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THE UNIVERSALITY OF  
INTERFACE NORMS UNDER  
CONSTITUTIONAL PLURALISM:  
AN ANALYSIS OF IRELAND,  
THE EU AND THE ECHR

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THE UNIVERSITY  
*of* EDINBURGH

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Tom Flynn

Marchmont

November 2013

## DECLARATION

In accordance with Regulation 2.5 of the Assessment Regulations for Research Degrees at the University of Edinburgh, I confirm:

- (a) That this thesis has been composed by me;
- (b) That the work contained in this thesis is my own; and
- (c) That the work contained in this thesis has not been submitted for any other degree or professional qualification.

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Tom Flynn

11 November 2013



## ABSTRACT

The theory of constitutional pluralism suggests that interacting legal orders that are (or claim to be) constitutional in nature need not—and should not—necessarily be regarded as being hierarchically arranged, with one ‘on top of’ the others. Rather, the relationships between the orders can be conceived of heterarchically. However, there is an assumption in much of the literature that the ‘interface norms’ that regulate the relationships within such a heterarchy are universal by nature, capable of undifferentiated application across differing constitutional orders. This thesis examines whether interface norms are in fact universal by nature, or whether they are relationship- and context-dependent, taking as its field of study three interacting legal orders—those of Ireland, the European Union, and the European Convention on Human Rights. It uses an established model of constitutional pluralism based on ‘coordinate constitutionalism’ to test the assumption of universality across three constitutional frames: the ‘vertical’ relationship between Ireland and the European orders, the ‘horizontal’ relationship between the European orders, and the ‘triangular’ panoply of state, Union and Convention. Having analysed the interface norms at work in these relationships, both in isolation and in the round, the thesis concludes that these norms are not in fact universal, and that different conceptions of constitutional pluralism need to pay much greater attention to the specific nature of any given constitutional order and its relationship with other orders in the constitutional heterarchy.

## LIST OF ABBREVIATIONS

- AG — Attorney General *or* Advocate General
- BVerfG — *Bundesverfassungsgericht*, German Federal Constitutional Court
- CCFSRW — Community Charter on the Fundamental Social Rights of Workers
- CFI — Court of First Instance
- CJEU — Court of Justice of the European Union
- CoE — Council of Europe
- DPP — Director of Public Prosecutions
- EC — European Communities
- EEC — European Economic Community
- ECA — European Communities Act
- ECHR — European Convention on Human Rights
- ECJ — European Court of Justice
- ECmHR — European Commission of Human Rights
- ECtHR — European Court of Human Rights
- ESC — European Social Charter
- EU — European Union
- GC — General Court
- ILO — International Labour Organization
- SEA — Single European Act
- SPUC — Society for the Protection of Unborn Children
- TEU — Treaty on European Union
- TFEU — Treaty on the Functioning of the European Union
- UN — United Nations

## LIST OF IRISH LANGUAGE TERMS

*An t-Árd Chláraitheoir* — The High Registrar

*An Bord Uchtála* — The Adoption Board

*An Garda Síochána* — National police (police officer *Garda*, plural *Gardaí*)

*Oireachtas* — Parliament, consisting of *Dáil Éireann* (lower house), *Seanad Éireann* (upper house), and the President of Ireland

*Taoiseach* — Prime Minister

## INTRODUCTION

This thesis examines the nature of the ‘interface norms’ that regulate the relationships between legal orders under certain conceptions of constitutional pluralism. It takes as its field of study three interacting legal orders—those of Ireland, the European Union, and the European Convention on Human Rights—and uses a model of constitutional pluralism based on the ‘coordinate constitutionalism’ of Charles Sabel and Oliver Gerstenberg<sup>1</sup> in order to test the literature’s assumption that the norms regulating the interaction of overlapping constitutional orders are universal in nature.

### 1 RESEARCH CONTEXT: CONSTITUTIONAL PLURALISM

‘National law’ and ‘international law’ were once quite easily distinguishable. The former operated within the territorial and conceptual borders of the Westphalian nation state; the latter dealt with the interstices between these states. However, the years since 1945 have seen the rise of one of the defining features of modern public law: the non-state legal system or normative order. This phenomenon entails, as its logical corollary, a shift or transfer of institutional normative power away from traditional actors, such as states and governments, and towards various international, transnational, and supranational organisations—public,<sup>2</sup> private,<sup>3</sup> and sometimes a hybrid of the two<sup>4</sup>—with concomitant difficulties for received notions of public accountability and democratic legitimacy. Though frequently possessed of the kind of jurisgenerative authority once the sole preserve of state legal orders, non-state legal systems lack many of the features commonly thought essential for the legitimation of the exercise of public power. Furthermore, given that this transfer of power has occurred without states *relinquishing* their claims to sovereignty and autonomy (the ‘transfer’ in this sense perhaps better characterised as a ‘pooling’), the

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<sup>1</sup> CF Sabel and O Gerstenberg ‘Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order’ (2010) 16 *European Law Journal* 511.

<sup>2</sup> Such as the United Nations.

<sup>3</sup> Such as the International Standardization Organisation or the World Anti-Doping Agency (N Walker ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ (2008) 6 *International Journal of Constitutional Law* 373 at 382).

<sup>4</sup> Such as the Internet Corporation for Assigned Names and Numbers (ICANN) (*ibid*).

prospect arises of legal conflict between the state and non-state orders in cases where their jurisdictions overlap.

Accordingly, much effort has gone into the attempt to conceptualise and to legitimise these orders—and to explain their relationships with each other and with more traditional legal orders—by transplanting the idea of *constitutionalism* (defined by Neil Walker as ‘the normative discourse through which constitutions are justified, defended, criticised, denounced or otherwise engaged with’<sup>5</sup>) from its state-based incubator and developing a theory to fit the post-state configuration,<sup>6</sup> while keeping that which made constitutionalism desirable in the first place. In this way, the United Nations Charter is reconceived as a kind of ‘constitution’ for the international community,<sup>7</sup> while attempts have been made similarly to ‘constitutionalise’ the international trade regime of the World Trade Organization.<sup>8</sup>

The focus of the thesis is on one particularly promising, yet particularly controversial, manifestation of this discourse: constitutional pluralism. However, as Matej Avbelj and Jan Komárek claim, ‘[t]he concept has gained so many meanings that often the participants in the debate talk past each other, each endorsing a different understanding of what constitutional pluralism actually means.’<sup>9</sup> These different understandings of the idea will be outlined in Chapter 1, but, at its simplest, constitutional pluralism is the notion that interacting legal systems that are (or claim to be) constitutional in nature need not—and should not—necessarily be regarded as being *hierarchically* arranged, with one ‘on top of’ the others. Rather, the relationships between the orders can be conceived of *heterarchically*, so that conflict

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<sup>5</sup> N Walker ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review* 317 at 318.

<sup>6</sup> By ‘post-state’ here, I do not mean to imply that the state is no longer of any relevance—quite the contrary, as the thesis will demonstrate—but simply that the state can no longer be considered in isolation.

<sup>7</sup> B Fassbender ‘The United Nations Charter as Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law* 529; and “‘We the Peoples of the United Nations’: Constituent Power and Constitutional Form in International Law’ in M Loughlin and N Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: OUP, 2007) at 269.

<sup>8</sup> See, inter alia, E-U Petersman ‘The WTO Constitution and Human Rights’ (2000) 3 *Journal of International Economic Law* 19; DZ Cass *The Constitutionalization of the World Trade Organization* (Oxford: OUP, 2005); JL Dunoff ‘Constitutional Concepts: The WTO’s “Constitution” and the Discipline of International Law’ (2006) 17 *European Journal of International Law* 647.

<sup>9</sup> M Avbelj and J Komárek ‘Four Visions of Constitutional Pluralism’ EUI Working Papers Law 2008/21, available at <[cadmus.eui.eu/handle/1814/9372](http://cadmus.eui.eu/handle/1814/9372)>, at 1. (Note that all URLs cited in this thesis were last checked on 10 Nov 2013).

between them can be managed and ultimately resolved interactively and dialogically, without necessarily relegating one legal order to an inferior status or, conversely, privileging it over and above the others. This is a significant departure from the tradition of state-based constitutionalism, which presupposes and requires a hierarchical arrangement of the legal order. Of the many different conceptions of constitutional pluralism in the literature, this thesis focuses on a particular subset: the ‘metaconstitutional’<sup>10</sup> theories, which seek to posit an overarching normative framework for the management and resolution of conflict between constitutional orders while still preserving their autonomy, and not integrating them into a new whole. This metaconstitutional framework—a system of constitutional norms about constitutional norms—serves a bridging function between the orders, providing certain adjudicative principles by which they can accommodate and manage the competing claims of each other order in the given constitutional heterarchy. However, analysis of these ‘interface norms’ reveals an interesting—and significant—problem.

## 2 RESEARCH PROBLEM: INTERFACE NORMS

It is important to distinguish at the outset between two different kinds of interface norm. First, there are the *substantive* ‘norms-at-the-interface’ between legal orders. By this, I mean the norm or norms around which a concrete case of interaction or potential conflict between legal orders revolve, such as the right to human dignity ‘versus’ the freedom to provide services in the European Court of Justice (ECJ) case of *Omega*<sup>11</sup> or the right to property ‘versus’ a state’s international obligations in the European Court of Human Rights (ECtHR) case of *Bosphorus*.<sup>12</sup> Any norm can become a norm-at-the-interface if its application in a given case gives rise to questions of jurisdictional overlap between legal orders; this thesis will consider several of them, but they are not its central focus.

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<sup>10</sup> See generally N Walker ‘Flexibility Within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe’ in G de Búrca and J Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford: Hart, 2000).

<sup>11</sup> Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

<sup>12</sup> *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* [2005] ECHR 440.

Secondly, and more importantly, there are the *metaconstitutional* norms—‘interface norms proper’—which, according to Nico Krisch, ‘regulate to what extent norms and decisions in one sub-order have effect in another ... [and] are the main legal expression of openness and closure, friendliness or hostility among the different parts.’<sup>13</sup> For example, the principle of conditional recognition, epitomised in the *Solange*<sup>14</sup> jurisprudence of the German *Bundesverfassungsgericht* (BVerfG) recurs throughout different conceptions of constitutional pluralism. It is this second-order type of interface norm that is the focus of the thesis because, while there is a certain amount of disagreement in the literature as to the identity of these norms, there is near-unanimity as to their nature—a position that I argue to be problematic.

Specifically, there is an inherent claim in the literature that second-order interface norms are universal by nature: that however we classify them or frame them, their application need not be adjusted to any given institutional or jurisdictional circumstance. In their presentation and analysis of interface norms, scholars in the field draw on various sources—the jurisprudence of the Court of Justice of the European Union, the European Court of Human Rights, and (especially) the BVerfG—but rarely consider whether and how the specific relations between the institutional actors in any given case may have influenced the choice and application of interface norms. In this regard, the ‘founder’ of constitutional pluralism, Neil MacCormick, wrote that ‘[t]he settled, positive character of law is jurisdiction-relative. ... Moral judgments, however personal and controversial, are not in this way relativistic ... These judgments apply universally.’<sup>15</sup> But concerns relating to democracy and individual rights—the normative core of the principle of conditional recognition—are both legal and moral in nature. Are they (and should they be) universal or particular in their application?

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<sup>13</sup> N Krisch *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: OUP, 2010) at 285–286.

<sup>14</sup> Reported in English as *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case 2 BvL 52/71) [1974] 2 CMLR 540 (*‘Solange I’*); *Re the Application of Wünsche Handelsgesellschaft* (Case 2 BvR 197/83) [1987] 3 CMLR 225 (*‘Solange II’*).

<sup>15</sup> N MacCormick *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, OUP 1999) at 14–15.

### 3 RESEARCH QUESTION: UNIVERSALITY OF INTERFACE NORMS?

The research question that this thesis addresses is therefore as follows: *are the interface norms between legal orders the same regardless of the relationship between the orders themselves and between the institutional actors involved?*

The thesis seeks to question a largely unchallenged presumption. It does this through the adoption of a version of constitutional pluralism modelled on the coordinate constitutionalism of Sabel and Gerstenberg as an analytical frame in order to test the hypothesis of interface norm universality across three categories of postnational legal relationship, isolated in the first instance and then drawn together holistically, drawing on a wide array of norms-at-the-interface: first, the ‘vertical’<sup>16</sup> relationship between the EU and its Member States, and between the ECtHR and the signatories to the European Convention on Human Rights (ECHR); secondly, the ‘horizontal’ relationship between the EU and the ECtHR; and, finally, the ‘triangular’ panoply of state, Union and Convention.

The significance of the thesis lies in the result of the testing: either the interface norms are indeed universal, or they are relationship-dependent. If universal, this bolsters the explanatory and normative claims of constitutional pluralism, providing us with universal norms for the approximation and coordination of distinct but linked legal orders. If relationship-dependent, this demonstrates the need for continued case-specific analysis in order for the particular to reshape the universal.<sup>17</sup> My hypothesis is that interface norms are better conceived of in this latter, relationship-dependent sense.

### 4 RESEARCH FIELD: JUSTIFICATION OF CHOICE OF JURISDICTIONS

Nowhere has the growth of non-state legal actors been more obvious than in Europe, where the legal orders of the European Union and the Council of Europe have intermingled with, infiltrated, and—in places—supplanted state-centred law to an

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<sup>16</sup> ‘Vertical’ is in quotes because a truly heterarchical arrangement of legal orders would have no x-axis. The terms ‘vertical’ and ‘horizontal’ will be used throughout, but only as a heuristic device: no concession to hierarchy is implied.

<sup>17</sup> This phrasing is adapted from N Walker ‘Reconciling MacCormick: Constitutional Pluralism and the Unity of Practical Reason’ (2011) 24 *Ratio Juris* 369 at 380; which draws in turn from M Walzer ‘Nations and Universe’ in D Miller (ed) *Thinking Politically: Essays in Political Theory* (New Haven CT: Yale UP, 2007) at 184.



unprecedented degree. Just as the constitutional credentials of the two most significant European non-state actors are the most developed of their transnational peers, so too is the academic discourse on non-state constitutionalism most developed with reference to the European experience. It is for this reason that the law of the EU and of the ECHR are two parts of the main focus of this thesis. The choice of the third, the law of Ireland, requires further explanation.

First, the choice of a single jurisdiction for analysis across the vertical and triangular relationships allows us to control for jurisdictional variables in a way that a more wide-ranging survey would not. There is a trend within the literature on constitutional pluralism to pick certain ‘highlight’ cases from different jurisdictions in order to demonstrate points or illustrate arguments. This approach lacks the continuity and focus of reliance on a single jurisdiction as an exemplar of the nation state in the postnational European legal sphere. Having said this, and though the thesis will draw heavily on Irish jurisprudence, it is not confined or unique to Ireland. It is intended that whereas the cases to be studied—and the interface norms they involve—may or may not be universal, the issues and themes involved are *universalisable*, to some extent at least, across EU Member States.

Secondly, the nature of Ireland’s constitutional order makes it a suitable candidate, combining the enclosed, self-referencing and self-authorising nature of the classical constitution of a sovereign state with an apparent openness to the postnational configuration, though the level of this openness varies as between the EU and the ECHR, a point returned to below.

Thirdly, there is a rich seam of constitutional jurisprudence to be mined with respect to the relatively long Irish experience of European integration. This jurisprudence has not generally been analysed in the round to date, taking the European constitutional constellation as a whole, but instead with the focus either on one particular legal order, or on discrete, substantive norms-at-the-interface rather than the metaconstitutional interface norms involved. As a result, the jurisprudence is under-theorised, despite the fact that, as we shall see, it very much lends itself to further analysis of the nature of the relationships between constitutional orders in the Europe of the early twenty-first century. Moreover, this large body of jurisprudence shows the constitutional frame not to be quite as open as its plain text—and the

history of Irish ‘loyalty’ to European integration—might suggest. Again, this is not unique to Ireland—the BVerfG’s decision in *Lisbon*<sup>18</sup> signals a degree of relative closure in a jurisdiction generally regarded as constitutionally open. However, whereas the German jurisprudence has been analysed extensively in the literature, the Irish cases have yet to receive the same treatment.

Finally, and related to the foregoing, Alexander Somek notes that

[i]t is indeed a quite remarkable fact about European constitutional theory that in its most visible form it scarcely amounts to more than a series of glosses on lengthy opinions by the German Federal Constitutional Court.<sup>19</sup>

While I would not necessarily go quite so far, it is true that there is a tendency in the literature to focus on the jurisprudence of large and powerful actors. In testing the universality of interface norms developed with reference to such actors, it is therefore a novel contribution to turn the lens to an economically, demographically and geographically peripheral state, such as Ireland.

## 5 CHAPTER OUTLINE

Chapter 1 consists of a literature review, examining the concept of constitutional pluralism: its origins, its development, and some of its specific applications to the EU and the ECHR, particularly as regards interface norms. It considers some of the many criticisms of the theory, and the attempts to navigate a way through them. It concludes by adopting a particular form of constitutional pluralism as an analytical framework to engage with the research question of whether interface norms are universal by nature.

Chapter 2 examines the vertical constitutional frame: the nature of the relationships between Ireland and the EU, and Ireland and the ECHR; the means by which the norms of these non-state legal orders are received within the domestic order; and the question of the choice and application of interface norms in cases of conflict. Chapter 3 takes a similar approach to the horizontal frame, with an analysis of the institutional and jurisprudential links between the law of the EU and of the ECHR, and the normative criteria by which these links are managed.

<sup>18</sup> Reported in English as *Re Ratification of the Treaty of Lisbon* (2 BvE 2/08) [2010] 3 CMLR 13.

<sup>19</sup> A Somek ‘Monism: A Tale of the Undead’ in M Avbelj and J Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart, 2012) at 346.

Chapter 4 then combines these vertical and horizontal frames, and investigates the triangular dimension of constitutional pluralism in Europe, whereby specific norms-at-the-interface may lead to tripartite conflict, its management and its resolution. The question of the choice and application of interface norms in specific circumstances becomes more complex in this frame, as will be demonstrated by the empirical case study developed in the chapter, the question of abortion in the Irish legal system.

Chapter 5 draws the three frames together, with a theoretical examination of what became clear when the inter-order relationships were looked at in isolation, and what becomes clear when all three are pulled together into one holistic frame. Finally, a brief conclusion restates the answer to the research question of interface norm universality, in light of the empirical evidence in Chapters 2–4, and the theoretical analysis in Chapter 5: that the norms are not in fact universal. As a result, the many different conceptions of constitutional pluralism need to pay much greater attention to the specific nature of any given constitutional order and its relationship with other orders in the constitutional heterarchy.

# CHAPTER 1: EUROPEAN CONSTITUTIONAL PLURALISM

## INTRODUCTION

A major feature of the European legal landscape in the early twenty-first century is the existence of multiple, overlapping, interlocking normative orders—national, supranational and international. The questions then arise as to how best to conceptualise this plurality of legal orders, and the way in which they relate to each other. This chapter reviews the literature on one attempt to answer these questions, the idea of constitutional pluralism. Section 2 lays some groundwork, first by setting out the initial development of the theory in the context of the constitutionalisation of EU law, and then by outlining a particular refinement and condensation of the theory into a ‘lowest-common-denominator’ conception. In Section 3, I address the preliminary conceptual and definitional difficulty of attempting to reconcile two ideas, ‘constitutionalism’ and ‘pluralism’, which by some accounts are in fact irreconcilable opposites. Having suggested that constitutionalism and pluralism are not in fact opposites, but rather end points on a continuum, I then narrow the focus of the discussion to the normatively thicker, ‘metaconstitutional’ theories of constitutional pluralism in the literature, as opposed to the looser conceptions of ‘radical’ pluralism. In Section 4, I outline the approaches of the major writers in the area of metaconstitutional pluralism with reference to both the EU and the ECHR, highlighting their similarities and differences, before settling on a particular conception of metaconstitutional pluralism as the analytical framework for the case studies used in the thesis. Section 5 discusses the arguments of constitutional pluralism’s detractors, and highlights a particular problem that arises from the overview of the metaconstitutional conceptions of pluralism in the literature, and which forms the research question of the thesis: the alleged universality of the interface norms by which the relationships between legal orders are regulated. Finally, Section 6 concludes the discussion by outlining the method and approach to be taken in subsequent chapters, detailing the model of metaconstitutional pluralism to be used and parsing the relationships between the three legal orders under discussion into ‘vertical’, ‘horizontal’ and ‘triangular’ frames, in order to address the research question of the universality of interface norms.

## 1 CONSTITUTIONAL PLURALISM'S ORIGINS IN THE EU

### 1.1 Constitutionalisation and disorder

The story of the European Communities' (and later the Union's) growth from a classical, treaty-based creature of international law, nothing more than a set of binding obligations between states, to the supranational, vertically-integrated legal order that exists today is well known, and will not be recounted at great length here.<sup>1</sup> Suffice it to say that the European Court of Justice (ECJ), through its formulation and elaboration of the twin doctrines of the direct effect of Community law and its primacy over national law, effected the steady 'constitutionalisation' of the Community. The famous statement from *van Gend en Loos* that '[t]he Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights'<sup>2</sup> lost its 'of international law' qualifier five years later in *Molkerei-Zentrale*.<sup>3</sup> Not only was the EEC Treaty capable of 'producing direct effects and creating individual rights which national courts must protect',<sup>4</sup> but '[t]he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed.'<sup>5</sup> By 1986, the ECJ felt confident enough in *Les Verts* to call the EEC Treaty the Community's 'basic constitutional charter.'<sup>6</sup>

This judicial constitutionalisation of the Union did not occur in a vacuum, but was aided by the agreement—or at least the acquiescence—of the Member States. There is the obvious fact that 22 of the 28 Member States acceded to the Community

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<sup>1</sup> See generally, N MacCormick *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: OUP, 1999) ch 7 and references therein; P Craig and G de Búrca *EU Law: Text, Cases and Materials* (5th ed, Oxford: OUP, 2011) chs 8–10. But let us bear in mind Arnall's warning against assuming too much: A Arnall 'The Americanization of EU Law Scholarship' in A Arnall, P Eeckhout and T Tridimas (eds) *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford: OUP, 2008) at 424–427.

<sup>2</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I at 12.

<sup>3</sup> Case 28/67 *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn* [1968] ECR 143 at 152.

<sup>4</sup> *Van Gend en Loos* (n 2) at 13

<sup>5</sup> Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585 at 594.

<sup>6</sup> Case 294/83 *Parti Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339 at para 23, affirmed in Case C-314/91 *Weber v Parliament* [1993] ECR I-1093 at para 8; Case C-15/00 *Commission v European Investment Bank* [2003] ECR I-7281 at para 75; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351 at paras 81 and 281.

or Union long after 1964, aware of the implications of *van Gend* and *Costa*. But more importantly, Joseph Weiler notes that this constitutionalisation was ‘brought about with the full collaboration of national governments [and] national parliaments, who again and again ... ratified the new order.’<sup>7</sup> He invokes Albert Hirschman’s theory of exit and voice to show that as Community law developed, political intergovernmentalism provided a counterweight to legal supranationalism, ‘allowing the Member States to digest and accept the process of constitutionalization’, which they could do ‘because they took real control of the decision-making process, thus minimizing its threatening features.’<sup>8</sup>

However, having had less of a Hirschmanian voice in the matter, the supreme and constitutional courts of some Member States were rather less enthusiastic, particularly the German Federal Constitutional Court, the *Bundesverfassungsgericht* (BVerfG). In its *Solange I* judgment,<sup>9</sup> the BVerfG claimed for itself the jurisdiction to review Community norms for conformance with fundamental rights as set out in the *Grundgesetz*. This was in clear defiance of the ECJ’s ruling in *Internationale Handelsgesellschaft*<sup>10</sup> (itself a stage in the proceedings that lead to the *Solange I* judgment), which had reserved such jurisdiction to itself. Faced with the threat of open rebellion by one of the most powerful and influential constitutional courts in Europe—and an apex constitutional actor in what has long been the continent’s economic powerhouse—the ECJ staged a remarkable about-turn in its jurisprudence. Whereas once it had held that fundamental rights as they appear in national constitutions were entirely outwith the scheme of the Treaties,<sup>11</sup> or, later, were to be protected only insofar as they formed part of the constitutional traditions common to the Member States,<sup>12</sup> the ECJ held in *Nold*<sup>13</sup> that:

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<sup>7</sup> JHH Weiler *The Constitution of Europe* (Cambridge: CUP, 1999) at 4, drawing on A Hirschman *Exit, Voice and Loyalty* (Cambridge MA: Harvard UP, 1970).

<sup>8</sup> Weiler (n 7) at 36.

<sup>9</sup> Reported in English as *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case 2 BvL 52/71) [1974] 2 CMLR 540.

<sup>10</sup> Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>11</sup> Case 1/58 *Stork v High Authority* [1959] ECR 17; Joined Cases 36, 37, 38 & 40/59 *Geitling v High Authority* [1960] ECR 423; Case 40/64 *Sgarlata and others v Commission* [1965] ECR 215. See, in particular, *Geitling* at 438: ‘Community law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights.’

<sup>12</sup> Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; *Internationale Handelsgesellschaft* (n 10) at para 3.

[F]undamental rights form an integral part of the general principles of law, the observance of which [the Court] ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.<sup>14</sup>

The ECJ went on to develop its case law<sup>15</sup> to the satisfaction of the BVerfG, which held in *Solange II*<sup>16</sup> that as the EC's (and in particular the ECJ's) rights protection was now at a level comparable to its own, it would no longer exercise (but did not renounce) the jurisdiction it had claimed for itself.

It is in response to this 'disorder of normative orders'<sup>17</sup>—wherein the legal orders of both the EU and its Member States make claims to autonomy and to primacy in their own domain, with all the potential for jurisdictional overlap and conflict that this entails—that constitutional pluralism has been developed.

## 1.2 Beginnings: MacCormick's 'radical pluralism' and 'pluralism under international law'

The title of 'inventor' of constitutional pluralism—at least insofar as it relates to European law of both kinds—belongs to Neil MacCormick, who set out to show that:

[S]overeignty and sovereign states, and the inexorable linkage of law with sovereignty and the state, have been but the passing phenomena of a few centuries, that their passing is by no means regrettable, and that current developments in Europe exhibit the possibility of going beyond all that.<sup>18</sup>

MacCormick illustrated this claim by reference to the UK's position within the legal orders of the European Communities and of the European Convention on Human

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<sup>13</sup> Case 4/73 *Nold v Commission* [1974] ECR 491.

<sup>14</sup> *Ibid* at para 13.

<sup>15</sup> See, in particular, Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727. For a summary of developments, see N Fennelly 'Pillar Talk: Fundamental Rights Protection in the European Union' (2008) 1 *Judicial Studies Institute Journal* 95 at 97–106. See further, N Nic Shuibhne 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law' (2009) *European Law Review* 230.

<sup>16</sup> Reported in English as *Re the Application of Wünsche Handelsgesellschaft* (Case 2 BvR 197/83) [1987] 3 CMLR 225.

<sup>17</sup> N Walker 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373.

<sup>18</sup> N MacCormick 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1 at 1.

Rights: to regard the UK as still being ‘sovereign’ in the classical, all-encompassing sense is to blind ourselves to objective reality, but to regard the Communities as being sovereign, with Member States merely their subordinates, is to overstate the case.<sup>19</sup> Problematically, the traditional concept of sovereignty by its very nature—indivisible, exclusive, etc—lends itself only to one of these either-or approaches. Alternatively, ‘[t]o escape from the idea that all law must originate in a single power source, like a sovereign, is thus to discover the possibility of taking a broader, more diffuse, view of law.’<sup>20</sup>

It is exactly this broader, more diffuse approach that MacCormick took in response to the *Maastricht* judgment<sup>21</sup> of the BVerfG two years later.<sup>22</sup> Here, the BVerfG held the Maastricht Treaty to be compatible with the *Grundgesetz*, but also drew a line in the sand: sovereignty in Germany continues to be vested in the German people, and Germany is still (for the BVerfG) a sovereign state. Accordingly, the competences of the EU are specified and limited, and its authority derived from and dependent on that of the Member States: neither the EU corporately, nor any of its individual actors—such as the Court of Justice—has interpretive *Kompetenz-Kompetenz*, the power to decide the limits of its own jurisdiction and powers. As a result, if the BVerfG detected an intrusion by a future EU legislative instrument into the still-sovereign sphere of German law, such instrument would have no binding power within Germany.<sup>23</sup> How can this be squared with the ECJ’s long-standing jurisprudence on the autonomy and primacy of Community—and now Union—law? Clearly, the BVerfG and the ECJ cannot both be right. Or can they?

<sup>19</sup> Ibid at 5, citing the House of Lords judgment in *R v Secretary of State for Transport, ex parte Factortame* [1991] 3 All ER 769 and the ECtHR judgment in *Sunday Times v United Kingdom (No 2)* [1991] ECHR 50.

<sup>20</sup> MacCormick (n 18) at 8.

<sup>21</sup> Reported in English as *Brunner v European Union Treaty* (Case 2 BvR 2134/92 and 2959/92 JZ 1993, 1100) [1994] 1 CMLR 57.

<sup>22</sup> N MacCormick ‘The Maastricht-Urteil: Sovereignty Now’ (1995) 1 *European Law Journal* 259.

<sup>23</sup> Much of this argument has been echoed more recently in a somewhat different constitutional frame, in the BVerfG’s judgment on the compatibility of the Lisbon Treaty with the *Grundgesetz*, reported in English as *Re Ratification of the Treaty of Lisbon* (2 BvE 2/08) [2010] 3 CMLR 13. See further JEK Murkens ‘*Bundesverfassungsgericht* (2 BvE 2/08): “We want our identity back”—the Revival of National Sovereignty in the German Federal Constitutional Court’s decision on the Lisbon Treaty’ (2010) *Public Law* 530; J Ziller ‘The German Constitutional Court’s Friendliness towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon’ (2010) 16 *European Public Law* 53; M Niedobitek ‘The *Lisbon Case* of 30 June 2009—A Comment from the European Law Perspective’ (2009) 10 *German Law Journal* 1267.



MacCormick observed that from the point of view of an institutional (rather than pure) theory of law, institutions and actors within municipal European legal systems derive their authority and competence from the national legal order, independently of whatever international or supranational organisations to which the state may belong. Equally, EU legal actors derive their authority and competence from the Treaties, without reference (for doctrinal purposes) to the ins and outs of the national law of any one Member State. The conclusion MacCormick drew from this observation is a clear statement of the fundamentals of constitutional pluralism, and merits quoting at length:

[T]he doctrine of supremacy of Community law is not to be confused with any kind of all-purpose subordination of Member State law to Community law. Rather, the case is that these are interacting systems, one of which constitutes in its own context and over the relevant range of topics a source of valid law superior to other sources recognised in each of the Member State systems. ... On the whole, therefore, the most appropriate analysis of the relations of legal systems is pluralistic rather than monistic, and interactive rather than hierarchical. The legal systems of Member States and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another.<sup>24</sup>

This refusal to accept (from anything other than an internal perspective) the claims of apex actors within both national and European law to total primacy, one over the other, is one of the hallmarks of constitutional pluralism. However, acceptance of the incommensurability of the sovereignty-claims of the heterarchical orders does not offer us any assistance in seeking to determine how conflicts between these orders might be resolved. Quite the opposite, for a clear hierarchical division between the orders would enable us to look to our chosen actor (whether the ECJ or a national court) for the final say on the matter, but acceptance of heterarchy leaves us at a loss. This is why MacCormick later termed this initial formulation of constitutional pluralism as one of ‘radical pluralism’, which ‘entails acknowledging that not every legal problem can be resolved legally’.<sup>25</sup>

MacCormick later moved away from this radical pluralism towards ‘pluralism under international law’, which, he admitted, is ‘a kind of “monism” in Kelsen’s

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<sup>24</sup> MacCormick (n 22) at 264.

<sup>25</sup> MacCormick (n 1) at 119.

sense’,<sup>26</sup> whereby conflicts between legal orders are dealt with under the overarching normative authority of international law.<sup>27</sup> His main reason for doing so was in response to a problem of radical pluralism, which we shall, in Section 5, see extended to the idea of constitutional pluralism *tout court*, that:

Simply to remit to state courts an unreviewable power to determine the range of domestic constitutional absolutes that set limits upon the domestic applicability of Community law would seem likely to invite a slow fragmentation of Community law.<sup>28</sup>

However, the fact that pluralism under international law does admit to the existence of an authoritative frame for the resolution of disputes does not necessarily rob it of its pluralist qualities. Accepting the hierarchically superior placement of public international law does not require the subsequent hierarchical arrangement of EU and Member State law one above the other—the two orders remain interactive and heterarchical in their (‘horizontal’) relationships with one another, subject only to the ultimate authority of the public international order. It is from these two conceptions of the idea of constitutional pluralism, one radical, one rather less so, that the literature has evolved.

### 1.3 The three major claims of Walker’s pluralism

MacCormick’s underlying scepticism towards claims to sovereignty in the classical sense by any modern legal or political actors<sup>29</sup> was taken up and developed by Neil Walker, who, in his exposition of the ontological basis of constitutional pluralism,<sup>30</sup> combines scepticism as to sovereignty-claims with a recognition of the fact that constitutionalism itself—which he defines as ‘the normative discourse through which constitutions are justified, defended, criticised, denounced or otherwise engaged with’<sup>31</sup>—has ‘been subject to a perhaps unprecedented range and intensity of attack.’<sup>32</sup> If claims to sovereignty are to be treated sceptically, and if the very concept of constitutionalism is a debased and antiquated one, then any attempt to frame and

<sup>26</sup> MacCormick (n 1) at 121.

<sup>27</sup> See further, N MacCormick ‘Risking Constitutional Collision in Europe?’ (1998) 18 *Oxford Journal of Legal Studies* 517.

<sup>28</sup> MacCormick (n 1) at 120.

<sup>29</sup> Upon which he elaborated in MacCormick (n 1): see, in particular, chs 7 and 8.

<sup>30</sup> N Walker ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review* 317.

<sup>31</sup> *Ibid* at 318.

<sup>32</sup> *Ibid*.

explain the European legal landscape and its multiple, competing, overlapping jurisdictions by means of a constitutionalist discourse, pluralist or otherwise, would be doubly quixotic.

Having set out what he believes to be the major criticisms of constitutionalism, and possible methods for them to be overcome,<sup>33</sup> Walker outlines a particular conception of constitutional pluralism as the best way of meeting the challenges, a conception which, echoing MacCormick:

[R]ecognises that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of inter-*national* law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states. The relationship between the orders, that is to say, is now horizontal rather than vertical—heterarchical rather than hierarchical.<sup>34</sup>

However, let us be quick to note, as Walker himself does,<sup>35</sup> that this brief outline of the contours of pluralism does not even come close to answering all of the objections of the critics (and, most likely, it raises a whole crop of new ones). This is why Walker calls it a ‘lowest common denominator’<sup>36</sup> position, serving only as a common basis shared by the various species of pluralism, ‘a series of preliminary steps beyond which the various pluralists ... and many others have gone their own ways’.<sup>37</sup>

The kind of pluralism that Walker outlines is much more than an attempt simply to explain what actually happens in European constitutional practice. While, as we shall see, pluralism’s explanatory or analytical function is of profound importance, it is not the only element of the theory. Additionally, pluralism is presented as being *normatively desirable*, because of its claimed ability to transcend the flaws and shortcomings for which constitutionalism is (perhaps justly) criticised, while still retaining the possibility of meaningfully bringing public power under public control, which made constitutionalism a worthy discourse in the first place. The first, explanatory, claim of Walker’s baseline conception is that to persist with a monist conception of constitutionalism in Europe is to ignore reality. The only adequate way

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<sup>33</sup> Which criticisms include constitutionalism’s statist legacy, fetishism, normative bias, ideological exploitation and debased conceptual currency: see generally, *ibid* at 319–339.

<sup>34</sup> *Ibid* at 337, emphasis in original.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid* at 339.

<sup>37</sup> *Ibid* at 337.

of accounting for the radical changes to the allocation and distribution of jurisgenerative power in the past half-century is conceptually to posit the different legal orders alongside each other, rather than in some vertical relationship (the precise arrangement of which will differ depending on one's own political preferences and institutional viewpoint). This explanatory claim is deeply persuasive. The current configuration of the exercise of public power in Europe bears little relation to anything that went before. A monist view, whereby the exercise of all public power must draw on the same font of legitimacy, a common constitutional *Grundnorm*, has little to offer given the competing claims to autonomy that characterise the legal landscape. The different accounts of constitutional pluralism in the literature thus take this explanatory claim as a given.

However, the second, normative, claim goes further: not only is constitutional heterarchy posited as an observable, existing fact, but this fact is to be welcomed. For Walker, pluralism 'contend[s] that the only acceptable ethic of political responsibility for the new Europe is one that is premised upon mutual recognition and respect between national and supranational authorities.'<sup>38</sup> This normative claim is less clear-cut than the explanatory, but, as we shall see in Section 4, the various strands of pluralism on offer do tend to commit themselves to the normative desirability of a judicial and legal (indeed constitutional) ethic of mutual recognition, mutual accommodation, and mutual deference, even if this deference is conditional and contingent. Comity, the recognition of the other, and the tolerance of difference are all normative values inherent in, and expressed through, the different articulations of constitutional pluralism in the literature.

There is also a third, epistemic, claim: that, in explanatory terms, there is no neutral position; no bird's-eye view; no 'Archimedean point' 'from which we can evaluate the strength and validity of the different, and in some respects contending, authority claims made from national and supranational constitutional sites.'<sup>39</sup> Instead, we can either accept the plausibility (and, crucially, the incommensurability) of each claim, and the heterarchical vision of their interrelationships that follows, or we can reject the plausibility of any given claim, which collapses us back into

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid at 338.

constitutional monism, with one system hierarchically inferior to the other. There are two preliminary points to be made here. First is Robert Schütze's criticism that the alleged absence of such an epistemic vantage point is in fact neither new nor unique to EU constitutionalism, but is rather 'part and parcel of Europe's *federal* nature'.<sup>40</sup> European insistence on an undivided conception of sovereignty is both 'introverted and unhistorical'<sup>41</sup> on this analysis, and ignores the experience of federalism and divided sovereignty in the United States. Let us just note this criticism for now, and bear it in mind while examining the various pluralisms in Section 4 below, before returning to engage with the criticism fully in Section 5.

The second point is that this claim of perpetual epistemic indeterminacy is at the root of much of the confusion and disagreement in the discourse surrounding constitutional pluralism, and can be described as a 'tightrope problem': is this indeterminacy in fact sustainable, or must it inevitably collapse into constitutional monism, whether national or supranational? The danger is that by leaning too far either to one side or the other, constitutional pluralism loses the run of itself, and returns us to one of the opposing monisms beyond which it tries to move. Underlying this difficulty is the possibly inherent tension between constitutionalism and pluralism, whereby the two are regarded as being diametrically opposed and utterly irreconcilable. Before detailing the further development of the theories of constitutional pluralism—and thus the research question at the heart of this thesis—this alleged dichotomy must be addressed.

## 2 CONSTITUTIONALISMS AND PLURALISMS

The tendency to posit constitutionalism and pluralism in oppositional, agonistic terms is put forward most forcefully by Nico Krisch, who writes that constitutionalism in the postnational<sup>42</sup> sphere:

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<sup>40</sup> R Schütze 'Federalism as Constitutional Pluralism' in M Avbelj and J Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart, 2012) at 211 (emphasis in original).

<sup>41</sup> Ibid.

<sup>42</sup> By which Krisch means the legal landscape where '[t]he classical distinction between the domestic and international spheres ... is increasingly blurred... [and] law has become 'postnational'—the national sphere retains importance, but it is no longer the paradigmatic anchor of the whole order' (N

[A]ttempts to provide continuity with the domestic constitutionalist tradition by construing an overarching legal framework that determines the relationships of the different levels of law and the distribution of powers among their institutions. It seeks to redeem the modern, revolutionary promise of a human-made constitution as an antidote to the forces of history, power and chance.<sup>43</sup>

Pluralism, on the other hand:

[I]s a less orderly affair. It sees such an overarching framework as neither practically possible nor normatively desirable and seeks to discern a model of order that relies less on unity and more on the heterarchical interaction of the various layers of law. Legally, the relationship of the parts of the overall order in pluralism remains open—governed by the potentially competing rules of the various sub-orders, each with its own ultimate point of reference and supremacy claim, the relationships between them are left to be determined ultimately through political, not rule-based processes.<sup>44</sup>

If we accept this characterisation of the two ideas, then talk of ‘constitutional pluralism’ is simply idle, a theoretically impossible cul-de-sac into which has been invested far too much time and intellectual effort. On this analysis, MacCormick’s retreat from radical pluralism to pluralism under international law is emblematic of the tension, and Krisch’s dichotomous characterisation of the two concepts fits well with MacCormick’s two positions, with ‘radical pluralism’ as an example of Krisch’s pluralism *simpliciter*, and ‘pluralism under international law’ being recast instead as a species of what Krisch would call constitutionalism, notwithstanding the heterarchical relationship of the legal orders below the overarching level of international law.

However, the idea that constitutional pluralism is a contradiction in terms is itself open to serious challenge. In this Section, I first set out why this is so, before going on to outline different ways in which the various theories of constitutional pluralism can be conceptualised.

## 2.1 A false dichotomy

The objection is put somewhat differently—but more succinctly—by Davies, who writes that:

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Krisch *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: OUP 2010) at 5).

<sup>43</sup> *Ibid* at 23.

<sup>44</sup> *Ibid*.

Where there are multiple sources of apparently constitutional law one always takes precedence and the other is then no longer constitutional. Dialogue may help the legal sources reconcile, but it does not change the normative hierarchy between them.<sup>45</sup>

Is this really the case? In order to engage with Davies' criticism, let us compare it to another situation by rephrasing it: what about a case where there are not 'multiple sources of *apparently* constitutional law', but rather 'multiple *provisions* of *definitely* constitutional law'?

What I have in mind is a classic situation of two constitutional rights being in conflict in a given case, such as the right to freedom of speech and the right to privacy, both of which we can well imagine being given some sort of specific recognition in a hypothetical (state) constitutional order. While the particular calculus a judge will employ in determining any given dispute will differ from case to case, and from place to place, it is unrealistic to imagine that a victory for the speaker means that the right to privacy 'is no longer constitutional', or that some definitive normative hierarchy between the two has been established. Similarly, a victory for the person seeking to protect his or her privacy does not mean that the right to freedom of speech has been destroyed for all time coming. Rather, it is just that two rights were in conflict in a particular way and a resolution was necessary. The effectiveness of one was temporarily displaced in favour of another, but not destroyed.

