685.

law rules concerning, for example, treaty interpretation and suspension,⁵² rules concerning the allocation of extraterritorial jurisdiction,⁵³ and rules concerning the law of the sea.⁵⁴ Potentially, therefore, international treaties, international customary law, general principles of international law, and acts of international organisations are all sources of EU law.⁵⁵

However, from the early days of the Communities, as noted above, the ECJ has set out to mark Community law out as distinct from general international law,⁵⁶ which in effect has given it a degree of discretion as to when it will take inspiration from international law as a source. EU law is characterised thus by an openness to international law, but also by self-positioning as distinct and *sui generis*⁵⁷ that enables the ECJ and the Union to reject at a conceptual level, in a

⁵² See, e.g. Case 104/81, *Hauptzollamt Mainz v. CA Kupferberg & Cie KG* [1982] ECR I-3641 and Case T-115/94, *Opel Austria v. Council* [1997] ECR II-39 on treaty interpretation and Case C-162/96, *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655 on treaty suspension.

⁵³ See, e.g. Case T-102/96, *Gencor v. Commission* [1999] II-753.

⁵⁴ See, e.g. Case C-286/90, *Anklagemyndhigeden v. Poulsen Diva Navigation Corp.* [1992] ECR I-601.

⁵⁵ The normal starting point for defining the sources of international law is Article 38(1) of the Statute of the International Court of Justice (ICJ), which lists as sources of international law (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Although not mentioned in Article 38(1), secondary acts (rather than the founding treaties) of international organisations can in practice be an important source (see, e.g. C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 *RdC* 195-374 (1993-IV)), most obviously perhaps in the case of UN Security Council resolutions. In Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649, the CFI accepted the primacy of UN Security Council resolutions over Community law subject only to review for compliance with *jus cogens* (*ibid*, paras. 226, 282-286). On appeal, in Joined Cases C-402/05 P and C-415/05 P, *Kadi and al Barakaat International Foundation v. Council* [2008] ECR I-6351, the ECJ departed from this reasoning, holding that the Community was an autonomous legal system with respect to international law (paras. 282, 316) and that the guarantee of fundamental rights in the Community, inspired by the constitutional traditions of the Member States and the ECHR (*ibid*, para. 283), formed part of the very foundations of the Community (*ibid*, para. 290; see also *ibid*, paras. 303-304), thus making it appropriate in the view of the ECJ to review Community acts implementing UN Security Council resolutions more generally on human rights grounds. The extent of the powers of the UN Security Council to 'legislate' in this way is controversial: see, e.g. S. Talmon, 'The Security Council as World Legislature', 99(1) *AJIL* 175-193 (2005).

⁵⁶ Most famously, see Case 26/62, *Van Gend en Loos*, *supra* n. 57, at 12; Case 6/64, *Costa v. ENEL*, *supra* n. 58, at 593; Joined Cases C-402/05 P and C-415/05 P, *Kadi and al Barakaat International Foundation v. Council*, *supra* n. 93, paras. 282, 316. The decision in *Kadi* is discussed more extensively below in Chapter 5 on fundamental norms and the relationship of the EU with other legal systems.

⁵⁷ See, e.g. Shaw noting "boundary marking [by Community judges and lawyers] ... their strong insistence on the *sui generis* teleological approach of the Court of Justice to the interpretation of the Treaties and the secondary legal texts": Shaw (1996), *op cit*, 235.

given instance, a standard public international law approach in developing the law. This opens up the problem of opportunistic positioning of the EU as either consistent with or different from general public international law, depending on whatever characterisation would achieve a desired result.

As well as international law, the EU looks to the constitutional and legal traditions of the Member States to fill gaps in EU law, including in the development of the category of general principles of law as a source of EU law.⁵⁸ In international law, general principles have been understood as relating to concepts inherent in legality and in a legal system.⁵⁹ Examples include the principle of good faith⁶⁰ and proximate causality.⁶¹ In general, such legal principles have an open texture and degree of generality or abstraction that makes them inherently more uncertain relative to more conclusive, clear-cut legal rules.⁶² In EU law, the category of general principles of law is similar to that in international law, though it appears to be somewhat broader in EU law in more explicitly encompassing human rights and principles specific to the nature of the Union (of the latter, e.g. the principles of equivalence and effectiveness of remedies). Among the principles that the ECJ has developed in this category are fundamental human rights,⁶³ proportionality,⁶⁴ legal certainty,⁶⁵ equality,⁶⁶ principles of procedural propriety,⁶⁷ equivalence⁶⁸ and effectiveness of

⁵⁸ See generally T. Tridimas, *The General Principles of EU Law* (Oxford Univ. Press 2nd ed. 2006).

⁵⁹ See generally, e.g. B. Cheng, *General Principles of Law as Applied by International Tribunals* (Stevens & Sons Ltd. 1953, reprinted by Cambridge Univ. Press 2006); Pauwelyn (2003), 124-131; I. Brownlie, *Principles of Public International Law* (Oxford Univ. Press 7th ed. 2008), 19-27. Brownlie refers to a category of 'general principles of international law' as distinct from the category of general principles of law recognised in Article 38(1) of the Statute of the ICJ, the former including custom.

⁶⁰ See, e.g. *Free Zones Case* (1930), PCIJ, Ser. A, no. 24, p. 12; Cheng (1953 & 2006), op cit, 105-162; Brownlie (2008), op cit, 18.

⁶¹ See, e.g. *Administrative Decision No. 11* (1923) *Dec. & Op.* p. 103, at pp. 133-134, of the German-United States Mixed Claims Commission (established 1922), cited in Cheng (1953 & 2006), op cit, 245 et seq.

⁶² The rules v. principles distinction is examined further in Chapter 3 below.

⁶³ First set out in Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419. See also, e.g. Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle* [1970] ECR 1125.

⁶⁴ See, e.g. Case 181/84, *R v. Intervention Board ex parte Man Sugar Ltd.* [1985] ECR 2889 See also Article 5 TEU.

⁶⁵ See, e.g. Case 98/78, *Firma A. Racke v. Hauptzollamt Mainz* [1979] ECR 69.

⁶⁶ Case 149/77, *Defrenne v. SABENA* [1978] ECR 1365.

⁶⁷ See, e.g. on legitimate expectations, Case 120/86, *Mulder v. Minister van Landbouw en Visserij* [1988] ECR 2351.

remedies,⁶⁹ and possibly transparency.⁷⁰ Further, the Treaties recognise the principles of conferral and subsidiarity.⁷¹

The ECJ more often looks to the ECHR⁷² as a source in developing its rights jurisprudence; it occasionally looks to the constitutional traditions of the Member States. Craig & de Búrca well explain the context for this:

The reasons are to some extent obvious, in that it is more difficult for the ECJ to assert a ‘common’ approach where a particular right does not appear in every national constitution, whereas an instrument like the ECHR is supposed to reflect precisely the collectively shared commitments of all Member States. Further, the fear of compromising the doctrinal supremacy of EU law by appearing to defer to a particular national constitutional provision has animated the ECJ’s case law ever since *Costa v. ENEL*.⁷³

The general approach set out in *Hoehchst* is that it is sufficient if a given principle is common to several of national legal systems, but ‘non negligible divergences’ constitute an obstacle to its recognition:

Since the applicant has also relied on the requirements stemming from the fundamental right to the inviolability of the home, it should be observed that, although the existence of such a right must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the Member States in regard to the

⁶⁸ See, e.g. Case 186/98, *Nunes and de Matos* [1999] ECR I-4883, para. 13; Case C-78/98, *Preston and Others* [2000] ECR I-3201, para. 31; Case C-234/04, *Kapferer v. Schlanck* [2006] ECR I-6307, para. 22.

⁶⁹ See, e.g. Case 68/88, *Commission v. Greece* [1989] ECR 2965, para. 24.

⁷⁰ The ECJ has implicitly recognised the principle, see e.g. Cases C-154 & 155/04, *The Queen on the application of Alliance for Natural Health and Nutri-Link Ltd. v. Secretary of State for Health* [2005] ECR I-6451, paras. 81-82. Judge Koen Lenaerts has suggested transparency should be considered a general principle of Community law: K. Lenaerts, “‘In the Union We Trust’: Trust Enhancing Principles of Community Law”, 41 *CMLRev* 317-343 (2004), 321.

⁷¹ See Articles 4 and 5 TEU and the Protocol on the Application of the Principles of Subsidiarity and Proportionality.

⁷² *Supra* n. 48.

⁷³ P. Craig & G. de Búrca, *EU Law: Texts, Cases and Materials* (Oxford Univ. Press 4th ed. 2008), 386.

nature and degree of protection afforded to business premises against intervention by the public authorities.⁷⁴

Some support for a much looser and flexible approach can also be found in the caselaw.⁷⁵

The wide range of these sources of law increases the risk and likelihood of conflict between them and raises the question of the ranking or hierarchy between them: as between (a) sources internal to EU law, (b) between EU law and national laws of the Member States, and (c) between EU law and public international law. A range of instruments might be considered soft law,⁷⁶ such as agreements reached at the Council of Ministers or at the European Council that are not eventually translated into a formal legislative form. However, as these instruments do not have any direct normative status other than as possible *travaux préparatoires*, they are considered in the present study only in so far as they may be relevant to interpretation⁷⁷ in Chapter 3.

⁷⁴ Case 46/87, *Hoechst Ag v. Commission* [1989] ECR I 3283, para. 17. See also Case 11/70 *Internationale Handelsgesellschaft*, supra n. 101, para. 3, where the ECJ stated that “Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law.”

⁷⁵ See, e.g. Advocate General Slynn in Case 155/79, *AM. and S. v. Commission* [1982] ECR 1575, at 1649, suggesting the ECJ should be free to choose from the laws of the Member States according to what it felt was suitable (though the CFI was dismissive of such a possibility in Case T-112/98, *Mannesmannröhren-Werke v. Commission* [2001] ECR II-729, at para. 84). In Case 155/79, *A., M. and S.*, the ECJ filled a gap in EU law on the issue of lawyer-client confidentiality by drawing on the legal traditions of the Member States: *ibid*, at 1611-12. More recently, the CFI in Joined Cases T-125/03 & T-253/03, *Akzo Nobel Chemicals v. Commission* [2007] ECR II-3253 refused to extend the basic principle of confidentiality to in-house legal counsel. The basic principle of lawyer-client confidentiality is found in almost all legal systems, but a more extensive application to in-house legal advice is not so. The CFI in this case did refer to the legal traditions of “a considerable number of Member States” that did not recognise such privilege: *ibid*, at para. 155.

⁷⁶ See generally Senden (2004), *op cit*.

⁷⁷ An example is the statement of the European Council, after the rejection of the Treaty establishing a Constitution in referenda in France and the Netherlands, that the ‘constitutional concept is abandoned’: stated in the European Council mandate for the 2007 Intergovernmental Conference: Presidency Conclusions, Annex I. 11177/07 p. 15. See also Dougan (2008), *op cit*, 622, 698-700. The statement could be of interpretative relevance, for example, on the scope of the supremacy doctrine in EU law.

2.2.6 The Relationship of EU Law with the Law of the Member States:

The use of the common constitutional traditions of the Member States as a source of general principles points to the more general question of the relationship between EU law and that of the Member States and the potential for conflict between them. From the internal perspective of EU law, an unqualified, absolute principle of the supremacy or primacy of EU law has been articulated by the ECJ in a way that would avoid any conflict through a simple, strong *lex superior* principle:

... the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional structure.⁷⁸

However, the simple solution to the problem of potential norm conflict in the above passage has been rejected by a number of supreme or constitutional courts of the Member States, the most well-known being those of the German Federal Constitutional Court. The potential for conflict arises especially in the context of the problem of *kompetenz-kompetenz*,⁷⁹ i.e. on the question of who has authority to decide ultimately the competence of the EU vis-à-vis the Member States. The Karlsruhe court has indicated in a series of cases that the validity of Community or Union law in the German constitutional order depended upon satisfactory compliance with human rights as protected by German constitutional law and that the Federal Constitutional Court has competence to determine the compatibility of the degree of transfer of competence to the EU with the German constitutional order.⁸⁰ On the *kompetenz-kompetenz* question, it required in its *Lisbon Treaty*

⁷⁸ Case 11/70, *Internationale Handelsgesellschaft*, supra n. 101, para. 3.

⁷⁹ See, e.g. G. Beck, 'The Problem of *Kompetenz-Kompetenz*: A Conflict Between Right and Right in which There Is No *Praetor*', 30 (1) *ELR* 42-67 (2005).

⁸⁰ *Internationale Handelsgesellschaft*, BVerfGE 37, 271, [1974] 2 CMLR 540 ('*Solange I*'); *Wüensche Handelsgesellschaft*, BVerfGE 73, 339, [1987] 3 CMLR 225 ('*Solange II*'); *Brunner v. European Treaty*, BVerfGE 89, 155, [1994] 1 CMLR 57; *Lisbon Treaty Case*, BVerfG, 2 BvE 2/08, judgment of 30th June 2009, available at: < http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html > (in English, last accessed 22nd January 2010). For academic commentary on the Lisbon Treaty judgment, see, e.g. A. Steinbach, 'The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration?', 11(4) *GLJ* 367-390 (2010).

judgment that increases in the competence of the Union institutions through the use of *passarelle* clauses and the use of the enhanced flexibility procedure in the Lisbon Treaty both require the prior approval of the two houses of the German Parliament in order for Germany to agree to them, and the Karlsruhe court asserted its own jurisdiction to determine the matter of *kompetenz-kompetenz*.

The constitutional courts of a number of other Member States, including both old and new members of the Union, have expressed similar reservations to an absolute, unqualified statement of the supremacy of Union law – for reasons of space, only a few can be surveyed here.

In France, the situation is somewhat complicated by the various judicial organs that have relevant jurisdiction, which are the *Conseil Constitutionnel*, the *Conseil d'État*, and the *Cour de Cassation*.⁸¹ The *Conseil d'État* initially resisted accepting the supremacy of Community law,⁸² but then relented to accept it in practice.⁸³ However, the basis of the *Conseil d'État*'s reasoning was that such supremacy as Community law had was based on Article 55 of the French Constitution,⁸⁴ which concerns the incorporation of international agreements into national law, and not on the nature of the Community legal order as identified by the ECJ in *Costa v. ENEL*. The *Conseil d'État* thus apparently does not accept the supremacy of Community law over the French Constitution, although it has not stated this explicitly, but it has ruled that international agreements under Article 55 do not have supremacy over the Constitution.⁸⁵

⁸¹ The *Conseil d'État* provides the executive branch with legal advice, thus exercising *ex ante* abstract review of legislative acts, but without having the power to declare proposed legislative acts impermissible or invalid as unconstitutional (so it exercises advisory review only). It also acts as the administrative court of last resort. The *Conseil Constitutionnel* also exercises *ex ante* abstract review, but does so after a legislative measure has been voted on by parliament and before signature by the President, plus it has the power to prevent enactment by a declaration of unconstitutionality. The *Cour de Cassation* is the highest court in general civil matters.

⁸² Decision of 1st March 1968 in *Syndicat Général de Fabricants de Semoules de France* [1970] CMLR 395, on the ground that as it had no jurisdiction to rule on the invalidity of legislation, it could not accord primacy to Community law.

⁸³ *Raoul Georges Nicolo* [1990] 1 CMLR 173.

⁸⁴ See further the decision of the Cour de Cassation in Decision of 24 May 1975 in *Administration des Douanes v. Sociétés 'Café Jacques Vabre' et Sàrl Weigel et Cie* [1975] 2 CMLR 336, which based its acceptance of supremacy on Article 55 of the Constitution also.

⁸⁵ Decision of 30th October 1998, *Sarran and Levacher* (RFDA 1998, p. 1091). International law does not have supremacy over national constitutional law in France.

The *Conseil Constitutionnel* or Constitutional Council has tended to base its acceptance of supremacy on Article 88-I of the French Constitution, which provides for the participation of the Republic in the EU, but the Constitutional Council has ruled that a directive that is in conflict with an express provision of the Constitution cannot be transposed and enter into force.⁸⁶ The Constitutional Council adopted the same general reasoning its approach to the Treaty of Lisbon, basing its constitutionality on Article 88 –I,⁸⁷ and stating:

When however undertakings entered into for this purpose contain a clause running counter to the constitution, call into question constitutionally guaranteed rights and freedoms or adversely affect the fundamental conditions of the exercising of national sovereignty, authorisation of such measures requires prior revision of the Constitution.⁸⁸

More recently, the Constitutional Council has again refused to treat Union law as supreme over national constitutional law, saying that the transposition of directives was subject to the limit of not conflicting with any rule of principle inherent in the constitutional identity of France.⁸⁹

In Italy, the Constitutional Court in *Frontini* stated that it would subject Community law to judicial review as to its compatibility with fundamental rights and with the basic principles of the Italian constitutional order.⁹⁰ In *Granital*, the Constitutional Court further asserted jurisdiction to determine the *kompetenz-kompetenz* question.⁹¹ In *Fragd*, it confirmed its willingness to subject specific

⁸⁶ See generally C. Richards, ‘The Supremacy of Community Law before the French Constitutional Court’, 31 *ELR* 499-517 (2006).

⁸⁷ *Décision n° 2009-595 DC*, 3 décembre 2009, cons. 14 et 22, *Journal officiel* du 11 décembre 2009, p. 21381, texte n°2, para. 7, as quoted in J. Ziller, ‘The Law and Politics of the Ratification of the Lisbon Treaty’, in Griller & Ziller (eds.) (2008), 324.

⁸⁸ *Décision n° 2009-595 DC*, *ibid.*, para. 9. Griller & Ziller indicate that there is some debate amongst French lawyers whether the reference to “constitutionally guaranteed rights and freedoms” goes further than previous judgments and brings the French position closer to the German Federal Constitutional Court’s reservation on sovereignty in the *Brunner* line of caselaw: *ibid.*

⁸⁹ *Décision n° 2010-605 DC*, 12 mai 2010, *Journal officiel* du 13 mai 2010, p. 8897, para. 18. The French courts have avoided explicitly addressing the question of a conflict between the EU Treaty and the French Constitution, though it is implicit in the reasoning of the cases above that absolute supremacy of EU law would not be accepted.

⁹⁰ *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372.

⁹¹ *Spa Granital v. Amministrazione delle Finanze*, Dec. 170 of 8 June 1984, unofficial translation at 21 *CMLRev.* 756 (1984)

rules of Community law to review on human rights grounds.⁹² Also from Southern Europe, the Spanish Constitutional Court has denied absolute supremacy of EU law in the Spanish legal order and asserted *kompetenz-kompetenz*, although it was keen to state that the eventuality in which it would have to exercise its powers in this regard were ‘scarcely conceivable’:⁹³

In the scarcely-conceivable event that in the ultimate functioning of European Union Law this Law were [as a] result [be] irreconcilable with the Spanish Constitution, and without the hypothetical excesses of European Law with regard to the European Constitution itself being remedied by the ordinary channels provided for in the latter, ultimately the preservation of the sovereignty of the Spanish people and of the supremacy of the Constitution as it provides for itself could lead this Court to tackle the problems that would arise in such a case, and which from the current point of view are considered to be non-existent, by way of the relevant constitutional procedures....This is aside from the fact that the safeguarding of the said sovereignty is always ultimately assured by Article I-60 of the Treaty [Establishing a Constitution for Europe] ... which may not override the exercise of a withdrawal, which remains reserved for the sovereign, supreme, will of the Member States.⁹⁴

The Constitutional Court went on to distinguish between supremacy and primacy, indicating that EU law can take effect in priority to national law (i.e. EU law can have primacy), but can not invalidate or nullify national law (i.e. EU law does not have supremacy).⁹⁵

In the UK, the question of supremacy was only confronted in the courts 15 years after accession, in the *Factortame* case.⁹⁶ Having referred a preliminary

⁹² *Spa Fragn v. Amministrazione delle Finanze*, Dec. 232 of 21 Apr. 1989, (1989) 72 RDI.

⁹³ Constitutional Court of Spain, Declaration on the consistency of the European Constitutional Treaty with the Spanish Constitution, DTC 1/2004, 13 Dec. 2004.

⁹⁴ As cited in R. Alonso García, ‘The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy’, 6(6) *GLJ* 1001 (2005), 1001-1002.

⁹⁵ See the summary of the judgment available on the Spanish Constitutional Court’s Web site: < <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/DTC122004en.aspx> > (last accessed 28th July 2010).

⁹⁶ *R v. Sec. of State for Transport, ex p. Factortame Ltd. (No. 1)* [1989] 2 All ER 692; 2 WLR 997. See also *Equal Opportunities Commission v. Secretary of State for Employment* [1994] 1 WLR

reference to the ECJ on whether the UK courts were required to dis-apply a statute in conflict with Community law, the House of Lords accepted the unsurprising verdict of the ECJ that this was so. Different views resulted on the compatibility of this with the strong UK tradition of parliamentary sovereignty; one eminent legal commentary considered it a revolution.⁹⁷ Another view is that as a result of supremacy, Acts of the UK Parliament, in being simply dis-applied rather than declared invalid, were not fundamentally compromised and that the acceptance by the UK of supremacy was itself a consequence of an Act of Parliament,⁹⁸ namely the European Communities Act 1972 giving effect in UK law to UK accession to the Communities. On this view, ultimate sovereignty remains since the 1972 Act can always be repealed.⁹⁹

Amongst the newer Member States, the Polish Constitutional Court has been amongst the most inclined to assert a sovereignty reservation concerning EU membership. It did so in its decision on the Polish Accession Treaty¹⁰⁰ to the EU, in “a clear refusal of supremacy of this Treaty over [the] national Constitution”.¹⁰¹ The Court stated that in the event of a conflict between the Constitution and Community law, the conflict would not lead to the invalidity of the applicable constitutional norms or to their automatic change: such a conflict “cannot be solved by recognition of supremacy of Community norm towards the national constitutional norm”.¹⁰² Also from the newer Member States, in its first judgment on the Lisbon Treaty,¹⁰³ the Czech Constitutional Court has asserted *kompetenz-*

409, where the House of Lords held that an applicant could raise a claim of conflict between EU law and Community law before any UK court.

⁹⁷ W. Wade, ‘Sovereignty: Revolution or Evolution?’, 112 *LQR* 568-575 (1996).

⁹⁸ TRS. Allan, ‘Parliamentary Sovereignty: Law, Politics, and Revolution’, 113 *LQR* 443-452 (1997). The House of Lords accepted the supremacy principle in the *Factortame* litigation: *R v. Secretary of State for Transport, ex parte Factortame Ltd (No 1)*, supra n. 134; C-213/89, *The Queen v. The Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433; *R. v. Secretary of State for Transport, ex parte Factortame Ltd (No. 2)* [1991] 1 AC 603 1. For a summary, see, e.g. A. Tomkins, *Public Law* (Oxford Univ. Press 2003), 109-120.

⁹⁹ This view echoes the distinction between primacy and supremacy in Spanish law.

¹⁰⁰ Judgment of 11 May 2005 r. in the case K 18/04 [Wyrok z dnia 11 maja 2005 r. Sygn. akt K 18/04] OTK Z.U. 2005/5A, item 49, as cited and discussed in K. Kowalik-Bańczyk, ‘Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law’, 6(10) *GLJ* 1355-1366 (2005) and A. Lazowski, ‘Case Note: Polish Constitutional Tribunal Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May’, 3(1) *ECLR* 148-162 (2007).

¹⁰¹ Kowalik-Bańczyk (2005), *ibid*, 1358.

¹⁰² As cited *ibid*, 1364.

¹⁰³ Decision of 26th November 2008, Case No. Pl. ÚS 19/08 (published as No. 446/2008 Coll.).

kompetenz, i.e. the power to determine if the Union institutions are acting within conferred powers,¹⁰⁴ though it has been suggested that in its second judgment on the Lisbon Treaty,¹⁰⁵ it was notably more positive toward the EU than the German Federal Constitutional Court in the latter's *Lisbon* judgment.¹⁰⁶

The relationship between EU law and the law of the Member States in the context of supremacy raises questions as to the fundamental values of the EU and the Member States and how they relate to each other. This was well brought out by the opinion of the Dutch State Council on the Lisbon Treaty, where it explained why it considered the Lisbon Treaty did not have the constitutional character of the Treaty Establishing a Constitution for Europe:

EU terminology and symbols are apt to create expectations amongst citizens, and form potential points of reference for the further development of both EU policy, whose dynamics are inherent in the integration process, and EU caselaw, with its characteristic emphasis on teleological interpretation. In the past, treaty terminology and symbolism have played an important part in the development of the EU. There is no reason to assume that things will be any different in the future.

In this respect, the proposed reform treaty is perfectly clear. Unlike the Treaty establishing a Constitution for Europe, it provides no arguments for a gradual expansion of the EU towards a more explicit State or federation.¹⁰⁷

The Treaty Establishing a Constitution appeared to articulate a degree of EU self-identity that is not shared amongst the Member States, at least as of yet; there is thus a mis-match between a vision of integration as a linear narrative that must take precedence ultimately over any other competing claim to political legitimacy

¹⁰⁴ Ibid, para. 120, as quoted in Editors & J. Komárek 'The Czech Constitutional Court's Second Decision on the Lisbon Treaty of 3 November 2009', 5(3) *ECLR* 345–352 (2009), 351.

¹⁰⁵ Judgment of 3rd November 2009, Case No. Pl. ÚS 29/09.

¹⁰⁶ The Editors of the *ECLR* interpret the judgment as conceiving of a pooling of sovereignty in positive terms as a reinforcement of sovereignty: Editors & Komárek (2009), op cit, 351.

¹⁰⁷ Opinion of the Raadvanstaat, 15th February 2008 (W01.08.0004/1/K), at < www.raadvanstate.nl >, excerpts translated into English in Ziller in Griller & Ziller (eds.) (2008), op cit, 322-323, a decision that Curtin noted was answered 'conveniently for the Dutch government', as it removed the requirement for a referendum on the Lisbon Treaty: D. Curtin, 'The Sedimentary European constitution: The Future of Constitutionalisation without a Constitution', in I. Pernice (ed.) '*Ceci n'est pas une constitution*'. *Constitutionalisation without a Constitution?* (Nomos 2009), 79 n. 11.

and perceptions of the EU amongst the majority populations in the Member States. This linear narrative is found especially in the first two decades of the Court of Justice's case in some of its leading decisions.

This tension or degree of cross-purposes between the EU's self-articulation and the degree of organic support for constitutionalisation in the Member States is reflected in the caselaw on supremacy and its reception in the Member States, but also in the broader question of human rights protection. Whereas the ECJ at times tends to adopt a self-referential discourse, in which the integration imperative prevailed above all, the fundamental values of the Member States had a broader scope beyond the common market that threatened to undermine the legitimacy of integration in the legal orders of the Member States. These developments, along with the fuller articulation of political values in more recent Treaty amendments (as discussed further in Chapter 3), "problematize...linear assumptions about progress from a union of states to an integrated polity".¹⁰⁸

This occurred especially regarding constitutional fundamental rights norms, which were not articulated in Community law at all in most of its first two decades.¹⁰⁹ In response to the threat that this posed to the legitimacy of Community law from a national perspective, the ECJ developed its own fundamental rights jurisprudence in order to deflect criticisms from the legal orders of the member States about the adequacy of rights protection at Community level.¹¹⁰ Nonetheless, the broader question of how the integration imperative can comfortably mesh with the values of the Member States remains. The imminent accession of the EU to the ECHR as provided for the Lisbon Treaty¹¹¹ may help achieve a convergence between of values around its relatively minimal standards and, thus, help ensure conflicts on fundamental rights between the EU and legal orders of the Member States do not materialise.

¹⁰⁸ Shaw (2000), op cit, 1.

¹⁰⁹ In Case 1/58, *Stork v High Authority* [1959] ECR 17, at 26, the ECJ refused to review Community law for its compliance with fundamental human rights contained in national constitutions on the ground that this approach would challenge the supremacy of Community law.

¹¹⁰ Case 29/69, *Stauder v. City of Ulm*, supra n. 101; Case 4/73, *Nold KG v. Commission* Case [1974] ECR 491.

¹¹¹ Art. 6(2) TEU (post-Lisbon) imposes on EU the obligation to accede to the ECHR.

However, potential for conflict exists with respect to the EU Charter of Fundamental Rights, also incorporated into EU law by reference in Lisbon Treaty (Article 6(1) TEU). The EU Charter goes beyond the basic standards of the ECHR in a number of respects and potentially on some points at least may conflict with it, although for the most part it incorporates ECHR standards wholesale. Two sources of conflict arise here: (a) between fundamental rights protection at EU level compared to the Member States and (b) between the ECHR and the Charter. The role of judicial interpretation in elaborating on the Charter will be decisive in addressing the potential and actuality of conflict in this situation, given the generality of rights clauses, an issue discussed more generally in Chapter 3 below on conflicts of interpretative principles and in Chapter 5 discussing conflicts of fundamental rights and values.

Ultimately, the potential for conflict exists between the competing *legitimacy* claims of the Member States and the Union. In a way, tension between the two is inevitable, since the integration principle must impact on and limit the sovereignty of the Member States. The practical question is whether this potential conflict can be effectively managed so that integration is accommodated within the Member States without a ‘rupture’ or ‘revolution’ with their values and traditions.¹¹² As the competence of the EU increases beyond the core dimension of the common market (difficult though it can be to conceptualise the limits of the latter), the risk of a clash between the competing legitimacy claims increases. This, in particular, arises in the context of the widely perceived democratic deficit of the EU, which has been well articulated by Weiler as the problem of the absence of an EU *demos*, or the absence of a shared loyalty and sense of identity leading to a sense of unity and mutual relationship so as to enable a common European public space within which citizens across the Union can participate so as to make democratic debate and exchange meaningful at EU level.¹¹³ In the absence of such a shared identity, questions as to the democratic legitimacy of the EU and thus of its compatibility with the legal orders of the Member States, which since World

¹¹² See generally D. Rossa Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Round Hall Sweet & Maxwell 1997).

¹¹³ JHH. Weiler, ‘The State “über alles”; *Demos*, *Telos*, and the German Maastricht Decision’, *NYU Jean Monnet Working Paper No. 6/1995* (1995).

War II have privileged democracy as a defining value, are likely to endure.¹¹⁴ Thus, the resolution of norm conflicts, both at the level of specific substantive rules and at the systemic level of relating values of the Member States and of the Union to each other in an effective and coherent way, is destined to remain relevant for the foreseeable future.

2.2.7 The Interaction of EU Law with the Legal System of the Council of Europe:

The interaction of the EU with the legal system of the Council of Europe resents both a considerable potential for conflict, but also the potential for conflict avoidance, depending on how the relationship is managed. The existence of the well-established and generally respected jurisprudence of the European Court of Human Rights on the ECHR offers the potential for a convergence of at least minimal standards of fundamental values between the EU and the Member States, as noted above. However, in other respects, the Council of Europe system represents a source of considerable norm conflict. The potential for overlap between these two entities has always existed. Although the focus of Council of Europe activity has been human rights and the rule of law and the focus of EU activity has been the establishment of a common market, the Council of Europe's formal statement of competences makes a general reference to 'social and economic matters' and it has always had some involvement in matters outside 'pure' human rights and rule of law concerns, while the EU has greatly expanded its competences beyond core common market activities.

The potential for duplication and overlap between the two organisations is increased by the passing of the Treaty of Lisbon, which considerably extends EU competences. The possibility of overlap, duplication and unnecessary complexity is also accentuated by the similar terminology that is used to denote the respective institutional frameworks of the organisations.¹¹⁵ The need for some kind of

¹¹⁴ See the foreword of C. Patten in A. Arnall & D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford. Univ. Press 2002), vi, suggesting that there is no EU-wide *demos* and nor is there likely to be one for reasons of difference in language and culture.

¹¹⁵ For example, the Council of Europe itself is often confused with two organs of the EU, namely, the European Council (meeting of heads of government of the Member States of the EU) and the

cooperation between emerging organisations for European cooperation¹¹⁶ was reflected in specific provisions of the founding treaties of the EU, especially of the European Coal and Steel Community (ECSC) Treaty. Article 49 ECSC Treaty provided that the relations between the Council of Europe and the ECSC institutions would be assured under the terms of an annexed Protocol. The Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) both provided for “all appropriate forms of cooperation with the Council of Europe” (Article 230 EEC Treaty, later Article 303 EC Treaty, and Article 200 EURATOM Treaty, now in Article 220 TFEU). In 1959, 1987 and 1996, an exchange of letters between the two organisations reiterated the need for dialogue, consultation, and representation to each other’s institutions. However, it was not until 2007 that formal *Memorandum of Understanding between the Council of Europe and the European Union*¹¹⁷ was adopted between them and it remains to be seen how this will work in practice and it for the most part restated the existing largely informal practices rather than developing new means of cooperation.¹¹⁸

2.3 General Methodology

The study aims to offer a general account of norm conflict in the legal reasoning of the ECJ. It cannot claim to offer a “sectorally nuanced examination”¹¹⁹ across all or most major areas of ECJ caselaw, rather it examines a representative sample of case studies across areas of EU law that are generally considered to be of

Council of Ministers (meetings of ministers of the Member States of the EU). Examples include: a reference to the Council of Europe as the same entity as the European Council in Office of the Director of Public Prosecutions (DPP) (Republic of Ireland), *Annual Report of the Office of the Director of Public Prosecutions 2006* (Office of the DPP 2007), 20-21; and the reference to the Framework Decision on an European Arrest Warrant as a ‘Directive’ in the judgment of Denham J. in *Clarke v. Governor of Portlaoise Prison & Minister for Justice Equality & Law Reform v. Clarke*, Supreme Court of Ireland, judgment of 23rd May 2006.

¹¹⁶ For an overview of the history of interaction between the EU and Council of Europe, see, Joris & Vandenberghe (2008-2009), op cit, 8-17.

¹¹⁷ 10th May 2007, available at < http://www.coe.int/T/E/Legal_Affairs/Legal_cooperation/Steering_Committees/Cdpc/Documents/1M%C3%A9morandum%20d'accord%20CE_U_E%20anglais_sign%C3%A9.pdf > (last accessed 20th July 2010).

¹¹⁸ Joris & Vandenberghe (2008-2009), op cit, 35.

¹¹⁹ SR. Weatherill, ‘Activism and Restraint in the European Court of Justice’, in P. Capps, M. Evans & S. Konstadinidis (eds.), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing 2003), 278.

constitutional importance: EU competence relative to that of the Member States both as regards internal and external powers, the free movement principles, some aspects of social law, and fundamental rights, and criminal law, and ‘constitutionalising’ decisions of the ECJ (e.g. on supremacy and direct effect). The study understands the term ‘constitutional’ as the term has generally meant in Western legal history: of or relating to the general structuring or ordering of government and of public power, or relating to, in a general way, the relationship between the individual and public power.¹²⁰ The ECJ has long been widely considered in the literature to act as a constitutional court¹²¹ and itself has described the Treaties as a ‘constitutional charter’.¹²² The constitutional character of EU from the point of view of the Member States is apparent from the unqualified doctrine of supremacy articulated in ECJ caselaw, which has been resisted by a number of national constitutional courts.¹²³

The focus is on the judgments of the Court of Justice itself, but opinions of the Advocate General are also discussed. Opinions of the latter are relatively infrequently referred to in ECJ judgments, and their influence is difficult to measure¹²⁴ because the ECJ does not generally explicitly state the influence of an Advocate General on its judgments. Its practice tends to refer to an Opinion on a specific point, rather than adopt it wholesale. Nonetheless, statistical evidence suggests a stronger implicit influence than is apparent on the face of ECJ judgments. Carrubba et al conclude that, statistically, opinions of the AG “[have] a systematic positive influence on ECJ decisions”.¹²⁵ Lasser’s extended comparative study of the ECJ with the US Supreme Court and the French *Cour de Cassation* noted a bifurcated style of reasoning between the ECJ and the Opinions of

¹²⁰ See generally G. Sartori, ‘Constitutionalism: A Preliminary Discussion’, 56(4) *APSR* 853-864(1962); G. Maddox, ‘A Note on the Meaning of a Constitution’, 76(4) *APSR* 805-809 (1982).

¹²¹ AM. Donner, ‘The Constitutional Powers of the Court of Justice of the European Communities’, 11 *CMLRev* 127-140 (1974); O. Due, ‘A Constitutional Court for the European Communities’, in *Constitutional Adjudication of European Community and National Law: Essays for the Hon. Mr. Justice T.F. O’Higgins* (Butterworths 1992); M. Rosenfeld, ‘Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court’, 4(4) *IJCL* 618-651 (2006), 620-623; B. Vesterdorf, ‘A Constitutional Court of the EU?’, 4(4) *IJCL* 607-617 (2006), 607-611.

¹²² Case 294/83, *Parti Écologiste ‘Les Verts’ v. European Parliament* [1986] ECR 1339, para 23.

¹²³ See Case 6/64, *Costa v. ENEL*, supra n. 58; Case 106/77, *Simmenthal Spa v. Italian Minister for Finance* [1978] ECR 629.

¹²⁴ N. Burrows & R. Greaves, *The Advocate General and EC Law* (Oxford Univ. Press 2007), 7-8.

¹²⁵ CJ. Carrubba, M. Gabel, C. Hankla, ‘Judicial Behavior under Political Constraints: Evidence from the European Court of Justice’, 102(4) *APSR* 435-452 (2008), 449.

Advocates General: following the French model, the ECJ tends to adopt a magisterial, declaratory approach, in contrast with the more discursive and dialectical method generally adopted by the Advocates General at the ECJ.¹²⁶ The latter can help flesh out the possible bases for the Court's judgment where these are not as fully discussed in the judgment itself. The Opinions of Advocates General in this regard are comparable to the kind of detailed scrutiny that an academic assessment of judgments might give, with the qualification that the former are more influential in practice, even if the exact extent of that influence in a given case may be difficult to measure.

A perspective often supported in literature on the EU and on the ECJ, in particular, asserts the *sui generis* character of the EU as a political and legal entity, the effect of which is to limit the scope for comparison with other legal and judicial contexts.¹²⁷ However, the focus of this study, legal reasoning, is regarded by many scholars as necessarily having a universal or universalizable character, which may have some particularities in the case of the EU, but the legal reasoning of the ECJ does not differ fundamentally from legal reasoning in general:

... In other words, there is no special case of European legal reasoning, nor anything particularly European about the way the ECJ proceeds to justify its decisions. Rather, any general theory of legal reasoning...could account for the ECJ's decision-making. Obviously certain rearrangements would need to be made in order to adjust the general theory to the different idiosyncratic elements of the European legal system.¹²⁸

¹²⁶ M. de S.-O.-L'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford Univ. Press 2004), 104.

¹²⁷ See, e.g. Bengoetxea (1993), op cit, 34; F. Mancini & D. Keeling, 'Democracy and the European Court of Justice', 57(2) *MLR* 175-190 (1994), 181; G. Martinico & O. Pollicino, 'Between Constitutional Tolerance and Judicial Activism: the 'Specificity' of European Judicial Law', 10(1) *EJLR* 97-125 (2008), 120-123.

¹²⁸ Bengoetxea, MacCormick & Soriano (2001), op cit, 48; Itzcovich (2009), op cit, 538. Similarly in the context of the ECJ, see JHH. Weiler, 'The Court of Justice on Trial', 24 *CMLRev* 555-589 (1987), 568. On the universal character of legal reasoning in general, see e.g. DN. MacCormick, *Legal Theory and Legal Reasoning* (Clarendon Press 1978), 6 (linking universalisability to rationality), 99 (linking universalisability to the principle of formal justice that like cases be treated alike); A. Peczenik, 'Moral and Ontological Justification of Legal Reasoning', 4(2) *L and P* 289-309 (1985), 293-298; R. Alexy (1989), *A Theory of Legal Argumentation* (Oxford Univ. Press 1989), 191-195, 292-297; J. Sharankova, 'The Principle of Universalizability and its Semiosis', 13(1) *IJSemioticsL* 29-64 (2000); R. Dworkin, 'Hart's Postscript and the Character of Legal Philosophy', 24(1) *OJLS* 1-37 (2004), 36; and see generally, Z. Bankowski and J. MacLean (eds.), *The Universal and the Particular in Legal Reasoning* (Ashgate 2007). On constitutional

In this study, therefore, literature on the role of norm conflict in legal reasoning in general, and in particular in relation to the WTO, is discussed and considered as conceptually relevant for studying norm conflict in the legal reasoning of the ECJ. In other words, the standard paradigm of comparison in comparative law – functional equivalence¹²⁹ – is one that applies equally to the context of the study of norm conflict and of norm conflict in an EU context.¹³⁰

In any study of legal reasoning and the caselaw of a particular court, a preliminary issue is the justification of case selection. The latter in legal ‘science’ often proceeds on the basis of shared assumptions, without being explicitly articulated, and there is always a risk that it is open to a charge of selectivity. To a large extent, this charge can be met on qualitative grounds: if generalisations can be made about methods of reasoning across a range of important, constitutional decisions, the resulting conclusions are as generalisable as any study can be without claiming to be a comprehensive description of every aspect and every case of a given court’s legal reasoning, which would be largely impossible in the context of a single work in any case. This is the approach implicitly adopted in Bengoetxea’s *The Legal Reasoning of the European Court of Justice*, where he acknowledges not providing the account of substantive law found in other general works on EU doctrine;¹³¹ similarly, Rasmussen did not explicitly address the issue of case selection, taking leading cases, or those that were most significant in their effects on the Community system¹³² Lasser’s important work on *Comparative*

interpretation, Goldsworthy observes: “Interpretation everywhere is guided by similar considerations”: J. Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study* (Oxford Univ. Press 2007), 5.

¹²⁹ K. Zweigert & H. Kötz, *An Introduction to Comparative Law* (Oxford Univ. Press 3rd ed. 1998), 11, 33, 43. See also M. Kiikeri, *Comparative Legal Reasoning and European Law* (Springer 2001), 300; L. Conant, ‘Review Article: The Politics of Legal Integration’, 45 *JCMS Annual Review* 45-66 (2007), 58, noting that political science scholars are increasingly analysing the ECJ in ways that are marginal to integration theory and that derive instead from literature on judicial politics.

¹³⁰ Lasser (2004), op cit; Rosenfeld (2006), op cit. The concept of functional equivalence indicates general comparability rather than absolute sameness, and comparison can thus open up a critical or dialogical perspective on a given legal practice by showing a different possible approach: e.g. MA. Glendon, G Carozza & CB. Picker, *Comparative Legal Traditions* (West Group 2nd ed. 1994), 8; S. Choudhry, ‘Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation’, 74(3) *Indiana LJ* 819-892 (1998-1999), 835-837.

¹³¹ Bengoetxea (1993), op cit, 3.

¹³² Rasmussen (1986), op cit, 1-46. Similarly, Pauwelyn does not discuss case selection beyond identify his study as focusing on WTO law: Pauwelyn (2003), op cit, 25-88.

*Judicial Deliberations*¹³³ has been criticised for not justifying case selection in its study of the French *Cour de Cassation*. Zucca's recent work on norm conflict of fundamental rights discusses caselaw from a number of jurisdictions without offering any systematic explanation of case selection.¹³⁴

The approach in these works are consistent with the idea of the universalisability of legal reasoning, in other words, legal reasoning is not a case-specific phenomenon and has a fundamental character that transcends the immediate context of a case. What this entails is that, in general, legal rules and legal reasoning have certain formal characteristics that are independent of the specific subject matter – they must be public, accessible to ordinary citizens, and the subject of a shared understanding by all participants in the legal interpretative community. Some variations exist across substantive areas, for example, strict construction of criminal law or the degree of intensity of review and the judicial recognition of a margin of appreciation, but in general legal interpretation everywhere follows some basic principles, chiefly, the logical priority of ordinary meaning and the conceptual necessity of clarity and accessibility.

One review of Lasser's *Judicial Deliberations in Comparative Perspective* suggests the comparatist must "go deeply into [the debates within a particular legal system] and try to understand the other legal system on its own terms",¹³⁵ suggesting this as a 'jurisprudential approach to comparative law'.¹³⁶ The universalizable character of legal reasoning would cast doubt on this at least in so far as it applies to legal reasoning. Most legal theorists claim to offer general accounts of law in a way that is not specific to any jurisdiction. Moreover, the reference to a legal system 'on its terms' seems to hint at an uncritical acceptance

¹³³ F. Bruinsma, 'A Socio-Legal Analysis of the Legitimacy of Highest Courts' in N. Huls, M. Adams and J. Bomhoff (eds.), *The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond* (T.M.C. Asser 2009), 64, comments 'Lasser is unforgivably silent about his empirical methodology...'. In a critical review of Lasser's work, Komárek questions how long we know Lasser was familiar with French law and further notes as follows: "But how do we know how long and detailed Lasser's exposure was? In that respect it is surprising that there is no list of cases, otherwise usual in such publications": J. Komárek, 'Questioning Judicial Deliberations', 29(4) *OJLS* 805-826 (2009), 821.

¹³⁴ Zucca (2007), op cit (which does not have a case list, as regards the issue in the previous footnote).

¹³⁵ Komárek (2009), op cit, 826.

¹³⁶ Ibid, citing W. Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to "rats"', 46(4) *AJCL* 701-707 (1998).

of whatever standards have become institutionalised in that system.¹³⁷ In the present work, therefore, literature from other contexts and jurisdictions is cited in so far as it helps understanding of the conceptual (i.e. non-empirical) character of legal reasoning. To put the point in a practical way, almost all legal systems require obedience of people within their jurisdiction and do not make exceptions on the basis that visiting foreigners have not been able to immerse themselves in the practice and *mentalité* of the local legal interpretative community.¹³⁸ The theory of legal reasoning relates to the formal, universalizable aspects of legal reasoning that seem essential for law to make a general normative claim to obedience for all people within a given jurisdiction.¹³⁹

That law is thus inherently qualitative, rather than quantitative, follows from the precedential significance that some cases have in a way that is far greater than other cases. If this were not the case, law would amount to a mass of single instances. It might be objected here that in order to know what cases are important, one must first become familiar with the whole mass of caselaw. Yet this kind of familiarity, apart from being impractical for a single study, is already achieved by the accumulated doctrine and commentary in academic literature, which will have as a collective exercise determined what cases are more important than others and what cases constitute the ‘canon’ within a legal discipline or sub-discipline, including through mutual criticism and self-correction. This ‘canon’ is likely to be a much smaller body of caselaw than the total numerical mass.

¹³⁷ This is a criticism that can be made of Bengoetxea’s institutional legal positivism: (1993), op cit.

¹³⁸ Public accessibility of the law is widely considered central to ideal of the rule of law: see Chapter 3 below.

¹³⁹ Dworkin seems to acknowledge this universalisable aspect of legal reasoning, although he seems unclear to what extent law has a local character: “For just as we can explore the general concept of democracy by developing an attractive abstract conception of that concept, so we can also aim at a conception of legality of similar abstraction, and then attempt to see what follows, by way of concrete propositions of law, more locally” and goes on to deny the criticism directed at his theory that it simply seeks explain US practice by noting that “...In fact, my account aims at very great generality, and how far it succeeds in that aim can only be assessed by a much more painstaking exercise in comparative legal interpretation than these critics have undertaken”: Dworkin (2004), op cit, 36. Nonetheless, Dworkin himself appears not to have published any comparative studies, and this has not undermined the confidence with which he advances his theory, which pragmatically suggests he tends relatively strongly towards a universalizable conception of legal reasoning.

This process of the identification of a canon is not unique to law; it applies across many disciplines, literature being a good example. It might be objected to a study of Shakespeare (1564-1616 AD) that it represents a random focusing on one of the many writers active in the 16th and 17th centuries and fails to establish his supposed pre-eminence. However, the body of critical work in English literature will have already established this canonical status to a degree that makes it unnecessary for a new researcher in the field to re-establish that *ab initio*. Similarly in EU law,¹⁴⁰ there exists a well-established canon of cases, e.g. of constitutional character, that are widely and frequently cited because of their substantive significance and precedential effect.¹⁴¹

Perhaps the most obvious examples of canonical cases are those cases that established the constitutional character of the EU, through the doctrines of supremacy, direct effect, parallelism and pre-emption in external relations, fundamental rights, State liability, and the extension of the free movement principles to encompass non-discriminatory obstacles to market access.¹⁴² That these cases are of constitutional character reflects a qualitative criterion of case selection, i.e. the importance of the subject matter that is regulated. It is a matter of looking deliberately, with a prior conception of what is important, for caselaw on these issues, because they are important. This reflects a point made by Finnis about the role of evaluation in legal theory: that in order to begin to consider what matters and is worth theorising about, one must have some prior evaluative understanding of what is important.¹⁴³ In the context of case selection, what seems important is a general familiarity with the working of legal systems and the

¹⁴⁰ On the idea of a legal canon and a comparison with a literary canon, see P. Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Blackwell 1986), 75; F. Cownie, A. Bradney, M. Burton, *English Legal System in Context* (Blackwell 2007), 102-104.

¹⁴¹ This is an objection that might be made to Judge David Edward's rejection of criticism by Sir Patrick Neill of the ECJ (Sir Patrick charged that the Court was forwarding integration by its own elite sense of mission fostering integration) on the basis that the cases Sir Patrick criticised were very few in number relative to the overall body of the Court's case law: D. Edward, 'Judicial Activism – Myth or Reality', in Campbell & Voyatzi (eds.), *Legal Reasoning and Judicial Interpretation of European Law: Essays in Honour of Lord Mackenzie Stuart* (Trenton Publishing 1996) referring to Sir Patrick Neill's *The European Court of Justice: A Case Study in Judicial Activism* (European Policy Forum 1995), 30.

¹⁴² These and other 'constitutionalising' cases are surveyed in Chapter 4.

¹⁴³ To use Finnis' language, focusing on, e.g. what is constitutional, is a matter of having a prior understanding of what constitutes "the central case of the legal viewpoint": J. Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980), 15.

concept of 'constitutional'. This allows a choice and a narrowing selection to be made amongst a mass of caselaw.

2.4 The General Theoretical Context of Norm Conflict in Contemporary Anglo-American Legal Theory

2.4.1 Introduction

Norm conflict is significant because it entails a choice between *prima facie* valid legal norms, i.e. rules or principles. The general extent to which norm conflict is a feature of a legal system varies according to different understandings or conceptions of law as a system. Two accounts in particular can be contrasted in this respect, those of Ronald Dworkin and Joseph Raz, who represent opposing positions, at least at face value. As with much legal theory, they do not generally address the problem of norm conflict very explicitly or directly,¹⁴⁴ but their work seems to have clear implications for it.

2.4.2 Dworkin on Coherence

According to Dworkin, famously, all 'hard cases' have a right answer. Dworkin reaches this conclusion by understanding moral evaluation to be part of how judges reason.¹⁴⁵ According to Dworkin, an analysis of how judges actually decide cases shows that they do not always rely on determinate legal rules, which can be applied syllogistically and neutrally, i.e. independently of moral choice or evaluation by the judge, to reach a correct conclusion. Dworkin proposes that there is much more disagreement¹⁴⁶ among lawyers as to what the law means than

¹⁴⁴ Klabbers (2009), op cit, 24, suggests that "If the law of treaties offers no ready-made theory to deal with treaty conflict, neither does jurisprudence".

¹⁴⁵ Occasionally, Dworkin seems to understand the justification of judicial review as the quality of its outcomes, i.e. on a purely consequentialist basis: see, e.g. R. Dworkin, *Freedom's Law* (Harvard Univ. Press 1996), 34.

¹⁴⁶ Dworkin's 'semantic sting' argument: R. Dworkin, *Law's Empire* (Harvard Univ. Press 1986), 31-33; Dworkin (2004), op cit, 19.

Hart's concept of rules¹⁴⁷ as the decisive unit of legal normativity seems to acknowledge and that judges do not claim to exercise discretion to make new law to apply to the case when the existing determinate rules do not provide an answer. Instead, judges in hard cases with no rule-bound conclusion rely on legal principles that are already in the law as more or less implicitly abstract propositions of legal normativity that underpin and explain the express body of rules and the legal system overall, i.e. that are already *part* of the law, to reach a correct outcome.

To find 'the right answer', Dworkin proposes a test whereby judges must apply the available 'legal principles', understood as having a more abstract character than relatively conclusive or all-or-nothing rules,¹⁴⁸ to produce the most coherent solution for the facts of a case in light of the values in the legal system overall, the solution that 'best fits' with the political morality in the legal system¹⁴⁹ (Dworkin seems also to use the term 'integrity' more or less interchangeably with the notions of coherence and fit¹⁵⁰). The emphasis of the ECJ on a meta-criterion of integration is comparable to the role coherence or fit plays in Dworkin's theory; the Court is "at bottom ... Dworkinian".¹⁵¹

The difficulty with Dworkin's position is that the standard of coherence or fit is largely indeterminate and under-specified in his account of it. Coherence (taken as going beyond a minimal concept of non-contradiction)¹⁵² is a semantically ambiguous concept and is thus to some degree a subjective element.¹⁵³ Berteau argues that coherence should thus not be considered as self-sufficient and self-exhaustive source of justification, but a tool suitable for reconsidering the results yielded by other argumentative techniques (i.e. it is a

¹⁴⁷ Hart (1994), op cit, 9-10, 55-58, 91-99.

¹⁴⁸ The rules-v-principles distinction is discussed further in Chapter 3.

¹⁴⁹ Dworkin (1986), op cit, 228-258.

¹⁵⁰ See, e.g. *ibid.*, 78: "It will be useful to divide the claims of integrity into two more practical principles. The first is the principle of integrity in legislation, which asks those who create law by legislation to keep that law coherent in principle...": *ibid.*, 184.

¹⁵¹ Bengoetxea (1993), op cit, vi.

¹⁵² J. Raz, 'The Relevance of Coherence', in *Ethics in the Public Domain* (Oxford. Univ. Press 1994), 280.

¹⁵³ S. Berteau, 'The Arguments from Coherence: Analysis and Evaluation', 25(3) *OJLS* 369-391 (2005) ('Berteau, 2005a'). See also S. Berteau, 'Looking for Coherence within the European Community', 11(2) *ELJ* 154-172 (2005).

secondary type of justification),¹⁵⁴ for example, textual techniques.¹⁵⁵ Recognition that Dworkin's concept of best fit or coherence is not all that useful as a meta-criterion of interpretation is quite widespread in the literature.

It has been labelled 'fantastic';¹⁵⁶ Hart suggested that "there are no actual legal systems where this full holistic criterion is used, but only systems like English law and American law where more modest exercises of constructive interpretation are undertaken...";¹⁵⁷ Schlag describes it as "not entirely empty, but useless";¹⁵⁸ Tamanaha notes that there is no agreement on how the principles Dworkin identifies at a general level are to be filled in;¹⁵⁹ Waldron succinctly states that Dworkin's right answers thesis "is notable by its absence".¹⁶⁰ And although Dworkin has acknowledged that no human judge could really accomplish the feat of the mythical Hercules or judge who seeks to find the best fit,¹⁶¹ it is an ideal to aspire towards. Nonetheless, this does not provide a clear answer, since the ideal itself, global coherence, seems itself indeterminate.

A number of specific points of criticism in the literature help demonstrate the subjective character of 'coherence' and 'best fit' as a stand-alone of meta-criterion of adjudication. First, it was not initially clear in Dworkin's account of coherence or best fit whether coherence should be understood in global or local terms, i.e. to take into account the entire legal system or just particular branches of the law.¹⁶² This question can be related to the level of generality problem in legal

¹⁵⁴ Berteau (2005a), *ibid*, 383.

¹⁵⁵ *Ibid*, 379, 387.

¹⁵⁶ Zucca (2007), *op cit*, 5.

¹⁵⁷ H.L.A. Hart, *The Concept of Law* (Clarendon Press 2nd ed. 1994), 268.

¹⁵⁸ P. Schlag, 'Authorizing Interpretation', 30(3) *ConnLR* 1065-1090 (1998), 1087.

¹⁵⁹ Tamanaha (2006), *op cit*, 131.

¹⁶⁰ J. Waldron, 'The Rule of Law as a Theatre of Debate', in J. Burley (ed.), *Dworkin and His Critics with Replies by Dworkin* (Blackwell 2004), 388. Wiklund suggests coherence blurs into legislation, although he also endorses it as a general criterion of interpretation: O. Wiklund, 'Taking the World View of the European Judge Seriously – Some Reflections on the Role of Ideology in Adjudication', in Wiklund (ed.) (2003), 41-44.

¹⁶¹ Dworkin (1986), *op cit*, 285.

¹⁶² J. Dickson, 'Interpretation and Coherence in Legal Reasoning', *Stanford Encyclopaedia of Philosophy* (Summer 2005 Edition), Edward N. Zalta (ed.) URL = < <http://plato.stanford.edu/entries/legal-reas-interpret/> > (last accessed 23rd July 2010). See also LM. Soriano, 'A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice', 16(3) *RJ* 296-323 (2003), 302-305.

reasoning.¹⁶³ At what level of generality should coherence be identified: coherence with a given law, with the surrounding body of laws on the same issue, etc., ranging up to coherence with the entire legal system?¹⁶⁴ Dworkin has acknowledged the local priority of interpretation, but considered in effect this was only contingent in that global coherence might justify discarding entirely local priority in the event that a local priority would be arbitrary or would go against popular opinion or conviction.¹⁶⁵ However, the test here, of arbitrariness or popular conviction, for departing from the local priority of interpretation, seems also unclear and potentially subjective; that legal rules can be dis-applied on the basis of popular convictions is hard to reconcile with the rule of law values of certainty and predictability, and raises the problem of how and why judges are to measure such popular convictions.

A related articulation of the level of generality problem in the context of coherence is the criticism that Dworkin fails to distinguish between tight and loose versions of coherence: a tight requirement of coherence means that existing law *must entail* a conclusion, whereas a looser requirement only requires that the conclusion in the present case to be decided is not inconsistent with existing law, as opposed to being a matter of necessary entailment. If the loose requirement is all that is required for a relationship between existing law and a current judgment, coherence can justify a result “quite new in itself”, this permitting judicial extension of existing law.¹⁶⁶ An additional difficulty that coherence presents is that it may require a judge to take into account legal developments after the events

¹⁶³ Dickson (2005), *ibid*, citing B. Levenbook, ‘The Role of Coherence in Legal Reasoning’, 3(3) *L and P* 355–374 (1984) arguing in favour of a local concept of coherence in law given different areas of the law embody different, potentially conflicting ideas. On the general issue of levels of generality in legal reasoning, see J. Stone, ‘The *Ratio* of the *Ratio Decidendi*’, 22(6) *MLR* 597–620 (1959); G. Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’, 14(6) *ELJ* 787–805 (2008).

¹⁶⁴ Suggesting that in EU law the level of generality can be permitted to run all the way up to the (global, as in being related to the overall body of EU law) level of integration, see J. Bengoetxea, ‘The Scope for Discretion, Coherence and Citizenship’, in O. Wiklund (ed.), *Judicial Discretion in European Perspective* (Kluwer Law International 2003), 69.

¹⁶⁵ Dworkin (1986), *op cit*, 251–256.

¹⁶⁶ L. Alexander & K. Kress, ‘Against Legal Principles’, in A. Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press 1995), 313–314; Dworkin (2006), 123, “very often, however, controversial decisions that seem novel do satisfy the test of fit”. See also Soriano, *op cit*, 312, not distinguishing between the two types of coherence.

being litigated, which also presents the problem of retroactivity.¹⁶⁷ In an EU context, it is worth noting here that the ECJ tends to a global approach in addressing the question of coherence in EU law, i.e. it tends to state the level of generality problem at a high level, at the level of the Union's legal system overall.

Further, the kinds of values taken into consideration in a coherence analysis need to be unpacked¹⁶⁸ or individuated. In the EU, among the relevant meta-values are integration, Member State sovereignty, human rights, democracy, and the rule of law: how does democracy relate to human rights, the role of subsidiarity, the scope of the rule of law, national diversity, in that how are they to be balanced and weighed against each other?¹⁶⁹ Given the vagueness of coherence as a standard, it is likely that several different lines of argument or conclusions in a given case may be equally coherent, and thus something other than a consideration of coherence must be used to decide the case.¹⁷⁰

In light of all these criticisms, Schlag seems correct in characterising Dworkin's invocation of best fit as more a statement of the problem of legal reasoning in hard cases than a solution to it.¹⁷¹ Or as Raz has put it, "coherence does not provide courts with determinate guidance".¹⁷²

¹⁶⁷ K. Kress, 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions', 72(3) *California LR* 369-402 (1984), 372 et seq.

¹⁶⁸ See Besson (2008), op cit, 57.

¹⁶⁹ J. Finnis, 'Natural Law and Legal Reasoning', in R. George (ed.), *Natural Law Theory* (Clarendon Press 1992), 144, noting the incommensurability of 'coherence' as a criterion of adjudication.

¹⁷⁰ 'The Relevance of Coherence', in J. Raz, *Ethics in the Public Domain* (Oxford Univ. Press 2nd ed. 1994), 303. For criticism, see V. Rodriguez-Blanco, 'A Revision of the Constitutive and Epistemic Coherence Theories in Law', 14 (2) *RJ* 212-232 (2001), arguing that Raz adopts too narrow a view of epistemic coherence theories and mischaracterises constitutive coherence theories. On epistemic theories, which Raz criticised for being based solely on an individual's own beliefs, Brink's distinction between first-order and second-order beliefs renders epistemic theories stronger than Raz acknowledges, and similarly Brink's conception of considered moral beliefs further solidifies them: Rodriguez-Blanco (2001), op cit, 220-221, citing D. Brink, *Moral Realism and the Foundations of Ethics* (Cambridge Univ. Press 1989).

¹⁷¹ See Schlag (1998), op cit, 1086.

¹⁷² Raz (1994), op cit, 314.

2.4.3 Raz on Coherence

A contrasting view of the unity of law and thus of the problem of norm conflict is that of Raz, who far from considering there to be a correct legal solution to every case provided by a concept of best fit with the existing political morality of the system, understands law to consist a of a rag-tag mix of conflicting aims and purposes, as being the product of the rough-and-tumble of politics.¹⁷³

The implication of this is that conflict of norms is to be expected to some degree, though this may not be a problem. Presumably, Raz means here incoherence stopping short of flat contradiction. Raz proposes that coherence accounts in law take court decisions and legislative and regulatory acts as their ‘base’ and consider law to be the set of principles that makes the most coherent sense of that base.¹⁷⁴ He distinguishes (in a not altogether clear way¹⁷⁵) between ‘epistemic’ and ‘constitutive’ accounts of coherence: whereas an epistemic account of coherence considers coherence as a necessary and sufficient condition of justified knowledge, constitutive coherence theories consider that coherence provides an explanation of what makes a statement of law true.¹⁷⁶ Raz’s position is to reject both types of coherence as explanations of legal practice. In plain terms, the difference seems to be that an epistemic coherence theory believes coherence is a way of acquiring knowledge of the truth, but does not go further in stating what the truth is, whereas a constitutive coherence theory proposes that coherence is what provides access to the truth.

In Raz’s view, the role of coherence in *adjudication* must reflect the vagaries of politics and the influence of political considerations on legislative and judicial decisions, and the latter makes it unlikely that the settled law of a jurisdiction will exhibit a strong coherence. Raz puts it as (see also the quote above):

¹⁷³ Ibid, 283.

¹⁷⁴ Raz (1994), op cit, 288. Raz understands coherence to have an undeniable validity when understood in its minimalist sense of intelligibility: ibid, 280.

¹⁷⁵ See the detailed critique in Rodriguez-Blanco (2001), op cit.

¹⁷⁶ Raz (1994), op cit, 263; Rodriguez-Blanco (2001), op cit, 213-214.

... is the result of activities of a multitude of people, and the interactions among them, over many years, sometimes over centuries. One cannot infer, in a Davidsonian-style argument about radical interpretation, the coherence of the activities, beliefs, or goals of all those whose activities make the law what it is.¹⁷⁷

As Dickson notes, the next stage in Raz's conception of coherence is:

This being so, if we are to apply a coherence account in order to determine how judges ought to decide cases according to law ..., then we should assume a coherence-independent test to identify the settled law of a jurisdiction first, and then bring in considerations of coherence at a later stage, and hold that courts ought to adopt that outcome to a case which is favoured by the most coherent set of propositions which, were the settled rules of the system justified, would justify them.¹⁷⁸

Thus, somewhat comparably to Dworkin's notion of 'pre-interpretive data',¹⁷⁹ Raz considers that "... the adjudicative coherence thesis assumes a way of establishing, free of coherence considerations, the content of the *prima facie* rights, duties and powers created by law. Coherence comes into play at a later stage"¹⁸⁰ (this seems to escape the criticism made by Rodriguez-Blanco of Raz's constitutive coherence account of law, because the coherence account of adjudication does not claim to constitute the law¹⁸¹).

For Raz, coherence provides only limited guidance, in that non-controversially it represents a requirement of intelligibility, but it is likely that several different lines of argument may be equally coherent, given the variety of legal sources and the *prima facie* valid legal reason that result from them; coherence provides only some thus rather limited indication of how to decide

¹⁷⁷ Ibid, 294. Raz here (see also *ibid*, 278) refers to the argument of David Davidson that it is incoherent to suppose that all or most of one's own beliefs are false: on the latter, see D. Davidson, 'A Coherence Theory of Truth and Knowledge', in D. Davidson, *Subjective, Intersubjective, Objective* (Clarendon Press 2001).

¹⁷⁸ Dickson in Zalta (ed.) (2005), *op cit*.

¹⁷⁹ Dworkin (1986), *op cit*, 65-66.

¹⁸⁰ Raz (1994), *op cit*, 302.

¹⁸¹ Thus, the coherence account of adjudication seems an epistemic account of law.

between conflicting or alternative *prima facie* reasons.¹⁸² Raz thus identifies an under-determination problem resulting from the in-commensurability of coherence wedded to other values relevant in adjudication. Instead of conceiving of coherence as a decisive meta-criterion, Raz's way out is to consider that judges should engage in moral reasoning to decide between alternative *prima facie* legal reasons, i.e. to resolve *prima facie* or potential norm conflict.¹⁸³ Although rejecting global coherence or strong monism whereby law is conceived as speaking with one voice, he is prepared to accept the importance of local coherence, for reasons related to predictability and ordinary rule of law considerations:¹⁸⁴ "Thus, this is another context in which coherence comes in to its own, another context in which precedent acquires a natural force, where there is reason to follow it even in countries which do not have a formal doctrine of precedent."¹⁸⁵

Some tensions seem to exist within Raz's understanding of the role of coherence in legal reasoning. Raz rejects the validity of global coherence applied to law on the grounds that it underestimates value pluralism in legal systems (a point which seems to have special force in contemporary pluralist Western societies), and similarly global coherence undervalues the concreteness of politics.¹⁸⁶ Neither value pluralism nor the concreteness of politics permit as credible a holistic conception of the law as speaking with one voice, as global coherence as a conception of law suggests.¹⁸⁷ Nonetheless, in the end, Raz himself appears to endorse the view that judges must decide conflicts of norms on the basis of moral reasoning, *despite Raz acknowledging the central fact of value pluralism* (Raz's views on innovative interpretation are further discussed in Chapter 4 below).

It seems unclear in this account how judgments can thus have the institutional authority¹⁸⁸ Raz claims for them if they are based on moral reasoning that, in the context of value pluralism, must have doubtful objective correctness or

¹⁸² Ibid, 280, 302-303. More generally, on the role of such meta-theoretical values (including simplicity and clarity), see J. Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001), 32-33.

¹⁸³ See further Chapter 4 below.

¹⁸⁴ Raz (1994), op cit, 318-320.

¹⁸⁵ Ibid, 318.

¹⁸⁶ Ibid, 314.

¹⁸⁷ Ibid, 320.

¹⁸⁸ See, e.g. ibid, 299-300.

universal validity. The prominent role Raz attributes to moral reasoning in adjudication thus seems to provide ‘exclusionary reasons’¹⁸⁹ only in the weak sense of reaching decisions instead of citizens would, but it seems without a judge being able to claim to deploy superior epistemic resources to ground a claim for the normativity of law beyond the need for *someone* to decide the resolution of social conflicts. In other words, Raz’s account of the authority of law seems substantially weakened by the claim that a judge simply decides the outcome of norm conflicts according to his or her own moral conceptions (and it seems it must be the latter in the context of moral pluralism, since unlike Dworkin, Raz does not consider the law itself possesses a coherent political morality from which to judge).

A second tension within Raz’s account of coherence exists between his acceptance of local coherence within pockets of the law and his rejection of the view that the lawmaker’s intention as to the meaning of an individual law should be relevant for interpretation:

What we need is a way of regarding the law as the function of the activities of legal authorities in general, that is, a way of seeing how its content is a function of various activities, and layers of activities, in continuous interaction, rather than as a function of a single act, fixed once and for all. This authority-based view of the law will avoid the pitfalls of the intention thesis, while preserving its ability to explain the institutional nature of the law, something the coherence thesis fails to do.¹⁹⁰

Here, Raz moves toward recognising the authority of law as operating in a global sense, despite having rejected the possibility of global coherence and consistency. Local coherence, in contrast, which Raz accepts, seems to point to the relevance

¹⁸⁹ Raz’s account of the authority of law makes much of the importance of law providing reasons for action so that ordinary citizens can act without having to engage in ordinary practical reasoning *ab initio* on a given matter: see J. Raz, *Practical Reasons and Norms* (Princeton Univ. Press 2nd ed. 1990), 38, 51, and *passim*. For discussion, see, e.g. C. Gans, ‘Mandatory Rules and Exclusionary Reasons’, 15 *Philosophia* 373-94 (1986); WA. Edmundson, ‘Rethinking Exclusionary Reasons’, 12(3) *L and P* 329-343 (1993), questioning the sustainability of the distinction between exclusionary reasons and first order reasons, e.g. in that acceptance of exclusionary reasons seems ultimately itself to be based on first-order reasons or reasons from first principles.

¹⁹⁰ *Ibid*, 300.

and epistemic possibility of legislative intention in relation to specific legislative acts.

2.4.4 General Remarks on Coherence, Dworkin and Raz

Both Raz's and Dworkin's accounts of coherence in legal reasoning - though different in important respects in that Raz denies the law reflects global coherence and treats coherence as but one aspect of legal reasoning in contrast to the decisive role it is generally thought¹⁹¹ to have in Dworkin's proposal of best fit as a meta-criterion of adjudication - can be contrasted with a more traditional use of norm conflict rules or maxims (*lex superior, lex posterior, lex prior*) prevalent both in international and domestic legal systems. Despite the differences between Dworkin's and Raz's explanation of the role of coherence in legal reasoning, there appears to be a certain convergence in the effect or conclusion of their theories of legal reasoning: both consider judges must engage in moral reasoning as to what the law should be and not simply give effect to the concrete original intention of the law-maker.¹⁹²

Soper argues¹⁹³ that theories of legal reasoning, and in particular, the positivist/anti-positivist distinction, have little or no necessary implications for theories of judicial restraint and thus for understanding discretion and flexibility in adjudication.¹⁹⁴ In cases where texts do not provide a determinate answer, it is practically immaterial whether a judge conceptualises his or her response as the making of new law according to the judge's own perception of the best thing to do in the case, as Hart's positivist account proposes,¹⁹⁵ or by invoking similar considerations though considering them to be in the form of abstract principles that are part of the law as it is, as Dworkin's interpretivist account suggests. For Soper,

¹⁹¹ See, e.g. Kress (1984), op cit, 370-371; S. Hurley, 'Coherence, Hypothetical Cases, and Precedent', 10(2) *OJLS* 221-51 (1990), 221; but see Raz (1994), op cit, 321, suggesting that Dworkin ultimately adopts moral desirability as the ultimate standard of adjudication over coherence.

¹⁹² See Raz (1994), *ibid.*

¹⁹³ P. Soper, 'Judge White and the Exercise of Judicial Power: Why Theories of Law have Little or Nothing to do with Judicial Restraint', 74(4) *UColorado LR* 1379-1407 (2003).

¹⁹⁴ *Ibid.*, 1388.

¹⁹⁵ Hart (1994), op cit, 121-131.

the difference is just a matter of terminology.¹⁹⁶ Much the same analysis can be applied to Dworkin's and Raz's accounts of coherence. Though they assign coherence different roles in legal reasoning, both argue judges must engage in moral reasoning in adjudication, the difference being that Dworkin considers this moral reasoning to be an exercise in finding and achieving legal coherence, governed by the political morality (which is also, it seems, legal morality) that is in the legal system, whereas Raz describes this moral reasoning as only partly concerned with coherence.

Both Dworkin and Raz thus reject legal originalism in the sense of an effort to recover the specific intention of the law-maker as a decisive way, e.g. in the language of Raz, to solve indeterminacy in choosing between *prima facie* valid legal reasons. In many legal systems, as mentioned above, norm conflict has traditionally been addressed through a series of norm conflict rules or maxims that arguably does more closely relate the resolution of norm conflicts (or indeterminacy between *prima facie* legal reasons) to the original intention of the law-maker: these are the maxims of *lex superior*, *lex specialis*, and *lex posterior*. The use of and rationale behind these maxims can be related more generally to a rule-bound conception of legal reasoning, a point developed in Chapters 2 and 3 below. Two fundamentally different alternative approaches to the problem of norm conflict can thus be identified: 1) the invocation of political morality or morality generally by judges (in different ways, Dworkin and Raz would support this approach or 2) the application of a rule-bound framework.

2.4.5 Structuralist and Systems Accounts of Law

Another aspect of contemporary legal theory (though originating in continental Europe, then finding its way into the Anglo-American world) that might also be thought especially relevant to the study of norm conflict is structuralist theory. A criticism that might be made of the idea of norm conflict as a framework of analysis is that it is bound to a set of 'binary oppositions' that fails to do justice to

¹⁹⁶ Soper (2003), op cit, 1389.

the complexity of legal reasoning or alternative conceptions of norm resolution. For example, the discussion of the differences between evolutive and conserving or originalist/historical interpretation might be considered such an opposition. This could be thought governed essentially by a binary structure:¹⁹⁷ that legal doctrine creates an impression of the inevitable and privileged status of these binary oppositions when different understandings that do not fit into this framework are eliminated from consideration even though they may be equally valid.

Structuralism seeks to explain culture, including legal culture if applied to law, ‘in terms of the structures of the mind’, and a structural analysis would seek to unearth these mind structures so as to more fully understand how they shape our understanding of law.¹⁹⁸ Structuralism conceives these structures to be controlling. It is hoped that in this study (a) the focus of the work on the values underlying norm conflict rules would help address any such controlling or limiting effects of norm conflicts as a framework of analysis and (b) the discussion of the interaction of norm conflict rules would give a fuller analysis than what might be criticised as a simple scheme of opposites. The discussion seeks to demonstrate that there are wide variations in how conflict can be addressed and thus the choice of norm conflict resolution becomes practically very important. This degree of choice suggests the importance of legal actors as agent, which is not consistent with the structuralist analysis that minimises human agency in light of the controlling and dominating effect of hidden or unconscious structures.¹⁹⁹ It might be then objected that the discussion of values is itself marked by binary oppositions and that they thus remain controlling in a limiting way.²⁰⁰ To some extent, this would be a criticism of law and political morality in general; the thesis does not claim to

¹⁹⁷ Associated with, in particular, Saussure and Lévi-Strauss: see, e.g. F. de Saussure, *Course in General Linguistics* (McGraw-Hill Book Company 1966); C. Lévi-Strauss, *Myth and Meaning* (Schocken 1979). On the application of structuralism to law, see, e.g. B. Jackson, *Structuralism and Legal Theory* (Liverpool Polytechnic Press 1979); TC. Heller, ‘Structuralism and Critique’, 36 *Stanford LR* 127-198 (1984); A-J. Arnaud, ‘Structuralist Theories of Law’, in P. Amselek & N. MacCormick, *Controversies About Law’s Ontology* (Edinburgh Univ. Press 1991). Arnaud notes Roberto Bobbio was sceptical of the new wave of structuralist analysis, considering that legal theory was inherently geared toward an understanding of structure and “has always had a structuralist vocation”: Arnaud in Amselek & MacCormick (eds.) (1991), 56, citing a letter from Bobbio.

¹⁹⁸ Jackson (1979), *ibid*, 26.

¹⁹⁹ On the latter, see Heller (1984), *op cit*, 146-151; Klabbers (2009), *op cit*, 38.

²⁰⁰ On the context of structuralist analysis and the desire to escape binary oppositions or controlling subconscious structures, see Heller (1984), *op cit*, 132; MH. Kramer, *Critical Legal Theory and the Challenge of Feminism* (Rowman & Littlefield 1995), 59.

fundamentally challenge existing legal notions of norm conflict, rather it seeks to theorise and contextualise in the context of EU law. Moreover, it is difficult to frame all questions of norm conflict in terms of binary oppositions, since there are subtleties and degrees of difference that are not straightforward oppositions.

Finally, the work of systems theorists seems to have a certain affinity with structuralism, in positing the existence of social forms that emerge independently of formal legal categories and hierarchies. Fischer-Lescano & Teubner propose that traditional States are being supplanted by the emergence of functional rationalities as distinct systems or structures, such as trade or the environment.²⁰¹ These systems have their own distinctive rationality that international legal hierarchy cannot capture or regulate, and thus conflicts between these systems also escape any systematic attempt at legal resolution. However, courts can mediate to some extent such conflicts through their caselaw by taking into account multiple rationalities in their reasoning.²⁰² Fischer-Lescano and Teubner thus:

...propose a radical break with a concept of international law and order based on the autonomous will of Nation-States. Accordingly, legal regulation does not only, if at all, emanate from Nation-States, but from a panoply of other public and, mostly, private actors.²⁰³

Further, as Klabbers notes, this body of theory downplays and even eliminates human agency.²⁰⁴ In its implications for legal reasoning, Fischer-Lescano & Teubner's approach tends to open up to courts policy and first-order or merits concerns, under the guise or framework of 'rationality'.²⁰⁵ Some elements of this

²⁰¹ A. Fischer-Lescano & G. Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Mich. JIL* 999-1046 (2004) ('Fischer-Lescano & Teubner (2004a)'). See also AL. Paulus, 'Commentary to Andreas Fischer-Lescano & Gunther Teubner: The Legitimacy of International Law and the Role of the State', 25(4) *Mich. JIL* 1047-1058 (2004); A. Fischer-Lescano & G. Teubner, 'Reply to Andreas L. Paulus: Consensus as Fiction of Global Law', 25(4) *Mich. JIL* 1059-1073 (2004) ('Fischer-Lescano & Teubner (2004b)'). Fischer-Lescano & Teubner's responses to Paulus' specific criticisms for the most part just restate their position without engaging with Paulus' arguments. For further discussion, including with reference to German-language material, see Klabbers (2009), op cit, 35-39.

²⁰² Fischer-Lescano & Teubner (2004a), 1017-1018, 1045. See also Klabbers (2009), op cit, 36-37.

²⁰³ Paulus (2004), op cit, 1047.

²⁰⁴ Klabbers (2009), op cit, 38. See also Paulus (2004), op cit, 1047, noting "such an explanation fails to recognize the element of choice".

²⁰⁵ Fischer-Lescano & Teubner (2004b), 1063:

body of thought seem quite open or unclear, especially concerning the normative significance of functional rationalities. For example, Fischer-Lescano & Teubner seem to infer a normativity or legitimacy, “on a sort of materialist theory”,²⁰⁶ from the fact such rationalities exist.

As Paulus put it, “Systems of rules and norms constructed ‘bottom-up’, that is, by a process of self-ordering of a particular issue area, cannot legitimize outcomes”,²⁰⁷ and questions of legitimacy cannot be avoided “by pointing to a miraculous ‘auto-poiesis’ of sub-systems that would automatically justify their separate existence”.²⁰⁸ The extent to which different rationalities can share in a common or universal set of values seems also largely left open on their approach. They note consensus upon an accepted hierarchy of values is elusive and that reference to a universal value community offers little assistance.²⁰⁹ On the other hand, they make reference to a common legal code, although they note “...global law can only be recognized as fragmented because the legal regimes use the same code”.²¹⁰ Here, they seem to envisage a greater role for agency in cooperation between different rationalities, although the use of the term ‘structural coupling’²¹¹ again suggests an inherent process over which the actors are not in immediate control. They see limits here to what law can do: it can only offer a kind of damage limitation, as a ‘gentle civilizer of social systems’.²¹²

The present work takes a largely opposing perspective: it argues that legal reasoning has the tools, when addressing normative conflict, to much better reflect

... judicial instances must conceive of themselves as a part of a transnational legal order and shift their horizons above nationally structured normative orders to include a transnational law-making process within which NGOs, international organizations and spontaneously coordinated societal actors are attempting to establish the legitimacy of global law with reference to a variety of sources.

²⁰⁶ Paulus (2004), op cit, 1054.

²⁰⁷ Ibid, 1048-1049.

²⁰⁸ Ibid, 1051. See also ibid, 1053, noting that non-State actors can only legitimately bind themselves, whereas public power, in the form of States, is needed to bind others.

²⁰⁹ Fischer-Lescano & Teubner (2004b), 1065.

²¹⁰ Ibid, 1068. This passage may be an example of what Klabbers has in mind when he says Fischer-Lescano & Teubner “rarely become concrete enough to test properly whether one has actually grasped what it is they intend to convey”: Klabbers (2009), op cit, 37, n. 58.

²¹¹ Fischer-Lescano & Teubner (2004a), op cit, 1013; Fischer-Lescano & Teubner (2004b), op cit, 1069.

²¹² Fischer-Lescano & Teubner (2004a), op cit, 1045, paraphrasing M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (Cambridge Univ. Press 2002).

the normative concerns and values of the Member States of the EU as articulated in the EU Treaties, and that States can meaningfully act as agents in the EU.

2.4.6 Concluding Remarks to the Section and Chapter

As Klabbers notes, Lon Fuller emphasised that legal rules cannot be understood independently of their purposes.²¹³ Yet, legal rules and institutions do not operate on a day-to-day basis by demanding deep reflection of their underlying purposes. In Razian terms, rules do the thinking for us and are thus exclusionary reasons. This character of legal rules seems to run out in the context of conflicting norms, or at least *prima facie* runs out. Dworkin pushes this question back to global coherence and a global morality in the legal system; Raz rejects the idea of global coherence, instead he only acknowledges local coherence and generally endorses innovative interpretation based on moral considerations (Raz's views are further discussed in Chapter 4 below). This study further examines to what extent legal reasoning solves these situations of conflict and what values choices are reflected in this process of resolution in EU law and the legal reasoning of the ECJ. It argues that the theory of legal reasoning can provide fuller answers to the problem of conflicting norms than either, for example, Raz or Dworkin's general theories of law would suggest. The study thus seeks to provide, first, a general conceptual framework of norm conflict in EU law and legal reasoning; secondly, an account of how this framework can helpfully explain existing EU practice coupled with an argument as to how EU practice might be modified to better reflect the values the EU itself professes.²¹⁴

²¹³ Klabbers (2009), *op cit*, 27-29, discussing L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', 71(4) *Harvard LR* 630-672 (1958).

²¹⁴ As Klabbers notes, it should not be assumed from the fact the ECJ adopts a particular approach to interpretation that it is the most proper approach; it is important to distinguish the normative from the explanatory: Klabbers (2009), *op cit*, 20. For an opposite perspective, see the institutional legal positivism of Bengoetxea (1993), *op cit*, 272, observing that he has "tried to assess the ECJ by its own standards".

Chapter 3: Conflicts of Norms in Legal Reasoning and Values in EU Law

3.1 Introduction

This chapter, first, seeks to present a framework or typology of norms and of methods of norm conflict and, secondly, to relate different types of norm conflict resolution to the values or rationales that underlie them. The chapter develops on the discussion in Chapter 2 of the general treatment in contemporary legal theory of the topic of conflicts or antinomies in the law and their resolution. The approaches identified in Chapter 2 of Dworkin and Raz tend to offer a very generic assessment of norm conflict: they identify the presence of disagreement and the possibility (in the case of Dworkin) or impossibility (in the case of Raz) for global coherence to be attributed to the body of law in a legal system. They adopt a meta-perspective and tend not to address the classic, traditional means of norm conflict, in the form of the rules or maxims of *lex posterior*, *lex superior*, and *lex specialis*. The latter maxims have been more explicitly addressed in continental European legal doctrine. The greater prevalence of statutory rules in the latter more obviously presented the problem of conflict in the law, since in the common law conflict could be partially mediated through common law development and change in the law. Nonetheless, these maxims are to be found to a greater or lesser extent in most legal systems, including the EU and international legal system.

Following discussion of the rules-principles distinction, the chapter first examines Hohfeld's typology of legal concepts. Hohfeld's work seeks to achieve conceptual clarity in analysing legal reasoning.¹ It thus offers the potential to analyse the problem of conflict more precisely, in that not all norms in conflict have the same character, and an understanding of their relative character can inform and clarify how to resolve conflict between them. A practical example in EU law may illustrate this point. Under the long-standing practice of the European Court of Justice (ECJ), exceptions to the founding Treaty principles of free

¹ As noted by Spaak, Hohfeld's work is widely considered to be the paradigm of analysis of fundamental legal concepts: T. Spaak, 'Norms that Confer Competence' 16(1) *RJ* 89-104 (2003), 89.

movement or undistorted competition are restrictively interpreted.² If exceptions are treated as instances of norm conflict, they may consequently be differently treated; in the practice of the ECJ, they are considered as contrary to the general purposes of the Treaty and thus to be interpreted narrowly, whereas in general public international law, the opposite has more often been the case in the case of exceptions to treaties.³ Both the fact of conflict, and the determination of the values underlying conflict, can have practical importance in legal reasoning. The mere presence of a given substantive rule or clause in the Treaty text does not determine the rule's scope: this is a matter of interpretation.

The existence of different ways of addressing norm conflict raises the question of choice and discretion in judicial decisions on norm conflict and the substantive values that underlie those choices. The second part of the chapter seeks to relate techniques and conceptions of norm conflict resolution to values. Early caselaw from the ECJ tended to emphasise the importance of integration, and this perhaps was natural in the formative years of the Union (or Community as it was then termed); integration tended to be more strongly articulated than any other values. However, since the Treaty of Maastricht, the self-articulation by the EU of its values has broadened and deepened. Subsidiarity, democracy and respect for human rights were first made explicit at Treaty level in the Treaty of Maastricht in 1992.⁴ The discussion of values in this chapter seeks to identify in a systematic and explicit way how the resolution of norms conflict is affected by value choices and how the articulated values in the EU treaties might be better reflected in norm conflict resolution in the legal reasoning of the ECJ.

² See, e.g. Case 72/83, *Campus Oil Ltd. v. Minister for Industry and Energy* [1984] ECR 2727, para. 37.

³ See, H. Lauterpacht, 'Restrictive Interpretation and Effectiveness', 26 *BYIL* 26-85 (1949), 58 et seq, referred to as interpretation *in dubio mitius*, which is interpretation in favour of the sovereignty of States; J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge Univ. Press 2003), 186, citing the Appellate Body of the World Trade Organisation (WTO) in *EC – Hormones*, panel and Appellate Body reports adopted on 13th February 1998, f.n. 154.

⁴ Subsidiarity had been mentioned in relation to environmental matters in the Single European Act 1986 (see further below).

3.2 Rules v. Principles in Legal Reasoning

The distinction between rules and principles is a long-standing one in legal theory. Dworkin characterised principles⁵ as having a dimension of weight and incommensurability that distinguishes them from the more conclusive character of rules; the latter tend to dictate or require a result, whereas a principle is more like a less conclusive guideline.⁶ Alexy distinguishes rules from principles on the basis that principles are norms that require something to be realised to the greatest extent possible given the legal and factual realities, and he thus describes them as ‘optimisation requirements’. For Alexy, rules are different in kind in that they are either fulfilled or not; thus when the rule applies, all that is required is to do what the rule states.⁷ Contrasting the two, Alexy suggests that principles posit an ‘ideal-ought’,⁸ whereas rules “describe fixed points in the field of the factually and legally possible”.⁹

Both Dworkin and Alexy thus attribute a greater element of incommensurability or abstractness to principles over rules.¹⁰ However, theorists have been less clear as to how legal reasoning can mediate and control or determine the influence of principles in legal reasoning.¹¹ Dworkin’s theory of

⁵ See R. Dworkin, *Taking Rights Seriously* (Harvard Univ. Press 1978), 24-25.