How, and to what extent, does this then differ from the case discounted by Davies, where there is conflict not between the norms of *a* legal order but between the norms of legal orders? I suggest that the two situations can be seen as being at the very least partially analogous. It is an overstatement to imagine that the disapplication in a given case of a norm from one 'constitutional' order in favour of a norm from another 'constitutional' order necessarily makes one order 'more constitutional' than the other. At least, this is the case if we accept (and embrace) the possibility of 'constitutionalism beyond the state'.<sup>46</sup> It would seem that only on a

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<sup>45</sup> G Davies 'Constitutional Disagreement in Europe and the Search for Pluralism' in Avbelj and Komárek (eds) (n 40) at 269

<sup>46</sup> In the European context, particularly that of the EU, see, *inter alia*, Weiler (n 7); P Craig 'Constitutions, Constitutionalism and the European Union' (2001) 7 *European Law Journal* 125; JHH Weiler 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*' in JHH Weiler and M Wind (eds) *European Constitutionalism Beyond the State* (Cambridge: CUP, 2003); U Haltern

statist, monist conception of constitutionalism can we describe the temporary disapplication of the norms of one order in favour of another as relegating the disappplied order to non-constitutional status.

It is precisely this—statist—conception of constitutionalism that Krisch employs in positing pluralism and constitutionalism as opposites.<sup>47</sup> We can in fact go further, for Krisch makes it clear that he has a particular *kind* of state constitutionalism in mind:

[T]he line of tradition that traces itself back to the American and French revolutions, [which] stresses more the formal elements: the actual constitution (not only limitation) of government through an act of the people, as expressed in a constitutional document.<sup>48</sup>

This he contrasts to the older conception of constitutionalism, ‘closer to British history and common law ideas, [which] emphasizes the importance of substantive constitutional values (rights, democracy, etc) as limitations to government power.’<sup>49</sup> The problem here is that ‘modern’ revolutionary constitutionalism obviously bears little relation to the foundation and evolution of the European *ordre publique*. This was obvious even prior to the failed EU Constitutional Treaty, but that very failure highlighted that if we are to imagine and describe the European legal order—by which I mean here the whole panoply of state, Union and Convention—as being ‘constitutional’, it is the older, evolutionary conception of constitutionalism that we must adopt.<sup>50</sup> Krisch and Davies’ argument that pluralism and constitutionalism are irreconcilable is perfectly true—even trivially so—if we are to take the

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‘Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination’ (2003) 9 *European Law Journal* 14; N Walker ‘Reframing European Constitutionalism’ in J Dunoff and J Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: CUP, 2009).

<sup>47</sup> See, generally, N Krisch (n 42), especially at chs 2–3. For detailed—and differing—responses to Krisch’s dichotomy between constitutionalism and pluralism, see S Besson ‘The Truth About Legal Pluralism’ (2012) 8 *European Constitutional Law Review* 354 at 357–359; G Shaffer ‘A Transnational Take on Krisch’s Pluralist Postnational Law’ (2012) *European Journal of International Law* 565 at 572–575; A Stone-Sweet ‘The Structure of Constitutional Pluralism’ (2013) 11 *International Journal of Constitutional Law* 491 at 491–493.

<sup>48</sup> N Krisch ‘Europe’s Constitutional Monstrosity’ (2005) 25 *Oxford Journal of Legal Studies* 321 at 330.

<sup>49</sup> *Ibid* at 329–330.

<sup>50</sup> See further, M Avbelj ‘Questioning EU Constitutionalisms’ (2008) 9 *German Law Journal* 1 at 25: ‘Constitutionalism is a social concept, which means that it does not have any essence of its own which is immutable and independent from the social constructionist forces in the society ... Consequently, there can be simply no justification for a claim that constitutionalism can not be severed from its statist pedigree.’ (Citing J Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: CUP, 1995) at 9).



revolutionary, documentary form of constitutionalism as our sole definition and point of reference. This sort of constitution is (or perhaps was) by its very nature authoritative, self-referential, and self-contained. Quite aside from the fact that these adjectives do not necessarily apply to non-state European constitutionalism, they may not even accurately describe the constitutions of EU Member States any longer, given the EU's claim to primacy and hierarchical superiority, and the openness of their legal orders to the influence of the ECHR and ECtHR.

This being the case, the claim that pluralism and constitutionalism are irreconcilable is not insuperable if we broaden our conception of constitutionalism to include the evolutionary, as I would argue we must. Walker's definition of constitutionalism as 'the normative discourse through which constitutions are justified, defended, criticised, denounced or otherwise engaged with'<sup>51</sup> is an altogether broader conception of the notion than the more prescriptive account given by Krisch, but it leaves open the question of what is meant by 'constitutions'. As we have seen, for those who regard constitutionalism and pluralism as opposites, 'constitutions' must be the founding documents that not only limit but also constitute and empower a polity and its institutions. The broader, evolutionary conception is that 'the constitution' is more than the document, or the accumulation of norms, practices, precedents and customs from which the polity may derive its legitimacy and by which the actions of the polity may be restrained.

As a corollary, whether or not a given polity is 'constitutional'—and thus, whether there is any point in speaking of 'constitutionalism'—is not an either/or question, but one of degree. The calculus used to determine where on this constitutional/non-constitutional continuum a given polity or organisation can be placed can be boiled down to three parts: empowerment, restraint, and the metaconstitutional enquiry. If a legal order makes claims for itself as an 'institutional normative order'<sup>52</sup> (empowerment), and limits those claims with, to take Paul Craig's examples, '[i]ssues such as the accountability of government, broadly conceived,

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<sup>51</sup> N Walker (n 30) at 318.

<sup>52</sup> MacCormick (n 1) at 131.

principles of good administration and mainstreaming of human rights<sup>53</sup> (restraint), that legal order can lay claim, at the very least, to a ‘thin’<sup>54</sup> or ‘low-intensity’<sup>55</sup> constitutionalism. Just how thin or thick, low- or high-intensity the constitutionalism in question actually is—and how valid or invalid the claims—can then be analysed in the third stage, the metaconstitutional enquiry. This is defined by Craig as that discourse which asks questions ‘such as why a constitution is legitimate, why it is authoritative and how it should be interpreted’ and including ‘the deeper justificatory rationale for the particular constitutional rules that a legal system has adopted.’<sup>56</sup>

Importantly, this more finely-graded conception of whether a given legal order qualifies as constitutional can be extended to the question of whether the relationships between legal orders are constitutional, pluralist, or somewhere in between, as we shall now see

## 2.2 Reconciling the dichotomy: different constitutionalisms, different pluralisms

Just as the first order question of the constitutionality of a legal order admits of answers altogether more complex than a simple denial or recognition of constitutionality, so too does the second order question of the relationships between legal orders (constitutional, pluralist or otherwise) allow us to give much more nuanced answers. There is still value in Krisch’s criticism, however, in that it forces us to be clearer in our meanings: to what extent are the different constitutional pluralisms in the literature constitutional, and to what extent are they pluralist?

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<sup>53</sup> P Craig ‘Constitutions, Constitutionalism and the European Union’ (2001) 7 *European Law Journal* 125 at 128. While Craig was using these examples in the specific context of the EU, the points hold more generally.

<sup>54</sup> N Walker ‘European Constitutionalism and European Integration’ (1996) *Public Law* 266 at 269.

<sup>55</sup> M Poiares Maduro ‘The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism’ (2005) 3 *International Journal of Constitutional Law* 332 at 334.

<sup>56</sup> *Ibid.*, citing L Alexander ‘Introduction’ in L Alexander (ed) *Constitutionalism: Philosophical Foundations* (Cambridge: CUP, 1998). Note that ‘metaconstitutional’ in this sense is not the same thing as the metaconstitutional pluralisms outlined in Section 4.

### 2.2.1 Constitutional pluralism, pluralist constitutionalism

There may be a qualitative difference between what we could call theories of ‘constitutional pluralism’ and ‘pluralist constitutionalism’. This is more than a semantic quibble, because the two ideas approach the problem—the resolution of seemingly opposing realities—from different angles. Constitutional pluralism in the strict sense can be seen as trying to collar, tame and stabilise the inherent unpredictability of a radical conception of pluralism (that is, to make pluralism more constitutional), whereas a theory of pluralist constitutionalism can be seen as trying, in the first instance, to make constitutionalism more pluralist, taking as its starting point the stability and predictability of state constitutionalism, while rescuing it, in Walker’s sense,<sup>57</sup> from the fact that a globalising world has robbed it of much of its previous descriptive force and accuracy; and, secondly, to open it to the polycentricity inherent in European integration. Put simply, constitutional pluralism seeks to narrow the overly broad, and pluralist constitutionalism seeks to broaden the overly narrow.

If we accept that constitutionalism and pluralism are not irreconcilable, we can recast MacCormick’s two conceptions in ways that do not fit Krisch’s either/or schema. In this light, MacCormick’s radical pluralism is indeed a species of constitutional pluralism—rather than pluralism *simpliciter* in Krisch’s sense—but is only ‘constitutional’ in the thin, descriptive sense that it deals with the arrangement, hierarchical or otherwise, of legal orders which themselves make valid (constitutional) claims to normative authority, whether in the normatively thick sense of national constitutionalism or the ‘small-c’ constitutionalism of the EU.<sup>58</sup> Its reliance on politics, rather than law, for the ultimate resolution of disputes between orders places it more towards the pluralist end of the spectrum, but does not altogether rob it of its constitutional pedigree. Conversely, the recognition of public international law as an overarching frame makes pluralism under international law the more constitutional of MacCormick’s two legal pluralisms, though it owes rather more to the constitutionalised internationalism of Bardo Fassbender<sup>59</sup> than to more

<sup>57</sup> Walker (n 30) *passim*.

<sup>58</sup> N Walker ‘Big “C” or Small “c”?’ (2006) 12 *European Law Journal* 12.

<sup>59</sup> See B Fassbender ‘The United Nations Charter as Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law* 529; and “‘We the Peoples of the United Nations’”:

traditional, state-based theories, or, indeed, to the normatively thicker conceptions of constitutional pluralism which will now be introduced.

## 2.2.2 Different classifications

### 2.2.2.1 Six conceptions

Though positing a difference between constitutional pluralism and pluralist constitutionalism does enable us to demonstrate more clearly the finely-graded relationship between the two concepts, and to determine how close to either end of the spectrum a given theory is, it is still a relatively rough division. Matej Avbelj outlines, more specifically, six conceptions of constitutionalism with respect to the legal order of the EU, all of which have pluralist aspects, though to greatly varying degrees: ‘socio-teleological constitutionalism’, represented by the work of Weiler,<sup>60</sup> ‘epistemic meta-constitutionalism’, represented by Walker;<sup>61</sup> the ‘best fit universal constitutionalism’ of Mattias Kumm;<sup>62</sup> the ‘harmonious discursive constitutionalism’ of Miguel Poiares Maduro;<sup>63</sup> Ingolf Pernice’s ‘multilevel classical constitutionalism’;<sup>64</sup> and the ‘reductionist constitutionalism’ of Charles Sabel and Oliver Gerstenberg.<sup>65</sup>

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Constituent Power and Constitutional Form in International Law’ in M Loughlin and N Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: OUP, 2007) at 269.

<sup>60</sup> Avbelj (n 50) at 11–12, citing, *inter alia*, JHH Weiler ‘Fin-de-Siècle Europe’ in R Dehousse (ed) *Europe After Maastricht: An Ever Closer Union?* (Munich: Beck, 1994); ‘The Reformation of European Constitutionalism’ (1997) 35 *Journal of Common Market Studies* 97; ‘In Defence of the Status Quo: Europe’s Constitutional Sonderweg’ in JHH Weiler and M Wind (eds) *European Constitutionalism Beyond the State* (Cambridge: CUP, 2003); ‘On the Power of the Word: Europe’s Constitutional Iconography’ (2005) 3 *International Journal of Constitutional Law* 173.

<sup>61</sup> Avbelj (n 50) at 13–15, citing, *inter alia*, Walker (n 30); ‘Late Sovereignty in the European Union’ in N Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003); ‘Flexibility Within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe’ in G de Búrca and J Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford: Hart, 2000).

<sup>62</sup> Avbelj (n 50) at 15–18, citing M Kumm ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty’ (2005) 11 *European Law Journal* 262.

<sup>63</sup> Avbelj (n 50) at 18–19, citing, *inter alia*, M Poiares Maduro ‘The Heteronyms of European Law’ (1999) 5 *European Law Journal* 160; ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in Walker (ed) (n 61).

<sup>64</sup> Avbelj (n 50) at 19–20, citing, *inter alia*, I Pernice ‘Multilevel Constitutionalism in the European Union’ (2002) 27 *European Law Review* 511.

<sup>65</sup> Avbelj (n 50) at 20–22, citing, *inter alia*, J Cohen and C Sabel ‘Directly-Deliberative Polyarchy’ (1997) 3 *European Law Journal* 313; O Gerstenberg and C Sabel ‘Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?’ in C Joerges and R Dehousse (eds) *Good Governance in Europe’s*

Two of these theories—‘socio-teleological constitutionalism’ and ‘multi-level classical constitutionalism’—are only pluralist in the very thinnest of senses. The normative core of Weiler’s theory is the notion of ‘constitutional tolerance’, which celebrates as a virtue distinct to the *sui generis*,<sup>66</sup> non-documentary constitutionalism of the EU that the institutional actors of the Member States:

accept [the legal doctrines of EU constitutionalism] as a continuously renewed, autonomous and voluntary act of subordination, in the discrete areas governed by Europe, to a norm that is the aggregate expression of *other* wills, *other* political identities, *other* political communities.<sup>67</sup>

Though this constitutional tolerance does recognise constitutional *plurality*, and evinces a similar commitment to the normative imperatives of pluralism as that outlined in the second claim of Walker’s lowest-common-denominator conception, its prior acceptance of the hierarchical constitutional claims of the EU order undermines any substantively pluralist aspects of the theory. As Avbelj notes:

[I]t fails to explain how its constitutional vision of the integration can be then genuinely tolerant and thus truly legitimate if a normative ideal of constitutional tolerance is introduced only when the constitutional framework of a clearly hierarchical nature is already in place.<sup>68</sup>

Similarly, but more explicitly, Ingolf Pernice’s ‘multi-level constitutionalism’ is virtually indistinguishable from standard federal constitutionalism at the state level, and in cases of conflict between legal orders always weighs on the side of the application of EU law.<sup>69</sup> Accordingly, neither of these theories will feature in what follows.

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*Integrated Market* (Oxford: OUP, 2002). Avbelj later (and less pejoratively) describes this sort of theory as ‘pragmatic constitutionalism’: M Avbelj and J Komárek ‘Introduction’ in Avbelj and Komárek (eds) (n 40) at 6.

<sup>66</sup> It is in this sense that Weiler used the word *Sonderweg* (see Weiler (n 46)).

<sup>67</sup> JHH Weiler ‘On the Power of the Word: Europe’s Constitutional Iconography’ (2005) 3 *International Journal of Constitutional Law* 173 at 188, emphasis added.

<sup>68</sup> Avbelj (n 50) at 24 fn 112.

<sup>69</sup> *Ibid* at 20. More recently, Franz Mayer and Mattias Wendel have mounted a defence of multilevel constitutionalism as a species of constitutional pluralism, arguing that it is neither ‘a [specifically] German quarrel’ nor ‘a quarrel about nothing’. However, René Barents’ reply argues that it is, in fact, both: see FC Mayer and M Wendel ‘Multilevel Constitutionalism and Constitutional Pluralism’ in Avbelj and Komárek (n 40) and R Barents ‘The Fallacy of European Multilevel Constitutionalism’ in the same volume.

### 2.2.2.2 *Metaconstitutional pluralism*

Though Avbelj does not group the remaining theories together, there is a significant amount of common ground between them. Most importantly, they share a conception (though in different ways and to varying degrees) of overarching ‘metaconstitutional’<sup>70</sup> principles whereby conflict between legal orders can—in the first place—be avoided, and—if necessary—be resolved. Metaconstitutional pluralism therefore seeks either (in its explanatory dimension) to identify, or (in its normative dimension) to posit a series of higher order norms that serve a bridging function between legal orders, while still maintaining the essentially heterarchical nature of the relationships between them and without falling off the tightrope and collapsing the orders into a monist whole. It is in this respect that this version of pluralism is *metaconstitutional*: it identifies or posits *constitutional rules about constitutional rules*. This can then be contrasted with radical pluralism, along MacCormick’s lines, which, as Cormac Mac Amhlaigh notes:

[I]nvolves nothing more than the prudence, pragmatism and accommodation of state and suprastate—mainly judicial—actors, operating in the absence of a higher-order metaconstitutional normative framework.<sup>71</sup>

Indeed, as we saw with MacCormick’s version of the theory, radical pluralism explicitly disclaims the very possibility of metaconstitutional principles serving the bridging function described above. Andreas Fischer-Lescano and Gunther Teubner write that:

Any aspirations to a normative unity of global law are ... doomed from the outset. A meta-level at which conflicts might be solved is wholly elusive both in global law and in global society. Instead, we might expect intensified legal fragmentation.<sup>72</sup>

In the global context, this may well be the case, but the focus of this thesis is on the two European non-state legal orders and (one of) their constituent states: these systems’ high degree of legal and social embeddedness, coupled with the active academic debate on the relationships between them, means that in the specifically

<sup>70</sup> N Walker ‘Flexibility Within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe’ in G de Búrca and J Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford: Hart, 2000).

<sup>71</sup> C Mac Amhlaigh ‘Questioning Constitutional Pluralism’ (forthcoming, paper on file with author) at 6, citing N Krisch ‘The Case for Pluralism in Postnational Law’ in G de Búrca and JHH Weiler, *The Worlds of European Constitutionalism* (Cambridge: CUP, 2012) at 221.

<sup>72</sup> A Fischer-Lescano and G Teubner ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2003–2004) 25 *Michigan Journal of International Law* 999 at 1004.

European context the search for a metaconstitutional framework for the resolution of conflicts is more fruitful.

### 2.2.2.3 *Metaconstitutional interface norms*

At the heart of these metaconstitutional pluralisms are the specific norms constituting the overarching framework, which offer guidance in the avoidance and resolution of conflicts between orders. These have been termed ‘interface norms’ by Krisch, which ‘are the main legal expression of openness and closure, friendliness or hostility among the different parts’.<sup>73</sup> This is the description that will be adopted throughout this thesis, and a major part of the discussion in Section 4 below is focused on the nature of the interface norms supplied or suggested by each of the metaconstitutional conceptions of pluralism. However, two preliminary matters must be dealt with here.

First, we have already seen that Krisch rejects the concept of (meta)constitutional pluralism as an impossibility, and posits his own theories as being specifically pluralist rather than constitutional. This he makes clear when he writes that:

Unlike in a constitutionalist structure, the strength of the respective claims in a pluralist order is not assessed by a single decision-maker or from a central vantage point. The pluralist setting distinguishes itself precisely by the fact that the conflict rules do *not* have an overarching legal character; they are normative, moral demands that find (potentially diverging) legal expressions only within the various sub-orders.<sup>74</sup>

But as we have seen, we need not accept this characterisation of affairs. The fact ‘the rules are set by each sub-order for itself’<sup>75</sup> does not necessarily render them non-constitutional, especially in light of the above discussion of the finely-graded, rather than either/or, nature of constitutionalism, and in particular when we consider the rules as being *metaconstitutional*. In fact, Krisch tacitly concedes as much when he goes on to write that:

This can lead to incoherences in the overall order ... [y]et the rule of law also poses demands on decision-makers in a pluralist setting: its asks legislators and judges to pursue the values of legal certainty and predictability by striving for consistency in the overall order. At times this goal may be trumped by other values—autonomy, democracy, and rights

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<sup>73</sup> Krisch (n 42) at 285–286.

<sup>74</sup> Ibid at 296, footnote omitted.

<sup>75</sup> Ibid at 286.

among them. If another order does not deserve respect on the basis of its autonomy pedigree, overall consistency need not be ensured.<sup>76</sup>

It is precisely this sort of contingent, relational analysis that supplies metaconstitutional pluralism with its constitutional credentials, and distinguishes it from radical pluralism, contrary to Krisch's *a priori* distinction between the two.

The lines quoted above also hint at the second preliminary issue: the use of the phrase interface *norms* to describe the means by which the relations between legal orders can be regulated. As we have seen, Krisch also characterises these 'norms' as 'rules', 'demands' and even 'values'. Elsewhere, he writes of the need for 'a more finely tuned legal and doctrinal instrumentarium'<sup>77</sup> and 'doctrinal tools'.<sup>78</sup> The issue is compounded by the varying ways in which the different metaconstitutional theories classify their conceptions of interface norms. As we shall see in Section 4, they are most frequently described as 'principles'. Mattias Kumm is explicit in his outline of what has come to be called 'cosmopolitan constitutionalism'<sup>79</sup> that he adopts and relies on Robert Alexy's conception of norms as consisting of both rules and principles,<sup>80</sup> under which:

[P]rinciples are norms which require that something be realized to the greatest extent possible given their legal and factual possibilities. Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules.

By contrast rules are norms that are always either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says, neither more nor less. In this way rules contain fixed points in the field of the factually and legally possible. This means that the distinction between rules and principles is a qualitative one and not one of degree. Every norm is either a rule or a principle.<sup>81</sup>

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<sup>76</sup> Ibid at 296.

<sup>77</sup> Ibid at 286.

<sup>78</sup> Ibid.

<sup>79</sup> See Section 3.3, below.

<sup>80</sup> Kumm (n 62) at 290 fn 70, citing R Alexy *A Theory of Constitutional Rights* (Oxford: OUP, 2002) at 44–110; R Sieckmann *Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden: Nomos, 1990); R Dworkin *Taking Rights Seriously* (Cambridge, MA: Harvard UP, 1977). See also M Kumm 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *Common Market Law Review* 351 at 375 fn 47, citing R Dworkin *Law's Empire* (London: Fontana, 1986); R Alexy *Theory of Legal Argumentation* (Oxford: Clarendon, 1989); N MacCormick *Legal Reasoning and Legal Theory* (Oxford: Clarendon, 1978).

<sup>81</sup> Alexy (2002 n 80) at 47–48.



Therefore, though the phrase ‘interface norms’ which will be used throughout the thesis is Krisch’s, this does not require us to accept the constitutionalism/pluralism dichotomy, nor does it limit the discussion to hard and fast legal rules. The various understandings of interface norms encompass not just rules and principles, but, in certain conceptions, ‘doctrinal instrumentaria’ in Krisch’s sense: whole toolkits encompassing a variety of considerations as to how legal orders relate to one another.

Let us now examine the various metaconstitutional pluralisms in more detail, and in particular their conception of interface norms.

### 3 ‘GOING THEIR OWN WAYS’:

#### DIFFERENT CONCEPTIONS OF METACONSTITUTIONAL PLURALISM

##### 3.1 Sabel and Gerstenberg: polyarchic coordinate constitutionalism

Sabel and Gerstenberg take as their starting point the ECJ’s development of a fundamental rights jurisprudence at the behest of Member State courts, most notably the BVerfG, as set out in Section 2 above. They note, however, that more recent judgments such as *Schmidberger*<sup>82</sup> and *Omega*<sup>83</sup>—where attempts are made at reconciling the market freedoms of the EU with national commitments to freedom of expression and the right to human dignity respectively—have the effect of solving an old problem only to recreate the same problem at a level further abstracted from national constitutionalism. In rising to the challenge of developing its own fundamental rights jurisprudence, the ECJ has extended its jurisdiction ‘in ways that overlap and potentially compete with that of Member States in matters of visceral concern’.<sup>84</sup> This is not just an issue within the confines of the EU and its relations with its parts, but is compounded by the EU’s place in the broader international order. *Kadi*<sup>85</sup> is given as an example: instead of national courts making demands of the supranational ECJ, the supranational ECJ makes demands of the Security Council

<sup>82</sup> Case C–112/00 *Eugen Schmidberger, International Transporte und Planzüge v Austria* [2003] ECR I–5659I.

<sup>83</sup> Case C–36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I–9609.

<sup>84</sup> Cf Sabel and O Gerstenberg ‘Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order’ (2010) 16 *European Law Journal* 511 at 512.

<sup>85</sup> Joined Cases C–402/05 P and C–415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I–6351.

of the United Nations, a jurisgenerative body unused to having its decisions reviewed in courts of law.<sup>86</sup> In the European sphere, the problem is complicated by the obvious overlap between the ECJ's jurisprudence on fundamental rights and the position of the ECtHR as the overseer and guardian of the ECHR, which the ECtHR has gone so far as to describe as a 'constitutional instrument of a European Public Order'.<sup>87</sup>

There is therefore in Europe a potential tripartite clash of jurisdiction concerning the meaning and scope of human and fundamental rights. Though the jurisdictions of the EU, the ECtHR and states are separate, they are not neatly compartmentalised or hermetically sealed. Sabel and Gerstenberg suggest that this problem is in the process of being resolved by:

the formation of a novel order of *coordinate constitutionalism* in which Member States, the ECJ [and] the ECtHR ... agree to defer to one another's decisions, provided those decisions respect mutually agreed essentials. This coordinate order extends constitutionalism ... beyond its home territory in the nation state through a jurisprudence of mutual monitoring and peer review that carefully builds on national constitutional traditions, but does not create a new, encompassing sovereign entity.<sup>88</sup>

This coordinate constitutional order is described in terms of John Rawls's idea of overlapping consensus,<sup>89</sup> whereby general agreement on fundamental matters of principle does not rest on a single set of shared (in this case, constitutional) values, but rather:

On the contrary, the parties to an overlapping consensus know that they have reached agreement on essentials, such as the attractiveness of democracy as a system of government or of respect for the individual as a condition of freedom and fairness, through differing, only partially concordant interpretations of such comprehensive ideas.<sup>90</sup>

The acknowledgement of these differences, rather than being a cause of friction, is precisely what drives each actor to reserve to themselves the right to their own interpretation of overlapping principles, while simultaneously affording that right to competing actors, within broader or narrower limits. For Sabel and Gerstenberg, it is the *Solange* principle—the principle of deference leavened by watchfulness—that provides the necessary doctrinal instrument for articulating each actor's viewpoint

<sup>86</sup> Sabel and Gerstenberg (n 84) at 512.

<sup>87</sup> *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* [2005] ECHR 440 at para 156.

<sup>88</sup> Sabel and Gerstenberg (n 84) at 512, emphasis added.

<sup>89</sup> J Rawls 'The Idea of an Overlapping Consensus' (1987) 7 *Oxford Journal of Legal Studies* 1.

<sup>90</sup> Sabel and Gerstenberg (n 84) at 513.

while providing the opportunity for this viewpoint to be adjusted in light of those of competing actors.

Coordinate constitutionalism is not a new idea, but it is one with a chequered history in the statist constitutional frame; as Bateup notes:

Coordinate construction is the oldest conception of constitutional interpretation as a shared enterprise between the courts and the political branches of government, having been first espoused by James Madison. While acknowledging that issues of constitutional interpretation would normally fall to the judiciary in the ordinary course of government, Madison rejected the view that judicial decisions had any unique status, as the [US] Constitution did not provide for any specific authority to determine the limits of the division of powers between the different branches. Similarly, Thomas Jefferson considered that each branch of government must be ‘co-ordinate and independent of each other,’ and that each branch has primary responsibility for interpreting the Constitution as it concerns its own functions.<sup>91</sup>

Though this idea was eventually torpedoed in the American context by the US Supreme Court’s assumption of the ultimate right to determine the meaning of the Constitution and the legitimate sphere of action of each actor established thereunder<sup>92</sup> (as well as the eventual acquiescence of competing actors in this analysis), it is not difficult to transplant the idea to the modern, postnational configuration. The ‘deliberative polyarchy’<sup>93</sup> of the ECHR takes the place of the constitutional state, and each normative order within the polyarchy takes the place of the constitutional actors empowered under coordinate constitutionalism to make their own interpretations of what the consensus requires, subject to an ongoing dialogic reframing and re-evaluation of these interpretations.

### 3.1.1 Interface norms under polyarchic coordinate constitutionalism

The explanatory claim of constitutional pluralism is evident in polyarchic coordinate constitutionalism’s acknowledgment of the messy reality of coexisting, competing, cooperating normative orders (the explanatory claim), and—although the authors are not explicit on the point—seems to agree with the normative claim in that this

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<sup>91</sup> C Bateup ‘The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue’ (2005–2006) 71 *Brooklyn Law Review* 1109 at 1137 (footnotes omitted).

<sup>92</sup> *Marbury v Madison* (1803) 5 US 137. See further, RH Jackson *The Struggle for Judicial Supremacy* (New York NY: Knopf, 1941).

<sup>93</sup> Sabell and Gerstenberg (n 84) at 513.

incipient dialogic polyarchy is presented as being preferable to the full-scale, hierarchical constitutionalisation of the EU or ECHR orders. Moreover, the statement, quoted above, that coordinate constitutionalism ‘carefully builds on national constitutional traditions, but does not create a new, encompassing sovereign entity’<sup>94</sup> clearly casts the theory as a species of metaconstitutional pluralism. However, the theory is unique among metaconstitutional pluralisms in its conception of interface norms. Rather than positing specific, universally applicable interface norms in the abstract and in advance, it is the principles of overlapping consensus themselves that do the substantive work of regulating relations between the legal orders in the polyarchy, and this only at the point of application. Sabel and Gerstenberg note two essential features of an overlapping consensus. First, it is:

[A] freestanding political view, which draws on shared democratic ideals of the parties to the consensus and which can be affirmed by them on the basis of their opposing, but reasonable, comprehensive outlooks.<sup>95</sup>

Secondly, and crucially, it:

[A]rises in practice not from a simultaneous deduction from overlapping first principles to convergent conclusions, but rather from an ongoing historical interaction between the emergent, common political view and the diverse comprehensive views underlying it.<sup>96</sup>

The centrality of this *temporal* element, with its focus on the ongoing (and potentially permanent) dialogue between sites in the polyarchy, is what most distinguishes coordinate constitutionalism from the metaconstitutional pluralisms to be discussed in Sections 3.2 and 3.2 below, and what marks the theory as the least prescriptive of the three. The emergence of an overlapping consensus is an iterative three-stage process whereby certain (unspecified, varying) liberal principles first come to be accepted as ‘boundary conditions on political contest’.<sup>97</sup> There then emerges ‘agreement on the kind of public reason—the kinds of reasons acceptable in arguments—that applying liberal principles of justice involves’,<sup>98</sup> followed by the third stage, in which there is the secular dialogic reinforcement of these liberal principles by the use of public reason by actors within the polyarchy.<sup>99</sup> Sabel and

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<sup>94</sup> Ibid at 512.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid, citing Rawls (n 89) at 159ff and 161.

<sup>98</sup> Ibid, citing Rawls (n 89) at 162

<sup>99</sup> Ibid.

Gerstenberg write that this three-stage process is exactly what has happened in the sphere of European integration: first, ‘certain areas of decision making ... were taken off the agenda of exclusively domestic decision making and established as European supranational norms with primacy over domestic law’<sup>100</sup> both as a response to the European experience of war and in order to solve political and economic problems that states could not deal with alone. Secondly, the *Solange* dialogue was the means by which the ECJ began to take seriously fundamental rights protection. Thirdly, continuing dialogue regarding fundamental rights in the EU legal order—and in the legal order overseen by the ECtHR—constitutes the secular reinforcement of this overlapping consensus.<sup>101</sup>

It is therefore through the principles of overlapping consensus and its operationalisation by means of the *Solange* principle that specific interface norms emerge under coordinate constitutionalism over time, rather than being posited beforehand.<sup>102</sup> *Solange* is on this view ‘a master framework for creating other frameworks and with them the necessity and methods for establishing mutual regard of constitutional traditions.’<sup>103</sup> Though Sabel and Gerstenberg do not posit specific interface norms in advance, the claim of universality that is at the heart of the research question of this thesis is present in their theory: this master framework creates a ‘de-nationalised precedent for de-nationalising precedents, which, loosened from their moorings in national constitutional tradition, can become part of the overlapping consensus.’<sup>104</sup> Moreover, this conception of constitutional pluralism is broad enough to encompass not just the EU and its Member States but also the legal order of the Convention.

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<sup>100</sup> Ibid.

<sup>101</sup> Sabel and Gerstenberg give as examples Case C–341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I–11845 (*Laval*), Case C–438/05 *ITWF & FSU v Viking Line* [2007] ECR I–10806 (*Viking*) and Case C–144/04 *Mangold v Helm* [2005] ECR I–9981 in the EU context, and the case of *Goodwin v UK* (2002) 35 EHRR 18 with respect to the ECHR: Sabel and Gerstenberg (n 84) at 545. *Viking* and *Laval* will be discussed in depth in Chapter 3, below.

<sup>102</sup> In fact, Sabel and Gerstenberg explicitly disclaim the possibility of such norms being posited beforehand: ‘If this view captures the jurisgenerative logic of the *Solange* jurisprudence, there can be no meta-criteria such as the best fit of all constitutional cases ... by which to harmonise all decision making.’ (Sabel and Gerstenberg (n 84) at 550).

<sup>103</sup> Sabel and Gerstenberg (n 84) at 545.

<sup>104</sup> Ibid.

### 3.2 Maduro: contrapunctual law

The aim of Maduro's theory is twofold: the avoidance of constitutional conflict, followed by its effective management when it does arise.<sup>105</sup> This he attempts by analogy to the musical theory of counterpoint, whereby different voices exhibit both independence and interdependence simultaneously, resulting not in cacophony but in harmony.

Maduro describes his principles of contrapunctual law as:

the principles to which all actors of the European legal community must commit themselves and according to which the EU legal order must be structured as a system of law. This commitment is voluntary but it may still be presented as a limit to pluralism. It can nevertheless be argued that this is the limit to pluralism necessary to allow the largest extent of pluralism possible.<sup>106</sup>

This is quite a useful way of looking at the tightrope problem adverted to in Section 1.3 above, and it contains within it echoes of pragmatic arguments commonly found elsewhere in the law—for example, that limits to free speech are simultaneously ways of guaranteeing free speech, or that the review of legislation by unelected judges is in fact a method of preserving democracy.

Maduro explicitly does not set out to provide a completely theorised third way between national and European monism. Borrowing a phrase from Sunstein, he writes that the aim of the contrapunctual principles is to achieve 'incompletely theorised agreements',<sup>107</sup> whereby different actors may proceed from different bases and by different routes, but nevertheless come up with the same (or at least different but compatible) results. We can further see the absence of an attempt to construct a *via media* in the following statement:

Borrowing the language of systems theory, we may say that the problem of compatibility between different legal systems or sub-systems is presented as a problem of coordination whose only answer can be found in each system adapting its own set of perspectives to the possible contacts and collisions with other systems.<sup>108</sup>

Maduro's approach is therefore aimed at modification of the existing, internal perspectives of both national and EU apex actors, instead of leaving them intact and

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<sup>105</sup> M Poiares Maduro 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003).

<sup>106</sup> *Ibid* at 524, emphasis added.

<sup>107</sup> *Ibid* at 525.

<sup>108</sup> *Ibid*.

bridging them with an entirely new discourse or philosophy. In this sense it shares more of Walker's third claim of pluralism, that of epistemic indeterminacy, than does the more concrete theory of Kumm, discussed below at Section 3.3. However, the theory is still metaconstitutional in nature in that Maduro posits specific principles of contrapunctual law by which this internal modification of perspectives is to be achieved.

### 3.2.1 Interface norms under contrapunctual law

The principles of counterpoint are how Maduro conceives of interface norms under contrapunctual law. First, there is the principle of *pluralism itself*, which has two elements: (1) different legal orders must expressly acknowledge the existence and autonomy of their counterparts, which 'entails the recognition and adjustment of each legal order to the plurality of equally legitimate claims ... made by other legal orders',<sup>109</sup> and (2) 'pluralism requires such a discourse to take place in such a way as to promote the broadest participation possible.'<sup>110</sup> Here we see quite some overlap with Walker's requirement of inclusive coherence for constitutionalism,<sup>111</sup> that it must be attentive to its own democratic deficit, along with acceptance and endorsement of the explanatory and normative claims of constitutional pluralism.

The second contrapunctual principle is constituted by the requirements of *consistency* and *vertical and horizontal coherence*, whereby the decisions of courts across Europe must fit not only with the jurisprudence of the ECJ, but also with that of other national courts.<sup>112</sup> The reasons for this are practical as well as theoretical: Maduro notes that the sheer weight of the Court of Justice's caseload means that 'an increased amount of the burden of interpreting and applying EU law will fall *de facto* even if not *de iure* upon national courts.'<sup>113</sup> However, this increased (and necessary) role for national courts must not undermine the coherence and uniformity of the EU legal order and, for this reason, requires the development of a strong tradition of dialogue and mutual interest between national legal systems.

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<sup>109</sup> Ibid at 526.

<sup>110</sup> Ibid at 527.

<sup>111</sup> Walker (n 30) at 336.

<sup>112</sup> Note, however, the touch of hierarchy in Maduro's phraseology here—a pluralist may wish to include the ECJ along the horizontal axis, rather than admit to the existence of a vertical axis.

<sup>113</sup> Maduro (n 105) at 528.

The third principle, *universalisability*, is related to but separate from the second. National judgments on EU law should be structured so as to permit their application, in principle at least, not just in the deciding Member State but also in any other. Maduro suggests that the taking seriously of this requirement would lead national courts to internalise the consequences of their judgments not just for their own legal system, or for the EU legal order itself, but for the whole pluralist array of legal orders existing in Europe. This, Maduro claims, ‘will prevent national courts from using the autonomy of their legal system as a form of evasion and freeriding’,<sup>114</sup> and so create a virtuous cycle whereby courts across Europe cooperate in the development and application of EU law, without insult to the autonomy of either their own legal systems or that of the EU, thereby avoiding the danger of fragmentation that lead MacCormick from radical pluralism to pluralism under international law in the first place.

Finally, there is the principle of *institutional choice*. This recognises that an exclusive focus on the judgments and actions of courts is necessarily distorting, particularly when we adopt a pluralist conception of legal orders. Just as pluralism means that there is no one court of wise judges to whom we can turn when we need a final answer, nor is there one parliament, one government, or one administration that can decide legal, political and social issues. Pluralism necessarily multiplies and complicates the range of legal actors in and across polities, as well as the internal self-images of these actors; their relationships amongst themselves within polities; and their attitudes to other polities (and the actors these polities contain). Here Maduro refers to the dangers of what Neil Komesar has called single institutional analysis,<sup>115</sup> and suggests that multiple institutional analysis is a *requirement* of contrapunctual law. He does not, however, elaborate on the precise contours and meaning of this requirement.<sup>116</sup>

Before elaborating on the nature of these interface norms, let us outline one further conception of metaconstitutional pluralism.

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<sup>114</sup> Ibid at 530.

<sup>115</sup> Ibid at 530–531, citing N Komesar *Imperfect Alternatives—Choosing Institutions in Law, Economics and Public Policy* (Chicago IL: Chicago UP, 1994).

<sup>116</sup> The challenge is taken up, however, in J Komárek ‘Institutional Dimension of Constitutional Pluralism’ in Avbelj and Komárek (eds) (n 40) at 231.



### 3.3 Kumm: cosmopolitan constitutionalism

In his 1999 analysis of the relationship between the BVerfG and the ECJ, Mattias Kumm defined the two courts' opposing theses as 'European monism' in the case of the ECJ and 'democratic statism' on the part of the BVerfG, and proposed a *via media* in the form of 'European constitutionalism'.<sup>117</sup> He subsequently broadened his argument by not focusing exclusively on the jurisprudence of one national court and relabelled the positions as 'European constitutional supremacy', 'national constitutional supremacy' and 'constitutionalism beyond the state'.<sup>118</sup> Most recently, Kumm has expanded the analysis further in order to encompass the question of the relationship between the EU and the UN,<sup>119</sup> and has relabelled the positions as 'legalist monism',<sup>120</sup> 'democratic statism',<sup>121</sup> and 'cosmopolitan constitutionalism'.<sup>122</sup> These more recent labels will be used below.

Under legalist monism, EU law, of any kind, is supreme over national law in cases of conflict; only the ECJ may review EU norms, and national constitutional provisions may not be relied upon by national courts to justify any decision to disapply or suspend the application of EU law in any given state—a decision that national courts have no jurisdiction to make in the first place.<sup>123</sup> Of course, this is merely a succinct restatement of a long line of ECJ case law,<sup>124</sup> which is mostly—but by no means always<sup>125</sup>—followed by national supreme and constitutional courts.

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<sup>117</sup> M Kumm 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *Common Market Law Review* 351.

<sup>118</sup> Kumm (n 62) *passim*.

<sup>119</sup> A move prompted by the ECJ's decision in *Kadi* (n 85): see M Kumm 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism' in Avbelj and Komárek (eds) (n 40) at 39.

<sup>120</sup> Kumm (n 119) at 43–49.

<sup>121</sup> *Ibid* at 49–54.

<sup>122</sup> *Ibid* at 54–63.

<sup>123</sup> Kumm (n 117) at 354, citations omitted; (n 119) at 43

<sup>124</sup> See, *inter alia*, *Costa* (n 5); Case 43/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629; Case 314/85 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

<sup>125</sup> See, most recently, the judgment of the Czech Constitutional Court in the 'Slovak pensions' case: Judgment of 31 Jan 2012, Pl ÚS 5/12, *Slovak Pensions XVII*, analysed in J Komárek 'Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*' (2012) 8 *European Constitutional Law Review* 323.

Conversely, democratic statism holds that national apex courts, as creatures of their domestic constitution, are bound to regard that constitution as the font of all legal authority. This statism is *democratic*<sup>126</sup> because it is justified by reference to democratic constitutional theory:

State law ultimately derives its authority from ‘We the People’ imagined as having acted as a *pouvoir constituant* to establish a national Constitution as a supreme legal framework for democratic self-government. International law, on the other hand, derives its authority from the consent of states.<sup>127</sup>

The consequences of democratic statism are twofold: first, the national constitution, being the supreme law of the land, is the sole point of reference for determining whether and under what circumstances international law (which on this analysis must include EU law<sup>128</sup>) is to be applied within the state. The legal universe is therefore dualist in its structure, and ‘[t]he only relevant question is how to interpret the constitution with regard to the status it ascribes to EU law.’<sup>129</sup> Secondly, the lack of authority derived from ‘We the People’ in the international sphere means that international law remains afflicted with an ‘aura of illegitimacy’.<sup>130</sup>

Kumm’s third approach, cosmopolitan constitutionalism, derives from that of what he calls the ‘*sui generis*’. Here, the important question is not whether the final say rests with Luxembourg or with national courts. Instead, the emphasis is on the procedural and jurisprudential factors (that is—though he did not initially use the phrase—the metaconstitution) that may serve to prevent constitutional conflict in the first place: the problem of the final say is thereby left unresolved because it is a problem that should never arise.<sup>131</sup> The problem with the *sui generis* approach for Kumm is that it is undertheorised and, as a result, cannot adequately answer the question of what kind of legal order the EU actually *is*. Here, the present author agrees, and recalls the further problem, noted by Tom Eijsbouts and others, that the language of ‘*sui generis*-ness’ serves only to ‘veil, or even wall off, the Union as a paradise for single-issue experts and officials, inaccessible to the common man and

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<sup>126</sup> Rather than ‘conceptual’ or ‘realist’: see Kumm (n 119) at 47–48.