⁶ Dworkin also characterises principles as relating to rights only, preferring the term ‘policy’ to indicate considerations relating to the general or collective interest (see, e.g. *ibid.*, 90).

⁷ R. Alexy, *A Theory of Constitutional Rights* (trans by J. Rivers) (Oxford Univ. Press 2002), 47-48. Alexy prefers to use the term ‘competition’ to describe principles in tension with each other and ‘conflict’ to describe this situation between rules: *ibid.*, 48, 62. See also generally WL. Twining & D. Miers, *How to Do Things with Rules: A Primer of Interpretation* (Butterworths 4th ed. 1999), 60-66, 125-127 (adopting a somewhat broader definition of a rule so as to encompass more abstract norms understood as principles by Dworkin & Alexy); L. Alexander & G. Sherwin, *Demystifying Legal Reasoning* (Cambridge Univ. Press 2008), 98-100. As Harbo notes, Alexy’s conception of principles (as optimising requirements) makes them more subject to weighing than Dworkin’s conception of a principle as relating to rights, which by definition, trump and cannot be weighed against policies: T-I. Harbo, ‘The Function of the Proportionality Principle in EU Law’, 16(2) *ELJ* 158-185 (2010), 166.

⁸ *Ibid.*, 60.

⁹ *Ibid.*, 48.

¹⁰ See M. Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’, 2(3) *IJCL* 574-596 (2004), 578.

¹¹ See, e.g. D. Lyons, ‘Principles, Positivism, and Legal Theory’, 87(2) *Yale LJ* 415- 435 (1977), 421 (Dworkin failed to address the issue of the weight to be accorded principles); L. Alexander & K. Kress, ‘Against Legal Principles’, in A. Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press 1995), esp. 301-309 (there is no correct way of defining the weight to be attached to legal principles and that legal principles tend to collapse into equivalence to moral principles); D. Kyritsis, ‘Principles, Policies and the Power of Courts’, 20(2) *Canadian JLLJ* 379-

'best fit' seems incomplete, as discussed in Chapter 1, because his account tends to raise a number of further questions: when does local coherence give way to global coherence, what values are relevant and what is to be given to them in a coherence analysis? Dworkin's coherence or best fit test is so open-ended, it seems to resolve to a substantive yardstick of what is morally desirable. As Klabbers notes: "Yet substantive yardsticks are awkward. They presuppose underlying agreement on the values with which to tackle ... conflict, yet the problem is precisely that such underlying agreement is lacking."¹² Alexy's Law of Balancing is further discussed in Chapter 5, and likewise seems to raise substantive moral choices being made by individual judges that are not accounted for or explained by Alexy's theory.

This question of principles contrasted with rules can be illustrated in EU law with reference to the principles of effectiveness, of free movement and undistorted competition, which form the core of the common market; the principle of loyal cooperation in Article 4 TEU; and the principle of equality or non-discrimination in Articles 2 & 3 EU Treaty. It is difficult to conceptualise the limits of 'effectiveness' as a self-sufficient criteria of interpretation, i.e. independent of specific Treaty rules; the question arises is anything that makes EU law more effective therefore legitimately the subject of innovative interpretation?¹³ As Snyder has noted, the political nature of 'effectiveness' as a concept tends to be forgotten in Community or Union discourse.¹⁴

The point is echoed by Herlin-Karnell more recently, noting that despite its popularity in EU institutional discourse, effectiveness is far from a clear yardstick.¹⁵ Similarly, the principle of loyal cooperation has an open-ended nature; in *Francovich*, the ECJ based its innovative ruling on State liability on a combination of arguments as to effectiveness and loyalty.¹⁶ Is anything that

397 (2007), 383-385 (policies may justify the restriction of rights and that policies may be the basis of legal rights through creating a legitimate expectation).

¹² J. Klabbers, *Treaty Conflict and the European Union* (Cambridge Univ. Press 2009), 54.

¹³ F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools, and Techniques', 56(1) *MLR* 19-54 (1993), 52; E. Herlin-Karnell, 'Subsidiarity in the Area of EU Justice and Home Affairs Law – A Lost Cause?', 15(3) *ELJ* 351-361 (2009).

¹⁴ Snyder, *ibid*, 52.

¹⁵ Herlin-Karnell (2009), *op cit*, 354.

¹⁶ In Case C-6 & 9/90, *Francovich v. Italy* [1991] ECR I-5357, the ECJ relied on Article 5 EEC Treaty, which stated that the Member States were required to take all appropriate measures,

further integration within the purview of the loyalty principle? It is a ‘ubiquitous notion’ resulting in a ‘catch-all provision’.¹⁷ Some caselaw has recognised the limit of the principle in accepting that it works both ways, that the Union institutions owe a reciprocal duty of loyalty to the Member States,¹⁸ a point that has now been expressed at Treaty level post-Lisbon.¹⁹ That suggests, for example, as a practical limit, that the loyalty principle cannot be invoked solely as a type of presumption in favour of integration, and to the diminishment of Member State competence, in any situation of interpretative doubt. Nonetheless, its exact scope is not self-evident given its abstract character.

Conceptualising the ambit of the principles of free movement and of competition is similarly difficult, since almost any national rules in the abstract could be conceptualised as an obstacle to free movement or as a distortion on competition (in the sense that cross-border movement could be said to be freer or competition less distorted the fewer the differences are between the national laws of the Member States, even if the actual effect on free movement²⁰ or competition²¹ was only potential or slight). This risk was identified by the ECJ itself in *Tobacco Advertising*:

106. In examining the lawfulness of a directive adopted on the basis of Article 100a of the Treaty, the Court is required to verify whether the distortion of competition which the measure purports to eliminate is appreciable (*Titanium Dioxide*, cited above, paragraph 23).

whether general or particular, to ensure the implementation of Community law (see para. 36), combined with an effectiveness argument (para. 33).

¹⁷ J. Klabbers, *Treaty Conflict and the European Union* (Cambridge Univ. Press 2009), 4. Klabbers concludes that the principle of loyal cooperation “cannot amount to a granting of carte blanche power. ... good faith alone cannot create obligations where otherwise none would exist”: *ibid.*, 193, citing, *inter alia*, J. Temple Lang, ‘Community Constitutional Law: Article 5 EEC Treaty’, 27 *CMLRev* 645-681 (1990), 647, stating that the loyal cooperation principle cannot be used to “create new kinds of obligations for Member States”.

¹⁸ See Case 230/81, *Luxembourg v. Parliament* [1983] ECR 255 and more recently, e.g. Case C-339/00, *Ireland v. Commission* [2003] ECR I-11757, paras. 71-72.

¹⁹ Article 4(3) TEU.

²⁰ See, e.g. Joined Cases C-187 & 385/01, *Gözütök & Brügger* [2003] ECR I-1345, paras. 28-34, where the ECJ departed from the literal meaning of a provision on *ne bis in idem* under the Third Pillar, partly on the basis of an argument about enhancing free movement.

²¹ See, e.g. Joined Cases C-402/05 P & C-415/05 P, *Kadi and al Barakaat International Foundation v. Council* [2008] ECR I-6351, paras. 228-231, where the ECJ held that sanctions against (on the facts a relatively small number of) individuals could be brought within Community competence on the basis of a possible impact on competition (although the relevant Community Regulations being interpreted themselves drew this link).

107. In the absence of such a requirement, the powers of the Community legislature would be practically unlimited. National laws often differ regarding the conditions under which the activities they regulate may be carried on, and this impacts directly or indirectly on the conditions of competition for the undertakings concerned. It follows that to interpret Articles 100a, 57(2) and 66 of the Treaty as meaning that the Community legislature may rely on those articles with a view to eliminating the smallest distortions of competition would be incompatible with the principle, already referred to in paragraph 83 of this judgment, that the powers of the Community are those specifically conferred on it.²²

Likewise, the principle of equality of rights of citizens could in the abstract be invoked to justify the extensive harmonization of citizens' rights across the Union.²³ An extensive application of the equality principle so as to require harmonisation could run counter to the principle of mutual recognition, whereby Member States accept each other's regulatory standards,²⁴ and also counter to the principle of respect for the diversity and constitutional traditions of the Member States.²⁵

The principles of free movement, competition, and equality can be defined if subject to more specific Treaty rules detailing the extent to which they entail a transfer of sovereignty by the Member States, e.g. *lex specialis* as a rule of priority can substantially narrow the scope of principles broadly stated, a point developed below. In contrast to an expansive principles-driven approach, which tends towards *lex generalis*, conserving or historical/originalist understanding, which tends towards *lex specialis* (i.e. the specific understanding of the law-maker), can function as an interpretative rule. Generally, for the purpose of analysing the resolution of norm conflicts by the tools of legal reasoning, a rule-bound method acts as much more of a constraint. In the discussion below, traditional rules of norm conflict resolution are examined (*lex superior*, *lex posterior*, *lex specialis*),

²² Case 376/98, *Germany v. Parliament* [2000] ECR I-8419, paras. 106-107.

²³ For an argument tending toward this view, see, e.g. D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', 15(2) *Columbia JEL* 169-195 (2009).

²⁴ A concept developed by the ECJ itself in Case 120/78, *Cassis de Dijon* [1979] ECR 649.

²⁵ See Article 4(2) TEU (post-Lisbon) and below sec. 2.3.2.1.

following which the difference between various general interpretative approaches are examined, *in the context of the values that underlie them*. First, the general question of the values and normativity that should inform decision-making in EU law is assessed in light of the values now articulated in the EU Treaties.

3.3 Values and the EU Legal System

3.3.1 Normativity in Law

In an attempt to map the concept of normativity in law, it may be useful to distinguish between attempts to theorise normativity of law in general as a universal or near-universal social phenomenon and a more specific treatment of values in a given legal system. The former is a question that has been debated throughout the history of legal theory and most centrally in the dispute between positivist and anti-positivist understandings of law. It goes to the heart of much legal theory seeking to answer the foundational question as to why there is a duty to obey the law.²⁶ Classic natural law relates law to the ends and purposes of human existence understood as going beyond mere survival or the maintenance of law and order in society and relates it to universally valid moral postulates with which fully valid law must cohere. Positivism seeks to adopt a generally neutral, non-evaluative understanding of law and generally relates normativity to social practices.²⁷

Here it may be worth distinguishing between strong and weak evaluation. Classic natural law adopts a standpoint of strong evaluation in that it relates law to the ultimate ends of human existence. Positivism seems suitably described as entailing weak evaluation: some degree of evaluation is essential to any legal theory, as Finnis observed, to even begin the enterprise of theorising the nature of law; to do so, one must first make an evaluation of what matters and is worth

²⁶ See, e.g. the collection of writings in W. Edmundson (ed.), *The Duty to Obey the Law: Selected Philosophical Readings* (Rowman & Littlefield 1999).

²⁷ Classic natural law thus conceives of normativity as *prior* to human practice, whereas positivism generally looks *within* human practice for an explanation of normativity: S. Delacroix, 'Hart's and Kelsen's Concepts of Normativity Contrasted', 17(4) *RJ* 501-520 (2004), 502.

counting as law or within the province of law.²⁸ But positivism seeks to ring-fence the evaluation of law to this relatively low level of deciding a minimal purpose and functionality of law, as expressed in Hart's acceptance of the minimum content of the natural law or:

Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law ...²⁹

Hart goes on to explain these conditions as entailing human vulnerability, requiring prohibitions to protect human survival (e.g. thou shalt not kill); the approximate equality of men requiring some system of forbearance to contain competition and conflict; limited altruism in human nature requiring some control of human aggression; limited resources with which to sustain human survival and which make the institution of some law of property essential; and limited understanding and strength of will necessitating coordination of behaviour through coercion and sanctions.³⁰

For critics of positivism, this minimum content of natural law, or the brute need for survival, does not adequately explain the duty to obey the law.³¹ The difficulty is agreeing on such higher purposes and moral principles that could be considered universally valid. Finnis could attract widespread agreement because his theory is stated at a very high level of abstraction in identifying basic goods and principles of practical reasonableness, but without identifying any hierarchy of values between basic goods.³² Dworkin's conception of law as entailing the political morality of the society in which it exists seems a kind of anti-positivistic constructivism.³³

²⁸ Finnis (1980), op cit, chap. 1.

²⁹ HLA. Hart, *The Concept of Law* (Clarendon Press 2nd ed. 1994), 192-193.

³⁰ Ibid, 192-200.

³¹ See R. Epstein, 'The not so Minimum Content of Natural Law', 25(2) *OJLS* 219-255 (2005), arguing that Hart was mistaken in ring-fencing natural law to minimal conditions of coexistence, and for a reply, J. Allan, 'Is You Is or Is You Ain't Hart's Baby? Epstein's Minimum Content of Natural Law', 20(2) *RJ* 213-229 (2007).

³² Finnis argues that the basic goods are all equally fundamental: Finis (1980), op cit, 92-95.

³³ See, e.g. D. Patterson, 'Dworkin on the Semantics of Legal and Political Concepts', 26(3) *OJLS* 545-557 (2006), 554. See also Delacroix (2004), op cit, 502.

Beyond these views, the fact of moral pluralism poses a challenge for any attempt to theorise the general normativity of law. However, this general debate is more of a backdrop in the context of specific legal systems where the underpinning values are expressly articulated in constitutional documents. In an EU context, the Treaties now articulate the fundamental values of the Union, i.e. those values that transcend specific areas of EU law and are meant to characterise it in general. In more recent times, especially since the Treaty of Maastricht, the EU has been much more explicit in how it articulates its central values, which both makes more complex the question of how norm conflicts can be avoided, but also helps clarify it. Following the Treaty of Lisbon, the following are the values that the EU articulates as it being founded on in Article 2 of the Treaty on European Union (TEU):

1. human dignity;
2. freedom;
3. democracy;
4. equality;
5. the rule of law;
6. respect for human rights.³⁴

Nonetheless, the traditional debate over the ultimate normativity of law and the implicit problem of agreement on fundamental values is also reflected in the EU, where moral pluralism is also marked, despite this relatively explicit articulation of values in the EU Treaties. Specifying the scope and application of the values expressed above in specific contexts is much more challenging than their articulation in the abstract.

³⁴ Article 2 TEU.

Much disagreement exists about the content of these various values and how they are to be weighed against each other. The notion of contested concepts can help to explain the complexity of reflecting on normativity in the legal system of a modern, pluralist society, even when fundamental values are specified as is now the case in the EU. Gallie identified seven characteristics, present in not always exactly the same degree, of such concepts.³⁵ Contested concepts are: evaluative or appraisive, in delivering value judgments; internally complex and diversely describable, in having more than one and maybe many possible instantiation(s); open, in that their meaning may be reviewed in different or novel situations; reciprocally recognised, in that parties acknowledge their contestedness; and capable of exemplars or paradigm examples, which anchor the concept and on which there is agreement. Such disagreement is not at the penumbra of the concept, but rather at the core,³⁶ although this is subject to the possibility of anchoring.

The possibility of anchoring is important in deflecting the criticisms directed at Gallie's account that it results in conceptual relativism, whereby the usefulness and determinacy of a concept is fatally undermined through the possibility of interminable contestation.³⁷ The possibility of anchoring through exemplars allows a judgment to be made that some propositions are closer to the core of a concept than others.³⁸ This can provide a useful conceptual framework for helping to identify the core of the values articulated by the EU.

³⁵ WB. Gallie, 'Essentially Contested Concepts', 56 *P Art Soc* 167-198 (1956).

³⁶ J. Waldron, 'Is the Rule of Law and Essentially Contested Concept (in Florida)?', 21(2) *L and P* 137-164 (2002), 148-149.

³⁷ Expressing the latter criticism of Gallie, see, e.g. JN. Gray, 'On the contestability of social and political concepts', 5 *Political Theory* 331-349 (1977), 339-343. Beck notes that the three essential features of Gallie's list are contested concepts' appraisive character; complexity; and lack of self-evident or indisputable justification in particular forms as to being good, right, or worthy: G. Beck, 'The Mythology of Human Rights', 21(3) *RJ* 312-347 (2008), 325-326.

³⁸ See generally C. Swanton, 'On the "Essential Contestedness" of Political Concepts', 95 (4) *Ethics* 811-827 (1985), 815.

3.3.2 Normativity in EU Law

3.3.2.1 Introduction

This section discusses in more detail the self-articulation of values in the EU. As well as the core humanistic and individual-centred values identified in Article 2 quoted above, the preliminary provisions of the Treaty identify other core values. Article 3 TEU expresses the values or aims that can be summarised under the heading ‘integration’. In Article 3, integration is related to the unifying values of equality, non-discrimination, and social solidarity, with some element of balance or counterpoint introduced by the reference to respect for cultural and linguistic diversity. The degree of balance or counterpoint is developed in Articles 4 and 5, which adopt the principles of subsidiarity and conferral and squarely address the central point of political cleavage or conflict that EU law must address: how to balance the goal of integration with the continuing sovereignty of the Member States.

Article 4 makes reference to the principle of conferral (repeated in Article 5) and goes on to state the Union shall respect the territorial integrity and national security of the Member States, to refer to a duty of loyal cooperation to be exercised reciprocally by the Union and the Member States, and to state the duty of the Member States to refrain from activities that may jeopardise the goals of the Treaties.

Article 5 confirms the principle of conferral and also to outlines the related principles of subsidiarity and proportionality. Under the principle of conferral, “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties ... Competences not conferred upon the Union in the Treaties remain with the Member States” (Article 5(2)). The principle of subsidiarity requires that:

... in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at

regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (Article 5(3)).

The principle of proportionality entails that the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties (Article 5(4)).

Of the above provisions, Article 3 represents the strongest degree of continuity with the founding Treaties. The Preamble of the Treaty of Rome 1957³⁹ referred to a determination to lay the foundations of an ever closer union among the peoples of Europe; economic and social progress; the constant improvement of the living and working conditions of the peoples of the Member States; steady expansion, balanced trade and fair competition; the progressive abolition of restrictions on international trade, solidarity, peace, and stability.

All of these values can be understood, for the purpose of legal reasoning, as ‘principles’. Taken collectively, these various principles present a very challenging interpretative task; the problem of incommensurability seems to loom large. In contrast, the aim of developing an understanding of norm conflict rules is to address this *prima facie* incommensurability so as to give determinacy to norm conflict resolution. Each of these values is now looked at in more detail.

3.3.2.2 Human Dignity

‘Human dignity’⁴⁰ could be considered a prime example of a legal principle, in that it has a particularly abstract character that is difficult to translate into an easily operationalised rule.⁴¹ Few would deny the normative force of human dignity in the abstract, yet its precise implications for legal rights and duties are not obvious.

³⁹ The European Economic Community Treaty, 298 UNTS 11.

⁴⁰ For relatively recent general academic discussion of dignity as a legal value, see. e.g. D. Feldman, ‘Human Dignity as a Legal Value – Part 1’, *PL* 68-702 (1999) and ‘Human Dignity as a Legal Value – Part 2’, *PL* 61-76 (2000); G. Moon & R. Allen, ‘Dignity Discourse in Discrimination Law: A Better Route to Equality?’, *EHRLR* 610-649 (2006).

⁴¹ See, e.g. Feldman (1999), *ibid*, 698-699.

Article 1 of the EU Charter of Fundamental Rights⁴² states that “Human dignity is inviolable. It must be respected and protected.” In *Omega*, Advocate General Stix-Hackl observed that “[t]here is hardly any legal principle more difficult to fathom in law than that of human dignity”, but that it forms the underlying basis and starting point for all human rights distinguishable from it and is considered by German theorists, for instance, as the ‘fundamental constitutional principle’ of human rights.⁴³

She contrasted it with a communitarian idea of rights, or the idea that rights are determinable by the majority,⁴⁴ instead associating it with the “idea that every individual being is considered to be endowed with inherent and inalienable rights.”⁴⁵ She further links the concept of dignity to equality, conveyed in the expression ‘*égale dignité*’ or equal dignity.⁴⁶ On the issue of its justiciability, she observed that the German Basic Law was exceptional in considering it to be a justiciable principle in its own right, independently of other justiciable rules of law.⁴⁷ A contrast is then drawn between human dignity as a non-justiciable principle and concrete guarantees of fundamental rights.⁴⁸ On the facts of *Omega*, which concerned a prohibition by Germany of a computer game simulating acts of homicide and which was claimed to be a violation of the free movement principles (freedom to provide services and free movement of goods), the Advocate General suggested that human dignity had to be related to public policy under Community law and based her decision primarily on the latter.⁴⁹

⁴² OJ C 364/01, 18.12.2000, p. 1.

⁴³ Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, Opinion of Advocate General Stix-Hackl, 18th March 2004, paras. 74-76.

⁴⁴ See *ibid*, para. 77: “The right to respect for human rights runs counter in this respect to the idea that human regard is negotiable by the State, the people and the majority – and therefore counter to the idea that the individual is identified according to the community and considered to be a function thereof.”

⁴⁵ *Ibid*, para. 77.

⁴⁶ *Ibid*, para. 80.

⁴⁷ *Ibid*, para. 84. Article of the German Basic Law or *Grundgesetz*, vom 23. Mai 1949 (BGBl. S. 1), zuletzt geändert durch Gesetz vom 28. August 2006 (BGBl. I S. 2034)

⁴⁸ *Ibid*, para. 86. Cf. the Opinion of Advocate General Jacobs in Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079, where he refers to human dignity as a right and assumes its justiciability, e.g. at para. 197 (the case related to a patent on a biotechnological invention). Similarly, see the judgment of the ECJ at paras. 70-77. In *Omega*, Advocate General Stix-Hackl queried whether the ECJ in *Netherlands v. Parliament and Council* had invoked human dignity as an interpretative principle rather than a right itself, though she noted only the German language text of the judgment seemed to support this view: see her Opinion, *supra* n. 43, para. 90.

⁴⁹ Opinion, *supra* n. 43, para. 93.

The evaluation of dignity as a non-justiciable principle in its own right, but rather as providing conceptual underpinning for justiciable rights, seems valid, given its incommensurable character and the difficulty in attributing a precise weight to it. The *travaux préparatoires* of the EU Charter seem to endorse both views, they state: “The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights”⁵⁰ (since the passing of the Treaty of Lisbon, reference to the *travaux préparatoires* in interpreting the Charter is now a binding rule of law under Article 6(1) TEU, this issue is discussed more generally in Chapter 3).⁵¹ What the content of the distinct right of dignity is, however, remains unclear. Notwithstanding this ambiguity in the *travaux préparatoires*, the contrast drawn by Advocate General Stix-Hackl between human dignity as a non-justiciable principle and codified concrete guarantees of fundamental rights has useful implications for rights adjudication in general. For the most part, rights guarantees are themselves relatively incommensurable and abstract, rather than being concrete in a way that human dignity is not. Further, the invocation by Advocate General Stix-Hackl⁵² of a Kantian conception of rights suggests the principle that a person cannot be considered a means to an end, in the way an object or a thing can, and this has implications for how rights arguments are weighed against competing interests. These issues are further addressed in Chapter 4 below.

3.3.2.3 Integration and Solidarity

Integration is the ‘meta-value’ that has been most strongly articulated in EU law and is inherent in the whole scheme of the Treaties. As Rasmussen critically observed, it has often dominated as a concern in the reasoning of the ECJ.⁵³ It is

⁵⁰ Bureau of the Convention on a Charter of Fundamental Rights of the European Union, *Explanations by the Convention relating to the Charter of Fundamental Rights*, document CONVENT 49 of 11.10.2000, CHARTE 4473/00 Convent 50, available online at: < http://www.europarl.europa.eu/charter/convent49_en.htm > (last accessed 13th February 2009), p. 3.

⁵¹ Article 6(1) TEU now reads: “The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.”

⁵² Opinion, *supra* n. 43, para. 78.

⁵³ H. Rasmussen, *On Law and Policy of the European Court of Justice* (Kluwer 1986).

most notably expressed in the commitment to an ‘ever-closer Union’ in the Preamble of the TEU and originally contained in the Preamble of the Treaty of Rome. The core principle of a common market and its accompanying freedom of movement principles (freedom of movement of workers, freedom of movement of goods, freedom of movement of services, freedom of movement of capital and payments) and the principle of undistorted competition seem generally accepted as inherent in the idea of a common market. Two points that are much more contested are: (1) the boundaries of the free movement and undistorted competition principles, since they have a conceptual pull that can draw within them almost any diversity of national rules and thus of national competence, as noted in *Tobacco Advertising* referred to above; and (2) the extent to which economic and monetary union should be accompanied by deeper political integration. This contestation is apparent from the ratification process of the Treaty Establishing a Constitution for Europe and of the Lisbon Treaty,⁵⁴ for example.

3.3.2.4 *Democracy and the Rule of Law*

This section examines the values of democracy and the rule of law and what they can be taken to mean in the context of the EU. They are considered together here because they are perhaps the most widely or universally accepted principles of political morality in the world and especially in Europe and, in addition, their practical implications for legal reasoning seem to dovetail to a large degree. The content of rights tends to be more contested than the normative content of democracy and the rule of law.⁵⁵ As ‘meta-principles of political morality’, thus, democracy and the rule of law might be thought to have a less disputable relevance for judicial interpretation, to the extent that they are relevant.

It may be questioned to what extent democracy and the rule of law have always been central elements of the Community’s normative self-understanding. They were not mentioned in the Treaty of Rome, and were only first explicitly

⁵⁴ See generally Z. Bañkowski & E. Christodoulidis, ‘The European Union As An Essentially Contested Project’, 4(4) *ELJ* 341-354 (1998).

⁵⁵ On the contested nature of human rights, see G. Beck (2008), *op cit*, and generally J. Waldron, *Law and Disagreement* (Oxford Univ. Press 1999).

articulated in the 1990s.⁵⁶ However, the Treaty of Rome was silent on such normative questions; it was largely a technical document. This may well have been because thicker normative questions of political morality were, in the 1950s, primarily for the Council of Europe and its European Convention on Human Rights⁵⁷ to the extent that they were to be regulated at the European level. The preamble to the Statute of the Council of Europe,⁵⁸ of which all the founding Member States of the European Communities⁵⁹ were parties, declares that the signatory States “[reaffirm] their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy”. With the later development of Community competence beyond the core idea of a common market, especially after the Single European Act 1986,⁶⁰ it became necessary for the EU itself to articulate its fundamental values in a fuller way.

However, it seems misplaced to consider the Community was thus until the 1990s a ‘normatively empty space’ or that its only normative concern was with integration, or with human rights to the extent the EC did later develop a human rights jurisprudence.⁶¹ This would be to see the Community as some sort of radical break or rupture with the legal traditions of the Member States, and it could be thought illogical that the Member States would have accepted such a supra-national framework without ever having articulated its radically different normative basis. ‘Constitutionalism beyond the State’ requires some reconceptualisation, but it is hard to see that it can plausibly be considered to

⁵⁶ Prior to its articulation at Treaty level by the Treaty of Maastricht, the ECJ had referred to the rule of law in its caselaw: see, e.g. Case 294/83, *Parti Ecologiste ‘Les Verts’ v. European Parliament* [1986] ECR 1339, at para. 23; *Opinion 1/91 Re European Economic Area Agreement I* [1991] ECR I-6079, para. 21.

⁵⁷ ETS no. 05. See generally AB. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford Univ. Press 2004).

⁵⁸ ETS no. 01. Similarly, see the preamble of the ECHR, *ibid.*

⁵⁹ Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.

⁶⁰ OJ L 169/1, 29.06.1987, p. 1.

⁶¹ Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419; Case 4/73 *Nold KG v. Commission* Case [1974] ECR 491.

operate contrary to the established basic values of the Member States.⁶² Though they may be operationalised in a new context, the same values are relevant.

Democracy and the rule of law might be taken as paradigm examples of ‘contested concepts’, and thus it might be objected that any account of them is just one version amongst several that are equally valid.⁶³ While it is important to note the differing conceptions of democracy and the rule of law, it is a mistake to believe them to be so contested that they have no fixed content. As Waldron has argued, the core attributes of the rule of law, more fully brought out in Tamanaha’s recent work, are fairly stable, settled, and subject to practical closure.⁶⁴ Waldron takes Fuller’s account as reflecting this settled core of the rule of law.⁶⁵ Differing perspectives on the rule of law tend not to relate to the core idea of formal legality, but rather to its application in specific contexts.⁶⁶ The rule of law has both settled and contested aspects. Formal legality seems to represent its core and relatively settled content. Tamanaha’s recent work seeks to bring out this core formal legality as the correct understanding of the rule of law, which he contrasts with an instrumentalised conception of law as a means to an end in the hands of the judiciary.⁶⁷

Democracy has also been significantly contested as a concept, with one study identifying over ten differing accounts of how a polity could be democratic.⁶⁸ An obvious example is a simple majoritarian model (as reflected to

⁶² See generally, arguing along these lines, M. Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’, 11(3) *ELJ* 262-307 (2005).

⁶³ For a thorough recent discussion of democracy and the rule of law as contested concepts, see D. Collier, FD. Hidalgo & AO. Maciuceanu, ‘Essentially Contested Concepts: Debates and Applications’, 11(3) *J Pol. Id.* 211-246 (2006). See also, e.g. DM. Clarke, ‘Interpreting the Constitution: Essentially Contested Concepts’, in O. Doyle & E. Carolan (eds.), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008).

⁶⁴ Waldron (2002), op cit, 154-155 and see B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge Univ. Press 2004); B. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge Univ. Press 2006).

⁶⁵ Waldron (2002), op cit, 154.

⁶⁶ See, e.g. *ibid*, 146; Collier et al, op cit, 230. Most commonly, the rule of law is understood on a ‘thicker’ way, as encompassing also human rights or democracy: see Tamanaha (2004).

⁶⁷ Tamanaha (2006), op cit. See further EO. Wennerström, *The Rule of Law in the European Union* (Iustus Förlag 2007), arguing that the way the EU addresses the rule of law is inconsistent as between its internal affairs, where it tends to adopt an instrumentalised understanding of it, and its external relations, where it requires a more traditional view (e.g. in accession criteria).

⁶⁸ D. Held, *Models of Democracy* (Polity 3rd ed. 2006).

some degree in the UK tradition of parliamentary sovereignty) contrasted with a consociationalist model⁶⁹ that institutionalises ongoing minority presence or representation in the executive branch. Nonetheless, as with the rule of law, it is important to identify the core elements of democracy that are relatively uncontested. Virtually everywhere a democracy exists, it is accompanied by a parliamentary system meant to be representative. The notion of ‘representativeness’ only makes sense if it is possible for the representative body to translate its collective decisions into law and if this process of ‘translation’ does not break down between the promulgation and application or adjudication of the law. As Tamanaha put it, such a breakdown would represent the evisceration of democracy at its point of application.⁷⁰

That is the element of democracy, namely, representation, that this study draws on to understand the implications of democracy for legal reasoning; as with the core of the rule of law, that aspect of democracy is relatively settled and not as contested as say, the role of minorities within a polity. Of ten main models of democracy identified by Held, none question the duty of courts, including supreme or constitutional courts, to follow, in general terms, the interpretative understanding of the law-maker or constituent power (whether there may be situations when evolutive interpretation, departing from the intention of the law-maker, is justified is examined below in Chapter 3).⁷¹

Addressing the commonly made critique of the EU as lacking democratic legitimacy, Scharpf distinguishes between input and output-legitimacy. Scharpf proposes that the absence of a sense of collective identity in the EU, i.e. the absence of a *demos* and the shared political space facilitating political communication and interaction given the parallel and mutually independent

⁶⁹ Recently, see, e.g. A. Lijphart, ‘Constitutional Design in Divided Societies’, 15(2) *Journal of Democracy* 96-109 (2004).

⁷⁰ Tamanaha (2004), op cit, 37.

⁷¹ Among the models Held identifies, *ibid*, are republicanism, liberal democracy, competitive elitism, and deliberative democracy. In an EU context, on models of democracy, see, e.g. JHH. Weiler, U. Haltern & F. Mayer, ‘European Democracy and its Critique’, 4(3) *WEP* 24-33 (1995) also published as *EUI Working Paper Robert Schuman Centre No. 95/11* (1995); Craig, op cit. See also Collier et al, *ibid*, 222-224, noting democracy has been subject to a “substantial degree of decontestation”.

political and cultural systems in the Member States,⁷² means an input-oriented concept of legitimacy is difficult to realise (i.e. legitimacy understood in terms of the effectiveness of democratic input and participation in the process of political decision-making),⁷³ and instead an output-oriented concept of legitimacy is more attainable. Despite thus seeming to offer a framework for moving away from the premise of democracy as the touchstone of legitimacy in favour of legitimacy being related to good outcomes, the determination of what amounts to a good outcome itself must still be decided and represents the democratic dilemma.⁷⁴ As Wincott succinctly expresses this view, the definition or determination of what is a desirable output itself requires democratic input to be legitimate.⁷⁵

In Tamanaha's statement of the link between democracy and the rule of law, judges' 'following of the law' is necessary to give effect to democratic intention. This notion of following the law entails predictability in the law.⁷⁶ Predictability entails relatively clear, shared criteria of interpretation. Thus, the law maker can be relatively certain how the judiciary will interpret the law and how the law will take practical effect. Without predictability, the significance of the publication of laws and the prohibition on retroactivity⁷⁷ breaks down: there seems

⁷² A point first articulated by JHH. Weiler, 'The State "über alles"; *Demos, Telos*, and the German Maastricht Decision', *NYU Jean Monnet Working Paper No. 6/1995* (1995).

⁷³ FW. Scharpf, *Governing in Europe: Effective or Democratic?* (Oxford Univ. Press 1999), 9.

⁷⁴ J. Schumpeter, *Capitalism, Socialism and Democracy* (George Allen & Unwin 5th ed. 1976), 269-270; J. Thomassen & H. Schmitt, 'Democracy and Legitimacy in the European Union', 45(2) *Tidsskrift for samfunnsforskning* 377-410 (2004), 399: "...according to this [the output-oriented conception of legitimacy] definition there are no criteria to distinguish a well performing democratic system from a dictatorship delivering the output that people want". Deliberative democracy defined solely with reference to the argumentative or rational superiority of one form of government over the other seems potentially open to the same criticism unless it is combined with some minimal element of proceduralism (the latter is arguably, however, implicit in the general presumption of equality underlying deliberative theory). See generally on deliberative democracy, Held, *op cit*, pp. 231-255.

⁷⁵ D. Wincott, 'National States, European Union and Changing Dynamics in the Quest for Legitimacy', in A. Arnall & D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford Univ. Press 2002), 492.

⁷⁶ *Ibid*, 119 ("Above all else it is about predictability"). M. Kramer, *Objectivity and the Rule of Law* (Cambridge University Press 2007), 116, referring to public ascertainability of the law as a necessary condition of the rule of law and of any type of governance.

⁷⁷ See generally L. Fuller, *The Morality of Law* (Yale Univ. Press revd. ed. 1969), which can be considered an elaborate statement of formal legality, stressing the importance, *inter alia*, of publication of laws. See also L. Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart', 71(4) *Harvard LR* 630-672 (1958). The ECJ has endorsed the principle of the non-retroactivity of law as a general principle of Community law: see, e.g. Case 98/78, *Racke v. Hauptzollamt Mainz* [1979] ECR 69, at 84; and see generally, F. Snyder, 'General Course on Constitutional Law of the European Union', VI *Collected Courses of the Academy of European Law* 41-155 (Dordrecht 1998), 80 et seq.

little difference between retroactive application of law and the clarification of the meaning of a law only when it is adjudicated. This is an understanding of the rule of law, linked with democracy, titled strongly towards its formal content. A different, more instrumentalised understanding is also possible; here, there is an internal conflict of value, i.e. a value itself is contested, as indicated above. In order for the rule of law to be a value that can help resolve norm conflict, it is thus necessary to make a choice as to one's understanding of it; otherwise there is simply a regress of conflict in values underlying norm conflict resolution. Ultimately, an instrumental understanding of the rule of law seems problematic because it is contradictory of its formal character. 'Law as a means to an end' as a guide for interpretation or legal reasoning legal reasoning does not represent the constraint on power and the subordination of power to the law that has always classically been associated with the rule of law.⁷⁸

Snyder notes the differing understandings of constitutional culture in the EU, citing its highly instrumental understanding of law along with influence from Western legal culture generally and the historical influence and story of integration since the 1950s.⁷⁹ One contradictory element is this highly instrumental concept of law in light of the core understanding of the rule of law in European legal traditions,⁸⁰ although instrumentalism in legal thinking has become more widespread in the 20th century.⁸¹ As EU constitutionalism matures and develops, and as the competences of the EU expand, a recovery of a more formal conception of the rule of law may enhance the legitimacy of the Union and its legal processes and contribute to enhanced coherence between the legal systems and traditions of the Member States.

⁷⁸ E.P. Thompson, 'The Rule of Law', in *Whigs and Hunters: The Origins of the Black Act* (Penguin 1975); D. Cole, 'An Unqualified Human Good': E.P. Thompson and the Rule of Law', 28(2) *JLS* 117-203 (2001).

⁷⁹ F. Snyder, 'The Unfinished Constitution of the European Union: Principles, processes and culture', in J.H. Weiler & M. Wind, *European Constitutionalism Beyond the State* (Cambridge Univ. Press 2003), 69-71 citing L. Friedman, 'Law and Social Change: Culture, Nationality, and Identity', IV *Collected Course of the Academy of European Law*, Book 2, *The Protection of Human Rights in Europe* (Martinus Nijhoff 1993), 258-265.

⁸⁰ See generally Wennerström (2007), op cit.

⁸¹ See generally, Tamanaha (2006), op cit; Snyder in Weiler & Wind (eds.) (2003), op cit, 71, noting an instrumental view of law is common in contemporary Western states.

A number of related issues arise when considering democracy and the rule of law: (a) the development of governance as a framework of understanding relative to a traditional ‘rule of law’ approach, and (b) and the values of transparency and accountability as aspects of democracy and the rule of law. Further, these issues raise the question of a tendency in theorising the EU to conceive of it in ‘*sui generis*’ terms, as at a basic conceptual level, deserving of different treatment to normative concerns in other, national or international, contexts. These issues are now considered in turn.

By ‘governance’ is meant the proliferation of actors and stakeholders in the development of policy beyond the usual classic institutional actors in the executive and legislature, the fragmentation and de-centralisation of law-making processes away from a traditional hierarchical national model.⁸² The complexity of modern life and of the administration of modern government requires extensive consultation and input from various affected interests, and the resulting processes of information management and policy determination represent a new site of political involvement and power.

The proliferation of these dispersed and more complex layers of governmental activity and engagement reflected in the concept of governance generates a complexity that can undermine the traditional legitimacy of public institutions by blurring lines of accountability and decision-making, contributing, as the Commission itself has recognized,⁸³ to a distancing between citizens Union institutions and processes. Clear hierarchical lines of democratic and legal accountability are at risk of being subsumed within a complex or ‘spread-out web’ of stakeholder networking.⁸⁴ Governance can thus work toward a “destabilisation of the traditional normative hierarchy”.⁸⁵ Governance can be understood in output-

⁸² See generally N. Walker & G. de Búrca, ‘Reconceiving Law & New Governance’, 13(3) *Columbia JEL* 519-537 (2006-2007); A. Gatto, ‘Governance in the European Union: A Legal Perspective’, 12(2) *Columbia JEL* 487-516 (2006); F. Snyder, ‘Governing Economic Globalisation: Global Legal Pluralism and European Law’, 5(4) *EJL* 334-374 (1999).

⁸³ European Commission, *White Paper on European Governance* Brussels, 25.7.2001 COM(2001) 428 final, 9.

⁸⁴ T. Scultz, ‘Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface’, 19(4) *EJIL* 799-839 (2008), 801.

⁸⁵ S. Picciotto, ‘Constitutionalising Multilevel Governance?’, 6(3-4) *IJCL* 457-479 (2008), 461; Walker & de Búrca (2006-2007), op cit, 521-522

oriented legitimacy terms as enhancing the quality of administrative or regulatory results, through enhancing expert involvement.⁸⁶ It privileges professional and social accountability and thus has an élitist tendency.⁸⁷ Broader, democratically-oriented input-oriented legitimacy concerns tend to get sidelined.⁸⁸

In dissipating traditional hierarchies, governance could be said to increase the potential for norm conflict (but it is less concerned with this; rather the degree and depth of stakeholder involvement is what counts, not the conceptual clarity or coherence of norm conflict or of its resolution). For example, soft law can be the product of governance forms, in the form of benchmarks and professional standards, such as through the Open Method of Coordination. This may put pressure on the institutions involved in hard law to play ‘catch up’, as hard law and soft law increasingly diverge. A rule-bound orientation tends to downplay the normative significance of soft law, thus transferring the question of conflict between hard or ‘real’ law and soft law to the policy domain.

In the EU, a dissipation of a clear conception of normativity can manifest itself, in particular, in normativity being defined in the self-referential operations of the EU institutions.⁸⁹ A tendency in some literature on the EU is to thus effectively elide the is-ought distinction in political and legal theory⁹⁰ and infer the normative acceptability of a given posture on governance from the fact of its adoption in a *sui generis* entity and its acceptance by élite actors,⁹¹ a tendency made relatively explicit by Priban, for example:

⁸⁶ C. Joerges (with comments by D. Chalmers, R. Nickel, F. Rödl, R. Wai), ‘Rethinking European Law’s Supremacy’, *EUI Working Paper Law 2005/12* (2005), 26.

⁸⁷ On professional and social accountability, see M. Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, 13(4) *ELJ* 447-468 (2007), 456-457.

⁸⁸ C. Scott, ‘Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU’, 15(2) *ELJ* 160-173 (2009), 170-172.

⁸⁹ J. Priban, ‘The Self-Referential European Polity, its Legal Context and Systemic Differentiation: Theoretical Reflections on the Emergence of the EU’s Political and Legal Autopoiesis’, 15(4) *ELJ* 442-461 (2009), 443, 449-451.

⁹⁰ See, e.g. R. Cohon, ‘Hume’s Moral Philosophy’, *The Stanford Encyclopedia of Philosophy* (Winter 2004 Edition), Edward N. Zalta (ed.), URL = < <http://plato.stanford.edu/entries/hume-moral/> > (last accessed 29th January 2009); Finnis (1980), op cit, 33-49

⁹¹ The ECJ famously sought to mark Community law out as distinct from general international law in Case 26/62, *Van Gend en Loos* [1963] ECR I (“the Community constitutes a new legal order of international law”, at 12) and Case 6/64, *Costa v. ENEL* [1964] ECR 585 (“By contrast with ordinary international treaties, the EEC Treaty has created its own legal system”, at 593).

The replacement of rational action and/or institutionalist theoretical views by the evolutionary epistemology of the autopoietic social systems of European politics and law facilitates a more precise description of what has been going on in European integration processes since the 1950s. First of all, it eliminates the political and ideological contexts of neofunctionalist theories because of the epistemological emphasis on operative rather than normative aspects of functionalist social theory.⁹²

The shift to multi-level governance has not been matched by the equivalent development of accountability mechanisms and results in ‘normative leakage’.⁹³

Governance and soft law seem to present a problem of drift, dissipation, and dispersion of competences. One way of claiming back competence to hold to account and control relatively autonomous agencies is an insistence on the priority of the principal-agent relationship:⁹⁴ not in the sense of ongoing interference, but in ensuring that agencies act within conferred⁹⁵ competences that are ultimately legitimised by the decision of the constituent power, in this case, of the Member States. The approach advocated here is not to suggest the irrelevance of governance,⁹⁶ but it does accept the relative priority of clear, legal demarcation lines and of power-conferring rules and their interpretation within a rule-bound framework.⁹⁷ This contributes to democratic representation that is closer to the electorate as agent.

⁹² Priban (2009), op cit, 450.

⁹³ D. Curtin & A. Nollkaemper, ‘Conceptualizing Accountability in International and European Law’, 26 *NYIL* 3-20 (2005), 6-7.

⁹⁴ See Bovens (2007), op cit, p. 455, discussing political accountability in principal-agent terms; D. Curtin, ‘Holding (Quasi-)Autonomous EU Administrative Agencies to Public Account 13(4) *ELJ* 523-541 (2007), 526-527, although questioning the application of the principal-agent model in the EU on the basis essentially of the dispersed character of the delegating authority. See further RW. Grant & RO. Keohane, ‘Accountability and Abuses of Power in World Politics’, 99(1) *APSR* 29-43 (2005), pp. 41-42.

⁹⁵ Thereby acting within the principal of conferral articulated in Article 5 TEU.

⁹⁶ See Walker & de Búrca (2006-2007), op cit, p. 523 et seq, criticising tendencies to embrace either one or the other of law and governance rather than seeing them as distinct but overlapping in some respects.

⁹⁷ For a contrary view, see A. Menon & S. Weatherill, ‘Legitimacy, Accountability, and Delegation in the European Union’, in Arnall & Wincott (eds.) (2002), op cit, 119. For a somewhat contrasting view to Menon & Weatherill, see Wincott in Arnall & Wincott (eds.) (2002), op cit, p. 492.

Problems of drift in power and competence are closely related to the question of accountability. ‘Accountability’ is a ‘golden concept’ that no one is against,⁹⁸ and although it has a broad range of meaning, at its core it entails an external authority calling a person or body exercising of power or responsibility to account for that exercise.⁹⁹ It thus has an important relationship with democracy; without accountability by those elected to those who have elected them, democracy breaks down.¹⁰⁰ Accountability can be understood as either or both *ex ante* or *ex post*, though an *ex post* conception is often more typical and in practice more feasible.¹⁰¹ In an EU context, the yellow card system whereby national parliaments can request a reconsideration of the subsidiary implications of proposed legislation is an example of *ex ante* accountability.¹⁰² *Ex post* accountability can take several forms,¹⁰³ including public holding¹⁰⁴ to account through requirements for the provision of open information and public deliberation (e.g. through participation in parliamentary debate, such as appearances of public officials before parliamentary committees¹⁰⁵) and legal accountability through judicial review.¹⁰⁶

A long-standing concern about a lack of accountability and democracy has existed relative to the EU institutions.¹⁰⁷ To some extent, this problem has been

⁹⁸ Bovens (2007), op cit, 448. Generally on accountability, see R. Mulgan, ‘“Accountability”: An Ever-Expanding Concept?’, 78(3) *Public Administration* 555-573 (2000); JM. Moncrieffe, ‘Accountability: Idea, Ideals, Constraints’, 8(3) *Democratisation* 26-50 (2001); Grant & Keohane (2005), op cit. On accountability in an EU context, see Arnull & Wincott (eds.) (2002), op cit; C. Harlow, *Accountability in the European Union* (Oxford Univ. Press 2002); Curtin & Nollkaemper (2005), op cit; C. Saunders, ‘Democracy, Transparency and the apparent Demise of the Treaty Establishing a Constitution for Europe’, 8 *CYELS* 9-35 (2005-2006); Bovens (2007), ibid; Curtin (2007), op cit; Harlow & Rawlings (2007), op cit.

⁹⁹ Curtin & Nollkaemper (2005), op cit, 4. See also Mulgan (2000), op cit, p. 555; A. Arnull, ‘Introduction: The European Union’s Accountability and Legitimacy Deficit’, in Arnull & Wincott (eds.) (2002), p. 1; Bovens (2007), op cit, pp. 450-454.

¹⁰⁰ Generally, on the link between accountability and democracy, see Harlow (2002), op cit.

¹⁰¹ Moncrieffe (2001), op cit, p. 27 et seq; Grant & Keohane (2005), p. 30; Bovens (2007), op cit, p. 453; Curtin (2007), pp. 525-526.

¹⁰² See the Protocol to the Treaties on the Principles of Subsidiarity and Proportionality.

¹⁰³ Generally, on the range of mechanisms that can be encompassed within ‘accountability’, see Harlow (2002), op cit.

¹⁰⁴ Curtin (2007), op cit, pp. 531-538.

¹⁰⁵ A point that is connected with the openness and thus the relative ‘intelligence’ of democracy: Bovens (2007), op cit, p. 464, citing CE. Lindblom, *The Intelligence of Democracy* (Free Press 1965).

¹⁰⁶ Institutions can also engage in ‘internal’ rather than external accountability through, e.g. internal peer assessment or internal checks and balances, and accountability can also be understood in the internalised sense of a consciousness of personal responsibility: see generally, Mulgan (2000), op cit, pp. 558-563.

¹⁰⁷ P. Dyrberg, ‘Accountability and Legitimacy: What is the Contribution of Transparency?’, in Arnull & Wincott (eds.) (2002), op cit, p. 81; Bovens (2007), op cit, p. 447

dominated by the absence of a *demos* in the EU that would make an effective European-wide public space.¹⁰⁸ Ultimately, accountability is linked with responsiveness if the process of holding to account reveals inadequacies,¹⁰⁹ which may include a process of sanctions.¹¹⁰ Governance in the EU has tended to privilege legal/constitutional and social learning accountability,¹¹¹ which can be seen as in tension with democratic accountability in that courts are non-representative and social accountability tends to cater to mobilised elite interests.¹¹² However, by deferring to the intention of the law-maker or constituent power, judicial review can be a means for effecting democratic accountability. This can be two-fold: first, it respects the intention and wishes of those with democratic or representative authority; secondly, it avoids politicians deflecting blame on to the courts, who are largely immune from electoral pressures and could thus allow themselves be used as safety valve for creatively developing new, but controversial, law.¹¹³

Transparency¹¹⁴ is closely linked with accountability: power exercised in an obscure, esoteric, or inaccessible way is more difficult to call to account. Accountability can be understood further as linked to the rule of law in that the rule of law has a shared, open, and public character that in an objective way binds the exercise of power to determinate legal rules in so far as possible.¹¹⁵ Accountability goes further than the rule of law in implying a kind of answerability and subordination to an outside political authority.

¹⁰⁸ Weiler (1995), op cit.

¹⁰⁹ Mulgan (2000), op cit, 566-569.

¹¹⁰ Grant & Keohane (2005), op cit, pp. 29-30, 41; Curtin (2007), op cit, pp. 538-539, noting legal accountability as entailing strong sanctions.

¹¹¹ On the latter as types of accountability, see *ibid*, p. 466.

¹¹² *Ibid*, noting tension between constitutional/legal accountability and democratic accountability; Mulgan (2000), op cit, p. 559, noting that with highly specialised professional groups, accountability to professional bodies may be in tension with broader democratic accountability to lay outsiders.

¹¹³ See generally, R. Hirschl, *Towards Juristocracy: Origins and Consequences of the New Constitutionalism* (Harvard Univ. Press 2004), arguing elites use constitutional review to insulate their policy preferences from democratic control. See further RM. Unger, *What Should Legal Analysis Become?* (Verso 1996), 72; J. Waldron, 'Review: Dirty Little Secret?', 98(2) *Columbia LR* 510-530 (1998).

¹¹⁴ Grant & Keohane (2005), op cit, 39; Dyrberg (2002), op cit, 81; K. Lenaerts, "'In the Union We Trust": Trust Enhancing Principles of Community Law', 41 *CMLRev* 317-343 (2004), 321.

¹¹⁵ Generally, see Tamanaha (2004), 114-126; Tamanaha (2006), *passim*.

Within this context of an input-oriented and process-oriented concern with democracy and rule of law values, a central question for the role of the courts is to what extent norm conflict techniques constrain the judiciary to an input-oriented conception of legitimacy or conversely, do norm conflict techniques allow the judiciary greater room for discretion and legal development according to a more output-driven understanding of legitimacy?

3.3.2.5 *Human Rights and Equality*

'Rights' in a very general sense as legal entitlements and 'rights' as human rights are better distinguished. The idea of legal rights, in the general sense of legal entitlement, could always be invoked in a counter-majoritarian way, but this arguably only has legitimacy where the rights in question are basic human rights. The allocation of competences at different levels (between the Member State and the Community level), for example is not generally a human rights issue. The counter-majoritarian justification for constitutional review thus needs to be carefully circumscribed: not any legal claim writ-large can justify counter-majoritarianism, only those claim relating to such fundamental rights as are not subject to majority determination, e.g. equality before the law.

The concept of equal respect or equality has been central to the discourse of justification of human rights.¹¹⁶ Equality or equal respect could be considered a conceptual framework in which more particular rights are specified. The relationship between equality and democracy here becomes more complex. Often rights are portrayed a counter-majoritarian: equality of respect for human rights limits what a majority can validly do or sanction. In this way, human rights are the obvious alternative to utilitarianism, or at least 'crude utilitarianism.'¹¹⁷ The

¹¹⁶ See, e.g. R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard Univ. Press 2000).

¹¹⁷ Hare combined 'rule utilitarianism' and 'preference utilitarianism' in a way he argues respects individual preferences and addresses the problem of minority rights (RM. Hare, *Moral Thinking* (Oxford Univ. Press 1981)). Preference utilitarianism seeks to fulfill people's preferences as much as possible. Hare married the Kantian idea of the universalisability of moral propositions to rule utilitarianism, with universalisability meaning that moral propositions must have a universal validity. In effect, this establishes the golden rule of morality (do unto others as you would

tension here is between ideas of equality related to substantive values and the idea of equality of participation. Participation is itself a substantive value, but it has an obvious procedural implication that is less contested than the substantive content of rights in general. Here, equal participation and equal respect are not competing principles, rather they interact – democracy is what seeks to optimize equal participation on the basis of a premise of equal respect. Dworkin, for example, tends to contrast the two, but his theory seems to allow the judiciary to declare what amounts to equal respect in a way that is itself in tension with the principle of equal respect because of the counter-majoritarian power it gives to judges through the vagueness of Dworkin’s criteria of fit and coherence. This is especially so given that almost any political claim can be conceptualised as a claim for equal respect for the views of its proponent: in this way, equality can be an ‘empty concept’ unless substantively defined; it is a derivative concept, not an independent norm.¹¹⁸

Accepting this criticism, as a broad range of critics of Dworkin do,¹¹⁹ does not mean having to accept Waldron’s preference of abandoning constitutional review in favour of the UK system of parliamentary sovereignty, on the basis that Bills of Rights underdetermine the content of rights to the extent that they leave a great deal of discretion to the judiciary to determine the content.¹²⁰ However, a human rights jurisdiction in the context of contemporary moral pluralism and disagreement can be exercised in a minimalist sense, for example, more in the manner of the European Court of Human Rights (although the Strasbourg Court can be innovative and creative) and as reflecting the understanding of rights endorsed by the polity at the time of constitutional entrenchment.

On this view, in the context of pluralism, human rights are to be determined by the polity and then to be applied by the judiciary. The role of the judiciary is counter-majoritarian in that the judiciary are entrusted with the enforcement of pre-determined rights, so that temporary political vicissitudes do not result in the

yourself) as a rule constraining utilitarian choices. See generally AW. Price, ‘Richard Mervyn Hare 1919-2002’, 124 *Proceedings of the British Academy* 117-137 (2004).

¹¹⁸ See P. Westen, ‘The Empty Idea of Equality’, 95(3) *Harvard LR* 537-595 (1982), passim and esp. 592-595.

¹¹⁹ See Chapter 2 above.

¹²⁰ See J. Waldron, *Law and Disagreement* (Oxford Univ. Press 1999).

failure to apply the pre-determined rights, but it is problematic that the judiciary should have a counter-majoritarian role in being entirely independent in determining what those rights are (a perhaps awkward way of putting the point is that the judiciary have a counter-majoritarian role in a counter-legislative sense, not in the sense of making fundamental value choices for the polity).

So this approach does not deny the role of the judiciary in specific disputes as protectors of last resort of human rights, rather it considers that the judiciary should be wary of advancing *avant garde* notions of human rights or other legal rights or claims and effectively imposing them on the polity. It suggests a relatively conserving, minimalist approach to human rights protection, in contrast to a Dworkinian, evolutive style of reasoning. In other words, an approach that focuses on the anchoring of contested concepts and leaves more fundamental innovation to the polity in general.¹²¹

Thus, human and rights and equality, as contested concepts, can be invoked in contrasting ways as to the proper organisation of power in a polity, including as regards the role of the judiciary. In an EU context, equality has a particular flavour because from the foundation of the Communities, equality has become closely linked to the application of free movement principles on the basis of non-discrimination on grounds of nationality.¹²² In addition, the principle of equal pay for equal work¹²³ was important in advancing the equality of women in the workplace and may have significantly contributed to the legitimacy of the Communities in its earlier period.¹²⁴

¹²¹ See generally Beck (2008), op cit. The contested of human rights claims, which to a substantial extent, relates to the problem of conflicting rights claims, is examined in Chapter 5.

¹²² Now referred to in Article 2 TEU and Article 10 TFEU states that in defining and implementing its policies and activities, the Union shall aim sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

¹²³ See Case 80/70, *Defrenne v. Belgian State* ('*Defrenne I*') [1971] ECR 1-445; Case 43/75, *Defrenne v. SABENA* ('*Defrenne II*') [1976] ECR 455; Case 149/77, *Defrenne v. SABENA* [1978] ECR 1365 ('*Defrenne III*').

¹²⁴ See J. Shaw, 'Process and Constitutional Discourse in the European Union', 27(1) *JLS* 4-37 (2000), 33, noting that until a decision declaring affirmative action contrary to EC equality law (in C-450/93, *Kalanke v. Bremen* [1995] ECR I-3051, the effect of which was reversed by Treaty amendment), the ECJ had spent "so many years held up as the great hope of liberal rights-based feminism".

Finally, the framework of norm conflict points to two types or levels of conflict in the context of human rights: (1) conflicting approaches to filling out the largely underdetermined content of rights (which generally have the character of principles rather than rules) as set out in Bills of Rights (e.g. conserving versus evolutive interpretation) and (2) conflicts between rights once their individual general scope is specified. These issues are addressed in Chapters 3 and 4.

3.3.2.6 The Principles of Conferral and Subsidiarity: The Constitutional Values of the Member States and their Enduring Sovereignty

The Treaty of Lisbon marks a new departure in EU law in according a specific status to the constitutional traditions of the Member States. Article 4(2) TEU now states:

The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. ...

Previously, Article 6(1) TEU stated that the constitutional traditions of the Member States were a source that could inspire the protection of fundamental rights in the EU legal order, but those constitutional traditions themselves were not independently expressed as values. The TEU pre-Lisbon also made a more generic statement, in Article 6(3), that “The Union shall respect the national identities of its Member States.” Thus, the increased competence that is formally accorded to the Union is counter-balanced with a more explicit recognition of the constitutional traditions of the Member States. This could be considered a clear recognition of the potential for norm conflict between those constitutional traditions and the newer polity of the Union and reflects an aspiration that conflict is effectively avoided. It implicitly seems to support an idea of the normative status and claims of the Union being consistent with those of the constitutional

traditions of the Member States. In that way, it might be thought to show the limits of *sui generis* characterisations of the Union's normative status,¹²⁵ at least as it has now developed, which tended to dominate in judicial and academic discourse in the earlier period of the Communities' or Union's development. Pragmatically, it also reflects a greater sensitivity that the future path of integration needs to avoid a sense of rupture or radical break with those constitutional traditions.

3.3.2.7 Summary on the Values Articulated in the Treaties

Much potential for conflict exists in the values articulated above. The general problem of the under-determination of rights by Bills of Rights is present, along with the ever-present potential in the EU, because of its nature, for conflict between the claims of Union law and those of national law, especially national constitutional law. In the latter context, the equality principle, for example, interacts with the question of EU competence: equality could provide a normative or at least rhetorical underpinning for claims of Union competence to harmonise the legal entitlements of citizens, in the interests of equality and its general connotation of fair treatment. However, the Treaty itself seeks to address one of the fundamental cause of conflict, the divisions of competences between the EU and Member States, through the principles of conferral and subsidiarity, which are examined further in Chapter 6. The general argument advanced in the remainder of this chapter is that a rule-bound conception of norm conflict resolution can provide a normatively appealing and effective way of mediating the clash of values and broadly-framed principles in EU law.

¹²⁵ For critical commentary on this tendency, see P. Dann, 'Thoughts on a Methodology of European Constitutional Law', 6(11) *GLJ* 1453-1474 (2005), 1469. As Shaw noted, this '*sui generis*' line of thinking tends to be self-sustaining: J. Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic', 16(2) *OJLS* 231-253 (1996), 245; A. Vauchez, 'Embedded Law. Political Sociology of the European Community of Law: Elements of a Renewed Research Agenda', *EUI Working Paper* 2007/23 (2007), 10 et seq.

3.4 Conceptual Clarity and Legal Concepts – Hohfeld’s Analysis

Wesley Hohfeld’s work on legal concepts and their definition is not expressly directed at the problem of norm conflict, but by clarifying the way legal concepts interact with each other, can contribute to an avoidance of conflict due to confusion as to concepts. It is important to address any conceptual issues early in the discussion, to determine if and in what way the characterisation of norms affects their application relative to other norms. The main benefit of a careful typology of norm types is conceptual clarity, which may contribute to a clear treatment of the problems of norm conflict. What Hohfeld aimed at was an ‘intensive and systematic’ treatment of ‘the nature and analysis of all types of jural interests’, “at the very threshold analyzing and discriminating of the various fundamental conceptions that are involved in practically every legal problem”.¹²⁶ An understanding of how legal interests or concepts related to each other, though more complex than a common tendency to treat legal interests individually, could result in a clearer understanding of these interests overall, in “the right kind of simplicity”.¹²⁷

Hohfeld indicated that the context of his analysis was not just conceptual clarity or neatness for its own sake,¹²⁸ but that the correct characterisation at a conceptual level of different legal interests could “control the decision of a number of specific questions”.¹²⁹ However, it is perhaps partly because looseness of language in itself may not have a decisive outcome on the result of a case except in a minority of instances that Hohfeld’s analysis has attracted and continues to attract much more academic attention than judicial notice.¹³⁰ This point can be

¹²⁶ Hohfeld (1913-1914), op cit, 19.

¹²⁷ Ibid, 19-20.

¹²⁸ Though he notes the intrinsic value of clear concepts as mental tools for comprehending and systematizing the complexity of legal materials: Hohfeld (1916-1917), op cit, 712.

¹²⁹ W. Hohfeld, ‘Some Fundamental Legal Conceptions As Applied in Judicial Reasoning’, 23 *Yale LJ* 16-59 (1913-1914), 18.

¹³⁰ Hohfeld (1913-1914), *ibid*; W. Hohfeld, ‘Fundamental Legal Conceptions As Applied in Judicial Reasoning’, 26(1) *Yale LJ* 710-770 (1916-1917), later published as a book with references to additional literature and more extensive discussion of examples, along with some other essays: W. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning And Other Legal Essays* (W.W. Cook, ed.) (Yale Univ. Press 1919 and 1946). Hohfeld’s work has been continually published in book form since, see recently, W. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning* (D. Campbell & P. Thomas, eds.) (Ashgate 2001). Among recent journal literature, see, e.g. A. Halpin, ‘Fundamental Legal Conceptions Reconsidered’, 26(1)

illustrated by an example. In Hohfeld's understanding of 'jural concepts', a right is understood as correlating to a duty. This means that there is a duty to comply with the exercise of a right. A privilege is weaker than a right, it is a freedom to do so something, but does not entail a corresponding duty. Using the term right in place of privilege gives a stronger sense of the legal interest involved, which *may* not be accurate in a given context.

For example, one may have a right to social assistance from the State if one has a low enough income, which means the State is under a duty to provide the social assistance, whereas one merely has a privilege to receive social assistance from non-State actors, who are not under a duty to provide social assistance. Conflating the terms 'right' and 'privilege' here could lead to a misleading characterisation of the legal interests and entitlements involved, but it may not matter much in practice. A person might state that he or she has a right to receive social help or aid from anybody who offers, whereas, more properly, it should be said that there is a privilege to receive it, but this would only matter if the other party understood as right to entail a duty, whereas many people understand right in the loose sense to mean 'freedom', i.e. so as to encompass both what Hohfeld defined as a right and a privilege.

The key to Hohfeld's analysis is the understanding that norms as concepts are relational. Rights cannot be understood in an atomistic way, as free-standing. Failing to see the relational character of legal concepts leads to conceptual confusion in the use of language, which may in turn confuse and cloud the substantive analysis of legal relationships. While in some or even many cases, loose use of the language of legal concept, such as 'right', might not matter much, it could matter if people understood the same terms to mean different things. Hohfeld's work seeks to address this by presenting legal norms as inherently relational and suggesting a standard typology. For example, rights necessarily entail duties, on Hohfeld's analysis. It follows from this that differences in rights

Canadian J LJ 41-54 (2003); N. Lazarev, 'Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights', [2005] *MurUEJL* 9; A. Halpin, 'Rights, Duties, Liabilities and Hohfeld', 13(1) *LT* 23-39 (2007). Noting the 'outpouring of secondary Hohfeldian literature', see H. Ross, *Law As A Social Institution* (Hart Publishing 2001), 151.

entail a conflict of duties, and any coherent analysis of a conflict of rights must take into account a conflict of corresponding duties.

From the foregoing and following discussion of Hohfeld's typology, two conclusions in particular can be derived for the present study: (1) differing levels of rights protection do involve a conflict and cannot merely be tolerated as a non-conflictual divergence or difference, because different levels of rights protection entail different corresponding duties (this can be a basis for critiquing the approach to conflict of rights norms in the EU Charter of Fundamental Rights, which treats rights in an atomistic, rather than relational way) and (2) a competence exists whenever there is a power to change legal relations, which can be used to critique the assessment of competence issues in ECJ caselaw and to rebut claims that the EU does not have competence in certain areas even though EU law has been held to apply. These points are further discussed in Chapters 4 and 5 respectively, the present section discusses Hohfeld's work to provide the theoretical background to these later conclusions.

Hohfeld began with the analysis of corporeal and incorporeal interests, noting that only legal interests, not corporeal things, could be the subject of legal relations, e.g. a transfer of interest, not of land or property.¹³¹ He then set out a comprehensive scheme of types of legal interests, which related legal interests with their opposite and correlative interests or concepts.¹³² Hohfeld first decried a common tendency to reduce all legal relations to rights and duties, proposing that these formed just two elements in a broader set of concepts that characterises all legal relations.¹³³ Individually, basic legal concepts were *sui generis*, and a full understanding of them was only possible in relational terms, a point which Hohfeld's translates into a general scheme setting out their opposites and correlatives.¹³⁴ The scheme consists of the following:

¹³¹ Ibid, 23 and generally 20-24.

¹³² Ibid, 28-59.

¹³³ Ibid, 28.

¹³⁴ Ibid, 30.

<i>Jural:</i>	rights	privilege	power	immunity
<i>Opposites:</i>	no-rights	duty	disability	liability

<i>Jural:</i>	right	privilege	power	immunity
<i>Correlatives:</i>	duty	no-rights	liability	disability

The opposite or negation of a term is self-explanatory; a correlative, for Hohfeld, is an implication of a first legal interest's characterisation for the understanding of another legal interest or concept (other than the first legal concept's opposite). Thus, the opposite of a right is the absence of a right or no-rights, but its correlative is a duty owed by others to respect the right.¹³⁵

A privilege entails a freedom or liberty¹³⁶ to do something, its opposite being a duty, but its correlative being the absence of a right not to have the privilege interfered with or prevented from being executed (if the latter was not a correlative of a privilege, a privilege would be equivalent to a right).¹³⁷ Therefore, a privilege is a weaker type of legal interest than a right, with a corresponding reduction in the resulting implications of a privilege for others than the implications of a right for others.¹³⁸ Thus, one may have the privilege of buying certain products, but this does not entail a duty on others to do something that may prevent a person from buying those foods in a non-forceful way, e.g. by buying them first. In contrast, a right to purchase food would mean that someone else was under a specific duty to provide it, which could be the case regarding the duties of a parent towards his or her child or the duty of the State to its citizens where 'socio-economic' right were given legal status. Where the parent has a duty to provide food for the child, the child has a right to receive it. However, the adult child of parents does not have a

¹³⁵ Hohfeld's treatment of rights suggests he does not consider rights to be internally complex, as did, for example, Kant and MacCormick. However, as Lazarev points out, the question of the internal complexity of a right matters at the stage or level of determining the content of a right, whereas Hohfeld is concerned with the next stage, i.e. with the preemptory force of determined rights: Lazarev (2005), op cit, Part II.

¹³⁶ Hohfeld suggested 'liberty' as the closest synonym of a privilege: Hohfeld (1913-1914), op cit, 36, 41.

¹³⁷ Ibid, 33-35.

¹³⁸ Hohfeld suggest the term 'claim' as the closest synonym to his understanding of a right, ibid, 32, and rights in his scheme are thus sometimes labelled 'claim rights' in the literature.

right to receive food from his or her parents, though the child of course has the privilege to receive if the parents choose to offer it. Simmonds clearly explain the difference a liberty or privilege and a right:

A liberty [i.e. privilege] differs from a claim-right [i.e. right] in a number of ways. Claim-rights held by X concern the actions of the other party to the jural relationship, since they entail a duty on the part of that other party. Liberties, by contrast, are concerned with the right-holder's won actions: they establish the permissibility (as against some other party) of the right-holder's action. Thus X has a liberty to wear a hat, as against Y, when X owes no duty to Y *not* to wear a hat. The liberty [i.e. [privilege] consists solely in the absence of a duty owed to the other party, and the other party's consequent lack of any claim right against the right-holder.¹³⁹

This example could be taken to indicate both the potential and limits of Hohfeld's analysis: a legal relationship could be mischaracterised as a right when it is really a liberty not entailing a duty on anybody else. However, a liberty could be loosely described as a right, while at the same time this being accompanied by a recognition that it was not immune from interference, i.e. that it did not entail a duty, in which case no conceptual problems would result. Thus, the use of language in a way that does not accord with Hohfeld's scheme does not necessarily result in a mischaracterisation of a legal interest; it all depends how words are related to each other in a given legal text and on the mutual understandings of the relevant legal actors (legal actors may not be talking at cross-purposes, even though not following Hohfeld's scheme).

A power in Hohfeld's scheme is the opposite of a disability, but as a correlative entails liability on others to respect the exercise of power. A power here is understood as "one's affirmative 'control' over a given legal relation".¹⁴⁰ Thus, what distinguishes a power from other legal relations is the possible

¹³⁹ N. Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell 2nd ed. Sweet & Maxwell), 277.

¹⁴⁰ *Ibid*, 55. Schütze distinguishes between power and jurisdiction, apparently taking the latter to be *in concreto* as opposed *in abstracto* expression of power: R. Schütze, *From Dual To Cooperative Federalism: The Changing Structure Of European Law* (Oxford Univ. Press 2009), 136-137. The distinction is not drawn in the present work, since the underlying concept seems the same, i.e. the capacity to change or determine legal relations.

consequence of a change of legal relations resulting from the exercise of a power, whereas other legal interests can be exercised, but cannot in themselves change other legal interests. This understanding of power is equivalent to how the term ‘competence’ is often used (and as it is used in EU law, discussed further in Chapter 6 below). Given this different character of the concept of power relative to other legal interests, and given that it is especially important as a concept in EU law in straddling the fault line between the status and role of the Member States relative to the Union, it is treated in a separate chapter in this work. The opposite of power is no power or disability, and the correlative of disability is immunity.

Hohfeld deals more briefly with the concept of immunity, but explains it very clearly and summarises the general relations between his core concepts:

As already brought out, immunity is the correlative of disability (“no-power”), and the opposite, or negation, of liability. Perhaps it will also be plain, from the preliminary outline and from the discussion down to this point, that a power bears the same general contrast to an immunity that a right does to a privilege. A right is one’s affirmative claims against another, and a privilege is one’s freedom from the right or claim of another. Similarly, a power is one’s affirmative “control” over a given legal relation as against another; whereas an immunity is one’s freedom from the legal power or control of another as regards some legal relation.¹⁴¹

Privilege and immunity may seem identical concepts when not understood in Hohfeld’s relational terms, but a difference only becomes clear when placed in the context of Hohfeld’s correlational scheme: a privilege is contrasted with a right, and an immunity is contrasted with a power in similar ways.¹⁴² Outside of the scheme and loosely, however, one could easily say that an immunity is also contrasted with a right, i.e. someone who has an immunity has a right not to be interfered with in some way.

¹⁴¹ Hohfeld (1913-1914), op cit, 55. Hohfeld suggested ‘exemption’ was the closest synonym to immunity: *ibid*, 57.

¹⁴² *Ibid*. Hohfeld gives as an example immunities from powers of taxation: *ibid*, 55-56.

Hohfeld proposed that the eight legal interests he identified – rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities – represented a lowest common denominator of the law, thereby making easier comparison and the discovery of fundamental similarities.¹⁴³ The stronger consequence, that the characterisation of a legal interest can affect the outcome of a case, is also possible. This risk of this happening was well expressed by Justice Holmes:

As long as the matter to be considered is debated in artificial terms there is a danger of being led to a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied.¹⁴⁴

Two general points seem to result from Hohfeld's analysis for the study of norm conflict. First, his work offers the insight that care with terminology may solve or render more understandable some apparent problems of norm conflict. Mainly, this arises through the use of the same term at cross-purposes in a variety of legal texts: if the terms are understood as meaning the same thing in all texts, then conflict may be more or less likely, whereas the possibility that the same term is used to describe different legal interests can at least clarify if norm conflict is actually present. Second, his work demonstrates the potential importance of intention in legal drafting. Since the same word can, as Hohfeld demonstrates, be plausibly used to mean or refer to actually different legal interests, attention to the specific intention behind the use of the word can help illuminate what meaning the word actually had as understood by those who authored the relevant specific legal text. The role of intention in interpretation is addressed in more detail in Chapter 3.

In conclusion, what Hohfeld sought to do was to standardise mutual understandings to avoid any conceptual confusion, but also his work does identify some elements of legal concepts that are essential to understanding them. In this regard, his definition of rights as entailing a correlative duty and of competence as

¹⁴³ Ibid, 58.

¹⁴⁴ Per Holmes J. in *Guy v. Donald* 203 US 399 (1906), at 406, as cited in Hohfeld (1916-1917), op cit, 711.

being an amenity to change legal relations does offer practical guidance to the consistent use of these terms in legal reasoning and discussion. As indicated above, Hohfeld's analysis can be used to criticise the use of the terms 'right' and 'competence' in some ECJ caselaw and EU legal provisions as inconsistent and confused with regard to conflicts involving competence norms and rights norms (see Chapters 4 and 5 below respectively). His definition of 'privilege' is perhaps less useful, since the term is not very widely used in legal discourse, whereas the terms 'right' and 'competence' are ('rights talk' being pervasive¹⁴⁵). Hohfeld managed to suggest how these two terms in particular could be used consistently in a way that does offer conceptual clarity. Unfortunately, while Hohfeld's work has been much praised academically for this conceptual rigour and clarity, few go to the trouble to use legal concepts as carefully as Hohfeld suggested.

3.5 Rules of Norm Conflict in Legal Reasoning

In this section, the three classic rules of norm conflict found in legal reasoning are examined. An important preliminary issue is the definition of norm conflict, upon which depends the application of norm conflict techniques,¹⁴⁶ and this is examined first.

3.5.1 The Definition of Norm Conflict

Although the term 'contrapuntal'¹⁴⁷ has been used by some scholars as evocative of the tensions within EU law, in-depth assessment of norm conflict is largely absent from EU scholarship until recently, which is perhaps surprising given that it is a phenomenon that has for long attracted at least some comment by legal

¹⁴⁵ M-A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1993).

¹⁴⁶ See, e.g. Vranes (2006), op cit, 398.

¹⁴⁷ M. Maduro, 'Contrapuntal Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Oxford 2003); J. Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"', 44 *CMLRev* 9-40 (2007).

theorists. WTO scholarship in this area tends to be quite recent also.¹⁴⁸ Apart from the discussion of coherence in Chapter 1, in general legal theory, Kelsen and several other German theorists, in particular, considered the problem,¹⁴⁹ as did a number of French scholars, chiefly Chaim Perelman,¹⁵⁰ while in international law, a standard point of reference is the work of Wilfred Jenks.¹⁵¹ Various other scholars have also addressed it in journal articles.¹⁵² The issue has been engaged most directly in EU law in the context of the competing claims of ultimate legitimacy of the ECJ as opposed to those of several national supreme and constitutional courts (as briefly surveyed in Chapter 1), rather than norm conflict being addressed at a general conceptual level as a matter of legal reasoning.

The chief difference between broad and narrow approaches is a willingness or not to recognise as one of norm conflict a situation where a permission conflicts with a prohibition, given that a permission does not have to be exercised, thus avoiding the conflict.¹⁵³ Jenks¹⁵⁴ and some of Kelsen's writing¹⁵⁵ suggested the narrow view,¹⁵⁶ in other writings Kelsen endorsed the broad view so as to

¹⁴⁸ As noted in A. Ramanujan, 'Conflicts Over "Conflict": Preventing Fragmentation of International Law', 1(1) *Trade, Law and Development* 171-191 (2009), 172, noting academics are only now approaching the field in a fully-fledged way. The main recent literature on the WTO consists of: G. Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The relationship between the WTO Agreement and MEAs and other Treaties', 35(6) *JWTL* 1081-1131 (2001); Pauwelyn (2003), op cit; E. Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory', 17(2) *EJIL* 395-418 (2006). The more general issue of fragmentation has spawned a large literature: see, e.g. G. Hafner, 'Pros and Cons Ensuing From Fragmentation of International Law', 25(4) *Michigan JIL* 849-863 (2004); B. Simma, 'Fragmentation in a Positive Light', 25(4) *Michigan JIL* 845-848 (2004); A. Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation', 74(3-4) *NJIL* 297-333 (2005); International Law Commission/M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 13th April 2006.

¹⁴⁹ See, e.g. H. Kelsen, *Allgemeine Theorie der Normen* (Manz 1979), cited in Marceau (2006), op cit, 398, 402 Pauwelyn (2003), op cit, 167.

¹⁵⁰ C. Perelman (ed.), *Les Antinomies en Droit* (Bruylant 1965).

¹⁵¹ W. Jenks, 'The Conflict of Law-making Treaties', 30 *BYIL* 401-453 (1953).

¹⁵² H. Hamner Hill, 'A Functional Taxonomy of Normative Conflict', 6(2) *L & P* 227-247 (1987); AAO. Elhag, JAPJ. Breuker & PW. Brouwer, 'On the Formal Analysis of Normative Conflicts', 9(3) *I&CTL* (2000).

¹⁵³ A narrower approach again is to consider that true conflict only exists when the law provides no technique of conflict resolution: see W. Malgaud, 'Les Antinomies en Droit: A Propos de l'Étude de G. Gavazzi', in Perelman (ed.) (1965), op cit, 13.

¹⁵⁴ W. Jenks, 'The Conflict of Law-making Treaties', 30 *BYIL* 401-453 (1953), 426.

¹⁵⁵ H. Kelsen, *Théorie Générale des Normes* (Presses Universitaires de France 1996), 161, as cited in Pauwelyn (2003), op cit.

¹⁵⁶ Paulson describes this view of conflict as entailing a conception of weak normative consistency: S. Paulson, 'On the Status of the *Lex Posterior* Derogating Rule', in R. Tur & W. Twining (eds.), *Essays on Kelsen* (Clarendon Press 1986), 234.

understand this situation coming within the category of norm conflict.¹⁵⁷ Hart, who only briefly addressed norm conflict, also endorsed the broader view.¹⁵⁸ The reason the difference between the narrow and broad views matters is that the narrow view excludes the operation of norm conflict rules in this situation, instead by definition requiring the permission not to be exercised, thus favouring the stricter or more demanding prohibition. This tends to resolve the situation only at the cost of failing to adequately consider the justification for favouring automatically the prohibition.¹⁵⁹ It thus ignores the question of value choice, treating coherence, and the quickest way to it, as an end in itself.

This approach, for example, downplays the significance of legislative or constituent intention. Perhaps a permission was enacted precisely to limit the scope of a prohibition; the narrow view of norm conflict simply shuts down the issue by automatically applying the stricter norm, i.e. the prohibition.¹⁶⁰ More generally, norm conflict rules reflect the intentions of the parties on an objective basis,¹⁶¹ because they in turn reflect objective conventions concerning legal communication, e.g. in the case of the application of *lex specialis* as a norm conflict maxim, the more specific provision is applied over more general ones because more specific provisions reflect, as a matter of logic, more accurately the will or the law-maker, a point discussed further below.

A broader view again considers that two permissions can conflict. Hart did not think this a situation of conflict, though Hamner Hill and some others do.¹⁶² Hamner Hill considers this is a situation of conflicting policies in the law.¹⁶³ Perhaps the most obvious example of a conflict of permissions is a conflict between two rights, which can clearly arise, e.g. the grazing rights of a farmer over common land that is also used by sportspeople or the right to life conflicting with the right to privacy in the case of abortion. The later situation has arisen in EU

¹⁵⁷ Kelsen (1979), op cit, 79, as cited in Vranes (2006), op cit, 402.

¹⁵⁸ HLA Hart, 'Kelsen's Doctrine of the Unity of Law', in HE. Kiefer & MK. Munitz (eds.), *Ethics and Social Justice* (SUNY Press 1970), 185. See commentary in Hamner Hill (1987), op cit, 231-233.

¹⁵⁹ Pauwelyn (2003), op cit, 168-172.

¹⁶⁰ Vranes (2006), op cit, 418.

¹⁶¹ *Ibid*, 404.

¹⁶² See discussion in e.g. Elhag et al (2000), op cit, 215-216.

¹⁶³ Hamner Hill (2007), op cit, 236.

law,¹⁶⁴ where the substantive conflict is cut across by a jurisdictional and a collateral conflict concerning the exercise of free movement, which can in effect determine the balance between the two competing rights, and the example is discussed further in Chapter 4. Hamner Hill terms a conflict of jurisdictions ‘normative competition’, and it commonly arises in private international law.¹⁶⁵ The effect in EU law is different; it does not just create a competition of jurisdictions, but can mean importing a right from one Member State to another or limiting domestic rights.

A conflict between two permissions or rights may be one that is finely balanced, and so formal rules of norm conflict resolution may only provide a solution in giving access to the essentially political or moral decision that the law-maker would have or did intend as regards prioritising them. Hohfeld’s typology may be useful here, in that it distinguishes between a right and a privilege. A right is normatively stronger, as noted above; it entails a duty on others not to interfere with it, whereas a privilege does not entail such a duty. Two privileges do not really conflict nor do a right and a privilege, since a privilege is contingent upon factual freedom to do something and can be displaced by the right. Where two rights are in conflict, as discussed further in Chapter 4, ‘balancing’, despite its widespread invocation in the context of rights conflicts, does not really provide a neutral, purely legal way of resolving straightforward conflicts of relatively incommensurable moral values. If exceptions to a right are understood as part of norm conflict, they also can give examples of this type of conflict, such as in EU law a possible conflict between the right to free movement and the right of Member States to limit free movement on grounds of public security.¹⁶⁶

¹⁶⁴ Case C-159/90, *SPUC v. Grogan* [1991] ECR I-4685.

¹⁶⁵ Hamner Hill suggests private international law principles and theory could be applicable to the broader problem of normative conflict: (1987), *op cit*, 246. This idea may be fruitful, though it is beyond the scope of the present work. See further C. Joerges (with comments by D. Chalmers, R. Nickel, F. Rödl, R. Wai), *Rethinking European Law’s Supremacy*, *EUI Working Paper Law 2005/12* (2005).

¹⁶⁶ See Articles 36, 45(3), 52(1), 65(1) & 202 TFEU. See further Articles 27-33 of Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158, 30.4.2004, p. 77), which seek to specify and narrow the scope of these exceptions. These are examples concerning conflicts between different agents (Member States versus citizens of the EU), but a conflict might also arise where a single agent has legal permission to do two things, but may only be able to do one (such a situation is mentioned in Hamner Hill (1987), *op cit*, 236). The range of possibilities seems variable: it may be because of contingent

Vranes has considered in most depth the reasons against adopting the narrow view considering that a prohibition and permission cannot conflict, in addition to the argument concerning the probable intentions of the contracting parties. He points out that eliminating conflict through the non-exercise of permission has the effect of rendering that permission of no useful value and is in effect to attribute superfluity to the law-maker.¹⁶⁷ This goes against a basic tenet of an attempt to recover the law-maker's intention, that the law-maker should not be presumed to act in vain.¹⁶⁸ More fundamentally, Vranes cites Jenks to the effect that the strict definition of norm conflict has the effect of excluding the scope of application of norm conflict rules from divergences in the law, divergences here understood to be ways in which norms can achieve differing or conflicting results once exercised:

... [such a divergence in the law] from a practical point of view be as serious as conflict; it may render inapplicable provisions designed to give one of the divergent instruments a measure of flexibility of operation which was thought necessary to its practicability.¹⁶⁹

Vranes rejects a test of conflict based on a test of joint compliance: is it possible for the addressee of two norms to comply with the second norm, after having complied with the first one. The joint compliance test excludes conflict which can be avoided by refusing to exercise (a perhaps implicit) permission,¹⁷⁰ and thus resolves itself to the strict or narrow definition referred to above.

On the broad view of norm conflict, a conflict of norms exists “between norms, one of which may be permissive, if in obeying or applying one norm, the

factual circumstances that there is such a conflict, or the two permissions may be conceptually incompatible. In many cases, the resolution may come down to a simple personal choice, e.g. do I drive or sell my car.

¹⁶⁷ Ibid.

¹⁶⁸ See, e.g. the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Stanislav Galic*, IT-98-29-T, Trial Chamber I, 5th December 2003, at para. 91.

¹⁶⁹ Jenks (1953), op cit, 426 (cited by Vranes (2006), op cit, 401).

¹⁷⁰ Vranes (2006), op cit, 413-414. See also Hart (1970), op cit. Lauterpacht appeared to endorse the broad view, considering that a true conflict arises only when “the performance of the later duty treaty involves a breach of the treaty obligation”, suggesting he did not consider conflict to be removed because the performance of the later treaty could be avoided by not exercising a permission: H. Lauterpacht, *Report by the Special Rapporteur on the Law of Treaties*, UN Doc. A/CN.4/87 35-53 (1954), reprinted in [1954] 2 *YBILC* 123-139, 133, UN Doc. A/CN.4/SER.A/1954/ADD.1.

other norm is necessarily of potentially violated.”¹⁷¹ Thus, what is decisive for distinguishing the narrow approach from the broad approach is the broad approach recognises that the (correct) *potential* application¹⁷² of a given norm, isolated before its application from any consideration of another norm (i.e. prior to any application of a norm conflict rule), would if so exercised result in conflict with another norm. As Pauwelyn has noted, this allows the issue of norm conflict to be addressed more fully.¹⁷³ The present study seeks to develop this approach, recognising a broad definition, to a fuller understanding of the connection between norms conflict resolutions and the values that underlie them in EU law.

The wording of the Vienna Convention on the Law of Treaties 1969¹⁷⁴ in Article 30 raises a further issue of definition: when can rules be said to apply to the ‘same subject matter’ so as to generate the context of conflict?¹⁷⁵ Article 30 provides for a *lex posterior* rule in the case of conflict between a later and an earlier treaty that is not resolved explicitly by the later treaty. The presence of the same subject matter is one of the two conditions for Article 30 to apply (the other being the existence of successive treaties). As with the definition of conflict, a narrow and a broad view exist on the application of Article 30: the narrow view holds that a later treaty is not applicable when it “impinges indirectly on the content of a particular provision of an earlier treaty”.¹⁷⁶ It seems difficult to define *ex ante* the scope of the concept of ‘indirect impingement’, but it seems this narrow approach may be the only tenable one.

The broad view of ‘same subject matter’ accepts the applicability of two treaties to the same subject matter whenever it is simply possible to apply them to the same facts and considers Article 30 applicable to any such situation. Wolfrum

¹⁷¹ Ibid, 418.

¹⁷² Vranes (ibid, 414) attributes this to Kelsen: H. Kelsen, ‘Derogation’, in H. Klecatsky, R. Marcic & H. Schambeck (eds.), *Die Werner Rechtstheoretische Schule* (Europa 1968), 1438.

¹⁷³ Pauwelyn (2003), op cit, 169-172.

¹⁷⁴ 1155 UNTS 331, 8 ILM 679, entered into force 27th Jan. 27 1980.

¹⁷⁵ See generally JB. Mus, ‘Conflict Between Treaties in International Law’, 45 *NILR* 208-232 (1988); R. Wolfrum & N. Matz, *Conflicts of International Environmental Law* (Springer 2003), 148-151; Ramanujan (2009), op cit, 176-178. Mus describes this issue as ‘particularly obscure’: ibid, 209.

¹⁷⁶ See, e.g. A. Aust, *Modern Treaty Law and Practice* (Cambridge Univ. Press 2000), 183. Sinclair, for example, endorsed the narrow view: see IT. Sinclair, *The Vienna Convention on the Law of Treaties* (University of Manchester Press 1973), 68-69, specifically making the link with *lex specialis* or *generalia specialibus non derogant*.

& Matz¹⁷⁷ accurately relate a broad view of ‘same subject matter’ to the level of generality problem in legal reasoning: ultimately, since all treaties could be considered to deal with ‘human welfare in a broad sense’, when stated at a high enough level of abstraction¹⁷⁸ a broad reading has the potential to render Article 30 universally applicable and thus render nugatory the qualifying conditions for its application set out in its own wording.¹⁷⁹

A number of authors express the view that explicit exceptions to a rule do not constitute a situation of conflict.¹⁸⁰ Once the scope of the exception is determined, it carves out from the primary rule another rule; there is thus no overlap and conflict. In the present work, exceptions to rules are considered situations of conflict, as a logical implication of the view that interpretative norms may conflict. In the case of an exception, there is a *prima facie* conflict until the scope of the exception and the corresponding limit of the primary rule are clarified by interpretation. Different interpretative approaches will yield a different outcome to this task of clarification, and thus it may be considered a situation of conflict.

3.5.2 A Typology of Norm Conflict

In this section, substantive norms are first examined followed by an overview of types of interpretative norm.

3.5.2.1 Types of Substantive Legal Norms

This section briefly outlines a typology of norm conflict with reference to Hohfeld and Pauwelyn’s recent work on norm conflict. First, it is useful to refer to Hart’s distinction between secondary and primary rules. Hart considered that all legal systems were characterised by a union of these two types of rules: (1) primary

¹⁷⁷ Wolfrum & Matz (2003), op cit, 149-150. See also International Law Commission/Koskenniemi (2006), op cit, 63-64, for a somewhat contrary view suggesting there is no way to decide between different regulatory purposes behind special provisions.

¹⁷⁸ Wolfrum & Matz (2003), op cit, 150.

¹⁷⁹ Ibid.

¹⁸⁰ Jenks (1953), op cit, 426-427; Pauwelyn (2003), op cit 162-163; Vranes (2006), op cit, 400-402.

rules, which were particular, substantive rules, e.g. rules of the road; and (2) secondary rules, or ‘rules about or governing the operation of primary rules, namely, rules of change, of adjudication, and the rule of recognition (the latter being the fundamental rule determining the criteria by which other rules of law could be recognised).¹⁸¹ This distinction is relevant for norm conflict in that secondary rules have an inherent role in the legal system that gives them a degree of priority over primary rules.¹⁸²

Pauwelyn identifies six types of norms in his study of norm conflict in international and specifically WTO law:

- i. a command or obligation (in Hohfeld, a duty is the closest equivalent),
- ii. a prohibition (in Hohfeld, a disability is the closest equivalent),
- iii. a right (similarly termed by Hohfeld),
- iv. a permission (in Hohfeld, a privilege is the closest equivalent),
- v. an empowerment (similarly termed in Hohfeld as power),
- vi. norms regulating other norms (these could be considered a sub-category of power in Hohfeldian terms, while according to Hart, they are secondary rules).

Pauwelyn relates rights to obligations on others and vice versa (as does Hohfeld). He notes some further distinctions, between conditional and unconditional norms and between perspective and permissive components,¹⁸³ but these elaborate or notice possible aspects of the six norms set out above. Pauwelyn then outlines a distinction between conflict *stricto sensu* and accumulation, the latter entailing the supplementation or alternatively confirmation of one norm by another norm. Accumulation involves norms that are ‘complementary’.¹⁸⁴

Pauwelyn then examines situations where conflict arises, suggesting that there can be no conflict if either the subject matter or the parties bound by the two norms are completely different. The need for rules relating to the same subject

¹⁸¹ Hart (1994), op cit, 79-100.

¹⁸² Hamner Hill criticises a narrow view of conflict that excludes the possibility of conflict between rules not imposing obligations (‘legal modalities other than deontic modalities’, of which secondary rules are an example): Hamner Hill (1987), op cit, 230-231.

¹⁸³ Pauwelyn (2003), op cit, 160.

¹⁸⁴ Ibid, 161-164.

matter seems self-evident and uncontroversial (though see above concerning definition of the ‘same subject matter’ under Article 30 of the Vienna Convention on the Law of Treaties), but some doubt may be raised as to Pauwelyn’s view that at least one party must be bound by both rules.

The latter, however, though perhaps likely in most cases, does not seem essential: so long as the content of two norms conflict, a situation may arise from the point of view of the legal system even if the parties to the norms are each only bound to one of the norms. An example might be a right by one party, which if exercised, interferes with a right of another party when the two rights have been created by private law. It might be suggested here that both parties are bound to accept a general duty to respect the right of each others, in which case both parties are bound to both norms, but only in a weak sense. The latter view just begs the question as to which right prevails. An example might be overlapping or intersecting rights of way granted to two parties, the exercise of which by one party in *concreto* renders the exercise of the right inoperable by the other party. Another example may be situation in environmental law, where the right of an industrial energy producer causes harm to the health of a citizen, even though the energy producer is exercising lawful rights.¹⁸⁵ For this reason, it seems the more important conditions for the existence of a conflict are overlap *rationae materiae* and co-temporality.

Pauwelyn identifies four situation of conflict:

1. a clash between two commands, e.g. Y and Z are commanded to do two things that are mutually incompatible or that are different;
2. a conflict between a command and a prohibition;
3. a conflict between a command and an exemption¹⁸⁶;
4. a conflict between a prohibition and a right.

¹⁸⁵ In public international law, the term ‘liability’ is generally used (in contrast with ‘responsibility’) to denote legal consequences arising from lawful acts: G. Lysén, *State Responsibility and International Liability of States for Lawful Acts* (Iustus Förlag (1997).

¹⁸⁶ An immunity in Hohfeld’s scheme.

Pauwelyn then distinguishes between necessary and potential conflict, identifying situation 1. and 2. as necessary and 3. and 4. as potential. Situation 1. covers cases both where there is a direct incompatibility between two commands and cases where one command regulates something differently, but without such direct incompatibility, e.g. one norm mandates a certain level of protection for a given right, while another norm requires a higher level of protection. This is a situation that is sometimes directly resolved in EU law through an express Treaty provision. Article 52(3) of the EU Charter of Fundamental Rights¹⁸⁷ is an example:

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

This might be thought to neatly resolve the norm conflict, by simply allowing EU law to go further in protecting a right than does the ECHR, but it raises a number of unresolved questions. In light of, for example, Hohfeld's characterisation of rights as entailing a correlative of a duty on others to respect the right, rights cannot be taken in an atomistic or isolated way. For this reason, Article 52(3) does not resolve conflict in that a given ECHR right X entails a correlative duty on others to respect the right to the extent that the right is granted, whereas more extensive protection for right X under EU law will entail more of a correlative duty, thus resulting in a conflict between lesser and greater duties: the ECHR will then require a degree of respect for right X as matter of legal duty that does not go as far as the respect required or permitted by EU law or conversely EU law will require more of a duty to respect right X than does the ECHR.

This is all the more so since expanding the scope of one right will have a corresponding effect on potential clashes of rights. An enlarged right X under EU law is more likely to clash with rights in general under the ECHR than is the corresponding, more narrowly defined, ECHR right X. Article 52(3) thus seeks to

¹⁸⁷ Supra n. 42, which strictly speaking is not a Treaty provision as it is incorporated only by reference into EU law (See Article 6 TEU).

regulate *rationae materiae* differing levels of rights protection in a way that seems conceptually unworkable on Hohfeld's scheme, which has much relevance in recognising the inter-relatedness of legal concepts and rights and, here, specifically the inter-relatedness of rights and duties.¹⁸⁸ This reflects a point made by Fiss that Bills of Rights entail indeterminacy because of their comprehensiveness in that all the rights are simultaneously applicable. For these reasons, Article 52(3) seems incomplete as a putative means of norm conflict resolution, since it fails to address the problem of conflicts of the correlative duties of more and less extensive formulations of rights, and an additional norm conflict technique is needed, a point taken up in Chapter 4.

Pauwelyn's 4 situations above cover most situations of conflict. They go beyond the narrow definition to allow for conflicts that are avoidable, such as a conflict between a right and a prohibition or command (in this situation, not exercising the right will avoid the conflict). It does not cover conflicts between two permissions. The present work follows Pauwelyn's listing, except acknowledges conflict between two permissions or freedoms or rights (or to follow Hohfeld, a conflict between two rights, privileges, or immunities¹⁸⁹) may also occur, while also placing more emphasis on conflicts of interpretative norms. Acknowledgment of a clash between permissions or freedoms or rights is important, because such clashes are central to human rights adjudication.

3.5.2.2 *Types of Interpretative Legal Norms*

A recent general account of legal reasoning by Spaak¹⁹⁰ distinguishes between interpretative arguments (ways of attributing meaning to a text), interpretative presumptions (e.g. presumption against absurd consequences), modalities of

¹⁸⁸ See also A. Torres Perez, *Conflicts of Rights in the European Union* (Oxford Univ. Press 2009), 37, 60-62.

¹⁸⁹ A conflict between two immunities seems unlikely in practice, since an immunity is a negative type of legal interest to resist a power. An example in abstract terms is a conflict between an immunity against a duty owed to another party.

¹⁹⁰ T. Spaak, 'Guidance and Constraint: The Action-Guiding Capacity of Neil MacCormick's Theory of Legal Reasoning', 26(4) *L and P* 343-376 (2007), 346-349.

decisions¹⁹¹ (such as analogy), and conflict solving maxims (such as *lex specialis*, *lex posterior*, and *lex superior*). In this section, interpretative norms are briefly surveyed; in the next section, norms of conflict resolution are briefly overviewed. The reasons or rationale for each approach are also briefly identified, before a fuller discussion in Chapter 3 of a central cleavage in methods of legal interpretation: whether a method is ‘conserving’ of meaning or innovative in its effect.

An initial distinction is that between first and second order justification, as articulated by MacCormick. First-order justification relates to deduction from clear rules and can be related to the clear case of legal reasoning where meaning is straightforward in that a readily applicable legal rule exists. Second-order justification relates to the choice between different methods of interpretation, e.g. when a textual approach on its own results in ambiguity.¹⁹² As Maduro has noted in criticism of the ECJ, the Court is generally quite poor at second-order justification, leaving its choices largely unjustified.¹⁹³

a. ‘Literal’ or ‘ordinary’ or ‘textual’ or ‘plain language’ meaning: this approach privileges the ordinary, everyday meaning of terms used in legal texts. It could be said to involve, by definition given its ‘ordinariness’, the least amount of interpretative effort by the interpreter, since it does not generally involve any additional interpretative effort beyond the comprehension of language as is required for ordinary everyday living. However, sometimes ordinary meaning may be technical: it may be ordinary in a specific professional or vocational context, though it may have a somewhat different meaning for most citizens. The reasons

¹⁹¹ Alternative categorisation of interpretative argument or types of argument (Bobbitt uses the term modality as it is broader than ‘interpretation’), e.g. Bobbitt distinguishes (i) historical, (ii) textual, (iii) structural, (iv) doctrinal, (v) ethical, and (vi) prudential approaches to interpretation: P. Bobbitt, *Constitutional Interpretation* (Blackwell 1991), 12-13. See also Spaak (2007), op cit, 346-347, identifying (i) textual arguments, (ii) systemic arguments, (iii) intentionalist, and (iv) teleological arguments.

¹⁹² N. MacCormick, *Legal Theory and Legal Reasoning* (Clarendon Press 1978), 100 et seq.

¹⁹³ Maduro comments that “[second-order justification] has rarely been the case in the ECJ caselaw” and that this is a ‘remarkable’ feature of the Court’s adjudication: MP. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing 1997), 20. However, more recently, Maduro tempers his criticism on this point, merely noting “It may be true that the Court does not always fully articulate why it identifies a particular goal as the predominant one in a certain area of the law”: MP. Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’, 2(1) *EJLS* (2007), 13.

why this method of attributing meaning has priority in most legal systems, i.e. its underlying values, were well summarised by Summers & Taruffo:

First, these types of arguments require for their construction the least by way of materials. ... The second ... is that, when competing with other arguments, the linguistic arguments are relatively more difficult to cancel, or relatively less often subordinated pursuant to a mandatory rule or maxim of priority, or relatively more difficult to outweigh, than other arguments. Their superior comparative force is presumably attributable mainly to the great weight of the substantive rationales behind them, including democratic legitimacy of the legislature.¹⁹⁴

b. Teleological or purposive: this approach is broader than the previous one in identifying the purpose or aim underlying a provision as a primary interpretative consideration and thus goes beyond the self-evident meaning at first reading. Although it is often now associated with EU law, it is equivalent to the mischief rule of interpretation at common law, whereby the problem that a statute was trying to address could be examined as a way of supplementing the meaning derived on the basis of the ordinary meaning approach.¹⁹⁵ What is different about EU law then compared to the traditional common law approach is not in having a concept of purposive interpretation, but in the degree to which it influences interpretation. Lasser has aptly described a distinct characteristic of the use of purposive interpretation by the ECJ as ‘meta-teleological’.¹⁹⁶ This means that purposes are stated at a broad level of generality. Very often, the level of generality issue is left unarticulated,¹⁹⁷ which raises questions concerning choice, discretion, and objectivity. The rationale underlying this interpretation is apparent from the term used to denote it, i.e. it is to advance the purposes of a legal provision.

¹⁹⁴ R. Summers & M. Taruffo, ‘Interpretation and Comparative Analysis’ in DN. MacCormick & R. Summers (eds.) *Interpreting Statutes: A Comparative Study* (Aldershot 1991), 481-482.

¹⁹⁵ (1844) 8 ER 1034; 11 Cl & Fin 85, at 143.

¹⁹⁶ See Lasser (2004), op cit, 288; Rosenfeld (2006), op cit, 648.

¹⁹⁷ J. Stone, ‘The *Ratio* of the *Ratio Decidendi*’, 22(6) *MLR* 597-620 (1959); footnote 6 of the Judgment of Justice Scalia in *Michael H. v. Gerald D.* 491 US 110 (1989); L. Tribe & MC. Dorf, *On Reading the Constitution* (Harvard Univ. Press 1988), 21-23 et seq.; A. Barak, *Purposive Interpretation in Law* (Princeton Univ. Press), 149-153; G. Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’, 14(6) *ELJ* 787-805 (2008).

c. Consequentialist: This approach allows consideration of the consequences of a particular interpretation to be decisive or important in legal reasoning. This relates to an aspect of interpretation that arises anytime there exists interpretative choice, it is thus a consideration that attaches to other interpretative considerations, rather than being a free-standing one by itself, unless on the basis of consequentialism, a judge entirely ignores an otherwise applicable legal text. The term ‘results-oriented’ is also used. Purposive and consequentialist approaches may in fact converge, especially depending on how broadly purpose is stated; the more broadly purpose is stated, the more likely the reasoning can push toward pure consequentialism.

d. Historical or originalist interpretation: This privileges the understanding of a legal text prevalent at the time of its adoption (in US literature, the term ‘originalist’¹⁹⁸ is more commonly used and is the term used in the present work). Two types of originalist interpretation can be identified. One looks to the intention of the authors or signatories or those who ratified legal texts, e.g. as evidenced by preparatory or drafting materials. A more objective type of originalist interpretation looks to the understanding that the legal terms had generally in the legal system or body politic at the time of its adoption, as evidenced by legal tradition. A text itself is objective evidence of historical intention, but it may result in ambiguity, calling for reference to other legal materials to fill in the gap in meaning. This is especially the case with human rights clauses. Evolutive interpretation is the opposite of originalist interpretation, and the latter can also be described as ‘conserving’.

3.6 Norm Conflict Rules

Earlier in this chapter, a distinction was drawn between a rule-bound approach to norm conflict resolution and a more global or principles-driven approach. Though less open and discretionary than principles, it is not the case though that these rules entirely exclude questions of value choice in norm conflict resolution, for they

¹⁹⁸ See, e.g. K. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, & Judicial Review* (Kansas Univ. Press 1999).

themselves rest on certain values or logical preferences; but once posited and given authoritative status of norm conflict rules in a legal system, they tend to preempt a variable application of values by different courts or judge, by disposing of the question of choice according to their terms. This section examines the values underlying the traditional norm conflict maxims of *lex superior*, *lex specialis*, and *lex posterior* and seeks to relate the discussion to the articulation of values in EU law discussed earlier in this chapter.

A preliminary issue concerns the status of norm conflict maxims as having a prior validity or alternatively as a product of custom¹⁹⁹ and thus contingent and variable. A similar question arises with the theory of legal interpretation in general, as referred to in Chapter 1.3, i.e. its universalisability. It is submitted that the traditional maxims of norm conflict resolution have a similarly universalizable character in that they are, to at least some extent, propositions of logic. In any legal system, *lex superior* must apply to some extent, for the secondary rules must have a more or less implicit superiority over substantive or primary rules in so far as the former may be used to amend or abrogate the latter. Given the phenomenon of the variability of levels of generality with which to characterise the scope of rules, purposes, and rights in legal reasoning, some application of *lex specialis* seems inevitable to produce some degree of consistency, coherence, and predictability. Similarly, *lex posterior* seems to have a non-contingent status in so far as any legal system must recognise the possibility to change the law and thus to give preference to a more recent law.²⁰⁰ What may be more a matter of custom is the extent to which these norm conflict rules have force and weight in legal reasoning. The latter is the subject of this study and the argument is that the values in a legal system have an important bearing on this force and weight.

¹⁹⁹ Suggesting they are a matter of custom, see JW. Harris, 'Kelsen and Normative Consistency', in R. Tur & W. Twining (eds.), *Essays on Kelsen* (Clarendon Press 1986), 213.

²⁰⁰ See, e.g. the discussion of rules of change in Hart (1994), *op cit*, 95-96.

3.6.1 *Lex superior*

A *lex superior* rule is perhaps the simplest way of solving norm conflicts in law: when two norms conflict, one has a higher status and thus applies. Its simplicity at a conceptual level as a solution though belies the difficulty in determining if a given norm should have superior status, a problem that is especially acute in EU law given the strong supremacy claims of the ECJ and the resistance such unqualified supremacy claims have encountered in national constitutional law, as discussed in Chapter 1. In legal theory, the most elaborate explanation of the role of a *lex superior* can be found in the theory of Hans Kelsen.²⁰¹ He developed the idea of a chain of norms, each norm itself deriving validity from a hierarchically superior norm until eventually an originating ultimate norm or *grundnorm* could be posited, from which all other norms derived their validity. Kelsen described his theory as ‘pure’ in that unlike other positivist accounts and natural law account it did not relate the theory of law to social facts or to moral postulates.²⁰²

In this account, a *grundnorm*, as an ultimate *lex posterior*, is inherent in the notion of law. The *grundnorm* is a presupposition and could be described as neither descriptive nor entirely normative.²⁰³ It provides theoretical understanding of the relationship between norms in a hierarchically scheme, but does not provide a strong account of normativity.²⁰⁴ This aspect of his theory, depending on how it is viewed, could be considered either useful or inapplicable in EU law. Its abstract character posits the existence of an ultimate norm, but says little about how to identify it or decide between competing possible *grundnorms*, offering little hope for clarifying the contestedness of the ultimate norm of EU law. This vagueness, and the fact that the *grundnorm* is a presupposition, could alternatively be seen as useful; it leaves open the question of the precise identity of a *grundnorm*, being

²⁰¹ On the Kantian background to Kelsen’s thinking and his use of the transcendental method, see, e.g. S. Paulson, ‘The Neo-Kantian Dimension of Kelsen’s Pure Theory of Law’, 12(3) *OJLS* 311-332 (1992).

²⁰² See H. Kelsen, ‘The Pure Theory of Law, its Method and Fundamental Concepts’, 50 *LQR* 474-498 (1934) and 51 *LQR* 517-535 (1935) (perhaps a counter-intuitive use of them term ‘pure’ in disconnecting it from morality).

²⁰³ See U. Bindreiter, ‘Presupposing the Basic Norm’, 14(2) *RJ* 143-175 (2002).

²⁰⁴ Delacroix (2004), op cit. Kelsen later changed his views to suggest the *grundorm* was ‘a fiction’ in the sense that it had to be derived from another norm: for references to original work and criticism, see N. Duxbury, ‘Kelsen’s Endgame’, 67(1) *CLJ* 51-61 (2008), 53-56 et seq.

satisfied with the presupposition.²⁰⁵ This could be taken to suggest that overall phenomenon of a chain of norms is sufficient for the working of a legal system, which could give a legal character to legal norms even where the specificity of the *grundnorm* is disputed, as arguably it ultimately is in EU law.

Kelsen himself acknowledged the possibility of norm conflict in some of his works, even given the importance he attributes to a chain of validity that seems to exclude conflicts between two valid norms, although he has expressed differing views on the issue.²⁰⁶ One source of conflict he recognised was the possibility for the law-maker to will differing norms, the practical possibility previously discussed (in Chapter 1.2.1.5) that seems to be inherent in any legal system where the identity of the law-maker is variable over time.²⁰⁷ He also in some work acknowledged that a competent organ might declare a norm valid even though it did not satisfy the chain of validity²⁰⁸ and that a higher norm could implicitly contain an alternative formulation so as to allow the organ of creation of the lower norm to choose either to follow its explicit stipulations or depart from them.²⁰⁹ These views detract from the overall coherence of Kelsen's theory, and Weyland, for example, rejects them as unhelpful to Kelsen's theory given their incompatibility with his concepts of (a) objective validity and (b) of the legal *system*, considering the latter logically presupposes *lex superior*.²¹⁰

The ultimate status and application of *lex posterior* as a rule of norm conflict is perhaps the most contested of all questions of EU law, especially when presented in sharp terms as a conflict between the ultimate constitutional claims to legitimacy of the EU and the Member States. However, the question also arises as

²⁰⁵ See generally I. Weyland, 'The Application of Kelsen's Theory of the Legal System to European Community Law – The Supremacy Puzzle Resolved', 21(1) *L and P* 1-37 (2002), especially 23-24.

²⁰⁶ As noted by Duxbury, Kelsen in later life changed his views on two important parts of his theory: norm conflict and the status of the *grundnorm* (Duxbury (2008), op cit, 52).

²⁰⁷ See, e.g. H. Kelsen (1968), op cit, ii, 1429, cited in Vranes (2006), op cit, 399.

²⁰⁸ H. Kelsen, *Hans Kelsen: Essays in Legal and Moral Philosophy* (Kluwer 1973), 244, cited and discussed in Harris (1986), op cit, 215-216. See also I. Weyland, 'Idealism and Realism in Kelsen's Treatment of Norm Conflicts', in Tur & Twining (eds.) (1986), *ibid*, 254.

²⁰⁹ H. Kelsen, *General Theory of Law and State* (Harvard Univ. Press 1945), 156-157, cited and discussed, e.g. in Weyland (1986), *ibid*.

²¹⁰ Weyland (1986), *ibid*; Weyland (2002), *ibid*, 113. On Kelsen's changes of views, see also Harris, 201 'Kelsen (1986), op cit, 201, noting that "Whatever may be true of norms, no one surely would claim that the principle of non-contradiction should be applied to Kelsen himself", at 210-211. See also Duxbury (2008), op cit, 52, 60-61; Paulson in Tur & Twining (1986), op cit.

regards the relationship between EU law and general international, and the treatment of the question in that context by the ECJ can allow for a more structured perspective on the question, linking it to both the status of EU law vis-à-vis national law and international law. Kelsen's idea of a chain of validity applied this way raises the question whether there is any common *grundnorm*, in the form of a 'so long as' principle of compatibility with basic rights, linking the relationship between EU law and both national and international law.²¹¹ The question has been most sharply raised in EU law in the context of protection of fundamental rights. This issue is further explored in Chapter 4 below. Finally, it is worth noting that *lex superior* abrogates *lex posterior* in favour of *lex prior*, in that a later norm is invalidated if it conflicts with a hierarchically superior earlier norm.

3.6.2 Lex specialis

The general principle of *lex specialis derogat legi generali* ('*lex specialis*')²¹² has long been a technique of norm conflict resolution. The principle requires that the more specific rule be applied over and above the more general rule.²¹³ Emer de Vattel, one of the fathers of modern international law, said *lex specialis* should prevail "because special matter permits admits of fewer exceptions than that which is general: it is enjoined with greater precision, and appears to have been more pointedly intended".²¹⁴ The rationale for the principle can thus be said to have several elements: (a) it reflects a rational principle that whatever is most specifically stipulated is more wished for by the law-maker or States; (b) it contributes to the efficacy of law by (i) removing the need for more *ad hoc*

²¹¹ This is interesting in view of Kelsen's own views on the source of legitimacy in international law, some of which show the limits of his pure theory and his acceptance of some ultimate moral foundation to law's legitimacy: H. Kelsen, *Das Problem der Souveränität und die Theorie da Volkerrechts. Beitrag zu Emer Reinen Rechtslehre* (J.C.B. Mohr 1920), 205, 319, cited and discussed in D. Zolo, 'International Peace Through International Law', 9(2) *EJIL* 306-324 (1998), 310.

²¹² Or *generalia specialibus non derogant*. The term '*jus singulare*' from Roman law is sometimes also used: see, e.g. F. Mackeldey, *Roman Law* (trans by MA. Dropsie) (T. & J.W. Johnson 1883), secs. 196-197, cited in Hohfeld (1913-1914), op cit, 38.

²¹³ The principle is expressed in Article 55 of the *Articles on State Responsibility* adopted by the International Law Commission in 2001, UN GAOR, 56th Sess, Supp No 10, p. 43, UN Doc A/56/10 (2001).

²¹⁴ E. de Vattel, *Les Droits Des Gens Ou Principes De La Loi Naturelle* (1758) (reprinted by Carnegie Institution of Washington 1916), Liv. II, Chap. VII, para. 316.

exceptions to the general rules of State responsibility and (ii) allowing for greater precision; and (c) in transnational law, it is an expression of State sovereignty, in that it permits States to adopt their own agreed rules for responsibility between them.²¹⁵

Though, there is a clear rationale for the rule in that it logically provides a clearer way of expressing the intention of the law-maker, some issues need further examination: in particular, how far does it go, in other words how to determine the specificity? This is related to the more general problem of levels of generality in legal reasoning.²¹⁶ However, the principle *lex specialis* seems to answer this potential problem itself, by indicating the most specific level of generality is the appropriate one. This can be given a determinate content in practice looking to the most relevant and specific legal tradition.²¹⁷ Thus, two conceptions of *lex specialis* might be identified:

i. A narrow understanding, as a straightforward conflict rule: if a specific rule does apply, and so does a general one, the more specific rule is to be applied. The more specific rule has a restrictive effect, since application of general principles tends to

²¹⁵ The International Court of Justice has recognised the principle in a number of cases: *Hungary v. Slovakia* ('*Gabičikovo-Nagyymaros Project*'), ICJ Reports (1997), at para. 12, holding a treaty to be *lex specialis* relative to the law on State responsibility; *Nicaragua v. US (Military and Paramilitary Activities In and against Nicaragua) (Merits)*, ICJ Reports (1986), at para. 274, the ICJ described treaties as *lex specialis* relative to custom. The ECJ has also recognised the principle, in, e.g. Case C-444/00 *Mayer Parry Recycling* [2003] ECR I-6163, paras. 51 and 57, where the Court held that "Directive 94/62 must be considered to a special provision (a *lex specialis*) vis-à-vis Directive 75/442, so that its provisions prevail over those of Directive 75/442 in situations which it specifically seeks to regulate." See also, e.g. Case C-252/05, *R (Thames Water Utilities Ltd.) v. Bromley Magistrates' Court (Interested party: Environment Agency)* [2007] ECR I-3883, paras. 39-41 (where the validity of *lex specialis* was recognised but held not to apply to the provisions in issue).

²¹⁶ This may be what Klabbers has in mind when he described the distinction between special and general treaties as "itself hopelessly uncertain", though he does not develop the point and notes Lindroos' positive appraisal of *lex specialis*: Klabbers (2009), op cit, 90, citing A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*', 74(1) *NJIL* 27-66 (2005). Pru d'Homme interprets the decision of the ICJ in *DRC v. Congo* as completely abandoning *lex specialis*, even though the Court stated "...some rights may be exclusively matters of humanitarian law; some rights may be exclusively matters of human rights law; yet other may be matters of both these branches of international law": *Case Concerning Armed Activities on the Territory of the Congo*, ICJ Reports 116 (2005), para. 216. See N. Pru d'Homme, 'Lex Specialis: Oversimplifying A More Complex and Multifaceted Relationship', 40(2) *Israeli LR* 356-395 (1987), 385. On another view, at most, the ICJ here seems to accept that the two branches of law may accumulate, while implicitly seeming to accept one or the other may sometimes be *lex specialis*.

²¹⁷ See generally footnote 6 of the Judgment of Justice Scalia in *Michael H. v. Gerald D.*, supra n. 197; Tribe & Dorf (1988), op cit, 21-23 et seq; Conway (2008), op cit.

permit supplementation or extension of specific rules. If the existing specific rules are treated as exhaustive, such supplementation is prevented.²¹⁸

ii. A more general understanding by which *lex specialis* is an interpretative consideration, and its rationale as noted above, relates to the recovery of the intention of the law-maker, and which entails looking to the most specific relevant legal tradition when interpreting ambiguous clauses or concepts.

A feedback effect may take place if *lex specialis* is consistently applied that may minimise legislative inconsistency: if courts systematically adopt *lex specialis*, the law-maker may also become attuned to the principle and the need for legislation to deliberately reflect it.

Systemic interpretation is oriented toward *lex generalis* in that it relates particular legal provisions to various surrounding provisions, and what is relevant here under the concept of ‘systemic’ can vary in generality. In EU law, the highest level of generality has tended to be that of enhanced European integration, for example, the goal of ‘ever-closer Union’ stated in the Preamble of the Treaties.²¹⁹ The manipulability of the level of generality used to determine what is relevant creates a problem of uncertainty and indeterminacy. Bobbio commented that everyone understood that amongst the various interpretive methods, recourse to the spirit of the system or to general principles of law is the one to be deployed most rarely and most cautiously, since it is the interpretive method most vulnerable to personal preferences and the ideology of the judge.²²⁰ As Lindroos notes, questions of relative importance are not resolved by *lex specialis*,²²¹ but this is just to say that the concept cannot do the work of substantive philosophy, which it does not

²¹⁸ International Law Commission/Koskenniemi (2006), op cit, paras. 89-92. For a contrary view, see Pauwelyn (2003), op cit, 410-412.

²¹⁹ Favouring the opposite of *lex specialis*, see: “Coherence criteria can look at many different layers or levels of generality in the law all the way up to the very process of integration and the single market which EC law is aiming to achieve”, in J. Bengoetxea, ‘The Scope for Discretion, Coherence and Citizenship’, in O. Wiklund (ed.), *Judicial Discretion in European Perspective* (Kluwer 2003), 69.

²²⁰ N. Bobbio, ‘Des Critères Pour Résoudre les Antinomies’, in C. Perelman (ed.), *Les Antinomies en Droit* (Bruylant 1965), 240-241. See also Rasmussen (1986), op cit, 62.

²²¹ Lindroos (2005), op cit, 44.

have to claim to do. It is a formal tool, whose application may put the onus on the law-maker for legal reform.

3.6.3 Lex posterior

Lex posterior derogat lege priori ('*lex posterior*') requires that the most recent enactment ought to have priority over earlier enactments. As with *lex specialis*, it reflects a rational principle: that which is willed most recently is willed more. *Lex posterior* can be said to arise usually through inadvertence by the law-maker, since it can be supposed that a law-maker will not deliberately or knowingly have enacted or accepted the continuing enactment of contradictory laws and a later law will normally explicitly repeal an earlier law that it contradicts. For reasons of practicality, it is not always possible to achieve this, given the sheer number of rules in any legal system and the regular need for new laws, meaning that a fully comprehensive and exhaustive examination of all existing laws is not always feasible when a new law is being enacted.

Although coherence or non-contradiction could be achieved by giving priority to the earlier law,²²² the later law represents the most recent will of the law-maker,²²³ and in a democracy has an obvious justification as the most recent expression of democratic consent. A legal system which has no means of prioritising between successive competing and contradictory norms is unreasonable²²⁴ and impossible to comply with. An obvious limitation is that a subsequent law cannot derogate from a prior norm at a higher level in the legal hierarchy of sources, in which case *lex superior* prevails. The principle is relatively unproblematic except when it applies to laws at the same level of legal hierarchy, but where the first law deals with much more important matters, implied repeal or implied derogation by a later law dealing with less important matters is

²²² Paulson in Tur & Twining (eds.) (1986), op cit, 236.

²²³ Article 30(3) Vienna Convention on the Law of Treaties, supra n. 174, applies *lex posterior* in international treaty law to successive treaties where all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended. Under, Article 30(2) of the Vienna Convention, *lex prior* may prevail if the later treaty is specifically subject to it.

²²⁴ H. Kelsen, 'Reichgesetz Und Landesgesetz Nach Österreichischer Verfassung', 32 *Archiv des Öffentlichen Rechts* 202-45, 390-438 (1914), 206-207, as translated and cited in Paulson (1986), op cit, 232.

difficult to attribute to the law-maker. Given the hierarchy of sources in EU law, where the Treaties are in effect the equivalent of a superior constitutional norm, this problem does not really arise in EU law (though it does arise, e.g. in the UK²²⁵).

3.7 Concluding Comments on Values in EU Law and Norm Conflict Rules

The various conflict-solving maxims interact, and it is thus necessary to establish priority between them. Bobbio concluded that clearly hierarchy is the strongest of the norm-conflict rules, i.e. that hierarchically superior rule or norm must prevail over a more recent hierarchically inferior rule or norm or a more specialised norm, i.e. where there is an irreconcilable conflict that cannot be resolved through interpretation,²²⁶ because basic competence is obviously a more important and fundamental criterion than succession in time.²²⁷ Bobbio further noted that the relationship between more general and more specific provisions and as regards chronology was uncertain, i.e. between a prior *lex specialis* and a later more general provision.²²⁸ However, the rationale of *lex specialis* seems to hold true whether or not the competing, more general rule is prior or subsequent to it, if the *lex generalis* is in the form of a principle rather than a rule.

The sequence in time does not alter the degree of speciality or generality. Thus, *lex specialis* should still prevail unless the subsequent more general norm either expressly abrogates the prior more special one or establishes a new rule clearly inconsistent with *lex specialis*. Similarly, *lex specialis* may also interact with a *lex superior* that is also *lex posterior* and more general. Thus, a superior norm of a more general character that is enacted later than *lex specialis* may by

²²⁵ The issue has not yet been squarely confronted by the House of Lords (now the Supreme Court), but the Administrative Court has suggested that a later, ordinary or non-constitutional Act of Parliament can only repeal an earlier Act of Parliament of a constitutional nature by express repeal: *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin), paras. 60-67 (per Laws LJ.).

²²⁶ The possibility of removing potential antinomies through interpretation is emphasised in C. Perelman, 'Les Antinomies en Droit: Essai de Synthèse', in Perelman (ed.) (1965), op cit, 398, 403. See further Chapter 4 below.

²²⁷ Bobbio (1965), op cit, 254.

²²⁸ Ibid. See also Klabbers (2009), op cit, 139, suggesting *lex superior* prevails over *lex specialis*.

implication abrogate or repeal it. However, the distinctions between contradiction and accumulation and between rules and principles are also important here.²²⁹ If there is no contradiction between the *lex specialis* and superior *lex generalis*, i.e. the superior *lex generalis* does not expressly abrogate the *lex specialis* and does not contain a rule clearly contradicting *lex specialis*, the rationale for the exclusive application of *lex specialis* seems to remain. This can be related to the relatively uncertain scope and reach of *lex generalis*, a point underscored by Advocate General Stix-Hackl in her discussion of the non-justiciability of the concept of human dignity in *Omega*. All that this means is that the onus is on the law-maker or constituent power to formally abrogate the prior *lex specialis* in cases of ambiguity.

The application of traditional norm conflict maxims constitutes a rule-bound approach to norm conflict resolution. A focus on rules in legal reasoning can both sharpen and help resolve conflict. Considering rules to be the primary operators in a legal system limits interpretative discretion, since the rules are less susceptible to judicial ‘maximisation’ or ‘optimisation’ to use Alexy’s term. On a rule-bound approach, conflict cannot be avoided, therefore, through increasing the weight of one rule over another, whereas principles, such as Dworkin’s best fit standard, are more manipulable in this regard. Yet a clear application of norm conflict rules also provides a systematic approach to norm conflict resolution, in a way that better respects the appropriate institutional competences of the law-maker and the judiciary compared to a more free-wheeling, principles-driven approach. The latter tends to invite judicial involvement in determining the content of the law, and not just its application.

The application of norm conflict rules and more generally of a rule-bound approach to interpretation can be related to traditional normative hierarchies as encapsulated in the ideas of formal legality, popular democracy (through a greater orientation to recovering original intention of the law-maker), and a separation of powers (through deference by the judiciary to the law-making authority or

²²⁹ See International Law Commission/Koskenniemi (2006), op cit, 54-56.

constituent power). Legitimacy is thus understood essentially in input terms.²³⁰ The question of interpretation is a key prior conceptual issue. Originalist interpretation is naturally related to *lex specialis*, but the need for, and operation of, the other norm conflict rules is dependent upon the nature of the prior interpretation of substantive norms. Thus, interpretation, and the conflict between differing interpretative norms, is the focus of the next chapter.

²³⁰ This can be contrasted with the ‘governance turn’, at least in so far as the latter is presented as a general normative framework for contemporary legality and tends to dissipate clear normative hierarchies. Though the conception of stakeholders and involved actors in governance theory might suggest a process-oriented approach, this tends not to be articulated in democratic terms.

Chapter 4 - Conflicts of Interpretative Norms in the Legal Reasoning of the ECJ

4.1 Introduction

The rules of *lex superior*, *lex specialis*, and *lex posterior* discussed in Chapter 3 will often be applicable when two norms are clearly in conflict. Prior to the determination that there is a conflict, however, there must be an interpretation of each norm in order to determine its content and thus to determine whether conflict exists. Given that there are various methods of interpretation, it may be that one method of interpretation may reduce or eliminate the potential conflict and so preempt the application of one of the norm conflict maxims. This possibility in turn raises the question of an interpretative hierarchy, i.e. a ranking between the different techniques of interpretation, and the issue of the extent to which it is legitimate to vary methods of interpretation and their relative deployment or ranking in order to avoid substantive conflict of norms. This question relates to the normative scope of interpretation; differing methods of interpretation can be related to different rationales or values. It might be thought that flexibility in approaches to interpretation, allowing judicial choice as to what methods to adopt, could provide an easier means of norm conflict. However, as Klabbers notes:

... Zuleeg also points out that the oft-preferred escape into harmonising interpretation is, really, no escape at all but instead reproduces the problem. For to argue that conflicting provisions in different treaties can be harmonised will normally entail that one will be brought into line with the other. But on what basis can an objective decision be made to interpret treaty A so as to accommodate treaty B, rather than the other way around?¹

As noted in Chapter 3, the pre-eminent method of interpretation in most legal systems is textual or ordinary meaning interpretation. This can be related to values of the rule of law and democracy. It reflects democracy, in so far as the

¹ J. Klabbers, *Treaty Conflict and the European Union* (Cambridge Univ. Press 2009), 89, citing M. Zuleeg, 'Vertragskonkurrenz im Völkerrecht. Teil I: Verträge Zwischen Souveränen Staaten', 20 *GYIL* 246-276 (1977), 271-274.

public ascertainability of and comprehension of the law seems to rest on shared linguistic criteria,² and ordinary meaning does constitute a necessary criterion for this purpose. The meaning is ordinary precisely because it is widely shared, and this is what enables the shared, public space of communication in which coherent democratic and deliberation can take place. Similarly, the rule of law, understood in the sense of formal legality, presupposes the widespread comprehension of the law by ordinary citizens, and ordinary meaning is thus necessary here too.³ Privileging ordinary meaning for these reasons is in general uncontroversial;⁴ what is more controversial is the extent to which i. systemic arguments and ii. arguments from original intention, which could be considered a conserving interpretation,⁵ should be deployed.

The ECJ is characterised above all perhaps by a tendency to systemic interpretation, whereby Treaty provisions are interpreted in light of the overall goals and aims of the Treaties stated at a high level of generality.⁶ The concept of *lex specialis* is relevant here as both a maxim of conflict resolution and a more general principle of interpretation.⁷ *Lex specialis* points to a narrow interpretation of a norm in the sense that it should be understood as specifically as possible

² See R. Summers & M. Taruffo, 'Interpretation and Comparative Analysis' in DN. MacCormick & R. Summers (eds.) *Interpreting Statutes: A Comparative Study* (Aldershot 1991), 481-482. The principle of charity in interpretation associated with Wilson, Quine, and Davidson supports the idea of a shared hermeneutic framework as a dimension of the rule of law: see generally, D. Davidson, 'A Coherence Theory of Truth and Knowledge', in D. Davidson, *Subjective, Intersubjective, Objective* (Clarendon Press 2001).

³ Tamanaha put it that "Above all else it is about predictability": Tamanaha (2004), 119; M. Kramer, *Objectivity and the Rule of Law* (Cambridge Univ. Press 2007), 116, referring to public ascertainability of the law as a necessary condition of the rule of law and of any type of governance.

⁴ Summers & Taruffo (1991), op cit, 481-482.

⁵ Justice Scalia of the US Supreme Court used the term 'semantic intent': A. Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws', in A. Scalia & A. Gutmann (ed.), *A Matter of Interpretation: Federal Courts and the Law* (Princeton Univ. Press 1998), 37-44. Scalia notes that the specific intentions of the authors of a text are related to their objective use of language in a given context: Scalia, *ibid*, 44. Reliance on the specific intention of the authors or ratifiers of legal texts is in one sense not conserving, at least in terms of the public record of the law, since it may be because the public record, as evidenced by ordinary meaning, may be incomplete or ambiguous that resort to evidence of original intention becomes necessary or useful in interpretation.

⁶ A. Bredimas, *Methods of Interpretation and Community Law* (North-Holland 1978), 179; J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press 1993), vi; M. de S.O. l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford Univ. Press 2004), 288.

⁷ i.e. as not just a rule for determining a choice between two different norms, but as a rule of interpretation of a given norm.

consistently with its ordinary meaning (so it is not a question of straining language to achieve greater specificity). There is a connection here between *lex specialis* and original intention or understanding, since it is more likely that particular rules are intended by the law-maker to be understood in a more localised way than more general rules: that in a sense is the whole point of enacting a specific rule.

What this suggests is that an appeal to systemic interpretation should be a secondary type of interpretative resort and that the application of *lex specialis* is more consistent with originalist interpretation, whereas systemic interpretation is goal-oriented in way that can justify evolutive or innovative interpretation. As such, systemic and innovative interpretation are *prima facie* more flexible and, therefore, seem to have greater potential for resolving conflict' However, as Zuleeg and Klabbers note, the problem of value choice and its justification remains. The well known doctrine of 'indirect effect'⁸ of EU law requires national courts to interpret law to be compatible with EU law and thus invokes the idea of harmonising interpretation. Nonetheless, as Pauwelyn notes, there are limits to such interpretation, it cannot be *contra legem* or change the law to avoid conflict:

... interpretation must be limited to giving meaning to rules of law. It cannot extend to creating new rules. Within the process of treaty interpretation, other rules cannot add meaning to WTO rules that goes either beyond or against the clear' meaning of the terms' of the WTO rule in question. Interpretations *contra legem* are prohibited.⁹

The ECJ itself has stated interpretation cannot be *contra legem*.¹⁰ However, this apparently clear limit on interpretation becomes much greyer and blurred as a practical demarcating line between what is legitimate interpretation and what is not when evolutive or innovative interpretation comes into play. Innovative

⁸ Case 148/78, *Pubblico Ministero v. Ratti* [1979] ECR 1629; Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 189; C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135. In *Marleasing*, the ECJ held that the requirement to construe national law in conformity with the Directive in issue precluded the interpretation of the Directive to the effect that grounds of nullity other than those in the Directive could be imputed to it.

⁹ J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge Univ. Press 2003), 245.

¹⁰ C-105/03, *Criminal proceedings against Maria Pupino* [2005] ECR I-5285, para. 47; C-268/06, *IMPACT v. Minister for Agriculture and Food* [2007] ECR I-12327, paras. 100-101.

interpretation could be said to just shed a new perspective on the legal source and that its meaning is already there as part of the source, but in practice it can substantively add to and thus change the law.¹¹ Although a full consideration of the limits of legitimate interpretation and what distinguishes interpretation from law-making is beyond the scope of this chapter, the focus of the chapter on the contrast between conserving or originalist interpretation and evolutive interpretation could be taken as a litmus test for the limits of interpretation more generally. This chapter is concerned with the question of the scope or limits of interpretation as a means of norm conflict resolution, and it does this through examining the contrast between conserving or originalist interpretation and innovative or evolutive interpretation.

The perspective argued for is that conserving or originalist interpretation is both epistemically possible and normatively preferable than evolutive interpretation. The latter rests on essentially political preferences as to what is a desirable outcome and is difficult to reconcile with the requirement of predictability as a key feature of formal legality and with the democratic authority of the law-maker (and the comparative lack of democratic or representative legitimacy of the judiciary). In EU law scholarship, several authors have critiqued the downplaying by the ECJ of textual interpretation.

The Court has interpreted Treaty provisions so as to take more power into its own hands and to reduce the power of national courts. It has felt itself entitled to fill gaps in the Treaty and generally to interpret legal provisions so as to further its own vision of a harmonizing and fully effective Community legal system operating throughout the Member States. In the process the ECJ has been driven to adopt strained interpretations of the texts actually agreed by Member States and it has introduced doctrines and rights of action which cannot be found in the texts...¹²

¹¹ J. Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries', in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge Univ. Press 1998), 186, suggesting innovative interpretation in small steps can lead to 'radical' change over time; R. Dworkin, *Justice in Robes* (Harvard Univ. Press 2006), 123, noting that "Very often, however, controversial decisions that seem novel do satisfy that test of fit".

¹² P. Neill, *The European Court of Justice: A Case study in Judicial Activism* (European Policy Forum 1995). 2.

The methods of interpretation adopted by the ECJ appear to have liberated the Court from the customarily accepted discipline of endeavouring by textual analysis to ascertain the meaning of the language of the relevant provision.¹³

Hartley bemoaned what he identified as the “settled and consistent policy of the ECJ” of “promoting European federalism”, whereby the Court refused to accept “the natural meaning” of Treaty provisions and engaged in “judicial legislation”.¹⁴ More recently,¹⁵ Stone Sweet proposed that the ‘constitutionalising’ decisions of the ECJ in *Van Gend en Loos*¹⁶ and *Costa v. ENEL*¹⁷ and the resulting combination of supremacy, direct effect, and the workings of the preliminary reference procedure under Art. 234 ECT conditioned the legislative process at EU level and had far-reaching effects in national legal systems of the Member States. This was a transformation in a way unintended by the Member States at the founding, since the Treaties did not attribute direct effect or supremacy to themselves, rather they represented ‘international law plus’, i.e. standard internal law cooperation with the added feature of compulsory ECJ jurisdiction and the particular role of the Commission.¹⁸ These criticisms tend to be implicitly originalist in their approach, although originalism as a general approach to interpretation applicable across the full range of substantive norms (including human rights and competence norms) has been relatively little articulated in commentary on the ECJ.

Interpretation of human rights norms presents what could be said to be a special case because of the relative abstraction of norms. As a result, as mentioned in Chapter 1, traditional norm conflict maxims do not generally apply unless the human rights norms have been enacted at different times or at different levels of a legal hierarchy (they are often enacted together in a single Bill of Rights or are enacted as supplementations, with the same hierarchical status, to an existing Bill

¹³ Ibid, 47.

¹⁴ T. Hartley, ‘The European Court, Judicial Objectivity and the Constitution of the European Union’, 112 *LQR* 95-109 (1996), 95.

¹⁵ A. Stone Sweet, ‘The Juridical *Coup d’État* and the Problem of Authority’, 8(10) *GLJ* 915-928 (2007).

¹⁶ Case 26/62, *Van Gend en Loos* [1963] ECR 1.

¹⁷ Case 6/64, *Costa v. ENEL* [1964] ECR 585.

¹⁸ Stone Sweet (2007), op cit, 924.

of Rights¹⁹). An appeal to ordinary meaning is generally insufficient, and in this context the distinction between evolutive or innovative interpretation and conserving interpretation takes on especial importance. In addition to evolutive interpretation, the concept of balancing is often invoked as a means of determining the relative scope of competing rights norms. These two issues in the context of human rights norms are addressed in Chapter 4; this chapter focuses more generally on the issue of evolutive versus conserving or originalist interpretation of any legal norms, but especially of constitutional norms.

It has almost become commonplace to consider constitutions especially appropriate for evolutive interpretation, yet the normative case for this view has never been comprehensively identified in scholarship either on the EU or ECHR. Such justifications as are offered tend to. The two leading works on the ECJ did not address the issue,²⁰ though Rasmussen's work tends toward an originalist perspective without strongly articulating it. In this chapter, the dominant influences in contemporary legal theory that favour the acceptability of evolutive interpretation, Dworkin and Raz (ostensibly coming from different perspectives, but ending up with similar effects), are critically examined.

Although legal reasoning inevitably has to some extent both a retrospective and prospective aspect,²¹ what is open to contestation is the degree to which interpretation should normatively seek to recover the original intention of the law-maker or source of the legal norm(s) being interpreted. The minimal inherent prospective element of legal reasoning is that legal norms being interpreted must be applied to the facts of a current case so as to determine future legal relationships consequent on the interpretation of the norm. Where controversy exists in the legal literature, it tends to focus on the degree to which judges should so far as possible

¹⁹ The numerous protocols to the European Convention on Human Rights (ECHR), ETS no. 05, are examples of the latter. Most of the Protocols to the ECHR supplement the standards in the ECHR itself, rather than amend it. An example of an amending Protocol is Protocol No. 13 abolishing the death penalty in all circumstances (ETS no. 187)

²⁰ The two most recent and main works on the legal reasoning of the European Court of Justice (ECJ) by Rasmussen and Bengoetxea did not address the issue of originalism in legal reasoning: H. Rasmussen, *On Law and Policy of the European Court of Justice* (Kluwer 1986) and Bengoetxea (1993), op cit, as noted by Weiler (1987), op cit, 575, and G. Gaja, 'Beyond the Reasons Stated in judgements', 92(6) *Michigan LR* 1966-1976 (1994), 1975, respectively.

²¹ Dickson (2009), op cit.

seek to interpret laws in accordance with the intention of the law-maker,²² or conversely, should engage a more forward-looking innovative interpretation to achieve a more fitting or suitable norm.²³ From the perspective of norm conflict, the possibility of original intention being discoverable would add to the potential coherence of a legal system and thus could reduce norm conflict generally in a legal system by allowing law-makers to be more deliberate in how they make the law. This could potentially result in a greater intentional avoidance of conflict between a draft law under consideration and the law in general. In contrast, if group or legislative intention is generally not feasible as an epistemic possibility, the intentional and purposeful avoidance of conflict diminishes.²⁴ In the discussion below, the argument is advanced that a dominant view in academic literature that original intention is not recoverable is superficial and rests on a dubious epistemic premise.

Raz suggests that disagreement on the scope of innovative as opposed to conserving interpretation is always present, and appears to suggest that this precludes a general normative preference for one over the other.²⁵ However, few questions of political morality would be resolved if the fact itself of disagreement over them prevented a normative preference. Moreover, in its effect, Raz's approach is to sanction the most permissive option, since a narrower normative approach is precluded by the mere fact of disagreement (a sceptic might note that the result of this position coincides, in the example of interpretation, with Raz's own preference for innovative interpretation).

In an EU context, it may be wondered who these 'original intenders' are? They are understood here to be the signatories whose political authority to bind a

²² Most famously, see generally R. Bork, *The Tempting of America* (Simon & Schuster 1990). More recently, see, e.g. K. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, & Judicial Review* (Kansas Univ. Press 1999).

²³ See, e.g. J. Raz, 'Intention in Interpretation', in R. George (ed.), *The Autonomy of Law* (Oxford Univ. Press, 1996) ('1996a'); J. Raz, 'Why Interpret?', 9(4) *RJ* 349-363 (1996) ('1996b'); Raz (1998), op cit; J. Raz, 'Interpretation: Pluralism and Innovation', in *Between Authority and Interpretation* (Oxford Univ. Press 2009). See also W. Waluchow, *A Common Law Theory of Judicial Review* (Cambridge Univ. Press 2007).

²⁴ It is a possibility that a law-maker might intentionally enact a law that conflicts with another law without formally repealing that other law, but it seems a rational legislature would not do so.

²⁵ Raz (1996b), op cit, 361-3; Raz (1998), op cit, 180, 185.

polity (the authorised representatives of a Member State, in the EU context).²⁶ This chapter thus examines the case for and against the use of evidence of original intention of the Member States representatives in constituting or enacting EU law. As mentioned, originalist interpretation has hardly been debated at all in scholarship on legal reasoning in EU law. More generally, it is resisted by much academic opinion, with one author even suggesting it is ‘disreputable’ in academic circles, where it is the subject of ‘scholarly scorn’.²⁷

In this chapter, the normative case for reliance on subjective originalist meaning is discussed:²⁸ the general case for conserving interpretation is examined, taking Raz as a starting point for the discussion (as Raz is the most prominent general legal theorist to have addressed the question directly). Problems attributed to the idea of corporate intention, which underpins subjective originalist interpretation, are then assessed. The argument is that (i) Raz’s argument for innovative interpretation may not be fully persuasive; (ii) originalism can be understood normatively as supporting the rule of law and democracy, though the argument from democracy alone is the main justifying rationale for subjective historical interpretation (whereas innovative interpretation is premised on a conception of output legitimacy); and (iii) epistemic difficulties attributed to corporate intention are sometimes over-stated in critiques of originalism. Existing EU practice on the matter is then surveyed, followed by: an application of the potential use of subjective originalist interpretation to one of the foundational questions of EU law, namely, the doctrine of non-discriminatory obstacles to free movement (in order to illustrate the theoretical arguments advanced concerning group intention).

²⁶ One of the problems attributed to originalism is that it may be difficult to decide who are the relevant framers: J. Weiler, ‘The Court of Justice on Trial’, 24 *CMLRev* 555-589 (1987), 575; A. Kavanagh, ‘Original Intention, Enacted Text, and Constitutional Interpretation’, 47 *AJJ* 255-298 (2002), 255; W. Sadurski, ‘Juridical *Coup d’État* – All Over the Place. Comment on “The Juridical *Coup d’État* and the Problem of Authority” by Alex Stone Sweet’, 8(10) *GLJ* 935-940 (2007), 935-936. In an EU context and international law context, it seems clear that they are authorised representatives of the Member States.

²⁷ Kavanagh (2002), op cit, 256 and f.n. 6, though also noting (ibid) that there is a steady stream of literature in support of it.

²⁸ In Chapter 3, subjective originalist interpretation was distinguished from objective originalist, the latter relying on the understanding of a law prevalent in the body politic in general at the time of enactment, the former relying on the specific intention of signatories of a law.

This is followed by a more general survey of leading, mostly ‘constitutional’, cases from EU law in order to offer an overview of how the ECJ addresses the issue of interpretative norm conflict in light of the theoretical discussion in Chapters 2 and 3 and in this chapter. The focus is primarily on constitutional interpretation, though the arguments can also apply to innovative interpretation of the law in general *mutatis mutandis* (given what is often the relative abstraction of constitutional norms and the relative ease of amendment of ordinary or secondary legislation compared to constitutional rules, i.e. in the case of the EU, amendment of the EU Treaties).

4.2 The Debate on Conserving versus Innovative Interpretation and its Underlying Values

The very notion itself of evolutive or dynamic interpretation presupposes some degree of stability of constitutional meaning such that a change in interpretation can be identified as such.²⁹ Although it has now become almost common place to associate evolutive interpretation in rights adjudication with constitutional review, the rationale for evolutive interpretation of constitutions by the judiciary does not seem self-evident.³⁰ As Klabbers succinctly notes, “change may not always be for the better: that too is a matter for political judgment”.³¹ Evolutive interpretation³² seems inconsistent, for example, with the notion of entrenchment, which could be thought to underpin the usefulness of constitutional review as a bulwark against majoritarian tyranny: “It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change – to embed certain rights in such a manner that future generations cannot readily take them away”.³³ The most common justification offered for evolutive interpretation

²⁹ For a contrary view, see Raz (1998), op cit, 182, suggesting only the reasons for an innovative or conserving interpretation can be known.

³⁰ See generally J. Goldsworthy, ‘Raz on Constitutional Interpretation’, 22(2) *L and P* 22(2) 167-193 (2003).

³¹ Klabbers, (2009), op cit, 92.

³² Or as it sometimes labelled, ‘dynamic’ interpretation.

³³ Scalia (1998), op cit, 40; for an opposite view, see Raz (1998), op cit, 186, suggesting that entrenchment justifies judicial innovation on a continuing basis to update it and prevent it becoming ossified (even though Raz notes such cumulative small interpretative innovations can effect radical change over time).

is the need to ensure a constitution reflects the exigencies of contemporary society and to escape ‘the dead hand of the past’.³⁴ Underlying opposition to originalist interpretation is an association often made with conservative politics, although the absence of any such necessary link was well explained by Ely: “For one perfectly well *can* be a genuine political liberal and at the same time believe, out of respect for the democratic process, that the Court should keep its hands off the legislature’s value judgements”.³⁵

Raz suggests that the authority of constitutions cannot rest on their founders’ intentions since laws must have satisfactory merit considerations, i.e. considerations relating to moral desirability,³⁶ justifying them, and that such founders or authors could not plausibly be thought of as possessing moral expertise to justify timeless principles of morality. Rather, only in its early years should a constitution be interpreted with reference to the framers’ intentions.³⁷ Although generally classified as a positivist, Raz here seems to tend strongly toward anti-positivism in suggesting that any moral considerations can legitimately influence a constitutional court: “But if it is an originating constitution, then the question of its moral legitimacy cannot turn on the legitimacy of any other law. It must turn directly on moral argument”.³⁸ This sets a context for an argument that the authority of constitutions should not be understood as depending on their authors’ intentions:

On the whole the case for the temporally limited authority of institutions regarding laws of the second kind – those that allocate resources, burdens, and opportunities fairly among people – is easier to establish. It seems impossible to formulate these laws in was that do not necessitate frequent revision. Given that lawmakers cannot make laws that remain good for long,

³⁴ See, e.g. J. Arthur, ‘Judicial Review, Democracy and the Special Competency of Judges’, in R. Bellamy (ed.), *Constitutionalism, Democracy and Sovereignty* (Avebury 1996), 67; Raz (1998), op cit, 164, describing this as the most powerful argument for innovative interpretation; Waluchow (2007), op cit, 28-33. N. Walker, ‘Post-Constituent Constitutionalism? The Case of the European Union’, in N. Walker & M. Loughlin (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford Univ. Press 2008), 249, refers to ‘normative petrification’.

³⁵ JH. Ely, *Democracy and Distrust* (Harvard Univ. Press 1980), 72.

³⁶ Raz (1998), op cit, 163, 173, 178, and at 187, identifying merit considerations as primary reasons for deciding on a particular interpretation.

³⁷ Ibid, 167.

³⁸ Ibid, 159, though also suggesting a more positivistic approach to statutory law, at 157 and 172.

their authority cannot be the reason for the authority of old laws that they made.³⁹

This understanding tends to suggest that legislative or constituent will become redundant quite quickly and that a latter legislative or constituent authority needs to readdress the issue directly, absent which the judiciary may adopt innovative interpretation to update a law or constitution. Over time, Raz suggests, the cumulative effect of such small interpretative changes may be radical.⁴⁰ Raz does not really address the issue of why the legislature or constituent power is not better placed to effect such small changes or the criteria, which presumably must have some objectivity, by which judges are to evaluate when such, even small, changes to interpretation are needed. In this respect, his position seems open to the criticism of ignoring the degree of continuity in legislative or constituent powers. Though the personnel may change, the possibility for legislative or constitutional change by succeeding legislatures or constituent powers is constant, and the absence of deliberate amendment could point to the possibility of continuing acquiescence and support for the existing legal or constitutional position. It thus cannot be assumed at least that continuing legislative or constituent support is absent simply because of the passage of time; the passage of time without amendment could indicate exactly the opposite, namely, the relative venerability of existing law.

In an EU context, Möllers doubts the status of the Member States as a democratically legitimate constituent power.⁴¹ He proposes two conceptions of a constitution and its constituent power: first, a revolutionary or order-founding conception, exemplified by the French revolution, relating legitimacy to a creation of a fully new political order in a dramatic ‘constitutional moment’; and secondly, an evolutionary concept of the constitution defining and limiting

³⁹ Ibid, 167.

⁴⁰ Ibid, 186.

⁴¹ C. Möllers, ‘*Pouvoir Constituant – Constitution – Constitutionalism*’, in A. Von Bogdandy & J. Bäst (eds.), *Principles of European Constitutional Law* (Hart 2005). See also on constituent power in the EU, Walker (2008), op cit, 247, describing the issue as ‘deeply contested’. More generally, for recent literature, see F. Michelman, ‘Constitutional Legitimation for Political Acts’, 66(1) *MLR* 1- (2003); M-S. Kuo, ‘Cutting the Gordian Knot of Legitimacy Theory? An Anatomy of Frank Michelman’s Presentist Critique of Constitutional Authorship’, 7(4) *IJCL* 683-714 (2009).

existing powers, which is a ‘power-shaping conception’.⁴² Respectively, these could be characterised as normatively thick and thin conceptions of the process of creation of a constitution, the thick order-founding conception being linked to democracy (Möllers does not describe them in this way).

This thick notion of order-founding constituent power, Möllers proposes, is not present in the EU because the intergovernmental process of Treaty change lacks the character of a constituent power in a definable moment constituting a new polity. The power-shaping conception “cannot claim a complete discontinuity, a real new establishment that can be traced back to a democratic act”.⁴³ In the EU:

First, the Member States’ representation, according to the principle of sovereign equality, must be distinguished from the citizens’ representation, according to the principle of strict individual equality. Not only does the original act – the actual act of a *pouvoir constituant sans peuple* – conform to the first principle of representation, but also does the treaty amendment law found in Article 48 TEU. The states’ representation disrupts democratic equality. In the debate about international relations this problem has long been recognised under the heading of foreign policy’s lack of democratic coherence.⁴⁴

Here, the sovereign equality of States is contrasted with the equality of citizens, but why this is so is not really developed. The argument seems sustainable only if the individual Member States were not themselves democratic, but all founding and subsequent Member States have their own internal democratic legitimacy respecting the formal equality of citizens. In Möllers’ discussion, it is not obvious

⁴² Möllers gives the UK and Germany as examples: (2005), *ibid*, 191. The German example seems to only hold true up to World War I, while Möllers’ reading of the common law as a restriction on the sovereign seems open to the criticism that it substantially under-states the centrality of parliamentary sovereignty in the UK system, as formulated from Dicey onwards (A.V. Dicey, *An Introduction to the Law of the Constitution* (Macmillan 1885)), and the doctrine’s implicit privileging of democratic authority.

⁴³ *Ibid*, 193.

⁴⁴ *Ibid*, 204.

at least why this internal democratic legitimacy is not externalised through the process of intergovernmental representation and Treaty negotiation.⁴⁵

One argument that might be advanced here is that a constituent authority, whatever the formal status on paper, requires a *demos*, i.e. a shared political identity and space of engagement.⁴⁶ However, that a constituent power falls short of its ideal form does not mean it is not a genuine constituent power: any political entity must be constituted somehow, and as a concept, ‘constituent power’ captures the source of that formation.⁴⁷ There seems no obvious analytical use in positing the existence only of an idealised form, short of which the issue becomes redundant, as if the process of coming into being of a legal framework no longer really mattered. This approach seems to carry the risk of reducing itself to an ends-justifies-the-means argument (because the means lacked an ideal form) and purely outcome-oriented legitimacy that fails to accord value to democratic process (because the constituent power did not live to that of an ideal *demos*).⁴⁸ In the EU, while there is not a single, shared *demos*, there are sufficiently shared political ideals to justify the claim of regional cooperation going beyond typical public international law cooperation to form a complex treaty apparatus. In other words, the fact a constituent power falls short of the political ideal does not need to be seen as undermining its legal authority.

The common issue of a lack of parliamentary control over executive foreign policy, referred to by Möllers in the passage above, does not seem analogous to the process of Treaty adoption in the EU, which is far more deliberative and long-term than regular foreign policy decisions taken by executives with only *ex post facto* parliamentary scrutiny (which to an extent is necessitated by the need for swift and confidential action in foreign policy).⁴⁹ This

⁴⁵ The latter point of view is reflected in the acknowledgment introduced by the Lisbon Treaty of the democratic credentials of the Council and European Council, which with the European Parliament, provide a dual basis of democratic legitimacy: Article 10 TEU.

⁴⁶ Walker (2008), *op cit*, 259, citing M. Wilkinson, *A Theoretical Inquiry into the Idea of ‘Postnational Constitutionalism’: The Basic Norm, the Demos and the Constituent Power in Context* (Unpublished PhD thesis, EUI, 2005).

⁴⁷ For a contrary view on this specific point, see T. Schilling, ‘The Autonomy of the Community Legal Order’, *37(2) Harvard ILJ* 389-409 (1996), 390-394.

⁴⁸ See Walker (2008), *op cit*, 261, referring to a ‘stubborn sociological reductionism’.

⁴⁹ Ultimately, Möllers acknowledges the democratic limitations of the power-shaping conception of a constitution or constitutionalisation, which he links with output-legitimacy by describing it as

seems especially so given that Treaty changes have to be ratified according to the constitutional traditions of the Member States (now contained in Article 48 TEU⁵⁰). The constituent power can be seen thus as the Member States acting collectively and achieving convergence, but according to their own constitutional traditions.

Walker criticises an originalist approach to constituent power for missing out on ongoing democratic responsiveness.⁵¹ However, this criticism seems to suppose that originalism reifies or fixes a constitution completely, which seems misplaced. The criticism does not acknowledge the possibility of amendment, yet it seems clear that an originalist does not need to see any difficulty in the constituent power amending its prior constituent act. The argument then seems to become one about process: democratic amendment or amendment by élite judicial actors or especially engaged social and legal actors close to the process of a constitution being put into action or effect.

The EU can be seen as having a constituent power in both a formal sense and a thick normative or democratic sense, i.e. the Member States acting within their constitutional traditions. In that context, interpretation disconnected from the original intention of the constituent power seems to then bear a considerable burden of persuasion, because of the *prima facie* normative pull of democracy. One candidate as a basis for evolutive interpretation is that the judiciary would seek to identify a contemporary consensus and interpret ambiguity in constitutional or legal provisions to accord with that. This proposed solution runs into its own difficulties, as noted by Ely. The problem is that the judiciary are not obviously better representatives of consensus than parliaments, against whose

“the evolutionary development of legal principles on the basis of a case-by-case problem solving”, but (somewhat unclearly) “for precisely this reason it is doubtful that the chosen path of constitutionalisation is only considered legitimate because it was indeed chosen...”. The power-shaping approach applied to the EU would be to “construct the integration process as ...a development that can neither be fundamentally changed nor democratically answered for”: *ibid*, 220.

⁵⁰ The fact that the Member States are formally identified in Article 48 TEU as the amending authority in effect identifies them as the constituent power and reflects the established legitimacy of States. This avoids the problem of infinite regression (see Walker (2008), *op cit*, 248-249) in determining the ultimate origin of any claim to constituent power.

⁵¹ Walker, *ibid*, 262.

enactments constitutional review is directed.⁵² Here, it may be objected that this critique of consensus as a basis for identifying the content of the law undermines an emphasis on democratic intent legitimising law. However, originalism favours a more minimalist conception of rights according to which the judiciary protect fundamental rights articulated at a polity's founding or other 'constitutional moment'.⁵³ On this view, a period when a polity defines its constitutional framework, a defined constitutional moment,⁵⁴ is arguably a more valid basis for legitimating laws. This is especially so regarding the practical content of human rights laws in the context of moral pluralism, when a considered majority opinion or consensus at least provides some procedural legitimacy to the resulting rights settlement, compared to the judiciary deciding *ad hoc* what is a prevailing consensus for the purpose of filling out abstract constitutional clauses on a case-by-case basis.

In a recent contribution, Stone Sweet has posited that supreme or constitutional courts can effect a 'juridical *coup d'état*'⁵⁵ and thus subvert the constituent power. By the term '*coup d'état*', he understands a "fundamental transformation in the normative foundations of a legal system through the constitutional lawmaking of a court":

First, we must be able to infer, reasonably, that the constitutional law produced by the transformation would have been rejected by the founders had it been placed on the negotiating table. Second, the

⁵² See Ely (1980), *op cit*, 63-69 for clear discussion of the issue. Other objections to consensus as a basis for evolutive interpretation are that the judiciary seem no better placed (and are generally worse placed) to divine consensus than are the legislature. Further, a primary rationale for constitutional judicial review – protecting minority rights from majoritarian tyranny – is also thereby undermined in the following way: "... it makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority. The consensus approach therefore derives what apparent strength it has from a muddle" (Ely, *ibid*, 69). See also Scalia, *op cit*, 40.

⁵³ See also T-I. Harbo, 'The Function of the Proportionality Principle in EU Law', 16(2) *ELJ* 158-185 (2010), 168, noting criticisms of Alexy's 'inflationary' conception of rights and the role of proportionality in the hands of the judiciary, although ultimately seeming to endorse Alexy's approach.

⁵⁴ 'The concept of the "constitutional moment" is distinguished by lasting constitutional arrangements that result from specific, emotionally shared responses to shared fundamental political experiences': A. Sajó, 'Constitution Without the Constitutional Moment: A View from the New Member States', 3(2-3) *IJCL* 243-261 (2005), 243, associating it in particular with B. Ackerman, *We the People* (Belknap Press of Harvard University Press 1998).

⁵⁵ Stone Sweet (2007), *op cit*.

outcome must alter – fundamentally – how the legal system operates, again, in ways that were, demonstrably, unintended by the founders. The transformation will make it impossible for an observer to deduce the new system from institutional design at the *ex ante* constitutional moment. It will also imply a breach of pre-*coup* separation of powers orthodoxy. Put differently, traditional separation of powers schemes will fail to model, post-*coup*, the constitutional roles and limitations conferred on the organs of the state.⁵⁶

Stone Sweet argues that the ‘constitutionalising’ decisions of the ECJ in *Van Gend en Loos*⁵⁷ and *Costa v. ENEL*⁵⁸ could be understood in this framework. They brought about a transformation in a way unintended by the Member States at the founding, since the Treaties did not attribute direct effect or supremacy to themselves – rather they represented ‘international law plus’, i.e. standard international law cooperation with the added feature of compulsory ECJ jurisdiction and the particular role of the Commission.⁵⁹ Noting the problem of *kompetenz-kompetenz*, whereby the authority to decide the limits of the power of the ECJ itself is contested as between the ECJ and the highest courts of some of the Member States, Stone Sweet suggests that this conflict of approaches is irresolvable in that the ECJ does not have the capacity to force national courts to accept its strong assertion of supremacy. As a result, “In Europe, a great deal of judicial governance proceeds on this absence of coercive authority, because it proceeds in the absence of normative authority.”⁶⁰ Stone Sweet notes that his thesis raises more questions than it answers,⁶¹ but it successfully captures very clearly the full drama of the question of constituent power in the EU, even if provocatively expressed.

In reply, Walker⁶² suggests that Stone Sweet’s implicit originalism needed fuller justification and that the transformation was a process, rather than the single

⁵⁶ Ibid, 916.

⁵⁷ Case 26/62, supra n. 16.

⁵⁸ Case 6/64, supra n. 17.

⁵⁹ Stone Sweet (2007), op cit, 924.

⁶⁰ Ibid, 926.

⁶¹ Ibid, 916.

⁶² N. Walker, ‘Judicial Transformation as Process: A Comment on Stone Sweet’, 8(10) *GLJ* 929-933 (2007), 930-933.

event the concept of ‘*coup*’ suggested. Judicial development of a constitution reflects “... what we can see is a progressive dance of adaptation to the problem of incompleteness, with each judicial step both offering a way forward and also exposing new gaps, for which the need for closure justifies yet further steps”.⁶³ Stone Sweet responds that “The judges that instigated my *coups* conferred upon themselves new expansive capacities to ‘complete’ constitutions, displacing constituent authority as regulators of constitutional development”.⁶⁴ In other words, the question of completeness was itself judicially determined on Walker’s approach, and so the concept of incompleteness did not answer the question of the proper scope of judicial interpretative authority, it tended to raise the further question of how to identify that a constitutional feature needed ‘completing’.⁶⁵ Walker’s idea of ‘gaps’ here seems to raise more questions itself than it answers. It has a rhetorical suggestiveness, but lacks conceptual clarity or persuasiveness. Can any judicial amendment or change to the law be justified simply by attaching the label ‘gap’ to the law as it is? Kelsen identified the rhetorical misuse of the term ‘gap’ to simply indicate that the author wished to change the current law: “The so-called ‘gap’, then, is nothing but the difference between the positive law and a system held to be better, more just, more nearly right”.⁶⁶

Innovative interpretation on the basis of prevailing ideas tilts toward *ad hoc* adjudication, since prevailing ideas of justice may well change repeatedly and continually. The adoption of a constitution is a moment of relative definiteness and deliberation, when a polity’s representative institutions specifically direct themselves to enacting, by pre-commitment, fundamental laws of a general character. It is a moment when consensus deliberately manifests itself. In the absence of acceptance of a defined natural law as the basis of, for example, human

⁶³ Ibid, 932.

⁶⁴ A. Stone Sweet, ‘Response to Gianluigi Palombella, Wojciech Sadurski, and Neil Walker’, 8(10) *GLJ* 947-953 (2007), 952.

⁶⁵ See also Sadurski (2007), op cit; G. Palombella, ‘Constitutional Transformations vs. “Juridical” *coups d’État*. A Comment on Stone Sweet’, 8(10) *GLJ* 941-945 (2007). See further R. Hirschl, ‘Preserving Hegemony? Assessing the Political Origins of the EU Constitution’, 3(2-3) *IJCL* 269-291(2005), arguing that political élites allowed the ECJ to do what it did because they favoured the outcome, irrespective of the lack of democratic support for it.

⁶⁶ H. Kelsen, ‘On the Theory of Interpretation’, 10(2) *LS* 127-135 (1990), 133 (in the context of Kelsen’s belief in the completeness of a legal system). See also JHH. Weiler, ‘The Court of Justice on Trial’, 24 *CMLRev* 555-589 (1987), 561, noting that “Almost any problem of interpretation can be characterized as a ‘gap’”.

rights, a defence of originalism may argue that justiciable rights can only be compatible with democracy if determined by the democratic process itself, and in accordance with the conditions that inhere in democratic discourse and with the rights the democratic process embodies. This view requires that the content of rights is understood and determined so much as possible as it was generally understood to be at the moment of democratic endorsement.⁶⁷

Kavanagh proposes that arguments for originalism are best understood as having direct or positive force or indirect or negative force:

The argument from democracy is not based on any claim about the special role or status of the origination of what might be called the “affirmative virtues of originalist interpretation”. Rather, it relies on the perceived problems with other methods of interpretation and claims comparative advantage over them. ... Indirect arguments of the type discussed here are arguments in favour of a class of interpretative methods rather than being arguments which establish a direct or conclusive connection with originalism...But these matters, important though they are, are not the focus here... I will concentrate on direct arguments for originalism, i.e. arguments based on the particular relevance of Framers’ intent to constitutional interpretation.⁶⁸

Kavanagh classifies the argument from democracy as ‘indirect’ because it relates to a perceived problem with other methods of interpretation, and she further that arguments that originalism promotes predictability, stability, objectivity, and less discretion are all similarly indirect. She goes on to comment that a direct and positive argument for originalism relates to the inherent connection between words used and their authors’ intentions.⁶⁹ This approach seeks to deflect the bite of the anti-democratic critique of non-originalist interpretation, but it appears to be based

⁶⁷ J. Waldron, *Law and Disagreement* (Oxford Univ. Press 1999), 164-186, goes further in arguing that even if morality was objectively identifiable, constitutional review is still incompatible with democracy, since it still violates the fundamental procedural principle of voting and thus of equal participation of all citizens in government.

⁶⁸ Kavanagh (2002), op cit, 261-262, citing, *inter alia*, L. Simon, ‘The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?’, 73(5) *California LR* 1482-1539 (1985).

⁶⁹ Kavanagh, *ibid*, 262.

on an artificial partitioning of arguments for originalism on the basis of an unclear ‘direct versus indirect’ distinction.

The argument from democracy is not really separate to the idea of intention; it is an extension of it, since it is the intention of the founding authority that has democratic authority and legitimacy. In that respect, the argument for originalism from democracy is not just one possible justification shared by other interpretative methods: any non-originalist method is arguably problematic on democratic grounds. Tamanaha has noted a link between democracy and the rule of law: “... the rule of law can exist without democracy, but democracy needs the rule of law, for otherwise democratically established laws may be eviscerated at the stage of application by not being followed.”⁷⁰ Innovative or non-originalist interpretation seems clearly not about following as closely as possible the meaning of democratically pre-ordained law, but tends toward a developmental, creative approach to law, i.e. it tends to law-making under the guise of interpretation. The arguments against innovative interpretation based on the rule of law and democracy dovetail: what is innovative cannot be predicted, nor therefore pre-ordained democratically.

In a human rights context, Waluchow argues that courts are better suited than legislators to dealing with rights issues, because rights issues are complex and subject to disagreement and thus can attract the greater sensitivity and more case-specific attention in courts than the *ex ante* deliberations of legislatures can expect to achieve.⁷¹ Waluchow here invokes the common law method of incremental development to support this approach: the use of innovative or ‘living tree interpretation’ in constitutional review allows judges to develop the law through responses that are sensitive to particular cases, while achieving the degree of legal certainty manifested in the common law.⁷² As Raz notes, more generally, over

⁷⁰ B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge Univ. Press 2004), 37. Maravall describes the attributed harmony between democracy and the rule of law as a ‘normative stereotype’, frequently not reflected in practice in that political forces self-interestedly evade the rule of law if they can: JM. Maravall, ‘The Rule of Law as a Political Weapon’, in José María Maravall & Adam Przeworski (eds.), *Democracy and the Rule of Law* (Cambridge University Press 2003), 264.

⁷¹ Waluchow (2007).

⁷² *Ibid.*, 23, 208, 268, 270. Hayek addressed the compatibility of the common law with the rule of law, and came to accept it as a type of careful adjustment to a body of rules and principles already

time, a series of small changes (which ties in with Waluchow's point about common law virtues) could make a radical change overall:

There is no objection to regular development of the law within existing frameworks. Such modifications do not undermine continuity. By and large they tend to enhance it. So far I have not distinguished between stability in the law – that is, the absence of change in the law – and stability in the social or economic effects of the law. Since the two often go hand in hand, there was no need to distinguish between them. But they go hand in hand only as long as the underlying social, political, or economic conditions do not change. When they do, the law may have to change if it is to continue to have the same social or economic effects. In such a case innovative interpretations that modify the law prevent it from ossifying and getting progressively less and less adequate to its task and requiring major reform. Of course, the cumulative effect of small-change reform may well amount to a radical change in constitutional law over the years. But stability is consistent with slow change, whatever its cumulative effect. Therefore, entrenching the constitution may be justified in that it secures extensive debate and solid consensus behind radical constitutional change. But it also means that it falls to the courts to take charge of continuous improvements and adjustments within existing structures.⁷³

Raz does not really develop reasons for the relative suitability of the judiciary rather than the constituent power for effecting continuous improvements, and issue Waluchow addresses in more depth.

A central argument Waluchow advances in favour of innovative interpretation is that judges are also better trained than legislatures in reasoning about speculative (in)-consistencies from a given hypothesis, which allows them to fashion a general body of principles that is at the same time sensitive to individual

implicitly accepted, comparing it to the 'invisible hand' of the free market and viewing favourably its careful accretion of principles and experience in comparison with *ex ante* legislation: F. Hayek, *Law, Legislation and Liberty: Volume I* (University of Chicago Press 1979), 1-118, discussed in Tamanaha (2004), *op cit*, 69-70. However, value pluralism in modern Western societies might be thought to undermine this idea of an apolitical or neutral core of wisdom determining caselaw.

⁷³ Raz (1998), *op cit*, 186.

cases.⁷⁴ This argument seems vulnerable on a number of grounds. First, if rights are as particular and sensitive to context as Waluchow suggests, as a necessary inference from contemporary disagreement on rights, it is not clear how any generalisation or entrenchment is achievable; rights seem to only emerge after the fact. In that context, it is hard to see the relative superiority of constitutional review to the traditional approach in the UK, for example, of parliamentary sovereignty.⁷⁵ Sadurski's 'fact sensitive' analysis of the impact of constitutional review suggests relatively little empirical support for the view that jurisdictions with systems of constitutional review better protect rights than those that lack such review.⁷⁶ Secondly, the concept of speculative inconsistency necessarily involves moving beyond the particularities of the case and reasoning with reference to hypothetical cases in order to assess how much generalisation is possible if the solution in a given case was to operate as a precedent. In other words, this involves the type of *ex ante* deliberation that legislatures normally engage in. Moreover, legislatures too can learn from experience and can adjust previous enactments to reflect it; courts thus do not seem to have automatic superiority in this regard.

This is evidenced by the fact that in some jurisdictions the courts have used the power of constitutional review to establish general principles of lasting significance. In the US, cases such as *Lochner v. New York*,⁷⁷ and *Roe v. Wade*⁷⁸ established in their respective eras such principles. *Lochner*, in which the Supreme Court struck down as an arbitrary interference with freedom of contract a New York State law, was finally considered overturned, in *West Coast Hotel Co. v. Parrish*,⁷⁹ only after a prolonged struggle in which the Roosevelt administration threatened to pack the Supreme Court with anti-*Lochner* justices if it did not change its approach.⁸⁰ The rule in the controversial abortion case of *Roe v. Wade*

⁷⁴ Waluchow (2007), op cit, 264-265.

⁷⁵ For US literature favouring a move to legislative supremacy: see, e.g. TE. Pettys, 'Popular Constitutionalism and Relaxing the Dead Hand: Can the People be Trusted?', *University of Illinois Research Paper No. 08-10* (2008).

⁷⁶ W. Sadurski, 'Judicial Review and the Protection of Constitutional Rights', 22(2) *OJLS* 275-299 (2002); Hirschl, Ran, *Towards Juristocracy: Origins and Consequences of the New Constitutionalism* (Harvard Univ. Press 2004), 150 et seq.

⁷⁷ 198 US 45 (1905).

⁷⁸ 410 US 113 (1973).

⁷⁹ 300 US 379 (1937).

⁸⁰ See, e.g. Ely (1980), op cit, 14-15, 65-66.

has remained largely the same in the period since the judgement.⁸¹ As Raz notes above, even the cumulative effect of smaller changes introduced through innovative judicial interpretation over time can itself be radical.⁸² Similarly, many of the landmark cases of the ECJ have established highly general principles that far transcend the immediate facts of those cases, including as obvious examples, case law on direct effect,⁸³ supremacy,⁸⁴ State liability,⁸⁵ and non-discriminatory obstacles (the latter are examined later in this chapter), i.e. these cases involve decisions that create general rules of lasting significance unrelated to the particularities of the case in which they were formulated.⁸⁶ It is in this regard that they might be analogised to legislation.

Ultimately courts can only rule on or fashion general principles if *ad hoc* judging is to be rejected. A case-specific understanding of constitutional rights and requirements seems vulnerable to the criticism that it results in constitutional provisions losing a stable core of meaning that seems essential for their normative claim. As Schauer expressed this point in the context of rights:

... the only sensible way in which rights can operate in legal argument is by way of being both temporally and logically antecedent to the particular case in which a claimant's success might be deemed to be the recognition of a right.... The upshot of this is that an essential feature of rights is their generality, for a right must be at least more general than any particular result. ... A maximally particular specification of a right loses its ability to operate as a reason for a decision, and consequently loses almost all of the characteristics that would lead people to use rights in legal, constitutional,

⁸¹ In *Planned Parenthood v. Casey* 505 US 833 (1992), the Supreme Court reduced the period in which a woman could choose an abortion to the point of viability of the foetus or unborn child, namely, 22 or 23 weeks of pregnancy.

⁸² Raz (1998), op cit, 186.

⁸³ Case 26/62, *Van Gend en Loos*, supra n. 16; Case 57/65, *Lütticke GmbH v. Hauptzollamt Saarlouis* [1966] ECR 205; Case 36/74, *Walrave & Koch v. Association Union Cycliste Internationale* [1974] ECR 1405.

⁸⁴ Case 6/64, *Costa v. ENEL*, supra n. 17; Case 11/70, *International Handelsgesellschaft* [1970] ECR 1125; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629.

⁸⁵ Cases C-6/90 & 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357; Cases C-46 & C-48/93, *Brasserie du Pêcheur SA v. Germany* [1996] ECR I-1029; Case C-224/01, *Köbler v. Austria* [2003] ECR I-10239.

⁸⁶ Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837.

political or moral argument or that would lead people to insert rights-descriptions in statutes and constitutions.⁸⁷

Unless law is to be conflated with ordinary practical reasoning, rather than the subjection of disputes to determinable rules,⁸⁸ an open-ended appeal to the sensitivities of particular cases runs counter to the notion of a rule of law, namely, that there are rules of general applicability that are set out in advance of their application. It is in the nature of law as a distinct social phenomenon that it subjects individual cases to such general, universalisable rules,⁸⁹ which is a view of law that disfavors *ad hoc* adjudication.

In the context of the EU, the caselaw of the ECJ law is marked by an evolutive approach to interpretation; Bengoetxea observes many ECJ judges favour such evolutive interpretation because of the dynamic nature of the Community.⁹⁰ This dynamic character is generally not related to fundamental rights, to which Waluchow's work seems primarily directed.⁹¹ As such, the Courts' jurisprudence in this respect lacks the rights-protecting, counter-majoritarian context that Waluchow advances. The Court's jurisprudence tends, often though not always, to be motivated by 'a certain idea of integration' and furtherance of the idea of 'an ever-closer Union'.⁹²

⁸⁷ F. Schauer, 'The Generality of Rights', 6(3) *LT* 323-336 (2000), 329-330. Hayek, for example, considered generality of laws to be one of the three attributes of the rule of laws, the others being certainty and equality and that this required the separation of the legislative and judicial roles. See F. Hayek, *The Political Ideal of the Rule of Law* (National Bank of Egypt 1955), 34. The last sentence in the quote above from Schauer might be thought to argue against specificationism of rights (Chapter 5 below argues in favour of specificationism), but this is not necessarily so: a specificationist approach to rights does not eschew all generality – no right can be enumerated in every detail of its application. Specificationism rather seeks to be as specific as possible consistently with the necessarily general character of rights that Schauer identifies.

⁸⁸ Of course, ordinary practical reasoning is itself subject to certain rules, e.g. of formal justice (i.e. to treat like cases alike), and of non-contradiction: see generally, e.g. R. Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (trans. by R. Adler & N. MacCormick) (Clarendon Press 1989), 188 et seq.