<sup>127</sup> Kumm (n 119) at 48.

<sup>128</sup> *Ibid* at 49–50.

<sup>129</sup> Kumm (n 62) at 266.

<sup>130</sup> Kumm (n 119) at 49.

<sup>131</sup> Kumm (n 62) at 266–7. Kumm places Maduro’s ‘contrapunctual’ conception of pluralism, discussed below at Section 4.2, under this rubric.

sometimes impervious to common sense’,<sup>132</sup> a critique that ties in directly with Walker’s account of the alleged limits of constitutionalist discourse.<sup>133</sup>

Kumm is essentially sympathetic to the *sui generis* approach,<sup>134</sup> and it is in response to its theoretical shortcomings that he develops his theory of cosmopolitan constitutionalism, under which ‘a set of *universal principles* central to liberal democratic constitutionalism undergird the authority of public law and determine which norms take precedence over others in particular circumstances.’<sup>135</sup> As will be immediately clear, Kumm’s conception of cosmopolitan constitutionalism is a species of (meta)constitutional pluralism, seeking, through his various principles, to provide precisely the Archimedean point, the metaconstitutional norms about constitutional norms, from and through which constitutional conflict can be resolved or avoided in the postnational legal landscape. In positing specific principles for the avoidance and ultimate resolution of conflict, it is perhaps the most prescriptive accounts of metaconstitutional pluralism in the literature. Though it might seem that cosmopolitan constitutionalism owes rather more to democratic statism than to legalist monism—indeed, Kumm tacitly admits as much when he states that ‘[f]or so long as structural deficits remain on the level of the [EU], [EU] law will [not be], *and should not be*, recognised by national courts as the supreme law of the land without qualification’<sup>136</sup>—it should not be supposed that cosmopolitan constitutionalism is a kind of reactionary constitutional nationalism, insufficiently cognisant and respectful of the authority of EU law. Indeed, Kumm explicitly does *not* regard heterarchy as being always and in every case the best way of conceptualising the relationships between legal orders:

[C]onstitutional pluralism is no panacea and is not always attractive. ... [It] is not inherently superior to hierarchical constitutionalism. Whether it is or not itself depends on how potentially competing constitutional principles play out in particular contexts.<sup>137</sup>

Cosmopolitan constitutionalism therefore serves a dual purpose: it provides principles that allow us to determine, first, when heterarchy is preferable to hierarchy

<sup>132</sup> WT Eijsbouts, LFM Besselink, JH Reestman and JW Sap ‘Preface’ (2005) 1 *Journal of European Constitutional Law* 1 at 2.

<sup>133</sup> Walker (n 30) at 319–339.

<sup>134</sup> Kumm (n 62) at 291.

<sup>135</sup> Kumm (n 119) at 54, emphasis added.

<sup>136</sup> Kumm (n 62) at 301, emphasis added.

<sup>137</sup> Kumm (n 119) at 65.

in the relations between legal orders, and, second, how the heterarchical relations should be structured in those cases where heterarchy is in fact preferable. Kumm summarises this dual function as follows:

The refusal of a legal order to recognize itself as hierarchically integrated into a more comprehensive legal order is justified, if that more comprehensive order suffers from structural legitimacy deficits that the less comprehensive legal order does not suffer from. The concrete norms governing the management of the interface between legal orders are justified if they are designed to ensure that the legitimacy conditions for liberal-democratic governance are secured. In practice that means that there are functional considerations that generally establish a presumption in favour of applying the law of the more extensive legal order over the law of the more parochial one, unless there are countervailing concerns of sufficient weight that suggest otherwise.<sup>138</sup>

### 3.3.1 Interface norms under cosmopolitan constitutionalism

The interface norms of cosmopolitan constitutionalism are fourfold: ‘the formal principle of *legality*, [the] jurisdictional principle[] of *subsidiarity*, the procedural principle of *democracy*, and the substantive principle of the *protection of basic rights or reasonableness*.’<sup>139</sup>

The keystone of these principles is legality, by which Kumm means that ‘national courts should start with a strong presumption that they are required to enforce EU law, national constitutional provisions notwithstanding’,<sup>140</sup> a presumption informed by the ECJ’s (not at all unfounded) claim that any national review of EU norms would threaten the effective and uniform nature of those norms, and would undermine the entire scheme of the Treaties. Here we see the operationalisation of what we could call Kumm’s ambivalence between hierarchy and heterarchy. As we saw in Section 1, the doctrines of primacy and direct effect were neither fashioned out of whole cloth nor sprung on unsuspecting Member States, and any deviation from their requirements must be justified.

The first principle that may justify such a deviation is subsidiarity, which provides a basis for national review in cases of unjustified EU usurpation of national competences. Writing in 2005, Kumm noted that:

<sup>138</sup> Kumm (n 119) at 65, emphasis removed.

<sup>139</sup> Kumm (n 62) at 299, emphasis added.

<sup>140</sup> Ibid.

Much will depend on how the procedural and technical safeguards of the Constitutional Treaty will work in practice once the Treaty has been ratified. If the structural safeguards will succeed in establishing a culture of subsidiarity carefully watched over by the Court of Justice, then there are no more grounds for national courts to review whether or not the EU has remained within the boundaries established by the EU's constitutional charter.<sup>141</sup>

Of course, the Constitutional Treaty never came into force, but the safeguards of which Kumm wrote are now to be found in the revised Subsidiarity Protocol and the new Protocol on the Role of National Parliaments.<sup>142</sup> There is a broad and deep literature on the subsidiarity principle,<sup>143</sup> which is beyond the scope of this thesis, but we can say with a degree of confidence that the 'culture of subsidiarity carefully watched over by the Court of Justice' spoken of by Kumm does not yet exist.<sup>144</sup>

Kumm's second interface norm is the principle of democracy, or democratic legitimacy.<sup>145</sup> Of course, stated baldly like this, such a principle is far too broad to give us any guidance. Kumm therefore narrows down its implications:

Given the persistence of the democratic deficit on the European level ... national courts continue to have good reasons to set aside EU Law *when it violates clear and specific constitutional norms that reflect essential commitments of the national community*.<sup>146</sup>

The preference for the principle of legality, and thus the application of EU norms notwithstanding national specificities, is illustrated by the conditions Kumm attaches to the disapplication of EU norms under the principle of democracy: by 'clear and specific' he means that that the national norm in question 'has in fact been legislated by the constitutional legislator',<sup>147</sup> and not merely derived through interpretation by a constitutional court from an unclear or vague constitutional provision. Moreover,

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<sup>141</sup> Ibid at 300.

<sup>142</sup> Protocol (No 1) on the Role of National Parliaments in the European Union [2010] OJ C 83/203 and Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2010] OJ C 83/206.

<sup>143</sup> See A Estella *The EU Principle of Subsidiarity and its Critique* (Oxford: OUP, 2002) and references therein. See further, G Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 *Common Market Law Review* 63; M Kumm 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 12 *European Law Review* 503; R Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?' (2009) 46 *Cambridge Law Journal* 525.

<sup>144</sup> A cautiously optimistic view in the context of free movement law is given in T Horsley 'Space to Breathe: Subsidiarity, the Court of Justice and EU Free Movement Law' (PhD Thesis, University of Edinburgh, 2012, available at <[www.era.lib.ed.ac.uk/bitstream/1842/6390/1/Horsley2012.pdf](http://www.era.lib.ed.ac.uk/bitstream/1842/6390/1/Horsley2012.pdf)>).

<sup>145</sup> Kumm (n 62) at 300

<sup>146</sup> Ibid, footnote omitted, emphasis in original.

<sup>147</sup> Ibid at 298, emphasis removed.

even if clear and specific, such a norm may not be a constitutional essential: a close analysis of the legislative history and public function of the norm would be necessary to establish whether it is in fact.<sup>148</sup>

The third and final interface norm is that of the protection of fundamental rights. As Kumm makes clear, this is essentially a recitation and condensation of the *Solange* doctrine of conditional recognition: ‘If ... the guarantees afforded by the EU amount to structurally equivalent protections, then there is no more space for national courts to substitute the EU’s judgment on the rights issue with their own.’<sup>149</sup>

As will by now be clear, all of these justificatory interface norms are weighted towards the threshold principle of legality: taken in reverse, Kumm concedes that the EU’s fundamental rights protection is (in general) structurally equivalent to that of the Member States; the requirements of clarity, specificity and essentiality heavily circumscribe the potential ambit of the principle of democracy; and the principle of subsidiarity is seen as being potentially self-extinguishing in the event that the EU develops a subsidiarity ‘culture’ overseen by the ECJ. Moreover, the principles of cosmopolitan constitutionalism are altogether more prescriptive as interface norms than those of contrapunctual law. Maduro’s requirements of pluralism, consistency and vertical and horizontal coherence, universalisability and institutional choice—though they may guide a normative actor in shaping his or her institutional viewpoint, or in structuring his or her judgments—provide altogether less concrete guidance in cases of constitutional conflict. Whereas Kumm’s principles of subsidiarity, the protection of clear, specific and essential national norms, and the protection of fundamental rights are not themselves step-by-step guides for resolving constitutional conflict, they do provide much firmer bases from which a judge faced with such a conflict could proceed. However, what unites Kumm and Maduro’s theories is greater than that which divides them. They take as given Walker’s explanatory claim of pluralism, and are equally enthusiastic as to the normative desirability of such a configuration. Crucially, they both seek to extract or create, whether from historical legal practice or from first principles—or some combination of the two—a metaconstitutional frame for the management and resolution of

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<sup>148</sup> Ibid.

<sup>149</sup> Ibid at 299.

conflict. For Kumm, this can be achieved by a set of jurisprudential principles separate from the competing legal orders, whereas Maduro focuses more on the internal rules that must be developed within the epistemic confines of each system.

But all these principles have another aspect, crucial for the present analysis: Kumm writes that his principles ‘can be applied to the interpretation of constitutions *in all Member States and the European legal order [itself]*’.<sup>150</sup> Unlike Kumm, Maduro is not explicit on this point, but the universality of the principles of counterpoint is inherent in their very nature, particularly in the case of the principles of vertical and horizontal coherence, and universalisability. Contrapunctual law is a theory of EU law, and these are principles that, for Maduro, can be—and ought to be—put into effect throughout the Union. But in both cases, is this really so?

For Kumm, this ‘universal applicability’<sup>151</sup> of cosmopolitan constitutionalism and the interface norms thereunder is both a strength of the theory and a weakness. The weakness ‘lies in the fact that it does not guarantee that the results such an interpretation leads to will be the same in every legal order’.<sup>152</sup> But this admission of non-universality as to result would seem at least partially to undermine the prior claim of universality as to application.<sup>153</sup> Moreover, in his development of the principles, Kumm does not cast his analytical net particularly widely, and the jurisprudence of the BVerfG and the text of the *Grundgesetz* are the primary resources from which he draws. In discussing clear, specific and essential national commitments, Kumm does mention the Greek Constitution’s exclusive recognition of higher education from public, rather than private, institutions<sup>154</sup> and the Irish Constitution’s protection of the right to life of the unborn,<sup>155</sup> but does not go into detail. The question thus remains as to how universal these interface norms really are, and it is this question which the thesis seeks to address.

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<sup>150</sup> Ibid at 300.

<sup>151</sup> Ibid, see also Kumm (n 119) at 54.

<sup>152</sup> Kumm (n 62) at 300.

<sup>153</sup> Maduro writes of precisely the opposite happening, noting that the principles of contrapunctual law allow for incompletely theorised agreements, whereby actors may proceed from different bases but still come up with similar results (see Section 3.2.1 above).

<sup>154</sup> Art 16, Greek constitution (Kumm (n 62) at 297).

<sup>155</sup> Art 40.3.3°, Irish constitution (Kumm (n 62) at 297).

## 4 TWO PROBLEMS OF METACONSTITUTIONAL PLURALISM

Having set out these three conceptions of metaconstitutional pluralism, there are two important problems that must be addressed. The first is the claim that pluralism, whether metaconstitutional or radical, poses a threat to the rule of law. This is a serious charge and, as we are about to see, it is not entirely without validity. However, it is ultimately better regarded as a factor that may lead us in certain circumstances to prefer a hierarchical conception of legal orders, rather than as a trump that leads us away from heterarchy in every instance. The second is the issue of the universality of interface norms which was adverted to throughout Section 4. It is this, second issue that forms the central research question of this thesis.

### 4.1 Workability, chaos and the rule of law

The most prominent critic of constitutional pluralism is perhaps Julio Baquero Cruz, who writes that:

[W]e should never feel at home with a ‘system’ that betrays many of the basic values of constitutionalism and the rule of law. We have a pluralist ‘system’, that may be true in descriptive terms insofar as the supremacy case-law of the Court is not unconditionally and systematically respected in all the Member States. We may want to understand it and also to improve it. But should we also justify it in normative terms and try to perpetuate it? For radical legal pluralism not only justifies the past and the present erosions of the rule of law in the EU: it also acts as a deforming lens that bars any future legal development in a non-pluralist direction.<sup>156</sup>

While in this instance Cruz directed his criticism specifically at radical pluralism, he also applies it more generally, noting that:

[W]ithout some measure of hierarchy, the ‘contrapuntal’ law of Miguel Maduro may easily degenerate into dissonance or outright cacophony, with negative consequences for the legal situation of individuals.<sup>157</sup>

Constitutional pluralism would certainly be an unorthodox sort of constitutional theory if it leads, inexorably, to the destruction of the rule of law. However, a number of points can be made. First, the idea that pluralism—and more specifically, legal heterarchy—leads to the destruction of the rule of law because of the possibility of constitutional clashes ignores a large part of what pluralism, and in particular

<sup>156</sup> J Baquero Cruz ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’ (2008) 14 *European Law Journal* 389 at 417, citation omitted.

<sup>157</sup> *Ibid* at 414.



metaconstitutional pluralism, is actually concerned with—the *avoidance* of such clashes. Moreover, this avoidance is not attempted through some rough-and-ready *modus vivendi*, but by a genuine attempt to determine—and give a sound theoretical basis to—the jurisprudential rules and the adjudicative principles whereby rupture is postponed indefinitely, in favour of a dialogic mutual articulation and resolution of difference.

Secondly, there is the possibility that, by regarding a monist, hierarchical conception of the EU legal order as the only conceivable guarantor of the rule of law, Baquero Cruz simply overstates his case. Kumm put this objection nicely:

[T]he law is being disobeyed a lot of the time, in lots of systems, in lots of situations, by a lot of people. And it tends not to immediately lead into a civil war or anarchy. So, just as a sociological point, the practice of law tends to be pretty robust. ... [I]t is difficult not to be amused by the rhetoric of disaster, mutually assured destruction, complete disintegration etc. ... I never understood why only a monist construction of the legal world and an unqualified submission to the authority of law could conceivably save humanity from disaster.<sup>158</sup>

Less snappy, but somewhat more convincing, is Kumm's earlier analysis of what he calls the Cassandra and Pangloss scenarios.<sup>159</sup> If Baquero Cruz and Cassandra are correct, the review of EU norms by national courts leads to the Union devolving into a talking shop, abandoning any pretence at something more. Why engage in lawmaking if you know that your law will not be followed? Alternatively, if Dr Pangloss has his way, three substantial benefits would accrue to the Union as a result of acknowledging national court jurisdiction to review EU norms. First, oversight by national courts might enhance the democratic quality of EU legislation and encourage more rigour in the ECJ's exercise of its own jurisdiction regarding Union competence and fundamental rights. Second, the horizontal discourse between state courts of the kind alluded to above by both Kumm and Maduro would become a reality. Third, national courts could act as catalysts for a more informed public and enhanced popular debate on Union political issues. However, these possibilities are not conclusive—they are just that, possibilities. Moreover, they may be more applicable to the structurally 'looser' setting of the relationship between the ECtHR

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<sup>158</sup> Kumm (n 119) at 29.

<sup>159</sup> Kumm (n 117) at 359–62.

and nation states: they do not address the core issue in the EU context that the EU is a legal system based on primacy and direct effect.

Baquero Cruz describes pluralism as a ‘deforming lens that bars any future legal development in a non-pluralist direction’.<sup>160</sup> However, the same criticism could well be made in reverse: an insistence on a strictly hierarchical conception of the relationship between EU and national law might tend to act as a ‘deforming lens’, with its focus not on constitutional pluralism’s quotidian aspect—that of conflict avoidance—but on the possible nuclear scenario of total breakdown in communication and comity. Nor, as Kumm has noted, is it necessarily the case that this is more likely under constitutional pluralism than under rigid hierarchical constitutionalism. The argument in defence of the rule of law may well be an excellent reason not to become too attached to the heterarchical vision of constitutional relationships in Europe. But the metaconstitutional species of pluralism outlined here go far beyond simple reliance on (judicial) politics. It is too broad, then, to apply to all of the various theories of constitutional pluralism—both the constitutionally pluralist and the plurally constitutionalist, the radical and the metaconstitutional—the charge that the rule of law will inexorably be damaged.<sup>161</sup> Such concern *might* cause us to move towards and settle upon a conception of the relationships which is *more constitutionalist*—or, in the metaconstitutional frame, it may cause us to attach significant weight to the importance of the EU doctrines of primacy and direct effect—but this does not necessarily collapse us back to the former world of rigidity and hierarchy. It merely reminds us that we are dealing with serious matters, and should not be too keen to throw off decades or even centuries of experience in seeking to make better sense of the modern world. The criticism can then be reconceived: not as a trump, which forces us back into old ways of thinking, but as a necessary and important part of the analysis in seeking to theorise and justify the present constitutional configuration in Europe.

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<sup>160</sup> Baquero Cruz (n 156) at 417. Again, Cruz directs his criticism here at what he calls radical pluralism, but it is clear from the context that his understanding of ‘radical’ pluralism is broader than the sense in which the term is used throughout this chapter, and includes the metaconstitutional theories.

<sup>161</sup> For a defence of an explicitly radical conception of pluralism from the criticism from the rule of law, see Krisch (n 42) at 276–285.

## 4.2 The universality of interface norms

We saw, in Section 4, the different conceptions of interface norms under the various models of metaconstitutional pluralism. Fittingly, though the conceptions differed—from Sabel and Gerstenberg’s evolutive, dialogic account of the emergence of interface norms through the jurisgenerative mechanism of the *Solange* principle; through Maduro’s modification of the attitude and self-images of judicial actors; to Kumm’s more prescriptive account of specific adjudicative principles—there is something of an ‘overlapping consensus’ present in the literature: for example, regarding the importance of the mutual recognition of each system’s autonomy or of the *Solange* principle of conditional recognition.

In particular, however, we saw the claim that these interface norms, whatever form they may take, are universal in their applicability. This claim was an explicit feature of the work of Kumm, but was also an inherent part of the theories of Maduro and of Sabel and Gerstenberg. Problematically, all of these writers draw on similar sources in developing their notions of metaconstitutional pluralism—the jurisprudence of the ECJ, the ECtHR and (especially) the BVerfG—but without focusing much attention on how the specific, contingent relationships between the judicial actors in question may have influenced the choice and application of interface norms in a given case.

This problem is relevant in two dimensions. First, ‘horizontally’, it is arguable that the relationship between the ECJ and the ECtHR is perhaps more hierarchical in nature than is sometimes thought, even prior to the EU’s impending accession to the Convention. Moreover, pending this accession, states are interim actors in this relationship, and are important sites of constitutional power through which the relationship between the two European courts is mediated. Does this extra element change the choice and application of interface norms in a given case of conflict between legal orders? Secondly, ‘vertically’, there is the question of the relative importance of each national polity within the broader legal orders, EU or ECHR, notwithstanding the formal principle of equality between states. The BVerfG, the jurisprudence of which is of foundational importance to metaconstitutional pluralism, is a particularly powerful constitutional actor in a particularly powerful European

state. Can doctrines, toolkits, rules and principles developed largely with reference to its jurisprudence be transplanted, unchanged, right across the European polyarchy?

The research question to be addressed in this thesis is therefore as follows: *Are the interface norms between legal orders the same regardless of the relationship between the orders themselves and between the institutional actors involved?*

In this regard, MacCormick wrote that '[t]he settled, positive, character of law is jurisdiction-relative. ... Moral judgments, however personal and controversial, are not in this way relativistic ... These judgments apply universally'.<sup>162</sup> But the kinds of issues at play in the various conceptions of interface norms—Kumm's concern for democratic legitimacy; Maduro's principle of universalisability as a safeguard against freeriding; Sabel and Gerstenberg's secular, self-reinforcing dialogue on fundamental rights—are frequently both legal and moral in nature. Are they, and should they, therefore be universal or particular in their formulation, in their application, in both, or in neither? Walker notes that in the development of his ideas of constitutional pluralism:

MacCormick was searching for some notion of a unity of law standing beyond particular legal systems, but a unity which was not conceivable in terms of a new system to which the original legal systems would inevitably become subordinate[.]<sup>163</sup>

Precisely the same thing could be said of the metaconstitutional pluralists under discussion here. Walker notes—and discounts—one method by which this unity could be achieved, the 'covering-law universalism' of Michael Walzer,<sup>164</sup> which entails:

[A] version of legal unity so strong, so insistent on subordinating the local and particular to the epistemic and moral authority of the global and universal, that it does not countenance internal differentiation and division at all.<sup>165</sup>

A more justifiable possibility is Walzer's 'reiterative universalism',<sup>166</sup> where:

<sup>162</sup> MacCormick (n 1) at 14–15, citing N MacCormick 'Comment [on G Postema's 'The Normativity of Law']' in R Gavison (ed) *Issues in Contemporary Legal Philosophy* (Oxford: Clarendon, 1987) at 105–13.

<sup>163</sup> N Walker 'Reconciling MacCormick: Constitutional Pluralism and the Unity of Practical Reason' (2011) 24 *Ratio Juris* 369 at 379.

<sup>164</sup> M Walzer 'Nations and Universe' in D Miller (ed) *Thinking Politically: Essays in Political Theory* (New Haven CT: Yale UP, 2007) at 187.

<sup>165</sup> Walker (n 164) at 379.

<sup>166</sup> *Ibid* at 184.

[T]here is a general or universal quality to the norms that integrate the pluralist configuration. Yet the articulation of these common norms is not seen as a matter of simply ‘reading off’ the local version from some inert universal covering-law. Rather, it is a continuous and progressive process of recontextualization in which the universal is not just realized but also reshaped by the particular.<sup>167</sup>

My hypothesis is that interface norms under metaconstitutional pluralism are not universal, but rather context dependent. The intention in the Chapters that follow is similar to Walzer’s reiterative universalism: to apply a model of metaconstitutional pluralism to specific examples of constitutional conflict in Europe and to see whether, and how, these ostensibly universal interface norms can be ‘not just realized but also reshaped by the particular’.

## 5 OVERVIEW OF METHODS AND STRUCTURE

### 5.1 A working model of metaconstitutional pluralism

The model of metaconstitutional pluralism that I use in the analysis that follows is closely based on that of Sabel and Gerstenberg. In analytical terms, it regards the legal configuration in Europe today as a deliberative polyarchy, wherein three legal orders—state, EU, and ECHR—each make plausible claims as to their own autonomy. However, this is done without—at least from an external, freestanding perspective—any of the legal orders having entirely subsumed themselves under the authority and logic of any of the others. On this view, ‘the constitution’ in any given EU Member State is not just the national constitution, but rather the national constitution, the Convention, and the legal order of the EU taken together. The relationship between the orders is interactive and dialogic, and may be regarded as hierarchical or heterarchical, depending on the specific circumstances. This holistic constitutional construct is depicted in the thesis as *the triangular constitution*, with the legal orders themselves forming the vertices of the triangle, and the relationship and interactions between them constituting the triangle’s sides.

Where the model breaks with that of Sabel and Gerstenberg is in its conception of interface norms. Whereas Sabel and Gerstenberg expressly disclaim the possibility

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<sup>167</sup> Walker (n 163) at 380.

of there being any ‘meta-criteria ... by which to harmonise all decision making’,<sup>168</sup> preferring instead to rely on the jurisgenerative possibilities of inter-institutional dialogue, I instead leave that question open while undertaking the analysis that follows. This agnosticism allows the model to comprehend and probe the conceptions of interface norms under cosmopolitan constitutionalism and contrapunctual law as well as the principle of overlapping consensus. Being the most prescriptive account in the literature, and the one in which the claim to universality is at its most explicit and its most central, the work of Kumm will be at the heart of the inquiry. Moreover, though Kumm and Maduro’s theories were specifically developed within the context of the EU-Member State relationship, imagining the triangular constitution as a deliberative polyarchy allows us to broaden the analysis to include the Convention system while still encompassing and comprehending the interface norms formulated within that bilateral relationship, and enables us to investigate the extent to which these norms—and, conceivably, others as yet unidentified—may also play a part in the state-Convention and Convention-Union relationships. For the reasons outlined in the Introduction to this thesis, the Member State chosen as the specific setting for the analysis is Ireland.

## 5.2 Chapter outline

The investigation of the universality of interface norms will proceed in three parts, focusing on specific instances of constitutional conflict, actual and potential, within the triangular constitution.

Chapter 2 parses the relationships between the legal orders in the ‘vertical’ frame: the nature of the relationships between Ireland and the EU, and Ireland and the ECHR; the means by which the norms of these non-state legal orders are received within the domestic order; and the question of priority in cases of conflict, along with the choice and application of interface norms in such cases.

Chapter 3 examines the ‘horizontal’ side of the triangle, that is, the relationship between the Union and the Convention. Importantly, though this relationship is characterised as being ‘horizontal’, there is an important ‘triangular’ element to it,

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<sup>168</sup> Sabel and Gerstenberg (n 84) at 550.

given the as yet indirect but concrete nature of the linkages between the systems, and the status of states as intermediaries between the two European orders.

Chapter 4 is the broadest in scope, and investigates a specifically ‘triangular’ instance of interaction between all three orders: the issue of the regulation of abortion in Ireland. Importantly, the substantive question of the rights and wrongs of abortion is largely (but not necessarily entirely) irrelevant for this analysis. Instead, the focus is on the metaconstitutional aspects: how each legal order conceives of its role, its rights and its duties; and how these potentially competing conceptions find expression in interface norms.

Chapter 5 draws the three frames together, with a theoretical examination of what became clear when the inter-order relationships were looked at in isolation, and what becomes clear when all three are pulled together into one holistic frame. Finally, a brief conclusion restates the answer to the research question of interface norm universality, in light of the empirical evidence in Chapters 2–4, and the theoretical analysis in Chapter 5: that the norms are not in fact universal. As a result, theories of metaconstitutional pluralism need to pay much greater attention to the specific nature of any given constitutional order and its relationship with other orders in the constitutional heterarchy.

## CHAPTER 2: THE VERTICAL FRAME

### INTRODUCTION

This Chapter parses the relationships between the legal orders of the triangular constitution in the ‘vertical’ frame: the two sides of the triangle that deal with the relationship between state and non-state legal orders. As explained in Chapter 1, the central research question of the thesis concerns the universality or otherwise of metaconstitutional interface norms, but this question cannot be engaged with (or answered) without first demonstrating that the conception of the three legal orders as being part of a deliberative polyarchy is in fact accurate. Accordingly, along with a discussion of interface norms, this chapter also aims to demonstrate the correctness of such a conception, and will proceed in two major parts.

Section 2 seeks to set out the precise means by which the Irish constitutional order was ‘opened’ to that of the EU. In demonstrating the non-hierarchical nature of the relationship between these two orders, it examines two instances of the national constitutional review of EU norms—*ex post* and *ex ante*—and engages in a preliminary analysis of the nature of the interface norms employed.

Section 3 performs the same function with respect to the relationship between the Irish legal order and that of the ECHR, setting out the evolution of the relationship from being a standard dualist relationship between national and international legal orders to something more integrated and interactive.

The Chapter concludes by suggesting that the relationship between the national system and both European systems is best regarded as being heterarchical; that the three systems form part of a tripartite deliberative polyarchy; and that rather than being simple applications of the universal metaconstitutional interface norms posited by Kumm and Maduro, the norms that regulate the relationships between the orders are frequently *constitutional* or *legislative* in nature. That is, they are conflict-of-laws rules internal to the national legal system, and particular to that system. Whether (and how) they can be *metaconstitutionalised*—transplanted from their national site



of origin, departicularised, and made relevant to different national sites in the polyarchy—remains an open question.

## 1 THE TERMS OF ENGAGEMENT BETWEEN IRISH LAW AND EU LAW

### 1.1 Incorporating EU law in Ireland

#### 1.1.1 A closed legal order

The classical story of the constitutional evolution of the EU was recounted in Chapter 1. Quite aside from that narrative of judicial constitutionalisation, the Communities consisted of various institutions from the very beginning—an Assembly (later a Parliament), a Commission, a Council and a Court—which were to exercise very real normative power of a legislative, executive, judicial or administrative character, necessarily implying the delegation or transfer of some aspects of these powers from national institutions to those of the Communities. As originally enacted in 1937, the Irish Constitution contained a number of provisions that would complicate—if not definitely exclude—membership of an international organisation of the scale, depth, and breadth of the Communities and their later incarnations.<sup>1</sup>

First is the general issue of the source of constitutional authority, and the identity of those entitled to exercise it. **Article 6** of the Constitution states that:

All powers of government, legislative, executive and judicial derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.<sup>2</sup>

Having identified ‘the people’ as the source of all constitutional power (leaving the role of God to one side as essentially unknowable), and having invoked tripartite separation of powers theory to divide the powers of government into legislative, executive and judicial, Article 6.2 goes on to state that ‘[t]hese powers of government are exercisable only by or on the authority of the organs established by

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<sup>1</sup> DR Phelan *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Dublin: Round Hall Sweet & Maxwell 1997) at 330–1. Note that the numbering of some provisions of both the Constitution and the Treaties has changed since the enactment of the Constitution and since Ireland’s accession to the Union in 1972/73. For the sake of clarity, the current numbering as at November 2013 will be used throughout.

<sup>2</sup> Article 6.1.

this constitution.’ The particular institutions invested with governmental power are specified in later articles, following the tripartite scheme. As regards the legislative power, **Article 15.2.1**<sup>o</sup> vests the ‘sole and exclusive power of making laws’ in the Oireachtas. **Article 28.2** vests the executive power in the government, subject to the other provisions of the Constitution; and **Article 29.4.1**<sup>o</sup> vests the executive power insofar as it relates to external relations in the government in accordance with Article 28. **Articles 34–37**—grouped under the heading ‘The Courts’—deal with the judicial function. They provide that ‘[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution’;<sup>3</sup> that the High Court shall have ‘full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal’;<sup>4</sup> and that the Supreme Court is the final court of appeal, whose decisions ‘shall in all cases be final and conclusive’.<sup>5</sup> Finally, there is the Constitution’s dualist attitude to international law, **Article 29.6** providing that ‘[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.’

As will be clear, a dualist national constitutional scheme of this sort is essentially ‘closed’ in nature. It identifies ‘the people’ as the source of all governmental authority; vests the exercise of that authority in named institutions set up by the Constitution itself; and makes the domestic applicability of international law conditional on the specific incorporation of that law into the national legal system. A self-contained and self-referential normative order such as this is essentially incompatible with the autonomous and autochthonous jurisgenerative power of the Communities, as they then were. It was therefore clear that some form of amendment to the Irish Constitution would be necessary to ‘open’ the constitutional order in order to allow for Community membership.

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<sup>3</sup> Article 34.1.

<sup>4</sup> Article 34.3.1<sup>o</sup>.

<sup>5</sup> Article 34.4.6<sup>o</sup>. Note that the Thirty-third Amendment of the Constitution (Court of Appeal) Bill 2013 was approved in a referendum on 4 October 2013. Accordingly, a new Court of Appeal, situated between the High and Supreme Courts in the judicial hierarchy, will be established in the near future.

### 1.1.2 Opening the legal order—a three-pronged approach

Accession to the Communities was achieved, and EC law made domestically effective, by three legal mechanisms: a constitutional ‘licence to join’, a constitutional ‘exclusion clause’, and a legislative measure giving effect to EC law within the jurisdiction.<sup>6</sup> Each of these will be set out in turn.

The first two were contained within the Third Amendment of the Constitution Bill 1972, which proposed the insertion into the Constitution of the following provision, originally as Article 29.4.3<sup>o</sup>:

The State may become a member of the European Coal and Steel Community ... , the European Economic Community ... and the European Atomic Energy Community ... . *No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.*

The first sentence of the Third Amendment has been termed the ‘licence to join’,<sup>7</sup> and has repeatedly been updated by referendum in order to enable the ratification of subsequent EU treaties.<sup>8</sup> The second sentence—italicised above—has been termed the ‘constitutional exclusion clause’,<sup>9</sup> and is now to be found on its own in Article 29.4.6<sup>o</sup>.<sup>10</sup> The Third Amendment Bill was passed by both Houses of the Oireachtas, triggering a referendum in accordance with the terms of Article 46.<sup>11</sup> This was held on 10 May 1972, and was approved by 83% of the electorate, on a turnout of 71%.<sup>12</sup>

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<sup>6</sup> Contemporary accounts of the instruments of accession are given in J Temple Lang ‘Legal and Constitutional Problems for Ireland of Adhesion to the EEC Treaty’ (1972) 9 *Common Market Law Review* 16; and M Robinson ‘The Irish European Communities Act 1972’ (1973) 10 *Common Market Law Review* 352.

<sup>7</sup> *Crotty v An Taoiseach* [1987] IR 713 at 756 *per* Barrington J.

<sup>8</sup> As the Constitution now stands, Art 29.4.3<sup>o</sup> authorises membership of Euratom; Art 29.4.4<sup>o</sup> states that ‘Ireland affirms its commitment to the European Union within which the member states of that Union work together to promote peace, shared values and the well-being of their peoples’; and Art 29.4.5<sup>o</sup> authorises ratification of the Lisbon Treaty and membership of the EU established thereunder.

<sup>9</sup> M Cahill ‘Constitutional Exclusion Clauses, Article 29.4.6<sup>o</sup>, and the Constitutional Reception of European Law’ (2011) 18(2) *Dublin University Law Journal* 74 at 78.

<sup>10</sup> The text of the exclusion clause has been updated to take into account the expiry of the ECSC and the depillarisation of the EU, but its meaning and effect have not been materially affected.

<sup>11</sup> Article 46 sets out the only procedure by which the Constitution may be amended, ‘whether by way of variation, addition or repeal’ (Article 46.1), and requires a popular referendum, with a simple majority of votes cast for the amendment to be approved.

<sup>12</sup> Referendum Results 1937–2009 (Department of the Environment, Heritage and Local Government, Dublin 2009) available at <http://www.environment.ie/en/LocalGovernment/Voting/Referenda/PublicationsDocuments/FileDownload,1894,en.pdf>. It is worthwhile to note, in relation to the issue of democratic legitimacy that informs

The third provision enabling membership was the European Communities Act (ECA) 1972, a short piece of ordinary legislation. Section 2 provides, in full, that:

From the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties.

Taken together, these three provisions enabled the direct and full-throated incorporation of Community law into the domestic legal order. The ECA 1972 performed the substantive legwork of making EC law domestically effective within a dualist system, backed up by a constitutional authorisation for membership of the Community, and a clause which ostensibly sought to immunise EC law from constitutional scrutiny. It might therefore appear that constitutional pluralism of any sort, and particularly a heterarchical conception of the power relations between domestic and EU constitutional orders, is simply inapt for describing the Irish constitutional configuration. On this analysis, the three-pronged method of accession simply subsumed Irish constitutional law within the mantle and the logic of the Treaties, replacing dualism with monism, and that is all there is to it. Indeed, as we shall soon see, this has been the long-standing orthodoxy in Ireland, particularly as regards the ‘exclusion clause’ of Article 29.4.6°.

But the reality is altogether more complex. A close reading of the ‘license to join’ and the ‘exclusion clause’—and the case law surrounding them—suggests that a monist reading of the relationship is inaccurate; provides an opening for a pluralist analysis of the terms of engagement between the legal orders; and, more than this, demonstrates that a polyarchic arrangement is in fact the most convincing way of conceptualising these relations. In developing his theory of contrapunctual law, outlined in Chapter 1, Maduro identified two different types of national constitutional challenge to the claim to ultimate authority made by European constitutionalism: first, there is the *ex ante* constitutional review of EU norms,

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much of Kumm’s conception of cosmopolitan constitutionalism—and, more generally, the resistance of metaconstitutional pluralism to the wholesale primacy of EU law—that this was the second-highest turnout in a referendum in Ireland’s history, beaten only by the 76% turnout in the referendum on adopting the Constitution itself in 1937. Moreover, in 1937, the Constitution was approved by only 57% of those voting. Accordingly, in 1937, only 39% of the total electorate endorsed the Constitution, whereas, in 1972, fully 58% of the total electorate voted in favour of accession to the Communities—a fact rarely remembered in debates surrounding the Union’s democratic legitimacy in Ireland. (Percentages have been rounded to the nearest whole figure).

especially including Treaty amendments.<sup>13</sup> Though the particular way in which such a review is conducted varies widely throughout the Union, ‘[t]his is effectively required by all national legal orders with regard to Treaty changes’.<sup>14</sup> Secondly, there is the altogether more controversial *ex post* national constitutional review of EU norms,<sup>15</sup> epitomised by the *Solange* jurisprudence of the BVerfG. This occurs in different ways and to greatly varying degrees across the Union, depending on the existence of mechanisms of constitutional judicial review, the status ascribed to the EU by the national constitution, and the attitudes of national constitutional courts.<sup>16</sup> This typology fits well with the case law on the ‘authorisation’ inherent in Article 29.4.3° and the ‘exemption’ suggested by Article 29.4.6°, and will therefore be used to examine the nature of the relationship between the Irish Constitution and EU law, and the nature of the interface norms—constitutional and metaconstitutional—regulating the relationship.

## 1.2 The ‘license to join’ and the *ex ante* review of EU norms

We have seen that Ireland’s initial accession to the EU was backed up by a relatively impressive expression of popular constitutional authorisation. However, if we are to take seriously the argument that 1 January 1973 was a watershed, after which provisions of the Irish Constitution could never outweigh the exigencies of European integration, it would follow that subsequent Treaty amendments would be entirely within the initial popular authorisation for EU membership. Indeed, this was essentially the state’s argument in its role as defendant in *Crotty v An Taoiseach*,<sup>17</sup> ‘the only case solely dedicated to an analysis of the constitutional problems posed by membership’<sup>18</sup> and the proximate cause of much subsequent pan-European grief resulting from what now appears to be the Irish tradition of the ‘neverendum’. As we shall soon see, the state’s argument was unsuccessful: instead, *Crotty* provides convincing evidence for the proposition that *at least prior to the coming into force of*

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<sup>13</sup> M Poiares Maduro ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in N Walker (ed) *Sovereignty in Transition* (Hart, Oxford 2003) at 506–508

<sup>14</sup> *Ibid* at 506.

<sup>15</sup> *Ibid* at 508–511.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Crotty v An Taoiseach* [1987] IR 713.

<sup>18</sup> Phelan (n 1) at 335.

EU norms, the question of the compatibility of these norms with the Irish Constitution cannot be ignored or papered over. Accordingly, there remains at the very least a residual or gatekeeping role for national constitutionalism, and the argument of all-purpose subordination to EU law is weakened. From the internal perspective of a (dualist) national constitutional order, a non-state legal order that relies on national constitutional law for its validity cannot in any meaningful sense be considered hierarchically superior in normative terms.<sup>19</sup>

Crotty, an Irish citizen, sought an injunction restraining the Irish Government from finalising the ratification of the Single European Act (SEA); a declaration that the European Communities (Amendment) Act 1986 (which purported to make the SEA domestically effective) was repugnant to the Constitution; and a declaration that ratification of the SEA without a constitutional amendment would be in breach of the Constitution. The injunction was initially granted by the High Court, but upon full hearing of the issues, the Court discharged the injunction and the plaintiff's relief was denied. The plaintiff immediately appealed, and had his injunction re-granted pending the hearing. It was finally held by the Supreme Court that the 1986 Act was not repugnant to the Constitution.<sup>20</sup> However, while the Supreme Court held unanimously that the courts have no jurisdiction to interfere with the government's conduct of foreign policy, it went on to hold—by a 3:2 split<sup>21</sup>—that in any case where the Government, in conducting foreign policy, purported to alienate any powers of government or fetter the sovereignty of the state, such purported action would be beyond the power conferred upon the government by the Constitution. On this basis, the majority held that the State's purported ratification of Title III of the SEA<sup>22</sup> was outwith the executive powers of the Government in the sphere of external relations, and thus was void without specific constitutional license to ratify, which

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<sup>19</sup> Maduro (n 13) at 507–508.

<sup>20</sup> This part of the judgment was unanimous, and without dissenting opinions, as was required under the circumstances by Article 34.4.5°: 'The decision of the Supreme Court on a question as to the validity of a law having regard to the provisions of this Constitution shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion on such question, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed.'

<sup>21</sup> Article 34.4.5°'s unanimity requirement not applying, as this issue did not concern the constitutionality of a statute.

<sup>22</sup> Entitled 'Treaty Provisions on European Co-operation in the Sphere of Foreign Policy', the forerunner of the Common Foreign and Security Policy.

could be achieved only by referendum. The issues of the constitutionality of the 1986 Act and Title III SEA will be dealt with in turn.<sup>23</sup>

### 1.2.1 Domestic reservation of ultimate constitutionality by conditional recognition: the European Communities (Amendment) Act 1986

The 1986 Act purported to amend the ECA 1972 to make domestically effective certain provisions of the SEA, all of which consisted of amendments to the Treaties of Paris and Rome. Because the State was explicitly authorised to ratify these Treaties by the electorate in 1972, the question was therefore whether the license to join of Article 29.4.3° entitled the State to ratify the Treaties as they stood in 1972, but not to ratify any subsequent treaties without a further Constitutional amendment (as the plaintiff alleged); or, as the Government claimed, whether it entitled the State:

[T]o join Communities which were established by Treaties as dynamic and developing entities and that it should be interpreted as authorising the State to participate in and agree to amendments of the Treaties which are within the original scope and objectives of the Treaties.<sup>24</sup>

In a passage much subsequently quoted, the Court held that:

[Article 29.4.3°] must be construed as an authorisation given to the State not only to join the Communities as they stood in 1973, but also to join in amendments of the Treaties *so long as* such amendments *do not alter the essential scope or objectives of the Communities*. To hold that [Article 29.4.3°] does not authorise any form of amendment to the Treaties after 1973 without a further amendment of the Constitution would be too narrow a construction; to construe it as an open-ended authority to agree, without further amendment of the Constitution, to any amendment of the Treaties would be too broad.<sup>25</sup>

Straightaway, we can see from the words italicised an—unreferenced—application of the *Solange* principle of conditional recognition. The Supreme Court chose a middle path between the outright denial or wholesale embrace of the evolutionary nature of the EC legal order. The acceptability of EC constitutional evolution to the national constitutional order was made conditional, and the Court reserved to itself

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<sup>23</sup> It was not contended, and the Court held it to be clear, that ratification of the SEA—which, despite its name, was an international treaty between states referred to using the public international law terminology of ‘High Contracting Parties’, and not an infra-Community measure agreed upon between fellow Member States (*Crotty* (n 17) at 784 *per* Henchy J)—was not an act ‘necessitated by the obligations of membership of the Communities’: therefore we need not consider the ‘exclusion clause’ of Article 29.4.6° for present purposes (ibid at 767 *per* Finlay CJ (*per curiam*)).

<sup>24</sup> *Crotty* (n 17) at 767 *per* Finlay CJ.

<sup>25</sup> Ibid, emphasis added.

the power to determine the breach or fulfilment of the substantive condition that the ‘essential scope or objectives of the Communities’ not be altered. The Court therefore conducted its own analysis of the SEA, the Treaties, and the 1986 Act, without (direct) reference to the jurisprudence of any other court, including the ECJ.

The plaintiff alleged four areas where the 1986 Act went beyond what was permissible under Article 29.4.3°. First, a shift in the Council’s voting procedures in six areas from unanimity to a qualified majority was alleged to be an unauthorised surrender of sovereignty.<sup>26</sup> Second, the establishment of the then-Court of First Instance (CFI) was said to be an unauthorised surrender of judicial power.<sup>27</sup> Third, the SEA added five new objectives to the EEC Treaty, allegedly taking it outside the terms of the initial authorisation of 1972.<sup>28</sup> Finally, the SEA gave the Council new powers relating to the provision of services, the working environment, and the health and safety of workers ‘which could encroach on existing guarantees of fundamental rights under the Constitution’.<sup>29</sup>

In its decision, the Court noted that:

The capacity of the Council to make decisions with legislative effect is a diminution of the sovereignty of Member States, including Ireland, and this is one of the reasons why the Third Amendment to the Constitution was necessary. Sovereignty in this context is the unfettered right to decide: to say yes or no.<sup>30</sup>

However, the Court went on to note that whereas unanimity was a ‘valuable shield’<sup>31</sup> against proposals the State might oppose, qualified or simple majority voting was of significant assistance with respect to proposals the State might support. Moreover, the EC Treaty itself contemplated that decision-making in various areas would initially be unanimous, but would, over time, require only a qualified majority.<sup>32</sup>

Accordingly:

The Community was thus a developing organism with diverse and changing methods for making decisions and an inbuilt and clearly expressed objective of expansion and progress, both in terms of the number of Member States

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<sup>26</sup> *Crotty* (n 17) at 768.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* The new objectives added by Articles 20–21 and 23–25 SEA concerned economic and monetary policy; the health and safety of workers; economic and social cohesion; research and technological development; and environmental protection.

<sup>29</sup> *Ibid.* at 768.

<sup>30</sup> *Ibid.* at 769.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*



and in terms of the mechanics to be used in the achievement of its agreed objectives.<sup>33</sup>

The changes envisaged by the SEA as regards the Council's voting procedures were therefore neither unforeseeable nor unjustifiable, and did not go beyond what had initially been authorised in 1972. The plaintiff's other objections fell on similar grounds, the Court noting that some of the judicial power of the State had been ceded to the ECJ by virtue of Ireland's accession to the Communities; and that the establishment of the CFI was an internal re-organisation of power already ceded, and did not involve any further cession of power.<sup>34</sup> Though the SEA's separate and specific statement of various objectives was indeed an innovation, they were within the original objectives of the Communities, as set out in Articles 2 and 3 EEC.<sup>35</sup> Moreover, the Council's new powers did not 'alter the essential character'<sup>36</sup> of the Communities, and the plaintiff had not shown that they could threaten fundamental constitutional rights.<sup>37</sup> Within the hermetically-sealed boundaries of Irish constitutional law, the changes to the Treaties effected by the SEA were held not to alter substantially the scope or objectives of the Communities, and accordingly, the 1986 Act, which incorporated those changes into domestic law, was constitutional.

This first part of the judgment in *Crotty* shows that it is for the Irish courts, and none other, to determine what does and does not constitute the essential scope and objectives of the Communities, and later the Union. Two consequences flow from this as regards the powers of the domestic judiciary vis-à-vis EC/EU law. As Phelan notes, if the Community law interpretation of the scope and objectives of the Community were to go beyond that that of Irish constitutional law 'then the European Communities Act (as amended) would be open to constitutional challenge so far as it purports to import into domestic law a rule which goes beyond the Irish constitutional law version'.<sup>38</sup> Second, acts or measures of Community law or implementing Community law which go beyond the Irish interpretation of the scope and objectives would not be 'necessitated' within the meaning of Article 29.4.6°, and would therefore *prima facie* be vulnerable to Irish constitutional attack, regardless of

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<sup>33</sup> Ibid at 770.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Phelan (n 1) at 337.

how one interprets Article 29.4.6°. It is submitted that despite the changes that have taken place since Phelan first proposed this analysis, his logic stands.<sup>39</sup>

Before moving on from the 1986 Act, there is another aspect of the decision which is important for present purposes, because it relates to the acceptance or otherwise of the ECJ's doctrine of primacy, and therefore to the question of hierarchy and heterarchy. The headnote to the case report of *Crotty* states that 'the proposed new Court of First Instance did not in any way extend the primacy of the [ECJ] over the Irish Courts beyond that already authorised in [Article 29.4.3°].'<sup>40</sup> But nowhere in the relevant part of the judgment did the Supreme Court advert to the EU legal concept of primacy.<sup>41</sup> Instead, according to the Court, the ECJ was established 'to ensure that in the interpretation and the application of the Treaty the law is observed'<sup>42</sup>—a simple recitation of what is now Article 19 TEU. Furthermore, the Court only recognised the finality of the ECJ's jurisprudence insofar as it relates to the interpretation of the Treaty and on questions of its implementation. Recognising the ECJ's authority to interpret the Treaty is hardly a recognition of the absolute primacy of its judgments over those of national courts. Just as the only bodies competent to interpret the Irish Constitution authoritatively are the High and Supreme Courts established thereunder—and specifically empowered to do so and for that interpretation to be final—the ECJ is the only body competent to interpret the Treaties authoritatively, and to have its interpretation taken as final. This in no way amounts to the all-purpose subordination of one legal system to another—rather, it is a good example of exactly the sort of arrangement described by deliberative polyarchy. It stretches the Court's judgment—which at this point did not even refer to any cases of the ECJ, let alone *Costa v ENEL*<sup>43</sup> or *Internationale Handelsgesellschaft*<sup>44</sup>—past breaking point to regard the above as a wholesale

<sup>39</sup> See further M Cahill 'A Critical Assessment of Irish Scholarship on the Constitutional Reception of European Law' in T Mohr and J Schweppe (eds) *Thirty Years of Legal Scholarship* (Dublin: Roundhall, 2011) 234 at 244–246.

<sup>40</sup> *Crotty* (n 17) at 714–5.

<sup>41</sup> Curiously, the only mention of 'primacy' in the relevant part of the case is with regard to the Council, 'whose decisions have primacy over domestic law'—a statement made in passing, and without reference to authority (ibid at 769).

<sup>42</sup> Ibid at 769 *per* Finlay CJ *per curiam*.

<sup>43</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585.

<sup>44</sup> Case 11/70 *International Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

endorsement of the ECJ's conception of primacy, regardless of what the headnote to *Crotty* may say. For judicial endorsement of the *Costa* jurisprudence, as we shall see in Section 3, one must look elsewhere.

### 1.2.2 'Penultimate judicial supremacy' and the boundaries of government action: Title III SEA

Though the plaintiff was unsuccessful in challenging the constitutionality of the 1986 Act, the claim that Title III SEA could not be ratified without a referendum was upheld. The Court was in total agreement that Article 29.4.1° vests in the Government the executive power of the State in connection with its external relations, and that the conduct of this power is outwith the purview of the courts (in that the courts have no foreign policy role or voice whatsoever). However, Article 29.4.1° specifically states that this foreign policy power is to be exercised *in accordance with Article 28*, which provides, at Article 28.2, that '[t]he executive power of the State shall, *subject to the provisions of this Constitution*, be exercised by or on the authority of the Government.'<sup>45</sup> For the majority of the Court, the portion of Article 28.2 emphasised above was sufficient to impart to the Government, along with the *right* to conduct the State's foreign policy without judicial interference, the *obligation* not to go beyond what is permissible with respect to the totality of the Constitution. The threshold question of what is and is not permissible with respect to the Constitution is then a matter for the courts exclusively.<sup>46</sup> This idea was put most succinctly by Hederman J, whose brief judgment contains a neat *précis* of the majority's reasoning:

The State's organs cannot contract to exercise in a particular procedure their policy-making roles or in any way to fetter powers bestowed unfettered by the Constitution. They are the guardians of these powers—not the disposers of them.<sup>47</sup>

According to the reasoning of the majority, Title III SEA obliged the State, and each ratifying State, 'to surrender part of its sovereignty in the conduct of foreign

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<sup>45</sup> Emphasis added.

<sup>46</sup> *Crotty* (n 17) at 778 *per* Walsh J, at 786 *per* Henchy J.

<sup>47</sup> *Ibid* at 794 *per* Hederman J.

relations',<sup>48</sup> which, in Ireland's case, directly went against the claims to national and state sovereignty in Articles 1 and 5 of the Constitution. Furthermore, according to Henchy J's reading of Article 6.1, 'the common good of the Irish people is the ultimate standard by which the constitutional validity of the conduct of foreign affairs by the Government is to be judged.'<sup>49</sup> For the State to be bound to 'take full account' of the common positions of the Member States, as provided for by Title III SEA, was therefore enough of a derogation from the 'ultimate standard' of the common good of the Irish people to render the State's purported ratification of Title III SEA null and void, in the absence of a new 'license to join' along the lines of that in the Third Amendment, which could only be provided by the people by way of referendum. Thus the coming into force of the SEA was delayed pending such referendum, which was held in May 1987 and was carried by a large majority, albeit on a turnout of only 44%.<sup>50</sup>

This part of the judgment in *Crotty* demonstrates that the system of authority under the Irish Constitution can be regarded as one of 'penultimate judicial supremacy'. The reason that this judicial supremacy is 'penultimate', rather than final, is that the final say on each matter (insofar as constitutional decisions can ever be truly 'final') is reserved to the citizens themselves, acting in concert, by way of referendum. Though the Constitution provides for a wide degree of autonomy for and separation between the legislative, executive and judicial powers, it is the judicial power that is charged with the penultimate defence of the Constitution. The judiciary may not interfere with the legislative process while it is ongoing,<sup>51</sup> but may rule on the constitutional validity of legislative norms once enacted. Equally, the judiciary has no role or voice in the government's exercise of its foreign policy powers, except for a residual, threshold power to prevent the government 'fetter[ing] powers bestowed unfettered by the Constitution'. Whatever its merits and demerits—and no doubt there are many—this strong judicial power is the long-established orthodoxy in Ireland, as evidenced by the foundational statement of Ó Dálaigh CJ in *The State (Quinn) v Ryan*:

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<sup>48</sup> Ibid at 787 *per* Henchy J.

<sup>49</sup> Ibid.

<sup>50</sup> Referendum Results (n 12) at 39.

<sup>51</sup> *Wireless Dealers' Association v Fair Trade Commission* (Unreported, Supreme Court, 14 March 1956); *Roche v Ireland* (Unreported, High Court, 17 June 1983).

It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary it follows that no-one can with impunity set these rights at nought or circumvent them, and that the Court's powers in this regard are as ample as the defence of the Constitution requires.<sup>52</sup>

A necessary corollary of this, taken in conjunction with the Constitution's amendability by way of referendum, is that if the citizenry believes the judiciary to have been *wrong* in its defence of the Constitution, that decision can be reversed and corrected by popular vote. Of the 36 constitutional referenda held in Ireland since 1937, nine have been in response to judicial decisions,<sup>53</sup> with some endorsed and others reversed.

### 1.2.3 Analysis: conditional recognition, 'scope and objectives', and the attitude of the Court

The overview above has demonstrated that *Crotty* provides an exemplar of Maduro's first leg of the national legitimization of EU law: *ex ante* constitutional review. The question of the compatibility of the European Communities (Amendment) Act 1986 with the Constitution was a matter solely of Irish law, and was therefore apt for review by an Irish court without reference to other authorities ('higher' or otherwise). The Government's ability to ratify Title III SEA without consent was, under the accepted Irish theory of the separation of powers, subject to the control of the judiciary, and ultimately the electorate. These facts go some of the way towards demonstrating that the Irish and EU legal orders can be regarded as part of a polyarchy—each order having ultimate authority on its own terms in its own domain—rather than being hierarchically integrated.

The substantive interface norm adopted by the Supreme Court with respect to the 1986 Act was the principle of conditional recognition subject to the 'scope and objectives' test, a standard noted by Phelan to be 'extremely vague ... the essential scope of the Community is far from clear, and what can come under its objectives is

<sup>52</sup> *The State (Quinn) v Ryan* [1965] IR 70 at 122.

<sup>53</sup> Updated from C Costello 'Ireland's Nice Referenda' (2005) 1 *European Constitutional Law Review* 357 at 382.

potentially limitless.<sup>54</sup> Vague or otherwise, what is important is that this is a norm *internal to the Irish legal order*. This manifests in two senses. First, rather than being an overarching (metaconstitutional) rule, straddling legal orders and managing the relationships between them, it is a conflict-of-laws rule purely from within the national system. It is in this sense *constitutional*, not *metaconstitutional*. Secondly, and relatedly, because this is a norm particularly and logically within the domain of Irish law, it is subject to the final say of domestic constitutional actors.<sup>55</sup> The question of the legitimacy of the Government's purported ratification of Title III SEA was similarly internal in nature.

Let us recall that Kumm posits the principle of conditional recognition as a universal, metaconstitutional interface norm justifying the disapplication of EU norms in the face of deficient protection for fundamental rights, whereas Sabel and Gerstenberg regard the principle as a more general doctrinal tool by which an overlapping consensus can be constitutionalised. Neither of these descriptions quite captures the Court's decision here, however, though the notion of conditional recognition as a doctrinal tool comes closest. The question of fundamental constitutional rights had been raised by the plaintiff, but the Court merely pointed out that no threat had been identified, and therefore engaged in no inquiry as to whether the EC legal order was equipped to guard against such a threat. Rather, the Court's concern—though expressed in both parts of the judgment in the language of sovereignty, defined as the unfettered right to decide—was *democratic legitimacy*. Accession to the Communities, and the diminution of sovereignty that this entailed, had been democratically authorised. With respect to the 1986 Act, the principle of conditional recognition was therefore employed as a means by which the Community legal order could be prevented from going beyond this authorisation without further recourse to the electorate. With respect to Title III SEA, the focus was similarly on democratic legitimacy, but here conditional recognition played no role—rather, the Government, in purporting to ratify Title III SEA without a referendum, had strayed beyond the bounds of the authority in foreign affairs granted to it by the Constitution.

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<sup>54</sup> Phelan (n 1) at 336.

<sup>55</sup> *Ibid* at 336–7.

Being a rule internal to a national system, the ‘scope and objectives’ test, though having democratic legitimacy as its central concern, does not fit with Kumm’s conception of democratic legitimacy as a metaconstitutional interface norm capable of universal application—the protection of a ‘clear and specific constitutional norm that reflect[s] essential commitments of the national community’.<sup>56</sup> It is clear from the examples Kumm gives—the right to the life of the unborn in Ireland and the non-recognition of private higher education in Greece<sup>57</sup>—that, by this, he meant an instance of national constitutional specificity, something particularly important in one state, which does not necessarily have echoes in other European constitutional orders. While it may well be possible to construct a retrospective argument that the Supreme Court was protecting the ‘clear and specific’ constitutional norm of Article 6 of the Constitution—its reservation to the people of the ultimate right to decide all questions of national policy—the Court framed its arguments in altogether more general terms. Moreover, there is nothing nationally specific about the Irish Constitution’s claim of popular sovereignty. Rather, the ‘scope and objectives’ test derives from the particular, historically contingent means by which the Irish legal order had been opened to that of the Communities, and the legitimacy of the ratification of Title III SEA depended solely on how the Irish Constitution confers authority on the executive.

The Irish Supreme Court is a national court, and as such is obliged to operate within the terms of the national constitution. Constitutional pluralism, and particularly metaconstitutional pluralism, by contrast, is a specifically external explanatory discourse. This being the case, the question then arises whether the internal, nationally-specific approach of the Supreme Court in *Crotty* can be ‘metaconstitutionalised’—that is, explained in more general, universal terms, from a perspective outwith the national legal system. In his discussion of the *ex ante* review of EU norms, Maduro notes the variety of ways that Member States deal with the issue: an express requirement in the constitutional text for national ratification of any

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<sup>56</sup> M Kumm ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty’ (2005) 11 *European Law Journal* 262 at 300

<sup>57</sup> *Ibid* at 297.

‘constitutional amendment’ of the EU;<sup>58</sup> the imposition of substantive conditions regarding the content and manner of the transfer of sovereignty;<sup>59</sup> and the imposition of conditions relating to other constitutional values and rules.<sup>60</sup> In terms of the decision in *Crotty*, the second of these categories describes the scope and objectives test, and the third describes the judicial oversight of the government’s exercise of its foreign policy. However, these various methods of national oversight of EU constitutional development are so generally phrased, and subject to such diversity in their application, that they bear little resemblance to the clearly specified, narrowly delimited universal metaconstitutional interface norms posited by Kumm. It may well be the case that any attempt to zoom out from a national constitutional order in order to formulate universal principles by which the *ex ante* review of EU norms could be conducted results in ‘principles’ so wide in their statement and general in their application that they cease to be in any way action-guiding and instead become broad categories, encompassing different, potentially conflicting approaches. Let us bear this thought in mind for now, before returning to it in considering the question of *ex post* constitutional review in Section 2.3

While the specific principles that the Supreme Court applied in *Crotty* are deeply embedded in the text and nature of the Irish Constitution, the Court’s general attitude to the autonomy of EC law does fit quite well with one of Maduro’s principles of contrapunctual law, the principle of pluralism itself, whereby different legal orders must expressly acknowledge the existence and autonomy of their counterparts, which ‘entails the recognition and adjustment of each legal order to the plurality of equally legitimate claims ... made by other legal orders’.<sup>61</sup> The Court described the Community as ‘a developing organism with diverse and changing methods for making decisions and an inbuilt and clearly expressed objective of expansion and progress’.<sup>62</sup> While it is perhaps odd to describe a legal order as an ‘organism’, the metaphor nicely illustrates the great extent to which the Court was prepared to

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<sup>58</sup> Maduro (n 13) at 506–507, citing the constitutions of Italy (Article 11); Spain (Article 93 ff); Belgium (Article 34); Germany (Article 23); Denmark (Article 20); Portugal (Article 7); and the Netherlands (Article 92).

<sup>59</sup> *Ibid* at 507, citing Denmark (Article 20); Sweden (Article 5); Austria (Article 92); and Belgium (Article 25).

<sup>60</sup> *Ibid*, citing the *Maastricht* decisions of the French, German and Spanish courts.

<sup>61</sup> Maduro (n 13) at 526.

<sup>62</sup> *Crotty* (n 17) at 770.



recognise the ('organic') growth of the Community, and, by holding that this growth was still within the initial 'license to join' of 1972, to adjust the domestic constitutional order to accommodate it. But whereas the Court's decision fits well with one of the principles of contrapunctual law, it is much less in line with another, the principle of universalisability. In the High Court, counsel for the defendants in *Crotty* specifically invited the Court to 'have regard to the fact that its decision will affect not only Ireland, but the other Member States of the European Communities as well, of which the total population affected comprises 300 million.'<sup>63</sup> Nowhere in their judgments did the High or Supreme Court Justices take counsel up on his suggestion, preferring, as I have shown, to regard themselves as purely domestic actors, and to treat the issues as being ones of exclusively domestic law.

In *Crotty*, the impugned legislation and Treaty provisions had not yet come into force, and were thus not yet 'immunised' from review by the exclusion clause of Article 29.4.6°. If one believes that the exclusion clause of Article 29.4.6° is in fact *completely* exclusionary, *ex ante* constitutional review can be seen as a kind of once-off, 'last-chance-saloon' jurisdiction. Difficult questions of normative effectiveness and democratic legitimacy can be answered once, but only once, and consent once granted can never be withdrawn without the 'nuclear option' of complete withdrawal from the Union. This can cause great difficulty in cases of subsequent, unforeseen constitutional conflict, and raises questions about just how exclusionary the exclusion clause can—or should—be. The resounding popular endorsement of 1972, and the less impressive but no less effective endorsements of 1986 and later, certainly provide a democratic basis for the effectiveness of EU law in Ireland, but they raise deep questions about the very nature of constitutions and constitutional law: once power has been democratically delegated, how and under what circumstances can it be reclaimed if necessary? With these questions in mind, let us turn to Article 29.4.6°, and the second, much more controversial leg of Maduro's two conceptions of national constitutional challenge: the *ex post* national constitutional review of EU law.

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<sup>63</sup> Ibid at 723 *per* Eoghan Fitzsimons SC for the defendants.

### 1.3 The 'exclusion clause' and the *ex post* review of EU norms

#### 1.3.1 Ripples and torpedoes

Article 29.4.6° is a remarkable constitutional provision. At first blush, it seems to subordinate the entirety of the Irish Constitution to Union law without exception. Indeed, it would seem to do this at the second and subsequent blushes as well: Cahill notes that this criticism was levelled at the amendment by a Labour Deputy during the Third Amendment Bill's passage through the Dáil,<sup>64</sup> and cites some statements from the Bench that are supportive of this idea: in *Meagher v Minister for Agriculture*,<sup>65</sup> for example, Blayney J stated that '[i]t is well established that Community law takes precedence over our domestic law. Where they are in conflict, it is the Community law that prevails.'<sup>66</sup> Four years later, the Chief Justice of the Supreme Court stated that '[t]he democratic system in Ireland functions through three branches of government. However, in addition, the State is *subject* to the European institutions and provisions made therein.'<sup>67</sup> To see the practical effect of this, we can usefully add the earlier statement of Murphy J in *Lawlor v Minister for Agriculture* that 'it is no part of the function of this Court to determine whether or not any part of the EEC regulations were invalid'.<sup>68</sup> Though it was suggested in Section 2.2.1 that the headnote to *Crotty* jumped the gun in alleging unqualified acceptance of the ECJ's doctrine of primacy, there is plenty judicial support for the idea to be found elsewhere. Indeed, the received interpretation of Article 29.4.6° is that it has what Cahill calls a 'torpedo effect' on the whole of the Constitution, 'whereby [it] destroy[s] the effect of every other provision',<sup>69</sup> rather than a 'ripple effect', 'whereby [it] temporarily displace[s], without destroying the effect, of the other provisions.'<sup>70</sup>

<sup>64</sup> Justin Keating TD, 2 Dec 1971, available at <[historical-debates.oireachtas.ie/D/0257/D.0257.197112020003.html](http://historical-debates.oireachtas.ie/D/0257/D.0257.197112020003.html)>, cited in Cahill (n 9) at 81.

<sup>65</sup> *Meagher v Minister for Agriculture* [1994] 1 IR 329.

<sup>66</sup> *Ibid* at 360, citing (without comment) Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135 and Case C-6/90 *Francovich v Italy* ECR I-5357. Cahill notes that this statement was quoted and endorsed in the Supreme Court by Hamilton CJ in the later case of *Nathan v Bailey Gibson* [1998] 2 IR 162 at 173-4 (Cahill (n 9) at 92 fn 52).

<sup>67</sup> *Nathan v Bailey Gibson* [1998] 2 IR 162 at 222 *per* Hamilton CJ, emphasis added.

<sup>68</sup> *Lawlor v Minister for Agriculture* [1990] 1 IR 356 at 378, following the ECJ judgment in Case 314/85 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

<sup>69</sup> Cahill (n 9) at 90.

<sup>70</sup> *Ibid*.

Nor are Irish judges and politicians alone in adopting the ‘torpedo’ explanation, that the function of Article 29.4.6° is automatically and irreversibly to neuter the Constitution when it comes to Union law. On the occasion of a visit to the ECJ in Luxembourg by the President of Ireland in 1995, then-President of the Court, Judge Gil Carlos Rodríguez Iglesias, stated in his welcoming address that:

The Irish judiciary have been active in ensuring that the Community is based on the rule of law. The principle of primacy, which is *specifically recognised* in the Constitution of Ireland, and that of direct effect, are regularly applied in the Irish Courts. The procedure by way of preliminary ruling, which transforms every national judge into a Community judge and thus constitutes one of the dynamic forces of European integration, is one to which Irish judges have untrammelled access and of which they make regular use. By their vigilance, the Irish courts ensure that the rights of the citizens of the Union receive adequate protection and are properly safeguarded.<sup>71</sup>

With respect to Judge Rodríguez Iglesias, it is submitted that the emphasised part of the above statement is based on a superficial reading of Article 29.4.6°. In order for the principle of primacy to be ‘specifically recognised’, the Constitution would first have to specify—that is, mention—primacy, which it does not, and then endorse it, which it cannot, because it never mentions it. Be this as it may, if the Chief Justice of the Irish Supreme Court<sup>72</sup> and the President of the European Court of Justice take as their reading of Article 29.4.6° that it renders all Union law, without exception, permanently immune from constitutional challenge in Ireland, one could be forgiven for expecting this to be the end of the matter. However, there is a unanimous judgment of the Supreme Court, *SPUC v Grogan*,<sup>73</sup> which predates the above-quoted judgments in *Lawlor*, *Meagher*, and *Nathan*, that has never been expressly overturned, and which provides a quite different—more convincing and more principled—account of the effect of Article 29.4.6° and of the terms of engagement between Irish law and European law.

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<sup>71</sup> GC Rodríguez Iglesias ‘Memorandum: Visite de Mme le Présidente d’Irlande, le 16 mai 1995’ (No 212/95) (Internal ECJ Memorandum, copy with author). Emphasis added.

<sup>72</sup> *Nathan* (n 67) at 222 *per* Hamilton CJ.

<sup>73</sup> *Society for the Protection of Unborn Children v Grogan* [1989] IR 753.

### 1.3.2 *SPUC v Grogan*: an aberration?

*SPUC v Grogan* is the only case where the Irish judiciary dealt head-on with a case of potential conflict and collision between a right protected under the Irish Constitution and a right protected under EU law. This unanimous decision of the Court is directly along the lines of the German *Solange* jurisprudence,<sup>74</sup> but has come to be regarded as an outlier, and would seem to have been effectively reversed—though never explicitly—despite its obvious precedential value. In this regard, Gerard Hogan and Gerry Whyte state that the arguments in *Grogan* are ‘isolated ones and entirely confined to an area of great sensitivity and it is unlikely that they would nowadays be followed’.<sup>75</sup> This is an unprincipled approach. Why should the mere fact that abortion is an area of great sensitivity lessen the precedential value of a unanimous judgment of the Supreme Court? Far preferable is to investigate the implications that *Grogan* may have for our understanding of Article 29.4.6°, rather than turning a blind eye and hoping that constitutional collision never happens.

The facts of the case may be familiar to the European lawyer, on account of the preliminary reference sought by the High Court.<sup>76</sup> Briefly, the plaintiff society, an anti-abortion campaign group, sought an injunction restraining various student groups from publishing information on identity, location, and method of communication with abortion clinics outside the jurisdiction. The argument of the defendants was that pregnant women had a right under EU law to travel to another Member State to receive services, including therefore a right to travel in order to procure an abortion in a Member State where it is legal to do so. As a corollary, they also had a right under EU law to receive information about abortion clinics outside Ireland but within the Communities; and by extension, the defendants had a right to publish and distribute such information. This argument was made despite the fact that none of this series of mutually-dependent and mutually-reinforcing rights had

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<sup>74</sup> Cahill (n 9) at 75. Cahill, like Maduro (see n 58–n 61), notes other courts which have taken similar approaches—defensive of national constitutional provisions but still open and receptive to the power of EU law—include the constitutional courts of the Czech Republic, Denmark, Italy, Poland and Spain. However, in light of its decision in the *Slovak Pensions II* case, the Czech Constitutional Court may no longer serve as a good exemplar (see Chapter 1 of this thesis at Section 3.3).

<sup>75</sup> G Hogan and G Whyte *JM Kelly: The Irish Constitution* (4th edn, Dublin: Tottel, 2003) at 535.

<sup>76</sup> Which was handed down by the ECJ in Case C–159/90 *SPUC v Grogan* [1991] ECR I–4685 (referred to in this thesis as *Grogan (ECJ)*).

actually been recognised in EU law at that time, whether by Treaty provision, legislation, or judgment of the ECJ.

Article 40.3.3° of the Constitution, inserted by referendum in 1983, provides (now in part, but at the time in full) that:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

The defendants' argument in *Grogan* was thus predicated on the widespread belief—indeed, the judicial, political and social orthodoxy—that Article 29.4.6° has Cahill's 'torpedo effect' on the rest of the Constitution.

In the High Court, Carroll J considered the year-old Supreme Court judgment in *Attorney General (SPUC) v Open Door Counselling Ltd*,<sup>77</sup> but distinguished it on the ground that that case had turned on the question of whether there was a right to receive information about abortion services abroad in the context of one-to-one counselling (the Supreme Court had held that there was not). Because the present case was concerned with the question of whether there was a stand-alone right, outside the counselling context, to receive information relating to abortion services outside the jurisdiction, Carroll J held that a preliminary reference to the ECJ was necessary to determine the matter. Pending word from Luxembourg, Carroll J made no decision as to the injunction sought by the plaintiff.

### 1.3.3 The 'torpedo effect' torpedoed

On appeal to the Supreme Court, Carroll J's judgment was overturned in unusually strong terms, and SPUC's injunction granted and made permanent. Though the Court was unanimous as to the result of the case, the reasons contained in the three written judgments are quite diverse. However, two major threads can be drawn out for the present analysis. First, the paramount importance of the fundamental rights provisions of the Constitution was emphasised, offering little support for the 'torpedo effect' orthodoxy surrounding the 'exclusion clause' and preserving for the domestic judiciary a role in their vindication, even in the face of EU norms. Secondly, the Court hinted darkly as to possible repercussions if the ECJ were ever to hold that the

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<sup>77</sup> *AG (SPUC) v Open Door Counselling Ltd* [1988] IR 593.

defendants were in possession of the rights they had claimed. Though these two threads are conceptually distinguishable, they are inextricably linked and will be discussed together.

Finlay CJ ‘rejected as unsound’<sup>78</sup> the idea that the facts of the case could be meaningfully distinguished from those in *Open Door* as Carroll J had held—the application for the injunction was in reality:

An application to restrain an activity which has been clearly declared by this Court [in *Open Door*] to be unconstitutional and therefore unlawful and which could assist and is intended to assist in the destruction of the right to life of an unborn child, a right acknowledged and protected under the Constitution. That constitutionally guaranteed right must be fully and effectively protected by the courts.<sup>79</sup>

Here we see the first of SPUC’s major threads: it would seem that when it comes to *at least one right* guaranteed by the Constitution, the Supreme Court saw itself as being obliged to protect that right, regardless of any other provision of the Constitution, emphatically including Article 29.4.6°. Indeed, Finlay CJ went on to suggest as much in his very next sentence:

*If and when* a decision of the [ECJ] rules that some aspect of European Community law affects the activities of the defendants impugned in this case, the consequence of that decision on these constitutionally guaranteed rights and their protection by the courts will then fall to be considered *by these courts*.<sup>80</sup>

The conclusion that Cahill draws from this is, I argue, entirely correct and essential to any analysis of the relationship between Irish and EU law: specifically, she asserts that the Chief Justice ‘expressly acknowledged and established for the Irish courts the power to review a decision of the European Court of Justice on the grounds that it was contrary to a fundamental right protected by the Irish Constitution.’<sup>81</sup> The words italicised in the above quote encapsulate this second major thread of *SPUC*. They were a shot across the bow: a warning, in no uncertain terms, that if the ECJ were ever to hold that, as a matter of EU law (recognised, polyarchically, as the exclusive interpretive domain of the ECJ), pregnant women had any of the rights claimed by the defendants, then the response of the Irish courts could not be predicted and obedience could not be guaranteed. As we can see, this part of the judgment in

<sup>78</sup> *Grogan* (n 73) at 764.

<sup>79</sup> *Ibid* at 764–765, emphasis added.

<sup>80</sup> *Ibid* at 765, emphasis added.

<sup>81</sup> Cahill (n 9) at 95.

*Grogan* very much lessens the force of the argument that Article 29.4.6° subordinates the entire Constitution, without exception, to EU law for all time coming.

The judgment of Walsh J, with whom Hederman J concurred, was particularly scathing of Carroll J's judgment at first instance, and lends further weight to the 'ripple' interpretation of Article 29.4.6°:

When the present matter came before the High Court it was clear beyond all doubt that the activities complained of were contrary to the Constitution. The decision of the High Court judge to adopt the course which she did, namely, to leave the matter undecided, was in effect to suspend the provisions of [Article 40.3.3°] for an indefinite period. *It is not open to any judge to do anything which in effect suspends any provisions of the Constitution for any period whatsoever.*<sup>82</sup>

Walsh J continued in equally strong terms, holding that '[i]t is the undoubted duty of this Court to ensure that the protection guaranteed by [Article 40.3.3°] is not put in abeyance.'<sup>83</sup> He then discussed, without deciding, an argument of counsel for the plaintiff that had been raised during the hearing, and which merits quoting at length:

It has been sought to be argued in the present case that the effect of [Article 29.4.6°], which was necessary to permit our adhesion to the treaties of the European Communities, is to qualify all rights including fundamental rights guaranteed by the Constitution. [The insertion of Article 40.3.3° was] subsequent in time, by several years, to the [insertion of Article 29.4.6°]. That fact may give rise to the consideration of the question of whether or not [Article 40.3.3°] itself qualifies [Article 29.4.6°]. Be that as it may, *any answer to the reference received from [the ECJ] will have to be considered in the light of our own constitutional provisions.* In the last analysis only this Court can decide finally what are the effects of the interaction of [Article 40.3.3°] and [Article 29.4.6°].<sup>84</sup>

This paragraph triggers a number of observations. First, Walsh J noted, but did not explicitly accept or reject, the argument that Article 29.4.6° has a 'torpedo effect' on the rest of the Constitution. Second, he raised the possibility that a subsequent amendment to the Constitution could qualify the effect of the alleged 'exclusion clause'. On one view, this would render the clause not very exclusionary after all. Alternatively, if the exclusion clause was capable of being qualified, then it must have had at least some exclusionary effect prior to such popular qualification, but presumably more of the 'ripple' than 'torpedo' variety. Third, Walsh J followed

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<sup>82</sup> *Grogan* (n 73) at 767–8, emphasis added.

<sup>83</sup> *Ibid* at 768.

<sup>84</sup> *Ibid* at 768–9, emphasis added..

Finlay CJ in implying that any future ECJ jurisprudence on point would be ‘considered’ in the light of Irish constitutional provisions and not automatically followed, as the ECJ would argue it should be. Fourth, Walsh J reserved to the Irish courts all interpretive power over the Irish Constitution—hardly a revolutionary proposition, but again one that lends itself to the idea of polyarchy rather than to agreement either with a monist conception of the EU legal order, or to a national constitutional supremacist vision of the relations between legal orders.

Before we leave Walsh J, one final line of his judgment is worthy of inspection:

[I]t cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right.<sup>85</sup>

Let us remember that only a few years previously, in *Crotty*, the Supreme Court had held unanimously that, as a matter of Irish law, just what constitutes the scope and objectives of the Community in the context of Treaty amendment falls to be determined by the Irish courts, and no other. Because *Grogan* concerned certain substantive (claimed, but not explicitly granted) rights under EU law and not Treaty amendments, this part of Walsh J’s judgment echoes the scope and objectives test but transplants it to a different frame. His reference to the objectives of the Communities would thus seem to have at least the potential to qualify the exclusionary effect of Article 29.4.6°. This can be analogised to the ‘penultimate judicial supremacy’ leg of *Crotty*, i.e. though the Constitution provides for no judicial role in the Government’s exercise of its foreign policy powers, such powers are ultimately subject to the provisions of the Constitution as a whole, the interpretation of which is a matter for the judiciary (subject, in the final instance, to override and reversal by the electorate). Extending the analogy, Article 29.4.6°, on its face and in its ordinary everyday effect, immunises EU law from constitutional challenge, but does not go so far as to oblige the judiciary ‘to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right.’ The fact that this sentence was expressed in general terms, and was not confined to the protection of the right to life of the unborn, makes even less convincing the idea that *SPUC v Grogan* is ‘confined to an area of great sensitivity’

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<sup>85</sup> Ibid at 769.



and lends weight to the argument that the ‘ripple effect’ is the preferable interpretation of Article 29.4.6°.

### 1.3.4 Analysis: democratic legitimacy, ‘areas of great sensitivity’, and a hierarchy of norms

The parallels between the decision in *Grogan* and Kumm’s conception of the principle of democratic legitimacy as an interface norm are immediately apparent. This is hardly surprising, given that the Irish constitutional provision on the right to life of the unborn was specifically given by Kumm as an example of where the application of the principle might justify the rebuttal of the presumption of legality of EU norms.<sup>86</sup> But the specific circumstances under which the case arose; the way in which the principle was applied; and how all of this differs from Kumm’s conception, are especially interesting. Rather than being a case of straightforward conflict between a norm of EU law and a ‘clear and specific constitutional norm that reflect[s] essential commitments of the national community’,<sup>87</sup> *Grogan* was more contingent and conditional in nature. The rights under EU law claimed by the defendants were derived from the Treaties but not specified therein, and their existence had never been confirmed by the ECJ. As a result, the overall effect of the decision in *Grogan* was one step removed from how Kumm conceives of the principle of democratic legitimacy. Rather than relating directly to the relationship between EU and Irish constitutional norms, the principle was adopted in interpreting the Irish constitutional provision that itself regulates the relationship. This extra layer of abstraction shifts the principle from the realm of the metaconstitutional to that of the constitutional—the Supreme Court used Kumm’s principle of democratic legitimacy not to disapply a norm of EU law, but to interpret one norm of Irish constitutional law—the exclusion clause—in such a way that it assumed a position subordinate to another norm (protecting a fundamental right).

The fact that the fundamental right in question in the case was the right to life, and specifically the right to life of the unborn, raises two related questions. First, was the Court’s approach focused specifically on the protection of the right to life of the

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<sup>86</sup> Kumm (n 56) at 297.

<sup>87</sup> *Ibid* at 300

unborn and limited to that right, or might other constitutional rights warrant similar vigilance? The judgments were clearly phrased in general terms, capable of application to any of the fundamental rights guaranteed by the Constitution. At no point did the Supreme Court give any indication that the right to life of the unborn was being afforded protection above and beyond any other constitutional right. This leads to the second question, whether the Supreme Court was relying—though not explicitly—on a hierarchical conception of constitutional rights and norms. The Supreme Court has repeatedly recognised a hierarchy of norms under the Constitution when two provisions are in seemingly irresolvable conflict, with a particularly heavy weight attached to the right to life.<sup>88</sup> However, the difficulty inherent in trying to formulate a definitive and all-encompassing hierarchy has also been recognised,<sup>89</sup> most relevantly for present purposes in the statement of Henchy J in *The State (Keegan) v Stardust Compensation Tribunal* that:

The concept of ‘accepted moral standards’ [by which the ranking in a hierarchy of norms may be judged] represents a vague, elusive and changing body of standards which in a pluralist society is sometimes difficult to ascertain.<sup>90</sup>

By ‘pluralist’, Henchy J was referring here to social pluralism—i.e. a society consisting of individual citizens with varying political, religious, social and moral beliefs—but the point holds when one extends it from the realm of diversity among citizens to that of diversity among legal systems. In the modern European state, where the individual must daily navigate a plurality of legal orders—both in the sense of ‘hard’ law (state law, EU law) and ‘soft’ law (religious codes of practice, rules of social interaction)<sup>91</sup>—the difficulty of determining a universal standard, whether moral or legal, against which conduct can be judged becomes even more pronounced. We can further extend this difficulty to the attempt to posit overarching metaconstitutional rules by which conflicts between heterarchically-arranged legal

<sup>88</sup> On the importance of the right to life see, inter alia, *The People (DPP) v Shaw* [1982] IR 1 (right to life superior to right to personal liberty); *AG v X* [1992] 1 IR 1 (superior to right to travel, see Chapter 4 of this Thesis); *DPP v Delaney* [1997] 3 IR 453 (superior to inviolability of the dwelling).

<sup>89</sup> See Egan J’s example in *AG v X* [1992] 1 IR 1 at 92 of a woman’s right to bodily integrity outweighing a rapist’s right to life in the case of her rescue during a rape resulting in the death of the attacker.

<sup>90</sup> *The State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642 at 658.

<sup>91</sup> On this kind of pluralism, see W Twining ‘Normative and Legal Pluralism: A Global Perspective’ (2010) 20 *Duke Journal of Comparative and International Law* 473. See also, by the same author, ‘Institutions of Law from a Global Perspective: Standpoint, Pluralism and Non-State Law’ in M del Mar and Z Bańkowski (eds) *Law as Institutional Normative Order* (Surrey: Ashgate 2009) 17.

orders may be regulated. It was noted in Section 2.2.3 that Kumm's conception of the principle of democratic legitimacy seems largely concerned with instances of national constitutional specificity. There is therefore a twofold problem with the principle. First, it means that the number of cases to which it could apply is essentially limited—it is therefore a rather narrow means of dealing with cases at the boundaries, rather than a general principle of (meta)constitutionalism. Examples of Greek and Irish constitutional specificity have already been mentioned, to which we could add the *laïque* nature of the French State;<sup>92</sup> the particular way in which the right to human dignity is expressed in the *Grundgesetz*;<sup>93</sup> and no doubt as many others as there are Member States. This is the mirror image of the problem discussed above in Section 2.2.3: whereas the attempt to take decisions predicated on specific national circumstances and to universalise them may leave us with principles so broad as to offer little guidance; similarly, to posit general principles capable of being put into effect universally may leave us, at the level of application, with nothing more than an exceptional method of dealing with a few dozen exceptional instances of national specificity, or, at worst, recalcitrance.