⁸⁹ "Following this understanding, rights do not function *against* rules, for rights *are* rules, at least if we understand the generality of rules as their defining and most important characteristic": Schauer (2000), op cit, 330.

⁹⁰ Bengoetxea (1993), op cit, 99. See also, e.g. A. Albors-Llorens, 'The European Court of Justice, More than a Teleological Court', 2 *CYELS* 373-398 (1999), 379; L. Senden, *Soft Law in European Community Law* (Kluwer 2004), 374-380.

⁹¹ The ECJ developed a human rights jurisdiction itself without an explicit Treaty basis in Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419 and Case 4/73, *Nold v. Commission* [1974] ECR 491, although an explicit Treaty basis was later inserted in the Treaty.

⁹² Bengoetxea (1993), op cit, 99-100.

Accepting the idea that a legal system is dynamic, it does not necessarily follow that it is the judiciary who should do the changing, or that the views of the judiciary on the normative value of dynamic interpretation should be thought decisive. There exists a formal and democratic process of constitutional amendment in most legal systems, and in the EU, normal rules of public international law on treaty amendments apply,⁹³ although national constitutional traditions must all be satisfied for a new Treaty to come into effect. Goldsworthy notes that an established procedure for amendment of the law prescribed in exclusive terms and the fact that it has not been used ought to be a moral reason for judges not changing the law.⁹⁴ Bypassing the formal system of treaty amendment in the EU in favour of *de facto* judicial amendment is thus open to the criticism that it negates a basic feature of the institutional and constitutional framework of the EU, in that the judiciary are assigning to themselves a power that is for the Member States (in the case of Treaty amendments).⁹⁵ This view seems to have more force given the frequency of Treaty amendment within the EU since the Single European Act 1986⁹⁶; as Hartley notes, it is hard to accuse the Member States of inadequate attention to the issue.⁹⁷

What this discussion suggests for norm conflict is that there are general normative objections to innovative interpretation as a means of norm conflict resolution and more generally as an interpretative method. A preference for innovative over conserving interpretation amounts to a preference for particular values. Innovative interpretation downplays traditional rule of law and democratic objections to an ‘activist’ judiciary or ‘*gouvernement de juges*’.⁹⁸ Its main justification relates to consequentialist or output-oriented legitimacy. Conversely, conserving or originalist interpretation privileges input-legitimacy, which dovetails with a traditional rule of law emphasis on formal legality understood as requiring

⁹³ B. de Witte, Bruno, ‘Rules of Change in International Law: How Special is the EC?’, 25 *NYIL* 299–333 (1994).

⁹⁴ Goldsworthy (2003), *op cit*, 188.

⁹⁵ The responsibility of the Member States for Treaty amendment is made explicit by the Treaty of Lisbon: see Article 48(4) TEU (post-Lisbon), which provides that Treaty amendments shall come into effect only after being ratified by all the Member States in accordance with their respective constitutional requirements.

⁹⁶ 28:1986, OJ L 169, 29.06.1987, p. 1.

⁹⁷ Hartley (1996), *op cit*, 104.

⁹⁸ An expression coined by LB. Boudin, ‘Government by Judiciary’, 26(2) *PSQ* 238-270 (1911).

certainty and predictability in the law. This often implicit reliance on output legitimacy, is, however, problematic, since the outcome that is claimed to be good, enhanced integration, has no apolitical validity. It is in fact a highly contested claim to political morality for Europe.

4.3 Specific Justification of Subjective Originalist Interpretation

4.3.1 Legal Texts and Intention

The general debate on evolutive and originalist interpretation was outlined above. This section develops on that by focusing on the debate surrounding the specific intention of ‘founding fathers’ as a guide to interpretation, by examining the question of their collective or group intention.

Dworkin acknowledges the obvious intuitive appeal of attributing a specific meaning to an enacted text and suggests that the authors of constitutional texts deliberately use abstract language and avoid specific understandings of constitutional requirements as, in effect, a type of delegation to the courts to decide the most suitable concretisation in a specific or contemporary context.⁹⁹ Pauwelyn makes a similar point, writing about the WTO:

It may, indeed, be an indication that WTO members wanted these terms to evolve with society and international law or, at least, should have realised, that the vagueness of these terms would result in their meaning being open to discussion and variation depending on the context and times.¹⁰⁰

⁹⁹ More recently, see generally Dworkin (2006), op cit, 123-124. See also, e.g. R. Dworkin, *Freedom's Law* (Harvard Univ. Press 1996), 14: "... it is as illegitimate to substitute a concrete, detailed provision for the abstract language of equal protection clause..."; R. Dworkin, 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve', 65(4) *Fordham LR* 1249-1268 (1997), 116-119 referring to 'expectations intention' and contrasting it with abstract intention. See generally K. Whittington, 'Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation', 62(2) *Review of Politics* 197-229 (2000), 198, noting that by attributing to the founding fathers an intention to enact in the constitution only an abstract understanding of rights, Dworkin tried to collapse the distinction between originalists and non-originalists; P. Brest, 'The Misconceived Quest for the Original Understanding', 60(2) *Boston ULR* 204-238 (1980).

¹⁰⁰ Pauwelyn (2003), op cit, 267.

On this view, evolutive interpretation almost flows necessarily from the abstract nature of the text. Nonetheless, it is also possible for abstract legal rules to be interpreted in an originalist way, if (a) an intention can be plausibly attributed to their law-maker or (b) if legal tradition indicates the way in which a right is to be concretised. Some degree of abstraction in legal provisions is essential, since the full range of factual circumstances to which they may apply cannot be enumerated in advance. In that context, logically, it does necessarily follow from the fact of abstraction of legal provisions that the law-maker intended an evolutive interpretation to be adopted.

In the EU, the Treaties are notably detailed and specific for constitutional texts, running to hundreds of pages. However, the EEC (now TFEU) Treaty has been described as a '*traité cadre*', in that it sets out broad principles and purposes, as well as more specific provisions.¹⁰¹ Nonetheless, the attribution of the character of a *traité cadre* to a treaty does not seem to dispose of the question of how and to what extent matters of detail are to be filled in and developed and how abstraction is to be addressed as a matter of interpretation; different approaches are possible, e.g. contrast originalist or Dworkinian approaches. Article 6 of the TEU, since the coming into effect of the Lisbon Treaty, includes a directive that the rights enumerated be interpreted in accordance with explanations given of their content at the time of adoption of the Charter of Fundamental Rights of the EU,¹⁰² which appears to be an explicit endorsement of interpretation based on original intention:

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. (Text of Article 6(1))

It could reasonably be assumed that the explanations referred to in the Charter reflected the understandings of the Charter signatories, since these

¹⁰¹ T. Millett, 'Rules of Interpretation of EEC Legislation', 10(3) *Statute LR* 163-182 (1989), 163; A. Arnall, *The European Union and its Court of Justice* (Oxford Univ. Press 1st ed. 1999), 5.

¹⁰² OJ C 364/01, 18.12.2000, p. 1.

explanations were meant to represent the views of the signatories of the texts.¹⁰³ These explanations can be quite clear and specific and do not appear to create problems of uncertainty as to intention. An example was referred to in Chapter 3, where the principle of human dignity was stated in these explanations to be non-justiciable. Similarly, general objections to original intention as an influence on interpretation on the basis of uncertainty may not be applicable to interpretative declarations formally agreed by the Member States and attached to the EU Treaties.¹⁰⁴ The fact that they are not included in the instrument itself does not mean they cannot affect the interpretation of it, since in the context of ambiguity in the text, resort to considerations other than the text is inevitable.

Raz proposes that in general evidence of intention should *not* be taken as a convention of interpretation.¹⁰⁵ He identifies the argument that legislative intention provides a democratic rationale for interpretation:

But [this argument] runs against one major problem. It applies only to democracies (really only to democracies of a certain type). The law exists in many non-democratic countries, and, as we are seeking to a general understanding of legal interpretation of the law created by law-making acts, this argument will not do.¹⁰⁶

Raz proposes that such evidence of original, democratic intention should not be used because such theory is not generalisable to countries that are not democracies. It is widely accepted that law and legal reasoning have a requirement of universalisability in order to justify the normative claim that they makes to obedience, as noted in Chapter 1. MacCormick, for example, relates universalisability to the requirement for rationality and to the idea of formal

¹⁰³ See Bureau of the Convention on a Charter of Fundamental Rights of the European Union, *Explanations by the Convention relating to the Charter of Fundamental Rights*, document CONVENT 49 of 11.10.2000, CHARTE 4473/00 Convent 50, available online at:

< http://www.europarl.europa.eu/charter/convent49_en.htm > (last accessed 30th September 2009).

¹⁰⁴ In the EU, such interpretative declarations may be agreed by the Member States in relation to secondary legislation in the Council of Ministers or in a European Council or Intergovernmental Conference in the context of Treaty changes and amendments. Conceptually, the issue of collective or corporate intent (discussed further below at 6.2.3) is the same in these different contexts.

¹⁰⁵ Raz (1996a), *op cit*, 257.

¹⁰⁶ *Ibid*, 257-258.

justice, which requires like cases to be treated alike on rational grounds.¹⁰⁷ Universalisability of law is inherent in the rule of law notion that the law applies equally to everyone in a given jurisdiction. Even if one did accept the proposition that any valid theory of law must be universalisable in the different sense of being compatible with all kinds of systems of government as Raz seems to use it above, Raz's own account of interpretation arguably runs into trouble because of the severing of interpretation from original democratic intent as evidenced by the ordinary linguistic meaning. The latter could be viewed as inconsistent with democracy, and so in this regard does not seem to meet the standard of generalisability that Raz himself proposes.

Raz himself rescues the argument from original intention in a way by noting that the authoritative intention of the law-maker is a more general formulation: "to the extent that law derives from deliberate law-making, its interpretation should reflect the intentions of its law-makers" (which Raz refers to as 'The Authoritative Intention Thesis'¹⁰⁸). This is consistent with democracy, but it also applies to non-democratic systems, it is just that in the latter, the law-maker is not democratically constituted. Stated at this level of generality, the argument from original intention can be applied to all legal systems, it is just that the 'original intender' is differently constituted. Raz then goes on to reject the idea that something other than the words of the legislation itself might be useful in determining intention: only the words used can generally be taken as meaning, and these are the words already in the legislation.¹⁰⁹

¹⁰⁷ N. MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978), 97–99, 123–124. On the universal character of legal reasoning in general, see e.g. A. Peczenik, 'Moral and Ontological Justification of Legal Reasoning', 4(2) *L and P* 289-309 (1985), 293–298; R. Dworkin, 'Hart's Postscript and the Character of Legal Philosophy', 24(1) *OJLS* 1-37 (2004), 36; and see generally, Z. Bañkowski and J. MacLean (eds.), *The Universal and the Particular in Legal Reasoning* (Ashgate 2007).

¹⁰⁸ *Ibid.*, 259. See, e.g. Whittington (1999), *op cit.*, 90, understanding authorial intention as decisive for interpretation.

¹⁰⁹ Raz (1996a), *op cit.*, 269-270. Raz makes what seems an odd point, especially (but also more generally) in the context of the institutionalised, public debate that precedes the adoption of legislation (which could be expected to be governed by clear conventions of communication even more so than normal communication), that people do not first intend to say something and then say it:

Of course, people sometimes say things they do not mean, and mean to say things which they fail to say. These cases result from incomplete command of the language, momentary loss of control of the physical aspects of one's speech, or permanent impairment of such control, from momentary confusion of thought (as when one means to say 'the oven is on', and says instead 'the fridge is on', or in the

Recently, Raz adopts a position that seems in conflict with the idea of a ‘general understanding of legal interpretation’ he invoked in the passage quoted above, by introducing the opposite idea of the local character of interpretation, although he does not observe any change in his views:

There are no useful universal recipes for interpretation. Theoretical reflection can help. But it helps in making us aware of the nature of interpretation, and the diverse reasons for engaging in it, not by providing us with recipes for correct interpretation. Sometimes, for example, in the law, there are specific interpretive rules, but they are never exhaustive guides and they are local rules liable to change.¹¹⁰

Further, Raz now argues that innovative interpretation result from the under-determination of the meaning of texts. In somewhat ambiguous passages, he gives an example of the performance of a play as an instance of this under-determination:

Think, by way of illustration, of the theatre. Typically, first, there will be various ways an actor can position himself, or move, various ways of speaking his lines, which make a difference to the meaning of the action, and a difference to the implied motivation and frame of mind of that character at the time of speaking., and in general. And second, the meaning

case of unintentional spoonerisms). But it does not follow from this that when we speak we first intend to say something and then attempt to say it, so that it is always an open question whether one said what one intended. Rather, barring exceptions, like those listed, one means what one says. There is no more to having meant to say that p than that one said that p and none of the exceptions obtain....An exception is any explanation of what went wrong which establishes either that one was trying or had formed an intention to say something and failed, or that one did not mean what one said even though there was nothing specific that one did intend.

Raz gives this as his essential reason for rejecting the Authoritative Intention Thesis, i.e. we only need to look at the words used in the legislation. It seems correct to say as Raz does “But it does not follow...” [from the examples of mistaken speech he gives] that we generally intend to say first and then say it (accurately), but the examples of mistaken speech are hardly a good premise, and it seem entirely implausible to suggest as a general proposition that people do not intend to say something first and then say it (also, Raz’s meaning in this passage would be clearer if he had noted how the verb ‘intend’ related to the verb ‘mean’). Apart from this, presumably there is some coherent connection between legislative debate and legislative enactments, and legislative debate is part of the recorded ‘words said’ from which legislative intent can be inferred in interpretation. Moreover, in the passage above, what amounts to exceptions seems only to be so because there was a failure to say what was intended, suggesting that the norm does amount to a correlation between what was intended and said. As regards the last element in the quote above, it would not seem surprising that one did not mean what one said if there was nothing specific that one did intend.

¹¹⁰ Raz (2009), op cit, 322.

of the character's action, his motivation, and frame of mind as portrayed by the text of the play is indeterminate as to which way of performing the role is correct. In such a case, given that to perform the play the actor has to act in one of the ways not required by the text, and give that each such way of acting will attribute to his character attitudes which the play itself does not, whichever way the actor acts will constitute an innovative interpretation of the play or parts of it.¹¹¹

However, the analogy between a play and legal texts seems limited for one central reason: what can differ in the articulation of a play is the emotional register of the performance as expressed non-verbally (tone, gesture, look, intensity of manner). This is also the case in everyday life,¹¹² whereas law and written legal expression lack this emotional register. Raz, however, suggests “the lesson of the theatrical illustration can be stated in terms which apply generally. Broadly speaking, innovative interpretations are inevitable where:

- aspects of meaning of the original are indeterminate;
- rules of meaning direct that various aspects of the interpretive statements carry interpretive messages;
- such message-conveying aspects of the interpretive statements are inescapable when interpreting the original, even though they relate to indeterminate aspects of its meaning; and
- it is impossible for them to preserve the indeterminate contours of the original.”¹¹³

The last point seems important and raises the issue of when a court can refuse to declare the law to have a specific content, or in other words, can issue a *non liquet* ruling. Raz acknowledges this latter possibility, but does not elaborate as to when it can arise. In EU law, this question is related to the issue of EU competence,

¹¹¹ Ibid, 307.

¹¹² See, e.g. ML. Knapp & JA. Hall, *Nonverbal Communication in Human Interaction* (Thomas Learning 5th ed. 2007). For a discussion of the application of ideas of linguistic pragmatics to law, see A. Marmor, ‘The Pragmatics of Legal Language’, *USC Legal Studies Research Paper No. 08-11* (2008), arguing that implied content semantically encoded (i.e. what is implied but which has become part of the semantic meaning of certain expressions and could be considered an operative part of legislative intent) can be taken into account in legal interpretation (33 et seq).

¹¹³ Raz (2009), op cit, 308-309.

since, it is an organisation of conferred and not unlimited powers; this issue of competence is taken up in Chapter 6 below on conflicts of competence norms.

Some ambiguity is also present in Raz's discussion of the extent to which an object has properties that control or limit legitimate innovative interpretation. This essentially seems to relate to the realism-anti-realism distinction in philosophy: whether the existence of objects is independent of human cognition and expression, or conversely, our cognition or perception constitutes the world around us. Realism posits the former, anti-realism the latter.¹¹⁴ Raz does not seem to come down clearly on the issue:

A way of understanding any object of interpretation which was never thought of before is a new way of understanding, and the interpretation propounding it is innovative, simply because it was never thought of before. The fact that the features of the play or the ceremony or whatever the interpreted object is, which show it to be a good interpretation were there all along does not matter. The contingency of socially dependent meanings makes ample room for innovative interpretations which show new ways of understanding their objects, and in so doing establish new meanings.¹¹⁵

Some of this passage suggests a realist assumption (the reference to features being 'there all along'), whereas elsewhere it suggest anti-realism (interpretation establishing new meanings).¹¹⁶

The reference in the passage above to contingent, socially dependent meanings (which also suggest an anti-realist position) is amplified by a later

¹¹⁴ For recent discussion of the realism and anti-realism distinction for legal interpretation, see T. Spaak, 'Legal Positivism, Anti-Realism and the Interpretation of Statutes', in K. Segerberg & R. Sliwinski (eds.), *Logic, Law, Morality: Thirteen Essays in Practical Philosophy in Honour of Lennart Åqvist* (Uppsala University 2003), 127-145, arguing that legal positivism is usually presented in empirical terms and that this suggests an anti-realist theory of meaning since empiricism claims not to have knowledge of whether the true nature of things transcends our experience; in turn, this points towards conventionalism and ordinary meaning in interpretation.

¹¹⁵ Raz (2009), op cit, 311-312.

¹¹⁶ This echoes criticism of Raz made by Rodriguez-Blanco referred to above in Chapter 1. She argues Raz is unclear as to what extent coherence is constitutive of legal meaning and understanding. By conceiving of a 'base', independent of coherence, Raz might be interpreted as appealing to a realist conception of legal knowledge. See V. Rodriguez-Blanco, 'A Revision of the Constitutive and Epistemic Coherence Theories in Law', 14 (2) *RJ* 212-232 (2001), 227-228.

comment in the same piece that “One important conclusion is that the constraints on interpretation are always shifting.”¹¹⁷ It does not seem obvious, however, that interpretation is as pervasively variable as this suggests. Ordinary meaning and language are the prime means of interpretation for citizens in any legal system, and sources of law that may be hundreds of years old are not unusual and can be quite stable in their meaning.¹¹⁸ More prosaically, a foreign defendant who pleaded the contingent and local character of interpretation, and on that basis claimed entitlement to a differing interpretation of the law than the court as a reason for not complying with the law, is unlikely to be unsuccessful in any legal system. Finally, it might be questioned whether indeterminacy of texts necessitates innovative interpretation as opposed to extra-textual interpretation. Reference to *travaux préparatoires* can help elaborate on a text. This, however, is not really innovative; it is a matter of retrieving a past intention that was not fully communicated in the public record of the law. It seems innovative only in a weak sense of finding out an existing meaning that is not clear from the text, rather than generating new meaning.

Kavanagh is among authors who argue that looking to evidence of framer’s intentions make sense because of the inherent connection between intention and the act of making a constitution, as a speech act. Kavanagh then suggests that going beyond the text subverts the distinction between what has been given force to and what has not: it is only the enacted text that is the relevant speech act.¹¹⁹ However, this seems to overstate the potential of the power of the text to address all problems of interpretation. Some degree of generality is necessary in a constitutional document, in that it cannot explicitly address all possible factual scenarios to which it applies. Looking beyond the text is thus inevitable in some cases, even if a *non liquet* judgement¹²⁰ can be issued in cases of strong

¹¹⁷ Raz (2009), op cit, 321.

¹¹⁸ e.g. the German Code of Criminal Procedure dates from 1877. The main case on the mischief rule of statutory interpretation in the common law dates from the 16th century (*Heydon’s Case* (1584) 76 ER 637, Pasch 26 Eliz).

¹¹⁹ Kavanagh (2002), op cit, 274-275; see also, e.g. Scalia (1998), op cit, 29-30.

¹²⁰ The issue of *non liquet* judgements cannot be addressed here; for recent contributions, see generally, e.g. J. Gardner, ‘Concerning Permissive Sources and Gaps’, 8(3) *OJLS* 457-461 (1988); I. Dekker & W. Wouter, ‘The Completeness of International Law and Hamlet’s Dilemma’, 68(3) *Nordic JIL* 225-247 (1999); E. Bulygin, ‘On Legal Gaps’, *Analisi e Diritto* 21-28 (2002-2003); P. Chiassoni, ‘A Tale of Two Traditions: Civil Law, Common Law, and Legal Gaps’, *Analisi e diritto* 51-74 (2006).

indeterminacy. Kavanagh suggests that it is for the courts to determine the shortfall in constitutional intention and meaning as determinable from the expressed intentions in the text:¹²¹ this goes to the core of the argument about the relationship between democracy and originalism in legal reasoning, in that it highlights the alternatives whereby courts determine the content of the constitution rather than that content being pre-ordained in essentials by the constituent power.

4.3.2 Legal Texts and Corporate or Collective Intention

One of the chief difficulties associated with the attempts to define subjective intention as an aid to interpretation is an attributed epistemic indeterminacy of the collective intent that such interpretation depends on, i.e. the collective intention of the law-maker; Waldron, for example, goes so far as to suggest that “one is surprised to find it appearing again in anything other than a trivial form in respectable academic jurisprudence.”¹²² The argument is made that there are many different motivations and intentions behind legal or constitutional texts, making it impossible to glean an identifiable single intention that might guide interpretation where the text is ambiguous¹²³ or ‘imperfect’.¹²⁴ The objection to this line of reasoning generally is that it goes against our daily social experience of the possibility of shared intention. As with jurisprudence that tends to problematise the practice of interpretation by basing theory on a generalization from hard cases, such criticisms of the viability of corporate intent tend to over-generalise from problematic cases.

It does not seem to follow from the fact that motivations are different that the intentional understanding of the relevant actors of the text that was agreed upon varied from each other, since motivation is not the same thing as intent.¹²⁵ What is necessary for a group or ‘we’ intention is that participants mutually agree

¹²¹ Kavanagh (2002), op cit, 297-298, noting ‘the immense power’ that resulted for judges.

¹²² Waldron (1999), op cit, 119.

¹²³ M. Radin, ‘Statutory Interpretation’, 43(6) *Harvard LR* 863-885 (1930), 869-870. Similarly, see Dworkin (1986), op cit, 336: “... we must worry about how to consolidate individual intentions into a collective, fictitious group intention”; Kavanagh (2002), op cit, 264.

¹²⁴ i.e. not exhaustively specific: Michelman (2003), op cit, 11.; Walker (2008), op cit, 249-250.

¹²⁵ i.e. a group of people may have varied motivations in doing or saying something, but all intend to do or say the same thing.

on a given course of action, not that they had the same motivation for doing so. Diverse private motivation can merge to a shared intention based on discussion, negotiation, or bargaining.¹²⁶ Waldron suggests that the discoverable intention ends with the text,¹²⁷ but this tends to assume that there is almost no discoverable connection between the prior discussion of the text, which seems clearly not the case given that the text is the product of the discussion and debate and there must be a coherent connection between the text and that discussion.

The text is thus primary evidence of intention, but the process of creating the text is likely to display sufficient convergence of purpose and intention to elaborate on the text. The essential objection to the critique of corporate intention then is that it understates the possibility of purposeful coordinated action by a group, and several possible responses are found in the literature. Ekins emphasises the degree of convergence that assemblies seek by arguing that the central case of legislative intent is better understood as similar to the intention of a sole legislator, precisely because what legislatures seek to do is to coordinate their action so as to act like a sole legislature.¹²⁸

In literature on general philosophy,¹²⁹ a broad acceptance exists that the notion of a 'we' or group or collective intention seems necessary to explain coordinated group behaviour.¹³⁰ However, there is a recognition that the idea of a

¹²⁶ See R. Tuomela, 'We-Intentions Revisited', 125(3) *Philosophical Studies* 327-369 (2005), 330-331.

¹²⁷ Waldron (1999), op cit, 142-145.

¹²⁸ R. Ekins, *Legislative Intent and Group Action* (Oxford: M.Phil thesis submitted to Balliol College Oxford University, Nov. 2005), see in particular 77 et seq. See also generally A. Wright, 'For All Intents and Purposes', 154(4) *U Penn LR* 983-1024 (2005-2006), over-viewing theories of collective behaviour and see esp. ibid, n. 28, for defences in US legal literature of the viability of corporate or congressional intent; P. Pettit, 'Collective Persons and Powers', 8(4) *LT* 443-470 (2002), 443 et passim (suggesting that collectives can be considered an intentional subject because of a shared purpose); S. Shapiro, 'Law, Plans, and Practical Reason', 8(4) *LT* 387-441 (2002), 420 (suggesting legal officials engage in jointly intentional activity to achieve a unified system of rules through applying the same tests for validity).

¹²⁹ See, e.g. R. Tuomela, 'We Will Do It: An Analysis of Group-Intentions', 51(2) *Philosophy and Phenomenological Research* 249-277 (1991); J. Searle, 'Collective Intentions and Actions', in PR. Cohen, J. Morgan & ME. Pollack (eds.), *Intentions in Communication* (MIT Press 1990); J. Searle, *The Social Construction of Reality* (The Free Press 1995); Tuomela (2005), op cit; SR. Chant & Z. Ernst, 'Group Intentions as Equilibria', 133(1) *Philosophical Studies* 95-109 (2007); SR. Chant & Z. Ernst, 'Epistemic Conditions for Collective Action', 117 (467) *Mind* 549-573 (2008).

¹³⁰ Chant & Ernst (2007), op cit, 101.

group mind is ‘ontologically suspect’,¹³¹ though not to the same extent as legal literature on legislative intention suggests. In philosophical literature, the different approaches can be broadly categorised as reductive or non-reductive.¹³² Searle offers a non-reductive account whereby each individual in a group coordinating its actions possesses a collective intention; it is non-reductive in not understanding group intention as built from units of individual intention. Individual intentionality is derived from collective intentionality, rather than the reverse:

The crucial element in collective intentionality is a sense of doing (wanting, believing, etc.) something together, and the individual intentionality that each person has is derived from the collective intentionality that they share.¹³³

In criticism, Chant and Ernst argue that this account is overly simple in failing to explain the development of a network of beliefs that ground individual intention related to collective intention.¹³⁴ Reductive accounts relate group or ‘we intentions’ more specifically to individual intentions and ground we or group intention in individual intentions rather than the reverse:

But without a compelling argument in favour of the irreducibility of collective intentions, considerations of parsimony favour an explanation of collective intentions that appeals only to the intentional states of individuals.¹³⁵

Tuomela offers such an account, emphasising the requirement of mutual beliefs amongst the participants in a collective action grounded¹³⁶ on a ‘we’ or group intention, which mutual belief requires a channel of communication or, to use Tuomela’s metaphor, a ‘bulletin board’.¹³⁷ This we intention can be transcribable where a group is represented by an operative member,¹³⁸ and although Tuomela

¹³¹ Ibid, 100.

¹³² Ibid, 97-101.

¹³³ Searle (1995), op cit, 25.

¹³⁴ Ernst & Chant (2007), op cit, 101.

¹³⁵ Ibid, 98.

¹³⁶ See, e.g. Tuomela (1991), op cit, 251-252.

¹³⁷ Tuomela (2005), op cit, 336 et seq.

¹³⁸ Tuomela (1991), op cit, 259.

does not speak specifically of political contexts, it seems clear that representatives of States or lead members of political parties can be understood as such:

In the case of formal and structured groups the leaders' relevant intentional acting (viz., their intentional performance of their parts as parts of the joint action) may suffice to make the joint action intentional (cf. Tuomela, 1984, Chapter 5).¹³⁹

Similarly, Bratmann notes that "In [shared cooperative activity] the fact that there is this mutually uncoerced system of intentions will be in the public domain. It will be a matter of common knowledge among the participants."¹⁴⁰

Ernst & Chant develop on this work to emphasise the interactive character of the knowledge necessary to sustain the possibility of group intention. The possibility of communication between groups is thus central to the formation of group intention,¹⁴¹ and they discuss various scenarios where communication is hampered so as to inhibit the formation of mutual, interactively generated beliefs that enable intentional cooperation among a collective¹⁴² (for example, when elements of risk are factored into decision-making about participating in group action, interactively generated assessment of risk might inhibit cooperation¹⁴³). Transferring this analysis to the context of law-making, the institutionalised nature of the latter process seems ideally suited to the generation of interactive knowledge necessary for the formation of mutually understood and shared intention through the 'bulletin boarding' of intention. It is precisely to generate such knowledge that constituent and legislative assemblies are formed and institutionalised, with structured debates. This can be related more generally to the deliberative character of assemblies.

¹³⁹ Ibid, 261, referring to R. Tuomela, *A Theory of Social Action* (Reidel 1984).

¹⁴⁰ ME. Bratman, 'Shared Intention', 104(1) *Ethics* 97-113 (1993), 335.

¹⁴¹ Ernst & Chant (2008), op cit, 550-552, where they draw on the work of Robert Aumann: R. Aumann 'Interactive Epistemology I: Knowledge', 28(3) *International Journal of Game Theory* 263-300 (1999) and 'Interactive Epistemology II: Probability', 28(3) *International Journal of Game Theory* 310-314 (1999).

¹⁴² Ernst & Chant (2008), op cit, 552-556, 560-569.

¹⁴³ Ibid, 560-564.

The view is sometimes argued that the circumstances of judicial decision-making are more deliberative and reflective, and thus more likely to produce just outcomes, than are legislative debates.¹⁴⁴ Without addressing the issue comprehensively, Waldron's argument seems persuasive in considering that courts are no more deliberative than legislative assemblies. In some respects legislative assemblies are more so: they are larger, more diverse in membership, have access to a broader range of socio-economic data, can debate issues and cross-issues in greater depth and length, and in their committee systems and in bicameral assemblies have double or treble layers of debate and contestation that is at least as deliberative as that of appellate courts.¹⁴⁵ They are thus well-placed for the generation of interactive knowledge whereby participants come to understand each others' motives and intentions so as to enable a shared intention to emerge through mutual understanding and consensus on a course of action. In effect, participants in legislative or constituent assemblies operate in exactly the bulletin boarding conditions needed for a shared intention to emerge. Individual intentions are communicated publicly in order to generate a shared intention reduced to a text.

Transferring this defence of the viability of corporate intention to the context of Treaty negotiation relevant to the EU, the devices of interpretative declarations can especially be the basis for attributing intention to a group of representatives of the Member States.¹⁴⁶ Further, formal statements read into *travaux préparatoires* function similarly. The process of international treaty negotiation or of deliberation in the Council of the EU is broadly comparable to negotiations and debate at a national parliamentary level, with research suggesting that the main differentiating characteristic of intergovernmental negotiations from parliamentary assemblies is the relative lack of transparency of the former.¹⁴⁷ However, this

¹⁴⁴ See, e.g. J. Rawls, *Political Liberalism* (Columbia Univ. Press 1996), 231-236; MJ. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (Yale Univ. Press 1982); cf. Waldron (1999), op cit, 23-24 and, comparing courts to legislatures, 69-87.

¹⁴⁵ See generally Waldron (1999), op cit, 19-117.

¹⁴⁶ I. Cameron, 'Swedish Parliamentary Participation in the Making and Implementation of Treaties', 74(3-4) *Nordic JIL* 429-482 (2005), 435.

¹⁴⁷ K. Goldman, S. Berglund & G. Sjöstedt, *Democracy and Foreign Policy, the Case of Sweden* (Gower 1986), also noting that participants in international negotiations tend not to be directly elected (this is less true of deliberations of the Member States in the Council of Ministers and European Council EU, since all are democratically elected; Article 10(2) TEU explicitly recognises

relates to the access (or lack of it) to the process of outside observers at the time of negotiation, rather than to the epistemic possibility of the participants forming a collective intention.

For example, a Member State can successfully bulletin-board its intended understanding by attaching a declaration to the Treaty. If there are no objecting declarations or statements entered by any other Member State (and it can be assumed that the other Member States' representatives are aware of it, i.e. that there is a 'bulletin board', so there is no absence of knowledge by the other participating Member States who are free to object to a unilateral interpretative declaration through a counter-declaration), so long as the interpretative declaration or statement does not go against the conventional or objective meaning of the Treaty, that declaration could be taken as representing the collective understanding of the Member State representatives. That is the only purpose such a declaration would have, and the conditions for interactive knowledge, through the formal adoption of a declaration, seem very clear. The case for using such interpretative declarations is stronger where they are issued, in the EU, by the Council or European Council collectively, rather than by individual States.

The possibility for shared intentions to inform legal texts, and thus for *travaux préparatoires* to be useful extra-textual gives to interpretation, enhances the possibility for norm conflict resolution. It gives meaning to intentional avoidance of conflict, since this is now a greater epistemic possibility.

of the joint basis of democratic legitimacy of the Council of Ministers and the European Parliament) and that achieving accountability can be difficult; Cameron (2005), *ibid*, 435-436.

4.4 Overview of Practice of the Luxembourg and Strasbourg Courts on Evolutive Interpretation

In this section, the practice of the ECJ as to evidence of original intention is examined. Further, the practice of the European Court of Human Rights is also briefly surveyed, as the Strasbourg Court has a normative influence, which is only like to increase with the imminent accession of the EU to the European Convention on Human Rights (ECHR) under Article 6 TEU as amended by the Lisbon Treaty.

The ECJ does not usually rely on *travaux préparatoires* or seek to unearth original understanding. As noted above, its interpretation, at least in a significant number of substantial constitutional cases, has a prospective, systemic character. In its submissions in the case of *Commission v. Belgium*,¹⁴⁸ the Commission noted that: "...originalist interpretation plays hardly any part in Community law it would be futile to refer to the intentions of the authors of the Treaty".¹⁴⁹ The ECJ has in some cases¹⁵⁰ rejected as irrelevant to its interpretation of secondary legislation any declarations by the Council (as opposed to individual Member States) of the legislation, such as *Reyners v. Belgium*¹⁵¹ and *Cartegena Protocol on Biosafety*.¹⁵² Later in *Antonissen*,¹⁵³ the Court stated that such interpretative declarations could only be accorded legal significance if referred to in the text of the legislative instrument itself, i.e. if formally incorporated by reference (this might be contrasted with its willingness to treat the EU Charter of Fundamental Rights¹⁵⁴ as a source or inspiration in EU law before its incorporation by reference into EU law by the Treaty of Lisbon¹⁵⁵). In *The Queen v. Licensing Authority*,¹⁵⁶ the Court held

¹⁴⁸ Case 149/79, *Commission v. Belgium* [1980] ECR 3881.

¹⁴⁹ *Ibid.*, 3890.

¹⁵⁰ Senden (2004, 374-380).

¹⁵¹ Case 2/74, *Reyners v. Belgium* [1974] ECR 631, 666.

¹⁵² *Opinion 2/00 Re Cartegena Protocol on Biosafety* [2001] ECR I-9713, para. 22.

¹⁵³ Case C-292/89, *ex parte Antonissen* [1991] ECR I-745, paras. 17-18. See, e.g. Case C-329/95, *VAG Sverige* [1997] ECR I-2675, para. 23, and further references in Senden (2004), *op cit.*, 375, n. 60.

¹⁵⁴ OJ C 364/01, 18.12.2000, p. 1.

¹⁵⁵ See, e.g. Case C-540/03, *European Parliament v. Council* [2006] ECR I-5769, where the ECJ accepted the status of the Charter as being 'of importance' (para. 38, see also para. 58) in a case concerning the degree of discretion Member States had pursuant to a directive to limit the right of access of a person to enter the Member States to be with a family member.

¹⁵⁶ Case C-368/96, *The Queen v. Licensing Authority* [1998] ECR I-7967.

that such declarations may be taken into consideration in as much as they serve to clarify a general concept, rather than a particular provision,¹⁵⁷ in a situation where the legislative instrument itself was unclear (here the meaning of ‘essentially similar material product’ was in dispute), even though the legislative instrument did not refer to the declaration.¹⁵⁸

The Court is less willing to refer to the *travaux préparatoires* of the Treaties.¹⁵⁹ However, especially with more recent Treaty amendments, *travaux préparatoires* are now more readily available.¹⁶⁰ Moreover, even the core body of *travaux préparatoires* of the founding treaties have been in a published form since 1960.¹⁶¹ Similarly, the same point is applicable to the use of material from deliberations of the Council in its legislative role, given that Article 16(8) TEU requires states that the Council shall meet in public when it deliberates and votes on a draft legislative act.

The Court’s tendency not to have resort to declarations made by a single Member State is more understandable¹⁶² since such declarations could be understood to lack the democratic implication of endorsement by the Council in general, in that they might be thought just to reflect that particular Member State’s

¹⁵⁷ Though presumably clarifying a general concept might have the effect of also clarifying a particular provision making reference to the general concept.

¹⁵⁸ *Ibid.*, para. 27.

¹⁵⁹ Senden (2004), *op cit.*, 374-380.

¹⁶⁰ The European Convention, which drew up the Treaty establishing a Constitution for Europe, held its deliberations in public and its proceedings were made available online and in printed form. See: < <http://european-convention.eu.int/organisation.asp?lang=EN> > (last accessed 29th January 2009) and G. Amato, H. Bribosia & B. de Witte (eds.), *Genesis and Destiny of the European Constitution: Commentary on the Treaty establishing a Constitution for Europe in the Light of the Travaux Préparatoires and Future Prospects* (Bruylant 2007). Many of the provisions of the Constitutional Treaty are reflected also in the Lisbon Treaty: M. Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’, 45 *CMLRev* 617-703 (2008), 622.

¹⁶¹ S. Neri & H. Sperl (eds.), *Traité Instituant la Communauté Économique Européenne: Travaux préparatoires, déclarations interprétatives des six gouvernements, documents parlementaires* (Cour de Justice Imprint Luxembourg 1960). For recent studies making extensive use of the *travaux préparatoires* of the EEC Treaty (Treaty of Rome), see M. Slotboom, ‘Do Different Treaty Purposes Matter for Treaty Interpretation? The Elimination of Discriminatory Internal Taxes in EC and WTO Law’, 4(3) *JIEL* 557-579 (2001) and M. Slotboom, *Do Different Treaty Purposes Matter for Treaty Interpretation?: A Comparison of WTO and EC Law* (Cameron May 2006) (comparing them to the *travaux préparatoires* of the WTO and concluding that the different object and purpose of the EC and WTO did not make the EC generally stricter in requiring liberalisation); P. Akman, ‘Searching for the Long-Lost Soul of Article 82 EC’, 29(2) *OJLS* 267-303 (2009) (arguing that the *travaux préparatoires* of then Article 82 ECT show the drafters were mainly concerned with enhancing efficiency, rather than a concern to de-concentrate market power).

¹⁶² See, e.g. Case 143/83, *Commission v. Denmark* [1985] ECR 427, para. 12; Joined Cases C-283/94, C-291/94 & C-292/94, *Denkavit* [1996] ECR I-5063, para. 29.

view. Nonetheless, the fact that such a decoration is authored only by one Member State does not mean that it reflects a unilateral understanding that cannot be attributed to the other signatory States. In public international law, objections to reservations are a feature of State practice, although the exact effect of such objections is not settled.¹⁶³ Nonetheless, the absence of any objections to an interpretative declaration or reservation, or any countervailing interpretative declarations, suggests that the reservation or interpretative declaration is not seen by the other signatories as incompatible with the treaty or instrument, since it would make sense for the other States not to risk, by not objecting to, a unilateral declaration skewing the interpretation of a treaty or legal instrument contrary to the expectations or desires of the other States. The ECJ itself recognised the validity of this line of argument in *Kaur*, where it held that an interpretative declaration by the United Kingdom as to the meaning of the term ‘national’ as used in the Treaties should be taken into account in interpreting the Treaty, notwithstanding that other Member States had not explicitly endorsed it¹⁶⁴ (it is a clear example of the generation of interactive knowledge through the kind of ‘bulletin board’ communication identified by Tuomela).

Although as noted in Chapter 1, the ECJ often does not make explicit its interpretative methods or approach, it has occasionally been quite explicit about a developmental, prospective orientation. In *Opinion 1/03 Re Lugano Convention*,¹⁶⁵ the ECJ held that it was not necessary for the areas covered by an international agreement and Community legislation to coincide fully for exclusive Community competence in external relations (i.e. relations with third countries) to arise; that

¹⁶³ The Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, 8 ILM 679, is silent on the use of interpretative declarations: see International Law Commission, *Yearbook of the International Law Commission 1993*, A/CN.4/SER.A/1993/Add.1, Vol. II, Part 2 (1993), paras. 427-430, 440. In the recent *Thirteenth Report on Reservations to Treaties*, A/CN.4/600, 20th May 2008, paras. 310-315, *Special Rapporteur* Allain Pellet argued that silence from other States could not automatically be taken to justify an inference of approval, but such approval could be inferred on a case-by-case basis on the rationale of good faith (the latter being reflected in Article 45 of the Vienna Convention on the Law of Treaties): relying mainly on F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (TMC Asser Institute 1988), 244. In an EU context, it seems easier to assume the existence of good faith and mutual trust between the parties more than is the case in international law generally.

¹⁶⁴ Case C-192/99, *Kaur* [2001] ECR I-1237, paras. 23-24. Another situation is if the declaration in question relates to a matter that is peculiar to that Member State, in which case the declaration is obviously more relevant as a statement of recognition of that Member State’s acceptance of the measure that is peculiarly applicable to it.

¹⁶⁵ [2006] ECR I-1145.

where the test of ‘an area which is already covered to a large extent by Community rules’ is to be applied, the assessment must be based not only on the scope of the rules in question, but also on their nature and content; and that it “is also necessary to take into account not only the current state of Community law in the area in question *but also its future development, insofar as that is foreseeable at the time of that analysis*”¹⁶⁶ (emphasis added). The approach here is to envisage future development of the law as a basis for enhancing Union competence, rather than the reverse. This might be taken as a good example of a linear narrative of increased future integration informing interpretation. This contrasts to the WTO, which, as Pauwelyn suggests, is “not the proverbial cyclist who needs to move on (i.e., further liberalise) in order to survive”.¹⁶⁷ The approach of the ECJ, at least in a case such as *Lugano*, tends to assume ever-increasing integration, almost independently of authoritative acts by the constituent power in the form of the Member States.

Schilling has been amongst the strongest critics of the implicit assumption by the ECJ of a role for itself, in effect, as a constituent power in the Communities by asserting the autonomy of the Communities compared to general international law. In the latter, the Westphalian principle conceives of States as the decision unit and of State sovereignty as normatively key to legal development. In contrast, the autonomy claim of the ECJ concerning the nature of the Communities “[t]he single most far-reaching, and probably most disputed, principle of the European Community... its claim to a legal order autonomous from Member State law”.¹⁶⁸ In Schilling’s view, the Communities are logically a creature of the public international law faculty of the Member States and thus cannot be severed from public international law by judicial conceptualisation.¹⁶⁹

¹⁶⁶ *Ibid*, paras. 124-126.

¹⁶⁷ Pauwelyn (2003), *op cit*, 398.

¹⁶⁸ Schilling (1996), *op cit*; Case 6/64, *Costa v. ENEL*, *supra* n. 17, where the ECJ described the EEC Treaty as creating a ‘new legal order’ that was ‘by contrast with ordinary international treaties’ (at 593) and that the transfer of sovereignty to the Communities as ‘permanent’ (at 594). The claim to the autonomy of the Community from public international law also surfaced strongly in the ECJ judgment in Joined Cases C-402/05 P and C-415/05 P, *Kadi and al Barakaat International Foundation v. Council* [2008] ECR I-6351, para. 316.

¹⁶⁹ Schilling (1996), *op cit*, 404-410, suggesting the EU has at most derivative autonomy in so far as powers were conferred by the Member States.

As mentioned, it is also useful here to refer to interpretation by the European Court of Human Rights, given that the EU is shortly to accede to the European Convention on Human Rights (ECHR).¹⁷⁰ This will in effect make the Strasbourg equivalent to a final court of appeal on human rights matters concerning EU law, and there is a clear possibility of divergence in the interpretation of the ECHR by the ECJ and ECHR, especially given the possibility that the EU Charter on Fundamental rights may differ from the ECHR.¹⁷¹ In its interpretation of the ECHR, the European Court of Human Rights Court has at times endorsed a ‘living tree’ or evolutive approach to interpretation, which may be thought to indicate, in conjunction with the ECJ, a normative trend toward a European judicial consensus against conserving interpretation. However, the latter view risks treating as normative the mere fact that an evolutive interpretation has, at times, been adopted by both courts. Moreover, the practice of the Strasbourg court is not uniform in this respect. As there are minority or dissenting opinions in its judgements, some debate has taken place within its judgements about this issue,¹⁷² and there are differences between Strasbourg cases. In *Soering v. UK*,¹⁷³ the European Court of Human Rights refused to adopt an evolutive interpretation of Article 3 of the ECHR so as to encompass the death penalty within the concept of ‘cruel and degrading treatment and punishment’, on the basis that a Protocol on the abolition of the death penalty had been adopted by some of the State parties.¹⁷⁴

Merrills observes, even though agreeing that evolutive interpretation of the ECHR may be sometimes justified, that the evidence of the intentions of the authors or contracting States of the ECHR must be of relevance to interpreting the Convention unless the organs of the Council of Europe are to be understood as having “absolute legislative autonomy” independent of the contracting States

¹⁷⁰ ETS no. 05. EU accession is provided for in Article 6(2) TEU.

¹⁷¹ The EU Charter was itself inspired by the ECHR (as noted in the Preamble to the Charter and by the ECJ in Case C-540/03, *European Parliament v. Council*, supra n 155, para. 38), so the room for conflict may not be all that great, but certainly does exist to some extent. This is further discussed in Chapter 5 below. See generally, A. Torres Pérez, *Conflicts of Rights in the European Union* (Oxford Univ. Press 2009).

¹⁷² See discussion in D. Nicol, ‘Original Intent and the European Convention on Human Rights’, 152-172 *PL* (2005) (although Nicol argues in favour of an evolutive approach); see also the dissenting judgements in *Golder v. UK* (1975) 1 EHRR 524 and *Tyler v. UK* (1978) 2 EHRR 1, especially of Judge Fitzmaurice.

¹⁷³ A 161 (1989).

¹⁷⁴ This is comparable to the approach of the ECJ in Case C-13/94, *P. v. S. and Cornwall County Council* [1996] ECR I-2143 on the issue of same-sex rights.

whose agreement is the basis of the legitimacy of the ECHR.¹⁷⁵ This echoes Schilling's criticism of the much stronger autonomy characterisation of the Communities preferred by the ECJ. In several cases, the *travaux préparatoires* of Convention provisions have been used by the European Court of Human Rights to clarify issues left ambiguous by the text.¹⁷⁶ These variations in approach in the Strasbourg jurisprudence, as with variations within ECJ caselaw discussed above, raise the underlying normative justification for evolutive versus conserving interpretation and suggest that evolutive interpretation has not achieved a natural or inevitable status within the Strasbourg caselaw.

4.5 Case Study – Caselaw Doctrine on Non-Discriminatory Obstacles

It was the combination of the two doctrines of direct effect and supremacy with the preliminary reference system that allowed the creation of a new legal system with such far-reaching consequences for the Member States, a constellation that one author describes as a “magic triangle”.¹⁷⁷ The three combined empowered ordinary private litigants as well as powerful corporate actors to pursue policies against their own national governments in the hope that they would find support in EU law, thus using private self-interest as a foil for reducing the power and autonomy of the Member States. This is most easily illustrated with reference to caselaw on free movement.¹⁷⁸

¹⁷⁵ JG. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester Univ. Press 2nd ed., 1993), 90-91.

¹⁷⁶ e.g. *James & Ors v. UK*, Series A, no. 98, para. 64, referring to the *travaux préparatoires* of Article 1 of Protocol No. 1, ETS no. 09, to determine that the phrase ‘the general principles of international law’ were not meant to be applied to nationals; *Kjeldson and Ors v. Denmark (Danish Sex Education)*, (1979–80) 1 EHRR 711, para. 50, referring to the *travaux préparatoires* of Article 2 of the same Protocol to determine that it applied to State as well as private schools (see further references in Merrills (1993), op cit, 90-97).

¹⁷⁷ A. Vauchez, ‘Embedded Law. Political Sociology of the European Community of Law: Elements of a Renewed Research Agenda’, *EUI Working Paper 2007/23* (2007), 8.

¹⁷⁸ Generally, for an analysis of the values underpinning free movement caselaw and ECJ decision-making, see MP. Maduro, *We the Court: the European Court of Justice and the European Economic Constitution* (Hart Publishing 1997). Maduro sets out to provide the kind of second-order justification for the Court's caselaw under Article 28 ECT (now Article 34 TFEU) on free movement of goods, that is lacking from the formal reasoning of the Court. In this field, Maduro conceives of the Court's role as a source of ‘majoritarian activism’, that is, as intending to achieve Community-wide harmonisation at national level, and not just de-regulation. The Court is understood as pitted against national administrations, rather than against a democratically elected EU-wide parliamentary body (ibid, 2, 11, 25, 58, citing e.g. Case C-18/88 *Régie des Télégraphes et des Téléphones v. GB-Inno-BM SA* [1991] ECR 5941 and generally ibid, Chapter 3). This

In *Dassonville*¹⁷⁹ and *Cassis de Dijon*,¹⁸⁰ the ECJ went beyond its previous caselaw to hold that non-discriminatory obstacles to free movement were contrary to the Treaty. Until that point, it was understood that only discriminatory rules in this regard were contrary to the Treaties. *Dassonville* gave a very broad scope to the free movement principle, since almost any diversity in national laws could be interpreted at a conceptual level as an inhibition on free movement. In both *Dassonville* and *Cassis de Dijon*, the ECJ invoked primarily the idea of the effectiveness of Community law. The relevant Treaty text here was somewhat ambiguous and tended to invite a consequentialist approach; Article 30 EEC Treaty (now Article 35 TFEU) prohibited quantitative restrictions on imports from one Member State to another and also *measures having equivalent effects*:

Article 30

Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.

Article 31

Member States shall refrain from introducing between themselves any new quantitative restrictions or measures having equivalent effect.

This obligation shall, however, relate only to the degree of liberalisation attained in pursuance of the decisions of the Council of the Organisation for European Economic Co-operation of 14 January 1955. Member States shall supply the Commission, not later than six months after the entry into force of this Treaty, with lists of the products liberalised by them in pursuance of these decisions. These lists shall be consolidated between Member States.

description reconfigures the traditional ‘counter-majoritarian’ critique of judicial activism in the context of constitutional review, in that the ECJ is represented as acting for a Community or Union-wide majority interest national difference or recalcitrance: “The conclusion to be drawn is that what is taking place in the Court is a kind of Community legislative process, with the Court trying to harmonise national rules in accordance with an ‘ideally drafted’ representation of all States’ interests” (ibid, 78). This seems implicitly to be an essentially output-oriented conception of legitimacy.

¹⁷⁹ Case 8/74, *Procureur du Roi v. Dassonville*, supra n. 86, paras. 5-9.

¹⁸⁰ Case 120/78, *Rewe-Zentrale AG (Cassis de Dijon)* [1979] ECR 649, paras. 8-14.

Adopting a brief, declaratory style of judgement (characteristic of the French judicial system¹⁸¹), the ECJ stated:

5. All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.¹⁸²

In *Cassis*, the judgement is framed in similarly consequentialist terms.¹⁸³

Given the limited textual guidance, the Court's reasoning here might seem not so open to criticism for departing from textual constraints, because the text itself refers to an extra-textual standard of 'equivalent effects'. However, the ECJ did not seek to recover the original intention of the Member States, for example, as to the meaning of what was an ambiguous provision. In the face of ambiguity, more or less restrained approaches are always possible. The judgement adopts the widest possible interpretation of 'measures having an effect equivalent to quantitative restrictions', whereas it could have confined it to discriminatory rules, and have left it to the Member States to fashion a broader rule.

The Court rowed back on the expansive effect of *Dassonville*¹⁸⁴ in *Keck*,¹⁸⁵ but only in holding that trading arrangements did not fall within the scope of Community free movement rules (although *Keck* could possibly be construed as creative in that there was no textual basis for singling out trading arrangements in this way).¹⁸⁶ The ECJ did not in *Keck* refer to this absence of explicit textual support, rather it was explicitly consequentialist in noting the effects of the wide interpretation in *Dassonville*:

¹⁸¹ Lasser (2004), op cit, 103-115.

¹⁸² Case 8/74, *Dassonville*, supra n. 86, para. 5. Applying this principle to free movement of workers and service providers, see Case C-415/93, *Union Royale Belge des Sociétés de Football Association v. Bosman* [1995] ECR I-4921, para. 103.

¹⁸³ Case 120/78, *Cassis de Dijon*, supra n. 180, para. 14.

¹⁸⁴ Case 8/74, *Dassonville*, supra n. 86.

¹⁸⁵ Case C-267/91, *Keck and Mithouard* [1993] ECR I-6097.

¹⁸⁶ This was to ensure that national Sunday trading rules were not brought within the scope of free movement.

In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.¹⁸⁷

Barnard describes the wide reading in *Dassonville* in the following:

The potential breadth of the so-called *Dassonville* formula is striking. In principle, measures having only an indirect, potential effect on trade fall within its scope and therefore breach Article 28. *Dassonville* therefore tends to support a reading of Article 28 as the basis for an economic constitution for the EU...¹⁸⁸

Did the Member States originally intend this? Did they signpost or bulletin board an understanding that reflects this or a different understanding? A reading of the *travaux préparatoires* suggests that the ECJ went further than the Member States intended in their use of the term ‘quantitative restrictions’ or ‘measures of equivalent effect’. These terms were used in what were then Articles 30 and 31 EEC Treaty. Some *travaux préparatoires* have been published for both of them (somewhat more material on Article 31). On Article 30, during the drafting process, the term ‘quantitative restrictions’ was substituted for ‘quotas’, in order that outright bans on imports would also be captured by the provision.¹⁸⁹ This change would seem redundant if the term ‘measures of equivalent effect’ were to mean any obstacle to market access. So the Member States in agreeing the text were concerned to avoid a very narrow interpretation that would permit bans, which seems to exclude the possibility that they intended an interpretation that is so wide as to encompass any obstacle to market access.

It was the Italian delegation that suggested adding the expression ‘or measures of equivalent effect’, though no additional comments of explanation were added in the *travaux préparatoires* on what the phrase meant. This seems to

¹⁸⁷ Ibid, para. 14.

¹⁸⁸ C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford Univ. Press 2007), 92.

¹⁸⁹ Neri & Sperl (eds.) (1960), op cit, 79. In French, ‘contingentements’ was replaced with ‘restrictions quantitatives’.

suggest it was not intended to elaborate or extend the meaning in a fundamental way, rather it was there to copper-fasten the idea of ‘quantitative restrictions’ and avoid a narrow interpretation that would exclude something as closely analogous to a quantitative restriction as a ban.¹⁹⁰ Nonetheless, there is some ambiguity still as to what exactly could be a ‘measure of equivalent effect’.

The *travaux préparatoires* for Article 31 EEC Treaty, and also the text itself of Article 31, tend to confirm a narrower original intention than is found in the *Dassonville* formula. Article 31 EEC Treaty prohibited new ‘quantitative restrictions’ and ‘measures of equivalent effect’. However, it expressly states that the obligation only applied to the level or degree of liberalisation achieved within the framework of the decision of the Council of the Organisation for European Economic Cooperation (OEEC)¹⁹¹ at the date of 14th January 1955. This reference to a particular level of liberalisation and to its consolidation is also redundant on the *Dassonville* formula, since *Dassonville* equates quantitative restrictions and measures of equivalent effect as encompassing any obstacles to market access, which is beyond a particular level of liberalisation and requires more or less requires absolute liberalisation. In the *travaux préparatoires*, it was formally stated by the drafting committee that Article 31 was concerned with consolidating the level of liberalisation achieved in the OEEC and that a further question was a re-examination of greater liberalisation beyond this level.¹⁹² Further, during the discussion, two lines of thought emerged: a consolidation of the level of liberalisation within the OEEC (supported by France and Italy) and a consolidation by list of products (supported by Germany and the Netherlands).¹⁹³

The French delegation supported by Luxembourg suggested removing all reference to the OEEC, which would possibly point to a broader reading of

¹⁹⁰ Ibid.

¹⁹¹ The OEEC was founded in 1948 in order to distribute US aid to Europe under the Marshall Plan. Its role became less important in the 1950s as the North Atlantic Treaty Organisation (NATO) and the European Communities were formed, and it was eventually superseded by the Organisation for Economic Cooperation and Development (OECD), established by the Convention on the OECD, 888 UNTS 180 (signed 14th December 1960). The OECD came into being in 1961. See Web site of the OECD: <
http://www.oecd.org/document/48/0,3343,en_2649_201185_1876912_1_1_1_1,00.html > (last accessed 28th March 2010).

¹⁹² Ibid, 80.

¹⁹³ Ibid.

quantitative restrictions and measures of equivalent effect than the specific level achieved within the framework of the OEEC,¹⁹⁴ but this was not eventually adopted. The German delegation expressly stated that unanimity existed on consolidating the level of liberalisation achieved within the OEEC and that differences existed on whether the point of departure should be existing liberalisation achieved or the liberalisation envisaged by the decision of the Council of the OEEC of 14th January 1955.¹⁹⁵ The text eventually adopted was a reconciliation or joining of a French proposal to prohibit new restrictions *simpliciter* and an Italian proposal to confine liberalisation during the transitional period to that envisaged in the decision of the Council of the OEEC of 14th January 1955.¹⁹⁶ Thus, in the final text adopted, the Member States were required to not introduce new quantitative restrictions or measures of equivalent effect, but this was stated in the text of Article 31 itself not to create an obligation beyond that contained in the decision of the Council of the OEEC of 14th January 1955.

In summary, it seems an absolute prohibition on all trading rules amounting to an obstacle on market access was not envisaged under either Article 30 or Article 31, especially when read together. Both use the same expressions ‘quantitative restrictions’ and ‘measures of equivalent effect’, which were the basis of the decision in *Dassonville*. This is confirmed by the reference in Article 31 to a list of products being notified to the Commission, a provision that the rather absolute, all-encompassing formula in *Dassonville* renders redundant. It seems that relatively little consideration was given by the drafters to the possibility of a very broad reading of Article 30 in isolation from Article 31, but they could certainly have done more to ‘bulletin board’ their intention. Rather the drafters were concerned about the opposite possibility of a literalistic interpretation that would permit outright bans if the term ‘quota’ was used; they understood ‘quantitative restrictions’ and ‘measures having equivalent effect’ to refer to the specific level of liberalisation achieved within the OEEC. They were, perhaps, unwise in not considering the possibility of a very wide reading, but one of the reasons for this may be because they considered such a reading of Article 30 was clearly not

¹⁹⁴ Ibid.

¹⁹⁵ Ibid, 81.

¹⁹⁶ Ibid, 82.

consistent with the specific level of liberalisation achieved within the context of the OEEC as stated on the face of Article 31.

The danger of potential over-breadth as a result of the *Dassonville* formula has by now been well noted in the literature.¹⁹⁷ The ECJ itself, unusually, took this on board to the extent of expressly overruling itself in *Keck*.¹⁹⁸ However, as Maduro has noted, “The Court has never clearly addressed the issue of which interests should be balanced”.¹⁹⁹ *Keck* was motivated by a desire to avoid a conflict of norms, which conflict became inevitable given the potentially breadth of *Dassonville* as a ground for invalidating diversity in national law. The approach of the ECJ, however, glossed over the articulation of conflict and its implicit demand for a careful normative unpacking of choice, instead the ECJ typically favoured of the narrow, internal logic of enhancing the effectiveness of the common market as the some constitutional value, without regard to the sensitive constitutional dynamic of how common market overreach impacted upon the competences and faculties of the Member States in ways that they did not seem to intend or endorse. Though the ECJ retreated in *Keck*, it did not modify its dominant conceptual apparatus and narrow normative perspective of the common market as almost the only political value worth articulating in its caselaw. *Keck* was framed in purely pragmatic or consequentialist terms, not as a decision calling for a more refined and articulated conception of constituent power.²⁰⁰

¹⁹⁷ Slotboom (2006), op cit, 110.

¹⁹⁸ Case C-267/91, *Keck and Mithouard*, supra n. 185, paras. 14-16.

¹⁹⁹ Maduro (1997), op cit, 54. He further suggested that *Keck* was influenced by both a concern to reduce the Court’s caseload and by “the increasing academic and even judicial criticism of the activism and the functional approach of the Court”: *ibid*, 88. In addition, Maduro further noted the degree of integration attained and the move to qualified majority in the Council as factors prompting the ECJ to reduce its assertiveness: *ibid*, 99-100.

²⁰⁰ Case C-267/91, *Keck and Mithouard*, supra n. 185, para. 17.

4.6 An Overview of Norm Conflict in Caselaw and Legal Reasoning of the ECJ

4.6.1 Introduction:

The following part of the chapter surveys caselaw of the ECJ on norm conflict. This initial section, 4.6.1, makes some introductory comments. The next section, 4.6.2, looks at the explicit articulation of conflicts or divergences of interpretative norms by the ECJ. Section 4.6.3 examines the explicit articulation of conflicts of substantive norms by the ECJ. Section 4.6.4 overviews major constitutionalising decisions of the ECJ to analyse them from the perspective of norm conflict, while section 4.6.5 examines caselaw on free movement. Finally, section 4.6.6 looks at cases of conflict between different linguistic versions of norms.

The central role of the ECJ in the furthering of integration has been widely acknowledged in the literature, with Shaw commenting that it “can hardly be denied by lawyers”.²⁰¹ More recently, Weatherill referred to “the (admittedly not entirely inaccurate) caricature of the European Court as driven to act audaciously in a manner apt to expand its influence and with it that of the other institutions of the European Community”. Weatherill further noted that the decision in *Tobacco Advertising* judgement,²⁰² for example, was “out of line with the caricature of the Court as (manically) pro-integrative”.²⁰³ Some commentators argue that the ECJ is mischaracterised if just described as a teleologically oriented court in its interpretation.²⁰⁴ However, what does appear to distinguish it is a tendency toward

²⁰¹ J. Shaw, ‘European Union Legal Studies in Crisis? Towards a New Dynamic’, 16(2) *OJLS* 231-253 (1996), 7; Stone Sweet (2004), op cit; J-M. Josselin & A. Marciano, ‘How the Court Made a Federation of the EU’, 2(1) *RIO* 59-75 (2006).

²⁰² Case C-376/98, *Germany v. Parliament and Council* [2000] ECR I-8419, where the Court of Justice held that a ban on advertising was not within the internal market competence of the Community (in the context that the Community competence on public health did not provide a sufficient legal basis for it). The case is important as an example of restrained interpretation because it reflects the principle of *lex specialis* applied to questions of competence, as further discussed in Chapter 6 below.

²⁰³ See SR. Weatherill, ‘Activism and Restraint in the European Court of Justice’, in P. Capps, M. Evans & S. Konstadinidis (eds.), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing 2003), 255, 271.

²⁰⁴ See, e.g. Albers-Llorens (1999), op cit; O. Spiermann, ‘The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order’, 10(4) *EJIL* 763-789 (1999).

meta-teleological interpretation, as described by Lasser:²⁰⁵ more than other courts, the ECJ engages in a purposive interpretation that understands purpose at a high, systemic level of generality, which tends to favour enhanced integration.²⁰⁶ The ECJ relatively rarely expressly articulates the interpretative method it adopts, to explain why it has chosen one competing interpretative norm over another. *Tobacco Advertising* is an example, where the Court did not note the *lex generalis-lex specialis* distinction implicit in its reasoning (see further Chapter 6 below).

This tendency and its contrast with the style of adjudication of another international judicial tribunal, the Appellate Body of the WTO, were well brought out by Ehlermann, a chairperson of the WTO Appellate Body and also a Community law specialist:

42. According to Article 31.1 of the Vienna Convention, “a Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Among these three criteria, the Appellate Body has certainly attached the greatest weight to the first, i.e. “the ordinary meaning of the terms of the treaty.” This is easily illustrated by the frequent references in Appellate Body reports to dictionaries, in particular to the Shorter Oxford dictionary, which, in the words of certain critical observers, has become “one of the covered agreements”. The second criterion, i.e. “context” has less weight than the first, but is certainly more often used and relied upon than the third, i.e. “object and purpose”.

43. For somebody having spent most of his professional life observing the European Court of Justice in interpreting European Community law, the difference in style and methodology could hardly be more radical. I do not remember that the EC Court of Justice has ever laid down openly and clearly the rules of interpretation that it intended to follow. What I do remember is that among the interpretative criteria effectively used by the EC Court of Justice, the predominant criterion was – and probably still is – “object and purpose”. While the Appellate Body clearly privileges “literal”

²⁰⁵ Lasser (2004), op cit, 231.

²⁰⁶ Bredimas (1986), op cit, 561.

interpretation, the EC Court of Justice is a protagonist of ‘teleological’ interpretation.

44. Only in one respect, the approach of the Appellate Body and that of the European Court of Justice converge. Both attribute little importance to the “preparatory work of the Treaty” (Article 32 of the Vienna Convention). However, the motives are probably not the same. For the Appellate Body, the low value of the negotiating history results from the secondary rank attributed to this criterion by the Vienna Convention, the lack of reliable records, and the ambiguities resulting from the presence of contradictory statements of the negotiating parties. For the European Court of Justice, the reasons are probably a mixture of deliberate choice and technical difficulties in determining the intentions of the authors of the text to be interpreted. ...

47 ...This choice has given clear guidance to members of the WTO and to panels....The heavy reliance on the “ordinary meaning to be given to the terms of the treaty” has protected the Appellate Body from criticisms that its reports have added to or diminished the rights and obligations provided in the covered agreements (Article 3.2, third sentence, DSU). On a more general level, the interpretative method, established and clearly announced by the Appellate Body, has had a legitimising effect, and this from the very beginning of its activity.²⁰⁷

In this passage, Ehlermann relates interpretative legitimacy to a close textual reading and, in particular, the application of textual interpretation in priority over purposive or teleological interpretation, which as he notes, is the opposite of the approach the ECJ. In effect, the ECJ tends to invert the priority²⁰⁸ established in Article 31 of the Vienna Convention on the Law of Treaties,²⁰⁹ which sets out the general rules governing interpretation in international law. This is a generalisation about the method of interpretation of the ECJ, and it does not always hold true, but

²⁰⁷ C-D. Ehlermann, ‘Some Personal Experiences as Member of the Appellate Body of the WTO’, *Robert Schuman Centre Policy Paper No. 02/9* (2002), paras. 42-47.

²⁰⁸ Comment by Prof. Francis Snyder, 6th International Workshop for Young Scholars (WISH): Evolution of the Community Courts, University College Dublin, 16th November 2007. See also PJ. Kuijper, ‘The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969’, 25(1) *LIEI* 1-24 (1998), suggesting that the ECJ does not follow the order of priority in Article 31 Vienna Convention on the Law of Treaties 1969, 115 UNTS 331; Slotboom (2006), op cit, 94.

²⁰⁹ *Ibid.*

as the following section seeks to demonstrate, many of the important decisions of the ECJ do tend to reflect a broad, systemic or predominantly meta-teleological and thus relatively creative approach.

The passage from Ehlermann also effectively invokes the contrasting substantive values that underlie different approaches to interpretation. A narrower textual approach is associated with input legitimacy, with democracy, with a separation of powers in the sense of a clearly defined judicial role of applying found law, not creating new law. Systemic interpretation can be related to a conception of output legitimacy, with outcomes that fit with the purposes of a system. The more controversial, and under-articulated, issue is exactly how to characterise purpose, i.e. at what level of generality to characterise it and how to justify the value choices implicit in varying the level of generality chosen. In this sense, linking systemic, purposive interpretation to outcome legitimacy creates a regress of questions as to what exactly constitutes a good outcome and how this is to be decided. Originalism finds the answer in the constituent power.

4.6.2 Some General Comments on Conflict of Interpretative Norms in ECJ Caselaw:

The early Opinions of Advocate General Lagrange²¹⁰ and of Advocate General Roemer were somewhat more explicit than the ECJ itself often is on matters of interpretation. These Opinions could be said to have set the scene for the Court's emphasis on teleological interpretation and its general eschewal of historical or originalist interpretation whereby interpretation is linked to the understanding of the Member States' representatives at the time of adoption of Community or now Union laws. Advocate General Lagrange in *France v. High Authority* stated that the approach of reading one Treaty provision in light of the Treaty overall "is always legitimate"²¹¹ and in *Fédération Charbonnière Belgique v. High Authority*

²¹⁰ See generally, R. Greaves, 'Selected Opinions Delivered by Advocate General Lagrange', 6 *CYELS* 83-103 (2003-2004).

²¹¹ Case 1/54, *France v. High Authority of the European Coal and Steel Community* [1954-1955] ECR 1, at 26. Advocate General LaGrange referred to the 'ultimate aim of beginning to unite

suggested that the ECJ may refer to *travaux préparatoires*, but had no obligation to do so;²¹² in contrast, an originalist approach to interpretation would give stronger weight to such material. Advocate General Roemer's suggestion, in *Commission v. Luxembourg and Belgium*, that factors outside of the Treaty could not be decisive²¹³ might be understood to tilt toward a more conserving, less creative approach. However, if the spirit of the Treaty and its objectives writ large are considered part of the Treaty, this may not represent a strong constraining factor. As Pauwelyn observes:

If the judge decides nonetheless to create his or her own conflict rule, he or she is, moreover, unlikely to do so openly. A judge would then rather cover this solution under the all-embracing approach of, for example, 'teleological interpretation'.²¹⁴

Where the ECJ is explicit about questions of interpretation, it tends to avoid any statement of hierarchy between the different techniques; in particular, it tends to avoid attributing any priority to ordinary textual meaning. Consistently with this, it generally does not articulate that differing interpretative approaches reflects different underlying substantive values or can produce different results. For example, in *CILFIT*, it stated:

Every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.²¹⁵

Europe', but on the specific scenario of the case identified the Treaty aim as 'ensuring the establishment, maintenance and observance of normal competitive conditions': *ibid.*

²¹² Opinion of Advocate General Lagrange in Case 8/55, *Fédération Charbonnière Belgique v. High Authority* [1954–1956] ECR 260, at 271. See also Opinion of Advocate General Roemer in Case 6/54, *Netherlands v. High Authority* [1954–1956] ECR 118, at 125–6.

²¹³ Case 3/62, *Commission v. Luxembourg and Belgium* [1964] ECR 625, at 640, giving as an example, *inter alia*, the Spaak report outlining the process for establishing a common market; Advocate General Roemer suggested that referring to extraneous material such as this would render interpretation less objective. He did not refer to the issue of *travaux préparatoires* as an interpretative source.

²¹⁴ Pauwelyn (2003), *op cit*, 420.

²¹⁵ Case 283/81, *CILFIT v. Ministry of Health* [1982] ECR 3415, para. 20.

In this passage, the emphasis is on context and object and purpose, with the additional implication that interpretation may be evolutive. The ECJ does not note here that objects and purposes understood evolutively might depart from the intentions of the Member States, if *specific* original intention, such as evidenced by *travaux préparatoires*, is invoked (rather than Dworkin's abstract conception of original intention as a type of delegation).

Similarly, in cases where the ECJ does emphasis the text more or does even adopt a historical interpretation, it generally tends not to make any general normative statement of interpretative preference that might be a useful guide for other cases. In *UPA*,²¹⁶ the ECJ observed that "... an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts". This seems to give priority to express textual meaning on the grounds of a separation of powers, but this general point is not quite stated explicitly. The inarticulacy in the caselaw is perhaps strategic. Failing to make explicit interpretative assumptions makes inconsistency less readily apparent, thus facilitating judicial choice and discretion. Greater articulacy on these matters would represent a type of judicial accountability by increasing the burden of persuasion when different cases take inconsistent approaches to the question of delimiting substantive norms in a variable way by varying the interpretative norms applied. In contrast, the framework of norm conflict calls attention to and requires justification for the variable choice of applicable norms.

In its very first reported decision, the statements of the ECJ on interpretation suggested a more conserving approach:

It is not for the Court to express a view as to the desirability of the methods laid down by the Treaty, or to suggest a revision of the Treaty, but it is bound in accordance with Article 31, to ensure that [in] the interpretation and application of the Treaty as it stands the law is observed.²¹⁷

²¹⁶ Case C-50/00, *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677, para. 44, which concerned the attempted annulment of a Regulation and the issue of grounds for standing in an annulment action under Article 173 EC Treaty.

²¹⁷ Case 1/54, *France v. High Authority*, supra n. 211, at 13.

Here, interpretation is implicitly contrasted with Treaty revision. The review of caselaw below suggests that this implicitly more conserving approach has often been superseded by more expansive teleological interpretation, though sometimes originalist interpretation does still feature in the Court's reasoning. In the more recent case of *Kaur*, for example, the Court indicated it would attribute a meaning to a Treaty provision in accordance with the intention of the Member States at the time of its adoption as indicated by a Declaration attached to the Treaty by the UK, which is contrary to the suggestion of evolutive interpretation in *CILFIT* above:

23. Although unilateral, this declaration annexed to the Final Act was intended to clarify an issue of particular importance for the other Contracting Parties, namely delimiting the scope *rationae personae* of the Community provisions which were the subject of the Accession Treaty. It was intended to define the United Kingdom nationals who would benefit from those provisions and, in particular, from the provisions relating to the free movement of persons. The other Contracting Parties were fully aware of its content and the conditions of accession were determined on that basis.

24. It follows that the 1972 Declaration must be taken into consideration as an instrument relating to the Treaty for the purpose of its interpretation and, more particularly, for determining the scope of the Treaty *rationae personae*.²¹⁸

This is implicitly originalist and in sharp contrast with many of the 'constitutionalising' decisions of the ECJ, but the Court does not attempt to justify nor even mention such differences.

4.6.3 Explicit Articulation of Substantive Norm Conflict by the ECJ:

For the most part, the issue of substantive norm conflicts seems also relatively under-articulated by the ECJ.²¹⁹ The following excerpt from the Opinion of

²¹⁸ Case C-192/99, *Kaur* [2001] ECR I-1237, paras. 23-24.

²¹⁹ e.g. in Joined Cases C-231-233/06, *National Pensions Office v. Jonkman and Another* [2007] ECR I-5149), at 662-663, a preliminary reference was phrased in terms of conflict of norms between national law and Union law. The ECJ answered without explicitly referring to 'conflict of

Advocate General Mayras in *International Fruit Company*²²⁰ both well articulates the problem of norm conflict and underscores the extent to which it is understudied generally in law:

Moreover, at the time when the European Economic Community was created, the member-States were already bound by juridical links, either bilateral links with certain countries, or multilateral links, particularly in the framework of the General Agreement on Tariffs and Trade (GATT).

In what way have these obligations been affected by the Treaty of Rome and by the derived Community law? How, if conflicts arise, can they be resolved? Can nationals of the Common Market meaningfully invoke, in challenging certain Community acts, the alleged violation of certain provisions of GATT?...

One aspect is that the conflict of norms can arise in the relations between the Community and one or more non-member States over an agreement binding the Community as a contracting party. In such a case, we do not see that the dispute can be brought before you. In fact, the solution of conflicts of this kind depends on modes of regulation under general international law, most frequently by negotiation, conciliation or arbitration....

That is why Article 234 (2) provides that, in so far as prior agreements are not compatible with the Treaty of Rome, the member-States must employ all appropriate means to eliminate the incompatibilities noted, that is, by negotiating to this effect, and, where necessary, must have recourse to the traditional procedure for regulating conflicts of international law; in case of

norms' (as did Advocate General Kokott in his Opinion), apart from noting the requirement for national law to be compatible with Community law and dis-applied if not: *ibid*, at 679-680. The facts concerned a claim for historic discrimination in a pension scheme for air hostesses compared to air stewards. The case also concerned a practical consequence of a conflict of norms entailing dis-application of a national norm, namely, the duty to compensate the party at a loss due to a failure to enforce Community law. In previous cases, the ECJ has been willing to limit the temporal effect of equality provisions so as not to prevent a serious risk of economic repercussions arising from the large numbers of potential claimants involved: e.g. Case 43/75, *Defrenne v. Sabena* ('*Defrenne II*'), at paras. 69-75. The Advocate General in *Jonkman* (*ibid*, at 672) referred to the issue of a prospective ruling, but observed that no evidence of such economic repercussions were presented, while the ECJ did not refer to this point.

²²⁰ Cases 21-24/72, *International Fruit Company NV. & Ors. v. Produktschap voor Groenten en Fruit* (No. 3) [1972] ECR 1219.

need, these States must render one another assistance with a view to attaining this goal, by adopting, where necessary, a common attitude.²²¹

Here, the Advocate General makes the problem of conflict very explicit, but sees it as a matter for political cooperation between States, rather than one to which legal reasoning might at least make some contribution. This perhaps just reflects the language and tenor of (ex) Article 234(2) EEC Treaty²²² to which he refers, but more generally the legally cognisable intentions of the parties and *lex specialis* are both *legal* concepts, tools of legal reasoning, that can contribute to the process of norm conflict resolution. In its brief judgement, the ECJ held it did have jurisdiction under the preliminary reference system to test the compatibility of a Community law with an international treaty to which the Community was bound, but that the relevant international treaty provisions, Article XI of the General Agreement on Trade and Tariffs,²²³ were not self-executing and could not be invoked in court given the particular means of dispute resolution provided for²²⁴ (essentially the matter was non-justiciable).

More recently in *Panayotova*,²²⁵ the Advocate General Maduro adverted to conflict of norms as a concept in the context of the compatibility of a Dutch law with EU law. The Advocate General first noted the general doctrine that both secondary Union law and national law should be interpreted to be compatible in so far as possible with (other) EU law, restating the well established doctrine of indirect effect, but noted that this cannot extend to interpretation *contra legem*:

[Consistent interpretation] is a rule that maximises the useful effect of Community law and minimises potential conflicts with national law. It must not however prejudice legal certainty and it must respect the autonomy of national courts in the interpretation of national law. Although the Court is the interpreter of Community law, it is not the interpreter of national law. When the Court considers national law, it has to abide by the interpretation

²²¹ Ibid, at 6, 11, 14 respectively. See generally Klabbers (2009), op cit

²²² Later Article 307 ECT, now Article 351 TFEU.

²²³ 1947, 55 UNTS 187.

²²⁴ Ibid, at 23.

²²⁵ Case C-327/02, *Panayotova and Others v. Minister Voor Vreemdelingenzaken en Integratie* [2004] ECR I-11055, concerning the right of establishment resulting from EU Association Agreements with Bulgaria, Poland, and Slovakia.

provided by the national court. In this case, it is very clear from the reference for a preliminary ruling and also from the written and oral observations submitted on behalf of the Netherlands Government that the Netherlands legislation cannot be interpreted along the lines proposed by the Commission. In other words, it could only be rendered compatible with the Association Agreements through *contra legem* interpretation. This means that the conflict of norms is unavoidable and the national judge must set aside the conflicting national norm. Moreover, to leave such a norm in force could lead to problems of uniformity and administrative practice. (references omitted)²²⁶

Though this passage recognises that there are conceptual limits to how far interpretation can go without contravening the law being interpreted, these limits are not identified in the Opinion, while the ECJ in its judgment did not address the issue. A narrow view of *contra legem* interpretation would equate it with a flat-out contradiction of textual meaning. Apart from this, for example, how far can evolutive interpretation go before being *contra legem*? The argument advanced above in this chapter is that conserving interpretation is generally epistemically possible and fits better with rule of law values (the legal certainty adverted to by the ECJ in the above passage) and, in particular, democracy. On this argument, evolutive interpretation in general, though stopping short of flat-out contradiction of a legal text, could be considered *contra legem* to some degree.

The term ‘conflict of norms’ or ‘norm conflict’ tends to be avoided in the caselaw.²²⁷ This might be thought an insignificant matter of terminology, in that issues of compatibility, whether compatibility between laws or between actions and the law, are inherent in all cases, and the term ‘incompatibility’ thus captures norm conflict too. However, ‘conflict of norms’ has a stronger connotation and intension than ‘incompatibility’; ‘conflict of norms’ emphasises the *prima facie* valid character of the norms, and the need to choose between competing norms, in a way that the looser term ‘incompatibility’ does not. This points to a greater need

²²⁶ Opinion of Advocate General Maduro, 19th February 2004, at para. 81.

²²⁷ The survey above was based on a search for the terms ‘conflict of norms’ or ‘norm conflict’ in the Westlaw database of ECJ judgement. ‘Conflict(s) of norms’ produced four results, norm conflict produced no results.

for justification²²⁸ in legal reasoning, since what is involved is a matter of refusing to apply a norm that in general may be valid.²²⁹ Looser language can downplay this need for justification, and this fits with the general tendency to a declaratory, magisterial style of the ECJ (though to a lesser extent than the French judicial style),²³⁰ in contrast to a more dialectical approach to justification.

4.6.4 Norm Conflict and ‘Constitutionalising’ the Community/Union:

This section examines some of the leading cases of the ECJ that have helped to create a constitutional structure for the EU through the lens or framework of conflict of norms. Caselaw on fundamental rights and on competence (in the narrow sense²³¹) are not included, as they are addressed in Chapter 5 and Chapter 6 respectively.

Though the major ECJ cases ‘constitutionalising’ the Communities, by which is meant those decisions that have contributed to the institutional edifice and structure of the EU in contrast to substantive law,²³² presented a potent context of norm conflict, impinging as they did on the constitutional sovereignty of the

²²⁸ See Chapter 1.1 above; R. Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (trans. by R. Adler & N. MacCormick) (Clarendon Press 1989), 221 et seq.; N. MacCormick, ‘Argumentation and Interpretation in Law’, 6(1) *RJ* 16-29 (1993), 100-101; Bengoetxea (1993), op cit, 130 et seq 159-160.

²²⁹ Pauwelyn distinguished between 1) illegality and invalidity, the latter meaning a norm is void or of no effect in a fundamental sense or *ab initio*; 2) breach of a competence norm, and 3) breach of *ius cogens* being the two situations of invalidity. Illegality entails a conflict of norms in which one norm renders another illegal, but not in the same fundamental sense, e.g. an *inter se* amendment of a multilateral treaty, which is prohibited by that treaty. See Pauwelyn (2003), op cit, 275-326. Pauwelyn classifies both of these as inherent normative conflicts, in contrast to conflicts in the applicable law, where one law prevails, rather than any illegality attaching to either norm: see *ibid*, 327 et seq.

²³⁰ Lasser (2004), op cit, 317. Generally, see N. MacCormick, *Rhetoric and the Rule of Law* (Oxford Univ. Press 2005), 20; E. Feteris, ‘A Dialogical Theory of Legal Discussions: Pragmadiological Analysis and Evaluation of Legal Argumentation’, 8(2-3) *Article Int. and L* 115-135 (2000), 118-119 et seq. In an EU context, see H. Rasmussen, ‘Between Activism and Self-Restraint: A Judicial Policy for the European Court’, 13 *ELR* 28-39 (1988), 34-35; S. Berteau, ‘The Arguments from Coherence: Analysis and Evaluation’, 25(3) *OJLS* 369-391 (2005), 388-389; V. Perju, ‘Reason and Authority in the European Court of Justice’, 49(2) *Virginia JIL* (2009), 310.

²³¹ Virtually all caselaw could be interpreted as loosely connected with the question of competence, since most cases test the legality of a particular action by somebody and could be articulated in terms of whether legal power or competence existed to do what was done (or not to do what should have been done in the event of a failure to perform a duty). See further Chapter 6 below.

²³² See further the discussion of the meaning of ‘constitutional’ in Chapter 1.

Member States, the general issue of norm conflict tended not to be confronted. The first of these judgements was *Van Gend en Loos*,²³³ where the ECJ held that Community law had direct effect in the legal systems of the Member States. This was not obviously supported by the wording of the Treaty, which appeared to only attribute such effect to Regulations.²³⁴ The tendency of the ECJ to invert the priority of wording over purpose and context is apparent from the statement in *Van Gend* that: “To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of these provisions”.²³⁵ On the wording of the relevant Treaty provisions, the ECJ observed:

The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of States which would make its implementation conditional upon positive legislative measure enacted under national law.²³⁶

So to infer the existence of a doctrine of direct effect, it was not necessary that the text contained an explicit statement, rather it was enough that the text did not explicitly exclude it.²³⁷ Hartley noted that the doctrine of direct effect could only find textual Treaty support in relation to Regulations, and that the law-making character of the holding in *Van Gend en Loos*²³⁸ of a general Community law principle of direct effect was implicitly recognized by the decision to give a

²³³ Case 26/62, *Van Gend en Loos*, supra n. 16, which concerned the requirement in (ex) Article 12 EEC Treaty that Member States refrain from increasing customs duties on imports from other Member States. Advocate General Roemer considered that only certain provisions, based on their wording, could have direct effects and did not think Article 12 did as it was addressed to the Member States: *ibid*, 23-24. The ECJ has adopted this approach itself in refusing to consider that Directives may have horizontal direct effect, on the ground that the Treaty provision, (ex) Article 189 (Article 288 TFEU), on Directives addresses them to the Member States: see Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority ('Marshall I')* [1986] ECR 723, para. 48; Case C-91/92, *Faccini Dori v. Recreb* [1994] ECR I-3325, para. 20.

²³⁴ See E. Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’, 75(1) *AJIL* 1-27 (1981), 7. The issue was somewhat confused because the Court used the term ‘direct effect’ in contrast with ‘direct applicability’ as used by the Treaty in relation to Regulations.

²³⁵ Case 26/62, *Van Gend*, supra n. 16, at 12.

²³⁶ *Ibid*, 13.

²³⁷ Hartley (1996), *op cit*, 96-98. Defending the ECJ, essentially on grounds of output legitimacy, see A. Arnall, ‘The European Court and Judicial Objectivity: A Reply to Professor Hartley’, 112 *LQR* 411-423 (1996), 415-416.

²³⁸ Case 26/62, supra n. 16.

prospective ruling later in the case of *Defrenne v. SABENA*, where the doctrine was applied to the equal pay principle.²³⁹

In *Van Gend*, the ECJ seemed to suggest direct effect applied to negative obligations,²⁴⁰ but later in *Lütticke*,²⁴¹ the Court held that (ex) Article 95 EEC Treaty (now Article 110 TFEU) had direct effect even though it imposed a positive obligation to remove discriminatory internal taxes on imports:

The first paragraph of Article 95 contains a prohibition against discrimination, constituting a clear and unconditional obligation. With the exception of the third paragraph this obligation is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member States. This prohibition is therefore complete, legally perfect and consequently capable of producing direct effects on the legal relationships between the Member States and persons within their jurisdiction. The fact that this article describes the Member States as being subject to the obligation of non-discrimination does not imply that individuals cannot benefit from it.²⁴²

Here again it was enough that the text did not explicitly rule out direct effect for the ECJ to extend the direct effect doctrine, but further, the significance of the wording of the text in being expressly directed to the Member States was side-stepped with the brief observation that it did not imply the exclusion of direct effect. The effect was to create a situation of norm conflict between a national rule and a Community rule that was invocable before a court of a Member State by an ordinary citizen. This distinguished Community from general international law which traditionally considered that only States could be subjects and thus litigants who could invoke norms of international law before a court.²⁴³ This is not so much a case of direct conflict between Community and international law, but of

²³⁹ Case 43/75, '*Defrenne II*', supra n. 219.

²⁴⁰ As noted in Stein (1981), op cit, 10.

²⁴¹ Case 57/65, *Lütticke GmbH v. Hauptzollamt Saarlouis* [1966] ECR 205.

²⁴² Ibid, 210.

²⁴³ See generally, e.g. R. Higgins, *Problems and Process* (Oxford Univ. Press 1994), 39-56; C. Leben, 'Hans Kelsen and the Advancement of International Law', 9(2) *EJIL* 287-305 (1998).

accumulation:²⁴⁴ Community law supplemented the limitations of international law on this point.

The direct effect doctrine was later further extended in *Walrave & Koch* by rendering it applicable to cases between private individuals, i.e. where the violation of Community law was by an individual ('horizontal direct effect'),²⁴⁵ with the ECJ doing so again in relation to a Treaty provision that was explicitly addressed to the Member States.²⁴⁶ Here, the ECJ did not make reference at all to the text, but to consequences and effectiveness, arguing that Community law would be less effective and unequal in application in the absence of such direct effect being applied to a body, a sporting association, which did not have standing in public law:

18. The abolition as between the Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3(c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations which do not come under public law.

19. Since, moreover, working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibition in question to acts of a public authority would risk creating inequality in their application.²⁴⁷

The ECJ did not address, for example, whether it would be possible to achieve effective and equal implementation of the Community obligation in question by holding the Member States to be subject for an action for a failure to implement Community law, as a procedural rule, instead of permitting the direct liability of

²⁴⁴ On accumulation, see Pauwelyn (2003), op cit, 161-164, 212-236 direct effect can be seen as an example of contracting out of general international law.

²⁴⁵ See Case 36/74, *Walrave & Koch v. Association Union Cycliste Internationale*, supra n. 83, taken against a private bicycle association. See also Case C-415/93, *Bosman*, supra n. 182, taken against a sporting association.

²⁴⁶ In Case 43/75, '*Defrenne II*', supra n. 219, the ECJ held (ex) Article 119 of the EEC Treaty on equal pay for equal work to have direct effect.

²⁴⁷ Case 36/74, *Walrave & Koch*, supra n. 83, at paras. 18-19.

private entities. Thus, alternative rulings that may have been more consistent with the text were not addressed; in its judgement, the ECJ did not make explicit the role of a text in interpretation and thus of conflict or of accumulation between the text and its conclusion.

What Stein described as the most radical extension of direct effect came in *Franz Grad*,²⁴⁸ where the ECJ broadened it to cover secondary legislation, and not just Treaty provisions. The ECJ made two major arguments: first, the effectiveness of binding measures would be impaired in the absence of direct effect; and, second, the preliminary reference procedure implied individuals could exercise their rights in national courts.²⁴⁹ The judgement here involved a Decision, whereas only Regulations appeared to be attributed with such effect under the Treaty.²⁵⁰ The ECJ addressed this point, noting that the express attribution of direct applicability to regulations did not mean that other measures did not have such effect.²⁵¹ This approach clearly tends to downplay the significance of specific textual rules,²⁵² avoiding “the customarily accepted discipline of endeavouring by textual analysis to ascertain the meaning of the language of the relevant provision”.²⁵³

What really gave the direct effect doctrine its significance was its combination with a new principle of the supremacy of Community law over that of all the Member States, first set out in *Costa v. ENEL*.²⁵⁴ This decision similarly resulted in a doctrine of fundamental significance, without explicit Treaty support, and is one that at its core entails a conflict of norms.²⁵⁵ However, the Treaty of

²⁴⁸ Case 9/70, [1970] ECR 825.

²⁴⁹ Ibid, paras. 5-6.

²⁵⁰ See Stein (1981), op cit, 20.

²⁵¹ Case 9/70, *Franz Grad v. Finanzamt Traunstein* [1970] ECR 825, para. 5.

²⁵² The interpretative maxim *expressio unius est exclusio alterius* could be invoked in favour of a contrary conclusion.

²⁵³ Neill (1995), op cit, 47.

²⁵⁴ Case 6/64, *Costa v. ENEL*, supra n. 17.

²⁵⁵ The ECJ did not use the expression conflict of norms, but Advocate General Mazák has done so recently as regards *Costa v. ENEL* in his Opinion in Case C-02/08, *Amministrazione delle Economia e delle Finanze and Agenzia delle entrate v. Fallimento Olimpiclub Srl*, judgment of 24th March 2009, where he observed in footnote 17:

It should be noted that the resolution of a conflict of norms on the basis of that principle [i.e. supremacy or primacy] may generally prove to be less straightforward in cases where the application of Community law is indirectly hampered by the national procedural and institutional framework than in cases where, for example, Community law collides directly with a substantive rule of national law.

Rome had not actually explicitly addressed the issue of the relationship between Community law and that of the Member States, which might tend to support the view that the ECJ inevitably had to exercise a degree of discretion. In favour of a more limited interpretation, however, it may be argued that a departure as significant as the supremacy doctrine compared to general international law was not intended by the Member States.²⁵⁶ In *Costa*, the Court had sought some textual support by suggesting that the express provisions on derogation from the Treaty carried the implication that they alone were the means by which Member States could deviate from Community law and that a supremacy doctrine could be thus inferred.²⁵⁷ However, this seems not a necessary inference, as many international treaties contain explicit derogation rules without purporting to establish a supremacy claim.²⁵⁸

In a later judgment, the Court confirmed that Community law takes precedence over all national including constitutional law, relying on an argument as to effectiveness and what could be described as a structural, rather than textual, principle of uniformity²⁵⁹:

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law....Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either

²⁵⁶ This assumes that such a legal proposition of fundamental importance would not generally be left implicit by the authors of the legal text. See generally, e.g. L. Claus, 'Implication and the Concept of a Constitution', 69(11) *ALJ* 887-904 (1995), distinguishing between a 'definitive document approach' to constitutional interpretation under which what is expressly enumerated is considered exhaustive of constitutional meaning, and an 'illustrative approach' that considers the document to reflect broader unwritten principles (ibid, 887-888). Claus observes a definitive document approach can be related to popular or democratic will: ibid, 889.

²⁵⁷ e.g. Article 15 of the ECHR..

²⁵⁸ Case 6/64, *Costa v. ENEL*, supra n. 17, 594. The ECJ made no reference to the *travaux préparatoires*, which seem to suggest that only Regulations should have supremacy: see Neri & Sperl (eds.), op cit, 383-386.

²⁵⁹ Similarly, a structural appeal to the uniformity of Community law was given as the justification for the decision in *Foto-Frost* that the jurisdiction of the ECJ to give preliminary rulings the EEC Treaty was exclusive in nature, despite being only expressly exclusive under the ECSC Treaty: Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para. 15. For criticism, see, e.g. A. Barav, 'The European Court of Justice and the Use of Judicial Discretion', in O. Wiklund (ed.), *Judicial Discretion in European Perspective* (2003), op cit, 139.

fundamental rights as formulated by the Constitution of that State or the principles of national constitutional structure.²⁶⁰

Here, the ECJ invoked an absolute *lex superior* principle for Community law. Given the profound constitutional implications, the reasoning is disappointingly short. The ECJ did not attempt to explain how the supremacy principle could be related to the authority of the Member States as constituent power by justifying such a far-reaching conclusion in the absence of explicit textual support. It is hard to sustain the conclusion of such a far-reaching conflict rule as an absolute supremacy doctrine if Member State intention and authority are to be taken seriously. As Weiler wryly noted:

In 1957, neither the doctrine of direct effect nor the doctrine of supremacy had emerged. If they were nascent, as the Court later claimed, they were certainly very well hidden, and the introduction of these concepts involved a series of daring acts of judicial activism.²⁶¹

The Court further entrenched the supremacy principle at a procedural level, holding in *Simmenthal* that a national court was required to dis-apply any national legislation that conflicted with Community law and should not wait before making a preliminary reference to the ECJ:

The effectiveness of [the preliminary reference procedure] would be impaired if the national court were prevented from forthwith applying Community law in accordance with the decision or the caselaw of the Court.²⁶²

Again, the ECJ did not discuss in *Simmenthal* any argument concerning the need for explicit textual support for interpretation: the reasoning was purely consequentialist or effectiveness-based. Pure consequentialism in legal reasoning always tends to open up the question (essentially un-addressed by the ECJ) of why the judiciary are best placed to assess what is desirable as a consequence and how

²⁶⁰ Case 11/70, *International Handlungsgesellschaft* [1970] ECR 1125, para. 3.

²⁶¹ JHH. Weiler, 'Eurocracy and Distrust', 61(3) *Washington LR* 1103-1142 (1986), 1112-1113.

²⁶² Case 106/77, *Simmenthal*, *supra* n. 84, para. 20 and see also para. 18.

such reasoning is any different in substance to ordinary practical reasoning or political decision-making.

There was no Treaty basis for the Court's original human rights jurisprudence,²⁶³ and the Court itself even held later that the Community did not have the power to ratify the European Convention on Human Rights (ECHR),²⁶⁴ but it is widely accepted that the ECJ was motivated primarily by a desire to support the supremacy doctrine against human challenges. This prompted some of the sharpest criticism of the ECJ in academic literature, with Coppel & O'Neill pointing out this aspect of the Court's motivation and accusing it of instrumentalising human rights protection for the purpose of advancing integration.²⁶⁵ More recently, the decision of the Court in *Mangold*²⁶⁶ that a ban on age discrimination could be considered a general principle of EU law has been sharply attacked by Roman Herzog,²⁶⁷ a former President of Germany and also former President of the German Federal Constitutional Court, as an example of unacceptable methods of interpretation. In its judgment, the ECJ stated that various international instruments and the constitutional traditions common to the Member States supported its conclusion.²⁶⁸ Herzog & Gerken, however, observed that (in much less restrained language than appears in most academic literature):

... this 'general principle of community law' was a fabrication. In only two of the then 25 member states – namely Finland and Portugal – is there any reference to a ban on age discrimination, and in not one international treaty is there any mention at all of there being such a ban.²⁶⁹

²⁶³ Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419; Case 4/73, *Nold v Commission* [1974] ECR 491. And see, generally, P. Alston (ed.), *Human Rights and the EU* (Oxford Univ. Press 1998).

²⁶⁴ In *Opinion 2/94 (Accession of the Community to the European Convention on Human Rights)* [1996] ECR I-1759.

²⁶⁵ J. Coppel & A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', 29 *CMLRev* 669-692 (1992). This is discussed further in Chapter 5.2 below.

²⁶⁶ Case C-144/04, *Mangold v. Helm* [2005] ECR I-9981.

²⁶⁷ Co-authoring with Lüder Gerken: '[Comment] Stop the European Court of Justice', *EU Observer.com*, 10th September 2008: < <http://euobserver.com/9/26714> > (last accessed 21st July 2010).

²⁶⁸ Case C-144/04, *Mangold*, supra n. 266, paras. 74-75.

²⁶⁹ Herzog & Gerken (2008), op cit.

A prohibition on discrimination on grounds of age had been included in Article II-81 of the Treaty establishing a Constitution for Europe,²⁷⁰ which has of course not been ratified, a fact that tends to confirm the relative novelty of the Court's conclusion.

The ECJ also developed the doctrine of State liability in the absence of an explicit basis in the Treaties. In *Francovich*,²⁷¹ the ECJ invoked primarily the effectiveness of Community law and the principle of loyal cooperation in support its decisions.²⁷² Although these principles are certainly not inconsistent with the doctrine of State liability, equally they do not necessarily entail it.²⁷³ In *Brasserie*,²⁷⁴ the ECJ supplemented its reasoning by suggesting that many national legal systems the essentials of the legal rules governing state liability have been developed by the courts;²⁷⁵ however, in the EU, doctrines of State liability were more often established by statute.²⁷⁶ More recently, the ECJ has extended the State liability principle to encompass liability for the decision of the highest courts of the Member States.²⁷⁷

In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply *a fortiori* in the Community legal order . . .

The Court went on to refer to the principle of the effectiveness of the remedies.²⁷⁸ Two issues seem to be posed by this: the political and empirical nature of

²⁷⁰ Treaty Establishing a Constitution for Europe, Brussels, 29th October 2004, CIG 87/2/04 REV 2. Article 21 of the EU Charter on Fundamental Rights also contained a prohibition on discrimination on grounds of age.

²⁷¹ Cases C-6/90 & 9/90, *Francovich*, supra n. 85.

²⁷² *Ibid*, paras. 33 and 36 respectively.

²⁷³ The difference between loose and tight coherence is discussed in Chapter 1, drawing on L. Alexander & K. Kress, 'Against Legal Principles', in A. Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press 1995), 313-314.

²⁷⁴ Cases C-46 & C-48/93, *Brasserie du Pêcheur*, supra n. 85, para. 57.

²⁷⁵ *Ibid*, paras. 29-30.

²⁷⁶ See further Chapter 6 below.

²⁷⁷ Case C-224/01, *Köbler*, supra n. 85.

²⁷⁸ *Ibid*, paras. 33-34.

effectiveness as a criterion of interpretation,²⁷⁹ and thus the difficulty in conceptualising its limits; and secondly, the justification for the analogy with international law in the context that the ECJ is more typically at pains to distinguish the Community legal order from general international law, starting with *Van Gend en Loos* and *Costa v. ENEL*.²⁸⁰ Here, a convergence of EU law with international law norms helped justify a novel ruling, whereas in other cases the asserted novelty of the Community order has been invoked to justify novel conclusions.

Thus, norm conflict in an EU context has a bi-directional character and dynamic: EU law looks both toward public international law and national law. The potential de-legitimising effect of a conflict of norms between national and Union law can be re-balanced in favour of Union law through compatibility with general international law (see further Chapter 4 below). More provocatively perhaps, it might be argued that the ability to justify new rules of law on either the contrasting bases of likeness with or difference from general international law, of converging or diverging norms in EU law relative to international law, seems potentially to open up a large area of judicial discretion.

4.6.5 Free Movement Caselaw:

The development of the free movement principle to cover non-discriminatory obstacles to free movement has been discussed above, where it was argued that the ECJ in *Dassonville* seems to have gone beyond original intention in its interpretation, though there was at least some textual ambiguity in Article 30 EEC Treaty read on its own. Another clear example of extra-textual, consequentialist reasoning by the ECJ was the creation of exceptions to the prohibition on non-discriminatory or indistinctly applicable measures, the latter itself being a development of the Court rather than of the Treaty. The Treaties themselves provide for exceptions to the free movement principles, which the ECJ

²⁷⁹ Also F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools, and Techniques', 56(1) *MLR* 19-54 (1993), 24, 56.

²⁸⁰ Case 26/62, *Van Gend en Loos*, supra n. 16, at 12, and Case 6/64, *Costa v. ENEL*, supra n. 17, at 593.

supplemented with its caselaw. Pauwelyn considers exceptions to rules to be outside the scope of norm conflict theory: exceptions carve out a new rule.²⁸¹ On the approach in the present work, exceptions do fall within norm conflict theory because they give rise to the application of differing possible interpretative norms.

In *Bachmann*, for example, the ECJ held that national rules allowing the deductibility from income tax of various insurance and pension contributions only if the contributions were paid in Belgium could be justified to ensure the cohesion of the tax system, since the Belgian authorities could not be sure of the tax regulations of other countries and compliance with them.²⁸² The ECJ did not examine the text of (ex) Article 48 ECT (now Article 45 TFEU) on the free movement of workers and the express exceptions it creates to the free movement principle.²⁸³ It did not bring this justification within the textually based categories or grounds of public policy, public security or public health, which it could quite easily have done given the open-ended nature of the latter. In *Gebhard*, the ECJ affirmed that its caselaw created exceptions beyond those in the Treaty:

37. It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663, paragraph 32).

In *Kraus v. Land Baden-Wuerttemberg*, the ECJ had held that (ex) Articles 48 and 52 of the EEC Treaty must be interpreted as meaning that they do not preclude a Member State from prohibiting one of its own nationals, who holds a postgraduate academic title awarded in another Member State, from using that title on its territory without having obtained an administrative authorization for that purpose, provided that the authorization procedure is intended solely to verify

²⁸¹ See, e.g. Pauwelyn (2003), op cit, 163, 414.

²⁸² Case C-204/90, *Bachmann v. Belgium* [1992] ECR I-249.

²⁸³ *Ibid*, paras. 26-29.

whether the postgraduate academic title was properly awarded, that the procedure is easily accessible and does not call for the payment of excessive administrative fees, that any refusal of authorization is capable of being subject to proceedings, that the person concerned is able to ascertain the reasons for the decision, and that the penalties prescribed for non-compliance with the authorization procedure are not disproportionate to the gravity of the offence.²⁸⁴ The Court thus held that the need to protect a public that will not necessarily be alerted to the abuse of academic titles constituted a legitimate interest such as to justify a restriction of the fundamental freedoms guaranteed by the Treaty.²⁸⁵

In the above passage from *Gebhard*, the ECJ refers to paragraph 32 of *Von Kraus*, which itself refers to *Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris*.²⁸⁶ The *Thieffry* case was applying principles relating to the recognition of educational qualifications in the context of freedom of establishment, for which the Treaty provides for the enactment of secondary legislation, but which had not been adopted at the time of the facts in that case; in *Gebhard* the ECJ generalised from the approach in *Thieffry* and went considerably beyond in specifying criteria for the acceptability in general of exceptions to free movement, i.e. exceptions other than the Treaty-based exceptions. In *Thieffry*, the ECJ was filling in a legal gap in so far as secondary legislation has not been adopted even though required by the Treaty as to the mutual recognition of professional qualifications of the self-employed.²⁸⁷ In contrast, in *Gebhard*, it simply supplemented the Treaties. By establishing a category of justified restrictions outside the Treaty-based categories, the ECJ was establishing an alternative set of criteria to that established in secondary legislation²⁸⁸ for the application of the Treaty-based exceptions.

²⁸⁴ Case C-19/92, *Kraus v. Land Baden-Wuerttemberg* [1993] ECR I-1663, para. 42.

²⁸⁵ *Ibid*, para. 35.

²⁸⁶ Case 71/76, *Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765.

²⁸⁷ See *ibid*, paras. 8-9, concerning (ex) Article 52(1) EEC Treaty.

²⁸⁸ Now consolidated in Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 29.04.2004, OJ L 158, 30.4.2004, pp. 77-123, Articles 27-33. These criteria are quite strict. For example, they may be invoked to serve economic ends (contrast Case C-204/90, *Bachmann*, *supra* n. 282) (Article 27(1)) and the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, such that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted (Article 27(2)).

The willingness of the ECJ to recognise this caselaw-based category of exception can be seen as a counter-example to the view that ECJ is always or consistently pro-integration in its approach. On the other hand, the creation of such exceptions could have been considered inevitable as a *quid pro quo* in order to induce the Member States to accept the very broad definition of the scope of Community law on free movement in *Dassonville*. What the broad reading of free movement in *Dassonville* and the creation of caselaw-based exceptions to free movement do is to create a situation of conflict between incommensurable values: free movement versus, e.g. the coherence of a national tax system or educational system. The weighing of incommensurable values in this way essentially involves balancing. The Court tends not to articulate this question of degree or of weight very explicitly. Balancing as a tool of norm conflict resolution is further examined in Chapter 4 below. Overall, the effect of the broad reading in *Dassonville* and the caselaw exceptions being subject to a balancing test is, on a critical reading, to hugely enhance the jurisdiction and thus potential power of the ECJ itself: virtually any divergences in national law are conceptually within the *Dassonville* formula, while the Court then granted itself a (largely discretionary, if the determinacy of ‘balancing’ is assessed sceptically) power to exempt national rules from its newly expanded jurisdiction.

4.6.6 Linguistic Conflict of Norms:

As discussed in Chapter 1, considerable potential exists in EU law for linguistic conflicts of norms. This arises from the fact that EU laws are drafted and translated into all the official languages. Progress can be made in avoiding conflict between different legal traditions through adopting ‘autonomous’ EU law concepts, much as the European Court of Human Rights has recognised under the ECHR. These are free-standing concepts in the sense that they do not depend on the use of the term in national legal traditions, their definition is a matter of transnational law.²⁸⁹ Nonetheless, it would seem implausible to divorce their meaning fully from the

²⁸⁹ See generally G. Letsas, ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’, 15(2) *EJIL* 279-305 (2004); G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford Univ. Press 2007), chap 2., adopting a Dworkinian constructivist account of adjudication by the European Court of Human Rights.

legal systems of the Member States, rather they are not determined by the national law of any Member States or particular Member State as a matter of a ‘margin of appreciation’ accorded to Member or Contracting States, but autonomous concepts necessarily seem to be an abstraction of a concept that plausibly can be applied to any legal system of a Member or Contracting State. They are thus to an extent an abstraction from the laws of the Member States, but without being tied in a specific way to any of those laws in particular.

In contrast, the construction of an entirely new lexicon would be less likely to reflect predictability, accessibility, and thus legitimacy of the law.²⁹⁰ As an example of a typical or classic autonomous concept under the ECHR, Dijk et al give Article 6(1) and its reference to ‘the determination of a civil right or obligation’ or a ‘criminal charge’, which the Strasbourg Court has interpreted independently of national qualifications of proceedings as, for example, administrative in nature (a classification found in civil law systems that is distinguishable from a classification as criminal or penal).²⁹¹ The ECJ has invoked the idea of autonomous concepts in several cases, for example, concerning the terms ‘management’ and ‘disability’ in Directives.²⁹²

The need for definition and thus translation of autonomous norms, however, means the possibility of linguistic divergence or conflict represents itself. Maduro suggests that textual ambiguity resulting from linguistic norm pluralism²⁹³

²⁹⁰ See the Dissenting Opinion of Judge Matscher, *Özturk v. Germany* [1984] 6 EHRR 409: “... autonomous classification ... must never go too far – otherwise there is a danger of arriving at an abstract qualification which may be philosophically valid, but which has no basis in law” and the discussion in Letsas (2004), op cit, 286-292. Letsas argues that disagreement makes discretion inevitable in adjudication. However, a practical question for this view is how extensive disagreement is. Convergence and agreement can be taken as far as they will go, leaving disagreement a more marginal feature of law; Letsas tends to mainstream disagreement as characteristic of law in general.

²⁹¹ P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Martinus Nijhoff 1998), 77-79, citing, *inter alia*, *Engel & Ors v. The Netherlands*, judgement of 8th June 1976, Series A no. 22, p. 34; [1976] I EHRR 647.

²⁹² e.g. Case C-169/04, *Abbey National Plc. v. Commissioners of Customs and Excise* [2006] ECR I-4027, the term ‘management’ (at para. 38); Case C-13/05, *Chacón Navas v. Eurest Colectividades SA* [2006] ECR I-6467, the concept of ‘disability’, linking the idea of autonomous concepts to uniformity (at paras. 39-42).

²⁹³ See A. Arnull, *The European Union and its Court of Justice* (Oxford Univ. Press 2nd ed. 2006), 607-608, citing Case 283/81, *CILFIT*, supra n. 215, paras. 17-20, identifying three problems of interpretation to be borne in mind with EU law: multi-lingualism, the terminology particular to Community law, and the need to interpret all provisions of Community law in light of the Treaty as a whole.

justifies the teleological interpretation of the ECJ.²⁹⁴ However, linguistic variation where it exists does not inevitably entail a failure of textual interpretation. Few if any of the more creative decisions of the ECJ are strongly or significantly related to linguistic variations in the different language texts, and the issue is quite rarely discussed in judgements.²⁹⁵ A tendency to generalise in favour of more creative, teleological interpretation in the face of variations in different language versions of a legal text raises obvious questions of certainty and predictability in the law. This line of thinking can be debunked if it is applied in reverse to the question of citizen's adherence to the law when that law is found in linguistically diverse sources. Should citizens be entitled to refuse a textual interpretation of the law and thus to circumvent liability? There is a kind of epistemological asymmetry in the argument that linguistic variations can have a general impact on judicial interpretation, while at the same time citizens throughout the Member States are called to uniformly²⁹⁶ adhere to EU law and judgements in various languages.²⁹⁷

²⁹⁴ Similarly, see recently F. Jacobs, 'Approaches to Interpretation in a Plurilingual Legal System', in M. Hoskins & W. Robinson (eds.), *A True European: Essays for Judge David Edward* (Hart Publishing 2003), 304. See generally, K. McAuliffe, 'Enlargement at the European Court of Justice: Law, Language and Translation', 14(6) *ELJ* 806-818 (2008); E. Ioriatti, 'Linguistic Dynamics of European Integration: The Role of the European Court of Justice', *Paper presented at 4th annual Summer School on Comparative Constitutional Adjudication (CoCoA)*, University of Trento, Italy, August 2009.

²⁹⁵ For example, in Cases C-187/01 & 385/01, *Gözütok and Brügger* [2001] ECR I-1345, the Advocate General (ibid, para. 110) argued that differences in translation justified resort to more purposive interpretation, but the ECJ did not decide on this basis. Differences of translation have sometimes been of practical significance, e.g. the different language versions of (ex) Article 81 EC Treaty varied between suggesting that application of the Article depended upon trade being 'adversely affected' or just 'affected', which arose in Joined Cases 56/64 & 58/64, *Grundig and Consten v. Commission* [1966] ECR 299. The ECJ adopted the broader reading that it was sufficient for trade to be affected. It seems that the practice of the ECJ (but not of the Advocate Generals) is to avoid having issues of translation annotated in its judgements. A change in this practice could facilitate closer adherence by the Court to legal texts or at least fuller justification of its choices. See generally on the latter issue, L. Mulders, 'Translation at the Court of Justice of the European Communities', in S. Prechal & B. Van Roermund (eds.), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford Univ. Press 2008), 53-54.

²⁹⁶ On the requirement of the ECJ for a uniform interpretation of Community law, see, e.g. Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419, at para. 3; Case 283/81, *CILFIT*, supra n. 215, at para. 7; Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199, at para. 15; Case C-17/00, *De Coster* [2001] ECR I-9445, at para. 74 of the Opinion of the Advocate General Ruiz-Jarabo Colomer.

²⁹⁷ An example of a problematic decision in this regard is pointed out by Rasmussen, Case 238/84, *Criminal proceedings of Hans Röser* [1986] ECR 795, in which the ECJ held that although a German national being prosecuted for breach of a Community law acted within the meaning of the German text of the legislation, the German text was incorrect and had to be altered to conform to the Community-wide meaning, with the consequence that Mr. Röser's prosecution could succeed notwithstanding that he had acted within the facial meaning of the law. see the critical discussion in H. Rasmussen, 'Towards a Normative Theory of Interpretation of Community Law', *UChicago LF* 135-178 (1992), 169-171.

It can be argued, therefore, that if textual indeterminacy is pervasive because of linguistic diversity, the oft-stated doctrine of the ECJ that EU law must be interpreted in a uniform manner throughout the Member States²⁹⁸ seems itself to be undermined. In other words, if ordinary linguistic interpretation can work for the Member States, it can also be expected to work, in general, for the ECJ in its approach to interpreting Treaty and other norms, thus casting some doubt at least on the inevitability of broadly framed teleological interpretation as a necessary response to conflict of linguistic norms. An alternative approach is that problems of translation confronting the ECJ, which seem inevitable given the large number of official languages now in the EU, be addressed through fact-finding in careful comparative translation of texts. This kind of comparative linguistic assessment was suggested by the ECJ itself in its decision in *CILFIT*:

To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.²⁹⁹

Further, if different language versions cannot be reconciled in this way, the ECJ is left with a choice between a narrow interpretation and a broad interpretation, depending on which language versions apply. It is not inevitable that a broad or expansive reading be adopted in this scenario: a conflict of possible interpretative responses is present. The ECJ could adhere to the narrower reading not affected by translation problems, out of respect for the prerogative of the legislature or constituent authority to amend the law if needed. As in other instances, a broad approach tends to appeal to outcome legitimacy and systemic

²⁹⁸ In a US context, Levinson argues for pervasive linguistic indeterminacy as a feature of law: see S. Levinson, *Constitutional Faith* (Princeton Univ. Press 1988), 32, 125, 141, 153-54, 159, 170. For a critical review, see AR. Amar, 'Civil Religion and its Discontents', 67(5) *Texas LR* 1153-1172 (1988-1989), noting, e.g. at 1161, that *Constitutional Faith* "does not engage fully the myriad conventions of legal argument that help to generate fairly determinate legal answers to a considerable range of constitutional issues".

²⁹⁹ Case 283/81, *CILFIT*, supra n. 215, at para. 18, and as the Court did in, e.g. Case 35/75, *Matisa v. Hza. Berlin* [1975] ECR 1205 (on the latter, see Albors-Llorens (1999), op cit, 390). See also Joined Cases C-283/94, 291/94, 292/94, *Denkavit International and Others v. Bundesamt für Finanzen* [1996] ECR I-5063 and Case 268/99, *Jany & Ors* [2001] ECR I-8615, where the ECJ followed the meaning of the majority of languages when, respectively, one and two languages diverged from this. See further Arnall (2006), op cit, 608-611.

values (in the official discourse of the EU institutions, this tends to resolve itself to enhanced integration), whereas a narrow approach appeals to judicial deference to the law-making role of the legislature or constituent power. What follows from this is a need for full justification of the choice of interpretative responses to linguistic divergence or conflict, which a simple equation of varying linguistic norms with teleological interpretation fails to achieve.

A recent example of linguistic variation entailing a conflict of norms is *easyCar (UK) Ltd. v. Office of Fair Trading*.³⁰⁰ The question was whether the hiring out of cars came within the expression ‘contracts for the provision of transport services’. The ECJ held that Article 3(2) of Directive 97/7/EC³⁰¹ on the protection of consumers in respect of distance contracts is to be interpreted as meaning that ‘contracts for the provision of transport services’ can cover all contracts governing services in the field of transport, including those involving an activity which does not include, as such, the carriage of the customer or his goods, but which is aimed at enabling the customer to perform that carriage. That concept thus includes contracts for the provision of car hire services which is the making available to the consumer of a means of transport. The reasoning of the ECJ provides an example of a restrained approach to dealing with the issue of linguistic divergence. The ECJ first noted that the term ‘carriage’ is used in a narrower sense in the legal systems of the Member States, indicating that the use of the term ‘transport’ thus conveyed a broader meaning.³⁰² It went on to note that the broader meaning was supported by several of the language versions and by ordinary meaning:

25. That interpretation is expressly supported by several language versions of Article 3(2) of the directive, namely the German, Italian and Swedish versions, which mention, respectively, ‘Dienstleistungen in den Bereichen ... Beförderung’ (‘services in the transport sector’), ‘servizi relativi ... ai trasporti’ (‘services relating to transport’) and ‘tjänster som avser ... transport’ (‘services which concern transport’).

³⁰⁰ Case C-336/03, [2005] ECR I-194.

³⁰¹ 20.05.1997, OJ L 144, 4.6.97, p. 19.

³⁰² *Ibid*, para. 43.

26. In everyday language, ‘transport’ refers not only to the action of moving persons or goods from one place to another, but also to the mode of transport and to the means used to move those persons and goods. Making a means of transport available to the consumer is thus one of the services involved in the transport sector.

Here, there is an absence of broad, systemic teleological reasoning in favour of reasoning based on comparative linguistic assessment and ordinary usage.

4.7 Conclusion

The caselaw surveyed in this chapter demonstrates that conflicts of interpretative norms and substantive norms can arise in a range of situations in ECJ caselaw. Both the degree of conflict and of choice in legal reasoning that results tends to be under-articulated. The ECJ often simply adopts a particular approach to interpretation, without actually explicitly identifying it, though this is not always the case. The tendency to under-articulation of choice has important implications for justification in legal reasoning and thus for legitimacy. At the formal level, it can give an impression of inevitability in the argument and conclusion, but in substance merely conceals a choice and the thinness or superficiality of the reasoning.³⁰³

Under-articulated choices are by almost definition not fully justified, since articulating choice necessarily presents the question why one interpretation or approach to reasoning is favoured over another. This is an issue that arises within a case, but also across cases. The ‘constitutionalising’ decisions referred to above adopt a prospective, systemic, teleological interpretation, whereas *Kaur* and *easyCar* are much more constrained in focusing on conserving meaning and recovering legislative or constituent intention. By not explicitly articulating this difference, the inconsistency in approach across the caselaw is less obvious. This

³⁰³ A-M. Burley & W. Mattli., ‘Europe before the Court: A Political Theory of Integration’, 47(1) *IO* 41-76 (1993).

may enhance the superficial impression of legitimacy, but at a deeper level merely postpones it.

The present work argues that the framework of norm conflict is a fruitful one for understanding this dynamic of choice in the caselaw of the ECJ. Ultimately, the choice relates to substantive values and to ‘political morality’. Different choices reflect different political moralities. In the above chapter, two poles on a spectrum were emphasised: on the one hand, output legitimacy understood as enhancing integration, and on the other hand, a more conserving approach to interpretation and legal reasoning, where the text and legislative or constituent intention feature more prominently, reflecting input legitimacy. The choice of cases is necessarily selective, but what this choice of cases does show is that judicial interpretation can have far-reaching and innovative effects. It relates to cases where the ECJ has established quite new rules, as opposed to giving a broad interpretation of existing rules.³⁰⁴ As Arnall has observed, “the Court’s general approach to questions of interpretation ... attracts little criticism in technical and routine cases”.³⁰⁵ Nonetheless, it seems an incomplete answer to the issue of choice and the normative context of interpretation and legal reasoning to observe that the Court varies in the degree of creativity in which it engages.³⁰⁶ Such variations beg the underlying question of the normative basis for the different approaches, a point made clear by the framework of norm conflict.

In general, the ECJ fails to address norm conflict with a degree of articulacy that can be considered satisfactory. Its reasoning tends to be superficial, creating an impression of inevitability, but in substance simply concealing choices. This could be understood critically as reflecting the self-interest of courts as institutional actors: failing to articulate choice gives the impression that courts engage in reasoning that is substantively different from political and policy actors. The conceptual framework of norm conflict suggests this impression is misleading. Important choices, varying between input and output legitimacy, are being made,

³⁰⁴ An example of the latter is the interpretation by the Court of the term ‘worker’ in Article 39 EC Treaty (now Article 45 TFEU): see, e.g. Case 53/81, *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035; Case 139/85, *Kempf v. Staatssecretaris van Justitie* [1986] ECR 1741.

³⁰⁵ Arnall (2006), op cit, 620.

³⁰⁶ Defending the ECJ on this basis from charges of ‘activism’, see, e.g. Albers-Llorens (1999), op cit; Arnall (2006), op cit, 607, 620-621.

with the ECJ typically referring, when it does offer justification, to output legitimacy concerns, usually in the form of an effectiveness argument linked to integration. This inevitably calls into question the broader institutional legitimacy of courts making such political and policy choices ('policy' in the sense of not being bound to legal rules) and whether the failure to articulate such choice is an implicit acknowledgement that it would be difficult to overtly justify the role the ECJ seeks to assign to itself. On a critical reading, the insights of political scientists that courts, including the ECJ, are strategic and self-interested institutional actors³⁰⁷ seem reflected in the superficiality of the reasoning of the Court used as a possible means to limit the obviousness of its political power.

In the following two chapters, the broad scope of the method of legal reasoning preferred by the ECJ is assessed concerning two specific types of norms of central importance in any legal system: human rights and competence norms. These norms relate to the fundamental values underlying a legal system, both as regards the individual citizen (human rights norms) and the definition of powers or the institutional, political morality of the system (competence norms).

³⁰⁷ E. Haas, *Beyond the Nation State: Functionalism and International Organization* (Stanford Univ. Press 1964); Burley & Mattli (1993), op cit, esp. 55 et seq; G. de Búrca, 'Rethinking Law in Neofunctionalist Theory', 12(1) *JEPP* 310-326 (2005), 322-323.

Chapter 5 – Conflicts of Fundamental Values in EU Law and Legal Reasoning

5.1 Introduction

As discussed in Chapter 3, human rights clauses present a particular problem for norm conflict theory and legal reasoning because of their relative interpretative indeterminacy. Rules of *lex posterior* and *lex specialis* may not be that helpful.¹ Rights provisions are usually all enacted simultaneously, meaning *lex posterior* does not provide a solution. Even if rights were enacted at different times, their normative status as inherent ‘goods’ makes questionable any *lex posterior* rule. *Lex specialis* is unlikely to be helpful in many cases of rights as they tend currently to be drafted because these rights clauses have a relatively high degree of generality, and indeed some degree of generality is necessary.² Since such rights apply across all public law, it is very difficult to enumerate them in considerable detail relative to the circumstances of their application (detention and trial rights may be something of an exception under current practice³), i.e. competing rights claims in abstract Bill of Rights may not be resolvable on grounds of specificity, since they may be expressed in equally general terms. However, the articulation of rights claims at a very high level of generality is not inevitable, as the trial rights example demonstrates.

The question of specifying rights in more detail than abstractly phrased Bill of Rights currently tend to do, termed specificationism, is one of two approaches to conflicts of rights norms addressed in this chapter. By clarifying the relative scope of respective rights, potential overlap and conflict are reduced through a specificationist approach. Apart from the avoidance *ex ante* of conflict in this way through specification, the most obvious potentially applicable norm conflict rule is that of *lex superior*: can some rights be considered superior to others, so as to form a hierarchy of rights? Such a hierarchy to some degree seems inevitable, since very many rights claims will entail a clash of rights claims: the absence of

¹ E-U. Petersmann, ‘Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration’, 13(3) *EJIL* 621-650 (2002) (‘Petersmann (2002a)’), 635; L. Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford Univ. Press 2007), 54-55; E. Klein, ‘Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy?’, *Hebrew University of Jerusalem Faculty of Law Research Paper No. 02-09* (2009), 486.

² F. Schauer, ‘The Generality of Rights’, 6(3) *LT* 323-336 (2000), 329-330, as discussed in Chapter 4.2. above.

³ See Articles 5 & 6 of the European Convention on Human Rights (ECHR), ETS no. 05.

any hierarchy thus has the potential to render rights adjudication almost entirely *ad hoc*, dealt with on a case-by-case basis. This is the second and related issue addressed in the chapter. The two issues of specificationism and hierarchy interact, since specificationism makes easier the elaboration of a hierarchy.

The general issue of conflicts of rights has been surprisingly under-discussed until quite recently, and it seems generally to have been assumed that conflicts of rights did not occur or did not merit attention.⁴ A motivation for avoiding the question of conflict of rights might be, as Waldron notes, a dislike of the connotation of trade-offs between rights that conflict suggests, given that rights discourse has been contrasted with the utilitarian tendency to sacrifice or trade off individual interests for greater overall utility.⁵ This dislike, however, merely avoids a full articulation of the conceptual issues inherent in conflict of rights and in the reality of such conflict. It also leads to a lack of judicial accountability in this most important of normative areas; failing to clearly identify conflict amounts to a fudging of issues and a failure to justify choices in adjudication. This chapter argues that in the EU, this can be seen in the ambiguous way that the ECJ relates traditional or classic rights to the goal of integration.

The first part of this chapter examines how human rights relate to other legal interests in EU law and the legal reasoning of the ECJ, in particular, the status of human rights relative to systemic concerns with integration and with economic goods. This is a prelude to the discussion of a hierarchy of rights. Clashes of rights occur in EU law both conceptually, in that many legal disputes about rights entail competing rights claims (e.g. in the context of abortion, the right to life competes with the right to privacy and/or bodily autonomy⁶), but additionally clashes of rights occur because of the phenomenon of multi-level governance. In the EU, rights are protected at national constitutional level, at regional level in the form of the European Convention on Human Rights⁷ (ECHR) and the EU Charter of Fundamental

⁴ C. Finkelstein, 'Introduction to the Symposium on Conflicts of Rights', 7(3) *LT* 235-238 (2001), 235; S. Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Hart Publishing 2005), 419. Waldron has noted that the issue is 'terribly difficult' and one 'with which moral philosophers are only just beginning to grapple': J. Waldron, 'Security and Liberty: The Image of Balance', 11(2) *J. Pol. Phil.* 191-210 (2003), 199.

⁵ See the chapter 'Rights in Conflict' in J. Waldron, *Liberal Rights* (Cambridge Univ. Press 1993), 209.

⁶ Although the EU does not have direct competence over abortion, it has at most a negative competence relating to free movement, see further below and next chapter.

⁷ ETS no. 05.

Rights,⁸ and internationally through the United Nations (UN). The EU thus provides a prime case study of how rights interact with multi-level jurisdictional and systemic questions. The accession of the EU to the ECHR will help reduce conflict between the Charter as interpreted by the ECJ and the ECHR as adjudicated by the European Court of Human Rights, but the issue of conflicts of rights will remain the same relating to EU law and national constitutional law.⁹

There exist thus two vertical dimensions to human rights concerns in the EU: the relationship between rights protection at Union level and (a) at national level and (b) at international level. As discussed in Chapter 1, the national-EU relationship has witnessed perhaps the strongest legal challenge to the integration process in the form of conditional acceptance by national constitutional courts of the supremacy of EU law, represented best in the ‘*solange*’ caselaw of the German Federal Constitutional Court. From the perspective of the latter, acquiescence in integration by the national legal order is conditional upon adequate human rights protection and adequate democratic safeguards (the latter condition being emphasised especially in the more recent *Lisbon* judgment¹⁰) in the exercise of Union competences. From the opposing perspective of the ECJ, human rights protection in its caselaw was conversely conceived as a way of meeting this qualified acceptance and resisting the challenge that it posed to EU legitimacy.¹¹ In a broad sense, EU human rights protection has been instrumentalised to at least some extent to protect the EU polity by ensuring a uniform standard of rights.¹² Rights in an EU context therefore are part of a multi-level dialectic, or more sceptically, multi-level power struggle. That dynamic potentially poses a threat to the notion of rights as having inherent value, independently of systemic or political considerations or power or competence struggles. A stronger articulation of individual rights and of their relative status and scope may help counteract the risk of rights being subject to arbitrary or partial definition in inter-court struggles.

⁸ OJ C 364/01, 18.12.2000, p. 1.

⁹ A. Torres Perez, *Conflicts of Rights in the European Union* (Oxford Univ. Press 2009), 34.

¹⁰ *Lisbon Treaty Case*, BVerfG, 2 BvE 2/08, judgment of 30th June 2009, available at: < http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html > (in English, last accessed 22nd January 2010).

¹¹ F. Mancini, ‘The Making of a Constitution for Europe’, 26 *CMLRev* 595-614 (1989), 609-611, a judge of the ECJ, suggesting the ECJ was forced to do so to defend the independence of Community law.

¹² Torres Perez (2009), op cit, 79-80, and noting that some diversity in rights protection does not have to be seen as undermining the efficacy of EU law. See generally on judicial completion and cooperation in the EU, K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford Univ. Press 2001).

As discussed in Chapter 3, one way of concretising in adjudication the scope of rights, including of the relative scope of competing rights, is to look to history or tradition: how has the practice of a legal or constitutional community polity traditionally prioritised competing rights? This approach may have its limits as new human rights contexts arise,¹³ but it in general suggests a minimalist judicial role in rights protection, as a safeguard against State totalitarianism, but it leaves innovation on the constitutional balance between rights to the process of formal constitutional amendment. It provides a more empirically grounded and self-evident source of conflict resolution.¹⁴ This grounding can also provide a basis for greater specification of existing Bills of Rights.

In contrast to history as a template for rights resolution, ‘philosophy’ makes competing claims,¹⁵ and this is best reflected in the work of Ronald Dworkin. Dworkin sees judges as the political philosophers of modern legal systems, whose job it is to fashion the best solution to hard cases according to a constructivist method of finding what ‘best fits’ with the prevailing political morality reflected in the constitutional system. In Chapter 2, the limits of this account and the questions it tends to further pose were discussed, but it can be clearly contrasted with an emphasis on history and tradition as the source of resolving conflicting rights. In the context of the limits of ‘best fit’, Zucca notes that Dworkin glosses over the possibility of two rights, i.e. two non-utilitarian arguments, competing.¹⁶ Dworkin has only briefly acknowledged that it may be necessary to override a given right when this is necessary to protect the rights of others.¹⁷

As Waldron notes, the conceptual account or definition of rights that a person adopts affects both the existence of conflict of rights and its resolution.¹⁸ In Chapter 3, Hohfeld’s conception of rights as relational was outlined. He understood rights as correlating to duties and being opposed to no-rights (a duty in turn is opposed to a privilege). Taking rights to be correlated with duties, Waldron suggests “When we say rights conflict, what we really mean

¹³ Although the preferable approach in this situation is for new rights provisions to be formally enacted.

¹⁴ See Zucca (2007), op cit, xi, noting that a static conception of rights resolution considerably reduces conflict.

¹⁵ Ibid, 24-25.

¹⁶ Ibid, xii. See also ibid 12, noting that both Alexy and Dworkin suppose a coherent order of values. See also Besson (2005), op cit, 429, who suggests some trade-offs are inevitable in rights conflicts resolution.

¹⁷ R. Dworkin, *Taking Rights Seriously* (Harvard Univ. Press 1977), 191.

¹⁸ Waldron (1993), op cit, 205.

is that the duties they imply are not compossible”.¹⁹ The correlation between rights and duties is widely accepted and is the understanding adopted in this chapter. Waldron emphasises here the duty aspect of rights as being at the core of conflict. Conflict of rights is also impacted by the conception of a right, not just the acceptance of a correlating duty. Different conceptions of rights are possible, i.e. different views exist as to what does it mean to say a person has a right (as opposed to discussion of the content of specific rights).

Hohfeld’s work is just one contribution in numerous attempts to explicate the concept of a right (Hohfeld’s work is broader in accounting for legal concepts or relations in general, not just rights).²⁰ Bentham understood rights as benefits, in that they entailed an obligation, imposed by law, to be respected and thereby conferred a benefit.²¹ Hart proposed the notion of immunity as useful in thinking about rights and which led to the idea of rights as legally respected individual choices,²² an idea later taken up by Steiner who suggested the idea of a domain of individual sovereignty free from State interference.²³ A right gave the bearer a measure of control, a domain in which free will could be exercised.²⁴ Among the difficulties with a will theory is that the content of rights seems unpredictable and also to lack objectivity.²⁵ It is hard to correlate the right to duties, since the exercise of rights seems to be essentially within the control of the individual.

In further criticism of the will theory, MacCormick proposed an interest theory, which posits that someone has a right if the interest is important enough to require a right and

¹⁹ Ibid, 206.

²⁰ See, generally, e.g. J. Waldron (ed.), *Theories of Rights* (Oxford Univ. Press 1984); L. Wenar, ‘Rights’, *The Stanford Encyclopedia of Philosophy* (Summer 2007 Edition), Edward N. Zalta (ed.), URL = < <http://plato.stanford.edu/entries/rights/#5.2> > (last accessed 17thth May 2010); Zucca (2007), op cit, 30-42, 55-60.

²¹ See the chapter ‘Legal Rights’, in HLA. Hart, *Essays on Bentham* (Clarendon Press 1982), 162-193, for original references (as Hart notes, ibid, 162, Bentham’s comments on rights were scattered throughout his works). Bentham distinguished between rights grounded in an obligation and liberty rights in which a corresponding obligation is absent.

²² Ibid, 190-193.

²³ H. Steiner, ‘Working Rights’, in M. Kramer, N. Simmonds & H. Steiner (eds.), *A Debate Over Rights* (Oxford Univ. Press 2000).

²⁴ The latter echoes the distinction between positive and negative liberty proposed by Isaiah Berlin: negative liberty is the freedom to live free from interference by others or especially the State, positive liberty connotes the freedom to do or carry out particular acts: I. Berlin, ‘Two Concepts of Liberty’, in I. Berlin, *Four Essays on Liberty* (Oxford Univ. Press New ed. 2002) (original edition 1969) (based on his 1958 inaugural lecture). For an accessible overview, see I. Carter, ‘Positive and Negative Liberty’, *The Stanford Encyclopedia of Philosophy* (Winter 2007 Edition), Edward N. Zalta (ed.), URL = < <http://plato.stanford.edu/entries/liberty-positive-negative/> > (last accessed 17thth May 2010).

²⁵ Besson (2005), op cit, 422.

corresponding duty to fulfil it. He suggested the limits of a choice theory by the example of the right of a baby: a baby can have rights, but does not exercise will or choice.²⁶ The interest theory is potentially broader than a choice theory, depending on what is considered within the idea of ‘interest’, and also seems more paternalistic. On the other hand, it does not seem to account for the idea of individual autonomy that is often strongly associated with rights.²⁷

The status theory of rights is the furthest from utilitarianism as a conception of rights: it is the least ‘instrumentalised’ notion of rights in attributing rights on the basis of the inherent nature of persons as human beings²⁸ or their worth.²⁹ A similar idea is conveyed by the notion of rights as grounded in human dignity.³⁰ It is thus the most consistent with a Kantian view of rights precluding treating individuals as a means to an end.³¹ Oberdiek proposes that any account of rights that considers rights to relate to some more fundamental account of reasons is an instrumentalist account of rights, as rights are now understood as means to fulfilling the underlying reasons, and this point also applies to the status theory. The underlying reasons thus are the primitive, not the rights themselves. However, this seems instrumentalist only in a weak sense, since status is an underpinning concept, but not a distinct interest for which rights can be subverted:

That rights are predicated on some more fundamental consideration or set of considerations does not entail that rights must be pursued as goals. It means only that there is a more basic reason of some kind that justifies any particular right.... One need not reject an instrumental account of rights, then, to avoid what Nozick calls a ‘utilitarianism of rights’ or what Kamm more pointedly calls ‘futilitarianism’.³²

²⁶ See the chapter ‘Children’s Rights: A Test Case for Theories of Rights’, in N. MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press 1982).

²⁷ Zucca (2007), op cit, 102. See generally on rights and autonomy, J. Edwards, ‘Rights: Foundations, Contents, Hierarchy’, 12(3) *Res Publica* 277-293 (2006).

²⁸ It can be considered the successor of natural law theories: Wenar (2007), op cit, at 6.1. The theory of Robert Nozick, privileging self-ownership, is an example: R. Nozick, *Anarchy, State, Utopia* (Basic Books 1974).

²⁹ Edwards (2006), op cit, 280-281, noting four different views of the foundations of rights, of which three (theories other than those grounded on utility) appear to be status theories of rights: utility, dignity, worth, and autonomy.

³⁰ See, e.g. P. Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A reply to Petersmann’, 13(4) *EJIL* 815-844 (2002), 827, 843.

³¹ Nozick’s work draws on this idea: see, e.g. (1974), op cit, ix, 30-33. It has been suggested that human dignity cannot be derogated from, which again conveys an opposition between rights and instrumentalism: see, e.g. B. Mathieu & M. Verpeaux, *Contentieux des Droits Fondamentaux* (Montchretien 2001), 472-473, cited and translated in Zucca (2007), op cit, 89.

³² J. Oberdiek, ‘Specifying Rights Out of Necessity’, 28(1) *OJLS* 127-146 (2008), 131-132.

Thus, even the status conception of rights is instrumental in the weak sense that rights are means to fulfil, or exist in virtue of, the status of e.g. autonomy or dignity that a person possesses. The EU Charter of Fundamental Rights seems to endorse a status conception of rights in that Article 1 states that “Human dignity is inviolable. It must be respected and protected” and the Explanations officially promulgated that accompany Charter state that “The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights”.³³ However, there is also considerable ambiguity in the Charter on the status and priority of human rights, as discussed further below.

An additional theoretical distinction in conceptual accounts of rights is between positive and negative rights: freedom from interference by others, rather than freedom entailing positive duties on others. Nozick’s account of rights as side constraints, as the prohibition of interference from others,³⁴ limits the duties that correlate rights much more than a positive account of rights, and thus Nozick’s account minimises conflict.³⁵

None of these conceptual accounts necessarily says much about the substantive content of rights,³⁶ and it also may be wondered what they say then about conflicts of rights. Though these accounts are generally analytical or conceptual, they may be thought to have at least some normative dimension or implication³⁷ (although a full substantive account of the limits of rights might be needed to fully establish such an implication). For example, Zucca suggests that Hart’s will or choice theory favours a right to end one’s own life.³⁸ The most obvious implication seems to stem from the status theory: that suggests that only other human rights may justifiably restrict a right, and it thus has an obvious anti-utilitarian connotation, i.e. the status theory tends to suggest more strongly the priority of rights over

³³ Text of the Explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, Brussels, 11th October 2000 (18.10) (OR. Fr), 3. The Explanations have since been updated, see: OJ 2007 C 303/2, 14.12.2007, pp. 17-35 (although the online version has been updated to reflect renumbering effected by the Treaty of Lisbon). The references below are to the original Explanations unless a substantive change is introduced by the revised Explanations (but equivalent page references to the latter are in brackets after page references to the original version).

³⁴ Nozick (1974), op cit, 28 et seq.

³⁵ Waldron (1993), op cit, 205, contrasting Nozick with an interest theory of rights.

³⁶ See Edwards (2006), op cit, 279, noting the content of rights is surprisingly under-discussed, with the literature almost being devoid of treatment of it.

³⁷ Zucca (2007), op cit, 30.

³⁸ Ibid, 35.

other legal interests, in contrast with the interest theory.³⁹ This is demonstrated by Zucca's recent discussion of how to frame the issue of physician-assisted and the right to life. Zucca proposes that this should be understood as a conflict of fundamental rights, between the fundamental right to life and the fundamental right to decisional privacy. Two alternative ways of conceptualising this situation can be envisaged:

In other words, I see a conflict between the FLR [Fundamental Legal Right] to life and the FLR to decisional privacy. Few people agree with this view. Many think that the only conflict is between the interest in self-determination of the individual, and the state interest in the protection of life. Framing the question that way is deeply problematic, especially if we hold a strong conception of FLRs, as it equates a FLR to decisional privacy to a simple interest. Then, it opposes the state interest in the protection of life to the simple interest aforementioned. This characterization of the conflict debases the importance of FLRs in constitutional adjudication. This is because the interest embedded in the FLR does not seem to have any specific priority in relation to the interest protected by the State.⁴⁰

The significance of a status-conception of rights, therefore, is to weigh much more strongly in favour of rights as opposed to a general interest, i.e. it is the conception of rights most opposed to utilitarianism.

The passage just quoted also points to another aspect of rights adjudication, namely, the descriptive characterization of rights. Is there a right to 'decisional privacy'? Zucca's formulation derives from a specification of a more general right to privacy.⁴¹ What this specification does, in Zucca's presentation, is implicitly lend more weight to the status of the right in the specific situation. This is related to another approach to dealing with rights conflicts noted above, namely, specificationism, which seeks to identify rights in as much detail and specificity as possible in advance of their application and to *ex ante* minimise conflict (in other words, a substantive definition of rights is detailed as much as possible

³⁹ See, e.g. Zucca (2007), op cit, 59. Zucca says he adopts a status theory of rights, but his approach arguably collapses it into a (subjective) choice or will conception. He proposes that a person has a constitutional status that is inalienable, but that it is up to each individual to decide whether and how to demand the implementation of his or her rights and that the relative importance of rights is also a matter for each individual: *ibid*, 64-65.

⁴⁰ Zucca, *ibid*, 144.

⁴¹ See *ibid*, 107, distinguishing between decisional and informational privacy.

prior to their application). This approach is discussed further below in the second part of the chapter, but it is worth noting at this stage that it could be considered the application of the *lex specialis* principle in the context of rights adjudication. Finally, it can be noted here that the status conception of rights also suggests rights have an objective character, which seems to point to the possibility of an *a priori* hierarchy of rights.

In the discussion so far, inherent rights have been contrasted with instrumental rights. However, there are degrees of instrumentalisation of rights, as Oberdiek discussed above identified: Dworkin contrasts rights with collective interests through his principles versus policies distinction and his exclusion of external preferences from the domain of principles (i.e. preferences related to other people, rather than to oneself) supporting rights,⁴² but his definition of rights is subject to the test of ‘best fit’ with the political morality of the system. The test of best fit seems to re-inject collective interest into the definition or discovery of rights. It may be best, therefore, to see a spectrum between a strong status conception and highly instrumentalised conception of rights, rather than a sharp opposition. Dworkin’s position is thus somewhat ambivalent overall, despite seeming close to a status theory in relating rights to principles.⁴³ The interest theory of rights seems to accommodate utilitarian concerns quite easily, as it does not fundamentally or necessarily distinguish between rights and other interests, such as collective goals.⁴⁴ It is also possible to see rights as consisting of various interests⁴⁵ to a sufficiently strong degree that they crystallise into something normatively stronger, which again blurs the distinctiveness of rights theories relative to utilitarianism.

Finally, it is worth noting that the various conceptual accounts of rights are not all mutually exclusive. It is possible to combine the interest and status theories, for example, as well captured by Besson:

A status-based filter on rights... permits the application of the interest theory to be finessed to prevent cases of infringement of rights that would deny any status to the right holder. According to the modified interest theory of rights, then, most rights are

⁴² Noting that Dworkin has an instrumental view of rights, see Wenar (2007), op cit, at 6.2.

⁴³ See Waldron (2003), op cit, 198, making this point in relation to Nozick.

⁴⁴ See, e.g. Besson (2005), op cit, 422-423.

⁴⁵ See e.g., *ibid*, 424, suggesting rights act as intermediaries between interests and duties.

based on interests, but some aim at recognising a person's status and inviolability which lie at the foundations of her interests. This is clearly the case of most constitutional or fundamental rights.⁴⁶

In other words, rights consist of a core relating to the status of the holder as a human being, but the exact scope and contours is subject to interests, which, implicitly, may be limited or traded off. An alternative conceptualisation of constitutional or fundamental rights that Zucca supports and which is found in previous writings⁴⁷ is the idea of immunity as characteristic of them, in that they amount to a limit on State power, in particular⁴⁸ (although rights also have a horizontal dimension in that not just the State is obliged to respect them). This idea of immunity could be attached to any of the theories. It is also possible to combine the will or choice theory with the interest theory, if choice is considered a pre-eminent interest to be protected.

A full conceptual account of rights may need to combine several elements. In this chapter, Besson's status-based filter of rights is adopted, along with a recognition of i. choice or autonomy as an underpinning principle and ii. the correlation between rights and duties. This points towards a (relatively) irreducible core of rights protecting individual autonomy in virtue of a person's status as a human being and points against utilitarianism or more vaguely defined interests. Identification of this minimalist account could facilitate the development of a hierarchy of rights as a means of rights conflict resolution or avoidance.⁴⁹

The remainder of this chapter begins by addressing the actual state of EU law and the normative status currently accorded human rights in ECJ caselaw. It does so through examining a well-known debate in the literature between Coppel & O'Neill and Weiler & Lockhart on the extent to which the ECJ instrumentalised human rights in its caselaw in favour of increased integration.⁵⁰ This reflects a debate in international law on the

⁴⁶ Besson, *ibid*, 423, citing F. Kamm, 'Conflicts of Rights. Typology, Methodology and Nonconsequentialism', 7(3) *LT* 239-255 (2001), 244.

⁴⁷ See Hart (1982), *op cit*, 190-193.

⁴⁸ Zucca (2007), *op cit*, 34, 41, 47. Zucca relates this conception to a right to privacy in particular.

⁴⁹ See also Torres Pérez (2009) (though the latter is more concerned with jurisdictional conflicts).

⁵⁰ Fundamental rights can conflict with both other fundamental rights and with other non-fundamental legal interests: Zucca (2007), *op cit*, 49. Torres Pérez (2009), *op cit*, 12, notes that divergences in rights protection can result from different ways of resolving conflicts of rights and resolving conflicts between rights and the general interest.

relationship between trade and human rights and the extent to which human rights are free-standing with a higher normative status than other competing elements in adjudication. This concerns a clash between rights and other legal interests. The chapter then moves on to examine some recent caselaw from the ECJ, to assess whether the somewhat ambivalent normative status of human rights in earlier caselaw has been replaced in favour of a more articulated account of the normative weight of human rights, and concludes that a certain ambivalence in characterising rights relative to other interests (particularly the concern with increased integration) is still found in some of the caselaw. Reflecting its exaltation of integration as a value, even in the human rights sphere where rights are normally thought to trump other political concerns, the ECJ seems reluctant to identify rights as the ultimate normative goods in EU law.

Finally, the chapter discusses the concepts of a hierarchy of rights and specificationism in rights' definition as a means of avoiding the trap of *ad hoc* adjudication that the incommensurability of competing rights claims presents. This reflects the concern in Chapter 4 and well articulated by Schauer that "the only sensible way in which rights can operate in legal argument is by way of being both temporally and logically antecedent to the particular case in which a claimant's success might be deemed to be the recognition of a right".⁵¹ This part concludes that such a hierarchy is to some extent workable and is reflected in the relatively detailed explanatory materials specifying the EU Charter of Fundamental Rights and can help overcome the somewhat unsatisfactory way in which the ECJ relates rights to other interests.

5.2 Reprising the Coppel-O'Neill v. Weiler-Lockhart Debate

In the 1990s, a well known debate took place in the literature between Coppel & O'Neill, who claimed the ECJ instrumentalised fundamental rights in its legal reasoning to enhance its own role and power and encourage further integration, which prompted a detailed

⁵¹ Schauer (2000), *op cit*, 329-330. Schauer's emphasis on the generality of rights might be contrasted with specificationism or the idea that rights can be fully specified and elaborated in advance. However, both approaches consider rights to be capable of some prior definition, and specificationism does not consider that every application of rights can be enumerated in advance. On specificationism, see R. Shafer-Landau, 'Specifying Absolute Rights', 37(1) *Arizona LR* 209-224 (1995); Oberdiek (2008), *op cit*. See further the discussion of a hierarchy and specification of rights below.

response from Weiler & Lockhart defending the ECJ.⁵² This section will first review this exchange, including with reference to a somewhat similar and more recent debate between Alston and Petersmann on how international trade law should relate to human rights.⁵³ It will then examine more recent human rights case law to see how the ECJ conceptualises rights relative to other legal interests in the Union legal order. In a forthright and provocatively worded piece, Coppel & O'Neill began by noting their purpose was to question the easy assumption that the use of the language of fundamental rights by the ECJ translated into the actual protection of rights within the then EC. The motivation of the ECJ in its early rights caselaw was, they noted, beyond question about securing its own supremacy claims rather than rights *per se*,⁵⁴ while a reading of its more recent caselaw suggested an 'offensive' use of rights to extent the influence of the EC over the Member States (as opposed to a defensive use to maintain supremacy), in other words, rights were being to enhance integration at the expense of Member State autonomy.⁵⁵

First, Coppel & O'Neill noted that the ECJ had begun to apply Community rights norms directly to national legal acts, instead of confining them to Community law. *Rutili*⁵⁶ signalled this trend in referring to the ECHR as a limit on the derogation by Member States from the free movement of workers principles. The ECJ noted that the exceptions in the Treaties to free movement were to be determined by Community law and reflected the limitations permitted in the ECHR under Articles 8, 9, 10 and 11.⁵⁷ The first case where the ECJ openly assessed the validity of an act of a Member State on the basis of fundamental rights considerations was *Wachauf v. Federal Republic of Germany*.⁵⁸ On the facts, German law required the consent of a landowner for a farmer to be able to surrender to and claim

⁵² J. Coppel & A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', 29 *CMLRev* 669-692 (1992); JHH. Weiler & NJS. Lockhart, 'Taking Rights Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence – Part I', 32 *CMLRev* 51-94 (1995) ('Weiler & Lockhart (1995a)'); JHH. Weiler & NJS. Lockhart, 'Taking Rights Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence – Part II', 32 *CMLRev* 579-627 (1995) ('Weiler & Lockhart (1995b)').

⁵³ Petersmann (2002a), *op cit*; Alston (2002), *op cit*; E-U. Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston', 13(4) *EJIL* 845-851 (2002) ('Petersmann (2002b)').

⁵⁴ Coppel & O'Neill (1992), *op cit*, 669, 672, citing, e.g. Weiler's comment that the "deep structure" of the early rights caselaw was "all about supremacy": JHH. Weiler, A. Cassese & A. Clapham (eds.), *Human Rights and the European Community Vol. II* (Nomos 1990), 580-581.

⁵⁵ Coppel & O'Neill (1992), *ibid*, 669-670. Weiler & Lockhart described the terminology as 'somewhat loaded': Weiler & Lockhart (1995a), *op cit*, 52.

⁵⁶ Case 36/75, [1975] ECR 1219.

⁵⁷ *Ibid*, para. 32.

⁵⁸ Case 5/88, [1989] ECR 2609.

compensation from the State for his milk production quota, which quota was provided for under Community secondary law.⁵⁹ The ECJ held that this violated a fundamental right of the farmer concerned, in depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding, and that the Member States must, so far as possible, implement Community law in accordance with the protection of fundamental rights in the Community legal order.⁶⁰ The ECJ went on to note that the Community law in question could have been implemented so as to comply with fundamental rights; in effect, therefore, the problem lay with implementation.⁶¹ The view that national implementing measures had to comply with Community fundamental rights was confirmed in *ERT*.⁶² Coppel & O'Neill identified this and other caselaw⁶³ as a trend of assessing Member States' public policy derogations from the standpoint of Community law protection of fundamental rights.⁶⁴

*ERT*⁶⁵ seemed to go further, however, in holding that fundamental rights are a stand-alone basis for assessing national implementation of derogations, rather than, as in *Rutili*, being invoked as echoing general principles of Community law:⁶⁶ "... The national rules in question may only benefit from the ... exceptions insofar as they are compatible with fundamental rights, the observance with which the Court ensures".⁶⁷ In contrast, Weiler & Lockhart argue that ECJ jurisdiction over derogations was inevitable to ensure some consistency in the matter.⁶⁸ They suggest that a proportionality standard of review of national derogating measures relative to restrictiveness on trade, which review was required to ensure some review of derogations, involves just as much a value choice as human rights review.⁶⁹

⁵⁹ OJ 1989 L 84, p. 2.

⁶⁰ Case 5/88, *supra* n. 58, paras. 16, 19.

⁶¹ *Ibid*, para. 22.

⁶² Case C-260/89, *ERT* [1991] I-2925, para. 41.

⁶³ Case 353/89, *Commission v. Netherlands* [1991] ECR I-4069.

⁶⁴ Coppel & O'Neill (1992), *op cit*, 677.

⁶⁵ The case concerned a broadcasting monopoly by the Greek States that Greece sought to justify as a public policy derogation from free movement.

⁶⁶ *Ibid*, 678.

⁶⁷ Case C-260/89, *ERT*, *supra* n. 62, para. 43.

⁶⁸ Weiler & Lockhart (1995a), *op cit*, 76. Weiler & Lockhart do not address the possibility of the variable intensity of review or a possible margin of appreciation, though they note more generally that in the context of human rights Advocate General van Gerven in *SPUC v. Grogan* laid the foundations for an EU version of the doctrine: Weiler & Lockhart (1995b), *op cit*, 603.

⁶⁹ *Ibid*, 77-78.

Further, even if the latter were more intrusive, a degree of latitude might still be left to the Member States.⁷⁰

The significance of *ERT* could be assessed by contrast with the decision in *Cinéthèque*, where the ECJ seemed to set clear jurisdictional limits to its role regarding fundamental rights:

Although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislature.⁷¹

The operative question though in light of this statement is what amounts to ‘the jurisdiction of the national legislature’. Coppel & O’Neill identified a subtle change in formulation in *Demirel*, which suggested a more expansive notion of Community jurisdiction:

The Court has no power to examine the compatibility with the European Convention on Human rights of national legislation lying outside the scope of Community law.⁷²

Implementation acts, for example, seem to fall within national jurisdiction, but *Demirel* paved the way for *Wachauf* to apply Community law standards to this implementation. In *ERT*, the EC confirmed this expansive approach, stating that it had jurisdiction to assess any national implementation “as soon as any such legislation enters the field of application of Community law”.⁷³ The potential of this line of caselaw was revealed, Coppel & O’Neill suggest, in the *SPUC v. Grogan* case, which concerned a challenge to a provision of the Irish Constitution prohibiting information on abortion as being contrary to free movement and where the Advocate General stated:

In *Cinéthèque*, ... it was stated that the Court’s power of review did not extend to ‘an area which falls within the jurisdiction of the national legislator’, a statement which,

⁷⁰ Ibid, 78.

⁷¹ Joined Cases 60/84 & 61/84, *Cinéthèque* [1985] ECR 2605, para. 26.

⁷² Case 12/86, *Demirel v. Stadt Schwäbisch Gmund* [1987] ECR 3719, para. 28.

⁷³ Case C-260/89, *ERT*, supra n. 62, para. 42, a passage emphasised by Coppel & O’Neill (1992), op cit, 680.

generally speaking, is true. Yet once a national rule is involved which has effects in an area covered by Community law (in this case Article 59 of the EEC treaty) and which, in order to be permissible, must be able to be justified under Community law with the help of concepts or principles of Community law, then the appraisal of that national rule no longer falls within the exclusive jurisdiction of the national legislature.⁷⁴

As discussed further in Chapter 6 on conflicts of competence norms, the scope of Community law principles of free movement and undistorted competition is virtually limitless, at least in the abstract, so Coppel & O'Neill seem correct in noting the jurisdictional *potential* of the formula in this passage as to a national rule 'having effects' (undefined) in an area covered by Community law.⁷⁵ In *SPUC v. Grogan*, the ECJ classified abortion as a service and held that Ireland could prohibit the provision of information in circumstances where such provision was not part of an economic activity. Coppel & O'Neill criticised this as an avoidance of the human rights issue involved, which was instead dealt with as a matter of technical classification.⁷⁶ Instead of relating to the issue of abortion in terms of "a profound moral dilemma", that "abortions are carried out for money... is the only relevant factor for the Court".⁷⁷ In defence of the ECJ, Weiler & Lockhart note that the preliminary reference was itself framed in technical terms, asking the question 'Does the organized activity or process of carrying out an abortion...come within the definition of 'services' ... [in] Article 60 of the Treaty...'⁷⁸ and that the broader rights issue was moot on the facts and did not need to be addressed.⁷⁹

⁷⁴ Case C-159/90, *SPUC v. Grogan* [1991] ECR I-4685, Opinion of Advocate General Van Gerven of 11th June 1991, para. 31, cited and discussed in Coppel & O'Neill (1992), op cit, 681. Ireland later had a Protocol inserted into the Treaty of Maastricht (Protocol No. 17) in which it sought to exclude the application of Community law in the area of the Irish constitutional prohibition on abortion.

⁷⁵ See also Coppel & O'Neill (1992), op cit, 692. See also Torres Pérez (2009), op cit, 18, 20, and at 24 suggesting ECJ caselaw is a "loaded gun" directed at national competences. On competence, see further Chapter 6 below. The EU Charter is ambivalent on this point. On the one hand, Article 51 seems to tilt away from *Wachauf* and *ERT* in stating that the provisions of the Charter apply only when the Member States "are implementing Union law", which could be interpreted as excluding the exercise of derogations, but it has been suggested that the accompanying Explanations push in the other direction in referring to the Member States acting "in the scope of Union law": see N. Nic Suibhne, 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law', 34(2) *ELR* 230-256 (2009), 241-243. Nic Suibhne comments that "For now, then, at least on a formal legal analysis, *ERT* remains valid" (ibid, 243).

⁷⁶ They also noted its inconsistency with a statement by Advocate General Werner in Case 7/76, *IRCA* [1976] ECR 1213, at 1237, that a fundamental right recognized and protected by the constitution of any Member State must be recognized and protected by Community law": Coppel & O'Neill (1992), op cit, 685-686.

⁷⁷ Coppel & O'Neill, ibid, 687.

⁷⁸ Weiler & Lockhart (1995b), op cit, 599.

⁷⁹ Ibid, 601. They also noted that they would not enter further into the issue of relating the conflicting rights claims of the life of the unborn and freedom to choose of the mother, "save to say that its solution is not some

Coppel & O'Neill then went on to situate the issue in the context of the normative status of human rights, as being at the top of the normative hierarchy in legal reasoning:

We suggest that fundamental rights are commonly regarded as being at the peak of the normative hierarchy of laws against which other rules of law are to be measured. This is, in essence, the basis of the European Court's claim to national courts that it could be relied upon to protect fundamental rights, implicit in the Court's original adoption of fundamental rights discourse. ... Legitimate action by Community institutions was to be limited by the higher standard of respect for fundamental rights.⁸⁰

However, per Coppel & O'Neill, rights have generally been used in the Community legal order to challenge or attack national implementation, the ECJ has hardly ever invalidated a provision of Community law on fundamental rights grounds. This trend:

... follows directly from an instrumental manipulation of the nature and importance of the concept of fundamental rights protection. In each case the Court has manipulated the usage of fundamental rights principles, endowing these principles with just enough significance in Community terms to allow for the triumph of the Community will.⁸¹

In *Wachauf*, for example, fundamental rights were treated as simply an interpretative principle:⁸²

The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of these rights, in particular in the context of a common organization of a market, provided that those restrictions in facts correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights.⁸³

mathematical formula, rules of averages or question of majority, as may appear from the presentation of the issue in [Coppel & O'Neill's] article": *ibid.*, 598.

⁸⁰ Coppel & O'Neill (1992), *op cit.*, 682.

⁸¹ Coppel & O'Neill, *ibid.*, 683. See also *ibid.*, 684-685.

⁸² *Ibid.*

⁸³ Case 5/88, *supra n.* 58, para. 19.

This approach subordinates human rights to the social function of achieving Community objectives⁸⁴ (although in defence of the ECJ against this criticism by Coppel & O'Neill, it could be said that the last line of this passage seems to salvage at least some pre-eminence for rights). In response, Weiler & Lockhart argued that too much was read here into the phrases “as far as possible” and “general interest”.⁸⁵ On the former expression, it simply connoted the principle of consistent interpretation;⁸⁶ on the latter expression, it simply connoted the need to balance individual rights with the common good, a balancing exercise familiar to all courts.⁸⁷

Finally, Coppel & O'Neill go on to cite ECJ caselaw equating the free movement provisions of EU law with fundamental rights. In *Heylens*, for example, the ECJ stated:

Since free access to employment is a fundamental right which the Treaty confers individually on each worker of the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for this right.⁸⁸

This seems to consider that there is no hierarchical distinction between the free movement market principles and human rights and thus:

... it is difficult to see any foundation for the European Court's claim that it will measure the specific enactments of Community law against some pre-eminent standard of respect for and protection of human rights.⁸⁹

Coppel & O'Neill conclude that evidently the ECJ sees economic integration as its fundamental priority and by using the term ‘fundamental right’ in such an instrumental way, refuses to take fundamental rights discourse seriously.⁹⁰ In response, Weiler & Lockhart contend that this criticism makes an unjustified leap from lexical equivalence to normative

⁸⁴ Coppel & O'Neill (1992), 684.

⁸⁵ Weiler & Lockhart (1995b), op cit, 582, 584.

⁸⁶ Ibid, 588-589.

⁸⁷ Ibid, 584-586.

⁸⁸ Case 222/86, *UNECTEF v. Heylens* [1987] ECR 4098, para. 14.

⁸⁹ Coppel & O'Neill (1992), op cit, 692. See also Harbo (2010), op cit, citing Case 240/83, *Procureur de la République v. ADBHU* [1995] ECR 531.

⁹⁰ Coppel & O'Neill, ibid, 692.

equivalence: that the fact the ECJ uses the term ‘fundamental’ to describe two things, human rights and free movement, does not have to mean both are equally important.⁹¹ In reply to this latter point, it remains the case, however, that the ECJ did not attempt to offer any explanation of the normative priority between the interests. It might be questioned why the Court should describe two things in a ‘lexically equivalent’ way, if it did not mean to treat them as equal. Commentators can only go by the language used by the ECJ.

Though noting an “all too small corpus of critical academic writing about the Court”,⁹² Weiler & Lockhart set out, for the most part, to systematically rebut Coppel & O’Neill’s criticisms.⁹³ Weiler & Lockhart responded with three main counter-claims: that the motive analysis they engaged in was neither verifiable nor falsifiable⁹⁴ and that in any case human rights do not have to be seen as in conflict with integration;⁹⁵ that the claim of competence overreach was wrongly attributed to the ECJ and was really the fault of the Community legislature, with the ECJ largely trying to follow suit by developing an applicable human rights framework for this competence;⁹⁶ and that the broad scope of the empirical claims Coppel & O’Neill made as to the lack of invalidation of Community measures on human rights grounds was not supported by ECJ caselaw.⁹⁷ They thus generally reject the claim that human rights were instrumentally manipulated to advance integration.⁹⁸ Their responses to Coppel & O’Neill’s criticism of specific cases are outlined above. Apart from these cases, Weiler & Lockhart identified a series of cases where the ECJ found against Community

⁹¹ Weiler & Lockhart (1995b), op cit, 594-595.

⁹² Weiler & Lockhart (1995a), op cit, 54; see also Weiler & Lockhart (1995b), op cit, 624.

⁹³ They noted, however, that they did not want to act as apologists for the Court and that they accepted the importance of the issues Coppel & O’Neill raised: *ibid*, 57-58. Weiler himself had previously noted a legitimate concern as to whether the ECJ would be sufficiently robust in its protection of human rights threatened by policies furthering European integration: JHH. Weiler, ‘Eurocracy and Distrust’, 61(3) *Washington LR* 1103-1142 (1986), 1108-1109, 1119-1120.

⁹⁴ Weiler & Lockhart (1995a), op cit, 55, although see *ibid*, 68, noting that “... the truly interesting debate is not simply what the Court has done in *Wachauf*, *ERT* and *Grogan*, but why it has done so...”. They go on, however, to suggest a possibly more complex motivation. They note that the ECJ was acting as a counterweight to the executive, rather than the legislature, and may have been motivated by the need to give legitimacy to a Community enterprise associated with industrial and capitalist interests and by the contemporaneous adoption by the UN covenants on human rights in the 1960s: *ibid*, 70-72.

⁹⁵ Weiler & Lockhart (1995a), op cit, 72.

⁹⁶ *Ibid*, 65-66, noting that the scope of Community law was a shifting target entirely in the hands of the Court.

⁹⁷ See, e.g. *ibid* 83-84. They further argued that Coppel & O’Neill’s critique should have identified cases where individual rights were not protected by the ECJ

⁹⁸ Though they appear to accept the motivation for the original human rights caselaw was to buttress the supremacy doctrine: Weiler & Lockhart (1995b), op cit, 621.

legislation on human rights grounds,⁹⁹ whereas Coppel & O'Neill had suggested such cases almost never arose.

On the criticism that the ECJ had illicitly extended the jurisdiction of the ECHR to EU law and thus into the legal system of the UK, for example, which at that time had not incorporated the ECHR, Weiler & Lockhart note that incorporation was desirable in itself¹⁰⁰ and that national human rights review could suffer from the defect of over-sensitivity to local practices in the painful tension between the universal and particular in rights adjudication.¹⁰¹ On this point at least, they do not address Coppel & O'Neill's essentially process-based point about the suitability of the Community judicature as agents for ECHR incorporation on its own terms, rather they make a more consequentialist defence based on the argument that the UK legal system needed supplementation in the area of rights protection. In this respect, the protagonists to the debate were at cross purposes in invoking input- and output-legitimacy respectively.

Generally, however, Weiler & Lockhart do acknowledge the brevity of the reasoning of the ECJ.¹⁰² And looking at the debate overall, it could be said to focus on the difference approaches the authors took to this relative brevity: Coppel & O'Neill here were willing to read into the suggestiveness of the caselaw normatively dubious motives and implications, on which they did not give the ECJ the benefit of the doubt. In contrast, Coppel & O'Neil did give the ECJ this benefit. The point about the brevity of the Court's reasoning has often been made in the literature,¹⁰³ but it seems to offer only a partial defence. Even if doing so only briefly, the ECJ could have quite easily clarified the relationship it understood to exist between human rights norms and the kind of systemic concerns with effectiveness and

⁹⁹ Concerning principally the rights of the defence (ibid, 86-91, e.g. Case C-49/88, *Al-Jubail Fertilizer v. Council* [1991] ECR 3187), the right to equal treatment (ibid, 90-92, e.g. Case C-37/89, *Weiser v. Caisse Nationale des Barreux Français* [1990] ECR 2395).

¹⁰⁰ Ibid, 79-80.

¹⁰¹ Ibid, 81, further noting that they preferred the bias of the transnational forum to that of the national one.

¹⁰² See, e.g., ibid, 63, noting that the formula in the caselaw of the 'scope or area of Community law' was open-textured, and thus could really be only evaluated on the basis of the outcome of cases. Chapter 6 below seeks to develop in a more systematic way a framework for understanding the role of competence norms in legal reasoning in the EU.

¹⁰³ See generally M. de S.-O.-L'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford Univ. Press 2004); P. Craig & G. de Búrca, *EU Law* (Oxford Univ. Press 3rd ed. 2004), noting that the reasoning of the ECJ "tends to be rather thin" (100, citing U. Everling, 'The ECJ as a Decisionmaking Authority', 82(5-6) *Mich. LR* 1294-1308 (1994)); S. Douglas-Scott, *Constitutional Law of the European Union* (Longmans 2002), 206, 218-219.

integration that are to be found in its caselaw. Apparently implicitly accepting to some degree Coppel & O'Neill's descriptive claim that the ECJ attributed a high normative priority to the goal of integration, Weiler & Lockhart sought to offer a more articulated defence of this normative preference:

But should one not treat with the respect due to a serious moral position the view that in the European Community, ensuring the free movement of information across national boundaries, including “commercial” information, is to be viewed as going beyond the Community objective to ensure free movement of factors of production? That it may relate to an understanding of a deeper ethos of the Community – say, its ability to tame the excesses of the nation State. The Community represents a challenge to a nationalist ethos which would regard the State – any State – as the final arbiter on all matters of value. Part of the Community ethos, in our view, lies in the important civilizing effect resulting from the manner in which the Community forces individuals and States to confront and become tolerant of the Other. Part of that civilizing confrontation is achieved through the intended ability of the Member States, practical and legal, to screen off different social choices, legally sanctioned, in other Member States.¹⁰⁴

The notion of the ECHR as a minimum standard might be seen as a way out for the EU, by acceding it could provide its human rights *bona fides*.¹⁰⁵ As noted in Chapter 3, however, this does not remove the problem of conflict because higher standards of rights entail higher correlative duties. The problem of conflict may not be removed by the supposition of a mere enhancement of an existing right, as opposed to contradiction with it. The correlative¹⁰⁶ duty is greater with the ‘enhanced right’, thus reducing the privilege or freedom of the duty bearer relative to the less exacting standard of rights.¹⁰⁷ It may be objected to this line of reasoning that an articulated right has a stronger normative claim than an unarticulated, ‘left-over’ space in which a privilege or freedom consequently exists, and

¹⁰⁴ Weiler & Lockhart (1995b), op cit, 604. Applying this framework to the case of *SPUC v Grogan*, they note that they “would not present those who are willing to entertain the notion of abortion as a legitimate commercial activity as outside the realm of moral discourse”: *ibid*, 605.

¹⁰⁵ Article 6 TEU post-Lisbon provides that the Union shall accede to the ECHR.

¹⁰⁶ As discussed in Chapter 3, a fuller understanding of the relativity of rights and of legal concepts is attributable to Hohfeld, whose work Zucca describes as ‘very valuable’: Zucca (2007), op cit, 29.

¹⁰⁷ For an example of such a conflict, see Weiler & Lockhart (1995b), op cit, 614, discussing the contrast between *Wachauf* and *Bostock*, on whether the absence of a right to compensation ought to prohibit compensation.

that, therefore, the ‘enhanced right’ must prevail as matter of norm conflict resolution. However, in the context of the existence of value pluralism about rights, this technical solution seems to lack normative depth and it is also contingent on the absence of any competing right as a cause of conflict.

Echoing the debate above, Petersmann has proposed that human rights need to be integrated into a system of liberalised and regulated trade. He makes explicit the fundamental character of trade rules that Coppel & O’Neill attributed to the ECJ and for which they criticised the Court, while Weiler & Lockhart both questioned the extent of the Court’s attributed link-up between trade and rights and also defended the concept of Community free movement as a civilising force with its own normative weight or claim. For Petersmann, economic freedoms have a fundamental character in light of their social function and their real importance in day-to-day lives of citizens: people spend most of their time on their economic freedoms.¹⁰⁸ In contrast with international law, in which has developed organisations with specific competences and without an overarching constitutional framework:

Regional integration ... has moved towards a different ‘integration paradigm’ linking economic integration to constitutional guarantees of human rights, democracy and undistorted competition.¹⁰⁹

Petersmann’s view is that the collective supply of public goods that international economic regulations seeks to achieve may not be attainable unless part of a broader package¹¹⁰ linked to what can be described as a thick understanding of constitutionalism,¹¹¹ understood as entailing the rule of law, the limitation and separation of government powers, democratic self-government, human rights, social justice, and the role of international law in ensuring the supply of public goods.¹¹² On this understanding, human rights are understood as having important instrumental functions: enhancing personal access to information widely dispersed; setting incentives for saving, investments, and the division of labour; promoting

¹⁰⁸ Petersmann (2002a), op cit, 629.

¹⁰⁹ Ibid, 623.

¹¹⁰ Ibid, 624.

¹¹¹ Petersmann does not use the term thick constitutionalism.

¹¹² Ibid, 648.

the effective resolution of economic conflict; and enabling decentralised enforcement of rules.¹¹³

There are thus functional interrelationships between economic and political order and human rights.¹¹⁴ Within the EU, Petersmann notes the judicial protection of market freedoms and the non-discrimination principle as fundamental individual rights,¹¹⁵ though he also notes that the ECJ avoids human rights language for the common market freedoms, for the right to property, and the freedom to pursue a trade or business.¹¹⁶ On this account, human rights are functionally related to the securing of market freedoms and the effective supply of public goods. The relative normative status of human rights and economic freedoms are not really differentiated. On the contrary, Petersmann advocates “a holistic human rights conception by granting equal importance to economic, social and cultural rights as to civil and political rights in their realm of protection”.¹¹⁷ This is presented as an ‘integration paradigm’ linking trade liberalization and its adjustment to problems with the promotion of economic and social human rights and joint financial ‘burden sharing’ (as in European integration).¹¹⁸

In a comprehensive refutation of Petersmann’s position, Alston argued that while it raised issues of clear importance, Petersmann dis-moored human rights law from its root or foundations in human dignity in favour of an instrumentalised conception whereby human rights were understood as having a social and economic function. This presented individuals as the objects, not the holder, of rights.¹¹⁹ To cross-reference the discussion above, this

¹¹³ Ibid, 626-627.

¹¹⁴ Ibid, 628.

¹¹⁵ Ibid, citing Case 240/83, *Procureur de la République v. ADBHU* [1985] ECR 531, para. 9; Case C-55/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 (free movement described as fundamental freedoms’); Case 22/86, *UNECTEF v. Heylens*, supra n. 88, para. 14 (free movement of workers described as a ‘fundamental right’).

¹¹⁶ Petersmann (2002a), op cit, 628, though *Heylens* seems an exception.

¹¹⁷ Ibid, 640, n. 49.

¹¹⁸ Ibid, 643.

¹¹⁹ Alston (2002), op cit, 827, 843. Alston offered numerous other criticisms, including the paradoxical character of Petersmann’s constant invocation of democracy compared to his prescription of attributing human rights competence to international bodies beyond the reach of domestic constituencies (ibid); a tendency to use Kant in a misleading way so as to lend an intellectually compelling tone to his writing (841, noting also other work by Petersmann describing the North Atlantic Treaty Organisation (NATO) as ‘a Kantian alliance of free States’); and Petersmann’s conception of the rule of law, equating it to rule by lawyers (ibid, 835). In agreement as to the normative priority of human rights over trade, see, e.g. J. Klabbers, *Treaty Conflict and the European Union* (Cambridge Univ. Press 2009), 39-45.

echoes the critique by Coppel & O'Neill of ECJ caselaw as being ambivalent about the normative status of rights, with Coppel & O'Neill attributing an integrationist agenda as the motive for the ECJ approach. Petersmann also seems motivated by the same integration concern, making reference to 'worldwide integration law'.¹²⁰ For Alston, this more instrumentalised conception of rights marked a radical departure from the existing understanding of rights, which Petersmann did not duly acknowledge. Further, Alston critiqued Petersmann's suggestion that the EU offered a bottom-up example of citizen-driven linkages between social and economic rights and classic civil and political rights, noting that:

... only...since the crises surrounding the ratification of the Maastricht Treaty ... [had the EU] begun to demonstrate awareness of the need to move away from the early functionalist elite-driven model of European integration to a more constitutional approach which consciously reaches out and seeks to involve civil society proper.¹²¹

Citing Peers, Alston noted that the ECJ had generally not equated freedom to trade with a human right.¹²² On the free movement principles, the Court's approach is open to many different interpretations.¹²³ Here, he cites Weiler:

On the one hand they have a de-humanizing element in treating workers as 'factors of production' on [par with goods, services and capital]. But they are also part of a matrix which prohibits, for example, discrimination on grounds of nationality, and encourages generally a rich network of transnational social transactions.¹²⁴

More critically, Alston noted that minority rights were marginal to the EU's own arrangements and "virtually absent from the EU Charter of Fundamental Rights".¹²⁵

¹²⁰ Petersmann (2002a), op cit, 632. For critique, see Alston (2002), *ibid*, 830-833, questioning the normative attractiveness of this idea.