Related to this is the second issue, that national specificity is not necessarily something to which the ECJ is blind in its jurisprudence, and therefore may not necessarily be best protected (if indeed it ought to be protected at all) primarily or in the first instance at the national level. An example is the case of *Omega*,<sup>94</sup> where the issue was whether it was permissible for the German authorities to ban the importation from elsewhere in the EU of equipment for the game of 'laser-tag', whereby participants could 'play at killing' other human beings. For the national authorities, such activity contravened Article 1(1) of the *Grundgesetz*, which provides specific protection for the concept of human dignity—the importance and sensitivity of which for the German constitutional order is evidenced by its prominent placement within the Basic Law and its unamendability. While the

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<sup>92</sup> French Constitution, Article 1.

<sup>93</sup> German Constitution, Article 1.

<sup>94</sup> Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. For analysis see MK Bulterman and HR Kranenborg 'Case Comment: What if Rules on Free Movement and Human Rights Collide? About Laser Games and Human Dignity: The Omega Case' (2006) *European Law Review* 93; N Nic Shuibhne 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law' (2009) *European Law Review* 230.

protection of human dignity is inherent in, if not the basis of, the protection of all human rights, nowhere else in national European constitutions does it receive the specific formulation to be found in the *Grundgesetz*. Accordingly, the question was whether the national ability to restrict such activity was dependent on ‘the condition that that restriction be based on a legal conception that is common to all Member States’.<sup>95</sup>

The ECJ emphasised the centrality of proportionality to its framing of the relevant test: while the question of whether the formulation given to the national protection of a right is common to all Member States is a legitimate part of the analysis, it is not the only concern. At the level of determining whether there had been a breach of free movement rules, it was the notion of human dignity specific to EU law that was relevant, whereas the specific nature of the German Constitution’s version of human dignity was relevant to the subsequent proportionality test. Critically, the fact that the *Grundgesetz* formulates the right to human dignity rather differently from other constitutions was not enough for the measure to be disproportionate.<sup>96</sup> The relevance to *Grogan* is clear: the right to life obviously receives some form of protection in all Member State constitutions, but nowhere else is it afforded directly to the unborn in the manner of the Irish Constitution. In the light of the subsequent *Omega* judgment, Walsh J’s statement in *Grogan* that the State should not be ‘obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right’ can be seen as entirely justifiable—indeed as positively *communautaire*—and not a mere piece of national supremacist grandstanding.

An in-depth look at Irish abortion litigation will form the basis of Chapter 4, but for now it is worth continuing this line of thought, regarding constitutional traditions which are not common to the Member States, with reference to the case of *Attorney General v X*,<sup>97</sup> where Costello J said in the High Court that:

I think the attainment of the fundamental objectives of the Treaty is enhanced by laws which assist in the development of a Community in which legitimate differences on moral issues are recognised and which does not

<sup>95</sup> *Omega* (n 94) at para 23, emphasis added. This requirement of commonality was the seeming result of the ECJ’s earlier judgment in Case C-275/92 *Schindler* [1994] ECR I-1039.

<sup>96</sup> *Omega* (n 94) at paras 36–40.

<sup>97</sup> *AG v X* [1992] 1 IR 1.

seek to impose a spurious and divisive uniformity on its members on such issues.<sup>98</sup>

As we shall see, the Supreme Court did not address this reasoning, finding itself able to resolve the case as a matter of domestic law. But Costello J's statement is at least conceptually compatible with Walsh J's judgment in *Grogan* and the ECJ's approach in *Omega*. 'Unity in diversity' is obviously not the same thing as 'spurious and divisive uniformity', and it is for precisely this reason that the ECJ has recognised, to an extent, the legitimacy of difference in national approaches to questions of fundamental rights.<sup>99</sup> The effective and uniform application of Union law is doubtless important, perhaps foundationally so, but it is a stretch to say that it is *the* most important norm in the European constitutional constellation.

#### 1.4 Conclusion: hierarchy and polyarchy, specificity and universality

This Section has demonstrated the means by which the Irish constitutional order, initially self-contained and 'closed' in nature, was 'opened' to enable membership of what is now the EU. Between them, the ECA 1972, the 'license to join', and the 'exclusion clause' incorporated EU law into the Irish system, democratically authorised membership of the Union and ostensibly immunised EU law from constitutional challenge. However, analysis of *Crotty* and *Grogan*, the leading cases on the issues, demonstrates that to regard the Irish and EU legal orders as being hierarchically integrated in all circumstances—the widespread orthodoxy—is mistaken. While in the ordinary, quotidian run of things, norms of EU law enjoy hierarchical superiority in the Irish legal order, the judicial imposition of the 'scope of objectives' test in *Crotty*—which has in practice resulted in the requirement of a referendum for Treaty amendments—demonstrates that EU law is received into the

<sup>98</sup> Ibid at 16, emphasis added.

<sup>99</sup> Later cases, where the ECJ adopts an altogether less accommodating approach to national specificity in the context of labour rights, will be discussed in Chapter 4, below. See Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11845 and Case C-438/05 *ITWF & FSU v Viking Line* [2007] ECR I-10806. For discussion, see R Eklund 'A Swedish Perspective on *Laval* (2007–2008) 29 *Comparative Labor Law & Policy Journal* 551; ACL Davies 'One Step Forward, Two Steps Back? The *Viking* and *Laval* cases in the ECJ' (2008) 37 *Industrial Law Journal* 126; C Joerges and F Rödl 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' (2009) 15 *European Law Journal* 1; A Veldman 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR' (2013) 9 *Utrecht Law Review* 104.

Irish legal order on terms *set by the Irish order itself*, undermining, from the domestic perspective, the ECJ's autonomy claim, while still being respectful of the 'organic' nature of the EU legal order, and this without contradiction. Moreover, *Grogan* demonstrates that Cahill's interpretation of Article 29.4.6° as having a 'ripple' rather than 'torpedo' effect on the rest of the Constitution is correct—when faced with potential conflict between the two orders, the Irish Supreme Court indicated a willingness to enforce a constitutional norm protecting a fundamental right in preference to a norm which ostensibly neutered that right's effectiveness. The vision of the two legal orders that results from this is polyarchic in nature: both legal orders make justifiable claims to legislative and interpretive autonomy in their own domains. Though this may in result in the appearance of hierarchy in the ordinary course of affairs, the two legal orders remain distinct and separable—part of a polyarchy. But the analysis above only focused on the decisions and attitudes of one part of this polyarchy, and so it has not yet shown to be *deliberative*. This will be done in Chapter 4, with reference to the interactions and dialogue that have occurred regarding the question of abortion.

In demonstrating the polyarchic nature of the relationships between the legal orders, close attention was paid to the specific principles applied by the Irish Supreme Court in its decisions. The principle of conditional recognition—Sabel and Gerstenberg's doctrinal tool for the constitutionalisation of an overlapping consensus—was of fundamental importance in both *Crotty* and *Grogan*. The Irish legal order permits the evolution of the EU legal order *so long as* it does not go beyond the 'scope and objectives' of the Treaties. If this condition is breached, a further popular authorisation is necessary. Similarly, the Supreme Court loyally and dutifully applies norms of EU law, including judgments of the ECJ, *so long as* these norms do not—to borrow Walsh J's phrase—'set at nought the constitutional guarantees for the protection within the State of a fundamental human right.'<sup>100</sup> However, being a national court bound by a national constitution, the Supreme Court formulated and applied its interface norms based on the specific text of the Constitution and on the historically contingent means by which EU law had been made effective in the State. They are therefore internal interface norms,

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<sup>100</sup> *Crotty* (n 17) at 769.

constitutional in nature, and not metaconstitutional. They deal with matters that are both nationally specific—e.g. the right to life of the unborn—and much more general—e.g. the Constitution’s conception of popular sovereignty. The question then arises as to whether they can be universalised into metaconstitutional interface norms, independent of any one legal system; and, relatedly, whether they bear any resemblance to the metaconstitutional interface norms posited by Kumm and Maduro. It was suggested above that any such attempt is beset by difficulty, and that the specific principles posited by Kumm, in particular, do not reflect Irish constitutional experience.

These questions will be analysed further in the chapters to follow, but for now let us turn our attention to another ‘vertical’ side of the triangle, the relationship between Irish law and the European Convention on Human Rights.

## 2 THE IRISH LEGAL ORDER AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The nature of the Convention legal order and the method of its reception in Ireland make the task of positing the two as part of a deliberative polyarchy more straightforward than is the case with reference to Ireland and the EU. Though the European Court of Human Rights (ECtHR) reserves supreme interpretive authority over the Convention to itself, it has never claimed for its judgments the same kind of primacy over national law as does the ECJ. Moreover, as we shall see, the method by which the Convention has been incorporated into the Irish legal system has no parallel with the ‘exclusion clause’ of Article 29.4.6°, simplifying the task of presenting the two systems as being non-hierarchically arranged.

While Ireland was a founding member of the Council of Europe, an original signatory to the Convention in 1950, and one of the first States to accept the right of individual petition to Strasbourg in 1953, it was not until 2003 that the Convention was made domestically effective, making Ireland the last Contracting Party to incorporate the Convention into its own legal system. The method chosen for incorporation was legislative, under the European Convention on Human Rights Act 2003, rather than constitutional. In this Section, the nature of the relationship between the two legal orders will first be set out, both prior to and after incorporation

in 2003. This will then be followed by an outline of how this incorporation justifies a polyarchic conception of the relationship between the legal orders.

## 2.1 The relationship defined, pre- and post-incorporation

### 2.1.1 1950–2003: Dualism, pride and prejudice

In a comprehensive comparative study of the effect of the Convention on the legal systems of Ireland and the UK (or rather, England and Wales), Besson states that ‘[b]ecause Irish courts always had to enforce the Irish Bill of Rights, there was no domestic pressure for the development of a European human rights catalogue and court.’<sup>101</sup> While it is true that there was little domestic pressure for something along the lines of the Convention, it is not quite true that the Irish courts ‘always’ had to enforce constitutional rights. The 1937 Constitution, like the 1922 Constitution before it, contains a catalogue of justiciable rights, but these rights had little real impact until the 1960s. In the (extra-curial) words of a former Chief Justice of the Irish Supreme Court:

[W]hile the Constitution was successfully invoked in scattered instances [in the first two decades of its existence], it was the appointment of Cearbhall Ó Dálaigh as Chief Justice in 1961 which signalled the beginning of the new era. He was joined on the court on the same day by Brian Walsh and it soon became clear that litigants and advocates who looked to the text of the Constitution itself, rather than to constitutional theory as expounded in the British tradition by Dicey and others, would receive a sympathetic audience.<sup>102</sup>

For all its superficial and substantive resemblance to the written, republican constitutions of the US or France, and notwithstanding the changed understanding and reality of rights adjudication from the 1960s, the Diceyan seam runs deeply in both the text of the Constitution and the body of law constructed around it. To take just two examples, its model of parliamentary democracy is in many regards a carbon copy of Britain’s;<sup>103</sup> and the law relating to the judicial review of administrative

<sup>101</sup> S Besson ‘The Reception Process in Ireland and the United Kingdom’ in A Stone Sweet and H Keller *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: OUP, 2008) 31 at 43.

<sup>102</sup> R Keane ‘Judges as Lawmakers: The Irish Experience’ (2004) 4 *Judicial Studies Institute Journal* 1 at 9–10.

<sup>103</sup> Note, for instance, that the provisions of Articles 20–25, under the heading of ‘Legislation’, bear more than a passing resemblance to the UK Parliament Act 1911 and to the general British theory of the power-relations between the upper and lower houses of Parliament.



action borrows heavily from the judgments of English courts, both before and after Irish independence. The legacy of British constitutionalism can also be detected in the Constitution's embodiment of the concept of dualism, and the courts' enthusiastic defence thereof.

As was mentioned above in Section 2, Article 15.2.1<sup>o</sup> vests the legislative function in the Oireachtas, and Article 29.6 provides that '[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'. As early as 1960, the Supreme Court held in *Ó Laighléis*<sup>104</sup> that, taken together, these provisions created an 'insuperable obstacle to importing the provisions of the [Convention] into the domestic law of Ireland'.<sup>105</sup> The courts over the next forty years held fast to this strict approach to the direct application of the Convention, approving the rule in *Ó Laighléis* as late as 2003, just prior to the enactment of the ECHR Act.<sup>106</sup> One important side effect of this judicial resistance to reliance on the Convention is described by O'Connell:

[T]his view of dualism, as a legal fact, has permeated the discourse on human rights in the political domain. Thus, dualism has become 'internalised' as a political value with the result that international human rights obligations have been 'externalised', as it were, as matters to be resolved exclusively through arguably flawed international enforcement mechanisms and, ultimately, international diplomacy. In other words, the separation of international and domestic law under the concept of dualism can be seen as an effectively immutable norm.<sup>107</sup>

This is the leitmotif of the Convention's reception in Ireland prior to incorporation. Before we explore the reasons for this 'externalisation' of human rights discourse, and its consequences for a pluralist analysis of the Irish and Convention legal orders, it is worth noting that the courts' strict adherence to dualism did not result in the Convention having no effect upon the Irish legal order. The relatively few cases decided by the European Commission and Court of Human Rights against Ireland did lead to reform, though this was often piecemeal and belated. For example, the

<sup>104</sup> *In re Ó Laighléis* [1960] IR 93.

<sup>105</sup> *Ibid per* Maguire CJ at 124. Notably, this case went on to become the very first case decided by the ECtHR (with the plaintiff using the English language form of his name): *Lawless v Ireland* [1961] 1 EHRR 15.

<sup>106</sup> *The People (DPP) v MS* [2003] 1 IR 606, *per* Keane CJ at 611.

<sup>107</sup> D O'Connell 'Watched Kettles Boil (Slowly): The Impact of the ECHR Act 2003' in U Kilkelly (ed) *ECHR in Irish Law* (2nd edn, Bristol: Jordans, 2009) at 5–6.

decision in *Airey*<sup>108</sup> that the absence of a legal aid scheme in civil matters amounted to a breach of Article 6(1) ECHR led to such a scheme being set up, but on a merely administrative rather than legislative basis. In *Norris*,<sup>109</sup> the ECtHR held that the provisions of the Offences Against the Person Act 1861 and the Criminal Law (Amendment) Act 1885 (both Acts of the former Parliament of Great Britain and Ireland which had the effect of criminalising male homosexual conduct) were a violation of Article 8 ECHR. This led to the enactment of the Criminal Law (Sexual Offences) Act 1993 and the repeal of the impugned provisions five years after the ECtHR had handed down judgment in the case.

However, these are cases where the State had been held to be in breach of its obligations under the Convention as a matter of international law by the bodies established thereunder, and so executive and legislative remedy of the breaches, however tardy, in no way offended the principle of dualism. Judicial opposition to the notion of giving effect either to the Convention or to judgments of the ECtHR prior to the State having been found in violation is clearly illustrated by the Supreme Court's refusal, in *Norris v Attorney General*<sup>110</sup> (the precursor to the ECtHR case mentioned above) to follow *Dudgeon v UK*,<sup>111</sup> in which the ECtHR had already held the very same nineteenth century statutes, in the context of Northern Ireland, to be in violation of Article 8 ECHR. As Besson notes, despite the increasing frequency of judicial references to the Convention in the High Court from the 1980s as an aid to legislative interpretation, the Supreme Court was careful not to lend its weight to this slight shift in attitudes.<sup>112</sup>

Why this insistence on keeping the Convention at (more than) arm's length from the domestic system? The legalistic explanation is that given by the Supreme Court in *Ó Laighléis*—the Constitution's conception of dualism. This is certainly justifiable, though it must be said that the Supreme Court adhered to this very strict construction long after such an approach to interpretation gave way to an altogether more flexible (or, if you prefer, activist) approach to the protection of fundamental

<sup>108</sup> *Airey v Ireland (No 1)* [1979–80] 2 EHRR 305.

<sup>109</sup> *Norris v Ireland* [1991] 13 EHRR 186.

<sup>110</sup> *Norris v Attorney General* [1984] IR 36.

<sup>111</sup> *Dudgeon v UK* [1982] 4 EHRR 149.

<sup>112</sup> Besson (n 101) at 52, citing, inter alia, *O'Leary v Attorney General* [1993] 1 IR 102 (HC), [1995] 1 IR 254 (SC); *Heaney v Ireland* [1994] 2 ILRM 420 (HC), [1996] 1 IR 540 (SC).

rights from the 1960s. For example, Article 15.2.1°’s reservation of all law-making power to the Oireachtas never posed any difficulty for the Supreme Court’s development, from 1965, of a doctrine of ‘unenumerated rights’—supposedly inherent, but nowhere specified, in the Constitution.<sup>113</sup> Whatever other criticisms may be levelled at the Irish judiciary, and despite a more recent retreat from judicial activism,<sup>114</sup> it has rarely been seen since the 1960s as being in hock to textual formalism. The dualist approach to international law inherent in Article 29.6 and 15.2.1°, taken alone, cannot explain this wary judicial attitude to the Convention and the judgments of the ECtHR.

The explanation presented here is twofold. First, there was a widespread conviction that the constitutional provisions for the protection of individual rights were sufficient, to the extent that placing any reliance on the Convention would be otiose (or even lead to a *reduction* in rights-protection),<sup>115</sup> coupled with a concomitant suspicion of the interpretive methodology of the ECtHR.<sup>116</sup> These two ideas, one of pride and one of prejudice, had both legal and political consequences: legally, they were instrumental in the judiciary’s largely sceptical treatment of the Convention; and, politically, they shed light on why it took fifty years for the State to make the Convention domestically effective.

As regards the first reason—that of the Irish Constitution’s sufficiency on its own, or even of its superiority to the Convention—it is worth noting that there are areas where the rights afforded by the Convention go above and beyond those provided for by the Constitution, and vice-versa.<sup>117</sup> This notwithstanding, there is no

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<sup>113</sup> Beginning with *Ryan v Attorney General* [1965] IR 294. See generally GW Hogan and G Whyte *JM Kelly: The Irish Constitution* (4th edn, Dublin: Tottel, 2003) at ch 7.3.

<sup>114</sup> I Bacik ‘A Human Rights Culture for Ireland?’ in I Bacik and S Livingstone *Towards a Culture of Human Rights in Ireland* (Cork: Cork UP, 2001) at 37–42.

<sup>115</sup> KL Bodnick ‘Bringing Ireland Up to Par: Incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (2002) 26 *Fordham International Law Journal* 396 at 418; AZ Drzemczewski *European Human Rights Convention in Domestic Law: A Comparative Study* (Clarendon, Oxford 1983) at 170–174; Besson (n 101) at 43–44. See also *Lobe & Osayande v Minister for Justice* [2003] IESC 1 *per* Fennelly J, dissenting: ‘It may ... be possible to argue persuasively that an act which does not satisfy the minimum standards of the Convention should not lightly be considered compatible with the more rigorous demands of the Constitution.’ (No page or paragraph numbers in transcript).

<sup>116</sup> O’Connell (n 107) at 8, citing conference papers delivered by the then-Minister for Justice in October 2003, and Hardiman J of the Supreme Court in February 2001.

<sup>117</sup> Bacik (n 114) *passim*, especially at 17–23, noting the wider scope of the ‘family’ under Article 8 ECHR and the more extensive protection of free speech under Article 10 ECHR.

doubting that the Irish record before the ECtHR is quite good. The ECtHR's database shows that only 24 of the more than 100 cases taken against Ireland have proceeded to decision on the merits, though 15 of these have resulted in findings of a violation of the Convention. However, to suggest that this low number of cases can be ascribed in the main to 'the lively and strong human rights tradition in Ireland'<sup>118</sup> is to risk letting self-satisfaction obscure the many deficiencies in the protection of rights under the Constitution.<sup>119</sup> The length and expense of taking a case to Strasbourg (particularly given that seeking domestic redress may be just as long and expensive, depleting both funds and patience in the exhaustion of domestic remedies) and Ireland's small population should be taken into account. One must also not forget the litany of human rights abuses at the hands of (or with the connivance of) the State with regard to the treatment of, in particular, vulnerable women and children, against which both the Constitution and the Convention were singularly useless—an important reminder of the limits of an excessively juridified, legalistic approach to the protection of fundamental rights.<sup>120</sup>

## 2.1.2 2003 to the present day: the ECHR Act

### 2.1.2.1 Origins

Given the half-century that had passed since ratification without incorporation, one might have been forgiven for imagining in the 1990s that the Convention would never be given domestic effect in Ireland.<sup>121</sup> However, when the impetus to

<sup>118</sup> Besson (n 101) at 61, citing G Hogan 'Incorporation of the ECHR: Some Issues of Methodology and Process' in U Kilkelly (ed) *ECHR and Irish Law* (1st edn, Bristol: Jordans, 2004) at 14.

<sup>119</sup> Of the 15 cases decided against Ireland, nine have involved violations of Article 6(1) ECHR and four have involved violations of Article 8 ECHR (with an overlap of two cases involving both).

<sup>120</sup> See *Report of the Inquiry into Child Sexual Abuse in the Diocese of Ferns* ('Ferns Report', October 2005, available at <<http://www.bishop-accountability.org/ferns/>>); *Report of Dr Kevin McCoy on the Western Health Board Inquiry into Brothers of Charity Services in Galway* ('McCoy Report', November 2007, available at <[www.hse.ie/eng/services/Publications/services/Disability/MCoy\\_BOC.pdf](http://www.hse.ie/eng/services/Publications/services/Disability/MCoy_BOC.pdf)>); *Report of the Commission to Inquire into Child Abuse* ('Ryan Report', 20 May 2009, available at <[www.childabusecommission.com/rpt/pdfs/](http://www.childabusecommission.com/rpt/pdfs/)>); *Report of the Commission of Investigation into the Catholic Archdiocese of Dublin* ('Murphy Report', 29 November 2009, available at <[www.justice.ie/en/JELR/Pages/PB09000504](http://www.justice.ie/en/JELR/Pages/PB09000504)>); *Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries* ('McAleese Report', 5 February 2013, available at <[www.justice.ie/en/JELR/Pages/MagdalenRpt2013](http://www.justice.ie/en/JELR/Pages/MagdalenRpt2013)>).

<sup>121</sup> Note also that the ECtHR had by the 1980s declared that there was no legal obligation on States to incorporate the Convention into domestic law: N Krisch 'The Open Architecture of European Human

incorporate did come, it came neither from Dublin, nor from Strasbourg, but from Belfast. The Belfast Agreement of 1998<sup>122</sup> contained a number of commitments by the governments of both the UK and Ireland regarding human rights in general, and the Convention in particular. The UK Government committed itself, inter alia, to completing the incorporation in Northern Ireland of the ECHR (which was ongoing across the UK in any case, having been a manifesto commitment of the New Labour Government in 1997)<sup>123</sup> and to establishing a Northern Irish Human Rights Commission.<sup>124</sup> Though the Irish Government agreed that it would establish a Human Rights Commission ‘with a mandate and remit equivalent to that within Northern Ireland’, it committed itself only to ‘further examining’ the question of the incorporation of the ECHR.<sup>125</sup>

This ‘further examination’ led, after five years, to the enactment of the ECHR Act 2003, which finally incorporated the Convention but did so in a sub-constitutional, indirect, interpretive and residual fashion. There is a large and growing literature on the origins, provisions and effects of the ECHR Act.<sup>126</sup> Accordingly, only the Act’s major features will be mentioned here, in order to ground a discussion of the implications the Act may have for a polyarchic conception of the relationship between the Irish and ECHR legal orders.

### 2.1.2.2 *The European Convention on Human Rights Act 2003*

The Act’s most controversial feature was the chosen method of incorporation. In its 1996 report, the Constitution Review Group considered, but ultimately rejected, the

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Rights Law’ (2008) 71 *Modern Law Review* 183 at 208, citing, in particular, *James and Others v United Kingdom* App no 8793/79 (judgment, ECtHR, 21 Feb 1986 at para 84).

<sup>122</sup> *Agreement Reached in the Multi-party Negotiations*, 10 April 1998 (also known as the Good Friday or Stormont Agreement) available at [peacemaker.un.org/sites/peacemaker.un.org/files/IE%20GB\\_980410\\_Northern%20Ireland%20Agreement.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/IE%20GB_980410_Northern%20Ireland%20Agreement.pdf).

<sup>123</sup> *Ibid* at Part 6.2.

<sup>124</sup> *Ibid* at Parts 6.3–6.8

<sup>125</sup> *Ibid* at Part 6.9.

<sup>126</sup> See Kilkelly (2004) (n 118); Kilkelly (2009) (n 107); Besson (n 101); D O’Connell, S Cummiskey, E Meenaghan and P O’Connell *ECHR Act 2003: A Preliminary Assessment of Impact* (Dublin: Law Society of Ireland, 2006); TE O’Donnell ‘The Constitution, the European Convention on Human Rights Act 2003 and the District Court—A Personal View from a Judicial Perspective’ (2007) 7 *Judicial Studies Institute Journal* 137; A Connolly ‘Implications of the ECHR Act 2003’ (2004) 98 *Law Society Gazette* 7; PA McDermott & MW Murphy ‘No Revolution: The Impact of the ECHR Act 2003 on Irish Criminal Law’ (2008) 30 *Dublin University Law Journal* 1.

constitutional incorporation of the Convention—whether by wholesale replacement of the Constitution’s own fundamental rights provisions; or by something along the lines of Sweden’s incorporation by reference, forbidding any enactment contrary to the Convention.<sup>127</sup> The rejection of total replacement is unsurprising and sensible, given that it would have involved jettisoning decades of home-grown rights jurisprudence. The rejection of the Swedish model is more difficult to understand, particularly given the scant attention the Group paid to the possibility. Instead, the Group’s recommendation was for piecemeal incorporation, as part of a wider project of constitutional reform, drawing on the Convention where:

- i. The right is not expressly protected by the Constitution
- ii. The standard of protection of such rights is superior to those guaranteed by the Constitution; or
- iii. The wording of a clause of the Constitution protecting such right might be improved.<sup>128</sup>

While an interesting proposal, it was, along with most of the Group’s other recommendations, quietly shelved.

Instead, the ECHR Act followed a model not contemplated by the Group, the interpretive approach of the UK Human Rights Act 1998 (HRA). It is perhaps rather odd that this approach was chosen in the Irish context, given that it was developed with specific reference to the UK’s tradition of parliamentary supremacy and a concomitantly weak role for the judiciary in the vindication of fundamental rights. Though the UK and Ireland share a dualist approach to international law, the legal, political and social experience of judicial rights-enforcement in Ireland would have made some form of constitutional or quasi-constitutional incorporation both politically possible and normatively desirable.

**Section 2** of the ECHR Act obliges the judiciary to interpret and apply statutes and rules of law in a manner compatible with the Convention ‘in so far as is possible’. However, there is an important proviso: that this obligation is ‘subject to the rules of law relating to such interpretation and application’. **Section 3** obliges every ‘organ of the State’ to act in accordance with the Convention. Significantly,

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<sup>127</sup> Constitution Review Group *Report* (Stationary Office, Dublin 1996) at 216–219.

<sup>128</sup> *Ibid* at 219.

the courts are specifically excluded from the definition of an ‘organ of the State’.<sup>129</sup> **Section 4** obliges the courts to ‘take due account’ of the jurisprudence of the Strasbourg bodies in considering the Convention’s provisions. **Section 5** furnishes the High and Supreme Courts with the jurisdiction to make ‘declarations of incompatibility’ against legislation it finds to be incompatible with the Convention, but only ‘where no other legal remedy is adequate and available’. These declarations do not affect the ‘validity, continuing operation or enforcement’ of the incompatible legislation. The Taoiseach is required to bring such a declaration to the attention of both the Dáil and the Seanad,<sup>130</sup> but there is no legal obligation on the political organs to rectify the incompatibility. Finally, **Section 5(4)** authorises the government, at its own discretion, to make an *ex gratia* payment of compensation in the event of a declaration being made, with the amount linked to the ECtHR’s practice relating to ‘just satisfaction’ under Article 41 ECHR.

## 2.2 The ECHR Act and polyarchy

The method of incorporation adopted in the ECHR Act is residual, interpretive and sub-constitutional. Certain provisions, particularly the exclusion of the courts from the definition of ‘organs of the State’, render the claim by the Minister for Justice who oversaw the Act’s passage that ‘its provisions have exploited, to the utmost sinew and limit, the capacity of our legal system’<sup>131</sup> rather suspect. The well-known limitations of the UK Human Rights Act can at least be explained by the constraints in Britain of the doctrine of parliamentary sovereignty, an idea long rejected in Ireland as unsound.<sup>132</sup> Viewed in this light, the HRA was indeed a revolutionary development in the UK context, as evidenced by the present political controversy

<sup>129</sup> ECHR Act 2003, S 1.

<sup>130</sup> ECHR Act 2003, S 5(3).

<sup>131</sup> M McDowell ‘The European Convention on Human Rights Act 2003: What the Act Will Mean’ paper delivered at the Law Society of Ireland/Irish Human Rights Commission Conference on New Human Rights Legislation, 18 Oct 2003 at 3 of the typescript.

<sup>132</sup> In this regard, see the extra-curial address of Sir Igor Judge LCJ, where he argues that tyranny was surmounted in Britain by the establishment of the sovereignty of Parliament, whereas in the US ‘a sovereign Parliament was the problem. It could therefore not be the solution.’ The parallels with Ireland are obvious. “‘No Taxation without Representation’: A British Perspective on Constitutional Arrangements’ (Colorado Springs, CO, 28 Aug 2010, <[www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-speech-no-taxation-without-representation-28082010.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-speech-no-taxation-without-representation-28082010.pdf)> at 10).

surrounding it. The former Minister's claim that the British conception of parliamentary sovereignty has 'different, but no less fundamental, echoes in the context of popular sovereignty and the sole and exclusive law-making role of Parliament'<sup>133</sup> in Ireland sheds little light on the issue. Given the long-standing judicial role of parliamentary oversight—which was suggested in Section 2 above to be less offensive to the idea of democracy and popular sovereignty than might be thought given the system of penultimate judicial supremacy—resistance to giving the judiciary a supplementary set of rights provisions to consider, and a supplementary jurisprudence to take into account at a constitutional level, must be explained and justified by more than simple and simplistic analogy to the constitutional configuration of a (very) different jurisdiction. The most likely answer, I suggest, refers us back to the twin shibboleths of pride in the domestic constitutional order, and prejudice as to the abilities and intentions of a 'foreign' supervisory body.<sup>134</sup>

The traditional, dualist approach to the Convention in Ireland finally and somewhat grudgingly gave way to a form of domestication—and this only as the necessary and unfortunate price of peace, stability and a 'levelling-up' of rights protection in Northern Ireland. It was not necessarily for any intrinsic usefulness or goodness in the internalisation of long-standing international standards of human rights; nor a recognition of the numerous deficiencies in Ireland's own constitutional order; nor a desire to aid in the progressive realisation of the Convention's values across Europe by way of the Irish judiciary finally engaging in the kind of dialogic mutual engagement envisaged by pluralism. However, what the ECHR Act does do is make quite credible a pluralist—and specifically polyarchic—analysis of Irish and ECHR law for dualism, by definition, is not pluralism: it is *plural*, in that it recognises the concurrent validity, in different spheres, of more than one legal system, each independent of the other for their validity; but this is not the same thing. As O'Connell noted above, dualism emphasises the 'otherness' of international law, the idea that it is of relevance only to experts and senior politicians, and not to the ordinary business of legislation, administration, adjudication and rights vindication. By making the Convention part of Irish law, even if only residually ('where no other

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<sup>133</sup> McDowell (n 131) at 2.

<sup>134</sup> Though note Besson (n 101) at 96: 'Generally speaking, and contrary to the attitude of the British (tabloid) press, "international" standards are well regarded by the Irish media.'



legal remedy is adequate and available’), the Act has opened the door to a conception of the Irish and Convention legal orders as being, in MacCormick’s foundational words, ‘interactive, rather than hierarchical’.<sup>135</sup> It enables the Irish judiciary to engage with the reasoning of the ECtHR on its own terms, and within the sphere of its own jurisdiction. Moreover, despite the limitations of the interpretive obligation under Section 2, the tortious action under Section 3 and the declaration of incompatibility under Section 5, these remedies do present an important opportunity to undo this sense of ‘otherness’ surrounding the Convention, and, after fifty years, to regard it as an essential component of the Irish and European constitutional polyarchy.

### 2.2.1 Otherness and embeddedness

Leaving aside for the moment the particular provisions and provisos of the ECHR Act, it is worth examining, in the round, the overall effect of the Act on the Convention’s place in the domestic legal order. We saw above how the European Communities Act 1972 is the legislative vehicle through which EU law became effective in Ireland. The ECA provides that the Treaties as well as the existing and future acts adopted by the Union ‘shall be binding on the State and part of the domestic law thereof under the conditions laid down in [the] Treaties’.<sup>136</sup> The ECA is therefore the provision from which Union measures draw legislative force in Ireland, but the ECA is not their *origin*. EU legal norms still originate from outwith the domestic order, but are automatically made effective by a domestic legislative provision.<sup>137</sup> Significantly, this is *not* the approach employed with respect to the Convention by the ECHR Act. Instead of providing that—to borrow the ECA’s language—the Convention ‘shall be binding on the State and part of the domestic law thereof’ (and thus maintaining the external origin of the Convention provisions), the ECHR Act imposed a specific set of obligations on domestic institutional actors,

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<sup>135</sup> N MacCormick ‘Risking Constitutional Collision in Europe?’ (1998) 18 *Oxford Journal of Legal Studies* 517 at 528.

<sup>136</sup> European Communities Act 1972, S 2.

<sup>137</sup> This is the case even with regulations. Though self-executing, they derive their legal force in Ireland from the ECA 1972.

set out in the Schedules to the Act.<sup>138</sup> This may seem to be a rather nice distinction, but it has important consequences for the ‘externality’ of human rights discourse, described above by O’Connell. The idea is that rather than being external imports, the rights protected under the ECHR Act can be seen as being *as domestic in their origin as any other national legislative provision*, while simultaneously being norms of international law to which the State has committed itself. Their interpretation is therefore a matter for the domestic courts, taking judicial notice of (but not necessarily being strictly bound by) the jurisprudence of the ECtHR.<sup>139</sup> Though not strictly required by the legislation, this arrangement would logically seem to imply that attention should be paid to the interpretation given to the Convention by similarly-situated domestic courts in other European jurisdictions, echoing Maduro’s contrapunctual principle of horizontal coherence.

This requirement to take judicial notice of Convention provisions and the jurisprudence of the ECtHR has necessarily changed the world-view and terms of reference of the domestic judiciary. The days when the domestic judiciary was precluded from taking into account obviously relevant judgments of the ECtHR, as in *Norris*, are gone. Cases such as *Carmody*, *Doherty v South Dublin County Council (No 2)*,<sup>140</sup> and *Leonard v Dublin City Council*<sup>141</sup> all provide instances of detailed and sophisticated engagement with external jurisprudence to a degree previously foreclosed by dualism. The cases of *Foy v an t-Árd Chláraitheoir (No 1)*<sup>142</sup> and *(No 2)*<sup>143</sup> demonstrate the integrative, pluralising effect of domestication particularly well. Just days after the High Court had found Ireland’s lack of provision for updated birth certificates for post-operative transgendered people to be compatible with the Convention with reference to the ECtHR’s jurisprudence, the European Court

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<sup>138</sup> In this regard, it is worth noting the statement of Laffoy J in *Lelimo v Minister for Justice* [2004] 2 IR 178 that ‘[i]t is not correct to say that the Convention has been incorporated into domestic law. What the Act of 2003 has done is to give effect to rights recognised in the Convention in Irish law.’ (at 186) and also O’Neill J’s description of the ECHR Act ‘importing’ Convention law into Ireland in *Dada v Minister for Justice* [2006] IEHC 166. See further, F de Londras ‘Using the ECHR in Irish Courts: More Whisper than Bang?’ Public Interest Law Association Seminar, Dublin, 13 May 2011. <<http://www.pila.ie/download/pdf/pilaachrseminar130511fdelondras.pdf>>. These comments notwithstanding, the standard term ‘incorporation’ is used here.

<sup>139</sup> ECHR Act 2003, S 4.

<sup>140</sup> *Doherty v South Dublin County Council (No 2)* [2007] 2 IR 696.

<sup>141</sup> *Leonard v Dublin City Council* [2008] IEHC 79.

<sup>142</sup> *Foy v an t-Árd Chláraitheoir (No 1)* [2002] IEHC 116.

<sup>143</sup> *Foy v an t-Árd Chláraitheoir (No 2)* [2007] IEHC 470.

handed down judgment in *Goodwin v UK*,<sup>144</sup> reversing its previous holdings on the matter and finding the UK in breach of the Convention for its similar refusal to accommodate the wishes of transgendered people. Accordingly, in *Foy (No 2)*, Mrs Foy was successful in seeking a declaration of incompatibility under Section 5 in view of this change in the interpretation of the Convention. No trip to Strasbourg was necessary in order to procure a judgment against the state under international law, for the ECHR Act's provisions had allowed for the ECtHR's jurisprudence to be applied domestically. Moreover, the fact that the domestic courts followed the new line of European jurisprudence does not privilege the ECtHR over the domestic judiciary, nor the Convention over the Constitution. Instead, it was merely that one source of authority in the polyarchy had reconsidered its jurisprudence, and the resultant conflict was resolved by the domestic adoption of this new jurisprudence, commanded by the legislature and thus compliant with the autonomy of the domestic order.

Furthermore, the interpretive obligation in Section 4 ECHR Act is phrased in such a way that it is not confined to cases where Convention rights have been specifically pleaded. In this regard, Oran Doyle and Desmond Ryan note that:

In the context of a declaration of unconstitutionality being sought in the absence of any ECHR-related claim, the Court has a statutory obligation pursuant to this section to have regard to any of the pertinent ECHR-related authorities listed in section 4. This point underscores the potential for section 4 to create an enhanced impetus for the already-developed practice of the infusion of Convention protection into domestic constitutional analysis<sup>145</sup>

However, for all the integrative effects of the ECHR Act, its long title is clear that it is intended 'to enable further effect to be given, *subject to the Constitution*, to certain provisions of the [ECHR]'. The question of priority must therefore be considered.

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<sup>144</sup> *Goodwin v UK* (2002) 35 EHRR 18.

<sup>145</sup> O Doyle and D Ryan 'Judicial Interpretation of the European Convention on Human Rights Act 2003: Reflections and Analysis' (2011) 18(1) *Dublin University Law Journal* 369 at 380, citing F de Londras and C Kelly *The European Convention on Human Rights Act: Operation, Impact and Analysis* (Dublin: Round Hall, 2010) at 6–44.

### 2.2.2 Unconstitutionality and unconventionality: a question of priority

The question of priority is most relevant with reference to the declaration of incompatibility under Section 5. The case of *Carmody v Minister for Justice*<sup>146</sup> concerned the compatibility of the State's criminal legal aid arrangements with both the Constitution and the Convention, and whether an indigent defendant facing trial in the District Court on a complex set of charges was entitled to be provided with both a solicitor and a barrister. Carmody had simultaneously sought a declaration that Section 2 of the Criminal Justice (Legal Aid) Act 1962 was repugnant to the Constitution and a declaration of incompatibility with the Convention under Section 5 of the ECHR Act. In the High Court, Laffoy J applied the long-standing (but not absolute) rule that 'a court should not enter upon a question of constitutionality unless it is necessary for the determination of the case before it'.<sup>147</sup> This is a sensible precautionary measure, in that the 'nuclear option' of finding a legislative provision or state action contrary to the Constitution should be avoided if the plaintiff's rights can be vindicated by less drastic measures. However, Gerard Hogan points out that to decide the question of conventionality before that of constitutionality may result in:

[A] practice that the exhaustion of constitutional remedies [is] the exception, not the norm. If that were so, we might well [reach] the point whereby the ECHR would *de facto* have replaced the Constitution as the principal legal instrument of protection so far as the protection of fundamental rights is concerned.<sup>148</sup>

Such an approach would therefore be inconsistent with the ECHR Act's stated intention that Convention rights be protected subject to the Constitution.

Having made the decision that it was most appropriate to begin by investigating the 1962 Act's compatibility with the Convention prior to deciding the constitutional issue, Laffoy J engaged in a wide-ranging and nuanced consideration of the ECtHR's jurisprudence on Articles 6 and 14 ECHR, and relevant decisions of the former Judicial Committee of the Privy Council in the UK, before eventually holding, on the facts, that Section 2 of the 1962 Act was not incompatible with the requirements of

<sup>146</sup> *Carmody v Minister for Justice* [2005] 1 JIC 2103 (HC); [2010] 1 IR 635 (SC).

<sup>147</sup> *The State (Woods) v Attorney General* [1969] IR 385 at 400 per Henchy J.

<sup>148</sup> G Hogan 'The Value of Declarations of Incompatibility and the Rule of Avoidance' (2006) 28 *Dublin University Law Journal* 408 at 418.

the Convention. A similar finding was made in relation to the Section 2's compatibility with the Constitution. Accordingly, Carmody lost his case, and then appealed.

Before considering the Supreme Court's reversal of *Carmody*, it is important to note the High Court judgment of O'Neill J in *Law Society of Ireland v Competition Authority*,<sup>149</sup> handed down shortly after Laffoy J's judgment in *Carmody*. Rather than expressly prioritising Convention arguments over constitutional arguments, or vice versa, O'Neill J employed what might be called an 'exhaustive' or 'concurrent' approach: the case was ultimately decided on constitutional grounds, and the order for certiorari sought by the applicants was granted on account of the respondents' breach of Article 40.3 of the Constitution, but the Court nevertheless went on to evaluate the Convention arguments. In the event, the respondents' actions were held also to amount to a breach of Article 6(1) ECHR. However, because a constitutional remedy had already been granted, 'it is impermissible to make the declaration of incompatibility envisaged in s. 5, there being another adequate legal remedy available.'<sup>150</sup>

The approaches of the High Court in *Carmody* and *Law Society* differ in important respects. In *Carmody*, Laffoy J set out a clear progression, where arguments under the ECHR Act are dealt with before any constitutional arguments are entertained; whereas O'Neill J in *Law Society* considered both sets of claims as alternatives, only preferring the constitutional remedy because of Section 5's requirement that there be no other adequate remedy available.<sup>151</sup> The Supreme Court's judgment in *Carmody* reveals, however, a different approach. The Court held that the ordinary, Constitution-last approach was inappropriate for cases in which both constitutional arguments and a claim under Section 5 ECHR Act are advanced. This was predicated on the fact that, in the present case, a declaration of incompatibility would not have the effect of 'determining the issue'<sup>152</sup> without

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<sup>149</sup> *Law Society of Ireland v Competition Authority* [2006] 2 IR 262.

<sup>150</sup> *Ibid* at 290.

<sup>151</sup> Which can be contrasted with O'Neill J's decision to grant a declaration of incompatibility in *Dublin City Council v Liam Gallagher* [2008] IEHC 354, where no constitutional arguments had been raised, and the alternative remedy of judicial review would not have been adequate given that the facts of the case were in dispute.

<sup>152</sup> *Carmody* (SC) (n 146) at 648, quoting *Murphy v Roche* [1987] IR 106 at 110 per Finlay CJ.

recourse to the Constitution. Because Section 5 specifically states that a declaration ‘shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made’,<sup>153</sup> Carmody would still have faced trial without the assistance of a barrister and, as the Court held, ‘any such declaration in this case would leave the plaintiff in the same position with regard to his claimed constitutional right ... as he was prior to the commencement of proceedings.’<sup>154</sup> This combined with Section 5(1)’s requirement that ‘no other legal remedy [be] adequate or available’ led the Court to conclude that in any case where both declarations of unconstitutionality and incompatibility with the Convention are sought, the constitutional arguments must be decided first.

It is therefore clear from the Supreme Court’s judgment in *Carmody* that for all the integrative effect of the ECHR Act, the Constitution remains the supreme law of the land; and while the judgment still allows for domestic application and interpretation of the Convention, and thus for a growth in domestic Convention jurisprudence over time, Convention remedies are still of a residual nature.

### 2.3 Conclusion: legislative interface norms

As was stated at the outset of this Section, the relationship between the Irish legal order and that of the Convention is fundamentally different from that between the Irish order and that of the Union. This is to be expected, both because of the very different natures of the two European legal orders per se, and because of the very different means by which the entry of these orders to the Irish system is regulated. Outlining the terms of engagement between Irish and EU law necessarily involved discussion of cases of actual and potential conflict between the legal orders, especially *Crotty* and *Grogan*, and thus the interface norms involved, whether constitutional or metaconstitutional. This was particularly the case given the remarkable nature of Article 29.4.6°, and the orthodoxy surrounding it. The relationship between Irish law and the Convention contains no equivalent to the exclusion clause; and, unlike the judicially-formulated constitutional interface norms discussed in Section 2, the ECHR Act provides a set of *legislative* norms regulating

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<sup>153</sup> ECHR Act 2003, S 5(2)(a).

<sup>154</sup> *Carmody* (SC) (n 146) at 650.

the interaction between legal systems. Again, these norms are internal to the Irish legal system, and not metaconstitutional. Accordingly, the focus of this section has been on outlining the means by which the Convention has been incorporated in Ireland and demonstrating the polyarchic nature of the resultant relations, and *not* on the approach of the Irish judiciary in cases of conflict. As we have seen with reference to the cases of *Foy (No 1)* and *Foy (No 2)*, conflict between the two legal orders is ordinarily resolved by the adaptation of the domestic order to the norms of the Convention. There are, however, examples of altogether more difficult cases of conflict between the orders, and these will be discussed in greater detail, in the context of the ‘triangular’ frame, in Chapter 4.

### 3 CONCLUSION

This chapter has set out in detail the means by which the legal orders of the EU and the Convention have been received in the Irish legal order. It has demonstrated, first, that, in both cases, the relationship between the systems is best regarded as being heterarchical and, second, that the three systems form part of a tripartite polyarchy, the triangular constitution. With reference to the Irish-EU side of the triangle, the interface norms invoked by the domestic judiciary when dealing with cases of constitutional conflict—whether before or after the coming into force of EU norms—are *constitutional* in nature. That is, they are conflict-of-laws rules internal to the national legal system. Whether and how they can be metaconstitutionalised, and what resemblance they bear to the interface norms posited by Kumm and others is a question that will be addressed further in the chapters to follow, but we can come to the preliminary conclusion that the attempt to universalise norms developed with reference to a particular national configuration is beset with difficulty, and that the external norms posited by Kumm do not quite reflect what has happened in actual practice.

Turning to the Irish-ECHR side of the triangle, we saw that a standard dualist relationship between national and international law has given way to the partial internalisation of the international system within the national by virtue of the ECHR Act. That Act itself provides substantive norms for regulating the relationship between the orders, but it does so at the legislative, and therefore subconstitutional,

level. Be that as it may, the Act provides convincing evidence for the polyarchical arrangement of the two legal systems. Discussion of instances of seeming irresolvable conflict between the orders, and the interface norms adopted therein, will be engaged in Chapter 4. Before this can be done, however, the third side of the triangle must be outlined: the relationship between the EU and the ECHR. This will be the subject of the next chapter.



## CHAPTER 3: THE HORIZONTAL FRAME

### INTRODUCTION

This chapter examines the interface norms at work on the ‘horizontal’ side of the triangular constitution—the relationship between the Union and Convention legal orders. Though the relationship can be characterised as ‘horizontal’ within the specific Member State-EU-ECHR configuration, this is subject to two important provisos. First, there is a ‘triangular’ aspect inherent to the relationship, in that nation states have historically served as the intermediaries through which the two European legal orders have articulated their relationship with and attitudes to each other, given the lack of a direct institutional link between them. As we shall see, the coming into force of the Charter of Fundamental Rights of the European Union<sup>1</sup> has partially provided the institutional link that was previously missing, and this link will be solidified by the impending accession of the EU to the Convention. Second, these two developments, the Charter and accession, raise serious questions about how we can best conceptualise the EU-ECHR relationship, and whether heterarchy is giving way—and ought to give way—to hierarchy.

The examination proceeds in two parts. Section 2 first sets out the institutional relationship between the EU and the ECHR before accession, from the perspective of each in turn, and analyses the interface norms regulating the relationship. It then discusses the implications of the recently negotiated Draft Accession Agreement. In Section 3, the focus narrows to a specific, ongoing case of conflict between the orders, investigating how it arose and offering suggestions based on precedent as to how it will be resolved.

The Chapter concludes though there are similarities with the ‘vertical’ frame, the specific nature of the EU and the ECHR as non-state legal orders complicates any attempt to simply transpose interface norms developed in the context of the EU-Member State relationship. Moreover, EU accession to the ECHR will shift a large part of the work of managing the interface between the orders from the realm of the

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<sup>1</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

*metaconstitutional* to that of the *constitutional*, posing further difficulties for the ostensible universality of metaconstitutional interface norms.

## 1 THE TERMS OF ENGAGEMENT BETWEEN THE EU AND THE ECHR

### 1.1 Pre-Accession

#### 1.1.1 The ECHR from the ECJ's viewpoint

We saw in Chapter 1 how the ECJ's initial disavowal of any jurisdiction in matters of human rights gradually gave way, following pressure from judicial actors at the state level, to the development of an expansive EU human (or 'fundamental') rights jurisprudence. Judge Allan Rosas of the ECJ describes his Court's attitude to the Convention during this process as progressing through five stages:<sup>2</sup> the initial denial of fundamental rights competence;<sup>3</sup> acceptance of fundamental rights as part of the general principles of Community law (since 1969);<sup>4</sup> explicit reference to the ECHR (since 1974);<sup>5</sup> characterisation of the ECHR as having 'special significance' (since 1991);<sup>6</sup> and reference to the jurisprudence of the ECtHR (since 1996).<sup>7</sup> However, these developments came about quite separately from the institutional machinery of the Convention. Indeed, the ECJ held in 1996 that EU accession to the Convention would be outwith the conferred competences of the Union,<sup>8</sup> being a change which would:

[E]ntail the entry of the Community into a distinct international institutional system as well as integration of all provisions of the Convention into the Community legal order[,] [s]uch a modification of the system for the protection of human rights in the Community ... would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could only be brought about by Treaty amendment.<sup>9</sup>

<sup>2</sup> A Rosas 'The European Union and Fundamental Rights/Human Rights' in C Krause and M Scheinin (eds) *International Protection of Human Rights: A Textbook* (Turku: Institute for Human Rights, Åbo Akademy University, 2009) at 457.

<sup>3</sup> Case 1/58 *Stork v High Authority* [1959] ECR 17; Cases 36, 37, 38 & 40/59 *Geitling v High Authority* [1960] ECR 423; Case 40/64 *Sgarlata and others v Commission* [1965] ECR 215.

<sup>4</sup> Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.

<sup>5</sup> Case 36/75 *Rutili* [1975] ECR 1219.

<sup>6</sup> Case C-260/89 *ERT* [1991] ECR I-2925.

<sup>7</sup> Case C-13/94 *P v S* [1996] ECR I-2143.

<sup>8</sup> Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759

<sup>9</sup> *Ibid* at paras 34-35.

This decision has been criticised on the ground that though the matter was framed as one of competence, the Court had an ulterior motive in the protection of its own jurisdiction and autonomy from external interference, leading to a decision that was ‘needlessly restrictive and diffident towards the ECHR.’<sup>10</sup> In the words of Giorgio Gaja:

[W]hat is here at stake is the conservation by the Court of Justice of its present functions, although understandably the Court has not stressed this point in order not to emphasize its concern with its own prerogatives.<sup>11</sup>

While this may well have been the case, the Opinion was still highly supportive of the Convention’s relevance to the EC legal order. The Court repeated its longstanding assertion that ‘fundamental rights form an integral part of the general principles of law whose observance the Court ensures’,<sup>12</sup> and recalled the further holding from *ERT*<sup>13</sup> that the Convention is of ‘special significance’ in the context of the Court’s consistent statement that it:

[D]raws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.<sup>14</sup>

As a result, the general attitude of the ECJ towards the ECtHR in the period since Opinion 2/94 has been one of comity in the face of potentially overlapping jurisdictions, coupled with (and perhaps tempered by) a desire to preserve its own autonomy and interpretive pre-eminence within the Union—the very substance of

<sup>10</sup> B de Witte ‘The Use of the ECHR and Convention Case Law by the European Court of Justice’ in P Popelier, C Van de Heyning and P van Nuffel (eds) *Human Rights Protection in the European Legal Order: The Interaction Between the European and National Courts* (Cambridge: Intersentia, 2011) at 17.

<sup>11</sup> G Gaja ‘Case-note on Opinion 2/94’ (1996) 33 *Common Market Law Review* 973 at 988. See, further, N Burrows ‘Question of Community Accession to the European Convention Determined’ (1997) 22 *European Law Review* 58 at 62, suggesting that: ‘Perhaps the Court is jealous of its jurisdiction and will not lightly give way to an international court which may stand above it.’ But compare C Franklin ‘The Legal Status of the EU Charter of Fundamental Rights After the Treaty of Lisbon’ (2010–2011) 15 *Tilburg Law Review* 137 at 158 fn 84: ‘[T]he stance adopted in *Opinion 2/94* was in fact no different to that taken in other well-known cases where the Court refused to open the door for other international courts, tribunals or bodies to rule on issues covered by Community law.’ (citing Opinion 1/91 *Draft Agreement Between the Community and the Countries of EFTA Relating to the Creation of the EEA* [1991] ECR I–6079 and Case C–459/03 *Commission v Ireland* [2006] ECR I–4635).

<sup>12</sup> Opinion 2/94 (n 8) at para 33. For a critical view, describing the EU’s fundamental rights narrative as an instance of political mythology, see S Smismans ‘The European Union’s Fundamental Rights Myth’ (2010) 48 *Journal of Common Market Studies* 45.

<sup>13</sup> *ERT* (n 6).

<sup>14</sup> Opinion 2/94 (n 8) at para 33.

Sabel and Gerstenberg's deliberative polyarchy. The purpose of this section is, therefore, to examine two related consequences of this generally accommodating attitude in the pre-accession era in order to reveal the interface norms—constitutional and metaconstitutional—regulating the relationship: first, how the ECJ regards the Convention itself, and, second, how it uses the ECtHR's jurisprudence.

### 1.1.1.1 *The status of the Convention within the EU*

As we have seen, the ECJ's case law on the general principles of EU law has followed a three-step formula in respect of the relevance of the Convention to the EU legal order. First, fundamental rights are general principles of Union law; second, international treaties between the Member States and others supply 'guidelines' from which the Court 'draws inspiration' in its decisions on these general principles; and third, the Convention has 'special significance' in this regard.<sup>15</sup> This formula leaves the formal relationship between Convention rights and the general principles somewhat unclear, and does not, of itself, give any particular indication as to the normative status of Convention rights within the EU. It cannot therefore be classified as an interface norm, even in the loosest sense—rather, it is a broad, general statement of openness towards the norms of another legal order, leaving more than enough room for those norms to be applied or departed from in a given case.

The generally accepted view is that, the EU not being a signatory to the Convention, the Convention is not binding within the EU legal order (at least not as part of the general principles). This is the clear and repeated position of the General Court (GC):

[T]he Court has no jurisdiction to assess the lawfulness of an investigation under competition law in light of the provisions of the ECHR, inasmuch as those provisions do not as such form part of Community law.<sup>16</sup>

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<sup>15</sup> In addition to the case law cited in Section 2.1.1 above, see Case 479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-8089 at para 61 for a simple, one-paragraph condensation of this approach.

<sup>16</sup> Case T-99/04 *AC-Treuhand v Commission* [2008] ECR II-1501 at para 45. See also, Case T-112/98 *Mannesmannröhren-Werke v Commission* [2001] ECR II-729 at para 59; and Case T-347/94 *Mayr-Melnhof Kartongesellschaft v Commission* [1998] ECR II-1751 at para 311.

However, the ECJ has never explicitly endorsed this approach of the GC, and Bruno de Witte advances a different interpretation, one based on the actual text of Article 6(3) TEU:

Fundamental rights, *as guaranteed by the [ECHR]* and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.<sup>17</sup>

For de Witte, this wording, present in the Treaties since Maastricht and justiciable since Amsterdam,<sup>18</sup> ‘indicates that the rights of the Convention *are* general principles of EU law and not just *a source of inspiration* for those principles.’<sup>19</sup> If this is so, then the relationship between the EU and the ECHR is the precise converse of that which existed between Ireland and the ECHR prior to the ECHR Act 2003. Whereas Ireland is a signatory to the Convention, and is thus bound by it as a matter of international law, the Convention itself was not a part of the Irish legal system, and could not be relied on directly in Irish courts. Conversely, the EU, not being a signatory to the Convention, is neither bound by it under international law nor are its institutions directly subject to the jurisdiction of the ECtHR, but Article 6(3) TEU has the effect of incorporating the Convention into the EU order. This ‘reverse dualism’ finds some support in a number of judgments of the ECJ. In *Elgafaji*, for instance, the Court stated simply, and without more, that ‘the ECHR forms part of the general principles of Community law’.<sup>20</sup> However, this tendency is not universal, and the ‘inspiration; guidelines; special significance’ formula still features in the Court’s reasoning in other recent cases, most notably in *Kadi*,<sup>21</sup> revealing a certain ambivalence on the part of the ECJ as to the precise nature of the relationship between the general principles and Convention rights, despite the wording of Article 6(3) TEU.

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<sup>17</sup> Emphasis added.

<sup>18</sup> Treaty on European Union (Treaty of Maastricht) [1992] OJ C 191, Art F(2) and Treaty on European Union (Treaty of Amsterdam) [1997] OJ C 340, Art 6(2): ‘The Union shall respect fundamental rights, as guaranteed by the [ECHR] ... as general principles of Community law’.

<sup>19</sup> De Witte (n 10) at 22, emphasis in original.

<sup>20</sup> Case C–465/07 *Meki Elgafaji, Noor Elgafaji v Staatsecretaris van Justitie* [2009] ECR I–921 at para 28. De Witte also cites Joined Cases C–482/01 and C–493/01 *Georgios Orfanopoulos v Land Baden-Württemberg* [2004] ECR I–5257 at para 98 and Case C–450/06 *Varec SA v Etat belge* [2008] ECR I–581 at para 44 ff (de Witte (n 10) at 23).

<sup>21</sup> Joined Cases C–402/05 P and C–415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I–6351 at para 283, citing Case C–305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I–5305 at para 29.

This view of the direct applicability of Convention rights within the EU is lent further weight by the entry into force of the Lisbon Treaty,<sup>22</sup> and with it the elevation of the Charter to a status equal to that of the Treaties.<sup>23</sup> The general principles of EU law have been supplemented with a written bill of rights,<sup>24</sup> containing its own provisions as to how these rights relate to those of the Convention. Article 52(3) of the Charter states that:

Insofar as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]. This provision shall not prevent Union law providing more extensive protection.

Accordingly, even if one does not accept de Witte's interpretation of Article 6(3) TEU, the combined effect of Article 6(1) TEU and Article 52(3) of the Charter is to incorporate into the EU order at least those Convention rights which correspond to rights in the Charter. Whether through the general principles (on de Witte's view) or through the Charter, Convention rights may therefore be directly applied within the EU, even prior to EU accession to the Convention, and notwithstanding the ECJ's recurrent filtering of the Convention through the 'inspiration; guidelines; special significance' formula. This view of the Convention's status within the EU fits well with the notion of polyarchy, with two non-state courts interpreting and applying the same rights within their own jurisdictional spheres. This being the case, two questions then arise relating to the interpretation of these rights: the normative force of Strasbourg jurisprudence within the EU, and how this jurisprudence is used by the ECJ.

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<sup>22</sup> Treaty of Lisbon [2007] OJ C 306.

<sup>23</sup> Art 6(1) TEU: 'The Union recognises the rights, freedoms and principles set out in the [Charter], which shall have the same legal value as the Treaties.'

<sup>24</sup> On the relationship between the general principles and the rights set out in the Charter, see HCH Hofmann and C Mihaescu 'The Relation Between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' (2013) 9 *European Constitutional Law Review* 73 (and references therein). See also, K Lenaerts 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, especially at 384–386.

### 1.1.1.2 ECtHR case law before the ECJ

The ECJ made no reference to the case law of the ECtHR until *P v S*,<sup>25</sup> a decision handed down a month after Opinion 2/94. Having ruled out the possibility of EU accession without Treaty amendment, the ECJ appears to have begun citing Strasbourg jurisprudence in a compensatory effort to demonstrate its commitment to human rights protection.<sup>26</sup> Sionaidh Douglas-Scott notes that:

While the earlier references made to Strasbourg tended to be brief and unexpansive, more recent references engage more with Strasbourg jurisprudence and tend to be more reliant on it as a ground of justification, especially if they are made by Advocates General.<sup>27</sup>

Despite this development, the ECJ in its use of ECtHR case law tends not to enter into discussion of the case law's normative force, and has never described it as *binding*.<sup>28</sup> Instead, the ECJ has historically restricted itself to an obligation to take Strasbourg jurisprudence into account.<sup>29</sup> This attitude—of maintaining autonomy on one hand, while demonstrating comity on the other—is well illustrated by two sets of cases where the ECJ interpreted the Convention in a manner subsequently contradicted by the ECtHR.

The ECJ held in *Hoechst*—in the absence of ECtHR case law on the point—that the right to inviolability of the dwelling under Article 8 ECHR could not be applied to a business premises.<sup>30</sup> Subsequently, the ECtHR established in *Niemitz*<sup>31</sup> and in *Colas Est*<sup>32</sup> that Article 8 did indeed cover business premises—a finding later acknowledged by the ECJ in *Roquette Frères*,<sup>33</sup> reversing *Hoechst*. Similarly, the ECJ held in *Orkem* that Article 6 ECHR did not encompass a right against self-

<sup>25</sup> *P v S* (n 7). Note, however, that references to Strasbourg jurisprudence began appearing in the Opinions of Advocates General in the 1980s: see S Douglas-Scott 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*' (2006) 43 *Common Market Law Review* 629 at 645.

<sup>26</sup> See de Witte (n 10) at 24.

<sup>27</sup> Douglas-Scott (n 25) at 645.

<sup>28</sup> *Ibid* at 651.

<sup>29</sup> See, for example, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV and Others v Commission* [2002] ECR I-8375 at para 274.

<sup>30</sup> Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859 at para 18. Note, however, that the Court held at para 19 that such protection *was* available under the legal systems of the Member States.

<sup>31</sup> *Niemitz v Germany* (1992) 16 EHRR 97 at para 27–33.

<sup>32</sup> *Société Colas Est v France* (2004) 39 EHRR 373 at 28–39.

<sup>33</sup> Case C-94/00 *Roquette Frères SA v DGCCRF* [2002] ECR I-9011 at para 29.

incrimination.<sup>34</sup> Again, this was later contradicted by the ECtHR in *Funke*,<sup>35</sup> and again, the ECJ corrected itself in light of this development in *Limburgse Vinyl Maatschappij*.<sup>36</sup> In both of these instances, though Luxembourg ultimately followed the lead set by Strasbourg, it was careful to do so by analogy and on its own terms, rather than to suggest that it was under any strict obligation to correct itself.

However, these cases concerned general principles of Union law, and predated the coming into force of the Charter. As was the case with the direct applicability of the Convention within the Union, the Charter in the post-Lisbon era has altered the status of Strasbourg jurisprudence. Article 6(1) TEU, having given the Charter the same legal value as the Treaties, goes on to provide that the Charter is to be interpreted in accordance with its own provisions on interpretation, and with ‘due regard’ to the explanations referred to in the Charter, which set out the sources of its provisions.<sup>37</sup> These explanations make clear that:

The reference [in Article 52(3) of the Charter] to the ECHR covers both the Convention and the Protocols to it. The meaning and scope of the guaranteed rights are determined not only by the text of those instruments, *but also by the case-law of the [ECtHR] and by the [ECJ]*. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.<sup>38</sup>

Although this provision, and the other provisions of the Charter regarding its interpretation, do not make ECtHR case law binding on the ECJ in specific terms, the combined effect is to make the Strasbourg Court’s interpretation of the meaning and scope of the Convention rights—and thus many of the Charter’s provisions—an authoritative baseline, below which the ECJ’s standards of protection may not fall. Furthermore, it is important that this part of the explanations to the Charter *also* charges the ECJ with the interpretation of the Convention, as emphasised in the extract above, specifically charging the ECJ with interpreting the Convention as a matter of EU law, and providing the institutional means by which this interpretation may lead to a higher—but emphatically not lower—level of rights protection. In the

<sup>34</sup> Case 374/87 *Orkem v Commission* [1989] ECR 3283 at para 30.

<sup>35</sup> *Funke v France* (1993) 16 EHRR 297 at paras 41–44.

<sup>36</sup> *Limburgse Vinyl Maatschappij* (n 29) at paras 258–280.

<sup>37</sup> The general provisions governing interpretation of the Charter are set out in Title VII, and the explanations referred to by Art 52(7) are found in Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17.

<sup>38</sup> Charter explanations (n 37) at 303/33; emphasis added.



post-Lisbon era, therefore, judgments of the ECtHR have greater normative force within the EU itself (at least in the interpretation and application of the Charter) than they do in the Irish legal order under the ECHR Act 2003, which, as we saw in Chapter 2, requires the Irish judiciary only to ‘take due account’ of the ECtHR’s decisions.<sup>39</sup> In this context, having reviewed the ECJ’s Charter case law since Lisbon, Filippo Fontanelli states that: ‘It is clear that reference to the ECtHR and its case-law is no longer a matter of nicety and comity but an actual precondition for the application of the Charter.’<sup>40</sup>

The ECHR’s status within the EU, and that of the ECtHR’s jurisprudence, is therefore based on much more than mere comity between the Luxembourg and Strasbourg courts, although this was previously the case. The EU is not only empowered but *obliged* to accede to the Convention,<sup>41</sup> Convention rights are stated to *be* general principles of Union law—though the ECJ has been somewhat ambiguous on this point; and, in a very real sense, the Convention and the case law surrounding it are incorporated into the EU legal order—and made a baseline or floor below which human rights standards may not fall—by means of the Charter. This therefore raises the question of whether hierarchy or heterarchy best characterises the relationship between the two legal orders; and it is at least arguable that hierarchy has the upper hand in the post-Lisbon era. Before this question can properly be addressed, however, we must examine the relationship from the other side.

### 1.1.2 The EU from the ECHR’s viewpoint

The ECJ’s development of an EU human rights jurisprudence has been broadly well received by the ECtHR. A relatively early, and somewhat tentative, example is the case of *Goodwin v UK*,<sup>42</sup> where the ECtHR referred to the *P v S* judgment of the ECJ, in which that Court had held that discrimination arising from gender reassignment constituted discrimination on grounds of sex under (and contrary to) EU law. Though the ECtHR did not go into detail in its analysis of the Luxembourg

<sup>39</sup> ECHR Act 2003, S 4.

<sup>40</sup> F Fontanelli ‘The European Union’s Charter of Fundamental Rights: Two Years Later’ (2011) 3 *Perspectives on Federalism* 22 at 39. See also de Witte (n 10) at 24–32, where he describes the ECJ’s use of Strasbourg jurisprudence as ‘eclectic and unsystematic’.

<sup>41</sup> Art 6(2) TEU.

<sup>42</sup> *Goodwin v UK* (2002) 35 EHRR 18.

case in this instance, and did not specifically adopt its reasoning, it seems fair to regard the ECtHR's attitude to the case as one of general approval, given that both cases had the effect of upholding a complaint of discrimination against transgendered people. It is also significant that the ECtHR made reference to the Charter in the course of its judgment, which, at the time, the ECJ itself had not yet done.<sup>43</sup>

But there is a significant jurisdictional problem that the ECtHR had to resolve. The majority of the States that are party to the Convention are also Member States of the EU, and are therefore subject to the requirements of the Treaties and the jurisdiction of the ECJ. However, as we know, the EU itself is not yet a signatory to the Convention and therefore is not subject to the jurisdiction of the ECtHR in the same way that its Member States are. What then is to be done in a case where a State subject to both the Convention and the Treaties is found to have acted in breach of the Convention, but this was only done in order to fulfil obligations under the Treaties? The case law on this point can be divided into two categories: review of primary EU law, and review of secondary EU law.

### 1.1.2.1 Review of primary EU law

As early as 1958, the former European Commission of Human Rights (ECmHR) held in *X & X*<sup>44</sup> that if a State's international obligations prevented it from living up to its obligations under the Convention, the State would still be responsible for the latter. Later, the ECmHR held in *M & Co*<sup>45</sup> that this responsibility would not apply provided that the international organisation to which a State had delegated power provided 'equivalent protection' of human rights, a decision which Douglas-Scott notes has obvious parallels with the *Solange* jurisprudence outlined in Chapter 1,<sup>46</sup> and thus with the interface norm of conditional recognition. Notwithstanding this development, the ECtHR still indirectly reviewed a norm of EU law for compliance with the Convention in *Matthews*.<sup>47</sup> The applicant, a Gibraltar resident, alleged that

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<sup>43</sup> Ibid at paras 58 and 100.

<sup>44</sup> *X & X v Germany* App no 342/57 (decision, ECmHR, 4 Sep 1958).

<sup>45</sup> *M & Co v Germany* [1990] 64 *Decisions and Reports* 138.

<sup>46</sup> Douglas-Scott (n 25) at 636.

<sup>47</sup> *Matthews v UK* [1999] 28 EHRR 361.

Annex II of the (EC) Direct Elections Act 1976,<sup>48</sup> by which the UK declared that it would apply the Act only in respect of the UK itself (and not the territories for whose foreign affairs the UK is responsible), was in breach of Article 3 of Protocol 1 ECHR. In holding for the applicant, the ECtHR noted that:

[A]cts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer.<sup>49</sup>

Crucially, both the 1976 Act and the Maastricht Treaty—which enhanced the powers of the European Parliament, giving it the characteristics of a ‘legislature’ within the meaning of the Convention<sup>50</sup>—were not ordinary EC legal acts, such as regulations or directives, but rather were primary law instruments, and thus immune from challenge before the ECJ.<sup>51</sup> Accordingly, the Convention rights could not be ‘secured’ in this instance, there being no method by which the law could be challenged on human rights grounds at EU level, ‘equivalent’ or otherwise. Clearly not content to allow such a lacuna, the Court held the UK directly responsible for the failure to hold elections to the European Parliament in Gibraltar.<sup>52</sup> *Matthews* demonstrates that the ECtHR is not averse to reviewing primary EU law for conformance with the Convention, provided that responsibility for this law can be attributed to a State party to the Convention. The case thereby demonstrates the partially ‘triangular’ nature of the EU-ECHR relationship, in that the ECtHR’s jurisdiction over primary EU law is *indirect*, mediated through the responsibility of States as signatories to the Convention, the UK serving in this case as the necessary intermediary to engage the supervision of Strasbourg over norms that would otherwise be outwith its jurisdiction.

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<sup>48</sup> Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage [1976] OJ L 278.

<sup>49</sup> *Matthews* (n 47) at para 32.

<sup>50</sup> *Ibid* at paras 45–54.

<sup>51</sup> *Ibid* at 33.

<sup>52</sup> *Ibid* at 60–65.

### 1.1.2.2 Review of secondary EU law

But there still remains the issue of secondary EU law, which *can* be challenged before the ECJ on human or fundamental rights grounds. In this regard, the most explicit support from the ECtHR for the human rights turn in the ECJ's jurisprudence is found in *Bosphorus v Ireland*.<sup>53</sup> Echoing the much earlier ECmHR decision in *M & Co*, the ECtHR held that:

State action taken in compliance with [legal obligations deriving from membership of an international organisation] is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.<sup>54</sup>

If the ECtHR considers that the organisation at issue does in fact offer an equivalent<sup>55</sup> level of rights-protection to the Convention, State action taken on foot of an international obligation is presumed to be in compliance with the requirements of the Convention, though this presumption can be rebutted if, in a given case, 'it is considered that the protection of Convention rights was manifestly deficient.'<sup>56</sup> In the case at hand, the ECtHR first set out the evolution of human rights protection within the Union, with particular reference to the 'special significance' given to the Convention in *ERT*, and Opinion 2/94's statement that respect for human rights is 'a condition for the lawfulness of [Union] acts.'<sup>57</sup> The Court went on to analyse the procedures by which Union acts can be challenged under the Treaties—whether by way of direct action before the ECJ or by action before a national court making use of the Article 267 TFEU preliminary reference procedure—and held that, at the relevant time, the EU had in fact offered an 'at least equivalent' level of protection of human rights, and that in the given case there was no deficiency or dysfunction in

<sup>53</sup> *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* [2005] ECHR 440. See generally, T Lock 'Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10 *Human Rights Law Review* 529; S Peers '*Bosphorus*—European Court of Human Rights' (2006) 2 *European Constitutional Law Review* 443.

<sup>54</sup> *Bosphorus* (n 53) at para 155.

<sup>55</sup> Note that: 'By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued ... However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection' (ibid).

<sup>56</sup> Ibid at para 156.

<sup>57</sup> Opinion 2/94 (n 8) at para 34.

this protection.<sup>58</sup> Accordingly, the presumption that Ireland's actions on foot of its EU obligations—which, in turn, were on foot of action required by the UN Security Council—were compliant with the Convention was not rebutted, and *Bosphorus*' application failed. As was the case in *Matthews*, it is important to note the triangularity of this interaction—it was *State* action that was being judged directly. The (potential and, in this case, unnecessary) review of secondary EU norms would still be indirect in a case finding 'manifestly deficient' protection of human rights, mediated through the responsibility of the State at issue.

Two points can be made about the ECtHR's *Bosphorus* approach to human rights protection at EU level. First—and as Douglas-Scott noted with reference to its ancestor, *M & Co*—it is strikingly similar to the *Solange* jurisprudence, a point also emphasised by Sabel and Gerstenberg<sup>59</sup> who note that the decision:

[R]econciles two conflicting aspects: the recognition of the accommodation of human rights concerns by the ECJ *and* recognition of the specificity and autonomy of the Community law system.<sup>60</sup>

As we have seen in Chapter 1, in *Solange II*, the *Bundesverfassungsgericht* (BVerfG) committed itself not to exercise—but did not renounce—its claimed jurisdiction to review norms of EU law for rights-compliance, so long as the level of protection offered by the ECJ was not less than that offered by the BVerfG in Germany. The *Bosphorus* approach is similarly accommodating, recognising as it does the very real progress made in terms of the attention paid by the EU to issues of human rights, while still reserving to the ECtHR the right to intervene if it considers such intervention necessary for the vindication of the rights protected by the Convention.

The *Bosphorus* principle is unique in the ECtHR's jurisprudence, in that the Court specifically *privileges* the jurisprudence of the ECJ in a way that it does not in relation to the High Contracting Parties to the Convention. No national legal system under the ECHR enjoys a presumption, rebuttable or otherwise, that its whole system of law is compliant with the Convention. Quite the contrary: the very *raison d'être* of the ECtHR is to supervise national legal systems party to the ECHR, and the

<sup>58</sup> *Bosphorus* (n 3) at paras 156–166.

<sup>59</sup> CF Sabel and O Gerstenberg 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 *European Law Journal* 511 at 519 and 547.

<sup>60</sup> *Ibid* at 519, footnote omitted.

existence of such supervision logically implies a certain suspicion (though this may be too strong a word) that the Convention will not always be upheld at the domestic level. The doctrine of the margin of appreciation—whereby the ECtHR allows States a certain leeway in their interpretation and application of some of the rights under the Convention—may seem comparable to the rule in *Bosphorus* at first glance, but the two notions are fundamentally different: a supervised leeway is not the same thing as a (rebuttable) presumption of compatibility. This discrepancy is justified, however, by the specific nature of the EU as an autonomous legal order not yet party to the Convention, with which the ECtHR must come to terms within the structural confines of its own jurisdiction. Furthermore, and as we shall soon see in Section 2.2, the *Bosphorus* privilege is now a temporary state of affairs, which will be lifted upon EU accession to the Convention.

### **1.1.2.3 Institutional matters: the ECJ's Advocates General and Article 6 ECHR**

Before moving on to the details of accession, there is one further matter that warrants examination: the potential—but averted—conflict between the ECtHR and the ECJ on the question of the compatibility of the role of the ECJ's Advocates General with Article 6 ECHR. The *Hoechst* and *Orkem* series of cases discussed above at Section 2.1.1.2 revealed a divergence in the approaches of the two European courts, which was ultimately resolved by the ECJ adopting the ECtHR's jurisprudence and correcting its own—an archetypal example of 'good behaviour' under the Convention, and an instance where the relationship between the orders can well be conceived of hierarchically. However, these cases concerned the manner in which the EU, and in particular the Commission, went about enforcing EU competition law, and did not call into question the substantive nature of that enforcement. Though the right to inviolability of the dwelling (or business premises) and the right against self-incrimination are important in their own right, they do not—and did not in these cases—pose constitutional or institutional difficulties for the EU, or offend against that legal order's autonomy. The divergence in the case law outlined in this Section had the potential to pose an altogether more serious threat to the autonomy of EU

law, and its ultimate resolution demonstrates the extent of the ECtHR's deference to that autonomy under the *Bosphorus* presumption.

The ECtHR had held in *Vermeulen*<sup>61</sup> that the impossibility of the defence replying to the observations of the *Procureur Général* before the Belgian *Cour de Cassation* constituted a breach of the right to adversarial proceedings under Article 6 ECHR, a right that:

Means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision.<sup>62</sup>

The breach had been aggravated by the *Procureur Général*'s participation in the court's deliberations, albeit in an advisory capacity.<sup>63</sup> Similar decisions were made regarding equivalent officers in the courts of Portugal, the Netherlands and France.<sup>64</sup> *Vermeulen* was subsequently relied on before the ECJ by the applicants in *Emesa Sugar*,<sup>65</sup> who had been refused leave to reply to the Advocate General's Opinion in the course of a preliminary reference, since neither the Statute of the ECJ nor the Court's Rules of Procedure made provision for such a submission.<sup>66</sup> *Emesa* argued that in the light of the ECtHR's decision in *Vermeulen*, the impossibility of replying to the AG's Opinion was in breach of Article 6 ECHR. In its decision, the ECJ recounted the 'general principles; guidelines; special significance' formula regarding the Convention,<sup>67</sup> but distinguished *Vermeulen* on the grounds that the ECJ's Advocates General are full members of the Court, equal in rank to the Judges, and are subject to no external authority.<sup>68</sup> Moreover, the Court can reopen the oral procedure after the delivery of the AG's Opinion 'if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties.'<sup>69</sup> Accordingly, the decision in

<sup>61</sup> *Vermeulen v Belgium* (1996-I) 32 EHRR 15.

<sup>62</sup> *Ibid* at para 33.

<sup>63</sup> *Ibid* at para 34.

<sup>64</sup> *Lobo Machado v Portugal* (1996) 23 EHRR 79; *JJ v the Netherlands* (1999) 28 EHRR 168; *KDB v the Netherlands* [1998] ECHR 20; *Reinhardt and Slimane-Kaïd v France* (1998-II) 28 EHRR 59.

<sup>65</sup> Case C-17/98 *Emesa Sugar (Free Zone) NV v Aruba* [2000] ECR I-665.

<sup>66</sup> *Ibid* at para 2.

<sup>67</sup> *Ibid* at para 8.

<sup>68</sup> *Ibid* at paras 10-15.

<sup>69</sup> *Ibid* at para 18.

*Vermeulen* was not ‘transposable’<sup>70</sup> to the position of the Luxembourg AGs, and on its own—autonomous—interpretation of the requirements of the Convention, the ECJ held that its structure and procedures did not constitute a breach of Article 6 ECHR.

Later, the decision in *Emesa* was relied on before the ECtHR by the French Government in *Kress*,<sup>71</sup> in respect of an Article 6 ECHR challenge against the impossibility of replying to the opinion of the *Commissaire du Gouvernement* at the *Conseil d’Etat*, who, like the Luxembourg AGs—and unlike the Belgian officials in *Vermeulen*—are members of the Court, and not subject to any external authority. Moreover, the EC’s archives show the office of the AG at the ECJ to have been inspired in particular by the *Commissaire du Gouvernement*.<sup>72</sup> The French Government argued that to find a breach of Article 6 ECHR with respect to the *Commissaire* would be to call into question the system in operation at the ECJ since its inception. The ECtHR again found a breach of Article 6 ECHR, but this time specifically on the ground of the *Commissaire*’s participation in the trial bench’s deliberations—something which the Luxembourg AGs do not do, though the ECtHR did not mention this—and not on the basis of his or her being subject to external authority. Such participation—*after* having submitted an Opinion to the court—may seem unfair in the eyes of a layperson ‘not familiar with the mysteries of administrative proceedings.’<sup>73</sup> The ECtHR reproduced the relevant part of the ECJ’s decision in *Emesa* at length as part of the ‘relevant domestic law and practice’, but did not engage substantively with the decision in its judgment. *Kress* accordingly left the issue of the compatibility of the ECJ’s structure and practice with Article 6 ECHR open. In *Kaba II*,<sup>74</sup> the ECJ ‘failed to reconsider the matter ... when presented with a chance’.<sup>75</sup> The ECJ’s silence on the issue—deciding the case on different grounds—was particularly noteworthy given AG Ruiz-Jarabo Colomer’s highly critical overview of the *Kress* jurisprudence, stating that:

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<sup>70</sup> *Ibid* at para 16.

<sup>71</sup> *Kress v France* [2001] ECHR 382.

<sup>72</sup> C Ritter ‘A New Look at the Role and Impact of Advocates-General—Collectively and Individually’ (2005–2006) 12 *Columbia Journal of European Law* 751 at 751.

<sup>73</sup> *Kress* (n 71) at paras 81–83.

<sup>74</sup> Case C-466/00 *Arben Kaba v Secretary of State for the Home Department (Kaba II)* [2003] ECR I-2219.

<sup>75</sup> Douglas-Scott (n 25) at 648 fn 83.



It seems that what was being sought was not so much the protection of a fundamental right as the imposition of a uniform conception of the organisation of the procedure [across disparate legal traditions] without explaining the need for it in terms going beyond [the perception of a layperson].<sup>76</sup>

The ECtHR having set itself on a collision course with the ECJ on this issue, the *dénouement*, when it came, was somewhat surprising. In *Kokkelvisserij*,<sup>77</sup> the applicants, in the course of an Article 267 TFEU reference, had been denied leave to reply to the AG's Opinion, and the ECJ had refused to reopen the oral procedure. The ECtHR held that because the national court had actively sought a preliminary ruling from Luxembourg, national responsibility for a potential breach of the Convention by the EU institutions was engaged.<sup>78</sup> The Court recalled the *Bosphorus* presumption of equivalent protection, and proceeded to an examination of whether the EU's protection of human rights was 'manifestly deficient' in this instance. Intriguingly, in finding that the presumption of equivalent protection was *not* rebutted by the impossibility of replying to the AG's Opinion, the ECtHR adopted an approach entirely different to that adopted with respect to the national systems in its previous case law. It did not focus on the institutional position of the AG (his or her independence; the fact that AGs do not take part in the ECJ's deliberations) or on the 'doctrine of appearances' (how matters may look to a layperson). Rather, it focused somewhat narrowly on the specific nature of the Article 267 TFEU procedure.<sup>79</sup> The Court noted that the protection offered did not need to be *identical* to that of Article 6 ECHR, and focused in particular on the possibility of reopening the oral procedure, which it held to be realistic and not merely theoretical.<sup>80</sup> In the case at hand, the ECJ had reviewed the request for a reopening of the oral procedure on the merits, and had found that the applicants had submitted no precise information suggesting that a reopening would be useful or necessary. Accordingly, the *Bosphorus* presumption was not rebutted, and the case was declared inadmissible.

<sup>76</sup> *Kaba II* (Opinion) (n 74) at para 105.

<sup>77</sup> *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA v the Netherlands* App No 13645/05 (decision, ECtHR, 20 Jan 2009).

<sup>78</sup> *Ibid* at section B(3) of the decision as to the law (no paragraph numbers in the decision).

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid*. The Opinion of AG Sharpston in Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon v Gouvernement flamand* [2008] ECR I-1683 was particularly influential in the ECtHR so deciding.

The decision in *Kokkelvisserij* is a reaffirmation of the *Bosphorus* presumption of equivalent protection, and demonstrates just how difficult it may be to prove ‘manifestly deficient’ protection of fundamental rights in the EU legal order. Despite having made a series of judgments with respect to national legal systems which called into question the very structure and procedures of the ECJ—and in the face of a refusal by the ECJ to accept that its structure and procedures were in conflict with Article 6 ECHR—when the matter came to a head, the ECtHR ‘scrutinized the ECJ’s procedures with considerable restraint in comparison to the national procedures.’<sup>81</sup> The ECtHR accepted, without investigation, the ECJ’s finding of ‘no precise information’ warranting a reopening of the oral procedure, and though it had previously characterised the right to adversarial proceedings under Article 6 ECHR as requiring the possibility of responding to ‘all evidence adduced or observations filed, even by an independent member of the national legal service’,<sup>82</sup> it accepted the possibility of the ECJ (at its sole discretion) reopening the oral proceedings as sufficient to safeguard that right, with no investigation of the proportionality of the possible restriction. Accordingly, the *Bosphorus* presumption—an application of the interface norm of conditional recognition—was employed to avoid a head-on collision between the two European courts on a matter of central importance.