¹²¹ *Ibid*, 832.

¹²² *Ibid*, 825, referring to S. Peers, 'Fundamental Rights or Political Whim? WTO Law and the European Court of Justice', in G. de Búrca & J. Scott (eds.), *The EU and the WTO* (2001), 125, describing caselaw referring to a right to trade as odd in the context of the overall jurisprudence of the ECJ.

¹²³ Alston (2002), op cit, 825.

¹²⁴ JHH. Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique', 3 *EJIL* 65-91 (1992), 68.

¹²⁵ Alston (2002), op cit, 833.

What comes through Alston's critique specifically on the EU and ECJ is an enduring ambivalence on the part of the EU institutions about the status of rights in the EU legal order. Free movement provisions are treated as being fundamental and having a 'quasi-human rights status',¹²⁶ but the relationship with the general law of human rights tends not to be made explicit. In at least one case (post-dating Coppel & O'Neill's critique), the ECJ has described free movement of goods as a 'fundamental right'.¹²⁷ The suspicion occasionally voiced that human rights have been invoked opportunistically to enhance the ECJ's own legitimacy rather than because of a concern with human rights protection *per se* is more understandable in that context, even if the criticism may sometimes be over-stated or to a degree speculative. In 2001, Besselink commented: "... it is not difficult to analyse the caselaw of the ECJ on human rights in terms of the predominance of (economic) fundamental rights over the classic human rights".¹²⁸ In the following section, some of the more recent leading decisions from the relatively small body of ECJ caselaw on human rights and free movement are analysed to determine to what extent this remains the case. The sample of cases cannot claim to be exhaustive, but it does reflect the 'mixed' nature of this body of caselaw in the sense that sometimes free movement has trumped national human rights law and sometimes the reverse has been the outcome.¹²⁹

First, it is worth briefly recalling (1) *International Handelsgesellschaft*,¹³⁰ which established the supremacy claim of the ECJ over all national constitutional law inclusive of national human rights laws, and (2) the EU Charter of Fundamental Rights adopted in 2000. The *International Handelsgesellschaft* judgment might be thought to have generated some ambiguity about the normative status of rights by predicating the interpretation human rights norms on structural concerns: "...the protection of such rights, while inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community".¹³¹ The 'framework and

¹²⁶ L. Besselink, 'Case Note', 38 *CMLRev* 437-454 (2001), 454.

¹²⁷ Case C-228/98, *Douinas v. Minister for Economic Affairs* [2000] ECR I-577, as noted by Nic Suibhne (2009), op cit, 236, citing P. Oliver & W-H. Roth, 'The Internal Market and the Four Freedoms', 41 *CMLRev* 407-441 (2000).

¹²⁸ Besselink (2001), op cit, 454.

¹²⁹ As noted by Nic Suibhne (2009), op cit, 23, and see *ibid* 234-235 for a summary of relevant categories of caselaw.

¹³⁰ Case 11/70, [1970] ECR 1125.

¹³¹ *Ibid*, 1134.

structure' of the Community is such an open-ended concept that the limitations permissible could be interpreted very broadly.

Similarly, the EU Charter could be considered quite ambiguous on the status of human rights relative to other interests. Article 52.1 on the scope of guaranteed rights states:

Any limitation on the exercise of rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

This paragraph recognises the possibility of conflict i. between rights and ii. between rights and the general interest and for rights to be limited in order to resolve the conflict. Two conflicting tendencies can be discerned from the wording. On the one hand, the wording, echoing the formula in *Wachauf*, that rights have an essence that may not be impaired at all points to a strong, status-oriented conception of rights. However, this essence is not identified. Moreover, there is a vague reference to a 'general interest' as a ground for limiting rights.¹³² The Explanations to the Charter elaborate on the meaning of 'general interest' and state:

The reference to general interests recognised by the Union covers both the objectives mentioned in Article 2 [of the European Community Treaty] and other interests protected by specific Treaty provisions such as Articles 30 or 39(3) of the EC Treaty.

Weiler has noted, regarding the concept of general interests in ECJ caselaw, that "it is clear that in assessing what is in the general interest ..., the Court makes reference to the *Community* general interest and *not to an aggregate or cumulative Member State interest*" (emphasis in original).¹³³ Given, however, the Treaty change since this observation to the effect that the TEU (in Article 4(3)) now recognises that the principle of sincere cooperation between the Member States and the Union is a mutual one and that the Article requires the

¹³² The expression in the Charter reflects its use in ECJ caselaw: see, e.g. Case 44/79, *Hauer v. Land Rheinland Pfalz* [1979] ECR 3727, at 3746.

¹³³ Weiler (1986), op cit, 1131.

Union to respect fundamental political and constitutional traditions of the Member States, this more one-sided approach seems problematic.

The reach and scope of the limitations on rights is thus very unclear, since both the general objectives of the Treaty as set out in Article 2 of the European Community Treaty (ECT)¹³⁴ and now Article 3 TEU¹³⁵ and (it seems) any specific provisions can be justifiably involved to limit rights. Further, the balance between the Union interest and Member States interest has also to be addressed in any assessment. However, the way in which the Charter and accompanying Explanations adopted ECHR standards works to limit the potential over-reach of this limitation clause (discussed further below). Paragraph 3 states:

Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.¹³⁶

Caselaw since the adoption of the Charter also sheds light on the relative normativity of rights in EU law.

In *Schmidberger*,¹³⁷ the facts concerned a protest mounted on an Alpine road route over which Austrian authorities had control. The aim of the protest was to demand from national and Community authorities a strengthening of the various measures designed to limit and reduce heavy goods traffic on the Brenner motorway and the pollution thereby caused.¹³⁸ The effect of the protest was to prevent the passage of trucks operated by the

¹³⁴ Article 2 ECT was very broad in stating the Community objectives:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

¹³⁵ The text of (now) Article 3 TEU is generally similar to that of Article 2 ECT.

¹³⁶ Generally, for an overview of the relationship between EU law and the ECHR, see A. Sherlock, *The European Union and the European Convention on Human Rights* (Oxford Univ. Press 2007).

¹³⁷ C-112/00, *Schmidberger v. Austria* [2003] ECR I-5659.

¹³⁸ Opinion of Advocate General Jacobs, 12th July 2002, para. 8.

plaintiff, Schmidberger, which was a German transport undertaking of modest size. The firm's vehicles did not breach environmental guidelines. The Austrian authorities considered that they had to allow the demonstration to go ahead because the demonstrators were exercising their fundamental rights of freedom of expression and freedom of assembly under the Austrian constitution.¹³⁹ Schmidberger complained of a breach of free movement.

The Advocate General noted that this appeared to be the first case in which a Member State had invoked the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms of the Treaty.¹⁴⁰ The Advocate General proposed that in such a case the Court should follow the same two-step approach as it did in analysis of the traditional grounds of justification such as public policy or public security which are also based on the specific situation in the Member State concerned: it was therefore to be established: (a) whether Austria was, as a matter of Community law, pursuing a legitimate objective in the public interest capable of justifying a restriction on a fundamental Treaty freedom; and (b) if so, whether the restriction in issue is proportionate.¹⁴¹ The Advocate General noted:

It must moreover be borne in mind that despite a basic consensus reflected in the European Convention on Human Rights about a core of rights which must be regarded as fundamental, there are a number of divergences between the fundamental rights catalogues of the Member States, which often reflect the history and particular political culture of a given Member State.

It cannot therefore be automatically ruled out that a Member State which invokes the necessity to protect a right recognised by national law as fundamental nevertheless pursues an objective which as a matter of Community law must be regarded as illegitimate.¹⁴²

This sets up a situation of clear conflict between a fundamental right at national level and Community law in the form of free movement and suggests that such a fundamental national

¹³⁹ Ibid, para. 88.

¹⁴⁰ Ibid, para. 89.

¹⁴¹ Ibid, para. 95.

¹⁴² Ibid, paras. 97-98.

provision must give way to the Community interest in the event of conflict. The Advocate General went on, however, to state that the present case was more straightforward:¹⁴³ as the Community itself recognised freedom of expression, it followed that the objective pursued by the Member States was legitimate.¹⁴⁴ On the proportionality issue, the Advocate General held that where it is for a Member State actively to protect a fundamental Treaty freedom from interference from private individuals the Member State concerned unquestionably enjoys a margin of discretion.¹⁴⁵ Further, the Advocate General made three points: the restriction on freedom of movement was limited in that it was for a short duration, measures were taken to limit the disruption, and some disruption was necessary in order for the right to be effectively exercised at all.¹⁴⁶

The ECJ followed similar reasoning, though contrasted the rights in issue here to non-derogable rights:

... unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose.... In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests. The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.¹⁴⁷

Here, the ECJ invoked a classic balancing metaphor to solving rights conflicts, discussed further below. It avoided making any claim that either human rights or free movement prevailed, but its methodology in effect creates an exception out of free movement on the basis of human rights. Klabbers suggests that this rhetorically places human rights and free

¹⁴³ Ibid, para. 99.

¹⁴⁴ Ibid, paras. 102-103.

¹⁴⁵ Ibid, para. 106.

¹⁴⁶ Ibid, paras. 108-110.

¹⁴⁷ C-112/00, *Schmidberger v. Austria*, supra n. 137, paras. 80-83.

movement on a par, but that if human rights were stated as the general principles and free movement the exception, it would be much more difficult to sustain a conclusion favourable to free movement.¹⁴⁸ “...*Schmidberger* suggests, [human rights] are afterthoughts to the process of market integration; at best, they may come to justify exceptions to the free movement of goods”.¹⁴⁹ On the proportionality of the restriction, the ECJ adopted very similar reasoning to the Advocate General, additionally noting that the demonstration complied with national formal requirements and the disruption was isolated.¹⁵⁰ The case might be taken to suggest a reasonably robust view of the status of human rights in its result, but not as robust as *Klabbers* would prefer, and it avoids any general statement confirming this through clarifying the relationship between fundamental market freedoms and human rights.

In *Omega*,¹⁵¹ the German police had made an order forbidding *Omega* from operating a ‘playing at killing’ game on the ground that the act of simulated homicide and the trivialisation of violence engendered was a violation of human dignity. In Germany, the protection of human dignity is a constitutional principle.¹⁵² As the equipment was lawfully made in the UK, *Omega* argued that the order breached its rights under the EU principle of freedom to provide services. The Advocate General expressly addressed the issue of the ranking of human rights relative to the fundamental freedoms, but she notes that the ECJ does not rank them more highly than the Treaties or fundamental freedoms:

Clarification would appear to be required with regard to the order of precedence that is to be afforded to fundamental rights as general principles of Community law. It is particularly questionable whether there is in fact any order of rank between the fundamental rights applicable as general legal principles and the fundamental freedoms enshrined in the Treaty.

It is significant in this context that the Court of Justice should defend fundamental rights as general legal principles of the Community on the basis of Article 220 EC and

¹⁴⁸ *Klabbers* (2009), op cit, 165-166. *Klabbers* suggests this and other cases “suggest, once again, that the EC is reluctant to subject itself to other norms”: *ibid*, 167. Implicitly, the suggestion here is that the integration imperative is what ultimately has the highest normative status in EU law.

¹⁴⁹ *Ibid*, 228.

¹⁵⁰ *Ibid*, paras. 83-93.

¹⁵¹ Case C-36/02, *Omega* [2004] ECR I-9609.

¹⁵² See Article 1 of the German Basic Law or *Grundgesetz*.

Article 6(2) EU. They are to be considered part of its primary legislation and therefore rank in hierarchy at the same level as other primary legislation, particularly fundamental freedoms.¹⁵³

The Advocate General went on to suggest that the fundamental freedoms could be equated with fundamental rights:

However, fundamental freedoms themselves can also perfectly well be materially categorised as fundamental rights – at least in certain respects: in so far as they lay down prohibitions on discrimination, for example, they are to be considered a specific means of expression of the general principle of equality before the law. In this respect, a conflict between fundamental freedoms enshrined in the Treaty and fundamental and human rights can also, at least in many cases, represent a conflict between fundamental rights.¹⁵⁴

However, somewhat ambiguously, the Advocate General went on to doubt the appropriateness of weighing fundamental rights against fundamental freedoms:

Even though the Court of Justice interprets the aforementioned restrictions on fundamental rights, in substance, in a particular manner tailored to the needs of the Community, it appears to me to be significant that in cases such as this the necessary weighing-up of the interests involved ultimately takes place in the context of the actual circumstances in which the particular fundamental rights are restricted. The need ‘to reconcile’ the requirements of the protection of fundamental rights cannot therefore mean weighing up fundamental freedoms against fundamental rights per se, which would imply that the protection of fundamental rights is negotiable.¹⁵⁵

Here, the argument seems to be that *in concreto* application of fundamental rights and fundamental freedoms is best addressed in the framework of limitations of rights, not in terms of weighing or balancing them. However, the apparent suggestion here of sensitivity to the facts does not resolve the problem of conflict. The suggestion is that fundamental rights are non-negotiable, but the Advocate General does not rule out their limitation, which

¹⁵³ Opinion of Advocate General Stix-Hackl, 18th March 2004, paras. 48-49.

¹⁵⁴ Ibid, para. 50 (reference omitted).

¹⁵⁵ Ibid, para. 53.

appears to somewhat fudge the issue. If rights can be limited, they are to that extent negotiable.

In a later paragraph, the Advocate General noted the interaction of Community and national human rights norms:

However, if such an examination should show that the restrictive national measure concerned is based on an evaluation of national protection of fundamental rights that reflects general legal opinion in the Member States, a corresponding requirement of protection could (also) be inferred from Community protection of fundamental rights – which would mean, methodologically speaking, that it would no longer be necessary to examine whether the national measure is to be considered a justified, because permissible, exception to the fundamental freedoms enshrined in the Treaty, but, according to the formula in the *Schmidberger* judgment, ‘how the requirements of the protection of fundamental rights in the Community can be reconciled with those arising from a fundamental freedom enshrined in the Treaty’.¹⁵⁶

This is a subtler and more nuanced account of the interaction of the Community and national legal orders than the linear integration narrative found in the Court’s constitutionalising decisions in *Van Gend*, *Costa*, *Internationale Handelsgesellschaft* and others. It seeks to relate the legal orders of the Member States with the EU, without either order entirely subsuming the other, whereas other caselaw presents a one-dimensional Community imperative superseding any other consideration. On this approach, general legal opinion of the Member States grounds Union fundamental rights. The above passage, however, does not identify how conflict between human rights and the fundamental freedoms is to be addressed, rather it just poses the issue.

In an Opinion that is much more explicit on the deeper foundations of human rights legitimacy in EU law and perhaps the most thorough discussion of it in all ECJ caselaw,¹⁵⁷ Advocate General Stix-Hackl developed her discussion to examine the foundation of rights in the Community legal order, not in jurisdictional terms, but in philosophical terms, in

¹⁵⁶ *Ibid*, para. 72.

¹⁵⁷ Endorsing Advocate General Stix-Hackl’s approach in *Omega* over that of the ECJ in *Schmidberger*, see J. Morijn, ‘Balancing Fundamental Rights and Common Market Freedoms in Union Law: *Schmidberger* and *Omega* in Light of the European Constitution’, 12(1) *ELJ* 15-40 (2006), 40.

relating it to human dignity as a value (see the discussion of dignity in Chapter 3 above). This is a status conception of rights and, as such, suggests that there are inherent limits to the extent to which rights can be qualified or limited. Having noted the inchoate nature of human dignity as a value, i.e. that it lacked enough specificity to translate into an immediate result, the Advocate General observed the general need for a balancing exercise, subject to the limitations in the caselaw on the invocation of derogations by the Member States.¹⁵⁸ The caselaw requires the existence of a ‘genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society’, the exclusion of purely economic ends, and a requirement that individual conduct give rise to punitive measures or other genuine and effective measures intended to combat that conduct.¹⁵⁹

Showing some deference to individual Member State autonomy (rather than just to the Member States as an aggregate), the Advocate General noted that “the finding that a fundamental interest of society has been affected is determined in the light of national value judgments,”¹⁶⁰ but national restrictions were then to be subject to a Community proportionality test.¹⁶¹ On the facts, she concluded the German prohibition should be accepted and that mention should be made that it caused public displeasure and of the rejection of conduct or services glorifying or promoting violence, such rejection being based on the protection and observance of human dignity.¹⁶² The application of proportionality to the facts is, however, extremely brief, the Advocate General simply asserted that proportionality had not been breached given the fact of public displeasure and given the concept of or concern with dignity. The limits or contours of ‘public displeasure’ or ‘dignity’ are not identified in any conceptual terms, meaning it would be difficult to predict how the application of this approach would play out on future facts.¹⁶³

¹⁵⁸ Opinion of Advocate General Stix-Hackl, *supra* n. 153, para. 92 et seq.

¹⁵⁹ *Ibid*, para. 99.

¹⁶⁰ *Ibid*, para. 105.

¹⁶¹ *Ibid*, para. 103.

¹⁶² *Ibid*, para. 108.

¹⁶³ See also the discussion in Nic Suibhne (2009), *op cit*, 244-246, discussing how the ECJ should approach clashing or conflicting views of rights amongst the Member States, e.g. differing conceptions of human dignity. Nic Suibhne also notes that *Omega* concerned Germany’s internal constitutional space: *ibid*, 13. There may have been thus an implicit *de minimis* approach by the ECJ to the infringement of free movement (though the ECJ has expressly rejected a *de minimis* concept applied to free movement in some cases, e.g. Joined Cases 177 and 178/82, *van de Haar and Kaveka de Meern* [1984] ECR 1797, para. 13).

In a much briefer judgment that failed to take up the opportunity to offer a stronger conceptual framework for norm conflict reasoning in EU law, given the relatively extensive discussion of the Advocate General, the ECJ noted the balancing exercise between Community and national competence:

The fact remains, however, that the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty.¹⁶⁴

In concluding on the facts, the ECJ stated:

... according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany. It should also be noted that, by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus ‘play at killing’ people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.¹⁶⁵

This amounts to the application of a proportionality test upon an acceptance by the ECJ of the requirement of human dignity in German law, which is similar to the Advocate General’s approach. The exact boundaries of discretion in more general terms are left unclear, but it seems obvious that it would require a quite idiosyncratic national constitutional provision to of itself fall foul of the ECJ approach here. Neither did the ECJ seek to impose the German standard on the Community as a whole.¹⁶⁶ In that respect, the ECJ decision shows a high

¹⁶⁴ Case C-36/02, *Omega*, *supra* n. 151, para. 31.

¹⁶⁵ *Ibid*, para. 39.

¹⁶⁶ Torres Pérez (2009), *op cit*, 173, 175. Torres Pérez, *ibid*, 174-175, notes that *Familiapress* (Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag* [1997] 1 ECR-3689, concerning the banning by Austria of offering consumers free gifts related to the sale of goods or supply of services) was similarly accommodating of national diversity, though in the latter case the ECJ left the application of proportionality to the national court, whereas it ruled on proportionality itself in *Omega* (finding no violation).

degree of deference to German and national law,¹⁶⁷ but without articulating this explicitly. Generally in *Omega*, the nature of balancing and proportionality as tools of conflict resolution are left unclear. There is no attempt to unpack the concepts of balancing or proportionality and no attempt to identify and examine the problem of weighing that both present. This point is taken up further in the next section on specification of rights.

The *Kadi* case involved the opposite vertical relationship than the caselaw above: namely the relationship between the Community and Union legal order and international law, in the context of human rights claims.¹⁶⁸ This offers an interesting way of testing the depth of a status-oriented conception of rights in Community law, since the latter would suggest a symmetrical approach to rights protection irrespective of competing jurisdictional claims, be they from national or international legal sources. Such a symmetrical approach was implicit in the reasoning of Advocate General Maduro in *Kadi*,¹⁶⁹ whose approach mirrored the German Federal Constitutional Court's qualified acceptance of EU supremacy, except here applied to the reception or relationship of EU law to international law. The facts related to the adoption by secondary legislation in EU law of measures against individuals resulting from requirements posed by UN Security Council resolutions. The Advocate General held that the EU could accept the direct application of UN Security Council resolutions in the EU legal order, so long as equivalent human rights protection as reflected in EU law was to be found in the UN system.¹⁷⁰ Thus, systemic questions appeared subordinated to human rights one, at least at the level of explicit motivation or justification. This priority was also reflected in a different way in the judgment of the Court of First Instance (CFI).

¹⁶⁷ Ibid, 173. Ni Suibhne (2009), op cit, 243-244, interprets *Omega* in this way, but notes that "one *Omega* does not a new dawn necessarily make" (ibid, 244).

¹⁶⁸ Case T-315/01, [2005] ECR II-3649, judgment in appeal delivered by the ECJ in Joined Cases C-402/05 P & C-415/05 P, *Kadi and al Barakaat International Foundation v. Council* [2008] ECR I-6351. Of the very large literature that has developed in the case, see, in particular of relevance to issues of norm conflict, S. Besson, 'European Legal Pluralism after *Kadi*', 5(2) *ECLR* 237-264 (2009), op cit; G. de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*', *Jean Monnet Working Paper 01/09* (2009); M. Cremona, F. Francioni & S. Poli (eds.), 'Challenging the EU Counter-Terrorism Measures through the Courts', *EUI Working Papers AEL 2009/10* (2009); D. Halberstam & E. Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural world Order', 47 *CMLRev* 13-72 (2009); KS. Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the perspective of Human Rights', 9(2) *HRLR* 288-305 (2009). See further references in Besson, ibid, 238, n. 3; de Búrca, ibid, n. 75; S. Poli & M. Tzanou, 'The *Kadi* Rulings: A Survey of the Literature', in Cremona, Francioni & Poli (eds.) (2009), op cit.

¹⁶⁹ S. Besson, 'How International is the European Legal Order: Retracing Touri's Steps in the Exploration of European Legal Pluralism', 5 *NoFo* 50-70 (April 2008), 59.

¹⁷⁰ Opinion of Advocate General Maduro, 16th January 2008, paras. 34-40, 54 (the Advocate General did not draw any parallel with national reception of Community/Union law).

Whereas the Advocate General was prepared to subject the EU implementing measures to judicial review, the Court of First Instance accorded an automatic priority to UN Security Council resolutions, excluding judicial review save for violations of *jus cogens*. Nonetheless, here too, human rights, even if only in the narrow category of *jus cogens*, prevailed implicitly over any systemic concerns that the EU needed to protect its own autonomy from international law. In contrast, the ECJ reached a similar conclusion to the Advocate General in subjecting EU implementing measures to fuller judicial review, but the systemic concern with autonomy was much more manifest in its reasoning.¹⁷¹ Before looking in a bit more detail at the judgment, the background and facts are summarised. *Kadi* is also important for the way in which the issue of competence was addressed, but in the discussion below, the focus is on how human rights protection was conceptualised relative to other legal interests or concerns.

In *Kadi*,¹⁷² the main issue was the competence or otherwise of the EU to impose so-called ‘smart sanctions’ on individuals, in this case arising from Resolution 1267 (1999) and Resolution 1333 (2000) of the UN Security Council requiring such sanctions to be imposed on Usama bin Laden and named individuals associated with the Taliban of Afghanistan. The applicable Regulation (EC) No. 881/2002 related to individuals rather than to the Taliban and Afghanistan as a regime or State of a third country. The plaintiff, Kadi, was one of the persons named or blacklisted as a result of legislative provisions, and in his action sought the annulment of Regulation (EC) No. 881/2002 and No. 2062/2001 (the latter specifically listing him as an individual to whom Regulation (EC) No. 881/2002 applied).¹⁷³ The applicant’s argument concerning competence was that the acts were adopted *ultra vires*, in that the defendant institutions adopted these regulations on the basis of Articles 60 EC and

¹⁷¹ See de Búrca (2009), op cit, 4.

¹⁷² The Court of First Instance (CFI) judgment in *Kadi* was subjected to considerable academic criticism for failing to protect human rights, see, e.g.: L. Van Den Herik, ‘The Security Council’s Targeted Sanctions Regimes: In Need of Better Protection of the Individual’, 20(3) *Leiden JIL* 797-807 (2007); C. Eckles, ‘Judicial Review of European Anti-Terrorism Measures - The *Yusuf* and *Kadi* Judgments of the Court of First Instance’, 14(1) *ELJ* 74-92 (2007); HP. Aust, ‘Between Self-assertion and Deference: European Courts and their Assessment of UN Security Council Resolutions’, 8 *Anuario Mexicano de Derecho Internacional* 51-77 (2008). Broadly supportive, see M. Karayigit, ‘The *Yusuf* and *Kadi* Judgments: The Scope of the EC Competence in Respect of Restrictive Measures’, 33(4) *LIEI* 379-404 (2006). See also de Búrca (2009), op cit, 24 and further references in Poli & Tzanou in Cremona, Francioni & Poli (eds.) (2009), op cit, 142-144 and especially nn. 17, 28.

¹⁷³ Council Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities, OJ L 139/9, 27.05.2002, p. 9; Commission Regulation (EC) No. 2062/2001, OJ L 277/25, 19.10.2001, p. 25, amended, for the third time, Council Regulation (EC) No. 467/2001, OJ L 67/1, 06.03.2001, p. 1, adding the name of Kadi, with others, to Annex I to that regulation.

301 EC, whereas those provisions authorise the Community to interrupt or reduce relations with third countries, but not to freeze individuals' assets.

The CFI in *Kadi* held that the *non-exclusion* in the text of the Treaty of the possibility of sanctions being effected against individuals was enough to justify reliance on Articles 60 and 301 ECT. It went on to hold that Articles 60 and 301 ECT were not themselves a sufficient legislative basis for Community action by Regulation (EC) No. 467/2001, Articles 60 and 301 ECT requiring as they did a factual link with third countries, and the addition of the general provision of Article 308 ECT was a necessary basis for individual sanctions.¹⁷⁴ On *jus cogens* and human rights, the CFI stated:

It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law....

None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible....

Furthermore, the Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person. In the preamble to the Charter, the peoples of the United Nations declared themselves determined to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person'. In addition, it is apparent from Chapter I of the Charter, headed 'Purposes and Principles', that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms.¹⁷⁵

¹⁷⁴ Case T-315/01, *Kadi*, supra n. 168, para. 92 et seq.

¹⁷⁵ *Ibid*, paras. 225-228.

Here, there seems to be a mix of pure human rights consideration and systemic concerns, or a compromise between them. While wishing to show strong deference to the UN and the role of the Security Council, ultimately *jus cogens* violations could be judicially reviewed. However, logically, the reference to fundamental human rights in general (and not just *jus cogens*) in the subsequent justifying paragraphs would point towards more expansive review based on any human rights violations.

The ECJ upheld the decision of the CFI, but differed in its reasoning. Having decided the competence issue in favour of the Community, the Court stated that the Community was an autonomous legal system with respect to international law¹⁷⁶ and that “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty”.¹⁷⁷ The Court declared that UN rules could not have priority over:

...the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.¹⁷⁸

The ECJ further held that the guarantee of fundamental rights in the Community, inspired by the constitutional traditions of the Member States and the European Convention on Human Rights,¹⁷⁹ formed part of the very foundations of the Community.¹⁸⁰ The ECJ held that it thus did have jurisdiction to determine the validity of international legal norms within the Community legal system, which did not entail any challenge to the primacy of (in this case) the Security Council resolution in international law.¹⁸¹ The ECJ noted the special importance of UN Security Council resolutions under Chapter VII of the UN Charter,¹⁸² but de Búrca notes “The judgment is striking for its treatment of the UN Charter, as least insofar as its

¹⁷⁶ Joined Cases C-402/05 P & 415/05 P, supra n. 168, para. 282 (ECJ). See also *ibid*, para. 316.

¹⁷⁷ *Ibid*, para. 285.

¹⁷⁸ *Ibid*, para. 304.

¹⁷⁹ *Ibid*, para. 283.

¹⁸⁰ *Ibid*, para. 290. See also *ibid*, paras. 303-304.

¹⁸¹ *Ibid*, para. 288.

¹⁸² *Ibid*, para. 294-297.

relationship to EC law was concerned, as no more than any other international treaty”.¹⁸³ For de Búrca, the ECJ judgment appeared to have expressed “important parts of its reasoning in chauvinist and parochial tones”, in contrast with the concern professed by the EU to be a ‘virtuous actor’ in international law.¹⁸⁴

On the facts, the ECJ held that the appellant’s rights of defence¹⁸⁵ and his right to property were breached.¹⁸⁶ The approach of the ECJ might be thought a victory for human rights over more instrumental concerns, and the judgement was welcomed for affording greater human rights protection than had the CFI.¹⁸⁷ However, the exact normative status of human rights remains under-discussed. In particular, it is not clear that human rights have the highest normative status, since they were assimilated into a broader category of constitutional principles making up the character of the EU as a legal system. The ECJ did not address the issue of *jus cogens* at all. This could be considered an example of what Coppel & O’Neill described as the defensive use of human rights: human rights helped support an argument about the autonomy and independence of the EU legal system from international law, thereby enhancing the status and legal power of the EU relative to international law. The ECJ emphasised the particularism of the EU legal order to an extent that suggests human rights *per se* was not the primary motivation, since human rights protection could have been articulated differently, in a more dialogic way that reflected the *Solange* principle that emerged at the end of Advocate General Maduro’s Opinion:¹⁸⁸ the ECJ could have stated it was willing to presume compliance by the UN with human rights norms, but which presumption would not be unchallengeable in the Community system.¹⁸⁹

¹⁸³ de Búrca (2009), op cit, 26.

¹⁸⁴ Ibid, 6 and passim.

¹⁸⁵ Joined Cases C-402/05 P & 415/05 P, *Kadi*, supra n. 168, para. 348. Similarly see ibid, para. 353, noting these procedures violated the right to be heard and the principle of effective judicial protection.

¹⁸⁶ Ibid, para. 369, the Court having noted that some restriction of property rights could in principle be justified: ibid, para. 366. See also, e.g. the decision of the CFI in Case T-47/03, *Sison v. Council* [2005] ECR II-1429, which adopted an approach more consistent with the ECJ rather than the CFI in *Kadi*.

¹⁸⁷ As noted in de Búrca (2009), op cit, 2.

¹⁸⁸ Opinion of 16th January 2008, para 54.

¹⁸⁹ See de Búrca (2009), op cit, 47-48, describing this as a preferable, ‘soft constitutionalist’ approach. See also Besson (2009), op cit, 252; Ziegler (2009), op cit, 300-301. If it had done so, the ECJ would have been mirroring the approach of the European Court of Human Rights towards EU law in *Bosphorus Hava Yollari v. Ireland* (2006) 42 EHRR 1.

Recently, the decisions in *Viking* and *Laval*¹⁹⁰ again provided the opportunity for the ECJ to clarify the status of human rights relative to the free movement principles. The judgments stand in contrast to the deferential approach to national human rights protection in *Omega*, surprisingly so given the greater sensitivity of the factual context of the cases namely, the right to strike in national law and its relationship to free movement. The *Laval* and *Viking* judgments also suggest continuing ambivalence as to the exact normative status of traditional human rights compared with the economic freedoms in the EU legal order. The cases, which are more fully discussed in Chapter 6 below, concerned the relationship between free movement and the right to strike as protected in national laws. Despite the specific exclusion of the rights to strike from the social competence of the Union by then Article 137(5) ECT (now Article 153(5) TFEU), the ECJ held that national rules permitting strikes where such strikes has the effect of being an inhibition to the posting of workers from one Member State to another were contrary to Community law.¹⁹¹ This could be considered as simply a limitation on the right to strike, and as such unremarkable given that few rights are absolute.¹⁹² However, it was more significant in its broad scope, in entirely excluding strikes in this situation, and in subordinating the right to strike to free market freedoms, despite the saving clause for strikes in the Treaty.

In summary, the ECJ has yet to articulate a clear model of norm conflict resolution in the area of fundamental rights. It is unclear exactly what their normative status is relative to the market freedom and systemic constitutional principles of the Union. In specifics, the caselaw varies in approach, from an apparently deferential attitude to Member States' human rights norms (and thus an implicit downplaying of competing Union systemic concerns), to a notable willingness to strike down or override a fundamental national human rights norm on grounds of free movement. The ECJ has not fully dispelled doubts reflected in the criticisms

¹⁹⁰ Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

¹⁹¹ Case C-438/05, *Viking*, *ibid.*, paras. 39-40; Case C-341/05, *Laval*, *ibid.*, paras. 87-88. There was no general discussion of human rights in either judgment, although various sources were referred to on the right to strike, which was described as a fundamental right (*Viking*, *ibid.*, paras. 43-44; *Laval*, *ibid.*, paras. 90-91). Article 11 ECHR provides for a right to join a trade union for the protection of a person's interests. Article 28 of the EU Charter of Fundamental rights explicitly protects the right to strike. See also A. Hinarejos, 'Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms', 8(4) *HRLR* 714-729 (2008), 728, noting that the judgments comes close to establishing a hierarchy where the economic fundamental freedoms are placed higher than the right to collective action.

¹⁹² See N. Reich, 'Free Movement v. Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases before the ECJ', 9(2) *GLJ* 125-161 (2008), 155.

of Coppel & O'Neill and of Alston about linking trade to human rights and thereby instrumentalising human rights in the particular context of the EU legal system. *Kadi* does not really resolve the ambiguity. A balancing approach has been suggested, but no clear rules of priority or hierarchy.

In effect, the ECJ sees to treat integration as having some kind of natural normative status, as if integration were to supplant the older idea of natural law as an inherent and ultimately dominant normative value in the EU legal system. Several commentators have remarked critically on this approach, which is still found even in the more recent caselaw discussed above. Rasmussen approvingly cites the following passage from a 1975 work by Blok:

If integrative progress for one reason or another is not achieved by Council decision, the Court must live with that. Integrative progress in the Community is not an objective law of nature; regard to progress does not legitimize judicial law creation in areas of public policy of high political relevance.¹⁹³

Similarly, Schilling comments that:

In contrast, integration viewed as a socio-economic law has no inherent morality, but is simply a question of cause and effect. As such, it does not necessarily serve any good. Such a law must rely on its own methods of enforcement, presumably on the political decisions of the legally competent bodies to proceed with the integration process. Although the functionalist theory of integration assumes that the inevitability of integration is expressed by the political actions of human actors, it could also be expressed by the ECJ's application of a law of integration absent any basis in positive law. Within the boundaries of any legal order, however, one cannot argue for judicial decisions that exceed the discretionary powers of the courts. As such, the question of a socio-economic law of integration becomes irrelevant in the present context. Thus, neither view of natural law provides a feasible foundation for the autonomy of the European Community. (references omitted)¹⁹⁴

¹⁹³ P. Blok, 'Book Review of H. Rasmussen, *Domstolen i EF* (Juristforbundets Forlag 1975)', *Tidsskrift for Rettsvetenskap* 612-621 (1976), p. 621, cited in H. Rasmussen, *The European Court of Justice* (GadJura 1998), p. 174.

¹⁹⁴ T. Schilling, 'The Autonomy of the Community Legal Order', 37(2) *Harvard ILJ* 389-409 (1996), 403.

Finally, Klabbers accurately concludes that the ECJ “remains silent about the possible conflict of norms created” by concluding international agreements, such as the ECHR.¹⁹⁵ The next section examines how such rules of priority or hierarchy can be justified in general terms and then applied to the above cases.

5.3 Hierarchy and Specification of Rights

The notion of a hierarchy of rights relates different rights to each other in a scale of ranking, as an *a priori* technique of norm conflict resolution or norm conflict avoidance. The notion has been resisted in light of the concepts or vocabulary often associated with human rights of ‘indivisibility’ and ‘interdependence’.¹⁹⁶ However, some conception of hierarchy or ranking or of the ‘relative stringency of rights’¹⁹⁷ seems inevitable. Without any hierarchy, if rights were generally thought equally ranked in the abstract, how to prioritise rights in the cases of clashes or conflict would necessarily be *ad hoc* and determined on a case-by-case, *in concreto* basis only. Rawls suggested that rights discourse should focus on a small number of essential liberties, as otherwise, the result is the “indeterminate and unguided balancing problems we had hoped to avoid by a suitably circumscribed notion of priority”.¹⁹⁸ Rawls argued that historical experience of practical institutions and reflections on constitutional design suggest that a scheme or working of the basic liberties is possible in which they do not conflict with each other. In effect, Rawls here is suggesting a kind of consensus around Western liberalism and a ranking of values on that basis.¹⁹⁹ Rawls proposed that freedom of conscience and thought and civil liberties generally are ranked first and that political liberties could be seen as instrumental protection for them, but he nonetheless stated political liberties

¹⁹⁵ Klabbers (2009), op cit, 5.

¹⁹⁶ Edwards (2006), op cit, 288; T. Koji, ‘Emerging Hierarchy in International Human Rights and Beyond’, 12(5) *EJIL* 917-941 (2001), 918-919.

¹⁹⁷ Shafer-Landau (1995), op cit, 209.

¹⁹⁸ J. Rawls, *Political Liberalism* (Columbia Univ. Press 1996), 296. Notwithstanding its indeterminacy, balancing is, as Klabbers notes, the typical solution to conflicts of rights problems: Klabbers (2009), op cit, 34. He argues that the law of itself cannot solve clashes of values: *ibid*, 35 et seq. See also JHH. Weiler, *The Constitution of Europe* (Cambridge Univ. Press 1999), 102-129, suggesting different courts may reach different balances between the same elements.

¹⁹⁹ Rawls acknowledges in *Political Liberalism* that he had a preconceived basic notion of the good that informed his theory, this being the Western experience of political liberalism: e.g., *ibid*, 297-299 et seq. (he did not make this background assumption explicit in *A Theory of Justice*).

can still be considered basic liberties as they are important enough as essential institutional means to preserving other liberties.²⁰⁰

Balancing rights on a case-by-case basis is in contrast with the notion of a hierarchy, but the use of balancing is contested on the grounds of its indeterminacy: “No plausible balancing procedure has ever been put forward”.²⁰¹ By plausible here is understood the idea of a workably objective procedure of balancing. The most influential account of balancing is probably that of Robert Alexy, who proposes the existence of a ‘Law of Balancing’. On Alexy’s account, balancing can be divided into three stages:²⁰² first, establishing the degree of non-satisfaction of a first principle; second, establishing the importance of that principle; and third, establishing the relationship between the first two elements.²⁰³

Following on this structure of balancing, Alexy contends that: “[The] judgment raises a claim to correctness, and it can be justified as the conclusion of another inferential scheme in a discourse.”²⁰⁴ Correctness here seems a matter of *relative* coherence, rather than any external standard that could be a basis for challenging the relative weights of competing principles overall. It seems that the *exact degree* of importance is still to be established. Another way of putting it is necessary to make a moral argument as to which ones takes priority and to what extent it takes priority. The outcome of our moral argument then dictates what is permissible and where the balance is to correctly drawn,²⁰⁵ not the law of balancing itself. While Alexy’s ‘Law of Balancing’, therefore, provides some logical and rationale structure to the process of balancing, it is doubtful that it provides an answer as to what

²⁰⁰ Rawls (1996), op cit, 299.

²⁰¹ Shafer-Landau (1995), op cit, 223. See also Rawls (1996), op cit, 296.

²⁰² R. Alexy, ‘Balancing, Constitutional Review, and Representation’, 3(4) *IJCL* 572-581 (2005), 572-573.

²⁰³ *Ibid*, 574.

²⁰⁴ *Ibid*, 576.

²⁰⁵ K. Möller, ‘Balancing and the structure of constitutional rights’, 5(3) *IJCL* 453-468 (2007) , 460; G. Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’, 14(6) *ELJ* 787-805 (2008), 796; T-I. Harbo, ‘The Function of the Proportionality Principle in EU Law’, 16(2) *ELJ* 158-185 (2010), 165, noting that the question of excessive burden, the third element of the standard three-element proportionality test (the first and second being *suitability* of the means to the end and the *necessity* of the means, respectively) has been criticised as undermining the whole rationale of a proportionality principle, which is to provide an objective guideline. See generally, TA. Aleinikoff, ‘Constitutional Law in the Age of Balancing’, 96(5) *Yale LJ* 943-1005 (1987), noting that balancing “openly embraced a view of the law as purposeful, as a means to an end” (958) and that one of the main criticisms is that there are “no objective criteria for valuing or comparing the interests at stake” (972). Recently, see A. Stone Sweet & J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’, 47 *Columbia Journal of Transnational Law* 73-165 (2008), arguing that for these kinds of reasons, balancing is a tool of judicial empowerment and does not constrain judicial choice.

moral priority to give to competing rights; it seems more a statement of the problem, albeit perhaps a very articulate one, rather than the solution. Habermas, criticising Alexy, related this problem to the question of goals or purposes in Alexy's scheme:

If principles manifest a value that one should optimally realise, and if the norms themselves do not dictate the extent to which one must fulfil this optimisation prescription, then the application of such principles within the limits of what is factually possible makes a goal-oriented weighting necessary.²⁰⁶

As argued in Chapter 4, following Schauer, the claim that rights have to normative superiority over more utilitarian interests seems to require that their content and status is known in advance of their application, in contrast to an *ad hoc* priority. Similarly, classic rule of law values, predictability and certainty, require such fore-knowledge of the operative content and effect of rights clauses in advance of their application. Oberdiek further argues that unspecified rights, i.e. general rights stated in the abstract without further specification, are philosophically weak because they fail to state the reasons for rights:

... the general conception of rights reifies rights, and erroneously invests special moral significance in an intermediate conclusion about what it is permissible to do instead of in the final conclusion about what it is permissible to do....Specificationism instead maintains that a right should be designated only after the final interaction of all of the reasons bearing upon the justifiability of a given action. Specificationism, in this way, makes rights themselves context-sensitive.²⁰⁷

However, a tabular form of ranking or hierarchy, comprehensively relating each right to every other, right seems unworkable. Some generality is thus necessary, but on a specificationist approach, it is minimised. Some gaps will arise and be exposed by necessity circumstances,²⁰⁸ these gaps are a space where the right does not exist as yet defined, but which was not specifically foreseen in the prior definition of the right. A right is not, on this

²⁰⁶ J. Habermas, *Between Facts and Norms* (MIT Press 1996), 254, also *ibid*, 259. See also discussion in Harbo (2010), *op cit*, 167-168.

²⁰⁷ Oberdiek (2008), *op cit*, 134-135.

²⁰⁸ *Ibid*, 141, discussing a much debated example of whether a hitch hiker who is lost in the wilderness and breaks into a cabin to make use of it to survive has acted in violation of the property rights of the owner. Oberdiek suggests no, that the property owner's right is limited to circumstances not entailing such necessity.

view, balanced and negated in a particular case: once it exists it necessarily trumps any competing consideration, if in some cases (i.e. cases of gaps) this may only become clear after the fact.²⁰⁹ The challenge, therefore, is to specify the content and inter-relationship of rights to a degree that makes their adjudication substantially predictable and determinate and that accounts for the full normative scope of a right in its definition so as to exclude as much as practicable the possibility of conflict with another right.

This may be easier than might be assumed on the basis of knowledge of caselaw, since typically only hard cases go to appellate courts. Many rankings of rights may be reflected in an unproblematic way in daily practice. For example, a general conception of liberty is obviously curtailed in the use of the road and public transport through common rules of behaviour adopted in the interests of the common good and the individual welfare and rights of citizens, including the right to life and the rights to bodily integrity.²¹⁰ The difficulty arises more in achieving a general and relatively comprehensive ranking of rights. An example that well illustrates the difficulty is the clash between the right to life and the right to privacy. Few people would disagree with an abstract statement that such two rights exist, yet disagreement is profound on how they are to be prioritised and related to each other in the context, for example, of abortion and euthanasia. In other words, abstract identification of values does not determine ranking,²¹¹ yet it is ranking that is practically necessary in resolving hard cases.

Besson proposes a formal hierarchy of rights as an internal or endogenous type of conflict resolution in legal reasoning.²¹² It entails a formal hierarchy, prioritising some rights over others on an *a priori* or *ex ante* basis. A material hierarchy does not establish a general ordering of rights, but privileges the content of some rights to some extent: it is reflected, for

²⁰⁹ Ibid, 138.

²¹⁰ Bodily integrity is not an independent right under the ECHR, but has been interpreted as an aspect of privacy under Article 8 (e.g. *Glass v. United Kingdom* [2004] ECHR 102), and grosser abuses come under the Article 3 prohibition on torture. See Article 3 of the EU Charter and for an overview of relevant sources, European Parliament Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, *Freedom, Security and Justice: An Agenda for Europe – Right to the Integrity of the Person*, available online at:

< http://www.europarl.europa.eu/comparl/libe/elsj/charter/art03/default_en.htm > (last accessed 11th June 2010).

²¹¹ For a fuller account, see O. Fiss, 'Objectivity and Interpretation', 34(4) *Stanford LR* 739–763 (1982). See also Zucca (2007), op cit, 22, noting that *prima facie* ranking could be changed by a supervening justification; A. Fischer-Lescano & G. Teubner, 'Reply to Andreas L. Paulus: Consensus as Fiction of Global Law', 25(4) *Mich. JIL* 1059-1073 (2004), 1066.

²¹² Besson (2005), op cit, 444-445.

example, in the idea of a core of rights;²¹³ it seems in effect a type of less pronounced hierarchy. This idea is arguably reflected, for example, in the statement of the ECJ in *Wachauf* that any limitation on rights must not entail a disproportionate and intolerable interference impairing the very substance of those rights,²¹⁴ which suggests a limit on the instrumentalisation of rights in EU law, even if the idea has not been developed in subsequent caselaw.

Finnis' re-working of natural law theory, which is amongst the most influential contemporary theories of values in the law, posits that seven basic goods could be identified as self-evident²¹⁵ essential for human flourishing: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion.²¹⁶ These could be elaborated through principles of practical reasoning, including, for example, requirement to live a coherent life and to not demonstrate arbitrary preferences amongst persons or values.²¹⁷ Finnis, however, does not believe that the goods could be ranked, they are all equally incommensurable and thus resist ranking.²¹⁸ Despite this emphasis on the difficulty of ranking, which renders Finnis' theory of less practical significance than it would otherwise be, several attempts to develop a hierarchy of rights are found in the literature.²¹⁹ Moreover, actual practice supports the idea of ranking to some extent: Meron, for example, identified a "trend toward graduated normativity"²²⁰ in international law.²²¹

²¹³ Ibid, 445.

²¹⁴ Case 5/88, supra n. 58, para. 19.

²¹⁵ J. Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980), 92-95.

²¹⁶ Ibid, 85-90.

²¹⁷ Ibid, 100-133.

²¹⁸ Ibid, 92-95. Contrast the comment by Waldron: "The idea that all rights should be put on a par seems implausible" (Waldron (1993), op cit, 218).

²¹⁹ See, e.g. C. Brockett, 'A Hierarchy of Rights', *Paper Presented at Annual Meeting of the American Political Science Association*, New York, USA, 31st August-3rd September 1978; P. Weil, 'Towards Relative Normativity in International Law', 77 *AJIL* 413-442 (1983); T. Meron, 'On the Hierarchy of Human Rights', 80(1) *AJIL* 1-23 (1986); JHH. Weiler & AL. Paulus, 'The Structure of Change in International Law or Is there a Hierarchy of Norms in International Law', 8(4) *EJIL* 545-565 (1997); ID. Seiderman, *Hierarchy in International Law* (Intersentia 2001) (not specifically on a hierarchy of human rights); Koji (2001), op cit; JD. Montgomery, 'Is there a Hierarchy of Human Rights?', 1(3) *JHR* 373-385 (2002); S. Kirchner, 'Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?', 5(1) *GLJ* 47-64 (2004); Edwards (2006), op cit; D. Shelton, 'Normative Hierarchy in International Law', 100(2) *AJIL* 291-324 (2006); Klein (2009), op cit.

²²⁰ Meron, *ibid*, 3.

²²¹ See, e.g. Vienna Convention on the Law of Treaties 1155 UNTS 331, 8 ILM 679, entered into force 27th Jan. 1980, Article 53, providing that any treaty that violates *jus cogens* is void. See generally, A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford Univ. Press 2006); Shelton (2006); op cit, 302-317.

Jus cogens is generally accepted in international law as a category of priority,²²² though it has been over-used in some literature²²³ and seems best confined at present to its most un-controversial or un-contested content, primarily the prohibitions on genocide, slavery, and racial discrimination.²²⁴ In human rights instruments, some rights are specified as non-derogable, in contrast to other rights whose limitation on grounds of common interests is accepted.²²⁵ Under the European Convention on Human Rights (ECHR),²²⁶ these are the right to life excepting death resulting from lawful action in war (Article 2); the ban on torture or inhuman or degrading treatment (Article 3); the prohibition on slavery or servitude (Article 4(1)); and the prohibition on retroactive criminal penalties (Article 7). The International Covenant on Civil and Political Rights²²⁷ identifies the prohibition on torture (Article 7), the prohibition on retroactive criminal penalties (Article 15), and recognition of every person as equal before the law (Article 16) as non-derogable. Meron observes that in the *Barcelona Traction* case the International Court of Justice gave currency to the idea of a hierarchy by suggesting that “basic rights of the human person (*droits fondamentaux de la personne humaine*) create obligations *erga omnes*”.²²⁸ However, Meron goes on to note the lack of agreement on what amounts to *jus cogens* outside of, in particular, the prohibitions of slavery, torture, genocide²²⁹ and further notes the differences in formulations of non-derogable rights between various international instruments.²³⁰

The existence of certain basic, physiological needs can ground some minimal hierarchy. Thus, Brockett argues that Maslow’s hierarchy of needs²³¹ provides a basis for

²²² For a contrary view, see Klein (2009), 479-481, 487-488, suggesting that the terms *jus cogens* and non-derogability relate to the scope, rather than the superior status, of the norms concerned. However, it seems that the concepts of ‘scope’ and ‘status’ are not mutually exclusive, in that the lack of limitation on the scope of these categories reflects their higher status.

²²³ Shelton (2006), op cit, 292.

²²⁴ Seiderman describes *jus cogens* as the ‘most promising construct on which to anchor a quasi-constitutional ordering of international law norms’: Seiderman (2001), op cit, 289.

²²⁵ Ibid.

²²⁶ ETS no. 05.

²²⁷ 999 UNTS 171; 6 ILM 368 (1967).

²²⁸ ICJ Reports 3 (1970), at 32, referred to in Meron (1986), op cit, 1 (references omitted).

²²⁹ Ibid, 14-16. Meron even doubts the *jus cogens* character of the prohibition on racial discrimination (ibid, 17). See also Koji (2001), op cit, 927, adding the right against retroactive punishment, and see further references ibid n. 35. See Chapter 1 above for further references

²³⁰ Koji, ibid, 16. Writing in 2001, Koji observed that most of the issues Meron raised were unanswered: Koji (2001), op cit, 918, 920. See also Kirchner (2004), op cit, 48-51; Shelton (2006), op cit, 302-317

²³¹ See, e.g. AH. Maslow, *Toward a Psychology of Being* (D. van Nostrand Co., 2nd ed., 1968). Maslow’s idea of a hierarchy of needs was first proposed in AH. Maslow, ‘A Theory of Human Motivation’, 50(4)

identifying a ranking of human rights. Maslow's theory identified five basic needs: physiological, safety, love and belongingness, esteem, and self-actualisation. Self-actualisation is the highest kind of need and fulfilment, and the other needs must be fulfilled to varying degrees in order for this to be achieved.²³² This approach points against Finnis' view that all basic goods are equally ranked in that life seems to have some general priority.²³³

The European Court of Human Rights has recognised the principle of hierarchy in describing the right to life as "the supreme value in the hierarchy of human rights".²³⁴ After life itself, physiological and safety needs, which can be partially satisfied to sustain life, can posit very minimal requirements of safety and nutrition, but not, for example, a well-balanced diet, or anything like comprehensive social welfare in general.²³⁵ The right thus is the minimum, beyond the minimum is a matter of policy.²³⁶ Basic health care for children and police protection against violence are other rights or implications of the right to life.²³⁷ Safety obviously requires protection from torture as a minimum, but also from arbitrary detention and exercises of force. This implies both due process and a minimal notion of equality before the law.²³⁸ The complexity of human needs and self-actualisation implies variety and choice in the roles people can fulfill, which suggests a right against servitude or against enslavement.²³⁹ Any meaningful kind of self-actualisation implies relative freedom of information exchange in society, to inform people's life decisions.²⁴⁰

Psychological Review 370-96 (1943). See also Koji (2001), op cit, 926, referring to the Basic Human Needs justification of core human rights obligations.

²³² Self-actualisation is the achievement of a state characterised by transcendent values of truth, beauty, wholeness, dichotomy transcendence, aliveness-process, uniqueness, perfection, necessity, completion, justice, order, simplicity, richness, effortlessness, playfulness, and self-sufficiency: see, e.g. AH. Maslow, *Further Reaches of Human Nature* (Viking 1971), 46, 106-108, 135. Of each of the needs, physiological involved the greatest degree of satisfaction for the typical person, followed in order of average satisfaction by safety, love, self-esteem, self-actualisation: AH. Maslow, *Motivation and Personality* (Harper & Row, 2nd ed., 1970), 54-55. See Brockett (1978), op cit, 5-13.

²³³ Brockett, *ibid*, 13; Edwards (2006), op cit, 288.

²³⁴ See, e.g. *Streletz, Kessler & Krenz v. Germany* (2001) EHRR 31, paras. 72-94. See also *Tysic v. Poland* (2007) 45 EHRR 42, para. 102.

²³⁵ Brockett refers to the 'the right to a mildly inadequate diet': *ibid*, 20. See also Edwards (2006), op cit, 289.

²³⁶ *Ibid*, 14.

²³⁷ *Ibid*, 14-15.

²³⁸ *Ibid*, 15.

²³⁹ *Ibid*, 16, going somewhat further in arguing for a wide variety of roles with status. This, for example, points to the need for equality in access to the workplace, or at least equality to some acceptable threshold.

²⁴⁰ *Ibid*, 18.

One of the chief criticisms of Maslow's approach is that it seems to commit the naturalistic fallacy by inferring an ought proposition from a fact.²⁴¹ However, in defence of it, such an inference is in a very limited way and only with respect to basic, 'existential' rights, not a full theory of ethics. Any theory of ethics must contend with basic factual considerations, i.e. with the factual circumstances of the human condition.²⁴² Addressing this criticism of Maslow, Brockett noted:

If it is accepted ... that people have innate needs and that the healthy development of the individual depends on the gratification of these needs (while deprivation inhibits development and can even lead to sickness), then it is clear that the human organism posits its own values.²⁴³

So long as Maslow's theory does not claim to be a comprehensive theory of ethics or of rights, it does not seem to fatally fall foul of the naturalistic fallacy.²⁴⁴ What this suggests, nonetheless, is that Maslow's approach may help sustain only a minimalist hierarchy of human rights.

Brockett's account based on Maslow does not distinguish civil and political rights and social and economic rights, the latter usually being considered more contestable and therefore less justiciable.²⁴⁵ The minimalist conception of rights in Brockett's account seems to make this unnecessary. This minimalist conception might be mistakenly related to the idea

²⁴¹ See R. Cohon, 'Hume's Moral Philosophy', *The Stanford Encyclopedia of Philosophy* (Winter 2004 Edition), Edward N. Zalta (ed.), URL = < <http://plato.stanford.edu/entries/hume-moral/> > (last accessed 29th January 2009); Finnis (1980), op cit, 33-49; J. Finnis, 'Natural Law and Legal Reasoning', in R. George (ed.), *Natural Law Theory* (Clarendon Press 1992), 135. Differing interpretations (Cohon, *ibid*, sec. 5; Finnis (1980), *ibid*, 37-38) have been put on David Hume's invocation of the is-ought distinction in *Treatise on Human Nature* (DF. Norton & MJ. Norton, eds.) (Clarendon Press 2000), *Book 3*, Part. 1, sec. 1, but the standard and most relevant one for law seems the interpretation that a normative proposition cannot be inferred directly or solely from any factual premises (see Finnis, *ibid*).

²⁴² Oberdiek (2008), op cit, 137 notes we should expect the exact content of our rights and duties to depend in part upon the way that the world is, citing Liam Murphy's claim that moral theories whose demands are insulated from the actual state of the world are implausible. See LB. Murphy, *Moral Demands in Nonideal Theory* (Oxford Univ. Press 2000), 66-67.

²⁴³ Brockett (1978), op cit, 7.

²⁴⁴ For a contrary view, see, e.g. A. Kohn, 'A Look at Maslow's Basic Propositions', in H. Frieberg (ed.), *Perceiving, Behaving, Becoming: Lessons Learned* (Association for Supervision and Curriculum Development 1999), 95-98.

²⁴⁵ See generally, e.g. F. Cooman (ed.), *Justiciability of Economic and Social Rights* (Intersentia 2006); A. Nolan, B. Porter & M. Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal', *Centre for Human Rights and Global Justice New York University Working Paper No. 15* (2007). Koji notes that the doctrine of indivisibility and interdependence of rights was intended to privilege civil and political rights over social and economic rights: Koji (2001), op cit, 925.

of negative rights or freedom.²⁴⁶ In this regard, Waldron criticises the suggestion that there is a category of welfare rights whose satisfaction in poor countries is impossible and that, therefore, that they are not really rights, making the point very clearly:

... For any inhabitant of these [poor, where industrialisation has hardly begun] regions, a claim might sensibly be made that his interest in basic welfare is sufficiently important to justify holding the government to be under a duty to provide it, and it would be a duty that the government is capable of performing. So, in each case, the putative right does satisfy the test of practicability. The problems posed by scarcity and underdevelopment only arise when we take all the claims of right together. It is not the duties in each individual case which demand the impossible (as it would be for example, if we talked about a right to happiness); rather it is the combination of all the duties taken together which cannot be fulfilled. But one of the important features of rights discourse is that rights are attributed to individuals one by one, not collectively or in the aggregate.²⁴⁷

...If we accept, however, that rights mark the way in which interests generate duties, then the picture is likely to appear much less tidy than this [i.e. than the negative versus positive rights distinction suggests]. A duty to refrain from interfering with someone's freedom is likely to be accompanied by a 'positive' (and therefore costly) duty on other agents to protect people from such interference....This means that it is impossible to say definitively of a given right that it is purely negative (or purely positive) in character.²⁴⁸

Brockett notes that the idea of rights correlating with duties needs to be clarified. The relationship is not a dualism, involving just two parties: everyone must respect a right, and this can translate into society's duty to organise itself adequately to provide, for example, minimal nutrition.²⁴⁹ This account of a hierarchy is not as minimalist an account as, for example, Nozick's idea of a right as a side-constraint, as entailing a negative obligation on the other to not interfere with it. Nonetheless, the rights that can be identified on the basis of

²⁴⁶ Brockett (1978), op cit, 20. In contrast, non-derogable rights have a negative rights character: Koji (2001), op cit, 927.

²⁴⁷ Waldron (1993), op cit, 207-208.

²⁴⁸ Ibid, 214.

²⁴⁹ Brockett (1978), op cit, 20-21. A right to minimal nutrition could be articulated as a distinct right or understood as an aspect of the right to life. See also generally Waldron (1993), op cit, 212-213.

the above scheme are relatively limited.²⁵⁰ So a more detailed hierarchy may draw on existing experience,²⁵¹ and not just a conceptual or *a priori* ranking.²⁵² A more comprehensive approach to rights definition, seeking to account as fully as possible *a priori* for the content of rights, is referred to in the literature as specificationism, which as Oberdiek notes, is an under-appreciated conception of rights.²⁵³

The multiple character of the duties that can result from a right prompts Waldron to the view that duties are “likely to play havoc with any tidy sense of the priority that the right has over other moral considerations”.²⁵⁴ Specificationism is an opposing view. It holds that all rights are absolute, because they are defined in such a way that what might otherwise be considered exceptions are not actually carved out from the right, but are separate to it.²⁵⁵ The most obvious criticism of this approach is that no rights can be wholly specified in advance of their application to an unpredictable myriad of possible circumstances, as noted above, gaps can emerge in a highly specified account of rights. Shafer-Landau responds that the approach still has merit though rights may not be fully knowable, i.e. in effect, that specificationism should be taken as far as it will go. Specificationism does not require exhaustive detail:

But the specificationist might instead insist that the relevant exceptive clauses be relatively few in number and couched in terms of repeatably instantiable kinds of exceptions. There might, for instance, be a small, finite number of kinds of circumstances that represent exceptions to one’s right not to be killed.²⁵⁶

²⁵⁰ See, e.g. Meron (1986), op cit, 4, 11, suggesting the right to life, the rights to protection from torture and slavery, the right against racial discrimination, and the right against retroactive punishment as possibly hierarchically superior *ex ante*.

²⁵¹ See, e.g. *ibid*, 22.

²⁵² In reality, most accounts of rights are neither purely conceptual nor experiential, but based on a Rawlsian reflective equilibrium between the two: see J. Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press 1971), 48-51.

²⁵³ Oberdiek (2008), op cit, 146.

²⁵⁴ Waldron (1993), op cit, 215.

²⁵⁵ See Shafer-Landau (1995), op cit, 210-211, attributing the articulation of the idea of full specification originally to J. Thomson. See, e.g. J. Thomson, ‘Self-Defense and Rights’, in J. Thomson (W. Parent, ed.), *Rights, Risks and Restitution* (Harvard Univ. Press 1986); J. Thomson, *The Realm of Rights* (Harvard Univ. Press 1990) (Thomson criticises the approach, e.g. on the ground that the resulting rights lack full explanatory power). See also Zucca (2007), op cit, 167, noting we should see the strength of certain narrow exceptions to rights.

²⁵⁶ Shafer-Landau (1995), op cit, 212. Zucca (2007), op cit, 4, suggests a hierarchy could not deal with all possible questions of priority. However, specificationism can be taken as far as it will go, even if inevitably stopping short of perfect completeness (see Besson (2005), op cit, 427, noting specificationism can only work

Further, that such rights may need further specification in light of experience simply means a specificationist has to accept a method of reflective equilibrium, i.e. reasoning back and forth from general principles to particular instances or experiences until a satisfactory equilibrium is achieved, which is unproblematic given widespread acceptance of this method.²⁵⁷ A specificationist can accept moral loss and tragedy²⁵⁸ in unusual cases of conflicts of rights and thus can accept the need to modify the exceptive clauses to a right.²⁵⁹ In sum, as Shafer-Landau expresses it, specificationism retains maximum stringency for rights, while reducing their scope.²⁶⁰ Understood in these terms, specificationism seems hard to object to. While all rights have some degree of generality, they must at least be meaningful so as to be predictably applied. Specificationism simply amounts to elaborating on the likely circumstances of application. In this regard, “[s]pecificationism is normatively neutral; it ... is a theory about the structure of rights and an explanation of putative rights conflict. It is not a substantive theory [of rights]”.²⁶¹

A specificationist approach ought to be more attainable in a regional context where there is greater homogeneity of values relative to the international system, but more difficult to achieve than in a national context.²⁶² Specificationism in a regional European context would likely only sustain a minimalist approach to human rights protection, focusing on what is common the Member States, much as the ECHR does. It could begin by adopting a hierarchy of rights. For the EU, this would involve, for example, establishing priority between traditional rights and the new trade-related rights of free movement. As Kirchner notes:

... it has to be made clear ... that Human Rights and the prohibition on the use of force take precedence over free trade etc. Otherwise states could, e.g. attempt to balance the

to some degree). Contrast Zucca, *ibid*, 74, seeming to suggest judicial practice determines hierarchy, but see also *ibid*, 89, suggesting that conciliation cannot be just *in concreto*, it must have some *a priori* element (citing Justice Black in *Konigsberg v. State Bar of California*, 366 US 36 (1961) advocating the originalist view that the framers of constitution did all the balancing *a priori*).

²⁵⁷ *Ibid*, 214; Rawls (1974), *op cit*, 48-51.

²⁵⁸ Zucca (2007), *op cit*, 23, 140 and *passim*, stresses that there is no happy resolution to conflicts of fundamental legal rights without sacrifice or tragedy and that basic liberties cannot possibly be fully harmonious.

²⁵⁹ *Ibid*, 215.

²⁶⁰ *Ibid*, 225.

²⁶¹ *Ibid*, 215.

²⁶² Weil’s (1983), *op cit*, well-known contribution argued that a hierarchy of rights would inhibit the ability of the international system to achieve co-existence in the context of pluralism.

right to free trade against the prohibition of the use of force and use force to gain access to markets.²⁶³

In other words, the conceptual reach and looseness of free trade (or undistorted competition) risks sidelining other, more concrete rights unless a priority of values is established in favour of the latter. However, though the EU and ECJ need to clarify the role of economic values relative to classic or core human rights, the EU arguably has gone a long way toward specificationism in its approach to adopting the EU Charter of Fundamental Rights by incorporating the ECHR standards built up over several decades.

The EU Charter of Fundamental Rights offers a mixture of quite detailed specification of rights in parts and under-determination of rights in other parts, but is greatly elaborated on through accompanying Explanations formally promulgated by the signatories.²⁶⁴ The text of the Charter itself is notably under-specified in several places,²⁶⁵ while some novelties are addressed specifically that are not found in other Bills of Rights, notably in a prohibition on eugenics and reproductive cloning²⁶⁶ and a right of access to a placement service.²⁶⁷ Some provisions are very brief and do not even mention the issue of the limits on a right or the grounds on which it may be permissibly restricted. However, Article 6(1) of the Treaties works toward specification by providing that the ‘rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the Explanations referred to in the Charter, that set out the sources of those provisions’. The reference to the Explanations or Notes from the Praesidium²⁶⁸ accompanying the text of the Charter appears to endorse a degree of originalist interpretation. Article 6(1) states that the rights shall interpreted with due regard to the

²⁶³ Kirchner (2004), op cit, 62. See also Klabbbers (2009), op cit, 43-45.

²⁶⁴ The Charter was adopted by the Member States through their representatives in the European Council and by the other institutions. It was ‘re-adopted’ by reference in Article 6 of the Treaty of Lisbon.

²⁶⁵ It is much briefer than the ECHR on the limitations on rights, which are set out in a general clause in Article 52.1, rather than being set out for each individual right, as under the ECHR: as noted in R. Alonso García, ‘The General Provisions of the Charter of Fundamental Rights of the European Union’, 8(4) *ELJ* 492-514 (2002), 497.

²⁶⁶ Torres Pérez (2009), op cit, 11 notes EU Charter rights mostly reflect existing rights, and that examples of novelty are Article 3.2 prohibiting eugenic practices and reproductive cloning and article 5.3 banning the trafficking of human beings, along with Title IV on social rights.

²⁶⁷ The right o a placement service is in Article 29.

²⁶⁸ Text of the Explanations relating to the complete text of the Charter, supra n. 33.

Explanations accompanying the adoption of the Charter (Article 6(1) further cautions against expansive interpretation by stating that ‘the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties’).

The Explanations that accompany the Charter refer in a wholesale way to ECHR standards to flesh out the bare essentials contained in the Charter itself (although as discussed in Chapter 4, the ECHR is itself subject to evolutive interpretation by the European Court of Human Rights). In many instances, the Explanations start by stating that the content of the rights is the same as the equivalent provisions of the ECHR. At the end of the Explanations, 12 provisions are listed as corresponding with the ECHR,²⁶⁹ while the clear implication from this list (and from Article 52 of the Charter stating there is correspondence between them) is that caselaw from Strasbourg also applies to EU law, which could be inferred from the statement in the Preamble that the Charter reaffirms, *inter alia*, the ECHR,²⁷⁰ and which the Explanations confirm is the case.²⁷¹

The mere fact of a reference to the ECHR standard does not indicate a full-blooded specificationism whereby rights are exhaustively defined to remove all conflict *ex ante*. However, the fact over 50 years of caselaw has now built up a recognisable body of standards²⁷² goes a long way to achieving determinacy in cases of conflict, even though unanticipated conflict will still arise and notwithstanding that the Strasbourg Court uses the open-ended language or test of proportionality in resolving conflicts of rights cases.²⁷³ More generally, Article 53 of the Charter states in effect that it is without prejudice to human rights protection under international law and national law. The actual wording states “Nothing in

²⁶⁹ Ibid, 49-50 (33-34).

²⁷⁰ Alonso García (2002), op cit, 498.

²⁷¹ Ibid, 48.

²⁷² There is a possible get-out clause in the Explanations to Article 52.3, which state:

This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down by the ECHR without thereby adversely affecting the autonomy of Community law and of that of the Court of Justice of the European Communities. (supra n. 33, 48 (33)).

However, now that the Lisbon Treaty requires accession to the ECHR (Article 6(2) TEU), the balance seems to have tilted more strongly in favour of the Strasbourg standard rather than any Union claim to autonomous standards in conflict with the ECHR. The firm commitment by the Member States to the ECHR may reflect what Torres Pérez (2009), op cit, 14 describes as ‘increasing uneasiness’ with ECJ rights discourse given how removed ECJ decision-making is from national rights discourses.

²⁷³ For recent discussion, see, e.g. S. Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’, *New York University Jean Monnet No. 09/08* (2008), arguing proportionality should be discarded in favour of more explicit moral evaluation.

this Charter shall be interpreted as restricting or adversely affecting...”. At first glance this would seem to subordinate the Charter to all other existing human rights instruments to which the Member States are bound, but the Explanations state that it is just intended that the Charter is to maintain the level of protection already existing.²⁷⁴ The problem of conflict between higher levels of protection, therefore, remains.

As an example of under-specification in the EU Charter itself, no hierarchy is established between more traditional rights and the free movement principles. The free movement principles are converted into the language of rights, in the form of a freedom to choose an occupation and right to engage in work (applicable to any EU citizen in any Member State) (Article 15) and the freedom to conduct a business (in accordance with Community law) (Article 16). However, the Explanations seem to reflect the doubtful normative strength of trade-based rights (as well articulated in Alston’s critique of Petersmann, and apparently contrary to the tenor of ECJ caselaw) by stating that Article 16 may be subject to the limitations in Article 52.1 of the Charter and that Article 16 is “Of course...to be exercised with respect for Community law and national legislation.”²⁷⁵ Article 52.2 provides that “Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.”

Thus, trade-related rights and the rights in the Charter in general are subject to other Treaty rules, rather than other Treaty rules being subject to the rights recognised in the Charter, and in the case of Article 16 are subject even to national legislation (and not just national constitutional law and tradition). This is different to other, more traditional or classical rights in the EU Charter. For example, the right to a trial in the EU Charter is subsumed under the very general wording of Article 6, which simply states that ‘Everyone has the right to liberty and security’. It is then further dealt with more specifically under Article 47 (of the EU Charter) on the right to an effective remedy and to a fair trial and under Article 48 on the rights of the defence. The Explanations of these Charter provisions go into much more detail, stating that the right in Article 6 of the Charter are the rights guaranteed

²⁷⁴ Text of the Explanations relating to the complete text of the Charter, supra n. 33, 50 (35, which states more briefly and more clearly “This provisions is intended to maintain the level of protection currently afforded...”).

²⁷⁵ Text of the Explanations relating to the complete text of the Charter, supra n. 33, 18-19 (23).

by Article 5 ECHR and going on to quote its much more detailed provisions. At no point does it state that Article 5, 47 or 48 of the Charter are subject to other Community rules or national law.

As regards the right to strike, for example, rather than stating that it can be limited subject to national law, the Explanations to Article 28 of the EU Charter state that the right to strike is governed by national law.²⁷⁶ This ties in with the question of the division of competences between the Union and the Member States, further discussed in Chapter 6 below. From a human rights angle, it seems hard to reconcile the decision in *Viking* and *Laval* with any of these provisions of the Charter. Whereas the Charter seems not to accord the right to freedom to choose an occupation and right to engage in work (applicable to any EU citizen in any Member State) (Article 15) and the freedom to conduct a business (Article 16) any pre-eminent status and to establish the priority of national law on the right to strike, the ECJ in *Laval* and *Viking* seemed to suggest that free movement principles trumped any national rules on the right to strike.²⁷⁷

The EU has thus adopted a specificationist approach based largely on the experience of the ECHR, with some additional elements that are specific to the Community *acquis* or that are novel.²⁷⁸ This approach has the advantage of securing rights with a relative degree of certainty and with largely acquired legitimacy through acceptance amongst all the Member States of the mostly minimalist standards of the ECHR. In contrast, the suggestion has been made that the ECJ might engage in future activism developing a jurisprudence linking the rights of EU citizenship and the principle of non-discrimination in order to develop a sense of European identity contributing to a Europe-wide *demos* so as to invest the EU with sufficient political legitimacy.²⁷⁹ It remains to be seen to what extent the ECJ will in its jurisprudence mirror or not the more cautious approach or move in a more activist direction,

²⁷⁶ *Ibid.*, 27.

²⁷⁷ As noted above, Article 52.3 of the Charter seems to work in the opposite direction to other provisions of the Charter in permitting a very broad category of limits on rights based in 'the general interest'. The ECJ treated the clash between the right to strike and free movement implicitly as one of competence, rather than as a conflict of rights.

²⁷⁸ For example, as the Text of the Explanations relating to the complete text of the Charter, *supra* n. 33, 41 (29), note, Article 48 on the right to a fair hearing goes further than Article 6(1) ECHR in not, for example, being applicable only to disputes relating to civil law rights and obligations.

²⁷⁹ J. Bengoetxea, 'The Scope for Discretion, Coherence and Citizenship', in O. Wiklund (ed.), *Judicial Discretion in European Perspective* (Kluwer 2003), 72-74.

Laval and *Viking* certainly suggest the latter is possible,²⁸⁰ but it is doubtful that decisions like the highly contested *Laval* and *Viking* cases will do much to create a European-wide sense of *demos*.

The decision to adopt wholesale ECHR jurisprudence helps address the complexity of rights in light of the varying duties that attach to them, i.e. given that the complexity of different levels and types of duty stemming from the same right makes lexical priority of one right over another more difficult: “Some rights and duties take lexical priority over others before a certain threshold is attained and this threshold may change from one right or duty to the next.”²⁸¹ ECHR jurisprudence has worked out on a case-by-case basis how different elements of different rights relate to each other and what such thresholds are. For example, the scope of the right to liberty under Article 5 has been interpreted in a minimalist way to permit investigative detention on quite broad grounds. This particular example is perhaps to the objection of being too minimalist, in that a period of almost four years of pre-trial detention has been held compatible with Article 5 of the ECHR.²⁸² It would not be difficult to further specify this right relative to investigative detention by providing for a maximum shorter period and for periodic judicial review of detention, for example. Caselaw from Strasbourg has clarified the relationship between the individuals’ right to a good name, protected under the Article 8 guarantee of a right to privacy, and the right to freedom of expression under Article 10, by requiring a higher burden of proof to demonstrate a factual basis for a statement the more defamatory a statement is,²⁸³ a point which could be included in a more specified formation of Article 11 of the EU Charter.

²⁸⁰ See R. Zahn, ‘The *Viking* and *Laval* Cases in the Context of European Enlargement’, 3 *Web JCLI* (2008).

²⁸¹ Besson (2005), op cit, 438. See also Waldron (1993), op cit, 215, commenting that successive waves of duty that may attach to a single right likely to play havoc with any tidy sense of priority.

²⁸² See *W v. Switzerland*, A 254-A (1993).

²⁸³ See, e.g. *Pedersen and Baadsgaard v. Denmark* [2003] ECHR 306, para. 78, and McVicar, Reports 2002-III, para. 84. For commentary, see, e.g. P. van Dijk, F. van Hoof, A. van Rijn & L. Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (Intersentia 4th ed. 2006), 795. An objection that may be made here is that such detail might clutter up a Bill of Rights and thereby lessen the salience and accessibility of its core elements. This, whoever, could be addressed as a matter of presentation so as to effectively highlight the core elements of a right before specification is provided. In this way, specificationism does not have to be in conflict with parsimony of rights, the latter being suggested by Edwards as preferable to a glut or over-use of the concept of rights: (2006), op cit, 292 (see also MA. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1991)). So long as the ‘headline or banner rights’ are not excessive in number, specificationism can be related back to a manageable number of basic rights.

In the most sensitive cases, where rights seem to be in direct conflict and of equal weight,²⁸⁴ such as the situation where abortion is considered necessary to save the life of the mother, the ECHR²⁸⁵ and the EU²⁸⁶ have not been involved by the contracting States or Member States. Minimalism of rights standards thus permits specificationism to a degree that is likely to achieve acceptance in the context of value pluralism across Europe. This points to an underlying question of institutional rules of conflict resolution, i.e. who should decide on conflicts of rights, courts or representative assemblies. The ECHR and its doctrine of a margin of appreciation suggest an acceptance of the view that "... democratic and epistemological reasons justify vesting most of the competence for controversial conflict resolution in a large assembly of representatives like the legislature"²⁸⁷ at least to the extent that the most controversial questions of rights are left to national polities. In this regard, Torres Pérez accurately notes divergences in rights protection can result from different ways of resolving conflicts between rights and the general interest and, in that context, increasing uneasiness with ECJ rights discourse given much less interaction between the ECJ and representative organs in the EU compared to national constitutional courts addressing conflicts of rights.²⁸⁸ The institutional question, therefore, is linked to the lack of development of a mature polity and *demos* in the EU that would enhance the legitimacy of ECJ adjudication.

5.4 Conclusion

This chapter has addressed two aspects of the conflicts of rights in the EU: (1) the relationship between human rights concerns and other interests in the legal reasoning of the ECJ, specifically the free movement principles and the concern with increasing integration, and (2) the possibility for a more detailed hierarchy and specification of rights in the EU. It

²⁸⁴ Besson (2005), op cit, 443, noting no conciliation is possible in a clash of rights of equal value.

²⁸⁵ Although the European Court of Human Rights has held that national abortion laws may entail certain standards of application or procedure where abortion is permitted: see *Tysic v. Poland*, supra n. 234.

²⁸⁶ The closest the EU has come to adjudicating on an abortion issue is Case C-159/90, *SPUC v. Grogan*, supra n. 74. In order to pre-empt any incursion by the ECJ on its strict national laws on abortion, Ireland agreed a Protocol to the Maastricht Treaty clarifying the exclusion of EU law from this sphere of Irish law.

²⁸⁷ Besson (2005), op cit, 447, citing J. Waldron, *Law and Disagreement* (Oxford Univ. Press 1999).

²⁸⁸ Torres Pérez (2009), op cit, 12-15.

appears that there is a certain ambiguity in the Court's approach to the normative status of rights, or at least that there is certainly scope for a stronger articulation of the essentially status-based nature of rights and of their special normative status in light of that. This is surprising in some degree, because in *Omega*, the Advocate General addressed this general issue in a relatively comprehensive way, yet the Court in a very brief judgment avoided characterisation of rights. Moreover, criticism of the ECJ's approach relates as much to what it does not say as it what it has said. In that regard, to an extent it is difficult to generalise about the approach of the ECJ, because there are some marked differences in the caselaw.

Even in *Wachauf*, which has been criticised for extending ECJ jurisdiction in a very forthright way into national implementation of EU law, including of derogations from EU law, the ECJ referred to the essence of core of rights that cannot be transgressed. *Schmidberger* suggests a strong procedural deference to the national margins of discretion at least in defining the interests relevant to determining the scope of rights, which points to an additional concern, namely the relationship between EU rights protection and that at both national level and at international level. Although perhaps it is unsurprising given its own institutional self-interest, the ECJ has asserted an unqualified supremacy claim that sits uneasily with the 'Solange' logic that it itself adopted in *Kadi* conditioning its acceptance of UN Security Council Resolutions, and the inconsistency could only fuel the kind of scepticism articulated by Coppel & O'Neill that the ECJ is more interested in promoting integration than protecting human rights.

On the other hand, in *Laval* and *Viking*, the ECJ entirely avoided the question of the relative status of free movement principles and human rights, in the specific context of the right to strike and in a situation where the result of the case suggests free movement principles may have higher status than human rights norms. Some presumptive priority for the right to strike seems justified given the reserve of competence in this area to the Member States, but also because there is no obvious or compelling reason articulated in the caselaw as to why workers' rights should be subordinated to free movement of businesses. The conceptual looseness of the economic freedoms has the potential to substantially curtail the scope of other rights. The priority of other rights over the economic freedoms could be achieved, for example, by requiring that only a very substantial impairment of free movement could call into question (e.g. if all of the ports of Member States were blockaded,

as opposed to a single business) rights reserved to national sovereignty. More generally, a more absolute priority of some rights over others, such as of the right to life (and of a right to minimal nutrition, if this interest were articulated independently of a right to life), can be justified *a priori*. Other rights that could be articulated with a more absolute character include all those described as non-derogable under the ECHR. On the other hand, some rights may not need specification in the EU, at least at present, because their substance is outside EU competence, such as a right to basic healthcare and familial rights.

The question of conflicts of rights is difficult for any court, because of the relative incommensurability of rights. The second part of the chapter developed the idea of a hierarchy and specification of rights so as to achieve a more stable and predictable prioritising of rights. This can be seen as a particular application of the rationale of *lex specialis*, which this thesis has stressed as an important principle for addressing norm conflict in a way that achieves predictable results through relatively certain rules, while also reflecting input legitimacy since it can be traced to the law-maker or constituent authority. This more rule-bound approach ties in with accountability and transparency concerns: rights conflicts are not resolved on an *ad hoc* basis, but as much as possible through prior deliberation. It also furthers democratic legitimacy in the determination of rights. Although often conceptualised as counter-majoritarian, rights determination cannot be wholly removed from democratic influences, though the democratic definition should be particularly deliberative. It is preferable to avoid resorting to under-specified concepts of weighing and balancing and instead to adopt explicit substantive rules of priority, which was done to an extent in *Kadi*, for example, in the determination that ‘smart sanctions’ are necessarily subject to some human rights review and the general interests of the effective application of UN measures could not prevail over such review. Further, the proportionality test should be carefully related to questions of fact, *Schmidberger* being a good example of this approach being put to good effect, rather than being another term for simple balancing.

On balance, the analysis in this chapter supports the contention of Coppel & O’Neill that the ECJ does not always take rights seriously as independent normative values that in general outright to have normative priority in the EU legal system. The ECJ is still ambiguous about their relationship with the principles of the common market, and in some cases, quite flagrantly so, such as in *Laval* and *Viking*. Thus, a suspicion must remain that the

Court may be motivated to a greater degree by enhancing integration than with the protection of rights. In that context, accession by the EU to the ECHR, as provided for by the Lisbon Treaty, and the subsequent jurisdiction of the Strasbourg court in human rights matters in the EU is welcome as a potential corrective to the institutionalised tendency of the ECJ to privilege integration as the supreme value of the EU legal system.

Finally, a deeper, symbolically more significant, moral accountability is involved in all these cases: conflicts cases inevitably involve some degree of moral loss, of tragedy.²⁸⁹ Failing to articulate moral loss, by failing to identify fully the conflict of rights, does not capture the moral drama of rights and of their demand for justice. Finally, given the complexity and difficulty of rights conflicts, it is argued that it is important for the law-maker or constituent power to make substantive choices to address conflicts of rights as much as possible, rather than leaving the matter solely to the judiciary, who are faced with a relatively difficult interpretative task when basing decisions on very abstract catalogues of rights with no priority rules.²⁹⁰ Originalist interpretation may be able to resolve the issue, but in so far as possible, specification can be used to clarify the extent of rights and to develop narrowly drawn exceptions.²⁹¹ In an EU context, specificationism may be easier because of the pre-existing national protections of human rights and also the already agreed ECHR level of protection. This approach has been adopted to a substantial extent in the drafting of the EU Charter of Fundamental Rights, even if the latter is still unfortunately ambiguous on how rights relate to the general interests and objectives of the Union. This last question of the ‘general interest and objectives’ of the Union links in with the question of what the EU is for, i.e. what are its competences and powers relative to the Member States and how should legal reasoning treat the interpretation of competence. This is the subject of the next chapter.

²⁸⁹ Zucca (2007), *op cit*, 24.

²⁹⁰ See *ibid*, 169, noting that bills of rights need to address the question of conflict specifically.

²⁹¹ This follows *ibid*, 141, 169-170, though Zucca’s argument is not presented in terms of a hierarchy of rights or the literature on specificationism.

Chapter 6 – Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ

6.1 Introduction

The phenomenon of competence creep and the difficulties of identifying the limits of Community/Union competence have been well noted in the academic literature:¹ “There is a school of thought that no opportunity should be missed of moving the Community caravan forward, if necessary by night marches”.² The same author goes on to observe:

... there was a time when it would have been considered impolite in Community circles to talk about drawing lines at all. That has changed; and I believe the change is healthy, and evidence of the growing maturity of the order.³

The risk to Member State competences from overreach by the Union was recently highlighted in an unusually sharply worded critique of the ECJ by Herzog and Gerken, who claimed:

Judicial decision-making in Europe is in deep trouble. The reason is to be found in the European Court of Justice (ECJ), whose justifications for depriving member states of their very own fundamental competences and interfering heavily in their legal systems are becoming increasingly astonishing. In so doing, it has squandered a great deal of the trust it used to enjoy.⁴

¹ See in particular MA. Pollack, ‘Creeping Competence: The Expanding Agenda of the European Community’, 14(2) *Journal of Public Policy* 95-145 (1994); S. Weatherill, ‘Competence Creep and Competence Control’, 23 *YEL* 1-55 (2004), 5-12.

² A. Dashwood, ‘The Limits of European Community Powers’, 21 *ELR* 113-128 (1996), 113.

³ *Ibid*, 128.

⁴ R. Herzog & L. Gerken: ‘[Comment] Stop the European Court of Justice’, *EU Observer.com*, 10th September 2008: < <http://euobserver.com/9/26714> > (last accessed 21st July 2010). Roman Herzog is a former President of the German Federal Constitutional Court and also a former President of Germany. See K. Hänsch, ‘A Reply to Roman Herzog and Lüder Gerken’, 3(2) *ECLR* 219-224 (2007). Hänsch argues in defence of the EU competence regime that competences need to be flexible to deal with common problems (in reply to this perspective, it might be argued that flexibility is already provided by the inherent faculty of States to cooperate under general international law and that Union competence needs to be justified more specifically by showing an added benefit). Writing in 1995, Weiler et al commented that there had been a practical eruption in the hitherto dormant question of Community competences and powers around the time of the Treaty of Maastricht, which marked a decisive growth in Community competences beyond the core common market (albeit subject to

The exact extent of Community powers and of their limits relative to the powers of the Member States were not stated in a systematic way in the Treaty of Rome founding the European Economic Community (EEC) in 1957,⁵ instead specific legal bases⁶ were set out for particular Community policies. Neither did the Treaty of Rome or the other two founding Treaties address the possible reversibility of the transfer of competence from the Member States to the Communities, now Union. Characteristically, the ECJ asserted irrevocability,⁷ but constitutional principle (according to which the Member States are understood as ‘Masters of the Treaties’) and Member State practice tends not to support that view.⁸ Article 50 TEU provides for Member State withdrawal, which tends to support the view that in principle repatriation of powers could be permitted subject to the normal Treaty amendment process. Despite the centrality of competence to the character of the EU,⁹ there has thus always been a certain ambiguity about the question of competence.¹⁰

A lack of clarity in the definition of the powers or competences of the Union is at odds with its self-articulation since the Treaty of Maastricht as an entity of conferred powers. This principle of conferral captures the notion of the Member States as ‘Masters of the Treaties’, i.e. as being able to control the activities of the EU through prior definition of the competences it is to exercise. Notwithstanding the ease with which the principle can be stated, EU institutional practice renders the whole issue much more difficult and less clear-

the Pillar system): JHH. Weiler, U. Haltern & F. Mayer, ‘European Democracy and its Critique’, 4(3) *WEP* 24-33 (1995) also published as *EUI Working Paper Robert Schuman Centre No. 95/11* (1995), at 41 of RSC paper. Apart from the introduction of subsidiarity and gradual de-pillarisation from Amsterdam to Lisbon (but with remnants of intergovernmentalism even after Lisbon), relatively little has changed in the overall competence framework since that time.