### 1.1.3 Conclusions: metaconstitutional interface norms

The terms of engagement described above are complex, have changed over time, and this process of change is ongoing. The EU has progressed to a situation where the Convention is binding within the EU order, and the ECtHR’s case law provides an authoritative baseline below which EU protection standards may not fall, but beyond which they may go. In recognising this progress, the ECtHR has attempted to reconcile its own duties and prerogatives as the overseer of the Convention with the EU’s autonomy and specificity as a legal order.

How does Kumm’s conception of the universal metaconstitutional interface norms regulating the relationships between legal orders relate to the specific context

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<sup>81</sup> C Van de Heyning ‘*PO Kokkelvisserij v the Netherlands*’ (2009) 46 *Common Market Law Review* 2117 at 2124.

<sup>82</sup> *Kress* (n 71) at para 65.

of the relationship between the EU and the ECHR? Though Kumm's procedural principle of democracy—which I characterised in Chapter 2 as a means for the protection of national specificity on democratic grounds—may have certain parallels in the supranational space with the protection of a supranational organisation's autonomy and uniformity, these are still very different things. Most notably, though the protection of the EU's autonomy may be justified on many different grounds, democracy is almost certainly not one of them. As we have seen, neither the ECJ nor the ECtHR have employed a principle along these lines in their jurisprudence.

The formal principle of legality may, however, have some relevance here. Recall that this involves a strong presumption that '[national courts] are required to enforce EU law, national constitutional provisions notwithstanding'.<sup>83</sup> Transposing this to the supranational domain, such a principle would require the ECJ to enforce the Convention, EU law notwithstanding. This being the case, the acquiescence of the ECJ to the ECtHR's divergent interpretation of the Convention in the context of the inviolability of business premises and the right against self-incrimination is nothing more than the correction of an erroneous interpretation of the Convention in light of a subsequent clarification by the body charged with interpreting that document authoritatively. It does not threaten the EU legal order's autonomy—or that of the ECJ as the authoritative interpreter of that legal order—and fits well with Kumm's principle of legality.

The jurisdictional principle of subsidiarity has little relevance to the EU-ECHR relationship, predicated as it is on the particular nature of the relationship between the EU and its Member States, and it finds no reflection in the non-state context. However, the substantive principle of the protection of basic rights finds an almost exact reflection in the ECtHR's *Bosphorus* presumption of equivalent protection—the similarity of which to the *Solange* jurisprudence being what led Sabel and Gerstenberg to characterise the EU-ECHR relationship as being part of a deliberative polyarchy in the first place. As a result, while there are certain aspects of Kumm's interface norms which are reflected in the case law surrounding the EU-ECHR relationship, the specificity of these two legal orders, and the resultant specificity of

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<sup>83</sup> M Kumm 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty' (2005) 11 *European Law Journal* 262 at 299.

their relationship, means that Kumm's metaconstitutional interface norms cannot be directly transposed from their statist origins. Instead, the less prescriptive notion of deliberative polyarchy, epitomised not just by the *Bosphorus* principle but also, more specifically, by its application in the judicial interaction regarding Article 6 ECHR and the structure and procedures of the ECJ with respect to the Advocates General, better captures the nature of the relationship.

However, important changes to this relationship will be effected by EU accession to the Convention, and it is to the specifics of this accession to which we must now turn.

## 1.2 Post-Accession

On 5 April 2013, the Council of Europe and EU negotiators finalised a Draft Accession Agreement,<sup>84</sup> three aspects of which are particularly important for the present analysis: the fact that the EU will accede to the Convention specifically *not* as a state, thus requiring modification to the Convention itself; the 'co-respondent' mechanism; and the 'prior involvement' procedure, whereby proceedings at the ECtHR may be stayed and the ECJ given an opportunity to rule on the compatibility of Union law with the Convention in cases where it has not already done so.

### 1.2.1 Accession to the Convention of a non-state legal order

Until now, all High Contracting Parties to the Convention have been states. Though arguably the most successful and the most deeply embedded of all international human rights instruments, the ECHR is framed as a standard agreement under

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<sup>84</sup> *Fifth Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights: Final Report to the CDDH* (Council of Europe, 47+1(2013)008rev2, available at <[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1\(2013\)008rev2\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf)>, hereinafter 'Draft Accession Agreement'). For academic comment on earlier drafts, and more generally, see C Eckes 'EU Accession to the ECHR Between Autonomy and Adaptation' (2013) 72(3) *Modern Law Review* 254; M Kuijer 'The Accession of the European Union to the ECHR: A Gift for the ECHR's 60th Anniversary or an Unwelcome Intruder at the Party?' (2011) 3 *Amsterdam Law Forum* 17; T Lock 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 *Common Market Law Review* 1025; T Lock 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' (2010) 35 *European Law Review* 777;

international law, using as it does the language of ‘states’,<sup>85</sup> ‘national law’,<sup>86</sup> the ‘economic well-being of the country’,<sup>87</sup> and ‘territorial integrity’.<sup>88</sup> Accordingly, Article 1 of the Draft Agreement sets out the scope of the EU’s accession to the Convention,<sup>89</sup> and provides for the interpretation of such phrases as they occur throughout the Convention as applying also to the Union.<sup>90</sup> It is noted at Article 3 that ‘[n]othing in the Convention ... shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law’, which itself mirrors the language of Article 6(2) TEU, that accession ‘shall not affect the Union’s competences as defined in the Treaties.’ Christina Eckes is correct to note that the fact that:

The EU is joining an international instrument as important in reach and influence as the Convention, and doing so moreover on an equal footing with all state parties, is in itself a success for the EU, confirming ... its particularity and maturity as an *integration* organisation.<sup>91</sup>

What makes this notable for present purposes is the remarkable fact that rather than having to become *more state-like* in order to accede to an international agreement between states, the EU has instead succeeded in having that international agreement modified in order to accommodate the EU’s specifically *non-state* legal nature. As regards the credentials of the EU as a specifically *constitutional* non-state legal order (or ‘integration organisation’ using Eckes’ term), its accession to the ECHR, and the making of modifications to the Convention in order to accommodate this, is of the highest order of importance for a conception of the European polyarchy as being both constitutionalist and pluralist, without contradiction. The fact that this accommodation is necessary is noted in the explanatory report accompanying the Draft Agreement:

The EU should, as a matter of principle, accede to the Convention on an equal footing with the other Contracting Parties, that is, with the same rights and obligations. It was, however, acknowledged that, because the EU is not a State, some adaptations would be necessary.<sup>92</sup>

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<sup>85</sup> Arts 10(1) and 17 ECHR.

<sup>86</sup> Art 7 ECHR, *inter alia*.

<sup>87</sup> Art 8(2) ECHR.

<sup>88</sup> Art 10(2) ECHR.

<sup>89</sup> Specifically, the EU will accede to the Convention itself, and to its First and Sixth Protocols.

<sup>90</sup> Art 1(5) Draft Accession Agreement.

<sup>91</sup> Eckes (n 84) at 278, emphasis in original

<sup>92</sup> Art (I)(6) of Annex V to the Draft Accession Agreement.

As we shall now see, two specific adaptations to the Convention legal order to accommodate the EU are important for framing the post-accession terms of engagement between the orders.

### 1.2.2 The co-respondent mechanism

As we saw in Section 2.1.2, one problem stemming from the interplay between EU and ECHR law is that of the allocation of responsibility between the EU and its Member States for (alleged) breaches of the Convention. For the ECtHR to involve itself in deciding precisely where responsibility lies in cases involving EU law would involve the Strasbourg Court in determining issues of substantive EU law, rather than the compatibility of such law with the Convention, which is precisely the sort of threat to the autonomy of EU law which so concerned EU actors during the accession negotiations.<sup>93</sup> The Draft Accession Agreement's solution is termed the co-respondent mechanism, and is set out in Article 3:

Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, including decisions taken under the TEU and under the TFEU, notably where that violation could have been avoided only by disregarding an obligation under European Union law.<sup>94</sup>

Particularly important is the last sentence: that the mechanism is to be engaged 'notably' (and not 'only') where the Member State had no discretion in its application of EU law. As we have seen, the *Bosphorus* presumption of equivalent protection that the ECtHR afforded to the EU—which will be extinguished upon accession—arose in circumstances where the Member State was acting on foot of a Council regulation, and so had no discretion in its actions. The ECtHR has never had the opportunity fully to get to grips with the issue of apportioning responsibility in a case where the EU Member State retained some discretion in applying an EU norm. Though it held in *Bosphorus* that a State 'would be fully responsible under the

<sup>93</sup> See Eckes (n 84) and Lock (2010) and (2011) (n 84) passim.

<sup>94</sup> Art 3(2) Draft Accession Agreement. Art 3(3) goes on to provide for the reverse case, whereby a Member State may become a co-respondent in an action against the Union.

Convention for all acts falling outside its strict international legal obligations',<sup>95</sup> the presumption of EU conventionality was held not to apply in the more recent case of *Michaud v France*<sup>96</sup> (concerning a directive rather than a regulation), due to the fact that, in the domestic proceedings, the *Conseil d'Etat* had not requested a preliminary reference from the ECJ, and so that Court had had no opportunity to scrutinise the directive in question on human rights grounds. This distinguished the case from *Bosphorus* and brought it more into line with the situation in *Matthews*, where the ECJ could never have scrutinised the laws in question in the first place, being primary norms of EU law. The essential factor in the ECtHR's decision to review the impugned legislation on the merits in *Michaud* therefore seems not to have been the fact that France had discretion in its transposition of the directive, but rather the fact that the ECJ had not yet been heard on the matter.<sup>97</sup> In the event, the Court held that the French implementing legislation was not in breach of the Convention; but the way in which the Court approached the issue illustrates a certain amount of reluctance, first, to get involved in the apportioning of responsibility between the EU and its Member States, and, secondly, to rule on the substantive compliance of Union measures with the Convention without first having heard the ECJ on the matter. The co-respondent mechanism provides a neat way of circumventing this first problem in such cases, allowing the ECtHR in the future to treat both the Union and its Member States as jointly liable without getting into specifics,<sup>98</sup> particularly because the mechanism is to be used 'notably' but *not* 'only' when the Member State had no discretion.

### 1.2.3 The 'prior involvement' of the ECJ

Article 3(6) of the Draft Accession Agreement provides as follows:

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<sup>95</sup> *Bosphorus* (n 53) at para 157.

<sup>96</sup> *Michaud v France* [2012] ECHR 2030.

<sup>97</sup> An earlier example of the ECHR not fully engaging with the issue is *MSS v Belgium and Greece* (2011) 53 EHRR 2.

<sup>98</sup> See Art 3(7) Draft Accession Agreement: 'If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.'

In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law ... , sufficient time shall be afforded for the [CJEU] to make such an assessment, and thereafter for the parties to make observations to the Court.

The practical effect of this provision is to introduce to the law of the Convention an entirely new mechanism, comparable—though different—to the preliminary reference procedure in EU law. Though the action is not formally framed as a ‘reference’ from Strasbourg to Luxembourg, the result will be similar: proceedings will be stayed in order to allow the ECJ to give its interpretation of norms of EU law, specifically in relation to conformance with the Convention. Though the ECtHR will be obliged to accept the correctness of the ECJ’s interpretation of EU law as a matter of EU law itself, it will be under no obligation to accept the ECJ’s assessment of this law’s compatibility with the Convention. Gaja has noted that ‘members of the Court of Justice have clearly expressed their strong wish that [this] procedure of “prior involvement” be introduced’<sup>99</sup> as part of any accession agreement. It is interesting to note how well the procedure dovetails with the decision in *Michaud*, where the lack of a previous opinion from the ECJ was decisive in rebutting the *Bosphorus* presumption. Moreover, the procedure is justifiable from the perspective of the Draft Agreement’s stated aim of ‘not prejudic[ing] the principle of the autonomous interpretation of the EU law.’<sup>100</sup> However, in her analysis of the proposals for EU accession, Eckes writes that

In many ways, the EU has been privileged for many years, even without being a party to the Convention. It enjoys a privileged position within the Convention system at least since the establishment of the presumption of equivalent protection in *Bosphorus* ... The accession agreement recognises the EU’s special position and in a different way codifies and institutionalises it. The EU will become *primus inter pares*, having all the rights of a Convention party and more.<sup>101</sup>

While it is true that the EU is privileged under the *Bosphorus* presumption, it does not follow that the co-respondent and ‘prior involvement’ mechanisms make the EU *primus inter pares* under the Convention. It does not contravene the principle of equality between High Contracting Parties that different situations should be treated

<sup>99</sup> G Gaja ‘The ‘Co-Respondent Mechanisms’ According to the Draft Agreement for the Accession of the EU to the ECHR’ (2013) 2 *European Society of International Law Reflections* 1.

<sup>100</sup> Article (I)(5) of Annex V to the Draft Accession Agreement.

<sup>101</sup> Eckes (n 84) at 265.



differently: in fact, the principle of equality requires this to be the case. In view of the particularities of the EU judicial architecture—especially its division of labour between the national and Union courts—and given that the EU is acceding to the Convention specifically *not* as a state like any other High Contracting Party, both the co-respondent mechanism and the prior involvement mechanism are justified. The requirement of exhaustion of domestic remedies ensures that national judiciaries will have been given the opportunity to be heard as to the compatibility of impugned national law or practice prior to the ECtHR being seised of the matter, but there is no such guarantee in the case of EU law within the existing Convention framework. The proposed ‘prior involvement’ mechanism corrects this potential lacuna and, in any event, the ECtHR is not obliged to accept the ECJ’s interpretation of the Convention—though the mechanism is a recognition of the autonomy and specificity of EU law, the ECtHR remains the Convention’s ultimate interpreter.

### 1.3 Conclusions: constitutional interface norms

The EU’s accession to the ECHR will change the nature of the relationship between the ECJ and ECtHR. Whereas even prior to accession, the Convention is binding *within* the EU, accession will make the Convention binding *on* the EU, and the ECtHR will no longer be able to rely on the *legerdemain* of ‘equivalent protection’ when it comes to the compatibility of EU law with the Convention. This being the case, the EU-ECHR relationship casts further doubt on the possibility of the *a priori* formulation of universal metaconstitutional interface norms regulating such a non-hierarchical relationship. It was suggested in Chapter 2 that to take the *constitutional* interface norms at work in 28 different legal orders and to attempt to boil them down to a single set of universally-applicable *metaconstitutional* norms was beset with difficulties, not least the highly contingent way in which such norms are formulated and applied in each system. This observation applies with perhaps greater force with respect to the EU and the ECHR, neither of which are states, both of which differ from states, and both of which differ from each other. Following EU accession to the Convention, the terms of engagement between the two orders will mostly shift from the metaconstitutional to the constitutional. There is one metaconstitutional interface norm, however, that has historically applied in the EU-ECHR relationship, and will

continue to do so, in a different way, after accession—the *Solange* principle of conditional recognition. Whereas the *Bosphorus* presumption that epitomised this principle will no longer apply, it will be replaced with the ECtHR’s margin of appreciation—described by Sabel and Gerstenberg as ‘reverse *Solange*’<sup>102</sup>—which will apply just as much (or as little) to the EU as to any other High Contracting Party.

How, then, can we best characterise the relationship between the orders after accession? I suggest that Sabel and Gerstenberg’s notion of deliberative polyarchy, and with it the dialogic reframing and adjustment of viewpoints, will still most accurately capture the nature of the interaction between the orders. In order to demonstrate this, let us consider the relationship in the round: two non-state courts are charged, in different ways, with the interpretation and application of the Convention to specific cases. One of these courts, the ECtHR, is charged with the final authority to interpret the Convention. The other, within its own legal order, is obliged to accept such interpretations as an authoritative baseline, but is free to give its own, autonomous interpretations of the Convention’s requirements, provided such interpretations provide a higher—and not lower—level of human rights protection. Such a state of affairs is inherently polyarchic, with different sites of authority within different legal orders. This polyarchy is also *deliberative*: the *Hoechst*, *Orkem*, and *Vermeulen* lines of case law demonstrate a dialogic statement, restatement and adjustment of attitudes. The pending formalisation and institutionalisation of this dialogue, particularly through the ‘prior involvement’ mechanism, lends weight to this view rather than detracts from it.

In setting out the relationship between the EU and the ECHR, the above discussion highlighted several instances of conflict between the orders, all of which were ultimately resolved, whether ‘in favour’ of the ECJ or the ECtHR. However, there is a further instance of conflict to be examined, which is still unresolved, and is of altogether greater constitutional significance, because it concerns the relationship between fundamental rights as protected by the Charter and the Convention, and the fundamental economic freedoms at the very foundations of EU law.

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<sup>102</sup> Sabel and Gerstenberg (n 59) at 519–520.

## 2 LABOUR RIGHTS AND CONSTITUTIONAL CONFLICT

A series of recent decisions by the ECJ and the ECtHR has revealed a wide—and perhaps unexpected—gap between the two courts’ understandings of a particular subset of human rights—labour rights—and their relative importance vis-à-vis other legal rights and principles. This disconnect in the jurisprudence of the two Courts, which is still unresolved, poses a fascinating opportunity to analyse further the interface norms at work—and that may yet be employed—in the EU-ECHR relationship, for three reasons. First, it was noted above in Section 1.1.2.3 that the potential conflict surrounding the role of the Advocates General of the ECJ was of greater constitutional significance to the EU than the previous conflict concerning Article 6 ECHR and the manner of the Commission’s enforcement of EU competition law. The current incompatibility between the two Courts’ jurisprudence on labour rights is of still greater constitutional significance to the EU, because it relates to the balance to be struck between the human rights at the heart of the Convention legal order, and the fundamental economic freedoms at the heart of that of the EU. Secondly, the conflict relates to labour rights, the precise level and nature of the protection of which varies significantly across Europe, touching on exactly the sort of concerns regarding national specificity and democratic legitimacy which inform Kumm’s conception of metaconstitutional interface norms. More generally, the conflict raises questions about the protection of human rights in the social and economic sphere which are of particular relevance given the current situation of economic crisis and high unemployment. Finally, the ongoing nature of the conflict allows us to analyse the different ways it may yet (or may not) be resolved, both before and after EU accession to the Convention.

### 2.1 The ECJ, labour rights and market freedoms: an indelicate balance

#### 2.1.1 The right to take collective action as a fundamental right

The roots of the controversy are the ECJ’s judgments in a series of cases concerning the relationship between the EU’s fundamental market freedoms and fundamental labour rights: specifically, freedom of association, the right to collective bargaining,

and the right to collective action.<sup>103</sup> Our starting point in analysing these cases is the ECJ's significant recognition of the right to take collective action—including the right to strike<sup>104</sup>—as a fundamental right forming part of the general principles of Union law.<sup>105</sup> In so holding, the Court drew on the recognition of the right in a wide range of international, Council of Europe, and EU documents: the International Labour Organisation (ILO) Convention No 87 on Freedom of Association and Protection of the Right to Organise; the European Social Charter (ESC); the Community Charter on the Fundamental Social Rights of Workers (CCFSRW); and the Charter of Fundamental Rights. The attention given to the EU Charter is significant because of its lack of specific enforceability at the time of the judgment, and because of the Court's previous reluctance to make use of it.<sup>106</sup> Grounding the decision more specifically in the Treaties proper, the Court noted that Article 151 TFEU makes express reference to the ESC and to the CCFSRW in its elaboration of the objectives of the Union's social policy.<sup>107</sup> The Court made no mention of the ECHR at this point in its judgments, and with good reason, for the categorisation of the right to strike as part of the fundamental right to take collective action went far beyond the (then) much more limited ECtHR jurisprudence on Article 11 ECHR, which had consistently ruled out a right to strike being protected by the Convention since *Schmidt and Dahlström*.<sup>108</sup>

However, the way in which the ECJ went on to balance the right to take collective action with free movement rights under the Treaties raises serious questions as to the depth and quality of the Court's understanding of the right. In their submissions to the ECJ in *Viking* and *Laval*, the Danish and Swedish Governments had sought to insulate the right to take collective action and the right to strike (which are constitutionally protected in those jurisdictions) from regulation by EU law in the first place by relying on Article 153(5) TFEU's exclusion of these

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<sup>103</sup> Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11845; Case C-438/05 *ITWF & FSU v Viking Line* [2007] ECR I-10806; Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323; Case C-346/06 *Rüffert v Land Niedersachsen* [2008] ECR I-1989.

<sup>104</sup> *Viking* (n 103) at para 44.

<sup>105</sup> *Ibid* at paras 43–44; *Laval* (n 103) at paras 90–92.

<sup>106</sup> ACL Davies 'One Step Forward, Two Steps Back? The *Viking* and *Laval* cases in the ECJ' (2008) 37 *Industrial Law Journal* 126 at 138. The right to collective action, including strike action, is set out in Art 28 of the Charter.

<sup>107</sup> *Viking* (n 103) at para 43; *Laval* (n 103) at para 90.

<sup>108</sup> *Schmidt and Dahlström v Sweden* (1976) 1 EHRR 632 (see below at Section 3.2).

rights from the scope of Union action; and, secondly, by arguing that the fundamental nature of the right was enough to exempt it from the scope of Article 49 TFEU's protection of freedom of establishment in *Viking* and Article 56 TFEU's protection of freedom to provide services coupled with Directive 96/71/EC<sup>109</sup> on posted workers in *Laval*. The Court disposed of the argument based on Article 153(5) TFEU with ease, relying on its consistent case law that the exclusion of a certain area of the law from the scope of the Treaties does not absolve the Member State from its general obligation to observe the requirements of Union law in its regulation of that area.<sup>110</sup>

The second argument, on the fundamental nature of the rights at issue, was also rejected, on two grounds: first, because Article 28 of the Charter makes clear that the right to take collective action is not absolute but is to be exercised in accordance with national and Union law and practice;<sup>111</sup> and, secondly, by analogy with the decisions in *Schmidberger*<sup>112</sup> and *Omega*.<sup>113</sup> In those cases, the rights to freedom of expression and respect for human dignity—though fundamental—were not held to fall outside the scope of the Treaties, but rather their exercise had to be reconciled with Treaty freedoms and with the principle of proportionality.<sup>114</sup> While it is difficult to argue with the basic premise of this first ground—very few human rights are absolute—the second requires deeper scrutiny, because of what it can tell us about the Court's conception of the relationship between fundamental—which is to say, human—rights and the fundamental economic freedoms of EU law.<sup>115</sup>

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<sup>109</sup> Parliament and Council Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services [1997] OJ L 18/1.

<sup>110</sup> *Viking* (n 103) at paras 39–41; *Laval* (n 103) at paras 86–88, citing, *inter alia*, Case C–120/95 *Decker* [1998] ECR I–1831 at paras 22–23; Case C–158/96 *Kohll* [1998] ECR I–1931 at paras 18–19.

<sup>111</sup> *Viking* (n 103) at para 44; *Laval* (n 103) at para 91.

<sup>112</sup> Case C–112/00 *Schmidberger* [2003] ECR I–5659 at para 77.

<sup>113</sup> Case C–36/02 *Omega* [2004] ECR I–9609 at para 35.

<sup>114</sup> *Viking* (n 103) at paras 45–47; *Laval* (n 103) at paras 93–95.

<sup>115</sup> For an early critique of the ECJ's equating fundamental economic freedoms with fundamental rights, see J Coppel and A O'Neill 'The European Court of Justice: Taking Rights Seriously?' (1992) 12 *Legal Studies* 227 at 242–244. More recently, see J Morijn 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: *Schmidberger* and *Omega* in the Light of the European Constitution' (2006) 12 *European Law Journal* 15.

### 2.1.2 Conceptualising collective action

The Court's ostensible reliance on *Schmidberger* and *Omega* in this context is questionable not just because of the differing circumstances of the cases, but also because of the differing nature of the rights and actions at issue. In both of the earlier cases, EU law was vertical in its effect, i.e. private enterprises were seeking damages from the State for infringing their free movement rights. In *Schmidberger*, this was a breach of the right to free movement of goods arising from Austria's failure to ban a demonstration which shut down a motorway; and in *Omega*, the claim was a breach of the right to free movement of services arising from the State authorities' ban on a 'laser tag' game. In seeking to vindicate fundamental human rights (free expression; human dignity), the State had infringed fundamental economic freedoms (free movement of goods; services), and the question was therefore whether the State infringements were justifiable and proportionate. This is in contrast to the situations in *Viking* and *Laval*, where rather than seeking *ex post* reparations from the State for the damage already caused by State (in)action, the enterprises were seeking to *prevent* other private actors—trade unions—from *continuing to exercise their rights*.

The Court had little difficulty in holding that Articles 49 and 56 TFEU were capable of horizontal direct effect in this manner,<sup>116</sup> and so the trade union action was held to constitute a restriction on Treaty freedoms. However, this reasoning ignores the very same fundamental nature of the right to collective action that the Court had earlier recognised. Though some of the organisations at the centre of the cases cited by the Court in justifying its decision were clearly not State actors, and so are legitimate precedents to draw on in applying Treaty freedoms horizontally, none of them could have claimed in their cases (and none in fact did claim) that the restrictions they had imposed on free movement were the result of their exercise of a fundamental right. UEFA,<sup>117</sup> the Union Cycliste Internationale,<sup>118</sup> and the Netherlands Bar Association<sup>119</sup> may very well have had an *interest* (usually financial) in acting as they did, but they emphatically did not have a *fundamental*

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<sup>116</sup> *Viking* (n 103) at paras 56–66, citing, *inter alia*, Case C–415/93 *Bosman* [1995] ECR I–4921; Case C–309/99 *Wouters and Others* [2002] ECR I–1577; and *Schmidberger* (n 112); *Laval* (n 103) at para 98, citing Case 36/74 *Walrave and Koch* [1974] ECR 1405, *Bosman* and *Wouters*.

<sup>117</sup> *Bosman* (n 116).

<sup>118</sup> *Wouters* (n 116).

<sup>119</sup> *Walrave and Koch* (n 116).

*right to do so*.<sup>120</sup> From the very beginning of the analysis, then, the right to take collective action assumes a position subordinate to the Treaties' economic freedoms: the starting point is the restriction on free movement, and the burden is then on the trade unions to justify their actions. Though this was also the approach taken in *Schmidberger* and *Omega*, those were cases of State liability, where the Court was evaluating whether the State's approach in seeking to vindicate fundamental rights was proportionate with respect to the Treaties. Nowhere in the judgments does the Court address how the horizontal nature of the actions in *Viking* and *Laval* may modify the calculus, despite the fact that the approach taken by a State in seeking to uphold fundamental rights will of necessity be very different to the approach taken by a trade union in deciding whether or not to exercise a fundamental right by engaging in collective action.

### 2.1.3 Justifying its exercise

Aside from the conceptualisation of the right to collective action as a purely defensive mechanism, rather than a freestanding entitlement in its own right, the Court's reasoning also founders on the question of the justification (or otherwise) of its exercise. In *Omega*, the importance attached to human dignity by the German Basic Law, coupled with the limited nature of the ban imposed (which was restricted to the variant of the game that involved 'playing at killing' and not, for example, shooting at non-human targets), meant that the State's restriction was a justifiable and proportionate exercise of the public policy derogation envisaged by Articles 62 and 52 TFEU.<sup>121</sup> We saw in Chapter 2 that this was significant from the perspective of the Court's fundamental rights jurisprudence because though the right to human dignity is a right common to the constitutional traditions of the Member States, its particular formulation and expression in the German Constitution differs from that found elsewhere. In this way, the Court in *Omega* was not insisting on the uniformity

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<sup>120</sup> The same point is made, but from the reverse angle, in C Joerges and F Rödl 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' (2009) 15 *European Law Journal* 1 at 15: '[T]he right to collective action does not imply the power to regulate market affairs unilaterally. Quite to the contrary, collective action is intended to compensate the absence of such a unilateral regulatory autonomy.' See, further, Davies (n 106) at 136–137.

<sup>121</sup> *Omega* (n 113) at paras 28–40

of Union law at the expense of national specificity, but rather reconciling the two through the acceptance of the specific national rule provided its exercise survived the proportionality test.

In *Schmidberger*, a case dealing with a right which *is* common to all the Member States, the Court allowed the State a wide margin of discretion in determining the proportionality of its actions, and noted the facts, specific to the case at hand, that the demonstration was limited both in time and in scope, and was widely publicised in advance for the avoidance of inconvenience. Importantly, the Court also noted that though the State *could* have imposed more onerous restrictions on the demonstration—both in terms of location and duration—such restrictions ‘could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope.’<sup>122</sup> Finally, the Court recognised that public demonstrations

usually [entail] inconvenience for non-participants ... but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion.<sup>123</sup>

Importantly, as long as this demonstration of opinion is lawful, it does not matter what the opinion actually *is*. The question had been raised whether the environmentalist purpose of the demonstration was relevant, and the Court rightly noted that it was not: the case concerned the liability of the Member State, which arises solely from state action or omission.<sup>124</sup> Whether the purpose and aims of the demonstrators were justifiable in Treaty terms was immaterial.

It is this dual acknowledgement by the Court of the *essentially disruptive intent* of the demonstration and the *irrelevance of the purpose* of this disruption that makes the ostensible application of the *Schmidberger* reasoning to *Viking* and *Laval* so problematic. As Anne Davies writes, ‘[t]here is more than a little sleight of hand in the Court’s use of *Schmidberger* as authority for its application of the proportionality test in *Viking* and *Laval*.’<sup>125</sup> In both cases, the Court placed great emphasis on the ways in which the trade union action was detrimental to the enterprises concerned: action designed to make Laval sign a collective agreement was ‘liable to make it less attractive, or more difficult’ to take advantage of the freedom conferred by Article 56

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<sup>122</sup> *Schmidberger* (n 112) at para 90.

<sup>123</sup> *Ibid* at para 91.

<sup>124</sup> *Ibid* at paras 65–69.

<sup>125</sup> Davies (n 106) at 142.



TFEU, exacerbated by the prospect of Laval being ‘forced’ into negotiations ‘of unspecified duration’.<sup>126</sup> This plaintive phrasing—drawn in part from *Gebhard*,<sup>127</sup> another case where the contested restriction could never be classified as flowing from the exercise of a fundamental right—signifies a lack of understanding on the part of the Court of the nature and purpose of industrial action. In the sphere of free expression, even a non-disruptive demonstration can still serve to highlight a cause, and to attract public and political sympathy for the demonstrators. In this context, an element of disruption may enhance the effectiveness of a demonstration, but its absence does not rob it of all force. But the exercise of the right to collective action, including the right to strike, *requires* this element of disruption. Without it, collective action is ‘reduced’ to the level of ‘mere’ expression, and a picket line becomes indistinguishable from an ordinary demonstration.

With this in mind, consider how the Court applied the proportionality test in *Viking* and *Laval*. In line with the case law on restrictions of free movement, in order to be justified the trade union action would (a) have to pursue a legitimate aim compatible with the Treaties; (b) be justified by an overriding reason of public interest; (c) be suitable for securing the attainment of the objective pursued; and (d) not go beyond what is necessary to attain it.<sup>128</sup> The focus on the legitimacy or otherwise of the union’s aims is in contrast to *Schmidberger*, where the demonstrators’ aims were immaterial to the question of State liability, but this is a necessary consequence of free movement provisions being applied horizontally without any allowance being made for the difference between a State acting to balance one set of constitutional rights (by which I mean EU constitutional rights), on the one hand, and a group of citizens collectively exercising other constitutional rights, on the other. Additionally, *Viking* and *Laval* diverge at this point of the justification exercise. Whereas in *Viking* the legitimacy of the union’s aims was held by the ECJ to be a question of fact to be determined by the national court,<sup>129</sup> in *Laval* the Court pre-empted this traditional division of labour between it and national courts (acting in their capacity as Union courts), holding that the trade union’s blockade in

<sup>126</sup> *Laval* (n 103) at paras 99–100, see also *Viking* (n 103) at paras 72–73.

<sup>127</sup> Case C–55/94 *Gebhard* [1995] ECR I–4186.

<sup>128</sup> *Viking* (n 103) at para 75, citing *Gebhard* (n 127) and *Bosman* (n 116).

<sup>129</sup> *Viking* (n 103) at para 83.

the case could not be justified because it was seeking terms which went beyond the ‘nucleus of mandatory rules for minimum protection in the host Member State’ laid down by Directive 96/71,<sup>130</sup> and because the negotiations on pay sought by the trade union:

... form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for ... an undertaking to determine the obligations with which it is required to comply as regards minimum pay.<sup>131</sup>

Accordingly, the trade union was effectively being penalised for a legal framework that was beyond its control, being the responsibility of the State and not the trade union.

The ECJ went on to elaborate that even though the aim of protecting workers may be a legitimate and justifiable one, it would cease to be so if the jobs or conditions of the workers in question were not jeopardised or under serious threat.<sup>132</sup> If it were established that the jobs *are* jeopardised, then the collective action would need to be suitable and no more than was necessary in the circumstances.<sup>133</sup> Moreover, the union would need to have exhausted all available alternative avenues for redress.<sup>134</sup> Two final objections can be raised to these considerations. First, the purpose of collective action by trade unions is not necessarily confined to achieving more favourable conditions for the specific workers affected, nor even for the union’s broader membership, but rather to enhance the position of labour generally. The Court’s view—that only a threat to the position of the workers in question is relevant—employs a highly individualist approach to an expressly non-individualist right and practice. Secondly, considerations such as suitability, necessity in the circumstances, the exhaustion of alternatives—indeed, the whole question of proportionality—are the stuff of daily life for State agents, with a civil service, legal officers and a national budget at their disposal. Imposing such conditions on the exercise of a fundamental right by individuals acting in concert potentially constitutes a significant restriction on the very essence of the right.

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<sup>130</sup> *Laval* (n 103) at para 108

<sup>131</sup> *Ibid* at para 110.

<sup>132</sup> *Ibid* at para 81.

<sup>133</sup> *Viking* (n 103) at para 84.

<sup>134</sup> *Ibid* at para 87.

## 2.2 The ECtHR and labour rights: the ground shifts

Whatever criticisms can be made of the ECJ's recent labour rights jurisprudence from the internal perspective of EU law (and as we have seen, there are many<sup>135</sup>), there is a strong argument that, at the time the decisions were handed down, they were consistent both with the terms of the ECHR and the jurisprudence of the Court of Human Rights. Historically, the ECtHR has been circumspect in its interpretation of Article 11 ECHR, holding that while it:

...safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States *must both permit and make possible* ... . [It] nevertheless leaves each State a *free choice* of the means to be used towards this end.<sup>136</sup>

Accordingly, though Article 11 'presents trade union freedom as one form or a special aspect of freedom of association, [it] does not guarantee any particular treatment of trade unions, or their members, by the State.'<sup>137</sup> Though the members of a trade union have the right that their union be heard,<sup>138</sup> this was held not to extend to a right to be consulted,<sup>139</sup> a right to conclude collective agreements,<sup>140</sup> or to a right to strike.<sup>141</sup> Virginia Mantouvalou has summed up the rationale of *Schmidt and Dahlström* as follows: 'when a right can be classified as social and is protected in the ESC or in instruments of the ILO, it ought to be excluded from the ECHR.'<sup>142</sup> This she dubs the 'exclusive' approach to interpretation of the Convention.<sup>143</sup>

<sup>135</sup> See Joerges and Rödl (n 120) and Davis (n 106). See further, R Eklund 'A Swedish Perspective on *Laval* (2007–2008) 29 *Comparative Labor Law & Policy Journal* 551; N Reich 'Free Movement v Social Rights in an Enlarged Union—The *Laval* and *Viking* Cases before the ECJ' (2008) 9 *German Law Journal* 125; T van Peijpe 'Collective Labour Law after *Viking*, *Laval*, *Rüffert* and *Commission v Luxembourg*' (2009) 25 *International Journal of Comparative Labour Law and Industrial Relations* 81; K Apps 'Damages Claims Against Trade Unions after *Viking* and *Laval*' (2009) 34 *European Law Review* 141; C Woolfson, C Thörnqvist and J Sommers 'The Swedish Model and the Future of Labour Standards after *Laval*' (2010) 41 *Industrial Relations Journal* 333.

<sup>136</sup> *Schmidt and Dahlström* (n 108) at para 36. Citations omitted, emphasis added.

<sup>137</sup> *National Union of Belgian Police v Belgium* (1979–80) 1 EHRR 578 at para 38.

<sup>138</sup> *Ibid* at para 39.

<sup>139</sup> *Ibid* at para 38.

<sup>140</sup> *Swedish Engine Drivers Union v Sweden* (1976) 1 EHRR 617 at para 39; *Schettini and Others v Italy* App no 29529/95 (decision, ECtHR, 9 Nov 2000).

<sup>141</sup> *Schmidt and Dahlström* (n 108) at para 36, see also *UNISON v UK* App no 53574/99 (decision, ECtHR, 10 Jan 2002).

<sup>142</sup> V Mantouvalou 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 *Human Rights Law Review* 529 at 532, referring also to *van Volsem v Belgium* App No 14641/89 (decision, ECmHR, 9 May 1990).

<sup>143</sup> *Ibid*.

However, two recent judgments of the ECtHR—*Demir and Baykara*<sup>144</sup> and *Enerji Yapı-Yol Sen*<sup>145</sup>—have expressly departed from this restrictive approach to Article 11 ECHR. In giving an altogether wider interpretation of Article 11’s requirements,<sup>146</sup> the judgments also raise serious questions about the compatibility of the ECJ’s approach with the Convention. As we shall now see, these judgments are examples of what has been dubbed the ‘integrated’ approach<sup>147</sup> to interpretation, whereby the ECtHR draws on the work of other institutional actors—particularly the ESC and the ILO—in seeking to determine the contours, requirements and limits of the social and labour requirements of the Convention.<sup>148</sup>

### 2.2.1 The ‘integrated’ approach to interpretation and Article 11

One feature that the judgment in *Demir and Baykara* has in common with the decisions in *Viking* and *Laval* is reference to a wide range of international legal authority, but where *Demir and Baykara* differentiates itself is in the depth and quality of its *engagement* with this authority. In its survey of the right to organise and to bargain collectively, the ECtHR drew on ILO Conventions Nos 87, 98 and 151; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the ESC; and the Charter of Fundamental Rights. But in doing so, and in contrast with the ECJ’s approach described above at Section 3.1.1, the ECtHR went beyond merely advertent to the existence of these instruments or the citation of their bare text; it also surveyed the jurisprudence of and

<sup>144</sup> *Demir and Baykara v Turkey* (2009) 48 EHRR 54.

<sup>145</sup> *Enerji Yapı-Yol Sen v Turkey* [2009] ECHR 2251 (French only).

<sup>146</sup> See generally, KD Ewing and J Hendy ‘The Dramatic Implications of *Demir and Baykara*’ (2010) 39 *Industrial Law Journal* 2.

<sup>147</sup> The term is Martin Scheinen’s: M Schienen ‘Economic and Social Rights as Legal Rights’ in A Eide, C Krause and A Rosas (eds) *Economic, Social and Cultural Rights* (2nd edn, Dordrecht: Martinus Nijhoff, 2001) at 29.

<sup>148</sup> The ‘integrated approach’ is a relatively new departure for the ECtHR, and is not universally applied in its case law: see *N v UK* (2008) 47 EHRR 885 at para 44, and compare the joint dissenting opinion in the case at para 6. Enthusiastic endorsement of the integrated approach can, however, be found in extra-curial statements of current and former judges of the ECtHR: see, for example, J-P Costa ‘La Déclaration universelle des droits de l’homme (1948–2008): Les droits économiques, sociaux et culturels en question’ (Strasbourg, 16 Oct 2008, available at <[www.echr.coe.int/NR/ronlyres/42BD71A1-099A-4B88-B907-185CFF3B3968/0/2008\\_Strasbourg\\_colloque\\_declaration\\_universelle\\_16\\_10.pdf](http://www.echr.coe.int/NR/ronlyres/42BD71A1-099A-4B88-B907-185CFF3B3968/0/2008_Strasbourg_colloque_declaration_universelle_16_10.pdf)>); and F Tulkens ‘Implementing the European Convention on Human Rights in Times of Economic Crisis’ (Strasbourg, 25 Jan 2013, available at <[www.echr.coe.int/NR/ronlyres/201DCAB7-9FB3-4183-A71E-3ED3EF7D00A4/0/Speech\\_20130125\\_Tulkens\\_ENG.pdf](http://www.echr.coe.int/NR/ronlyres/201DCAB7-9FB3-4183-A71E-3ED3EF7D00A4/0/Speech_20130125_Tulkens_ENG.pdf)>).

literature on the various bodies with responsibility for overseeing their implementation, including the ILO's Committee of Experts, its Committee on Freedom of Association, and the European Committee of Social Rights.<sup>149</sup> Amid such a wide range of sources, the omission of any mention of the ECJ's jurisprudence on Article 28 of the Charter—including the then year-old cases of *Viking* and *Laval*—is telling, and almost certainly deliberate.<sup>150</sup>

The Turkish Government had objected to the ECtHR placing reliance on instruments other than the Convention, and in particular on instruments that Turkey had not ratified, such as Articles 5 and 6 ESC.<sup>151</sup> In rejecting this argument, the Court gave a robust defence of its 'integrated' approach to interpretation, stating that it 'has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein'.<sup>152</sup> In the light of the ECtHR's previous, 'exclusive' approach to interpretation, this statement ('has *never* considered') may seem somewhat tenuous, but on closer investigation it holds true: even when the Court was in the habit of ruling that a right was not covered by the Convention because of its protection by the ESC or ILO, this did not mean that the Convention was its 'sole framework of reference'—quite the opposite, for excluding a right from the scope of the Convention because of its protection elsewhere still counts as placing reliance on instruments external to the Convention. Whether such reliance results in a diminution or an enlargement of the scope of the Convention makes no difference to the essential point that the Court's epistemic confines are not the four corners of the Convention itself.

It is this epistemic openness—coupled with the ECtHR's longstanding principle of the “living” nature of the Convention, which must be interpreted in the light of present-day conditions, and ... evolving norms of national and international

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<sup>149</sup> *Demir and Baykara* (n 144) at paras 37–52.

<sup>150</sup> There is a parallel here with what Daniel Sarmiento has called the 'silent judgments' of the ECJ, which enable the ECJ 'to avoid delicate points, delay an issue for future occasions, or grant a wider margin of action to the national court'. See D Sarmiento 'The Silent Lamb and the Deaf Wolves: Constitutional Pluralism, Preliminary References and the Role of Silent Judgments in EU Law' in M Avbelj and J Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart, 2012) at 293.

<sup>151</sup> *Demir and Baykara* (n 144) at para 53.