⁵ R. Schütze, *From Dual To Cooperative Federalism: The Changing Structure Of European Law* (Oxford Univ. Press 2009), 130.

⁶ The variety of which has been described as an ‘archipelago’ by former Italian Prime Minister and Foreign Minister Lamberto Dini: CONV 1234/02, 19th June 2002, at 6, as cited in S. Weatherill, ‘Competence and Legitimacy’, in C. Barnard & O. Odudu (eds.), *The Outer Limits of European Union Law* (Hart Publishing 2009), 19.

⁷ See, e.g. Case 7/71, *Commission v. France* [1971] ECR 1003, at 1018 (para. 20). See also Case 6/64, *Costa v. ENEL* [1964] ECR 585, where the ECJ described the transfer of sovereignty to the Communities as ‘permanent’ (at 594).

⁸ See D. Obradovic, ‘Repatriation of Powers in the European Community’, 34 *CMLRev* 59-88 (1997).

⁹ In this chapter, the term ‘Community’ is used where it is found in existing caselaw and ‘Union’ is used in more general discussion. For the most part, references are to provisions of the European Community Treaty (ECT) (replaced by Lisbon with the Treaty on the Functioning of the European Union or TFEU) and Treaty on European Union (TEU) pre-Lisbon, as the Treaty of Lisbon has only come into effect since 1st December 2009 and so must caselaw pre-date it (the Article numbers as amended by Lisbon are also generally given for ease of reference).

¹⁰ ZC. Mayer, ‘Competences – Reloaded? The Vertical Division of Powers in the EU and the new European Constitution’, 3(2) *IJCL* 493-515 (2005), 493, noting it is a recurring issue in EU law.

cut. This chapter examines whether the legal reasoning of the ECJ, in its treatment of competence norms, can be re-calibrated to more accurately respect normative self-expression of the Union, which goes beyond merely establishing a common market and ever-closer integration.

What distinguishes the ECJ is avoidance of reliance on specific competence provisions, in favour of more generic bases relating to the idea of a common market, often married to an effectiveness argument. However, effectiveness tends to be conceptualised solely with reference to enhanced integration as a value. On the approach of the ECJ, any national matter that potentially restricts freedom of movement or distorts competition falls within the competence of the EU, regardless of whether, as a matter of the centre-of-gravity of the issue, it falls into a domain that is outside the scope of Union competence. The *Dori* case provides a good example.¹¹ Here, the ECJ held that the equal pay provision in the Treaty, a general principle of EU law and which originally was a principle associated with the common market (hence the Treaty focused on the issue of ‘pay’), precluded discrimination on grounds of sex within the German military, notwithstanding that the EU has no competence in military matters.

There exists, therefore, a kind of conceptual spillover (to borrow the term of Haas and other neo-functionalists¹²) that can make it very easy to link the common market with almost any aspect of national or Member State sovereignty. The focus of this chapter is the varying ways in which competence norms can be mediated in legal reasoning and how these variations tie in with the principles that the EU articulates as its core constitutional identity beyond the more technical principle of the creation of a common market: the principle of conferral, the principle of subsidiarity, the rule of law, and democracy. The argument is that a consistent application of *lex specialis*, and the related idea of originalist interpretation, better respects the principle of conferral and the underlying constitutional principle of the Member States as ‘Masters of the Treaties’, much more so than the meta-teleological approach that dominates the Court’s caselaw.

¹¹ Case C-186/01, *Alexander Dori v. Bundesrepublik* [2003] ECR I-2479.

¹² E. Haas, *Beyond the Nation State. Functionalism and International Organization* (Stanford Univ. Press 1964), 48. A-M. Burley & W. Mattli., ‘Europe before the Court: A Political Theory of Integration’, 47(1) *IO* 41-76 (1993), 55 et seq.; A. Stone Sweet, *The Judicial Construction of Europe* (Oxford Univ. Press 2004), op cit, 243; G. de Búrca, ‘Rethinking Law in Neofunctionalist Theory’, 12(1) *JEPP* 310-326 (2005), 317.

The Treaty of Lisbon makes some attempt to delineate different types of competences, by distinguishing between those that are exclusive, shared, or supporting.¹³ A clearer delineation of, in particular, vertical competence boundaries between the Member States and the Union has been on the political agenda at least since the Declaration of Laeken in 2001.¹⁴ Horizontal competences, i.e. between the institutions, have become less prominent as a concern since co-decision has become the norm,¹⁵ compared to the period after the Single European Act 1986 (SEA). Following the SEA, a variety of different legislative procedures prevailed, according different competences to the institutions and mainly to the European Parliament, thus making the choice of legislative basis and differentiation of competence a matter of practical institutional importance.¹⁶ Horizontal competences are governed by the principle of ‘institutional balance’ and are outside the scope of this chapter, which is concerned with the vertical competence relationship between the Member States and the Union.¹⁷ Most caselaw from the ECJ on competence concerns this issue of legislative basis; the ECJ has hardly ever held that the Community or Union lacks competence *simpliciter*, though it has quite often found the wrong legal basis has been adopted.

A substantial challenge to the competence of the Member States came from the two general competence clauses in the Treaties: that relating to the common market, in (ex) Article 95 ECT and now Article 114 of the Treaty on the Functioning of the European Union (TFEU), and the general gap-filling competence clause in (ex) Article 308 ECT and now Article 352 TFEU.¹⁸ A tendency toward ‘competence creep’ can be seen, for example, in the extensive use by both the Council (of Ministers) of (ex) Article 308 ECT and that of the

¹³ Articles 2-6 TFEU.

¹⁴ *The Future of the EU: Declaration of Laeken*, document of the Belgian presidency, 15 December 2001, part 11A.

¹⁵ Article 289(1) TFEU confirms co-decision, in which the Council and Parliament have more or less equal co-legislative power, as the ordinary legislative procedure (the detail of the procedure is in Article 294 TFEU).

¹⁶ L. Moral Soriano, ‘Vertical Judicial Disputes Over Legal Bases’, 30(2) *WEP* 321-337 (2007), 324.

¹⁷ See generally K. Lenaerts & A. Verhoeven, ‘Institutional Balance as a Guarantee for Democracy in EU Governance’ in C. Joerges & R. Dehousse (eds.), *Good Governance in Europe’s Integrated Market* (Oxford Univ. Press 2002); S. Smismans, ‘Institutional Balance as Interest Representation. Some Reflections on Lenaerts and Verhoeven’, in Joerges & Dehousse (eds.) (2002), *ibid*; J-P. Jacqué, ‘The Principle of Institutional Balance’, 41 *CMLRev* 383-391 (2004), 384; Y. Devuyt, ‘The European Union’s Institutional Balance after the Treaty of Lisbon: ‘Community Method’ and ‘Democratic Deficit’ Re-assessed’, 39(2) *Georgetown JIL* 247-326 (2008); A. Dashwood, ‘The Institutional Framework and the Institutional Balance’, in M. Dougan & S. Currie (ed.), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009).

¹⁸ Which the German Federal Constitutional Court noted could be used to extend competence: *Brunner*, BVerfGE 89, 155; [1994] 1 *CMLR* 57, para. 210.

European Court of Justice (ECJ) to extend institutional competence beyond that expressly provided for in the Treaties.¹⁹

Article 308 ECT/Article 352 TFEU is a residual powers clause allowing the Union to adopt measures necessary for attaining Treaty objectives when no more specific legal basis is available.²⁰ Despite “reassuring (and late appearing)” words from the ECJ that (ex) Article 308 ECT could not be used as basis for widening Community powers beyond the general framework of the Treaty,²¹ “... there has been widespread concern, in particular amongst the *Länder* [states of Germany], that this article was used by the Council as a basis for the surreptitious erosion of Member State powers”.²² Prior to Lisbon, Article 308 read as follows:

If action by the Community should prove necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European parliament, take the appropriate measures.²³

On the question whether the requirement for unanimity by the Member States for the use of Article 308 ECT could be thought a guarantee against competence creep and its over use, “The ignoble answer is that there all kinds of ways of bribing and coercing delegations in a minority of one or two [in the Council of Ministers] on a matter to which the unanimity rule applies”.²⁴ Weiler described the potential scope of Article 308 in the following: “... it

¹⁹ Weatherill (2004), op cit, 5-12.

²⁰ See P. Craig & G. de Búrca, *EU Law: Text, Case & Materials* (Oxford Univ. Press 4th ed. 2008), 93, noting that Article 308 ECT was ‘broader still’ than Article 95 ECT. See generally on Article 95 ECT, *ibid*, 615-620.

²¹ *Opinion 2/94 Re Accession by the European Community to the European Convention on Human Rights* [1996] ECR I-1759, para. 30.

²² G. de Búrca & D. de Witte, ‘The Delimitation of Powers Between the EU and its Member States’, in A. Arnall & D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford Univ. Press 2002), 216.

²³ The Treaty of Lisbon modified this by requiring the consent of the European Parliament. Compared to Article 308 ECT, the wording of Article 352 TFEU is broader in referring to the objectives of the Union in *toto*, not just to the common market. However, as Dougan notes, this may make little practical difference given the broad reading of Article 308: M. Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’, 45 *CMLRev* 617-703 (2008), 655. Article 352 also excludes its application to the Common Foreign and Security Policy (CFSP), as well as requiring the Commission to bring proposals to the attention of national parliaments.

²⁴ Dashwood (1996), op cit, 124. The author based his comments on his own experience working in the Council Secretariat.

became virtually impossible to find any activity which could not be brought within the ‘objectives of the Treaty’²⁵. This is because of the generality with which the Treaty objectives can be described: anything that enhances integration is consistent with the preamble’s exhortation to ‘an ever-closer Union’.²⁶

This chapter argues that the theory of norm conflict can provide a conceptual framework for a clearer understanding and delimitation of competence in the EU, especially by articulating the significance of the *lex-generalis-lex specialis* distinction in the context of competing competence claims. As a matter of practice, to date, the distinction has not generally been drawn. Up to 2002, about 700 legislative measures were adopted under Article 308 ECT.²⁷ Relating this to rules of norm conflict, the institutions, both the Council and the ECJ, have been quite willing to resort to the *lex generalis* of ex Article 308 ECT in the absence of competence norms constituting *lex specialis*.²⁸ Meanwhile, the ECJ rarely makes explicit the nature of its reasoning on competence issues, a point that can be well illustrated by caselaw on Article 95 ECT (ex Article 100a ECT and now Article 114 TFEU).

Caselaw on Article 95 ECT illustrates the approach of the ECJ. Article 95 ECT (now Article 114 TFEU), the other most general Treaty competence provision, has also been used extensively by the Council.²⁹ It provides for the approximation of laws relating to the establishing or functioning of the internal market.³⁰ For its part, the ECJ expansively

²⁵ JHH. Weiler, ‘The Transformation of Europe’, 100(8) *Yale LJ* 2403-2483 (1991), 2445-2446 (in contrast with (ex) Article 308 ECT/now Article 352 TFEU, (ex) Article 95 ECT/now Article 114 TFEU does not require unanimity).

²⁶ T. Schilling, ‘Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously’, *New York University Jean Monnet Working Paper No. 10/1995* (1995), 13, 17, noting that there are no limits to Community competences because they are expressed in terms of ends.

²⁷ *Ibid.*, 217. Schütze notes that the extensive use of the provision runs the risk of subverting the idea of enumerated powers: (2009), *op cit.*, 134.

²⁸ Although Article 308 ECT (now Article 352 TFEU) has hardly ever been articulated officially or in academic discussion as a fallback from *lex specialis*, Dashwood noted that “There has never been any doubt that the absence of a specific legal basis in the Treaty is a legal condition precedent for recourse to Article 235”, citing Case 242/87, *ERASMUS* [1989] ECR 1425; Dashwood (1996), *ibid.*, 123.

²⁹ See de Búrca & de Witte (2002), *op cit.*, 215-216. As mentioned above, unlike Article 308 ECT, Article 95 did not require unanimity in the Council (though as Dashwood, quoted above, indicates, the extent of unanimity as a restraint on Union ‘enterprises of ambition’ is questionable). This remains the case with their successor provisions, Articles 114 and 352 TFEU respectively (though now Article 352 TFEU is subject to co-decision with European Parliament, as Article 95 ECT had been and Article 114 TFEU continues to be). See further generally, HG. Krenzler & C. Pitschas, ‘Progress or Stagnation? The Common Commercial Policy after Nice’, 6(3) *EFAR* 291-313 (2001); Schütze (2009), *op cit.*, 143-151.

³⁰ See, e.g. discussion in Schütze (2009), *op cit.*, 143, relates ‘establishment’ to the elimination of obstacles to trade and ‘functioning’ to the removal of distortions on competition.

interpreted it in caselaw, of which *Spain v. Council* is perhaps the high point. The ECJ held there that the harmonization power relative to the internal market in Article 95 could be used to prevent even any *future* obstacles to trade or a potential fragmentation of the internal market,³¹ although later caselaw clarified that such future obstacles must be likely and the measure in question must be designed to prevent them.³² As almost any diversity of national laws could be understood as an obstacle to free movement, they could be brought within this framework. This general point is succinctly reflected in the following passages from the recent *Metock* judgment, where the ECJ states that once an obstacle to free movement exists, the Member States no longer have exclusive competence (though *Metock* did not concern Article 95 ECT):

64. The refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State....

66. Consequently, the interpretation ... that the Member States retain exclusive competence, subject to Title IV of Part Three of the Treaty, to regulate the first access to Community territory of family members of a Union citizen who are nationals of non-member countries must be rejected.³³

However, the ECJ took a different approach in *Tobacco Advertising*,³⁴ a case that well illustrates diverging approaches to defining competence norms. In this case, the ECJ adopted both a qualitative and quantitative restriction on the internal market competence of the Community. As noted in Chapter 1, the ECJ rejected the view that the mere fact of disparities in national law could justify the use of competition competence, instead the ECJ

³¹ Case C-350/92, *Spain v Council* [1995] ECR I-1985, para. 35. The facts concerned the creation of a supplementary protection certificate for medicinal products, in the context that the Community did not have a general power to harmonize patent law. See discussion in Schütze (2009), op cit, 144-146; see also N. Foster, *Foster on EU Law* (Oxford Univ. Press 2006), 107, noting that the Commission tries to introduce as much legislation as possible under Article 95 ECT/Article 114 TFEU.

³² See, e.g. Case C-217/04, *United Kingdom v. Parliament and Council* [2006] ECR I-3771, paras. 60-64; Case C-58/08, *Queen (Vodafone & Others) v. Secretary of State for Business*, judgment of 8th June 2010, para. 33.

³³ Case 127/08, *Metock v. Minister for Justice, Equality & Law Reform* [2008] ECR I-6241, paras. 64, 66. See N. Nic Suibhne, 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law', 34(2) *ELR* 230-256 (2009), 235, noting that in *Metock*, the ECJ applied its now "familiarily expansive interpretation of 'obstacles' to the exercise of free movement".

³⁴ Case C-376/98, *Germany v. Parliament and Council* [2000] ECR I-8419.

proposed a *de minimis* or quantitative threshold of ‘appreciable impact’, noting that otherwise the competence of the Community legislature would be virtually unlimited.³⁵ Moreover, the ECJ in *Tobacco Advertising* stated that limitations on competence in one Treaty provision could not be circumvented by reliance on another Treaty provision:

77. The first indent of Article 129(4) of the Treaty excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health.

78. But that provision does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health. Indeed, the third paragraph of Article 129(1) provides that health requirements are to form a constituent part of the Community's other policies.

79. Other articles of the Treaty may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article 129(4) of the Treaty.³⁶

This is an implicit invocation of *lex specialis*: the specificity in the matter of public health of Article 129 ECT could not be circumvented by relying on the more general internal market power in Article 100a/95 ECT to harmonise on purely health grounds. It suggests a qualitative, centre-of-gravity approach to legal bases, seeing Article 95 as a residual clause, not as a general power to regulate the internal market.³⁷ On the facts, the ECJ held that a blanket ban on tobacco advertising and sponsorship in the Community, subject to a few exceptions, was beyond the Community's regulatory competence. In contrast, a more limited and general kind of restriction could have been based on Article 95 (along with the free movement competence in (ex) Articles 57(2) and 66), in so far as this could more obviously contribute to free movement. On the facts, for example, the Court noted that the Directive

³⁵ Ibid, paras. 106-107.

³⁶ This reasoning is in sharp contrast with that which prevailed in *Laval* and *Viking*, discussed further below.

³⁷ Schütze describes the test as one of ‘a centre of gravity’: (2009), op cit, 150. Tridimas & Tridimas described the judgment in *Tobacco Advertising* as “one of the most important ever delivered by the Court on the competence of the European Community” where the ECJ “gave for the first time a restrictive interpretation” to Article 95 ECT: G. Tridimas & T. Tridimas, ‘The European Court of Justice and the Annulment of the Tobacco Advertising Directive: Friend of National Sovereignty or Foe of Public Health’, 14(2) *EJLE* 171-183 (2002), 171-172.

related to matters that did not enhance free movement and, further, it did not ensure free movement of goods in conformity with its provisions.³⁸

Tobacco Advertising has been generally interpreted as placing important limits on the Community's harmonization power,³⁹ yet the full significance of the judgment can arguably only be explained within a framework of norm conflict theory. It is because *lex specialis* has a limiting effect that the case represented a "new judicial wind"⁴⁰ in contrast to the *lex generalis* of teleology dis-moored from particular Treaty provisions.⁴¹ *Tobacco Advertising* though is not typical, despite being offered as evidence that the ECJ now takes the limits of competence seriously.⁴² In the recent *Kadi* decision, for example, the ECJ held the Community had competence to impose sanctions on individuals, though the most specific Treaty provisions, then Articles 60 and 301 ECT, only related to sanctions with third States, and the ECJ did not mention the 'appreciable impact' standard in relation to Article 308.⁴³

³⁸ Case C-376/98, *Germany v. Parliament and Council*, supra n. 34, paras. 99-101.

³⁹ Tridimas & Tridimas, *ibid*; Mayer (2005), *op cit*, 501; Dougan (2008), *op cit*, 654; Schütze (2009), *op cit*, 144-151.

⁴⁰ As described by Dougan, *ibid*.

⁴¹ Article 352 TFEU, which replaces Article 308 ECT, expressly prevents its use to circumvent specific exclusions of harmonization. It provides in paragraph 3 that "[m]easures based on this Article shall not entail harmonization of Member States' laws or regulations in cases where the Treaties exclude such harmonisation". See Schütze (2009), *op cit*, 150-151, at n. 91.

⁴² Mayer (2005), *op cit*, 501; Dougan (2008), *op cit*, 654.

⁴³ Joined Cases C-402/05 P and C-415/05 P, *Kadi and al Barakaat International Foundation v. Council*, judgment of 3rd September 2008, paras. 211, 213, 216, 222-227, 229-230. See generally M. Karayigit, 'The *Yusuf* and *Kadi* Judgments: The Scope of the EC Competence in Respect of Restrictive Measures', 33 *LIEI* 379-404 (2006); M. Cremona, 'EC Competences, 'Smart Sanctions' and the *Kadi* Case', in M. Cremona, F. Francioni & S. Poli (eds.), 'Challenging the EU Counter-Terrorism Measures through the Courts', *EUI Working Papers AEL 2009/10* (2009); A. Dashwood, 'Article 308 EC as the Outer Limit of Expressly Conferred Community Competence' in Barnard & Odudu (eds.) (2009), 41-42. Dashwood suggests that the extension of measures from States, as envisaged in Articles 60 and 301 ECT, to individuals, as provided by the contested measures in *Kadi*, amounted to the enhancement of an existing mechanism and thus did not go beyond the general framework of the Treaties (the limits of the sue of Article 308 ECT identified by the ECJ in *Opinion 2/94*, see further below Chapter 6). However, given the punitive effect of the sanctions, their novelty as legal instruments, and the significant qualitative difference with sanctions imposed on States, a stricter approach to construction might have been warranted. Cremona is more critical on this point, commenting that "on any view the Community was here acting at the limits of its conferred powers": *ibid*, 83. The ECJ held the measures involved did touch on the common market. As Cremona notes, if an internal market element was present, there was really no need to rely on Article 308 ECT, which the ECJ proceeded to do: Cremona (2009), 92. The ECJ grounded competence on Articles 60, 301 and 308 ECT cumulatively. On the Article 308 ECT connection, the ECJ was very brief and used a criterion of 'efficiency', as well as two formal criteria, namely, that (a) the measure was necessary to fulfil an objective of the EC Treaty and (b) it was adopted in the course of the operation of the common market:

226. Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument.

Similarly, the *Viking* and *Laval* decisions relating to strikes represent an important opposing tendency to *Tobacco Advertising* and are discussed in more detail below. Moreover, *Tobacco Advertising* is ambiguous in some respects. The exclusion of Article 95 as a legal basis was mostly related to the facts, as despite stating in paragraph 79 of its judgment that “other articles of the Treaty may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article 129(4) of the Treaty”, the ECJ stated in another part of the judgment that Article 95 could be used in conjunction with the free movement provisions even if public health was a decisive factor in the choices to be made “provided that the conditions for recourse to Articles 100a (later Article 95), 57(2) and 66 as a legal basis are fulfilled”.⁴⁴

On the appreciable impact standard, as Tridimas & Tridimas note:

... whether the distortions which arise from the lack of harmonisation are appreciable is a question of degree and, as such, difficult to determine. One would have thought that empirical evidence is here of crucial importance. Little concrete empirical evidence, however, appears to have been presented to the Court.⁴⁵

Moreover, the ECJ does not generally require such evidence, and instead tends to make rather generic statements of appreciability that denude the standard of substance. In the recent case of *The Queen (Vodafone & Others) v. Secretary of State for Business, Enterprise and Regulatory Reform*, for example, it simply stated that the divergences of national laws governing prices of mobile roaming would cause ‘significant’ distortions of competition, without offering any empirical assessment or describing the nature of ‘significant’ as a threshold or relating it to ‘appreciability’.⁴⁶ Moreover, as Tridimas & Tridimas note, the ECJ has not applied any *de minimis* standard to the fundamental freedoms.⁴⁷

227. That objective may be regarded as constituting an objective of the Community for the purpose of Article 308 EC.

See Cremona, *ibid.*, 88-89.

⁴⁴ Case C-376/98, *Germany v. Parliament and Council*, *supra* n. 34, para. 88. Case C-58/08, *Queen (Vodafone & Others) v. Secretary of State for Business*, *supra* n. 32, para. 36.

⁴⁵ Tridimas & Tridimas (2002), *op cit.*, 175.

⁴⁶ Case C-58/08, *supra* n. 32, para. 47.

⁴⁷ Tridimas & Tridimas (2002), *op cit.*, 175; see also Schilling (1995), *op cit.*, 23. The ECJ rejected a *de minimis* approach to free movement in, e.g. Joined Cases 177 and 178/82, *van de Haar and Kaveka de Meern* [1984] ECR 1797, para. 13 (noted in Schilling, *ibid.*, and n. 284).

The creation by the ECJ of the doctrine of parallelism was an obvious historical example of extension of Community competence by the ECJ, based on the general scheme of Treaties or principles abstracted from a number of specific Treaty provisions (rather than either of the general competence clauses in now Articles 352 and 114 TFEU). Under this doctrine, the exercise of an internal Community competence gives rise to external Community competence that pre-empts Member States exercising an equivalent or overlapping competence.⁴⁸ This was the first time exclusive competence was expressly introduced into Community law.

It seems it can be safely concluded that the caselaw that established that non-discriminatory obstacles to free movement came within the remit of the Treaties⁴⁹ and the broad reading of ‘distortion of competition’ discussed above, which together make up the common market whose objectives Article 308 was to further,⁵⁰ has greatly expanded the competence of the EU to the point that it is now difficult to say that any matter is entirely outside of Community/Union competence.⁵¹ These are prime examples of legal principles whose scope is potentially wide-ranging and hard to limit, in contrast to specific competence rules. Such was the breadth with which specific competences were interpreted, Article 308 ECT may not be considered decisive as a basis for extending competence. Thus, as Davies has noted and as quoted at more length in Chapter 1: “Alas, as every Community lawyer knows, there could hardly be more open-ended and ambiguous competences that those

⁴⁸ Case 22/70, *Commission v. Council (Re European Road Transport Agreement) (‘ERTA’)* [1971] ECR 263, paras. 17-19, 28-31. The principle has been clarified and developed considerably in subsequent caselaw: see 5.6.2 below.

⁴⁹ Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837, paras. 5-9; Case 120/78, *Rewe-Zentrale AG (Cassis de Dijon)* [1979] ECR 649, paras. 8-14.

⁵⁰ Dashwood suggests that the term ‘internal market’ should be preferred in (ex) Article 235 European Economic Community (as Article 308 ECT was numbered pre-Maastricht) Treaty to the “notoriously open-textured concept” of a common market: Dashwood (1996), op cit, 123. It might be thought that internal market, for instance, would seem not to obviously include, on the surface, external relations. However, as the ECJ has drawn a link between internal and external powers through the doctrine of parallelism, the drafting change might not make much difference in practice, though it seems worth making in principle. By comparison, Article 352 TFEU, introduced by the Lisbon Treaty to replace Article 308 ECT, refers to neither the common market nor internal market and instead simply refers to ‘the policies defined in the Treaties’, which is possibly broader still than ‘common market’.

⁵¹ See also Weatherrill (2009), op cit, 19-20, noting that the likelihood of preventing obstacles to free movement as a basis for legislative competence “is so lacking in precision and predictability that ... one may readily regard the Court’s stance as now more concerned with ‘competence-enhancing’ ...”.

assigned to the Community.”⁵² The effect is that it is “disturbingly easy to touch upon EC [EU] law”,⁵³ as Klabbers put it. Torres Pérez remarks:

Arguing that state measures that distinguish between nationals and non-nationals might hinder free movement, the ECJ has extended its power to monitor state action, even of there is no clear connection with the field of EU law.⁵⁴

She gives the example of *Bickel and Franz*, where the ECJ held that criminal proceedings against a German and an Austrian national charged with criminal offences in Italy should be in the language of the accused in order to comply with the Community law requirement of non-discrimination, so as not to constrain free movement.⁵⁵ Torres Pérez thus remarks that the EU competence regime acts as a “loaded gun that a binding Charter [of fundamental rights] might contribute to shoot...regardless of the kind of state action under review”.⁵⁶

Similarly, Davies comments that common tax rules, a common contract code, harmonized education systems to ease migration of persons, a single language are all arguably within the conceptual reach of the overarching principles of the common market.⁵⁷ Yet Article 5 TEU clearly defines the EU as an organisation of conferred and not unlimited competence. There thus exists a conflict between the explicit self-articulation by the EU and by the Member States of EU competence and the reality of institutional practice within the

⁵² G. Davies, ‘Subsidiarity: The Wrong Idea, In the Wrong Place, At the Wrong Time’, 43 *CMLRev* 63-84 (2006), 63, 65. See also P. Craig, ‘Chap. 12: Competence and Subsidiarity’ in *EU Administrative Law* (Oxford Univ. Press 2006), 40-44; Von Bogdandy & Bast, ‘The Union’s Powers: A Question of Competence. The Vertical Order of Competences and Proposals for its Reform’, 38 *CMLRev* 227-268 (2002), 238; Soriano (2007), op cit, 329; J. Klabbers, *Treaty Conflict and the European Union* (Cambridge Univ. Press 2009), 115; A. Torres Pérez, *Conflicts of Rights in the European Union* (Oxford Univ. Press 2009), 16-21.

⁵³ Klabbers (2009), *ibid*, 205.

⁵⁴ Torres Pérez (2009), op cit, 20.

⁵⁵ C-274/96, *Bickel & Franz* [1998] ECR I-7637. The facts related to the province of Bolzano, where citizens are entitled to use their own language in administrative and judicial proceedings.

⁵⁶ Torres Pérez (2009), op cit, 24.

⁵⁷ Davies (2006), op cit, 63-65. Nic Suibhne (2009), op cit, 241, n. 51, points to some purely internal situations that clearly fall outside EU law, e.g. Case C-144/95, *Criminal proceedings against Maurin* [1996] ECR I-2909, where the ECJ held that Community legislation did not regulate the sale of foodstuffs complying with its requirements in respect of labelling and did not, therefore, impose any obligation on Member States where there was a sale of products which comply with the directive but whose use-by date has expired, with the result that the offence with which Mr. Maurin had been charged, relating to the sale of goods after their sell-by date had expired, involved national legislation falling outside the scope of Community law. See also *Foglia v. Novello* (Cases 104/79 [1980] ECR 745 (No. 1) and 244/80 [1981] ECR 3045 (No. 2)), where the ECJ held it did not have jurisdiction to rule on the tax regime applicable to *liqueur* wines imported from Italy into France in the context that the facts were not in dispute between the parties.

EU system whereby the conceptual pull of the concept of ‘internal market’ or ‘common market’ make defining the limits of EU competence very difficult.⁵⁸ Remarkably, almost 50 years after the founding of the Union, Mayer notes that at the Convention on the Future of Europe, many delegates may not have understood the scope of the Community’s internal market power.⁵⁹

This reflects a continuing debate as to who are the ‘Masters of the Treaties’.⁶⁰ As Mayer suggests, competence can be thus seen as a codeword for the future of European integration.⁶¹ The principle of conferral,⁶² the explicit rules on Treaty change,⁶³ and the possibility for Member State withdrawal⁶⁴ all point to the Member States as ultimately Masters, who have control over the pace of Treaty change. They would no longer be the Masters only if the Union itself, independently of the Member States individually and collectively, could effect constitutional change.⁶⁵

Nonetheless, institutional practice tends to push in the other direction and suggests a logic and momentum for integration that is not entirely within the control of the Member States. This reflects more generally a tension between Westphalian and more integralist views of international law, discussed in Chapter 1. The flipside of the question of who is Master of the Treaties is the question of *kompetenz-kompetenz*: who has authority to decide the limits of Union, and thus the extent of Member State, competence? The issue is not explicitly addressed in the Treaties, although Treaty provisions concerning the principle of conferral or enumerated powers,⁶⁶ Treaty amendment, and withdrawal at least cast doubt

⁵⁸ Tridimas & Tridimas (2002), op cit, 177.

⁵⁹ Mayer (2005), op cit, 511. The Convention on the Future of Europe drew up the text of the un-ratified Treaty Establishing a Constitution for Europe (29th October 2004, CIG 87/2/04 REV) which was the basis nonetheless for much of the Lisbon Treaty.

⁶⁰ Often referred to by the German translation ‘*Herren der Verträge*’.

⁶¹ Mayer (2005), op cit, 512; Sieberson (2008), op cit, 60.

⁶² Article 5 TEU.

⁶³ Art. 48 TEU (ex Article 236 EEC Treaty) states, in paragraph 4, that amendments shall enter into force after being ratified by the Member States in accordance with their respective constitutional requirements.

⁶⁴ Article 50 TEU.

⁶⁵ S. Griller, ‘Is this a Constitution?’, S. Griller & J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism Without a Treaty* (Springer 2008), 22-23. In its recent decision on the Lisbon Treaty, the German Federal Constitutional Court stated the Member States remain the Masters of the Treaties: *Lisbon Treaty Case*, BVerfG, 2 BvE 2/08, judgment of 30th June 2009, available at: < http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html > (in English, last accessed 6th April 2010), para. 235.

⁶⁶ Schütze (2009), op cit, 154, suggests that inferring an absence of *kompetenz-kompetenz* on the part of the Union from its character as an entity of conferred powers (for an example of this, see A. Dashwood, ‘The

over the implicit claims of the ECJ that it alone has jurisdiction and authority to decide the issue. In other words, how competence is understood turns on the constitutional perspective applied to it,⁶⁷ and thus it directly impacts upon the issue of values underlying competence norms and their treatment in legal reasoning.

Given the centrality of competence to the questions of defining and legitimising the EU, it has been surprisingly under-discussed at a conceptual level in EU scholarship. The approach in this chapter is to first analyse competence as a legal concept before explaining how it can be differently treated in legal reasoning. Institutional practice suggests that the EU is sometimes and even often greater than the sum of its parts as represented by the Member States and their individual consent to competence norms in the Treaties. The definition of competence is, therefore, an important fault-line in understanding the character of the EU as a constitutional and political entity. This chapter thus examines differing or conflicting approaches to defining EU competences in legal reasoning and seeks to relate the different approaches to the different substantive values discussed in Chapter 3. It first looks at analytical jurisprudential writing on the concept of competence, both Anglo-American and Continental, which helps understanding of the application and interpretation of competence norms. The general approach in this chapter is consistent with the idea of the universalisability of legal reasoning: namely, that an *ex ante*, general understanding of the interpretation of competence norms is possible. In other words, it is possible to systematise their interpretation, which does not consist of a ‘wilderness of single instances’ made on a case-by-case basis.⁶⁸

The normative argument is that given how the EU self-articulates as a polity in the Treaties (and not just in the official discourse of the institutions, which almost invariably privileges the value of integration), competence needs to be treated more carefully in the legal reasoning of the ECJ, in particular, through an application of *lex specialis* and

Relationship Between the Member States and the European Union’, 41 *CMLRev* 355-381 (2004), 357-358) is circular and thus transgresses the is-ought distinction in philosophy. However, the absence of *kompetenz-kompetenz* could be understood as an inherent implication or alternative formulation of the principle of enumerated powers, rather than a derivation of it. The principle of conferral itself could be considered a postulate established by the Member States, not a derivation as a matter of EU law (ultimately it might be argued to derive from the sovereignty to States).

⁶⁷ Mayer (2005), op cit, 512.

⁶⁸ Suggesting that competence claims will necessarily differ from case to case, see Craig (2006), op cit, 404. See also Soriano (2007), op cit, 325.

originalist interpretation. This is necessary in order to respect the principle of conferral, which is arguably inherent in the very idea of a competence norm. Further, the principle of subsidiarity can be operationalised to a much greater degree in the approach of the ECJ by interpreting it as requiring proof of jurisdictional suitability at EU level; this would, in effect, involve reconfiguring abstract ‘effectiveness’ arguments linked to integration into empirically grounded assessments of EU claims to superior competence. The chapter concludes with several case studies to illustrate the arguments.

6.2 Competence as a Legal Concept

Competence as a legal concept, described as important yet elusive by Bulygin,⁶⁹ entails a power to change legal relations.⁷⁰ Hohfeld described a power as the opposite of a disability. As a correlative, it entails liability on others to respect the exercise of power. He understood it as “one’s affirmative ‘control’ over a given legal relation”.⁷¹ Bulygin identified nullity as a distinctive feature of competence, in that an absence of legal competence entails a legal nullity. Hart had distinguished a nullity from a sanction, the latter being a consequence upon failure to comply with a rule.⁷² With a power-conferring or competence-conferring rule, there is no consequence as such for its breach, just the absence of a defined legal

⁶⁹ E. Bulygin, ‘On Norms of Competence’, 11(3) *L & P* 201-216 (1992), 201. See further generally on competence norms: HLA. Hart, *The Concept of Law* (Clarendon Press 2nd ed. 1994); T. Spaak, *The Concept of Competence* (Ashgate 1994); T. Spaak, ‘Norms that Confer Competence’ 16(1) *RJ* 89-104 (2003). Duxbury notes that “Kelsen might not have distinguished between power-conferring and duty-imposing rules, but he understood the distinction clearly enough”: N. Duxbury, ‘Kelsen’s Endgame’, 67(1) *CLJ* 51-61 (2008), 53. Generally on competence in EU law, see, e.g. Pollack (1994), op cit; Dashwood (1996), op cit; Obradovic (1997), op cit; Krenzler & Pitschas (2001), op cit; Von Bogdandy & Bast (2002), op cit; de Búrca & de Witte (2002), op cit; G. Davies, ‘The Post-Laeken Division of Competences’, 28 *ELR* 686-698 (2003); Dashwood (2004), op cit; P. Craig, ‘Competence: Clarity, Conferral, Containment and Consideration’, 29 *ELRev* 323-344 (2004); R. White, ‘Conflicting Competences: Free Movement Rules and Immigration Laws’, 29 *ELRev* 385-396 (2004); Weatherill (2004), op cit; S. Weatherill, ‘Better Competence Monitoring’, 30 *ELR* 23 (2005); Mayer (2005), op cit; D. Wyatt, ‘The Growing Competence of the European Community’, 16(3) *EBLR* 483-488 (2005); Craig (2006), op cit; Karayigit (2006), op cit; Soriano (2007), op cit; E. Herlin-Karnell, ‘“Light Weapons” and the Dynamics of Art 47 TEU – The EC’s Armoury of Ever Expanding Competences’, 71(6) *MLR* 987-1014 (2008); S. Sieberson, *Dividing Lines between the European Union and its Member States* (TMC Asser Press 2008); D. Eisenhut, ‘Delimitation of EU-Competences under the First and Second Pillar: A View Between ECOWAS and the Treaty of Lisbon’, 10(5) *GLJ* 585-604 (2009); Schütze (2009), op cit; S. Weatherill, ‘Competence and Legitimacy’, in Barnard & Odudu (eds.) (2009), op cit; Dashwood in Barnard & Odudu (eds.) (2009), *ibid*; HCH. Hofmann, ‘Which Limits? Control of Powers in an Integrated Legal System’, in Barnard & Odudu (eds.) (2009), *ibid*.

⁷⁰ Anglo-American legal theory tends to use the term ‘power’ instead of ‘competence’: Bulygin, *ibid*, 202.

⁷¹ W. Hohfeld, ‘Some Fundamental Legal Conceptions As Applied in Judicial Reasoning’, 23 *Yale LJ* 16-59 (1913-1914), 55.

⁷² Hart (1994), op cit, 30-35.

relationship. In this way, competence as a concept can be understood as entailing a more fundamental failure of legality, as entailing basic invalidity, not just, e.g. illegality or dis-application of one norm due to a conflict of norms valid on their own individual terms.⁷³ Invalidity is thus an important consequence of the mis-application of a competence norm, in contrast to other norms. Competence is thus linked to legitimacy in a very direct way.⁷⁴

A central issue in literature on competence is the extent to which competence norms are free-standing norms in their own right or ‘fragments’ of other norms. Kelsen favoured the view that they are fragments of other norms and not fully norms, which Hart criticised. For Kelsen, a legal norm properly understood was “a primary norm which stipulates the sanction”.⁷⁵ Hart first noted there is some truth to the view that legal powers are related to legal rules in general, but he argued that that failed to capture the full reality of the distinctiveness of power-conferring rules:

Further, it is important to realize that rules of the power-conferring sort, though different from rules which impose duties and so have some analogy to orders backed by threats, are always related to such rules; for the powers which they confer are powers to make general rules of the latter sort or to impose duties on particular persons which would otherwise not be subject to them.⁷⁶

Hart goes on to reject the idea that nullity is a concept common to both powers and other rules. Nullity resulting from a lack of legal recognition is very different to the sanction that results from breach of a criminal law, for example, in that there is no punitive consequence or character to the nullity.⁷⁷ Hart criticised the idea that orders to officials to apply sanctions embody true norms, of which other norms (such as competence norms) are fragments, as

⁷³ See J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge Univ. Press 2003), 278-326; Spaak (2003), op cit, 91-92. Spaak suggests the idea of competence is necessary to understand the concept of validity.

⁷⁴ See, e.g. Weatherill (2009), op cit, 17.

⁷⁵ H. Kelsen, *General Theory of Law and State* (Harvard Univ. Press 1945), 63

⁷⁶ HLA. Hart, *The Concept of Law* (Clarendon Press 2nd ed. 1994), 33. Power-conferring rules are thus secondary rules in Hart’s distinction between primary and secondary rules (80-81 et seq), and more specifically they are rules of change.

⁷⁷ Ibid, 34.

failing to capture the social, rule-like character of laws in general. Laws, for Hart, are not reducible to the notion of sanctions.⁷⁸

The idea of legal powers or competence rules as fragments of other rules reflects more generally two contrasting approaches to understanding competence norms: on a reductive view, competence norms are reducible to other norms, usually, to norms of conduct, i.e. a command or a permission.⁷⁹ The contrasting position is that of Hart, namely, that competence norms are fully norms in their own right, which cannot be reduced to another type of norm. From the perspective of norm conflict theory, this is important in relating competence norms to other norms. To what extent are they free-standing, as norms that in effect can impose or apply themselves, so that understanding these norms does not depend on the mediation of other norms? Hart's criticism of the association of norms with sanctions seems accurate as failing to capture the full range of legal norms and what is commonly understood as a norm. Thus, the prohibition on murder is itself a norm, rather than, as on the reductive view, the application of a sanction for murder being the norm to which the prohibition on murder is related as 'a fragment'. Similarly with competence norms, the ability to change legal relations is a norm itself, even though failure to exercise a competence norm does not detail a sanction. Kelsen's (reductive) view "purchase[d] the pleasing uniformity of pattern to which [it] reduce[d] all laws at too high a price: that of distorting the different social functions which different types of legal rule perform".⁸⁰ Law is not just about dealing with 'bad men' so as to be related in essence to sanctions: the "law is used to control, to guide, and to plan life out of court."⁸¹ Power-conferring rules are thought of or understood in ordinary social life in different ways than rules conferring duties: power conferring rules "confer a huge and distinctive amenity".⁸²

It can be concluded thus that power-conferring or competence norms are distinctive in creating an amenity, i.e. the capacity to change legal relations. To understand them more fully though, it is necessary to understand how they relate to other norms. This interaction with other norms is what is relevant for norm conflict theory (understood, as it is in this

⁷⁸ Ibid, 38. Famously, this was Hart's criticism of John Austin's positivism.

⁷⁹ See Bulygin (1992), op cit, 204.

⁸⁰ Hart (1994), op cit, 38.

⁸¹ Ibid, 40.

⁸² Ibid, 41. Bulygin noted he was convinced by Harts arguments: (1992), op cit, 204.

work, as including differing interpretative norms). An adequate conceptual understanding of competence or power is needed to understand systematic interpretation,⁸³ as well as to understand the notion of validity and invalidity when norms clash. When one norm invalidates another, it is because the maker of the latter norm acted *ultra vires* or outside its competence. To assist with this conceptual understanding, a basic question might further be briefly addressed: what exactly constitutes a ‘norm’ to begin with, apart from the general understanding in this work thusfar that a norm is a legal rule or principle that has some legal valence or force.

Spaak follows Hart & Raz in answering this question by considering a norm to be a reason for action, which he argues has implications for our understanding of norms related to competence.⁸⁴ The idea of reasons for action as providing an account of norms is appealing because it supports the claim that law makes in social life to be a supreme reason for action.⁸⁵ Von Wright understood norms as prescriptions, being norms issued by a norm-giver to one or more norm-subjects because the norm giver wants the norm subjects to act in a certain way.⁸⁶ In Spaak’s view, this understanding of a norm facilitates a formal distinction to be made between competence norms themselves⁸⁷ and norms that confer competence,⁸⁸ which is also implicit in Hart’s discussion of power-conferring norms referred to above. Competence norms are not themselves full norms, and in this regard they can be compared to merely technical norms: “duty-imposing norms but not competence norms are (complete) norms in the sense they give (complete) reasons for action”.⁸⁹ Norms that confer competence are addressed to legal officials and impose a duty on legal officials to recognise the conferral and exercise of competence.⁹⁰ On this view, norms that confer competence are a fuller type of norm than the competence norm itself.

⁸³ Spaak (2003), op cit, 102.

⁸⁴ Spaak considers reasons for action or guidance for human behaviour as implicit in Hart’s internal point of view: Spaak (2003), op cit, 93; generally, J. Raz, *Practical Reasons and Norms* (Princeton Univ. Press 2nd ed. 1990).

⁸⁵ Spaak (2003), *ibid*, 94.

⁸⁶ GH. Von Wright, *Norm and Action* (Routledge 1963), 7-8, discussed in Spaak (2003), op cit, 92-94.

⁸⁷ These are competence norms *simpliciter*, saying that by performing a certain kind of act in a certain kind of situation they can bring about a certain change in legal positions: *ibid*, 94.

⁸⁸ More briefly, Soriano makes a similar distinction between enabling (equivalent to competence conferring norms) and standard-setting norms (equivalent to competence norms): Soriano (2007), op cit, 323.

⁸⁹ Spaak (2003), op cit, 90.

⁹⁰ *Ibid*. “To exercise a competence is to bring about the intended change of legal positions by performing a competence-exercising act”: *ibid*, 90. See further Spaak (1994), chap. 5.

In reality, it seems these two types of norms will generally coincide. The actual exercise of a competence presupposes the norm conferring the competence. As Hohfeld explained, a power entails a correlate liability to recognise its exercise.⁹¹ Spaak's distinction seems to explain two different perspectives, that of the exerciser of competence and that of legal officials. Ultimately, Spaak concludes that norms conferring competence are duty-imposing norms (the duty being on legal officials to recognise them), whereas competence norms are technical norms in providing a means to an end, but they do not provide reasons for action in a full sense and are fragments of duty-imposing norms conferring competence.⁹² Article 86 TFEU could be considered both a norm conferring competence and a competence norm. It both creates the legal basis for the establishment of a European Public Prosecutor (EPP) (in this respect it is a norm that confers competence on the Member States to do so within the EU legal system), but it also defines the competence of the EPP to some extent (e.g. by stipulating its jurisdiction relates to crimes against the financial interests of the Union).

Spaak seems correct in describing competence norms as technical norms or subsidiary norms that are a means to an end, although it may be going too far to say they are not full norms, given Hart's argument about the social use and reality of the term 'norm'.⁹³ Competence norms are created by other competence-conferring norms for specific ends or purposes. Here, there seems a regress as to the exact origin of constitutional competence norms, which perhaps ultimately is determined by brute politics, rather than legal theory. A norm creates a power or competence, but the norm creating the power or competence presupposes a power or norm to create such competence conferral, and so on. Ultimately, there is an original or primitive norm in the form of the constituent power.⁹⁴ Competence norms thus need to be interpreted in light of the constitutional framework determining what

⁹¹ Spaak acknowledges that norms conferring competence can be viewed either as duty-imposing norms addressed to legal officials, or as competence norms addressed to the competence holders. See, e.g. Spaak (2003), *ibid*, 96, 99, where he appears to move seamlessly from referring to 'norms that confer competence' to 'competence norms'.

⁹² Spaak (2003), *ibid*, 100-101. Spaak accepts that competence norms are distinctive in conferring an ability, but this does not change their normative force or weight as reasons for action: *ibid*, 101.

⁹³ Not much turns on this in any case, other than a sense of precision in the use of the term 'norm'.

⁹⁴ N. Walker, 'Post-Constituent Constitutionalism? The Case of the European Union', in N. Walker & M. Loughlin (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford Univ. Press 2008), 249.

the ‘origins’ and ‘ends’ are of competence. In other words, there is a chain of validity, one norm creates another norm (and each of these norms has to be interpreted).

The idea of a chain of validity of competence norms points to a constitutional anchoring of competence norms, which can be related to the principle of conferral in EU law. Differing approaches to interpretation in light of this principle of conferral are possible: should systematic interpretation be related to *lex generalis* or to *lex specialis*? Here, there is a link between originalist interpretation and *lex specialis*, since *lex specialis* logically more closely reflects the will of the law-maker or constituent power. How do specific attributions of competence relate to the more general competence of the EU? For example, specific Treaty provisions on the extent of EU competence in the matter of a right to strike can be, and have been in the caselaw of the ECJ, related to the general competence of the EU to achieve a common market. Whether *lex specialis* or *lex generalis* should be preferred in a scenario like this can be related to the idea of competence norms entailing a chain of validity back to constitutional norms. This final part of the chapter seeks to explain how differing approaches of relating to competence norms reflects differing underlying substantive values through a series of case studies.

Related to a conceptual understanding of competence or power is the idea of implied powers. Two broad approaches to this can be identified, and here again different substantive values underlie the differing approaches. Hartley identifies the narrow approach in the following terms:

According to the narrow formulation, the existence of a given power implies also the existence of any other power which is reasonably necessary for the exercise of the former; according to the wide formulation, the existence of a given objective or function implies the existence of any power reasonably necessary to attain it.⁹⁵

Thus, the narrow view relies on the idea of necessary implication: the implied power must be considered to exist, indispensably, in virtue of the express power.⁹⁶ The wide view is

⁹⁵ T. Hartley, *The Foundations of European Community Law* (Oxford Univ. Press 5th ed. 2003), 106.

⁹⁶ Weiler commented that the extent of the use of ex Article 308 ECT “... was simply not consistent with the narrow interpretation of the Article as a codification of implied powers doctrine in its instrumental sense”: Weiler (1991), *op cit*, 2445. See also Dashwood (1996), *op cit*, 124, noting that an extensive doctrine of implied

looser: it relates to a reasonable assessment of the achievement of an objective or function. Relating power to the achievement of objectives could be further related to the issue of levels of generality in legal reasoning: how broadly is objective or purpose to be stated?⁹⁷ The *lex specialis-lex generalis* distinction thus arises here too. A view of the constraint applicable here as just one of ‘reasonableness’ to achieve any Treaty objective gives considerable scope to a doctrine of implied powers. As Ely observed in the context of US constitutional law, ‘reasonableness’ as a constitutional standard is empty in that (good) reasons and the good exercise of reason can only connect premises with conclusions, but cannot justify the values implicit in the premises.⁹⁸ A broad approach to implied powers as relating to the ‘reasonable’ achievement of objectives points to output legitimacy, whereas the narrow approach ties in with rule of law and accountability concerns through clearly delineating public power⁹⁹ (the connection with output legitimacy is suggestive only: the qualification of ‘reasonable’ says little about the content of the implied powers that might result, they could be wide or narrow, depending on the interpreter). The broad approach clearly risks sliding into competence expansion based on policy, rather than pre-determined rules of law. It allows the judiciary to further the overall purposes and goals of a legal system through teleological interpretation.

Hartley identifies the narrow approach to implied powers being adopted as early as 1956,¹⁰⁰ and that a wide view is apparent in the *Germany v. Commission*¹⁰¹ decision in 1987. However, though not expressed in terms of implied powers, many of the constitutionalising decisions surveyed in Chapter 4 developing new constitutional doctrines (e.g. direct effect,

powers would not be consistent with the principle of attributed or conferred powers. On the role of implication in law generally, see L. Claus, ‘Implication and the Concept of a Constitution’, 69(11) *ALJ* 887-904 (1995), also distinguishing between broad and narrow approaches and linking a narrow approach to democracy.

⁹⁷ See generally J. Stone, ‘The *Ratio* of the *Ratio Decidendi*’, 22(6) *MLR* 597-620 (1959). In an EU context, see G. Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’, 14(6) *ELJ* 787-805 (2008).

⁹⁸ JH. Ely, *Democracy and Distrust* (Harvard Univ. Press 1980), 56-60.

⁹⁹ See generally, e.g. Weatherill (2009), op cit, 25-27, linking flexible competences to effective problem-solving.

¹⁰⁰ Case 8/55, *Fédération Charbonnière de Belgique v. High Authority* [1956] ECR 245, at 280. See also Case 165/87, *Commission v. Council* [1988] ECR 5545, para. 17 (though the wording is suggestive rather than conclusive on the idea of a narrow approach).

¹⁰¹ Cases 281, 283-5, 287/85, [1987] ECR 3203, where the ECJ held that the Commission had an implied legislative power obliging the Member States to consult and inform it regarding draft measures and agreements in the social field given that the Treaty stated the Commission shall have the task of ‘promoting close cooperation between Member States in the social field’. The ECJ stated the test for the existence of an implied power was that it ‘was indispensable in order to carry out a task assigned by the Treaty’ (at para. 28). ‘Indispensability’ as a criterion suggests a narrow view, but once this can be related to any Treaty objective, however broadly stated, the broad view takes hold. See also, e.g. Case C-176/03, *Commission v. Council* [2005] ECR I-7879.

supremacy, parallelism in external relations,¹⁰² State liability) rest implicitly on a broad conception of implied powers.

A further conceptual distinction of types of competence is that between negative and regulatory competences, as suggested by Mayer.¹⁰³ A negative competence is a power to prevent the exercise of power or competence by another party. A regulatory competence enables the adoption of positive rules stipulating how legal relations are to operate. The distinction is similar to that between a prohibition and a permission. A negative competence is a power to exclude something from being done or a power to prohibit something, a regulatory competence is a power or permission to positively determine, in a more general and comprehensive way, legal relations and legal change. Analytically or linguistically it may be possible to frame a negative power in positive terms and vice versa. The distinction may thus be one of degree.

An example of a negative competence concerns a prohibition on gender discrimination in EU law and the *Dori* case referred to above. Somewhat controversially, the ECJ held that this prohibition extended to employment in the German military, even though EU competence was traditionally considered inapplicable to military and defence matters.¹⁰⁴ Though the EU could not purport to regulate the military in positive terms, a general prohibition on employment discrimination could apply in virtue of EU law. The prohibition could be framed in positive terms as a stipulation requiring the employment on equal terms in the military of men and women. However, it is a very confined and specific type of competence that in no way extends to a general military EU competence, and thus the articulation ‘negative competence’ seems to more accurately capture its scope. The distinction is useful in EU law, as further indicated below, because the term ‘competence’ is sometimes confined in EU discourse to legislative or regulatory competence, whereas in ECJ

¹⁰² Regarding parallelism, see Dashwood (1986), op cit, 125.

¹⁰³ Mayer (2005), op cit, 494, 508-509. The term ‘absorption’ seems also used in some literature to describe an equivalent concept: see, e.g. Schilling (1995), op cit, 6, citing B. Schima, *Das Subsidiaritätsprinzip im Europäischen Gemeinschaftsrecht* (Manzsche Verlags- und Universitätsbuchhandlung Wien 1994), 35 and Weiler (1991), op cit, 2438.

¹⁰⁴ Case C-186/01, *Alexander Dori v. Bundesrepublik*, supra n. 11, discussed ibid.

practice, the competence of the EU may often, as Mayer notes, extend further to a negative or prohibitive scope.¹⁰⁵

6.3 Conflicts of Competence Norms in the EU and the Principle of Subsidiarity

Consistently with a tendency to adopt a pro-integration interpretation in questions of competence, the ECJ has made limited use of the principle of subsidiarity,¹⁰⁶ which was intended it seems to counter an assumption that integration of competences was necessarily desirable as an end in itself.¹⁰⁷ Introduced by the Treaty of Maastricht in 1992, the principle requires, in essence, that it must be demonstrated that action can be better achieved at Community or Union level to justify the exercise of competence.¹⁰⁸ It is concerned with the *exercise*, rather than the existence of competence, and only applies to non-exclusive powers.¹⁰⁹ In *Germany v. European Parliament and Council*,¹¹⁰ the Court held that it was not necessary of Community measures to refer to the subsidiarity principle. In a later decision, the Court set a threshold of review that would render the subsidiarity principle of very limited legal significance as a limit on Community action, by suggesting that a diversity of

¹⁰⁵ Mayer (2005), op cit, 494, 508-509, 511. The observation of Advocate General Gulmann in *Bostock* that the fact that a legal problem has arisen as a result of the adoption of Community rules is not sufficient to justify a requirement by national authorities to comply with Community fundamental rights could be considered to implicitly reject negative competences: Case C-2/92, *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Bostock* [1994] ECR I-955, paragraph 33 of his Opinion.

¹⁰⁶ Soriano (2007), op cit, 331-332; Craig & de Búrca (2008), op cit, 105.

¹⁰⁷ See Wyatt (2005), op cit, 487-488, criticising the ECJ for thus being selective about the constitutional values it promotes.

¹⁰⁸ Article 5(3) EU Treaty:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or regional level or local level, but can rather by reason of the scale or effects of the proposed action, be better achieved at Union level.

Article 5(3) TEU also refers to Protocol on the Application of the Principles of Subsidiarity and Proportionality. An equivalent clause was included in the Single European Act 1986, inserting Article 130r(4) EEC Treaty, specifically for environmental matters. See Schütze (2009), op cit, 248.

¹⁰⁹ See Obradovic (1997), cit, 77-78. A very large body of literature has developed on subsidiarity and the following list refers to the more frequently cited and/or more recent contributions: Schilling (1995), op cit; G. de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', 36(2) *JCMS* 217-235 (1998); A. Føllesdal, 'Subsidiarity and Democratic Deliberation', *ARENA Working Papers No. 21/99* (1999); A. Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford Univ. Press 2002); N. Barber, 'The Limited Modesty of Subsidiarity', 11(3) *ELJ* 308-325 (2005); M. Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union', 12(4) *ELJ* 503-533 (2006); Davies (2006), op cit; E. Herlin-Karnell, 'Subsidiarity in the Area of EU Justice and Home Affairs Law – A Lost Cause?', 15(3) *ELJ* 351-361 (2009). See further references in Schütze (2009), op cit, 244, n. 7.

¹¹⁰ Case C-233/94, *Germany v. European Parliament and Council* [1997] ECR I-2405, paras 26–28.

national rules could of itself create barriers to the common market and that harmonization thus satisfied subsidiarity:

With regard to the principle of subsidiarity, since the national provisions in question differ significantly from one Member State to another, they may constitute, as is noted in the fifth recital in the preamble to the PPE Directive, a barrier to trade with direct consequences for the creation and operation of the common market. The harmonisation of such divergent provisions may, by reason of its scope and effects, be undertaken only by the Community legislature.¹¹¹

However, as noted already, given that almost any diversity of national rules could be conceptualised as a potential obstacle to a common market, on this approach, harmonization is almost necessarily rendered consistent with subsidiarity at a conceptual level.¹¹² Amongst academic analyses, Estella's assessment is consistent with the view that subsidiarity does not permit of a clear allocation of competence between different levels:

The truth of the matter is that attempting to define *ex ante* criteria of a general abstract character for the purpose of limiting central intervention stands little hope of success. The reasons for this limitation are functional and can be found in the nature of modern regulatory problems. The functional interconnection between regulatory areas... makes the task of establishing clear dividing lines difficult. Even in those areas in which there seem to be clear reasons in favour of national, or even regional or local regulation ... it will always be possible to argue that due to the close relationship between these areas and the development of the single market, some Community intervention will always be necessary.

Subsidiarity is not a straightforward or simple concept. However, the ECJ could adopt some threshold of scrutiny, such as a requirement for reasons or justification for the exercise of Union competence going beyond an assertion that national divergences of laws are

¹¹¹ Case C-103/01, *Commission v. Germany* [2003] ECR I-5369, paras. 46-47. Similarly, see Case C-491/01, *R v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd.* [2002] ECR I-11453, paras. 181-183; Cases C-154 & 155/04, *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd. v. Secretary of State for Health* [2005] ECR I-6451, paras. 106-108.

¹¹² As noted by Soriano (2007), *op cit*, 331; Weatherill (2009), *op cit*, 21. Schütze (2009), *op cit*, 254, describes this line of reasoning by the ECJ as an 'ontological tautology'.

necessarily less compatible with the common market than harmonization.¹¹³ Kumm has proposed the following layered series of rule-like criteria to form a specific test to give teeth to the principle as a tool of judicial review: federal or Union intervention has to further legitimate purposes, has to be necessary in the sense of being narrowly tailored to achieve that purpose, and has to be proportionate with regard to costs or disadvantages relating to the loss of Member States' regulatory autonomy.¹¹⁴

Kumm's approach seems the most explicit and specified in the literature and is the focus of the discussion below. Of the very large body of literature, most commentators agree the ECJ has made relatively little use of the concept.¹¹⁵ This may change to some extent with the 'yellow card system' under Lisbon, whereby national parliaments have the power to seek a review of a legislative proposal on subsidiarity grounds.¹¹⁶ Davies recently suggests that ECJ aversion to the principle may be justified because subsidiarity assumes shared objectives between different levels in a federal entity, which is not the case in the EU. Instead, Davies proposes the three-pronged proportionality standard entailing a test of effectiveness (or suitability), necessity, and proportionality in the narrow sense of striking a balance between the means and the end.¹¹⁷ However, it is not clear that this proportionality standard is any less incommensurate in content or more sensitive to Member State autonomy relative to supranational claims and thus how it might better substitute the current approach of the ECJ.¹¹⁸

In contrast, Schütze suggests the two standards of proportionality and subsidiarity are equivalent, that subsidiarity *is* proportionality in a federal context: proportionality applies in

¹¹³ See, e.g. Craig (2006), op cit, 426-427.

¹¹⁴ Kumm (2006), op cit. See also Davies (2006), op cit, 76-77, noting that the Commission's application of subsidiarity does not give any explicit consideration to national autonomy.

¹¹⁵ Davies (2006), op cit, 73; Kumm (2006), op cit, 504; Soriano (2007), op cit, 331; Schütze (2009), op cit, 253.

¹¹⁶ See Article 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality. See, e.g. Soriano (2007), op cit, 333-335.

¹¹⁷ Davies (2006), op cit, 81-83. See also Kumm (2006), op cit, 524. On proportionality, generally, see e.g. G. de Búrca, 'The Principle of Proportionality and its Application in EC Law', 13 *YEL* 105-150 (1993); N. Emilou, *The Principle of Proportionality in European Law: A Comparative Perspective* (Kluwer 1996); JH. Gerards, 'Proportionality Review in European Law', *IVR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law* (Summer 2010 edition), at < http://ivr-enc.info/index.php?title=Proportionality_review_in_European_law > (last accessed 22nd April 2010); T-I. Harbo, 'The Function of the Proportionality Principle in EU Law', 16(2) *ELJ* 158-185 (2010).

¹¹⁸ Herlin-Karnell (2009), op cit, 360.

the sphere of individual rights and subsidiarity in the public or collective sphere.¹¹⁹ In comparison, Kumm's approach seems to have the advantage of structured specificity through factoring in the importance of Member State autonomy as a constraining consideration. This is so because proportionality on Kumm's test is related to a more empirical factor of jurisdictional suitability, i.e. which jurisdiction is best suited to exercising competence. It is not about weighing incommensurable qualities against each other, as is the case with proportionality as a tool of the definition of rights and of their limitations.¹²⁰ The more empirical jurisdictional context of proportionality as an element of subsidiarity can be procedurally supported by requiring hard evidence of jurisdictional suitability. Further, by requiring competence claims to be weighed against Member State autonomy, it creates a presumption against the exercise of competence at a higher level and an empirically-bound burden of proof to justify any higher competence claim. Kumm's approach thus conceives of subsidiarity as having significant exclusionary force because a competence claim must be presented as the optimal solution to a collective action problem: "It excludes as besides the point, for example, arguments concerning what the Court of Justice calls the *effet utile* of furthering integration", because integration is no longer an end in itself.¹²¹

6.4 The Competence of the Member States Distinguished from the Competence of the EU Institutions

The reference above to the Member States as Masters of the Treaties points to the distinction between their powers as States and the powers of the Union institutions as organs of an international organisation. The Westphalian conception of a State posits few limits on the powers of States. They may now, however, be considered limited by *jus cogens* (which could be understood as a modern articulation of the idea of natural law limits on political power, whether by a State or otherwise) and by exclusive powers accorded to the UN under the UN Charter. Beyond these limitations, the contractual freedom of States appears not to have any defined limits in international law (although in the area of criminal jurisdiction, some debate has occurred as to whether principles of jurisdiction are prescriptive and exhaustive of all

¹¹⁹ Schütze (2009), op cit, 263-264.

¹²⁰ Kumm (2006), op cit, 524.

¹²¹ Ibid, 520.

States' possible jurisdiction or just statements of State practice that do not suppose limits on jurisdiction¹²²).

Pauwelyn suggests that because of this general conception of the power of States, the *lex specialis* principle should not be understood to apply to the acts of States creating international organisations, but only to the acts of the international organisations themselves.¹²³ This, however, appears to confuse the *potential* general (and largely unlimited powers) of States in theory, with their actual exercise of it. The fact that States have such general powers does not take from the specificity of their exercise and thus the importance of applying *lex specialis* to the interpretation of the exercise of States' powers. Pauwelyn's views on this are somewhat surprising given his emphasis on the contractual freedom of States as one of a 'holy trinity' of principles that provides the framework of norm conflict resolution in international law.¹²⁴ *Lex specialis* can be seen as respecting States' exercise of power through creating international organisation with specified powers. Not adhering to the degree of specification, which is what *lex specialis* seeks to do, of the attribution of powers by States to international organizations arguably undermines the contractual freedom of States by permitting international organizations to expand upon their powers independently of States. Thus, the present work argues that *lex specialis* should apply both to legal acts of international organizations (Pauwelyn supports its application here¹²⁵) and legal acts of States creating those international organisations as a practical solution to the phenomenon of levels of generality in legal reasoning and the characterisation of legal interests.

¹²² *Case of the SS Lotus* (1927) PCIJ Rep Series A No 10. Doctrine in international law differs on interpreting the implications of the *Lotus* decision for the general scope of States' jurisdiction. A broad, and older, view is that the case supports a thesis of the unlimited jurisdiction of States, which on this view have discretion to make whatever jurisdictional claims they wish. The narrower view suggests that States may only exercise such jurisdiction as is positively recognised in international law, as a corollary to the systemic the international law has, in that any ordered system could not accept the validity of unlimited and potentially conflicting claims of jurisdiction from sovereign equals in the form of States: see I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Ashgate 1994), 316-324.

¹²³ Pauwelyn (2003), op cit, 416.

¹²⁴ The others being the principle of *pacta sunt servanda* (States are bound to agreements to which they have consented) and *pacti tertiis* (States may not be bound to agreements to which are third parties): see, e.g. Pauwelyn (2003), op cit, 436.

¹²⁵ Thus, Pauwelyn seems to consider that *lex specialis* would apply to resolve any conflicts between two or more legal acts of an international organization (ibid, 416). Though describing at one point *lex specialis* as 'widely acclaimed' (ibid, 396), Pauwelyn's approach overall tends to downplay the role and importance of speciality: he considers it subordinate to *lex posterior* (ibid, 392-393, 405-409) and inapplicable to the exercise by States of their legal powers (ibid, 416) and concludes in favour of the view that international tribunals should apply all relevant international law rules, not just those particular to their founding instrument (e.g. he considers that WTO dispute settlement bodies should apply not just WTO 'covered agreements') (ibid, 463-472).

Central to the question of competence discussed in this chapter is the breadth of the interaction of Member State and Union competences. To briefly recall, the TFEU distinguishes between three categories of competence: that exclusively exercised by the Union, that shared with the Member States, and that involving a complementary or supporting role only for the Union.¹²⁶ In general, shared competences give priority to the Union, in that Member States only exercise competence to the extent that the Union has not,¹²⁷ and the term ‘conditional competences’ might thus be more suitable. Schütze has recently argued that in practice, all competences are shared, in that the exclusive competences of the EU have been restrictively interpreted by the ECJ in *Opinion 1/94*¹²⁸ and subject to re-delegation back to the Member States by the Council.¹²⁹ As a concept, exclusive competences were introduced by the ECJ, rather than by the Member States, in its judgments in the *ERTA*¹³⁰ line of cases on external relations.¹³¹

The question then becomes to what extent the Union has exercised competence, in other words, it is primarily a matter of legislative pre-emption by the EU and also for the ECJ as a matter of interpretation. On the interpretation issue, spillover tends to occur. For example, it seems that criminal competence cannot, in the view of the ECJ, be effectively severed from other competences, as demonstrated in *Ship Source Pollution*.¹³² Given this

¹²⁶ Article 2 TFEU. For background discussion, see, e.g. de Búrca & de Witte (2002), op cit, 208-213; Mayer (2005), op cit, 494-503; Schütze (2009), op cit, 266, noting the contours of complementarity have been largely unexplored, but that they operate as a constitutional corset around federal competences (ibid, 279 and further 279-284 discussing the example of public health).

¹²⁷ Article 2(2)(f) TFEU.

¹²⁸ *Opinion 1/94 Re World Trade Organisation Agreement* [1994] ECR I 5267, para. 46, excluding services from the scope of the Common Commercial Policy on the grounds that free movement of services was governed by its own specific provisions (this is implicitly to consider free movement *lex specialis*).

¹²⁹ See Bieber (1988), 148; Obradovic (1997), op cit, 64-65, distinguishing repatriation from re-delegation. See further generally Schütze (2009), op cit, 167-184. *Opinion 1/94 Re WTO Agreement* [1994] ECR I 5267, excluding services from the scope of the Common Commercial Policy is an example of restriction of exclusive competence (see also Soriano (2007), op cit, 326), although it has been superseded to an extent by Treaty amendments bringing nearly all services within its scope: see Krenzler & Pitschas (2001), op cit, 302. The ECJ accepted the legality of delegating legislative powers back to the Member States in Case 41/76, *Donckerwolke al. v. Procureur de la République au Tribunal de Grande Instance, Lille et al* [1976] ECR 1921. See further, e.g. Case 174, *Bulk Oil (Zug) AG v. Sun International Limited and Sun Oil Trading Co.* [1986] ECR 559, discussed in Schütze, ibid, 176-177. Schütze gives the example of Regulation 2371/2002/EC, on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358/59 of 31.12.2002: Schütze (2009), op cit, 183-184.

¹³⁰ Case 22/70, *Commission v. Council (Re European Road Transport Agreement) ('ERTA')* [1971] ECR 263; Cases 3, 4 & 6/76, *Kramer* [1976] ECR 1279.

¹³¹ See Schütze (2009), op cit, 158-167.

¹³² Case C-176/03, *Commission v. Council*, supra n. 101, where the ECJ held that the Community had competence to require criminal sanctions for breaches of Community environmental law in order to ensure the effectiveness of Community law.

approach, it may be difficult in practice to respect the boundaries of supporting competences. Spillover may also occur because of the way the different sub-categories of each competence are described, noted further below. Supporting competence entails a supporting or subsidiary function for the EU. To the extent that EU competences are only supporting or complementary, it could be said that they do not entail any disability on the part of the Member States. Supporting competences are perhaps better described, in Hohfeldian terms, then as a privilege, assuming that their exercise does not pre-empt the competence of the Member States.¹³³

The provision in EU law since the Treaty of Maastricht for so-called ‘variable geometry’ or flexible cooperation reflects the principle of the Member States as Masters of the Treaties and of the notion of the specificity of State power in the context of European integration.¹³⁴ With flexible cooperation, some Member States can pursue intensified cooperation in which other Member States do not have to participate. An example is contained in Article 86(1) TFEU, which provide for nine or more Member States to establish an EPP (see further below).¹³⁵ In the context of flexible cooperation, accession by a new Member States does not entail automatic acceptance of every feature of EU integration, rather States retain residual powers in some important areas that they may exercise in favour of further integration if they so wish (the most obvious example to date being participation in the single currency¹³⁶).

6.5 The Impact of the Lisbon Treaty

The Lisbon Treaty does not change the general competence paradigm within the Union. The free movement and undistorted competition principles, with the conceptual logic of cross-

¹³³ See Dashwood (1996), op cit, 114.

¹³⁴ See Title IV TEU on enhanced cooperation. On the other hand, as a matter of secondary law, the Member States would be bound ‘complementary’ legal instruments, so in that sense complementary competences could be seen as Hohfeldian powers.

¹³⁵ One ambiguity in Article 86 TFEU concerning flexible or enhanced cooperation relates to the provision that Member States that did establish an EPP could extend its competence beyond crimes against the financial interests of the Union to serious crimes having a cross-border dimension. Article 86(4) TFEU provides for an extension of competence by an EPP to cover the latter, but requires unanimity – it is not specified whether this requires unanimity from the 27 Member States or just those that have proceeded with flexible cooperation.

¹³⁶ See Articles 127-144, 282 TFEU. See generally, e.g. J. Usher, ‘Enhanced Cooperation or Flexibility’ in Arnall & Wincott (eds. (2003), op cit.

border impact and the competence creep that entails, remain intact.¹³⁷ The only general difference Lisbon has made to the definition of competences is the introduction of categories of competences, but it, for the most part, merely codifies existing caselaw to identify three categories of competence, as noted above: 1. exclusive,¹³⁸ 2. shared competences,¹³⁹ and 3. supporting competences.¹⁴⁰ The main specific change relates to what previously were Third Pillar matters, which are now ‘Communautarised’ brought within the Area of Freedom, Security, and Justice.¹⁴¹

On the categories of competences, one of the rationales for their introduction was to enhance clarity and thus safeguard competences remaining with the Member States, in particular, by defining competences that were not exclusive. Lisbon set out two non-exclusive categories, shared and complementary. However, as noted, ‘shared competences’ as a term may be something of a misnomer and better considered as ‘conditional competence’: the exercise of EU competence precludes Member State competence, only one may act over a given sphere of activity at any given time.¹⁴² Overall on Lisbon, Schütze comments that:

In many ways, by way of conclusion, the chance to enhance the constitutional clarity of the European Union’s federal order of competences will be missed. Worse, the Lisbon Treaty – if it ever enters into force – may represent a serious step backwards. Instead of three clear-cut competence categories, the Reform Treaty would give us three official and a number of ‘unofficial’ competence types, none of which impresses by defined

¹³⁷ On free movement, see Articles 43-37 (free movement of goods), 45-66 (free movement of persons, services and capital), 101-103 (competition) TFEU.

¹³⁸ Article 3 TFEU.

¹³⁹ Article 4 TFEU.

¹⁴⁰ Article 6 TFEU, using the terms ‘support, coordinate, or supplement’, and the term ‘complementary’ is also sometimes used (though not in the Treaty). For a generally clear and more detailed discussion, see R. Schütze, ‘Lisbon and the Federal Order of Competences: A Prospective Analysis’, 33(5) *ELR* 709-722 (2008). Schütze questions some of the details of the Treaty, such as whether there was any need to expressly state exclusive competence for the customs union (Article 3(10(a) TFEU) and whether there are any competition rules that can be distinguished from ‘rules necessary for the functioning of the common market’ (see Article 3(1)(b) TFEU): *ibid*, 712.

¹⁴¹ Articles 67(3), 82-89 TFEU. Some intergovernmental elements remain, such as the emergency break procedure: see Articles 82(3) and 83(3) TFEU re judicial cooperation in criminal matters and the definition of criminal offences and sanctions.

¹⁴² Schütze (2008), *op cit*, 715, describes this as a ‘bewildering conception of shared competences’.

contours. Nor will there be any clearer distinction between different types of competences.¹⁴³

On ‘unofficial competences’, Schütze suggests the competences in Article 4(3) TFEU (Article 4 is the provision on shared competences, Article 4(3) relates to research, technological development, and space) should not really be there, since paragraph three effectively provides for something different to shared competences by stating that the Member States do not lose their competence when the Union exercise its competence. Thus, Schütze suggests, the term ‘parallel competence’ might be better. Article 4(3) raises the possibility of conflict between Member State and Union action in this area, which will presumably be resolved by applying the supremacy principle. The second ‘unofficial’ category Schütze identifies¹⁴⁴ is ‘coordinating competences’, referred to in Article 2(3) TFEU, which states “The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide” (see Also Article 5). Given that the same term ‘coordinate’ is also used in Article 6 on supporting competences, it seems unclear why they were not simply included in that provision.¹⁴⁵

Conflict may arise in determining what kind of action falls into which category, as some activities could be considered to come within either shared or coordinating competence. For example, ‘economic, social and territorial cohesion’ is listed under shared competences and seems to contain in it the kind of cross-border all-embracing conceptual scope of free movement or undistorted competition. As a result, it could be used to regulate matters that come under supporting competences in Article 6, such as industry, culture, and tourism. Here, a presumption of strict construction in favour of Member States’ competence could be

¹⁴³ Ibid, 721. Dougan observes that “the underlying legal framework governing the existence and exercise of Union competences has not changed; the Treaty of Lisbon’s amendments affect only the detailed application”: Dougan (2008), op cit, 654.

¹⁴⁴ Schütze (2008), op cit, 717-718.

¹⁴⁵ Schütze, *ibid*, suggests (citing Craig (2004), op cit, 338) that these particular coordinating competences may best be considered on a spectrum between shared and coordinating competences, with the practical implication that some minimum harmonisation may be permitted. Joerges uses the term ‘diagonal’ to describe situations where the Union does not have exclusive competence and may need to rely on the Member States’ competence for the effective exercise of its own competence: C. Joerges (with comments by D. Chalmers, R. Nickel, F. Rödl, R. Wai), ‘Rethinking European Law’s Supremacy’, *EUI Working Paper Law 2005/12* (2005), 16; C. Joerges, ‘The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective’, 3(4) *ELJ* 378-406 (1997), 398-399.

inferred from the principle of subsidiarity and so as not to circumvent the limitations and specificity of Article 6 on Union competence.¹⁴⁶

The Lisbon Treaty could be thought to actually increase the likelihood of competence creep in criminal matters previously governed by the Third Pillar through including the whole Area of Freedom, Security and Justice within the scope of the mop-up clause of Article 352 TFEU (pre-Lisbon, the Third Pillar was not subject to its predecessor Article 308 ECT; Article 352 TFEU now only excludes the Common Foreign and Security Policy). In addition, the wording of Article 352 TFEU is broader than its predecessor in referring to Union objectives *in toto*, not just to the common market as had Article 308 ECT.¹⁴⁷

The Lisbon Treaty also reforms the legal bases for sanctions, providing an explicit legal basis for sanctions against individuals. There are now two provisions on sanctions, one under the Area of Freedom Security and Justice in Article 75 TFEU and one under the part of the Treaty on Cooperation with Third Countries and Humanitarian Aid in Article 215 TFEU. As Cremona notes, there appears to be some overlap between these provisions and the exact relationship between them is unclear.¹⁴⁸

6.6 Case Studies: (1) An Example from ‘Social Europe’, (2) External Relations, (3) Criminal Law

6.6.1 An Example from ‘Social Europe’

Although explicitly economic in orientation at the Treaty of Rome, what is now the Union always had at least some competence in what can be considered ‘social Europe’¹⁴⁹ through

¹⁴⁶ R. Schütze, ‘Subsidiarity After Lisbon: Reinforcing The Safeguards of Federalism’, 68(3) *CLJ* 525-536 (2009), 534, citing EA. Young, ‘Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism’, 77(6) *NYULR* 1612-1739 (2002), 1717. See also Schilling (1995), *op cit*, 19.

¹⁴⁷ Although as noted above, Article 308 ECT had been interpreted so broadly anyway this may not matter.

¹⁴⁸ Article 75 TFEU is more defined in relating to capital movements and payments and is restricted to individuals, but Article 215 TFEU can also apply to individuals (as well as to third countries): see Cremona (2009), *op cit*, 97 and for more detailed discussion, *ibid*, 96-98.

¹⁴⁹ See generally, recently, e.g. A. Giddens, P. Diamond, R. Liddle, *Global Europe Social Europe* (Polity Press 2006); B. Bercusson, *European Labour Law* (Cambridge Univ. Press 2nd ed. 2009), 5-12; C. Joerges & F. Rödl,

the inclusion of the provision for equal pay for equal work. This provision was broadly interpreted by the ECJ to further gender equality¹⁵⁰ and was significant more generally in developing a sense of progressive legitimacy for the Community. This section considers a more recent development in the social field, namely, the question of differing approaches to competence norms in the area of strike action by employees within the Union.

In *Viking*¹⁵¹ and *Laval*,¹⁵² the ECJ brought strikes within the scope of the free movement principles and thus within the competence of the EU, despite the limitation on Union competence contained in the then EC Treaty on the issue of strikes. Article 137 EC Treaty provided for the introduction of directives on, *inter alia*, working conditions, information and consultation of workers, the representation and collective defence of the interests of workers and employers, and equality at work between men and women. The text of Article 137(5) ECT stated specifically that its provisions shall not apply to pay, the right of association, the *right to strike* or the *right to impose lock-outs*. Article 137 here can be understood as *lex specialis* indicating the nature of Community competence in labour and employment law.

'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', 15(1) *ELJ* 1-19 (2009), 1-2, describing 'Social Europe' as "the ensemble of European social and labour law and policy and social rights.... A wide and opaque field of such complexity that generalists in European law... tend to shy away from". See also generally J. Shaw, J. Hunt & C. Wallace, *The Economic and Social Law of the European Union* (Palgrave 2007).

¹⁵⁰ See Case 80/70, *Defrenne v. Belgian State* ('*Defrenne I*') [1971] ECR 1-445; Case 43/75, *Defrenne v. SABENA* ('*Defrenne II*') [1976] ECR 455; Case 149/77, *Defrenne v. SABENA* [1978] ECR 1365 ('*Defrenne III*') interpreting Article 119 EEC Treaty (now Article 157 TFEU). *Defrenne III* defined equality as a general principle of Community law. This approach paved the way for an expansive interpretation of Article 119, e.g. in Case C-262/88, *Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, applying it to occupational pension schemes (a Protocol to the Maastricht Treaty later sought to limit its potential effect by stating *Barber* did not apply to individuals who joined a pension scheme before the judgment).

¹⁵¹ Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779. The facts concerned collective action taken by a Finnish trade union and by the International transport Workers' Federation against a Finnish ferry operator, which reflagged a vessel from Finland to Estonia in order to reduce labour costs. The ECJ held that whether such a restriction on the freedom to provide services could be justified in the circumstances was a matter for the national court (*ibid.*, para. 81 et seq) according to the test established in previous caselaw for such restrictions (*ibid.*, para. 75).

¹⁵² Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767. The facts concerned collective action taken by a Swedish trade union against a Latvian company, which had a Swedish subsidiary to which workers were posted to provide a building service in Sweden, in an attempt by the trade union to enforce the provision of a Swedish collective agreement concerning minimum pay. For (generally critical) academic discussion of *Viking* and *Laval*, see, e.g. ACL Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ', 37(2) *ILJ* 126-148 (2008); A. Hinarejos, '*Laval* and *Viking*: The Right to Collective Action versus EU Fundamental Freedoms', 8(4) *HRLR* 714-729 (2008); N. Reich, 'Free Movement v. Social Rights in an Enlarged Union – The *Laval* and *Viking* Case before the ECJ', 9(2) *GLJ* 125-161 (2008); R. Zahn, 'The *Viking* and *Laval* Cases in the Context of European Enlargement', 3 *Web JCLI* (2008); and from a constitutional perspective, Joerges & Rödl (2009), *op cit.*

This conceptual potential¹⁵³ of the free movement principles to encompass almost any national legal diversity is reflected in the following passage from *Viking*:

... In that respect it is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member State's are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law..., even if, in the areas which fall outside the scope of the Community's competence.¹⁵⁴

In effect here, the Court stated that EC law may have effect even outside the scope of Community competence. This, conceptually as stated by the ECJ, seems contradictory. The application of EU law changes legal relations, and it makes little sense, if the term competence is to have the specific meaning generally attributed to it in legal reasoning, to say that the requirement to comply with Community law does not involve competence. The change in legal relations here related to the validity of the claimed right to strike or otherwise. In Hohfeldian terms, this amounts to a power or its synonym, competence. What the ECJ is really saying is that negative EU competences may exist in the absence of a regulatory competence. This passage is clearly different in approach to that quoted above from *Tobacco Advertising*, where the ECJ noted that if any impact on competition was sufficient to render national rules *rationae materiae* within Community competence, the Community legislature's competence would be unlimited¹⁵⁵ (and the ECJ thus set a threshold of appreciable effect or impact).

The ECJ could have held similarly in *Viking* and *Laval* that a substantial negation of free movement was required before the right to strike could be limited by Community provisions, but as the judgment stands, it is difficult to conceptualise the limits of Union competence now in labour and employment law.¹⁵⁶ The effect of the ECJ decision in *Laval*

¹⁵³ The scope of free movement has also recently become a point of contention in the context of the rights of spouses of EU citizens from third countries: see White (2004), op cit; S. Peers, 'Free Movement, Immigration Control and Constitutional Conflict', 5(2) *ECLR* 173-196 (2009).

¹⁵⁴ Case C-438/05, *Viking*, supra. n. 151, paras. 39-40. See also the Opinion of Advocate General Maduro in *Viking*, at paras. 23-28; Case C-341/05, *Laval*, supra n 152, paras. 87-88.

¹⁵⁵ Case 376/98, *Germany v. Parliament*, supra n. 34, paras. 106-107. See, e.g. Dougan (2008), op cit, 654, referring to the 'new judicial wind' on competence issues in light of *Tobacco Advertising*.

¹⁵⁶ Criticising the vagueness of the ECJ criteria in *Laval* and *Viking*, see Zahn (2008), op cit.

was to prevent Sweden from permitting trade union action in order to pressure an employer to provide a minimum wage greater than that provided for by Community secondary legislation,¹⁵⁷ which does not obviously seem to entail a substantial impairment of free movement in general.¹⁵⁸

The reasoning in the *Albany*¹⁵⁹ case on competition, rather than free movement, is also in contrast with that in *Viking* and *Laval* concerning the exclusion of strikes or collective action from the scope of the common market. In *Albany*, strikes were held to be excluded from the scope of Community competition law. Advocate General Maduro in *Viking* sought to distinguish the reasoning of the ECJ in *Albany*:

Moreover, the underlying concern in *Albany* appears to have been to avoid a possible contradiction in the Treaty. The Treaty encourages social dialogue leading to the conclusion of collective agreements on working conditions and wages. However, this objective would be seriously undermined if the Treaty were, at the same time, to prohibit such agreements by reason of their inherent effects on competition. Accordingly, collective agreements must enjoy a ‘limited antitrust immunity’. By contrast, the Treaty provisions on freedom of movement present no such risk of contradiction, since, as I pointed out above, these provisions can be reconciled with social policy objectives.

This difference identified between the scope of the competition and free movement principles here appears to be that the bringing of strikes or collective action within the competition principle would automatically render them unlawful, whereas the scope for exceptions under free movement prevents this overreach. However, this reasoning would be more persuasive if Article 81 EC Treaty (now Article 101 TFEU) on competition

¹⁵⁷ Case C-341/05, *Laval*, supra. n. 152, para. 70.

¹⁵⁸ Case C-341/05, *Laval*, ibid, the ECJ held that free movement principles might legitimately be restricted by the fundamental right to strike (para. 57), but that “... however, as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective actions forms cannot be justified with regard to such an objective” (para 108). Compared to *Viking*, the ECJ decision in *Laval* seems to leave national courts with less autonomy or discretion in balancing the free movement principle with legitimate exceptions (e.g. compare para. 65 in *Viking*).

¹⁵⁹ Case C-67/96, *Albany* [1999] ECR I-5751, paras. 59-64. The facts concerned a collective agreement between organisations representing employers and workers setting up a sectoral pension fund to which affiliation was made compulsory.

competence had permitted of no exception, whereas it does provide for exceptions relating to, *inter alia*, “improving the production or distribution of goods or to promoting technical or economic progress”. The right to strike could be considered to come within the concept of economic progress, since it relates to the welfare of workers which could be considered a prerequisite for such progress.¹⁶⁰

The caselaw thus reflects differing approaches to the *lex-generalis-lex specialis* distinction. Applying the distinction, Article 137(5) ECT ought to have resulted in the opposite conclusion being reached in *Laval* and *Viking*. The ECJ does not, however, as a rule explicate its judgments in these terms. Norm conflict is not explicit. The practical importance and import of the distinction is apparent from the very different conclusions that can result from its application or not. As noted in Chapter 4, this inarticulacy is perhaps strategic, in that failing to make explicit interpretative assumptions makes inconsistency less readily apparent, thus facilitating judicial choice and discretion. Advocate General Maduro in *Viking* made some effort to distinguish *Albany*, but on a ground that is unpersuasive. It would have created a further problem of justification if the ECJ had to explain why it was not applying *lex specialis* here, but did apply it in effect in *Tobacco Advertising* and *Albany*. This is an example of how greater articulacy on the methods of legal reasoning adopted would represent a type of judicial accountability, by highlighting inconsistencies and intensifying both the burden of justification and grounds for critique in the absence of satisfactory justification. The application of *lex generalis* in *Viking* and *Laval* seems clearly open to the criticism of denuding the principle of conferral of any significance, apart from the conceptual confusion as the use of the term ‘competence’ in the judgments. Further, the conceptual confusion stems from the generally superficial treatment of the modalities and methods of legal reasoning, including in the definition and use of the basic concept or ‘building blocks’ of legal reasoning, such as the concept of competence. Even the express exclusion of Union competence by the Member States, i.e. a statement of negative competence, can be circumvented through the encompassing scope of the free movement principles¹⁶¹ and without this being fully identified, still less carefully justified.

¹⁶⁰ For a broad view as to the scope of (ex) Article 81 EC Treaty, suggesting that factors other than purely economic in the narrow sense should be considered relevant, see R. Whish, *Competition Law* (Butterworths 5th ed. 2003), 152-155.

¹⁶¹ See, e. g. Joerges & Rödl (2009), *op cit*, 17-18, criticising the decision on this ground and noting that Advocate General Mengozzi in *Laval* negated too the effects of Article 137(5) ECT (*ibid*, n. 78) (despite saying

Joerges & Rödl have recently argued that supranational conflict of laws provides a framework for understanding the EU legal system. Their approach is a broad contextual account of EU law and constitutionalism, and it bears out the potential for conflict as a lens for analysing the dynamics of EU law. On *Laval* and *Viking*, they note the fundamental character of the conflict between the economic freedoms envisaged in the Treaties and the national constitutional orders:

... [European particularity] was underlined at the beginning, namely the sectoral decoupling of the social from the economic constitution – and the difficulties involved in the establishment of a European *Sozialstaat*. The ECJ’s argument implies that European economic freedoms, rhetorically tamed only by an unspecified social dimension of the Union, trump the labour and social constitution (*Arbeits* and *Sozialverfassung*) of a Member State. In view of the obstacles to the establishment of a comprehensive European welfare state, the respect for the common European legacy of *Sozialstaatlichkeit* seems to require both the acceptance of European diversity and judicial self-restraint whenever European economic freedoms come into conflict with national welfare state traditions. ... [The ECJ] is not legitimised to reorganise the interdependence of Europe’s social and economic constitutions, let alone replace the variety of European social models with a uniform Hayekian *Rechtsstaat*.¹⁶²

The approach in the present work suggests adding to this analysis by explaining what occurred at the level of legal reasoning to result in the judgments in *Laval* and *Viking*, which was to give priority to *lex generalis* of free movement over the *lex specialis* of the exclusion of the right to strike from Community competence. What this offers is an understanding of how future such cases might be decided. In other words, the potential for results like *Viking* and *Laval* that seem to overcome the principle of conferral can be avoided where the *lex specialis* principle informs legal reasoning. As mentioned above, the nature of EU

at one point in his Opinion that that it should not be negated): see Opinion of Advocate General Mengozzi, 23rd May 2007, para. 57, stating “If the effectiveness of Article 137(5) EC is to be upheld, the Community institutions could not of course resort to other legal bases in the Treaty in order to adopt measures designed to approximate the laws of the Member States in this field.” The Advocate General effectively relied, notwithstanding Article 137(5) ECT, on the idea of a negative Community competence (see *ibid*, para. 54 et seq) (‘negative Community competence’ in the sense proposed by Mayer (2005), *op cit*, 494, 508-509, as contrasted with regulatory competence; Article 137(5) itself could be considered a negative competence of the Member States in seeking to exclude, albeit not very successfully given the caselaw, Community or Union competence from the issue of strikes).

¹⁶² Joerges & Rödl (2009), *op cit*, 18.

competence as revealed in *Viking* and *Laval* could be considered a negative competence: the EU could not regulate generally how strikes were to operate in the Member States, but it could prohibit their use in particular instances, namely, where strikes inhibit free movement between Member States. This can suggest how future Treaty amendments might more effectively delimit EU competence, by expressly stating, for example, that ‘no EU law may have the effect of restricting the right to strike’.¹⁶³

A final comment concerns subsidiarity. There was no discussion in the judgments of the cost or weighing of Union competence relative to Member State autonomy on the matter of industrial action. As Joerges & Rödl note, strikes and industrial action are part of the delicate balance of social welfare at the Member State level. The Union, in contrast, lacks the sense of a *demos* that would enable the development of a European-wide welfare system.¹⁶⁴ That points toward caution and restraint in any claim for Union competence and would suggest a lack of empirical support for the jurisdictional suitability of the EU in industrial relations.¹⁶⁵

6.6.2 External Relations

6.6.2.1 The General Law of External Relations

The role of the ECJ has been especially central in the development of the Union’s external relations law, and this section examines some of the leading judgments of the CJ on the general power of the Union in external relations. The ECJ has been instrumental here chiefly through the development of the doctrine of parallelism, whereby it held that the exercise of an internal Community competence gave rise to external Community competence that pre-empted Member States exercising an equivalent or overlapping competence, i.e. that Community could be exclusive.¹⁶⁶ The founding decision in *ERTA* on the parallelism

¹⁶³ Currently, Article 153(5) TFEU (ex Article 137(5) ECT) states that “The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.”

¹⁶⁴ Joerges & Rödl (2009), op cit, 15, and referring to “European usurpation of Member States’ labour constitutions”.

¹⁶⁵ Another significant effect of *Laval* and *Viking* was to extend horizontal direct effect to trade unions: see *ibid*, 13-15; Hinarejos (2008), op cit, 722.

¹⁶⁶ Case 22/70, *ERTA*, supra n. 130, paras. 17-19, 28-31. The Court also held in *ERTA* that the implied external competence entailed by the doctrine of parallelism could arise where the Community had not yet exercised any internal competence if Member State action could place in jeopardy or undermine the Community objective

doctrine was one that went considerably beyond the text of the Treaties, as is apparent from the judgment:

12. In the absence of specific provisions of the Treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy – a category into which, essentially, the AETR falls – one must turn to the general system of Community law in the sphere of relations with third countries.

...

15. To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.

16. Such authority arises not only from an express conferment by the Treaty – as is the case with Articles 113 and 114 for tariff and trade agreements – but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.

17. In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.

In these passages, the ECJ considered that the absence of express provisions conferring a general international legal capacity or power to conclude international agreements did not prevent a conclusion it held such a power. Systemic arguments then provided a basis for the conclusion of the Community general external power. The Court decisively established the significance of its ruling, concluding that this implied power was exclusive and pre-empted that of the Member States where common rules were adopted (instead of concluding, for example, that its general treaty-making power was concurrent, as suggested by the Commission¹⁶⁷).

sought to be attained, although it seemed to place more weight on the latter requirement in *Opinion 1/94 Re WTO Agreement*, supra n. 128.

¹⁶⁷ Case 22/70, *ERTA*, supra n. 130, para. 11.

Neither the existence nor the exclusivity of this treaty-making power with third countries was expressly to be found in the text. There were some textual contra-indications in that the express attribution of treaty-making powers to the Community in specific matters may be taken to imply the exclusion of such a general power, since the specific provisions attributing treaty-making power were rendered redundant by the attribution of a general power. This latter approach is reflected in traditional interpretative maxim of ‘*expressio unius est exclusio alterius*’, i.e. to express or include one thing implies the exclusion of another, or of the alternative, which is related to the more general principle that the law-maker should not be interpreted to act in vain unless there is some indication that the words were meant as ‘mere surplusage’, i.e. as simply an elaboration of and subsidiary to other words.¹⁶⁸ The ECJ did refer to one textual support, namely that the Treaty attributed legal personality to the Community. However, this does not entail the conclusion of a treaty-making power; the Community may have legal personality as an entity that can be sued or can sue, for example, which does not necessarily sustain the conclusion of pre-emption or exclusive competence.

The general style of the above passage is a good example of what Lasser calls the magisterial or declaratory style of judgment in which dialectical reasoning is minimised;¹⁶⁹ there is little discursive analysis weighing up each side of the argument. In particular, the passage does not show in any detail how the general scheme of the Treaty necessitated the Court’s conclusion by showing a chain of validity linked to the idea of conferral. At that stage of the development of the Community, the principle of conferral had not been articulated in the Treaties, though it could be considered implicit¹⁷⁰ in the fact that the Member States authored the Treaties *qua* States through exercising the secondary rules of international law.¹⁷¹

Differences emerged in the caselaw on the question of the exercise of internal powers as a pre-requisite for the existence of parallel external powers: *Kramer* suggested there must

¹⁶⁸ See, e.g. B. Simma & D. Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’, 17(3) *EJIL* 483-529 (2006), 505, 507.

¹⁶⁹ M. de S.-O.-L’E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford Univ. Press 2004), 103-115.

¹⁷⁰ Dashwood (2004), *op cit*, 357.

¹⁷¹ See generally B. de Witte, ‘Rules of Change in International Law: How Special is the European Community?’, 25 *NYIL* 299-333 (1994).

first be internal exercise of competence,¹⁷² *Inland Waterways* suggested the opposite.¹⁷³ Later in *Opinion 1/94*, the ECJ clarified *Inland Waterways* by stating it applied only where external competence could not be realistically be exercised without the initial exercise of external competence.¹⁷⁴ Later cases further clarified that this competence only became exclusive after the exercise of competence when the area of competence in question is “already covered to a large extent by Community rules progressively adopted ... with a view to achieving an ever greater degree of harmonization”;¹⁷⁵ when internal measures become sufficiently harmonised to have the effect of pre-emption is not fully clear.¹⁷⁶ Exclusive competence arises where international action by the Member States, individually or collectively, would affect internal rules or distort their scope:

The Court has already held, in paragraphs 16 to 18 and 22 of the *AETR* judgment, that the Community's competence to conclude international agreements arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions; that, in particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations towards non-member countries which affect those rules or distort their scope; and that, as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member countries affecting the whole sphere of application of the Community legal system.¹⁷⁷

Perhaps the high point of the creativity of the Court on competence involved the issue of the proposed creation of a new court for wide economic integration under the European

¹⁷² Cases 3, 4 & 6/76, *Kramer*, supra n. 130.

¹⁷³ *Opinion 1/76 Re Draft Agreement Establishing a Laying-up Fund for Inland Waterway Vessels* [1977] ECR 741.

¹⁷⁴ *Opinion 1/94 Re WTO Agreement*, supra n. 130, at paras. 85-86.

¹⁷⁵ *Opinion 2/91 Re Convention No. 170 International Labour Organisation on Safety in the Use of Chemicals at Work* [1993] ECR I-1061, para. 25.

¹⁷⁶ See, e.g. Craig (2006), op cit, 412; P. Koutrakos, *EU International Relations Law* (Hart Publishing 2006), 102-106.

¹⁷⁷ Case C-467/98, *Commission v. Germany* [2002] ECR I-9855, para. 74. See Craig (2006), op cit, 414-415.

Economic Agreement (EEA). In *Opinion 1/91*,¹⁷⁸ the ECJ held that the creation of such a court was contrary to Community law:

3. ... Although, under the agreement, the Court of the European Economic Area is under a duty to interpret the provisions of the agreement in the light of the relevant rulings of the Court of Justice given prior to the date of signature of the agreement, the Court of the European Economic Area will no longer be subject to any such obligation in the case of decisions given by the Court of Justice after that date. Consequently, the agreement's objective of ensuring homogeneity of the law throughout the European Economic Area will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law.

It follows that in so far as it conditions the future interpretation of the Community rules on the free movement of goods, persons, services and capital and on competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community. As a result, it is incompatible with Community law.¹⁷⁹

Shaw observed that here “[the ECJ] intervened directly in the exercise of sovereign will by the Member States”.¹⁸⁰ Constantinesco suggests that what the ECJ did was to give priority to some constitutionally expressed principles over others, where a discrepancy occurs between them; that it engages in what he terms ‘super-constitutionality’, which may mean one constitutionally expressed rule cannot be applied or fulfilled.¹⁸¹ In *Opinion 1/91*, the ECJ did appear to act as a supra-constitutional body, since it ruled out the apparent adoption by the constituent power of the EC, i.e. the Member States, of a body with overlapping competence with the Community. This suggests that although the Community originated in an act of the Member States, the Member States are no longer ‘masters of the Treaties’.¹⁸²

¹⁷⁸ *Opinion 1/91 Re European Economic Area Agreement I* [1991] ECR 6079.

¹⁷⁹ *Ibid*, at 6081-6082.

¹⁸⁰ J. Shaw, ‘European Union Legal Studies in Crisis? Towards a New Dynamic’, 16(2) *OJLS* 231-253 (1996), 239.

¹⁸¹ V. Constantinesco, ‘The ECJ as Law-maker: *Praeter aut Contra Legem?*’, in D. O’Keeffe & A. Bavasso (eds.), *Judicial Review in European Law: Essays in Honour of Lord Slynn* (Kluwer 2001), 79.

¹⁸² K. Alter, ‘Who are “Masters of the Treaties”? European Governments and the European Court of Justice’, 52(1) *IO* 121-147 (1998).

It seemed to consider the restrictions it placed on the power of the Member States to be inherent in the very nature of the Community, as to rule out entirely the Member States agreeing to an international organization that might touch upon Community competence, but without such an express exclusion of Member State competence being found in the Treaty texts. Despite the remarkable nature of the powers it was attributing to itself, effectively setting itself up alongside the Member States as a co-constituent power, the ECJ did not make any attempt to justify its institutional competence. More recently, the Court confirmed that exclusive competence may arise where not expressly conferred, but where it results from the from a specific analysis of the relationship between the matter in question (the facts concerned an international agreement) and Community law and further, that the development of Community law, in so far as it could be foreseen, should be taken into account in applying the test in *Opinion 2/91* of ‘an area which is already covered to a large extent by Community rules’.¹⁸³ The latter confirms the prospective, developmental character of teleological interpretation employed by the Court, in contrast to a retrospective, originalist analysis.

If *Opinion 1/91* represents the high point of Union claims to competence, *Opinion 2/94* represents one of the most explicit articulations by the ECJ of its limits. The ECJ refused in this case to identify the protection of human rights as one of the objectives of the Community so as to enable the Community to accede to the European Convention on Human Rights¹⁸⁴ under Article 308 ECT (the latter provision had been invoked to justify accession by the Community given the absence of any express provision in the treaties for accession). The ECJ qualified the scope of Article 308 as follows:

That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and activist of the Community. On any view, [Article 308] cannot be sued as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.¹⁸⁵

¹⁸³ *Opinion 1/03 Re Competence of the Community to Conclude the New Lugano Convention* [2006] ECR I-01145, paras. 124-126.

¹⁸⁴ 1950, ETS no. 05.

¹⁸⁵ *Ibid*, para. 30.

Thus, as Schütze observes, the ‘constitutional identity’ of the Union places a limit on the external powers and of Article 308 ECT.¹⁸⁶ The ECJ implicitly suggested that the lack of an express clause stating that human rights were a Treaty objective precluded it from deciding it was such an objective, i.e. that there was not a specific enough provision of the Treaties empowering the EU to join the ECHR by vesting it with a general human rights competence. Nonetheless, outside the specific context of Article 308, it seems hard not to note that the ECJ has hardly consistently applied throughout its history the notion of substantive amendment as a limit to its interpretation of the scope of the Treaties, given its origination of the doctrines of, for example, supremacy, direct effect, parallelism, and fundamental rights, and its decision *Opinion 1/91* above. However, the case does perhaps illustrate, at least to some extent, the risk of very brushstroke characterisations of the role of the ECJ purporting to describe its role over 50 years of integration: its caselaw is not always “manically pro-integrative”¹⁸⁷ (although a sceptical reading of the decision suggests that it may have primarily reflected a desire of the ECJ not to submit itself to a superior jurisdiction by the European Court of Human Rights¹⁸⁸).

The argument in the present work for a greater role for *lex specialis* as a tool of norm conflict resolution might be thought open to challenge where overlap exists between competences and one is not clearly more specifically tailored. The exclusive application of *lex specialis* in that situation runs counter to ECJ caselaw recognising that more than one competence may be at stake in the adoption of a law or international treaty. Reflecting the difficulty of the issue, there are in fact somewhat differing tendencies in ECJ caselaw, a difficulty exacerbated by the fact that the ECJ does not articulate the *lex generalis-lex specialis* distinction. In *Opinion 1/94 Re World Trade Organisation Agreement*,¹⁸⁹ the ECJ implicitly invoked *lex specialis* in relating the CCP to the treatment of nationals of non-member countries on crossing external frontiers:

¹⁸⁶ Schütze (2009), op cit, 142.

¹⁸⁷ SR. Weatherill, ‘Activism and Restraint in the European Court of Justice’, in P. Capps, M. Evans & S. Konstadinidis (eds.), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing 2003), 255, 271.

¹⁸⁸ Craig (2006), op cit, 408. The question has been superseded by Treaty amendment, with Article 6(2) TEU (post-Lisbon) providing for EU accession to the ECHR. This sceptical reading is supported by the willingness of the ECJ to be creative in linking the Community or Union with human rights in other contexts in its caselaw.

¹⁸⁹ *Opinion 1/94*, supra n.130.

46. As regards natural persons, it is clear from Article 3 of the Treaty, which distinguishes between ‘a common commercial policy’ in paragraph (b) and ‘measures concerning the entry and movement of persons’ in paragraph (d), that the treatment of nationals of non-member countries on crossing the external frontiers of Member States cannot be regarded as falling within the common commercial policy. More generally, the existence in the Treaty of specific chapters on the free movement of natural and legal persons shows that those matters do not fall within the common commercial policy.¹⁹⁰

Schütze described as ‘strange’ the implication that all those sectors covered elsewhere in the Treaty were excluded from the scope of the Common Commercial Policy and comments that the Court later “corrected the unfortunate wording”.¹⁹¹ In support, Schütze here cites *Opinion 2/00 Re Cartagena Protocol*,¹⁹² from which the following seems the most relevant passage:

23. If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component (see the *Waste Directive judgment*, paragraphs 19 and 21, Case C-42/97 *Parliament v Council* [1999] ECR I-869, paragraphs 39 and 40, and *Spain v Council*, cited above, paragraph 59). By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases (see, to that effect, the *Titanium Dioxide judgment*, paragraphs 13 and 17, and Case C-42/97 *Parliament v. Council*, paragraph 38).

This passage, however, does not exclude *lex specialis* as a tool for resolving norm conflict or accumulation, rather it notes the possibility that laws may overlap and still be applicable, but that one may be preponderantly relevant and thus be the main legal basis. *Lex specialis* or the

¹⁹⁰ Ibid, para. 46.

¹⁹¹ Schütze (2009), op cit, 172.

¹⁹² [2001] ECR I-9713. On the facts, the ECJ in effect applied *lex specialis*, holding that the environmental provisions of the EC Treaty related to the primary purpose of the international treaty in dispute and thus (ex) Article 175 ECT was the correct legal basis.

principle of speciality is actually reflected in the idea of preponderance and thus underpins the choice of legal basis, unless different provisions are equally relevant. The question of ‘equal relevance’ seems one of fact rather than generality in legal formulation, and this shows that *lex specialis* does not always provide a basis for a choice between two norms, but this does not exclude its application in so far as it does. In other words, multiple, quite highly specific legal clauses may not admit of *lex specialis* as an explanation of their relationship with each other. The most practical solution to this issue seems to be careful legislative drafting so as to make the choice of legal basis, and reasons for it, explicit.

The law-making, result-oriented, integration-enhancing character of the reasoning of the ECJ in external relations is shown particularly clearly in the area of mixed agreements, which arise in the case of shared competence between the Union and the Member States. The practice in this situation is for both the Member States and the Union to become parties to the agreements, and the question has arisen in caselaw of the extent of the exclusivity of ECJ jurisdiction over these agreements, as opposed to the correct legal basis for their adoption, the latter being the issue in the cases discussed above. Applying the logic of uniformity and effectiveness often present in its constitutionalising decisions, the ECJ in *MOX Plant* has held that it has exclusive jurisdiction over such mixed agreements, thereby precluding a Member State from bringing proceedings in an international tribunal.¹⁹³ The case represents an interesting example of the interaction of *lex generalis* and *lex specialis*, because the Treaties contain a provision that quite specifically addresses the question of the extent of exclusivity of ECJ jurisdiction. Article 292 ECT (retained as Article 344 TFEU following Lisbon) provided that the Member States undertake ‘not to submit a dispute concerning the interpretation or application of the Treaty to any method of settlement other than those provided therein’.

In *MOX Plant*, Ireland brought proceedings before a tribunal under the United Nations Convention on the Law of the Sea.¹⁹⁴ The ECJ decided the issue on the basis of teleological arguments. It noted that “a breach [of Article 292] involved a manifest risk that

¹⁹³ Case C-459/03, *European Commission v. Ireland* (*‘MOX Plant’*) [2006] ECR I-4635. For discussion, see PJ. Cardwell, ‘Who Decides? The ECJ Judgment on Jurisdiction in the *MOX Plant* Dispute’, 19(1) *JEnvirL*. 121-129 (2006); N. Lavranos, ‘The *MOX Plant* and *IJzeren Rijn* Disputes: Which Court Is the Supreme Arbiter?’, 19(1) *Leiden JIL* 223-246 (2006); CPR. Romano, (Case Note) ‘Case C-459/03, *Commission of the European Communities v. Ireland*’, 101(1) *AJIL* 171-179 (2007).

¹⁹⁴ December 1982, 1833 UNTS 396.

the jurisdictional order laid down in the Treaties and consequently the autonomy of the Community legal system may be adversely affected”.¹⁹⁵ The concern identified here was with a result (declared to be manifest), rather than the text. The literal wording of Article 292 did not seem to be dispositive of the question, for, first, as Ireland, argued, the initiation of proceedings before an arbitral tribunal constituted a method of dispute settlement provided for in the EC Treaty, within the terms of Article 292 EC, since the Community was a party to UNCLOS and thus UNCLOS was part of Community law.¹⁹⁶ Another argument that might have been made was that Article 292 could have been construed more narrowly to refer to ‘the Treaties’ only, not to secondary legislation or especially international agreements, since the exclusivity of the external competence was a creation of the ECJ, rather than the Treaties. Based on these arguments, it seems that *lex specialis*, i.e. Article 292, did not provide a complete solution, though the limitation of literal argument in supporting the Court’s conclusion was not really fully canvassed in the judgment.¹⁹⁷ Based on teleological argumentation as to the effectiveness of the Community legal order, the familiar integration narrative, the ECJ ruled out any overlap of norms of jurisdictional competence. In other words, the ECJ adopted a kind of generic coherence, result-oriented argument. *Lex posterior*, which would privilege UNCLOS, did not provide a clear solution, because what was at stake was an interpretation of *lex superior*, i.e. the EU Treaties. The case well illustrates the choice between minimalist and expansive approaches to interpretation in the absence of a clear rule of norm conflict providing a solution. Unsurprisingly, the ECJ adopted an expansive approach to enhance the specificity of the Community or Union legal order.¹⁹⁸

Subsidiarity has not generally been discussed in caselaw on external relations, nor does it seem to have been much argued before the ECJ in that context. It does, however, seem to have implications for this area in so far as there is uncertainty as to the exclusive competence of the EU in a given case. To demonstrate that the law of external relations respects subsidiarity, some analysis is needed for why the limitation of Member States’ autonomy is

¹⁹⁵ Case C-459/03, *MOX Plant*, supra n. 193, para. 154.

¹⁹⁶ See *ibid.*, para. 130.

¹⁹⁷ In response to Ireland’s argument that recourse to UNCLOS could be construed as a method of settlement within the scope of Article 292, the ECJ simply observed “an international agreement such as the Convention cannot affect the exclusive jurisdiction of the Court” (*ibid.*, para. 132) (which might be thought to beg the question).

¹⁹⁸ See Soriano (2007), *op cit.*, 331, noting with reference to the overall approach of the ECJ to competence (its interpretation of Articles 95 and 308 ECT and of the subsidiarity principle), “The consequences for member states’ defence of their political interest could not be more negative...”.

necessary to achieve the Union's objectives and is thus worth the cost to Member States' freedom of action. For example, in *MOX Plant*, the ECJ could have offered a justification as to why concurrent jurisdiction of other courts was necessarily harmful to the Union, especially given the international law doctrine whereby international courts and tribunals seek to facilitate each other's jurisdiction as much as possible.¹⁹⁹ The traditional ECJ approach of differentiating the Union legal order from public international law seems, of itself, too general and inadequate to discharge that burden of persuasion in specific cases. *Opinion 1/03*,²⁰⁰ on the Lugano Convention²⁰¹ and private international law, provides another example. Here, the ECJ held that the Community had exclusive competence to deal with the jurisdiction and enforcement of judgments in civil and commercial matters.²⁰² As Kruger notes, the effect of this was to limit the contractual freedom of private parties to choose a forum for dispute resolution and also to restrict the ability of Member States to conclude bilateral agreements with non-EU States, even though in both cases it may be commercially beneficial to have relative freedom of action.²⁰³

6.6.2.2 *The Boundary between the General Law of External Relations and the Common Foreign and Security Policy*

As well as the divide between Member State and Union competence in external relations, EU law has an internal divide between the external competences of the Union as an adjunct to the common market, developed through the doctrine of parallelism discussed above, and the

¹⁹⁹ The ECJ simply declared the risk to the Community order to be 'manifest' even though Ireland had offered an assurance that it would not seek to litigate any provisions of Community law in an arbitral tribunal: Case C-459/03, *MOX Plant*, supra n. 193, para. 154-156. On the latter point, the Advocate General offered somewhat more explicit reasoning, suggesting the fact that provisions of Community law coincided with international rules that Ireland had asked to be adjudicated by a tribunal was enough to breach Article 292 ECT: see Opinion of Advocate General Maduro, 18th January 2006, para. 51. This line of reasoning, however, has potentially very extensive implications on a broad reading: any rule of international law that coincides in any way with EU law cannot be litigated by a Member State before an international court or tribunal. Would such an exclusion operate at the level of very specific rules or at a much higher level of generality to cover whole sectors or areas, such as the environment, commercial matters etc.?

²⁰⁰ *Opinion 1/03 Re New Lugano Convention*, supra n. 183.

²⁰¹ Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988, (1989) 28 *ILM* 620.

²⁰² *Opinion 1/03*, supra n. 183, paras. 150-173.

²⁰³ T. Kruger, 'Opinion 1/03, Competence of the Community to conclude the new Lugano Convention on the Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', 13(1) *Columbia JEL* 189-200 (2006-2007), 198-199.

Common Foreign and Security Policy (CFSP). The CFSP is governed by a much looser, intergovernmental framework in which the Union institutions have much less power. As with foreign policy generally, competence is not usually exercised through legislation, but through executive action. Whether a matter comes under the CFSP or the general law of external relations thus has much practical significance for the exercise of competence or powers. In the main judgment to date in this field, *Light Weapons*,²⁰⁴ the ECJ suggested at one point in its judgment a similar centre-of-gravity or main purpose test that it has used to delimit Article 95 ECT/114 TFEU. This approach would suggest that what is needed is an overall assessment of the different aims of a particular legislative instrument and a weighing exercise to determine what was the preponderant aim. The case is revealing because it shows perhaps subtle differences in how this test is applied, which can make a big difference to the extent to which the test reflects the notion of *lex specialis*. The judgment was based on the Treaties prior to the passing of the Treaty of Lisbon, which meant Article 47 TEU applied and abrogated the *lex posterior* rule of general public international law in favour of a *lex superior* rule giving priority to the ECT or First Pillar over the CFSP or second Pillar.²⁰⁵

The main issue in the case was whether a legal instrument concerning the EU's contribution or assistance to the Economic Community of West African States (ECOWAS) through a moratorium on small arms and light weapons fell under the First Pillar or the Second Pillar. The Council considered this a matter for the CFSP and adopted a Joint Action and then a Decision, both under the CFSP, to this end. The Commission argued that the issue was properly considered as one of development cooperation and therefore fell as a matter of priority within Articles 177-181 ECT. In his Opinion, Advocate General Mengozzi canvassed different possible approaches in some detail. He rejected an argument that there was a parallel to be drawn between the EU-Member State competence divide, in the context of a non-exclusive competence, and the EU-Community or First Pillar-Second Pillar divide. Even if the Member States were free to act independently of the EU in the matter because it was not a matter of Community exclusive competence, it did not mean that the EU framework could be used to exercise their independent competence.²⁰⁶ Thus, a decision had to be made as to whether the correct legal basis was in the First or Second Pillar. On how to

²⁰⁴ Case 91/05, *Commission v. Council (ECOWAS/Light Weapons)* [2008] ECR I-3651 (this was the first decision of the ECJ on the First Pillar-Second Pillar relationship).

²⁰⁵ Eisenhut (2009), op cit, 589.

²⁰⁶ Case 91/05, *ECOWAS*, supra n. 204, paras. 105-115 of his Opinion of 19th September 2007.

characterise the aim of the Union measures being contested, the Advocate General adopted the following test:

171. It would be erroneous and excessive to consider that any measure which *fosters* the economic and social development of a developing country falls within the competence of the Community pursuant to Title XX of the EC Treaty.

172. Any other interpretation would undoubtedly deprive the other Community policies, such as the common commercial policy, of their reason for existence and render them ineffective. (M) It would also be likely to harm the practical effect of the provisions of Title V of the EU Treaty, in spite of the limits on the actions of the Community laid down by Article 5 EC.

173. Where a measure is likely to fall within the scope of the aims of the CFSP and also to contribute to the social and economic aims of the Community development cooperation policy, it is necessary, having regard to the content and purpose of that measure, to seek its main aim in order to secure a balance between the observance of Article 47 EU and of Article 5 EC. (references omitted)²⁰⁷

This invokes a concept of *lex specialis* in that it adopts a characterisation based on the greatest specificity. Applying this test, the Advocate General concluded that instruments in question were mainly related to the CFSP, not to development cooperation.²⁰⁸ In much briefer reasoning, the ECJ appeared to endorse a main purpose test.²⁰⁹

However, the ECJ went on to hold that the contested decision pursued a number of objectives, falling both within the CFSP and development cooperation policy, without one of those objectives being incidental to the other. This had the result that Article 47 TEU was engaged so as to give priority to Community competence.²¹⁰ In other words, the ECJ held that neither aim was preponderant or possessed the greatest specificity in the context of the instrument. Again, however, *lex specialis* was not explicitly articulated, and it may be argued that Advocate General's approach was more sensitive in application to the idea of *lex*

²⁰⁷ See also *ibid*, para. 89, referring to "the exclusive or principal objective".

²⁰⁸ See also *ibid*, para. 89, 213.

²⁰⁹ Case 91/05, *ECOWAS*, *supra* n. 204, paras. 60, 72.

²¹⁰ *Ibid*, paras. 108-111.

specialis than the judgment of the ECJ. The Advocate General engaged in a somewhat more detailed analysis of the provisions of the Joint Action and resulting Decision.²¹¹ The ECJ noted more briefly the reference to development in the Decision's preamble and also the fact that technical assistance and funding was to be provided as indicating the development aspect of it.²¹² The Advocate General thought the provision for funding and technical assistance was neutral as to the objectives involved.²¹³ This seems more persuasive in so far as expenditure is likely to feature across many exercises of legislative competence and so does not seem to offer a clear basis for distinguishing them. However, both the Advocate General and ECJ could have been more sensitive to the competence question by an analysis of the foreign and development policies of the Member States, in order to determine if the Member States classify a restriction on arms sales as part of development policy, to offer an empirical basis for the characterisation of the Decision overall as concerning development as much as CFSP. Herlin-Karnell accurately captures the underlying competence dynamic and context in *ECOWAS*:

There is no doubt that Art 47 constitutes the EC's trump card – perhaps one may (provocatively) add – as being somewhat outside the reach of the principle of attributed powers. The Light Weapons case also illustrates that the Court, in contrast to AG Mengozzi, has subscribed to the depillarization trend where the facade – or Chinese wall – of the 'pillars approach' is not intact but in fact steadily falling into pieces, as has been evident in the Court's case law ever since the failure of the Constitutional treaty in 2005.²¹⁴

A tendency to silently subsume the character of legal reasoning within the substance of a particular decision may not fully survive the passing of the Treaty of Lisbon and its implications for external relations and the CFSP. In what might be considered an example of the EU stalling on an often assumed inevitable trajectory of increasing supranationalisation, the Treaty of Lisbon abolishes the priority given to what was previously the Community over what is now still essentially an intergovernmental CFSP (although the Pillar terminology has

²¹¹ Opinion of Advocate General Mengozzi's, *supra* n. 206, paras. 197-212.

²¹² Case 91/05, *ECOWAS*, *supra* n. 204, paras. 93-108.

²¹³ *Supra* n. 206, para. 211.

²¹⁴ Herlin-Karnell (2008), *op cit*, 1003.

been discarded).²¹⁵ Article 40 TEU now states that the CFSP and other Union competences shall not affect the application of each other. In that context, it seems inevitable that the ECJ will have to start articulating the *lex generalis-lex specialis* distinction to extent in order to adopt a principled approach to choice of legal bases, as some commentators have pointed out.²¹⁶ The alternative seems to be that the Court adopts a more restrained or deferential stance and allows the Council considerable discretion to determine the correct legal bases in sovereignty-sensitive CFSP-related matters without really entertaining challenges to it.

6.6.3 Criminal Law

*6.6.3.1 Criminal Competence to Date*²¹⁷

In the area of criminal law, which has only featured within the Court's jurisdiction under the Third Pillar since the Treaty of Amsterdam,²¹⁸ the Court began its case law in a creative vein and essentially transplanted the meta-teleological reasoning it has employed under the First Pillar.²¹⁹ The Court interpreted Article 54 of the Schengen Convention²²⁰ contrary to the text in holding that 'a trial finally disposed of' encompassed out-of-court settlements, based on general arguments as to effectiveness and with reference to the free movement principle.²²¹ A formula sometimes adopted and found also in *Gözütok and Brügge* is to link an argument as to effectiveness with the lack of textual contradiction, which seems to invert the normal priority given in textual interpretation. In other words, it is enough that the text does not expressly contradict a particular conclusion²²² (although it could be argued in this case that

²¹⁵ For a contrary view, see Eisenhut (2009), op cit, 600-604.

²¹⁶ Dougan (2008), op cit, 626; Herlin-Karnell (2008), op cit, 1007.

²¹⁷ The most explicit discussion in the literature relates to criminal sanctions for breaches of environmental laws, see the debate between Faure and Comte: F. Comte, 'Criminal Environmental Law and Community Competence', *EELR* 147-156 (2003); M. Faure, 'European Environmental Criminal Law: Do We Really Need It?', *EELR* 18-29 (2004); F. Comte, 'Environmental Crime and the Police in Europe: A Panorama and Possible Paths for Future Action', *EELR* 190-231 (2006).

²¹⁸ See Article 35 TEU (pre-Lisbon).

²¹⁹ Joined Cases C-187/01 & C-385/01, *Criminal proceedings Against Gözütok and Brügge* [2003] ECR I-1345 (this was the first decision of the ECJ under the Third Pillar). See further, e.g. M. Fletcher, 'Some Developments to the *Ne Bis in Idem* Principle in the European Union', 66(5) *MLR* 769-780 (2003); G. Conway, 'Judicial Interpretation and the Third Pillar', 13(2) *EJCLCJ* 255-283 (2005).

²²⁰ Schengen Implementation Convention of the 14th June 1990, 30 *ILM* 184 (1991).

²²¹ Joined Cases C-187/01 & C-385/01, *Gözütok and Brügge*, supra n. 219, para. 36.

²²² See *ibid*, para. 31.

the text actually did contradict the conclusion). This is to subsume any conflicting textual indications into broadly stated purpose, when is then considered decisive:

Furthermore, it should be pointed out that nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters (Articles 34 and 31 of which were stated to be the legal basis for Articles 54 to 58 of the CISA), or in the Schengen Agreement or the CISA itself, is the application of Article 54 of the CISA made conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred.²²³

Given the sensitivity of the intergovernmental pillars with respect to sovereignty, it was to an extent surprising that the ECJ adopted such a bold approach in its first Third Pillar judgment.

More recently, the Court in *Commission v. Council (Environmental Crimes)*, took a further expansive step in determining that the principle of effectiveness required that sanctions for breaches of Community law may be required to be criminal in nature,²²⁴ notwithstanding the deliberate cordoning off of criminal competence from the First Pillar in the Third Pillar:

As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (see, to that effect, Case 203/80 *Casati* [1981] ECR 2595, paragraph 27, and Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 19). ... However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.²²⁵

Although previous legislative measures of the Member States may have made reference to criminal sanctions, it was a step further to suggest such sanctions could be required as a

²²³ Joined Cases C-187/01 & C-385/01, *Gözütok and Brügger*, supra n. 219, para. 32 and see also, e.g. Case 9/70, *Franz Grad, v. Finanzamt Traunstein* [1970] ECR 825, 837-838.

²²⁴ Case 176/03, *Commission v. Council*, supra n. 101.

²²⁵ *Ibid*, paras. 47-48.

matter of Community law. Here the *lex generalis* of effectiveness²²⁶ as a principle of Union law prevailed over the *lex specialis* of the Third Pillar provisions on criminal law, thereby contributing to depillarization in a way that cannot plausibly be attributed to the intentions of the Member States. Perhaps to dissipate accusations of judicial overreach, in two other recent decisions, the ECJ drew limits to the implications of the Community Pillar for criminal law. In *Berlusconi and Ors.*,²²⁷ the Court held, following its previous caselaw, that a Directive could not of itself have the effect of increasing the criminal liability in a national system for breach of a rule of Community law, and in *Commission v. Council (Sea Pollution)*,²²⁸ the Court decided that the type of criminal penalties to be adopted for breaches of Community law was not within the Community's competence.

However, both these decisions seem to have been on pragmatic grounds, and it seems difficult to identify any normative aspect of interpretation identified by the Court that explains the difference in approach with *Environmental Crimes*. For example, it seems clearly possible for a Member State to set only minimal criminal sanctions, e.g. which entailed discretion exercisable by national courts as to the establishment of a criminal record, and which might not effectively deter breaches of Community law at national level. *Sea Pollution* rules out any review on grounds of effectiveness in this scenario, though effectiveness was the criterion of adjudication of competence in *Environmental Crimes*,²²⁹ and no reasoning is offered to explain the difference.

²²⁶ For recent discussion, see E. Herlin-Karnell, 'An Exercise in Effectiveness?', 18(5) *EBLR* 11-81-1191 (2007), describing effectiveness as a 'celebrated' and 'prestigious' notion in EU law, which has been used variously by the ECJ to enhance enforcement, determine jurisdiction, translate supranational principles to intergovernmental spheres of cooperation, and to extend competence to new fields previously though within national sovereignty (ibid, 1181).

²²⁷ Case C-387/02, *Berlusconi and Ors.* [2005] ECR I-3565.

²²⁸ Case C-440/05, *Commission v. Council* [2007] ECR I-9097.

²²⁹ See Faure (2004), op cit, 21-22, criticising the empirical basis of claims that criminalisation for breaches of Community environmental law was necessary to make these laws effective and proposing that national experience in Europe suggests administrative sanctions could often be as effective, criminalisation only being needed for more serious offences. The European Commission judged the decision in *Environmental Crimes* "to lay down principles going far beyond the case in question. The same arguments can be applied in their entirety to the other common policies and to the four freedoms...": *Communication from the Commission to the European Parliament and the Council*, COM(2005) 583 final/2. In agreement, see Comte (2006), op cit, 228; Weatherill (2009), op cit, 20.

6.6.3.2 *The Competence of a European Public Prosecutor*

Article III-274 of the Treaty establishing a Constitution for Europe²³⁰ contained a legal basis for the establishment of an EPP, subject to a unanimous decision of the Member States, and it has been essentially reproduced by Article 69 E of the Treaty of Lisbon to create Article 86 TFEU. It is clear that the powers of the EPP go considerably beyond the common law tradition in this area. The EPP would have the authority to ‘investigate’, ‘prosecute’, and ‘bring to judgment’. Thus it would seem to have a police function of investigation, as well as purely prosecutorial one.²³¹ The reference to ‘bringing to judgment’ appears to be a basis for the complete responsibility of the EPP for the prosecution up to the delivery of a verdict. Special rules as to the admissibility of evidence are envisaged,²³² hinting at perhaps the more far-reaching idea of free movement of evidence envisaged in a Commission’s Green Paper.²³³ A basis for a potentially substantial extension of its competence beyond crimes against the financial interests of the Communities is contained in the last paragraph: its competence could be extended to include serious crime having a cross-border dimension and/or serious crimes affecting more than one Member State.²³⁴ This cross-border basis for an extension of competences is potentially very far-reaching, as experience with the common market has shown. The EPP is to be established from Eurojust,²³⁵ which currently has a very limited remit of facilitating, in the manner of a diplomatic agent, existing methods of criminal justice cooperation between member States of the EU. In addition to what was in

²³⁰ *Supra* n. 59.

²³¹ Article 86(2) TFEU. The legal basis certainly exists for the EPP to be assigned a full police arm, although it is also possible it could be given a supervisory role in relation to national police, as had been envisaged as a possibility under the *Corpus Juris* proposal (Article 20(2)): see *infra* n. 233.

²³² Article 86(3) TFEU.

²³³ European Commission, *Green Paper on Criminal-Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor*, COM(2001) 715 final. The idea of an EPP had been first developed by the so-called *Corpus Juris* group of academics and practitioners in the 1990s in response to a request by the Commission, with a model proposal in 1997: M. Delmas-Marty (ed.), *Corpus Juris: portent dispositions pénales pour la protection des intérêt financiers de l’Union Européenne, sous la direction de Mireille Delmas-Marty* (Economica 1997).

²³⁴ Article 86(4) TFEU.

²³⁵ See Decision establishing Eurojust 2002/187/JHA, 06.03.2002, OJ L 63, 6.3.2002, p. 1, and Decision on the Strengthening of Eurojust amending Decision to establish Eurojust 2009/426/JHA, 04.06.2009, OJ L 138, 4.6.2009, p. 14. Eurojust currently has a very limited remit of facilitating, in the manner of a diplomatic agent, existing methods of criminal justice cooperation between Member States of the EU. The investigative power attributed to an EPP could also assimilate the function of OLAF within the new institution, OLAF being a semi-autonomous element within the Commission with responsibility for monitoring and investigating fraud on the Union budget. OLAF has an external investigative power under Regulation 2185/96 (OJ L 292, 15.11.1996, p. 2). This gives OLAF the power to carry out on-the-spot, un-announced investigations and to request the assistance of Member State authorities for an investigation (see Article 7 of Regulation 2185/96).

the Treaty Establishing a Constitution for Europe, there is the possibility for nine Member States to proceed, through the enhanced cooperation procedure, with the adoption of an EPP in their jurisdictions in the absence of unanimity.²³⁶

A practical question of accountability is that of the dividing line between police and prosecution competences. This presents the possibility of ‘accountability forum shopping’ in this context: if the overlap of police and prosecution powers is unclear, the avenue of accountability may be shifted from one to the other in a way that reduces accountability. For example, in Ireland the Director of Public Prosecutions (DPP) acts as a legal advisor to the police or *Garda Síochána*. Since the establishment of a more robust system of police accountability in Ireland,²³⁷ there may be a temptation for the *Gardaí* to attribute their actions to legal advice from the DPP, which would then shift the framework of accountability away from the police to the much more limited accountability framework applicable to the prosecution authority. It is possible that legal advice from the prosecution authority might be deliberately framed in a general or ambiguous way in order to give a maximum cloak of relative protection to police action. The question, therefore, of competence interacts in an important way with that of accountability. It relates to the goals of accountability as a concept: to have some ultimately democratic control over the competence of prosecutors and police (through democratic enactment of competence norms) and to prevent the over-concentration and abuse of power.²³⁸ This is a matter especially pertinent in the context of an EU-wide prosecution authority, given that Community/Union competence has been marked by the phenomenon of competence creep. In the context that an EPP would for the first time represent the direct involvement of a Union institution in the legal systems of the Member States,²³⁹ and in the especially sovereignty-sensitive context of criminal and prosecution powers, a concern with clarifying and defining competences is likely to figure prominently in debate on an EPP.

²³⁶ Article 86(1) TFEU.

²³⁷ See D. Walsh, ‘Twenty Years of Police Complaints in Ireland: a Critical Assessment of the Review Board Model’, 29(2) *LS* 305-337 (2009).

²³⁸ M. Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, 13(4) *ELJ* 447-468 (2007), 462.

²³⁹ In the sense that it will be the first time a Union institution may initiate and act as a party in national proceedings as part of its core function.

In light of the analysis offered in this chapter, it may be difficult to determine the exact limits of the competence of an EPP once Member States adopt measures granting it competence beyond financial crimes against the Communities. Article 86(4) TFEU invokes the concept of ‘cross-border impact’ that has proven seductive as a source of increased Union competence in other spheres, albeit that Article 86 qualifies ‘cross-border crime’ with the adjective ‘serious’. Just as even relatively minor divergences of national laws on virtually any matter can in the abstract be understood as an obstacle to free movement, so almost any crimes could be understood in the abstract as having a cross-border dimension. Crime occurring within a given Member State, when it is at a higher level than another Member State, can be conceptualised as an obstacle to free movement in that the more crime exists in a Member State, the less likely it is to be viewed favourably by bearers of free movement rights (workers, service providers, and their families). When the fact that the EPP is to possibly have what are actually police powers of investigation is also considered, the EPP could be seen as a Trojan horse for a federalised combined police and prosecution force within the competence of the EU,²⁴⁰ if the ECJ were to adopt the logic of the integration imperative as it has done in the field of the common market.

In contrast to its *communautaire* logic, the ECJ could adopt here for determining the threshold justifying the extension of EPP competence the standard of ‘appreciable impact’ on serious cross-border crime, as it has at least formally done to justify competence in competition law. Nonetheless, the standard seems to need more specification. The background issue is subsidiarity, i.e. justifying a preference for Union competence as opposed to existing national competence. One practical application of subsidiarity would be to require data or evidence²⁴¹ demonstrating that traditional intergovernmental cooperation and mutual legal assistance (MLA) in the criminal justice sphere was inadequate and could only be remedied by the adoption of the ‘Community method’ (to use pre-Lisbon terminology). Ample raw data and evidence are available on the efficacy of traditional MLA in Europe, as the Council of Europe has been involved to a significant extent. Its work has

²⁴⁰ See WA. Tupman, ‘Supranational Investigation after Amsterdam, The *Corpus Juris* and Agenda 2000’, 7(2) *ICTLR* 85-102 (1998), 93-4, 102.

²⁴¹ See, e.g. Craig (2006), *op cit*, 427, noting that the ECJ could more meaningfully review legislation on subsidiarity grounds through requiring more justificatory data from the Commission.

been comparatively modest in general,²⁴² yet that of itself does not point to the need for the Community/Union method in this field. The burden of justification for a transfer of competence from the Member States to the Union institutions, instead of using their inherent faculty of cooperation under general international law as they currently do with the Council of Europe system, rests with those advocating further integration.²⁴³ Generic appeals to the need for more cooperation arguably do not meet this burden, since cooperation is inherently possible under general international law as matters stand.

The Treaty lists the area of freedom, security, and justice as a matter of shared competence between the Union and Member States.²⁴⁴ This seems to leave somewhat open the question of the exact nature of the competence of an EPP. Given that, in the view of the ECJ, criminal competence cannot be effectively severed from other competences, as demonstrated in *Ship Source Pollution*,²⁴⁵ it is thus possible the ECJ could consider that the EPP impacted upon an area of exclusive competence.²⁴⁶ In other words, the attempted division between exclusive and shared competences may not work meaningfully in practice given the competence ‘spillover’ in the caselaw. In an area of shared competence, Member State competence is conditional upon the non-exercise of Union competence, which itself can be expansively interpreted by the ECJ. The exact contours of here are unclear. It is conceivable, for example, the ECJ could apply the doctrine of pre-emption, translated from an external relations context, so as to exclude any parallel competence of national prosecutors in relation to the same facts as are subject to proceedings instituted by an EPP.²⁴⁷

²⁴² See, e.g. G. Conway, ‘The Council of Europe as a Normative Backdrop to Potential European Integration in the Sphere of Criminal Law’, 19 *Denning LJ* 123-148 (2007).

²⁴³ See Schütze (2009), op cit, 250, noting that subsidiarity under the Treaty fails to relate Union competences to *inter se* action by the Member States as subjects of international law.

²⁴⁴ Article 2(2) TFEU.

²⁴⁵ Case C-176/03, *Commission v. Council*, supra n. 101.

²⁴⁶ Areas of exclusive Union competence are set out in Article 3 TFEU and include such broadly framed categories as the ‘customs union’ and ‘competition rules for the functioning of the internal market’ (though the internal market itself is listed as matter of shared competence under Article 4 TFEU).

²⁴⁷ The ECJ might apply by analogy here its ruling in Case C-459/03, *MOX Plant*, supra n. 193 (where it held that the autonomy of Community law required the exclusive jurisdiction of the ECJ, as envisaged in Article 292 ECT, over mixed agreements concluded in an area of shared competence). Such an approach by the ECJ could be contrasted with the regime of complementarity that governs the jurisdiction of the International Criminal Court (ICC): the ICC may only exercise jurisdiction where a State party is unwilling or unable to exercise jurisdiction over the relevant crimes or exercises jurisdiction in order to shield a suspect: Article 17 of the Rome Statute of the International Criminal Court, (1998) 37 ILM 1002; 2187 UNTS 90.

The *Corpus Juris* permitted the national prosecutor to prosecute alongside an EPP ‘if national interests are also under threat’,²⁴⁸ though without indicating how a difference of views between the EPP and a national prosecutor would be resolved.²⁴⁹ An additional issue is the extent to which the ECJ could impose procedural requirements on national proceedings involving prosecution by the EPP in order to ensure the ‘effectiveness’ of Union law, given that effectiveness has often featured in ECJ caselaw as a criterion of interpretation.²⁵⁰ As Herlin-Karnell notes, despite its popularity in the official discourse of the EU institutions, “[t]he problem is that this principle is a far from being an unambiguous navigator when discussing legislation either in EU law or criminal law terms”.²⁵¹ A similar point has at least as much force when applied to the invocation by the ECJ of effectiveness as a criterion for extensive interpretation.²⁵² Any jurisdiction for the ECJ to determine the scope of competence norms in that context would likely prove highly sensitive, since it would give the ECJ in a more direct way than before jurisdiction in national legal processes.

6.7 Conclusion

This chapter has sought to demonstrate the differing ways that competence norms can be addressed in legal reasoning. In 1995, Weiler et al set out clearly the general dynamic of competence as it had emerged since the 1950s:

²⁴⁸ See also Article 22(1), *Corpus Juris*.

²⁴⁹ J. Spencer, ‘National Report of the United Kingdom’, in M. Delmas-Marty & J. Vervaele (eds.), *The Implementation of the Corpus Juris (Vol. III)* (Intersentia 2000), 907.

²⁵⁰ See, e.g. the caselaw on parallelism and pre-emption in external relations. In the context of an EPP, if the principle of conferred powers (Article 5 TEU), is to be respected, then legal accountability concerning the proper exercise of competence seems necessary. The kind of decisions an EPP would be exercising are not purely administrative or policy-based, but entail coercive legal powers, unlike, for example, at least some of the powers of OLAF (H. Xanthaki, ‘What is EU Fraud? And Can OLAF Really Combat It?’, 17(1) *JFC* 133-151 (2010), 1401-41). It seems any accountability with teeth will thus need to entail some ultimate judicial review. This is also reflected, for example, in the role given to a ‘Judge of Freedoms’ under Article 25 of the *Corpus Juris*. Spencer has commented that:

Judicial control [in the UK] is also the rule, *a fortiori*, over pre-trial detention – which in the UK, is neither in theory nor in practice, a means of collecting further evidence of crimes. For this it follows that in the UK there would be no difficulty whatever about the general notion of the ‘judge of freedoms’. Indeed, there would be objections to a scheme that did not have one. (Spencer (2000), *op cit*, 912).

²⁵¹ Herlin-Karnell (2009), *op cit*, 354.

²⁵² At its core, effectiveness seems an empirical concept, i.e. what way will a particular ruling work on the ground: see F. Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools, and Techniques’, 56(1) *MLR* 19-54 (1993), 52; Herlin-Karnell (2007), *op cit*, 1183.

Sooner or later, “Supreme” courts in the Member States would realize that the “Socio-legal contract” announced by the Court in its major constitutionalizing decisions, namely that “the Community constitutes a new legal order...for the benefit of which the states have limited their sovereign rights, *albeit within limited fields*” (emphasis added) has been shattered, that although they (the “Supreme” courts) have accepted the principles of the new legal order – supremacy and direct effect – the fields do not seem any more to be limited, and that in the absence of Community legislative or legal checks it will fall to them to draw the jurisprudential lines of the Community and its Member States.²⁵³

This chapter has sought to address this issue by outlining the different normative approaches to addressing competence in legal reasoning. Perhaps in the area of competence more than any other aspect of EU law, it is true that the ECJ “*has . . . assumed powers that would properly belong to a democratically elected legislature*”.²⁵⁴ The framework of norm conflict can illustrate why this is so, by revealing the alternative ways in which competence norms can be dealt with in legal reasoning and showing thus the absence of any inevitability in the approach of the ECJ. The treatment of competence in ECJ caselaw, whereby a single value of integration is privileged above all others in contrast to an approach articulating varying ways of dealing with competence norms, provides a very good example of the general critique directed by Burley & Mattli. In their view, “the staunch insistence on legal realities as distinct from political realities may in fact be a potent political tool”. The analysis of competence in this chapter bears out this view, whereby a poorly articulated and justified approach to legal reasoning provides the ECJ with a role in economic and even political integration, allowing it to make a decisive contribution to competence creep.²⁵⁵

Competence norms are distinct relative to other legal norms in the conferring of an ability or amenity to change legal relations. The relationship between competence conferring norms and the exercise of a competence norm helps reveal an important structural feature of competence norms as concepts, their relationship to each other in a chain of validity. This has implications for their treatment in legal reasoning. First, it suggests that the idea of

²⁵³ Weiler, Haltern & Mayer (1995), op cit, 42-43. The quote within the quote is from a passage in the decision of the ECJ in Case 26/62, *Van Gend en Loos* [1963] ECR 1, at 12-13.

²⁵⁴ C. Jetzlspenger, ‘Legitimacy through Jurisprudence? The Impact of the European Court of Justice on the Legitimacy of the European Union’, *EUI Working Paper Law 12/2003* (EUI 2003), 40.

²⁵⁵ Burley & Mattli (1995), op cit, 44.

‘conferral’ is inherent in a competence norm, and indeed conferral has been articulated explicitly through EU Treaty revisions. The context of the principle of conferral can be said to be the sensitive issue of the status and role of the Member States as ‘Masters of the Treaties’: can the Member States alone confer competence, or is competence by the institutions self-generating through the mechanism of expansive legal reasoning? The explicit articulation by the Treaties of constitutional principles could be taken to provide an unequivocal answer to this question, against the idea of self-generating competences.

However, the reality of institutional practice and of the legal reasoning of the ECJ suggests a more complex answer. Flexibility and ambiguity characterise the question of competence in EU law.²⁵⁶ There are sharp differences in how competence norms are mediated in legal reasoning. Perhaps most importantly is the distinction between *lex specialis* and *lex generalis*, which can be understood as relating to the phenomenon of levels of generality in legal reasoning. Applying *lex specialis* much more fully reflects the idea of conferral, as *lex specialis* logically reflects the will of the constituent power. The effect would be to exclude the use of Article 114 TFEU (ex Article 95 ECT) when a more specific Treaty basis is available. Surprisingly under-articulated in EU legal literature, the *lex specialis-lex generalis* distinction explains the differing treatments of competence norms in *Tobacco Advertising* and the *Laval* and *Viking* line of caselaw. *Lex specialis* localises the identification of Treaty objectives to a particular policy field,²⁵⁷ as opposed to a global teleology linked to the highest level of generality in the Union system of enhanced integration.

Lex specialis thus offers a conceptual key to understanding the differing treatment of competence norms in caselaw, while normatively supporting the idea of limited and conferred powers. It gives practical substance in legal reasoning to Dashwood’s view that “The technique of specific and detailed attribution ... remains the most effective method of setting identifiable limits to the competences of the European Union”.²⁵⁸ Somewhat in contrast to Article 114 TFEU, Article 352 TFEU (ex 308 ECT) by definition invokes *lex generalis*, in that it applies when a more specific Treaty basis is not available to achieve a

²⁵⁶ Obradovic (1997), op cit, 84-85; Soriano (2007), op cit, 333; Klabbers (2009), op cit, 189.

²⁵⁷ On the application of Article 308 ECT in this more specific sense, see Schütze (2009), op cit, 136-137.

²⁵⁸ Dashwood (2004), op cit, 380.

Treaty policy (not just referring to the internal market as does Article 114 TFEU, though internal market can be very broadly conceptualised). A narrow approach to the idea of implied powers is needed to avoid the use of this provision to circumvent the principle of conferral, although it is open to debate as to what extent the limit identified in the caselaw, the 'general framework of the Treaties', is a constraint, since the Treaties can always be conceptualised at a high level of generality. A test based on subsidiary or ancillary powers might be more constraining.

The different possibilities for applying the subsidiarity principle, which is a principle for resolving conflict between the competing competences of the Member States and the Union, are also under-articulated in the caselaw, though they have been more fully canvassed in the legal literature. A key to rendering subsidiarity for meaningful as a tool of judicial review is the integration of Member State autonomy as part of the weighing exercise in a subsidiarity test. This has an evidential implication of requiring cogent evidence to justify a claim of comparative efficiency for the exercise of competence at the Union level. It also serves to exclude the approach in ECJ caselaw of equating the existence of diversity of Member State laws as a justification in and of itself for the exercise of Union competence. The latter tendency effectively negates subsidiarity and more generally the principle of conferral as a meaningful control or limit on Union competence. It thus creates a problem of sharp conflict between constitutional self-articulation by the EU and institutional practice as mediated through the legal reasoning of the ECJ, which tends to avoid any extensive articulation of these issues, thereby undermining the legitimacy of its adjudication.

Chapter 7 - Conclusion

This thesis has sought to present an account, both descriptive and normative, of norm conflict resolution in EU law and the legal reasoning of the ECJ. Norm conflict as a conceptual framework offers much for understanding legal reasoning. Klabbers in his recent study of Treaty conflict in EU law concludes that treaty conflicts at bottom involve questions of value choice that law can only resolve to a limited extent and that ultimately need to be resolved by the body politic.¹ The present work has sought illustrate how the prism or framework of conflict illustrates these value choices in EU law and how legal reasoning reflects fundamental choices of value across the areas of norms of interpretation, human rights norms, and competence norms. This approach allows a fuller judgment to be made about the legitimacy, i.e. the coherence with basic values of the EU legal system, of the choices made in the course of legal reasoning. The analysis suggests that the role of value choices highlighted by Klabbers in the domain of treaty conflict is similarly important in conflicts of legal reasoning generally, but is much under-articulated in EU law. ‘Political decision’ in the broad sense of value choices not pre-determined by legal rules can take place *sub silentio* in legal reasoning, and this tendency is especially marked in EU law.

It is a truism that conflict is inherent and endemic in the law. Conflict is the context of all caselaw and adjudication. Yet the law at the point of judgment speaks with relative coherence. Coherence as a minimum notion of intelligibility and thus non-contradiction is as much a requirement for an effective legal system as conflict is its context. How the law reaches a coherent conclusion is a much more contested question. Apart from some of the theoretical writing of Ronald Dworkin, coherence is not considered an exhaustive or semi-exhaustive criterion of adjudication.² Much of the theory of norm conflict resolution is, thus, a matter of looking beyond coherence to examine what are the other ingredients or elements of adjudicating conflict of constitutional and legal norms. For Joseph Raz, any approach to

¹ J. Klabbers, *Treaty Conflict and the European Union* (Cambridge Univ. Press 2009), 14, 227-231, advocating ‘a principle of political decision’ as the primary means of norm conflict resolution.

² Dworkin appears to rank equal respect as another meta-criterion of legal reasoning, at least in the context of rights adjudication: R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard Univ. Press 2005). In other work, he appears to present ‘legality’ as the ultimate criterion of adjudication, although the shifts and development in his thinking tend not to be made explicit: R. Dworkin, ‘Hart’s Postscript and the Character of Political Philosophy’, 24(1) *OJLS* 1-37 (2004).

legal reasoning that consists of a recipe of suitable steps is unrealistic in failing to reflect the local and contingent character of much of adjudication.³ In contrast, most theorists accept the universalisable character of legal reasoning.⁴

Fundamentally, legal reasoning is not a local or parochial enterprise. This widely accepted view reflects another universal notion associated with or inherent in law, namely, the rule of law. Tamanaha, for example, identifies ‘formal legality’ as the core and universal requirement of the rule of law, i.e. an understanding of legal rules that distinguishes them from other social rules and that enables the law to have a politically neutral and objective core so that it constitutes a universal human good (the ‘minimum content of the rule of law’, common to several somewhat diverging versions of the concept comprises the principle of government being bound by the law; formal requirements of the law being public, prospective, general, applied equally, and certain; and in contrast with ‘the rule of men’, a non-discretionary and objective character). Beyond coherence, therefore, formal legality represents an additional minimum threshold for adjudication and relates to the idea of objectivity in the law. What this thesis has tried to do is to relate these minimal requirements of legal reasoning to a fuller account of the role of values in the context of a particular type of conflict in the law, namely, conflict of norms and in an EU context.

As noted, conflict is endemic in the law. Conflict of norms is perhaps the central case of legal conflict. Most caselaw before the courts consists of conflict of evidence or of fact. Conflict of norms concerns those cases where the disagreement is on the applicable norm or the correct interpretation of an applicable norm, the kind of cases that make up the work of the appellate courts. Norms here are understood as the operative requirements in a legal system, and generally they consist of rules giving full reasons for legal action. Rules here are contrasted with principles: rules have an all or nothing character that tends to dispose of a case, whereas principles are more open and require to a much greater extent the mediating role of the interpreter or judge. Conflict of norms thus relates to a conflict between *prima facie* valid reasons for adjudication, whether those reasons are in the form of rules or principles. As such, it represents a test case for a legal system, since in a case of conflict, the normative force of otherwise applicable norms is lost to some extent. Relatively strong

³ See above Chapter 4.3.1.

⁴ See above Chapter 2.3.

reasons are needed to cancel the normative force of a norm, and so norm conflict presents in an acute and sharpened form the problem or question of normativity in a legal system.

Prior to the resolution of any situation of norm conflict, the norms in question need to be interpreted. Sometimes conflict may be *prima facie* or only possible as opposed to inevitable, in that the initial apprehension of meaning suggests a conflict that can ultimately be resolved through interpretative discretion. However, the choice of interpretation itself involves deciding between values, between conflicting interpretative norms. That interpretation is often not a simple, mechanical process is by now accepted in mainstream legal theory. Debate persists, however, as to the degree of independence of an interpreter on the interpretation of the lawmaker or constituent power. This raises a fundamental question of legitimacy in a legal system: who ultimately controls the content of legal norms, the judiciary or the law-maker or constituent power? In EU law, evolutive and teleological interpretation has been practised by the ECJ with the spectacular result of fashioning many of the key constitutional features of the legal system: direct effect, supremacy, exclusive powers through the doctrine of parallelism, the development of human rights, and an expansive reading of competence norms. A contrasting or conflicting interpretative approach is originalist or conserving interpretation, which entails a much more low-key role for the judiciary.

However, the normative case for and against originalist interpretation in EU law has not been fully addressed either by the ECJ or secondary literature. A tendency has been to assume that the ingrained practice since the early days of the ECJ is necessarily legitimate. Criticisms have tended to be deflected by the attribution to the Community or Union of a *sui generis* character, but generic claims to uniqueness of the system do not provide a convincing or conclusive case for a particular normative understanding of any particular feature of it. The EU legal system does not operate in a vacuum of pure novelty. It is intermeshed with the legal systems of the Member States, as the ECJ has discovered despite its success in building a largely cooperative relationship with the judiciaries of the Member States. The German Federal Constitutional Court, in particular, has cautioned against the revision of the Treaties by the ECJ under the guise of interpretation and has emphasised the

need for prior democratic consent to any transfers of sovereignty.⁵ These shots across the bow of the ECJ adopt an implicitly originalist interpretation: it is the Member States that create the EU Constitution and invest it with legitimacy.

Chapter 4 presented an account of the conflict of interpretative norms on which this debate rests: that between conserving and evolutive interpretation. Though this debate has a strong public profile in the US, in the EU, the question has been, for the most part, sidelined. The argument was that (i) Raz's argument for innovative interpretation is not fully persuasive; (ii) originalism can be understood normatively as supporting the rule of law and democracy, though the argument from democracy alone is the main justifying rationale for subjective historical interpretation (whereas innovative interpretation is premised on a conception of output legitimacy); and (iii) epistemic difficulties attributed to corporate intention are sometimes over-stated in critiques of originalism. A rule-bound approach to interpretation can be contrasted with a broad principles-driven approach that moves legal reasoning much closer to ordinary practical reasoning on the merits. Evolutive interpretation is thus not an inevitable feature of EU law, and occasionally the ECJ has actually endorsed the opposing principle of originalist interpretation (most obviously in *Kaur*⁶). This conclusion allows the normative attractiveness of originalism and evolutive interpretation to be more fully judged. A defence of evolutive interpretation rests upon a notion of output legitimacy, avoiding the 'dead hand of the past' in order to achieve a more fitting or suitable result. From an originalist perspective, this justification is questionable, because the legitimacy of outputs or results requires criteria of assessment that cannot be determined independently of an originalist analysis. Originalism privileges the text conventionally understood as the point of departure and as a limit on the available meaning, given that the text is the strongest evidence of intention. Differing approaches to interpretation are a domain of norm conflict in their own right, but different approaches can also add to or detract from conflict of substantive norms.

Evolutive interpretation is more flexible and thus offers a greater possibility on interpreting away a *prima facie* conflict based on an initial apprehension of ordinary meaning. In contrast, what *prima facie* seems to be a conflict of norms will likely in fact be a

⁵ See Chapter 2.2.6 above.

⁶ Case C-192/99, *Kaur* [2001] ECR I-1237, paras. 23-24.

conflict of norms if originalism is applied, in the sense that originalism is less malleable than evolutive interpretation, by definition. Originalism is conceptually linked with the traditional norm conflict maxim of *lex specialis*, in that the more specific norm was logically more strongly intended. A rule-bound approach to legal reasoning, therefore, sharpens the possibility of norms conflict, but particular legal rules may also provide the solution to conflict. For example, ambiguity in a text can be clarified by originalist interpretation so as to remove the possibility of norm conflict. An example from EU law of where the latter could have occurred, but did not because of the EC's expansive interpretation, is the caselaw of the Court on non-discriminatory obstacles discussed as a case study in Chapter 4. An originalist interpretation seems to confirm that only discriminatory national laws were prohibited. On this interpretation, the national measures in questions were not contrary to Community law, so there was no norm conflict between national and Community law. The approach of the ECJ generated a conflict here. By expansively interpreting the scope of Treaty free movement, a conflict with national law resulted, which the ECJ resolved through a standard *lex superior* rule, i.e. the supremacy of EU law. Despite a frequent critique of the notion of corporate intention, discovering the original intention of the Member States may well be epistemically possible. As the ECJ moves out of the arena of being a court for an organisation of largely economic powers and becomes closer to what a constitutional court is in a national context, its methods of interpretation are likely to become the focus of much more sustained attention and critique.⁷ In that context, originalism merits re-examination as a method of constitutional interpretation.

The consideration of conflicts of interpretative norms provided a prelude to the discussion of conflict of substantive norms in two central areas of constitutional concern in the EU: conflict of human rights norms and of competence norms. In these two areas, the picture that emerges is of a relatively unsystematic and under-articulated approach in EU law to the problem of norm conflict.

⁷ J. Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic', 16(2) *OJLS* 231-253 (1996), 230, noting a tendency for critical voices on the Court to be denounced and an absence of critique where it might be expected; JHH. Weiler, 'Rewriting *Van Gend en Loos*: Towards a Normative Theory of ECJ hermeneutics' in O. Wiklund (ed.), *Judicial Discretion in European Perspective* (Kluwer 2003), 129, suggesting that the ECJ should not be excluded from the democratic deficit critique of the EU. See also A. Arnall, *The European Union and its Court of Justice* (Oxford Univ. Press 2nd ed. 2006), 614-615, suggesting that the approach of the ECJ on this is likely to change toward greater use of *travaux préparatoires*, especially relating to more recent Treaty changes.

Conflicts of human rights involve a deep, symbolically significant, moral accountability: conflicts cases inevitably involve some degree of moral loss or tragedy.⁸ Failing to articulate moral loss, by failing to identify fully the conflict of rights, fails to capture the moral drama of rights and of their demand for justice. Fundamental rights conflicts involve particular complexity and difficulty, as traditional norms conflicts maxims of *lex specialis*, *lex posterior*, and *lex superior* may not provide a clear solution, in that catalogues of rights contain equally abstracts statement of potentially rights adopted at the same time with minimal internal hierarchy. It is important for the law-maker or constituent power to make substantive choices to address conflicts of rights as much as possible, so as to avoid leaving the judiciary in the difficult position of basing decisions on very abstract catalogues of rights with no priority rules.⁹ In so far as possible, specification can be used extend to develop narrowly drawn exceptions.¹⁰ In an EU context, specificationism of rights (which is really the principle of *lex specialis* applied to rights) may be easier because of the pre-existing national protections of human rights and also the already agreed ECHR level of protection. This approach has been adopted to a substantial extent in the drafting of the EU Charter of Fundamental Rights,¹¹ even if the latter is still unfortunately ambiguous on how rights relate to the general interests and objectives of the Union, especially the free movement and undistorted competition principles. The latter have been translated into the language of rights in the Charter itself, but the normative relationship between these ‘economic rights’ and more classical rights is ambiguous in ECJ caselaw. The result is that the general scope of rights in EU law is quite, and disappointingly, uncertain.

On the question of competence, the Treaties suggest a deceptively simple answer to the problem of definition: the EU only has what competences are conferred on it by the Member States. However, Chapter 6 has argued that the reality of institutional practice and of the legal reasoning of the ECJ suggests a more complex and variegated situation. The central difficulty of definition is that the general principles of competence, free movement and undistorted completion, have a conceptual generality that can be applied to almost any area of Member State competence. Thus, even in areas where the EU ostensibly does not

⁸ Zucca (2007), op cit, 24.

⁹ See ibid, 169, noting that bills of rights need to address the question of conflict specifically.

¹⁰ This follows ibid, 141, 169-170, though Zucca’s argument is not presented in terms of a hierarchy of rights or the literature on specificationism.

¹¹ OJ C 364/01, 18.12.2000, p. 1.

have a competence, it may still have negative as opposed to regulatory competence. There are sharp differences in how competence norms are mediated in legal reasoning. Perhaps most importantly is the distinction between *lex specialis* and *lex generalis*, which can be understood as relating to the phenomenon of levels of generality in legal reasoning.

Applying *lex specialis* much more fully reflects the idea of conferral, as *lex specialis* logically reflects the will of the constituent power. It in effect subjects the interpretation of competence norms to a more determinate, rule-bound definition. For example, the effect would be to exclude the use of Article 114 TFEU (ex Article 95 ECT) when a more specific Treaty basis is available. Article 352 TFEU can be confined to a more modest role by relating it to implied powers, to avoid the risk of it being used as a vehicle for *de facto* Treaty amendment or competence extension. In this regard, the existing limits on it identified in the caselaw, ‘the general framework of the Treaty’, seems overly general, since it does not address at what level of generality the general framework of the Treaty is to be identified. This is in effect what the ECJ did in *Tobacco Advertising* (without fully articulating it),¹² but took the opposite approach in the *Laval* and *Viking* line of caselaw.¹³ *Lex specialis* localises the identification of Treaty objectives to a particular policy field,¹⁴ as contrasted with a global teleology linked to the highest level of generality in the Union system of enhanced integration.

On questions of competence, generalisation based on overall Treaty objective of enhanced integration can always be used in legal reasoning to extend competence to some degree, especially to extend negative competence. *Lex specialis* offers a conceptual key to understanding the differing treatment of competence norms in caselaw, while normatively supporting the idea of limited and conferred powers. The thesis argues that it gives practical substance in legal reasoning to Dashwood’s view that “The technique of specific and detailed attribution ... remains the most effective method of setting identifiable limits to the

¹² Case C-376/98, *Germany v. Parliament and Council* [2000] ECR I-8419.

¹³ Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; Case C-438/05, *The International Transport Workers’ Federation and The Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

¹⁴ On the application of Article 308 ECT in this more specific sense, see R. Schütze, *From Dual To Cooperative Federalism: The Changing Structure Of European Law* (Oxford Univ. Press 2009), , 136-137.

competences of the European Union”.¹⁵ Finally, on competence, the thesis has argued that a key to rendering subsidiarity for meaningful as a tool of judicial review is the integration of Member State autonomy as part of the weighing exercise in a subsidiarity test, with a resulting evidential implication of requiring cogent evidence to justify a claim of comparative efficiency for the exercise of competence at the Union level.

Overall, thus, this thesis has sought to demonstrate how values underlie choices made in legal reasoning across the dimensions of differing norms of interpretation, fundamental rights norms, and competence norms. Beyond these specific contexts, the analysis offered also has implications for a general constitutional conception of the EU.¹⁶ In the first place, by demonstrating that integration as a justification of choice in legal reasoning is normatively insufficient at this juncture of the development of the Union, given the breadth of values explicitly articulated in the Treaties, the argument casts doubt over the continuing dominance of a prospective, meta-teleological approach in the caselaw of the ECJ geared at supporting increased integration. This approach of the ECJ could be understood as directed at output legitimacy, but even this justification is problematic given that what constitutes output legitimacy is itself contested. The extent to, and pace at, which integration should occur at the expense of Member States’ autonomy or constitutional traditions is much contested, as the long saga of non-ratification of the Treaty establishing a Constitution and of eventual ratification of the Lisbon Treaty demonstrates. The invocation of ‘an ever-closer Union’ in the Preamble to the Treaties points to a goal of continuing and increased cooperation between Member States, but does not dispose of the question of how such integration is to proceed.

The framework of norm conflict highlights the tension between the integration narrative dominant from the early period of the caselaw of the ECJ with the authority claims of the Member States to be Masters of the Treaties. The early conceptualisation by the ECJ of the Communities as a new legal order distinct from public international law and as possessing a degree of autonomy is in conflict with the concept of the Member States as

¹⁵ A. Dashwood, ‘The Relationship Between the Member States and the European Union’, 41 *CMLRev* 355-381 (2004), 380.

¹⁶ See generally Shaw (1996), *op cit*, calling for a move away from the integration-enhancement as orthodox in EU scholarship; JHH. Weiler, *The Constitution of Europe* (Cambridge Univ. Press 1999), noting the tension between the increased competence of the institutions of supranational integration and citizens’ rights rooted in the national setting.

constituent power.¹⁷ As Chapter 6 has demonstrated, the open-ended nature of EU competences resulting from the ambiguous treatment of competence in ECJ caselaw has the effect that EU competences can quite easily and are in fact extended beyond what can be plausibly attributed to the Member States in their drafting and adoption of the Treaties. What this suggests, adopting a broad constitutionalist perspective, is that the ECJ needs to re-calibrate its reasoning from the pro-integration methodology that characterises it toward a more articulated approach in which the input of the Member States is more strongly reflected. This re-calibration can be related to what Dashwood aptly describes as the peculiar constitutional character of the EU as ‘a constitutional order of States’.¹⁸ Solely teleological interpretation, whether of competence through the exalting of *lex generalis* at the expense of *lex specialis* or of fundamental human rights norms through their subordination or ambiguous articulation relative to pro-integration values, conceives of the EU in self-referential terms and as set loose from the constraint of the continuing political authority of the Member States. In contrast, a constitutionalist privileging of democracy and the rule of law would support originalist interpretation over evolutive teleology, greater emphasis on the normative priority of core human rights, and the specific enumeration of competence norms over self-generating competences by the EU institutions.

On the one hand, this self-referentiality of orthodox EU legal discourse might be understood as strong constitutionalism, enhancing the specificity of the EU legal order against competing claims to constitutional legitimacy. Normatively, however, this seems best-regarded as weak constitutionalism, despite this strong political content and

¹⁷ This general, constitutionalist analysis questioning the claimed autonomy of the Union legal order is not new: see T. Schilling, ‘The Autonomy of the Community Legal order – an analysis of Possible Foundations’, 37(2) *Harvard JIL* 389-409 (1996). For a reply, see JHH. Weiler & U. Haltern, ‘The Autonomy of Community Law - Through the Looking Glass’, 37(2) *Harvard JIL* 411-448 (1996), 416, arguing that the ECJ is no different to any court in insisting it has final authority on *kompetenz-kompetenz*, though agreeing with Schilling that Community law cannot be severed from general public international law (for a general defence of autonomy of Union law, see also R. Barents, *The Autonomy of Community Law* (Kluwer 2003)). What distinguishes the ECJ, however, is that it claims supremacy of Union law in national legal systems, which is not a claim made by conventional international law, and is much more intrusive in national legal systems through the added operation of direct effect and the preliminary reference system. Moreover, what matters in practice at least as much as the *kompetenz-kompetenz* question is how competence is treated or mediated at the level of legal reasoning, rather than at the level of meta-constitutional theory. Weiler & Haltern acknowledge this point toward the end of their article, describing the lack of clear limits to the competence of the Community as a “ticking constitutional time bomb” (ibid, 444). Their solution, however, is to suggest an institutional reform through the creation of a specialised court for determining competence, like the French *Conseil Constitutionnel* (ibid, 447-448), rather than to engage the issue at the level of legal reasoning. This thesis has sought to address the question of legal reasoning more fully than has been the case to date in the literature.

¹⁸ A. Dashwood, ‘The Limits of European Community Powers’, 21 *ELR* 113-128 (1996), 114.

consequence: weak because it is not consistent with how the EU articulates itself and how it relates to its fundamental constituent units, i.e. the Member States, rather than the Union institutions. The Union institutions, from the point of view of democracy and the rule of law as meta-principles of political morality for Europe, cannot self-conceive in autonomous terms as acting in opposition to the Member States *in toto* or as the ultimate political authority in the EU (though the institutions' particular constitutional role may often pit them against *some or individual* Member States in the context of disputes as to the valid implementation of Union law at national level).

Dashwood's expression of a constitutional order of States captures the competing claims to political legitimacy in the Union. On the one hand, the Member States remain those with sole explicit authority to amend the Treaties, while on the other, such amendment often represents an alienation and diminishment by the Member States of their own individual political authority in favour of supranational competences. The assumption that has tended to dominate ECJ caselaw is of a continual process of reduction of competences of the Member States in favour of the *telos* of integration, with the consequence that explicit sanctioning in any given case by the Member States of sovereignty transfer is no longer decisive. On this approach, the move from Member States as decisive authorities toward an ever-increasing importance of supranational institutions can be bundled into a process of ever-increasing integration, with specific and careful normative articulation of the steps of the process. This is consequentialist justification writ large, but where the consequences are much contested. If the Member States had (unanimously) agreed on an ultimate goal of a European super-State, such an approach to legal reasoning might seem more justified, though it would still run into problems with respect to ordinary rule of law values of certainty, predictability, and formal stability in the law. Given, however, that the journey of integration is 'toward an unknown destination',¹⁹ the case for pro-integration teleology as the decisive criterion of the legal reasoning of the ECJ remains normatively unjustified.

Finally, the thesis has been written on the premise, and has sought to demonstrate, that the conceptual framework of norm conflict has much to offer for understanding the dynamics of legal reasoning in general. Norm conflict inevitably entails a normative loss in a

¹⁹ JHH. Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the arena of Political Integration', 31(4) *JCMS* 417-446 (1993).

legal system: a norm that is usually valid and possessing normative force loses some of that force (though usually not to the extent of losing validity, unless the superior norm touches on a question of basic competence or something of a *jus cogens* or fundamental human rights character). This normative loss requires an explanation and thus an elaboration of the steps of legal reasoning. The present work argues that this elaboration should distinguish between principles and rules and that the distinction has a very practical application for the values that are reflected in a legal system. A narrower, rule-bound approach to norm conflict (applying *lex specialis* and originalist interpretation in particular) reflects classic values of constitutionalism: the rule of law, democratic input, and limits on powers. This contrasts with a narrower, internal perspective focused on system coherence and output legitimacy, understood in EU law as advancing above all a project of integration. What norm conflict theory suggests, in an EU context, is that integration as a sole or dominant value is too simple a narrative to capture the range of values – democracy, the rule of law, subsidiarity, human rights, accountability, transparency, as well as integration and an ever-closer Union – that now constitute the self-articulated normative basis of the EU legal system. The concern with integration was naturally dominant in the earlier decades of EU law and ECJ jurisprudence, but the growing maturity of the EU legal order presents a thicker normative context that needs a fuller articulation in the legal reasoning of the Court and in the resolution of conflicts of norms. In conclusion, the constitutionalist approach in this thesis, therefore, is to privilege the values of democracy and the rule of law and to explain how these values are mediated in legal reasoning. Central to the argument is the role of and connection between speciality and historical or originalist interpretation, both of which have long been marginalised in legal reasoning by the ECH, but which deserve to be re-habilitated and to feature much more prominently. This approach opens up a perspective critical of pro-integration teleology as a dominant interpretative method, arguing it fails to accurately capture the normative depth of the Union as now articulated, much more fully than in the past, in the Treaties. The framework of norm conflict is a conceptual key to understanding normativity in legal reasoning more fully.

Appendix – Translation of French text referred to in Chapter 4.5

* The excerpts below are from S. Neri & H. Sperl (eds.), *Traité Instituant la Communauté Économique Européenne: Travaux préparatoires, déclarations interprétatives des six gouvernements, documents parlementaires* (Cour de Justice Imprint Luxembourg 1960), 78-93.

** Translation by Kwintessential Ltd., London.

ARTICLE 30

The quantitative restrictions on importation, as well as any equivalent effective measures, are forbidden among the member States, without prejudice to the provisions hereafter.

I. - History

At the heart of this article, there is the following draft plan:

"The quotas on importation are gradually removed among the States within the conditions set out hereafter" (1).

Whilst resuming its suggestion dated 13/07/1956 (2), the G.M.C. decides in its meetings on 15 and 16/10/1956 (3) to replace the "quota" terms with "quantitative restrictions" so as not only to cover the cases where some quotas are open, but also those where there is a total ban on importation.

On 15/11/1956, the Italian delegation, whilst adopting this method, adds the proposal of abolishing and banning "any equivalent effective measure" in the trade between the member States (4).

These two methods come across in a version drawn up on 20 and 21/11/1956 by the Secretariat of the G.M.C.:

"the quantitative restrictions on importation, of the products between the member States as well as any equivalent effective measures, are forbidden within the Common Market" (5) (6).

This text is accepted in principle for the draft plan drawn up on 24/01/1957 by the Delegation Leaders (7).

- (1) MAE Document 175/56.
- (2) MAE Document 174/56.
- (3) MAE Document 465/56.
- (4) MAE Document 545/56.
- (5) MAE Document 626/56.
- (6) This text is followed by a second paragraph which anticipates that this ban is applied to the products which come from the member States as well as to the products from third world countries which have been made available for consumption in the member States. A specific note is made stating that this paragraph would need to be reviewed after the resolution of the problems relating to the commercial policy.
See article 111§ 5, paragraph 2.
- (7) MAE Document 254/57.

ARTICLE 31

The member States refrain from introducing, amongst themselves, any new quantitative restrictions and equivalent effective measures.

However, this obligation is only applied to the level of deregulation achieved in accordance with the rulings of the Council of the Organisation for European Economic Co-operation (O.E.E.C.) on 14th January 1955. The member States notify the Commission, no later than six months after the coming into force of the present Treaty, of their lists of products deregulated in accordance with these rulings. The lists, thus notified, are consolidated between the member States.

I. - History

In its findings on 13/07/1956, (I) the G.M.C. states that

"It is advisable:

- a) to determine in this article, the principle of consolidation between the member States, from the level of deregulation achieved within the framework of the O.E.E.C. Moreover, it shall be determined under what conditions and until what date the method of deregulation of trade practiced by the O.E.E.C. will be applicable to the member States,
- b) to re-examine the issue of knowing whether, and, if need be, to what extent, a provision shall be anticipated making it compulsory for the member States to maintain the deregulations granted beyond the minimum standards required by the rules and procedures of the O.E.E.C.

During the meetings of the G.M.C, held on 15 and 16/10/1956, the following alternatives are put forward:

- the French and Italian delegations declare themselves in favour of a consolidation of the level of the deregulations;

- the German and Dutch delegations declare themselves in favour of a consolidation by list of products (2).

Moreover, the French delegation, supported by the Luxembourg delegation (3), suggests removing any reference to the O.E.E.C. (4).

(1) MAE Document 174/56.

(2) MAE Document 465/56.

(3) MAE Document 496/56.

(4) MAE Document 465/56.

Article 31

A proposal from the German delegation on 06/11/1956 (1), however, records that there is unanimity regarding the fact that it is advisable to consolidate the deregulation of trade achieved between the member States within the framework of the provisions of the O.E.E.C. once the present Treaty has come into force:

"However, the opinions have differed about the issue of knowing whether it is necessary to take, as the starting point, the level of deregulation actually achieved (2) or the obligations resulting from the application of the rulings of the Council of the O.E.E.C. on 14/01/1955" (3).

In the event that the group is won over by this last solution, the following text could be proposed:

"At the time of the coming into force of the present Treaty, the member will consolidate the measures of deregulation which they have taken in accordance with the rulings of the Council of Ministers of the O.E.E.C. on 14/01/1955.

The suggestions made by the French delegation are accepted in the draft plan of the G.M.C. on 20 and 21/11/1956 (4), resumed on 28/11/1956 (5) and accepted by the Delegation Leaders on 10/12/1956 (6).

"From the coming into force of the present Treaty, the member States refrain in their mutual trade from establishing any new quantitative restrictions on importation as well as any equivalent effective measure" (7).

On 11/01/1957 (8), the Italian delegation proposes to add to this text the following paragraphs:

The obligation above is only applied, during the period of transition, to the level of deregulation achieved in accordance with the rulings of the Council of Ministers of the O.E.E.C. on 14/01/1955.

The member States notify the Commission of their lists of products deregulated in accordance with the aforementioned rulings.

- (1) MAE Document 510/56.
- (2) This stance is supported on 05/11/1956 in the draft plan drawn up by the Italian delegation (MAE Document 504/56).
- (3) Method put forward on 16/10/1956 in the text drawn up by the Dutch delegation (MAE Document 434/56).
- (4) MAE Document 626/56.
- (5) MAE Document 686/56.
- (6) MAE Document 787/56.
- (7) The sentence continues as follows: ... and to make the quotas "in place on this date" more restrictive; this provision has been inserted into paragraph 1 of article 32.
- (8) MAE Document 787/56.

Article 31

The lists, thus notified, are consolidated between the member States (1).

The text drawn up by the G.M.C. on 14/01/1957 (2) brings together the suggestions made by the French and Italian delegations in a draft article in two paragraphs which is approved on 24/01/1957 (3) by the Delegation Leaders.

II. – Act of Parliament

Italy

Senate of the Republic. Term of office II, 1953-1957

Article 31, paragraph 2

"In other words, article 31 allows the member States, who, at their own initiative, have deregulated their importations beyond the level set by the abovementioned ruling made by the O.E.E.C, to restore partially some quotas provided that the overall rate of deregulation, thus carried out, is not lower than the level of deregulation ended on 14th January 1955" (4).

- (1) The text of the second paragraph has been suggested for the first time in an amendment submitted by the G.M.C. on 04/12/1956 (MAE Document 694/56).
- (2) MAE Document 105/57.
- (3) MAE Document 254/57.
- (4) MAE Document 2107 – A p. 24.

Article 32

ARTICLE 32

The member States refrain, in their mutual trade, from making the quotas and equivalent effective measures more restrictive, which are in place on the date of the present Treaty coming into force.

These quotas must be removed no later than the expiry of the period of transition. They are gradually eliminated during this period within the conditions set out hereafter.

I - History

At the beginning of this article, there is a proposal made by the G.M.C. on 20 and 21/11/1956 (1).

(1) MAE Document 626/56.

See also the History of article 31, note 4.

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