<sup>152</sup> *Ibid* at para 67.

law<sup>153</sup>—that enabled the Court, in rejecting in particular Turkey’s contention that its non-ratification of various instruments should shield it from their effects, to state with confidence that:

Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard . . . . [I]n searching for common ground among the norms of international law [the Court] has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.<sup>154</sup>

Having cleared the preliminary hurdles of reliance on extra-Conventional sources and Turkish non-ratification, the stage was set for a major departure from precedent. The ECtHR surveyed the place of the right to bargain collectively in ILO Convention No 98, the ESC, the EU Charter, and the law and practice of European states,<sup>155</sup> and held that:

In light of these developments, the Court considers that its case-law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems.<sup>156</sup>

A similar approach, relying on the reasoning developed in *Demir and Baykara*, was employed in *Enerji Yapı-Yol Sen v Turkey* with respect to the right to strike, the ECtHR stating that ‘[l]a grève, qui permet à un syndicat de faire entendre sa voix, constitue *un aspect important* pour les membres d’un syndicat dans la protection de leurs intérêts.’<sup>157</sup> Here, the Court cited paragraph 38 of its judgment in *Schmidt and Dahlström*, but more important is what it left out: the fatal addendum to ‘*un aspect important*’, ‘but there are others’.<sup>158</sup> This completed the about-turn in the ECtHR’s labour rights jurisprudence and, as Albertine Veldman notes, reveals that the approaches of the two European Courts differ in profoundly important respects, not least the general legal methodology applied and the proportionality required.<sup>159</sup>

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<sup>153</sup> Ibid at para 68.

<sup>154</sup> Ibid at paras 76–78.

<sup>155</sup> Ibid at paras 147–151.

<sup>156</sup> Ibid at para 153, citing *Swedish Engine Drivers Union* (n 140) at para 39; *Schmidt and Dahlström* (n 108) at para 34.

<sup>157</sup> *Enerji Yapı-Yol Sen* (n 145) at para 24, emphasis added.

<sup>158</sup> *Schmidt and Dahlström* (n 108) at para 38

<sup>159</sup> A Veldman ‘The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR’ (2013) 9 *Utrecht Law Review* 104 at 113–115.

### 2.3 Managing impending judicial conflict in Europe

There is a jarring discordance that runs throughout the ECJ's judgments between the loud noises the Court makes about the fundamental nature of the right to strike and importance to the Union of 'a high level of social protection',<sup>160</sup> on the one hand, and the onerous restrictions that the Court imposes on the exercise of the right to strike, on the other. Though there was no particular reason to suppose that the judgments in *Viking* and *Laval* offended the Convention at the time they were handed down, this is no longer the case, and it is difficult to see how the ECJ's understanding of labour rights, if it persists, can now be seen as anything but contrary to the ECtHR's standard of protection as constructed through *Demir and Baykara* and *Enerji Yapı-Yol Sen*. This provides an opening for discussion of the possible consequences, both before and after EU accession to the Convention, and what this might tell us about the interface norms by which the European legal orders relate.

It was noted above in Section 2.1.2.3 that the ECJ was easily able to adopt subsequent ECtHR jurisprudence in the *Hoechst* and *Orkem* series of cases, as the rights at issue in those cases hardly went to the core of the EU legal order. Conversely, with respect to the rather more jealously-guarded role of the Advocates General and the ECJ's Rules of Procedure with respect to Article 6 ECHR, the ECJ was altogether less willing to follow Strasbourg's lead, leaving the ECtHR to settle the matter by finding the *Bosphorus* presumption not rebutted in *Kokkelvisserij*: while the ECJ's structure and procedures may not *equal* the standard of protection demanded by Strasbourg, they were not 'manifestly deficient'. However, the disconnect between Luxembourg and Strasbourg over labour rights examined in this Section emphatically falls into this latter category, dealing as it does with the relationship between human rights as protected by the Convention and the free movement rights at the very core of the ECJ's jurisdiction and jurisprudence. How, then, is this disconnect to be resolved?

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<sup>160</sup> *Viking* (n 103) at para 78, quoting then-Art 2 EC. It is perhaps important, and telling, that this 'high level' of social protection has since been downgraded to a guarantee of merely 'adequate' social protection in Art 9 TFEU and 'proper' social protection in Art 151 TFEU: aims which Alain Euzéby has rightly called 'both more vague and less ambitious' (A Euzéby 'Economic Crisis and Social Protection in the European Union: Moving Beyond Immediate Responses' (2010) 63 *International Social Security Review* 71 at 81).

### 2.3.1 Pre-accession

As we saw in Section 2.1.2, membership of an international organisation, even one of the scope and breadth of the EU, does not absolve parties to the Convention of their obligations thereunder. Though the EU institutions themselves are not directly subject to the jurisdiction of the Strasbourg Court, the Member States remain so in their application of EU law, regardless of whether they had any discretion or room for manoeuvre in so doing. The question of discretion is only relevant to whether the *Bosphorus* presumption of equivalent human rights protection applies, but we can deduce from *Michaud* that the more important factor is not necessarily whether the Member State had any discretion, but rather whether the ECJ has yet had an opportunity to scrutinise the norm of EU law at issue on grounds of fundamental rights. This being the case, as things stand, the EU's Member States may find their actions on foot of the judgments in *Viking* and *Laval* subject to the full measure of the ECtHR's scrutiny in an appropriate case. Concerning, as they do, the interpretation of directly effective Treaty norms, such cases will not leave much in the way of discretion to the Member States; but given the disparity between the recent approaches of the ECJ and the ECtHR on the issue of labour rights, it is difficult to see how the ECtHR could justify applying the *Bosphorus* presumption where a State gives precedence to the EU 'version' of labour rights. Of course, at the time of the decisions in *Viking* and *Laval*, the ECJ did not have the benefit of the ECtHR's later Article 11 judgments, and so the ECtHR might prefer first to have the benefit of the ECJ's response to this change in direction under the Convention. But in the current state of relations between the legal orders, the ECtHR cannot itself request such a response, and must await future developments at the ECJ.

This leaves us in an interesting situation. The ECJ is bound under the Charter not to go below the level of rights protection provided by the ECtHR's jurisprudence. Similarly, the ECtHR has expressed both a great deal of confidence in the ECJ's competence as a court with a human rights jurisprudence and a great deal of concern for the autonomy of EU law as a distinct and unique legal order. Yet this mutual respect and comity cannot allow for clearly divergent approaches towards the meaning and requirements of the Convention: put bluntly, something will have to



give. As will be clear from the tenor of the above, I prefer the ECtHR's approach to the issues, but this is for reasons of process as much as for reasons of outcome. The Strasbourg cases engage in a more sophisticated manner with the international jurisprudence on labour rights than their Luxembourg counterparts, and they do so in a way that takes a holistic, evolutionary and interactive view of the protection of labour rights both within the Council of Europe and worldwide—even to the extent of applying norms of international law to which Turkey was not a party. This pluralism is rooted in a deep understanding of the Convention as an expressly *constitutional* instrument, devoted to the limitation of coercive state power against the individual.

On the other hand, there is little of pluralism in the ECJ judgments: the cases pay scant attention to national specificities in terms of the operation of labour relations (both in the Member States directly concerned and across the Union more widely), and instead are altogether more concerned with the vindication of the EU's fundamental market freedoms. This is an approach that fits well with the ECJ's previous constitutionalising tendencies, and thus what Kumm would call European (Union) constitutional supremacy, but it sits uncomfortably with the (limited) deference shown to national specificity in *Omega*. Moreover, given the quality of the reasoning in the ECtHR cases, the force with which they were phrased, and their status as being subsequent in time to the relevant ECJ judgments, it is the Strasbourg Court's approach that should prevail. Importantly, this is *not* to say that the judgments of the ECtHR are to be preferred to those of the ECJ always and in every case, and thus to be regarded as hierarchically superior. Rather, the point is that, in a deliberative polyarchy, such conflicts will naturally arise and ought to be worked out dialogically in a way that best realises the shared ideals underlying the overlapping consensus.

The critical question is, therefore, how this is actually to happen. There are two possibilities: in light of the new turn in the Convention jurisprudence, the ECJ could correct itself in a future case; or, in a different case, the ECtHR could specifically find the ECJ's interpretation of Article 11 ECHR to be contrary to the Convention. However, for this latter possibility to occur, a case would have to find its way to the ECtHR, having exhausted domestic remedies, which would include opportunities for

the issue to be referred to the ECJ by national courts. Pending the accession of the EU to the Convention, this latter course of events is most likely, and most desirable in the circumstances. Of course, all of this is predicated on the assumption that the ECJ will in fact acquiesce to the new and somewhat unexpected turn in the ECtHR's Article 11 ECHR jurisprudence.

### 2.3.2 Post-accession

But what if this incompatibility between the two legal systems does *not* get resolved until after the EU's accession to the Convention? The co-respondent mechanism of the Draft Accession Agreement seems almost tailor-made for such a situation. Rather than the ECtHR having to address the compatibility of EU law with the Convention indirectly through the Member States' implementing measures and actions, both the State and the Union could be joined as co-respondents. This allows the two actors to be regarded as indivisible parts of a whole, and relieves the ECtHR of the responsibility of apportioning responsibility between them, this instead becoming a matter for internal resolution within the Union.

Moreover, the co-respondent mechanism's prior involvement provisions would solve the procedural difficulties adverted to above, providing an institutional mechanism whereby the ECJ could be prompted by the ECtHR to consider the more recent Convention jurisprudence and—ideally—make whatever adjustments it considers necessary to its own.

## 3 CONCLUSION

The most obvious feature that emerges from surveying the current and future relationship between the EU and the ECHR is that this relationship is entirely unlike that which exists between the EU and its Member States or between the ECtHR and the States party to the Convention. For the ECJ and the ECtHR, both being non-state actors, the norms that regulate their interaction cannot be analogised directly to those developed with reference to the relationship between national and EU law. Certainly, similarities exist, as in the strong presumption that ECtHR jurisprudence should be followed which informed the ECJ's decisions in *Roquettes Frères* and *Limburgse*

*Vinyl Maatschappij*, as well as the principle of conditional recognition inherent in the *Bosphorus* presumption. However, as the ongoing conflict regarding Article 11 ECHR demonstrates, the EU's nature as a supranational organisation, and the ECJ's status as a court with transnational jurisdiction—particularly, in this instance, in economic matters—means that the polyarchic relationship between the orders cannot be boiled down to a simple set of universal rules or principles. Contrary to the assumption in the metaconstitutional literature, it is only through the actual, case-specific engagement of different legal orders that the norms regulating the relationship emerge.

Moreover, the relationship is further complicated by the important and continuing role of the Member States, who, even after EU accession, will continue to be important intermediaries given the specific division of competences within the Union. In the next Chapter, this tripartite polyarchy—the triangular constitution—will be looked at in the round.

## CHAPTER 4: THE TRIANGULAR FRAME

### INTRODUCTION

#### **Aims and structure of the chapter**

Abortion is illegal in Ireland in almost all circumstances. The one exception is when the procedure is carried out in order to save the life (but not the health) of a pregnant woman, including—in certain circumstances—from possible suicide. This narrowly-drawn exception, nowadays set out in and governed by the Protection of Life During Pregnancy Act 2013, arose from the Supreme Court judgment in *Attorney General v X*,<sup>1</sup> where it was held to be inherent in Article 40.3.3° of the Constitution, which states (in part, but at the time in full) that:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

Of course, this state of affairs is controversial, from the perspective of those who would rather an absolute ban on abortion, and of those who would like to see the restrictions lifted for various reasons, and to a greater or lesser degree.

It was mentioned previously but bears repeating here that this case study is emphatically *not* about the substantive moral and ethical questions of abortion: when human life begins; the morality of terminating a foetus's gestation; the relative strength and importance of the rights of women as autonomous individual agents and equal citizens; and much else. Instead, the Chapter evaluates the metaconstitutional aspects of how the issue of abortion has played out as a domestic and European legal issue. The Irish constitutional provisions on abortion provide an archetypal example of national constitutional specificity, and, given the means by which they were (rightly or wrongly) adopted, they also engage questions of democratic legitimacy. The case law surrounding them therefore provides an ideal field for analysing the research question of interface norm universality.

Section 2 sets out the two pivotal domestic cases through which the regulation of abortion under national constitutional law entered European legal discourse. Section

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<sup>1</sup> *Attorney General v X* [1992] 1 IR 1.

3 will outline how the European legal orders and the domestic order interacted regarding three specific aspects of the abortion issue: the right to receive and impart information; the right to travel; and the right to a private and family life. Finally, Section 4 will examine what this interaction tells us about the self-images and attitudes of the three legal orders, or at least of their judicial branches; about the nature of the relationships between them; and, therefore, about the particularity or universality of the interface norms regulating the relationship. The Chapter concludes that though (very) broad, general metaconstitutional principles can be drawn out from the various judgments, we cannot derive hard and fast, universally applicable norms from them without stripping these norms of the content and meaning which made them capable of guiding judicial action in the first place.

It is first important properly to situate the argument by outlining the history of Irish abortion law prior to the addition of Article 40.3.3° to the Constitution, which is the constitutional provision around which the subsequent legal controversy revolves.

### **Prologue: the situation prior to 1983**

Though the right to life of the unborn has only been specifically recognised in the Constitution since 1983, the ban on abortion in Ireland is much older. For centuries an offence at common law, the crime was put on a statutory footing by sections 58 and 59 of the Offences Against the Person Act 1861, an Act of the then-British and Irish Parliament at Westminster. First ‘carried over’ to the legal order of the Irish Free State by Article 73 of that State’s 1922 Constitution,<sup>2</sup> and again in 1937 by Article 50.1 of the Constitution,<sup>3</sup> these sections of the 1861 Act were not repealed until July 2013.<sup>4</sup> They provided as follows:

58. Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing or shall unlawfully use any instrument or other means

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<sup>2</sup> Which read: ‘Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.’

<sup>3</sup> Which reads: ‘Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.’

<sup>4</sup> Protection of Life During Pregnancy Act 2013, S 5.

whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony, and being convicted thereof shall be liable to be kept in penal servitude for life.

59. Whoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude.<sup>5</sup>

The recurrence of the word ‘unlawfully’ in Sections 58 and 59 was crucial in Great Britain, where medical opinion came to regard abortion as a legitimate therapeutic practice where the pregnancy posed a danger to the woman’s life or mental or physical health. As Casey notes, there is little evidence that Irish medical practice ever adopted this stance, but this was for moral and religious, not legal, reasons.<sup>6</sup> No one was prosecuted under the 1861 Act between independence in 1922 and the Act’s repeal in 2013.<sup>7</sup>

Following the coming into force of the 1937 Constitution, and particularly since the beginning of its judicial exegesis in the 1960s (discussed in Chapter 2), the ban on abortion both gained a basis in constitutional theory and faced a new—potential—threat. In *Ryan v Attorney General*,<sup>8</sup> it was held that the rights guaranteed to the citizen by the Constitution were not limited to those specifically mentioned in the text of the document itself. Instead, Article 40.3.1°’s statement that ‘[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen’ was held to include ‘all those rights which result from the Christian and democratic nature of the State.’<sup>9</sup> These ‘unenumerated’ constitutional rights were later held, in *McGee v Attorney General*,<sup>10</sup> to include a right to marital privacy. The statutory ban on the sale, manufacture or importation of contraceptives at issue in that case was struck down for breaching this

<sup>5</sup> Offences Against the Person Act 1861, Ss 58–59, as amended by the Statute Law Revision Act 1892 and the Statute Law Revision (No 2) Act 1893.

<sup>6</sup> J Casey *Constitutional Law in Ireland* (3rd edn, Dublin: Round Hall Sweet & Maxwell, 2000) at 433–434, citing J Keown *Abortion, Doctors and the Law* (Cambridge: CUP, 1988) Ch 3.

<sup>7</sup> Though Casey notes that charges of murder have been brought where women have died following an abortion: Casey (n 6) at 434, citing *People (Attorney General) v Cadden* (1956) 91 ILTR 97.

<sup>8</sup> *Ryan v Attorney General* [1965] IR 294.

<sup>9</sup> *Ibid* at 312 *per* Kenny J.

<sup>10</sup> *McGee v Attorney General* [1974] IR 284.

right, at least with respect to married couples. The Supreme Court in *McGee* made very clear that the unenumerated right to (marital) privacy could not trump the State's abortion laws, Walsh J in his judgment holding that:

[A]ny action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question.<sup>11</sup>

Accordingly, even prior to the insertion of Article 40.3.3° by the Eighth Amendment to the Constitution in 1983, the constitutional right to life contained in Article 40.3.2° had been interpreted as applying equally to the born and the unborn. This was made explicit in *G v An Bord Uchtála*,<sup>12</sup> an adoption case, where it was held (again by Walsh J) that:

[All children have] the right to life itself and the right to be guarded against all threats directed to [their] existence whether before or after birth. ... The right to life necessarily implies the right to be born, [and] the right to preserve and defend (and have preserved and defended) that life ... It lies not in the power of the parent who has the primary, natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child's natural right to life and all that flows from that right are independent of any right of the parent as such.<sup>13</sup>

Given these strong judicial statements of support for the idea that the constitutional right to life extended to the foetus, what happened next was perhaps surprising. The 'potential threat' to the 1861 Act adverted to above arose from the doctrine of unenumerated rights itself. Despite the Supreme Court's assurances on the issue, there was thought to be nothing in theory *definitively* to preclude a future Supreme Court—or, 'worse', a future European court—from liberalising the law on abortion. The American experience was crucial here. The US Supreme Court's striking down of a statute criminalising contraception in *Griswold v Connecticut*<sup>14</sup> was seen as a stepping stone towards its later finding, in *Roe v Wade*,<sup>15</sup> that the right to privacy (unenumerated, but held to flow from the due process clause of the 14th Amendment to the US Constitution) extended to a woman's choice as to whether to have an abortion, within gestational limits. The parallels between *Griswold* and *McGee*, and

<sup>11</sup> Ibid at 312.

<sup>12</sup> *G v An Bord Uchtála* [1980] IR 32.

<sup>13</sup> Ibid at 69.

<sup>14</sup> *Griswold v Connecticut* (1965) 381 US 479.

<sup>15</sup> *Roe v Wade* (1973) 410 US 113.

what this might mean for the future of abortion in Ireland,<sup>16</sup> unnerved anti-abortion campaigners, who—not content either with judicial statements confirming a pre-natal right to life or with the specific invocation and reaffirmation of Sections 58 and 59 of the 1861 Act in the statute enacted to regulate contraception on foot of *McGee*<sup>17</sup>—began to campaign for a constitutional amendment to settle the issue conclusively. A referendum on the Eighth Amendment was held on 7 September 1983, and passed by a majority of 66.9% to 33.1%, on a turnout of 53.4%.<sup>18</sup> Accordingly, Article 40.3.3° (or rather, what is now its first paragraph) was added to the Constitution.

## 1 AVOIDANCE, ENGAGEMENT AND CONDITIONAL RECOGNITION

This section will set out the High and Supreme Court judgments in the cases which triggered the engagement of the European legal orders on the question of abortion regulation in Ireland: *AG (SPUC) v Open Door Counselling and Dublin Well Woman*<sup>19</sup> and *SPUC v Grogan*.<sup>20</sup> As we shall see, the reasoning in the cases is diverse, and there is a variety of interface norms at work—from a principle of avoidance, through to a (threatened) application of the *Solange* principle of conditional recognition—depending on the circumstances and the position of the court in the domestic hierarchy.

### 1.1 *AG (SPUC) v Open Door Counselling and Dublin Well Woman*

The first case to call for judicial interpretation of Article 40.3.3° was *Open Door*. The defendants were organisations offering non-directive counselling services to pregnant women; critically, both organisations were prepared, in the course of this counselling, to discuss with clients the possibility of travel to England to procure an

<sup>16</sup> This also raises interesting questions about judicial ‘borrowing’ and the interaction of legal orders beyond the European, which is beyond the scope of the present study. For a (somewhat dated) account of the US influence on Irish constitutional jurisprudence, see PD Sutherland ‘The Influence of United States Constitutional Law on the Interpretation of the Irish Constitution’ (1984) 28 *St Louis University Law Journal* 41.

<sup>17</sup> Health (Family Planning) Act 1979, S 10.

<sup>18</sup> M Gallagher ‘Referendum Campaigns in Ireland’ (paper presented at the 8th international SISE conference on ‘Le Campagne Elettorali’, Venice, 18–20 December 2003, available at <[www.studielettorali.it/convegni/paper/Gallagher\\_ing.pdf](http://www.studielettorali.it/convegni/paper/Gallagher_ing.pdf)>) at 21.

<sup>19</sup> *Attorney General (Society for the Protection of Unborn Children) v Open Door Counselling and Dublin Well Woman* [1988] IR 593, hereinafter *Open Door*.

<sup>20</sup> *Society for the Protection of Unborn Children v Grogan (No 1)* [1989] IR 753, hereinafter *Grogan*.



abortion in accordance with English law. If the client wished to consider this option further, they would make arrangements to refer her to a medical clinic in England (with which the counselling organisations had no formal relationship, financial or otherwise). The plaintiff society sought a declaration that the activities of the defendants were unlawful having regard to Article 40.3.3° and an injunction prohibiting the defendants from continuing to counsel, advise or assist pregnant women regarding the procurement of an abortion abroad.<sup>21</sup>

The first defendant, Open Door, denied that its activities were unlawful having regard to Article 40.3.3°, and further claimed that it was entitled to engage in these activities ‘by virtue of the provisions of the Constitution’.<sup>22</sup> Oddly, in making this defence, it did not claim reliance on any *specific* provision of the Constitution, such as Article 40.6.1°i’s guarantee of freedom of expression,<sup>23</sup> or on the unenumerated right to privacy established in *McGee*. Additionally, no provision of EU law or of the ECHR was raised.<sup>24</sup>

The second defendant, Well Woman, also denied that it had acted unlawfully, and raised in its defence the constitutional rights to privacy, to freedom of expression, to freedom of communication, and to freedom of access to information in the course of counselling and generally.<sup>25</sup> Importantly for present purposes, however, Well Woman also claimed reliance on certain rights arising from EU law, made effective in Ireland by the European Communities Act 1972 and, as we have seen in Chapter 2, allegedly immunised from constitutional challenge by the ‘exclusion clause’ then to be found at Article 29.4.3°.<sup>26</sup>

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<sup>21</sup> The plaintiffs also sought a declaration that the defendants’ activities amounted to the common law offence of conspiracy to corrupt public morals. Hamilton P, in the High Court, held that the activities *could* amount to the commission of such an offence, but that to make such a declaration would be to usurp the authority of the criminal courts, the offence being a misdemeanour triable on indictment before a judge and jury. Hamilton P was not prepared to run the risk of ‘treating conduct as criminal when a jury might consider otherwise’ (at 615). This leg of the case will not, therefore, be discussed.

<sup>22</sup> *Open Door* (n 19) at 604.

<sup>23</sup> Though note the proviso at Article 40.6.1° itself, that such right is ‘subject to public order and morality’.

<sup>24</sup> The ECHR was not incorporated into the domestic order at this time, as discussed in Chapter 2.

<sup>25</sup> Though note that this last right had never been ‘discovered’ by the Courts as being inherent in the Constitution.

<sup>26</sup> Now Article 29.4.6°.

### 1.1.1 Avoidance of triggering engagement: the High Court judgment

Hamilton P, for the High Court, found for the plaintiff and granted the declaration and injunction sought. In the course of his judgment, he noted that Article 40.3.3° of the Constitution, like any other constitutional provision granting or recognising rights, is self-executing and thus requires no subsequent legislation to give it effect. Accordingly, the fact that there had been no legislation on foot of Article 40.3.3° in the years since the passage of the Eighth Amendment was neither here nor there.<sup>27</sup> Hamilton P evaluated the history and present of the right to life in Ireland, and invoked the *dicta* of Walsh J in *McGee* and *G v An Bord Uchtála* (quoted in Section 1.2 above), along with the plain text of Article 40.3.3° and the following statement of McCarthy J in *Norris v Attorney General*:

[T]he provisions of the preamble [to the Constitution] ... would appear to lean heavily against any view other than [that] the right to life of the unborn is a sacred trust to which all the organs of government must lend their support.<sup>28</sup>

On the strength of this, the High Court held that:

[T]he judicial organ of government is obliged to lend its support to the enforcement of the right to life of the unborn, to defend and vindicate that right and, if there is a threat to that right from whatever source, to protect that right from such threat, if its support is sought.<sup>29</sup>

The High Court went on to find that the defendants' activities amounted in fact 'to counselling and assisting pregnant women to travel abroad to obtain further advice on abortion and to secure an abortion',<sup>30</sup> and that that such activities must be unlawful with regard to Article 40.3.3°:

Obedience to the law is required of every citizen and there exists a duty on the part of the citizens to respect that right [to life of the unborn] and not to interfere with it. The court is under a duty to act so as not to permit any body of citizens to deprive another of his constitutional right, to see that such rights are protected and to regard as unlawful any infringement or attempted infringement of such constitutional right as constituting a violation of the fundamental law of the State.

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<sup>27</sup> *Open Door* (n 19) at 605–607, relying on the traditionally very strong judicial authority to vindicate constitutional rights: *Educational Company of Ireland v Fitzpatrick (No 2)* [1961] IR 345; *Byrne v Ireland* [1972] IR 241; *Meskeil v CIÉ* [1973] IR 121 and *Mead* (Supreme Court, unreported, 26 July 1972).

<sup>28</sup> *Norris v Attorney General* [1984] IR 36 at 103.

<sup>29</sup> *Open Door* (n 19) at 597–599.

<sup>30</sup> *Ibid* at 617.

The qualified right to privacy, the rights of association and freedom of expression and the right to disseminate information cannot be invoked to interfere with such a fundamental right as the right to life of the unborn, which is acknowledged by the Constitution of Ireland.<sup>31</sup>

Finally, the High Court dealt with the issues of EU law raised by *Well Woman*: the effect of the Constitution's EU 'exclusion clause'; of then-Articles 59 and 60 EEC with regard to services; and of the provisions of Council Directive 73/148/EEC,<sup>32</sup> dealing with free movement and residence within the Community for Member State nationals with regard to establishment and the provision of services.<sup>33</sup> In a brief passage at the end of his judgment, Hamilton P took pains to point out how seriously he had taken and studied these submissions, but concluded that all of the activities at issue in the case had occurred within Ireland, and, there being no cross-border element, that no issue of EU law therefore arose.<sup>34</sup> Because such questions might be considered in a future case, he made no finding as regards the interaction or relationship between the EU law rights relied on and the provisions of Article 40.3.3°.

The possible relevance of EU law having been ruled out, the High Court judgment in this case is an ordinary instance of domestic constitutionalism. While arguments based on EU law had been advanced—and the trial judge tried to stress his *communautaire* credentials in stating that the submissions on EU law 'warranted [full and careful] consideration',<sup>35</sup> echoing, to a limited extent, Maduro's contrapunctual principle of pluralism itself—the reasoning behind his finding that EU law had not been triggered was threadbare, contained no reference to the jurisprudence of the ECJ, and, as we shall see in Section 3.1.1, was later indirectly contradicted by that Court. The view of the relationship between the domestic and EU legal systems arising from the judgment is not one where the two are interweaved in any particular way, but where they are imagined to be neatly separable. There being no cross-border issue, this must therefore be a purely national issue, and was treated as one. However, this analysis ignores the extensive case law

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<sup>31</sup> *Ibid.*

<sup>32</sup> Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172.

<sup>33</sup> *Open Door* (n 19) at 618.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

of the ECJ on *potential* restrictions of free movement rights.<sup>36</sup> Accordingly, the only metaconstitutional interface norm that can be derived from the judgment is one which plays no part in Kumm or Maduro's theories—a principle of *avoidance*, whereby matters are kept firmly within the domain of the national constitution, and within the jurisdiction of the national courts.

### 1.1.2 Engagement avoided, narrowly: the Supreme Court judgment

On appeal to the Supreme Court, the defendants were similarly unsuccessful. In a brief, unanimous judgment delivered by Finlay CJ, the Supreme Court held that it was 'satisfied beyond doubt that having regard to the admitted facts the defendants were assisting in the ultimate destruction of the life of the unborn by abortion'.<sup>37</sup> As a result:

[T]here could not be an implied and unenumerated constitutional right to information about the availability of a service of abortion outside the State, which, if availed of, would have the direct consequence of destroying the expressly guaranteed constitutional right to life of the unborn.<sup>38</sup>

Furthermore, the argument that Article 40.6.1°'s guarantee of freedom of expression implied an ancillary right to receive information was also unsuccessful, the Court holding that 'no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child'.<sup>39</sup>

As part of their appeal, the defendants asked the Supreme Court to make a preliminary reference to the ECJ under then-Article 177 EEC in order to determine whether a pregnant woman resident in Ireland had the right, under Articles 59 and 60 EEC, to travel to another Member State 'for the purpose of being the recipient of a service consisting of the performing of an abortion upon her', and whether 'a necessary corollary to that right ... was the right to information about the availability

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<sup>36</sup> See, with reference to the trade in goods, Case 8/74 *Dassonville* [1974] ECR 837 at para 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.' This approach has long been extrapolated beyond goods to services: for an overview, see the Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177 at paras 69–74.

<sup>37</sup> *Open Door* (n 19) at 624.

<sup>38</sup> *Ibid* at 625.

<sup>39</sup> *Ibid*.

of that service.<sup>40</sup> However, the reference was not made, for a reason different from that of the High Court, but similarly narrow. Counsel for the defendants had conceded that the corollary right ‘was confined to the obtaining of *information* about the availability or existence of the service’ and ‘could not be extended to the obtaining of *assistance* to avail of or receive the service.’<sup>41</sup> The order of the High Court was not confined to the question of information, and nor did it seek to ‘prevent a pregnant woman from becoming aware of the existence of abortion outside the jurisdiction.’<sup>42</sup> Instead, it sought to restrain ‘*assistance* to a pregnant woman to travel abroad and obtain the service of abortion.’<sup>43</sup> Because the defence had made no claim that *this* was a right flowing from the Treaty, the Supreme Court held on this very narrow ground that no question of the interpretation of the Treaty arose, and the Court was therefore not obliged to make a reference to Luxembourg. Accordingly, the Court expressed no opinion on three issues which had arisen in argument: whether the Treaty grants pregnant women a right to travel for the purpose of having an abortion; whether the defendants would be entitled to rely on such a right despite it being vested in pregnant women and not in them as counselling services; and the general nature of the right to travel to receive services under then-Articles 59 and 60 EEC.

Again, the only metaconstitutional interface norm at work in the judgment is a principle of avoidance. However, there is an important difference between the reasoning of the High Court and the Supreme Court as to why EU law had not been engaged in the case, and thus how the principle of avoidance was applied: whereas for the High Court the lack of actual cross-border activity was decisive, the Supreme Court made no mention of this finding, depending instead on the rather nice distinction between providing ‘assistance’ and providing ‘information’. The EU law arguments therefore failed because of the defendants’ concession that the EU rights they claimed were narrower than the restrictions that had been placed upon them. This concession is rather strange, in that it can at least be argued that providing assistance to someone to avail of a service must necessarily include the provision of

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<sup>40</sup> Ibid at 622.

<sup>41</sup> Ibid at 626, emphasis added.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid, emphasis added.

information about that service—indeed, the defendants would have failed in their primary duty as counsellors had they not provided this information. On this analysis, the fact that the injunction’s restrictions were *broader* than the right claimed should have been no bar to a finding that EU law had been engaged. Assistance *encompasses* information, and a right to impart and receive that information having been claimed, this went to the heart of the validity of the injunction with respect to EU law. The question then arises of the extent to which fear of the possible consequences of engagement with EU law on a sensitive issue played a part in the Court’s reasoning.

Dissatisfied with their defeat, the defendants applied to the European Court of Human Rights in Strasbourg. That Court’s judgment, in *Open Door and Dublin Well Woman v Ireland*,<sup>44</sup> will be discussed at Section 3.1.2 below.

## 1.2 SPUC v Grogan

In Chapter 2, the decision in *Grogan* was discussed as part of a preliminary analysis of the relationship between Irish and EU law and the ‘torpedo’ or ‘ripple’ effect of what is now Article 29.4.6°, and the Supreme Court’s application of the principle of conditional recognition. These features will be elaborated upon in this section.

### 1.2.1 Engagement begins: the High Court judgment

As will be recalled, the facts were quite similar to *Open Door*, but whereas in that case SPUC had sought an injunction preventing *assistance* in procuring an abortion abroad by means of one-to-one counselling, the defendants in *Grogan* were the officers of various students’ unions who had published the contact *information* of licensed English abortion clinics in their annual students’ welfare guides. The defendants relied on this difference to distinguish their case from *Open Door*, and claimed a right to distribute the impugned information under EU law, the right to receive information in relation to services provided in another Member State giving rise to a corresponding right to impart such information. Carroll J, for the High Court, agreed with this distinction between these two cases, and exercised her

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<sup>44</sup> *Open Door and Dublin Well Woman v Ireland* (1992) 15 EHRR 244, hereinafter *Open Door* (ECHR).

discretion under then-Article 177 EEC to refer questions on the issue to the ECJ. Having done this, and considering that an answer from the ECJ was required in order for her to dispose of the case, she made no formal order in relation to the interlocutory injunction that had been sought by SPUC.<sup>45</sup>

As with the High and Supreme Court decisions in *Open Door*, this judgment is an ordinary instance of national constitutionalism, but in a different way. A national judge was faced with a case that she felt required an authoritative interpretation of EU law and duly referred the question to Luxembourg, as she was entitled to do under the national constitution and under the Treaty. We cannot make any distinction here between *EU*-constitutionalism and *national*-constitutionalism—at least in this case and at this stage—as the two amount to the same thing, particularly in light of the constitutional status afforded to EU law by the Irish Constitution. Kumm’s terms, European Constitutional Supremacy and National Constitutional Supremacy,<sup>46</sup> are inapplicable here, the case not (yet) being one of conflict between legal orders, and the question of supremacy therefore not yet being called into question. The principle of avoidance, employed in different ways by the High and Supreme Courts in *Open Door* in an attempt to avoid precipitating a conflict between the Irish and EU orders, played no part in the High Court judgment in *Grogan*. The decision exhibits none of the wariness of engaging EU law that permeates the judgments in *Open Door*; in fact, Síoifra O’Leary suggests that ‘the national judge was eager to introduce the case to the European forum given the continuous flow of litigation at national level.’<sup>47</sup>

### 1.2.2 *Solange* in Ireland: the Supreme Court judgment

On appeal by SPUC to the Supreme Court, the interlocutory injunction it had sought—and on which the High Court had made no formal decision—was granted. The Supreme Court was unanimous that regardless of the form of her order, Carroll J had effectively made *two* decisions: first, to refer questions to the ECJ, and,

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<sup>45</sup> *Grogan* (n 20) at 758–759.

<sup>46</sup> M Kumm ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty’ (2005) 11 *European Law Journal* 262 at 266.

<sup>47</sup> S O’Leary ‘Freedom of Establishment and Freedom to Provide Services: The Court of Justice as a Reluctant Constitutional Adjudicator: An Examination of the Abortion Information Case’ (1992) 17 *European Law Review* 138 at 143.

secondly, not to grant the injunction sought.<sup>48</sup> The Supreme Court did not question or seek to review the propriety of Carroll J's having sought a reference under then-Article 177 EEC (an option unavailable to the Supreme Court by its own jurisprudence<sup>49</sup>), but noted that it was entirely open to her to have made this reference while still granting the interlocutory injunction, which is the course that should have been followed.<sup>50</sup>

As noted in Chapter 2, the justices of the Supreme Court were critical of Carroll J's distinction between the facts of *Open Door* and the present case, Finlay CJ rejecting the distinction as unsound, and noting that:

It is clearly *the fact that such information is conveyed* to pregnant women, and not *the method of communication* which creates the unconstitutional illegality, and the judgment of this Court in [*Open Door*] is not open to any other interpretation.<sup>51</sup>

This seems difficult to reconcile with the importance that the Supreme Court had attached in *Open Door* to the distinction between the provision of *information* and the provision of *assistance*, and I suggest that this difficulty arises from the Supreme Court's losing sight of another important distinction: between *legality* (under Irish law) and the *necessity of a reference*. With respect to the former, both information and assistance in the circumstances were illegal under Irish law, and the Supreme Court was perfectly correct that this was clear from *Open Door*. Accordingly, Carroll J should indeed have granted the injunction pending the return of the answers from Luxembourg—no real distinction could be made between the two cases as regards legality. However, a close reading of the judgment in *Open Door* shows that the information/assistance distinction in that case related only to the question of whether an issue of EU law arose—and thus the necessity of a reference to the ECJ—and *not* to the substantive question of whether the impugned action was illegal. Thus the

<sup>48</sup> *Grogan* (n 20) at 762 *per* Finlay CJ.

<sup>49</sup> *Campus Oil v Minister for Industry* [1983] IR 82 at 86 *per* Walsh J: 'A request by a national judge to [the ECJ] for an interpretation of articles of the Treaty is not, in any sense, an appeal to a higher court. It is an exercise of a right ... to request an interpretation of the Treaty from the Court of Justice which itself is the only one having jurisdiction to give such binding interpretations. ... The power is conferred upon [the national judge] by the Treaty without any qualification, express or implied, to the effect that it is capable of being overruled by any other national court. ... The national judge has an untrammelled discretion as to whether he will or will not refer questions for a preliminary ruling under article 177. In doing so, he is not in any way subject to the parties or to any other judicial authority.'

<sup>50</sup> *Grogan* (n 20) at 762 *per* Finlay CJ.

<sup>51</sup> *Ibid* at 764, emphasis added.



Supreme Court confused the issue by seeming to regard the two cases as entirely indistinguishable: they were not, at least as regards the necessity of a reference.

The remainder of the judgments in the *Grogan* case concern the interpretation to be given to the constitutional ‘exclusion clause’ in relation to EU law, the paramount duty of the national judge to vindicate constitutional rights, and, as we saw in Chapter 2, an application of the principle of conditional recognition in the *Solange*-style warning that the Supreme Court’s obedience to the ECJ could not be guaranteed in the event of that Court deciding that EU law was in conflict with the Supreme Court’s Article 40.3.3° jurisprudence. However, there is one further important aspect of the judgment, linked to the Supreme Court’s warning, which was not discussed in Chapter 2. Let us bear in mind that this case, and its counterpart in the ECJ’s jurisprudence which will be discussed at Sections 3.1.1 and 3.1.2 below, were procedurally unusual: a case was brought before the High Court and a reference made to the ECJ, but the Supreme Court heard the plaintiff’s appeal *prior* to the ECJ having answered the questions asked. This was not, however, an attempt by the Supreme Court to pre-empt the decision of the ECJ—the appeal related only to the question of the interlocutory injunction, and not the substance of the issues. We have already seen the Supreme Court’s warning that:

*If and when* a decision of the [ECJ] rules that some aspect of European Community law affects the activities of the defendants impugned in this case, the consequence of that decision on these constitutionally guaranteed rights and their protection by the courts will then fall to be considered *by these courts*.<sup>52</sup>

Crucially, however, Finlay CJ also expressly granted both parties liberty to apply to the High Court to have the injunction varied in light of the ECJ’s judgment once it was handed down.<sup>53</sup> This essential fact had two effects, one legal and one theoretical. Legally, it was instrumental in the ECJ’s determination that the questions referred to it were not moot, and that it could therefore accept jurisdiction in the case.<sup>54</sup> Theoretically, it lends weight to the argument made initially in Chapter 2 that the Supreme Court’s judgment in *Grogan* is an example of the metaconstitutional principle of conditional recognition in action: having made its point regarding the

<sup>52</sup> Ibid at 765 *per* Finlay CJ, emphasis added.

<sup>53</sup> Ibid at 766.

<sup>54</sup> Case C-159/90 *SPUC (Ireland) v Grogan* [1991] ECR I-4685 at paras 11–13.

particular importance attached in Ireland to the right to life of the unborn and how obedience to an adverse judgment from the ECJ could not be guaranteed, the Supreme Court did not go so far as to *preclude* either the ECJ from delivering its judgment or that judgment from being given legal effect by the High Court. Seen in this light, what the Supreme Court ‘took away’ with one hand (automatic and unquestioning obedience to Luxembourg) it ‘gave’ with the other (the very real possibility of the loyal application of the Luxembourg judgment).

We can therefore see reflected in the Supreme Court’s decision the first of Kumm’s metaconstitutional interface norms, the formal principle of legality.<sup>55</sup> For Kumm, ‘legality’ means that ‘national courts should start with a strong presumption that they are required to enforce EU law, national constitutional provisions notwithstanding.’<sup>56</sup> That this is the *starting* position of the Supreme Court in *Grogan* is evident from both its language in the case and its general praxis of loyal application of EU law. But Kumm’s countervailing principles of subsidiarity, democracy as well as the protection of basic rights would all seem to weigh strongly in the present case against the automatic enforcement of that presumption: subsidiarity because abortion is not something regulated at the EU level; democracy (which I categorised in Chapter 2 as a means of defending national specificity) because the right recognised by Article 40.3.3° (whether rightly or wrongly) was a democratically-endorsed, specific expression of the values of a self-determining political community; and the protection of rights because that is what the entire controversy boils down to, with the right to life—and its particular formulation in Ireland—being considered decisive, at least from the domestic perspective. However, the fact that Kumm’s interface norms mesh well with the decision in *Grogan* does not lend too much weight to the claim as to their universality, bearing in mind that they were formulated with precisely such a situation in mind. As we shall see below in Section 4, their applicability to the decision in *Grogan* is the exception, and not the rule.

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<sup>55</sup> M Kumm (n 46) at 299.

<sup>56</sup> *Ibid.*

## 2 POLYARCHIC DELIBERATION

The national decisions in *Open Door* and in *Grogan* triggered a series of responses at each point in the triangular constitution, which can be grouped thematically into three areas: the right to receive and impart information; the right to travel; and the right to private and family life. The first of these, the right to receive and impart information, will be further divided into two subsections, reflecting the different natures of the two European orders: the right as a corollary to the EU freedom to provide services, and the right as an inherent part of the right to freedom of expression under Article 10 ECHR.

### 2.1 The right to receive and impart information

#### 2.1.1 The right as a corollary to the freedom to provide services

The ECJ's response<sup>57</sup> to the reference requested by the High Court in *Grogan* was the first opportunity for a European court to rule on the compatibility of Irish abortion law with a European legal order. Before dealing with the questions raised in the reference, the Court summarised the law in Ireland as it arose from *Open Door*:

According to the Irish Courts ... , to assist pregnant women in Ireland to travel abroad to obtain abortions, *inter alia* by informing them of the identity and location of a specific clinic or clinics where abortions are performed and how to contact such clinics, is prohibited under Article 40.3.3° of the Irish Constitution.<sup>58</sup>

We can see straightaway that the distinction between providing *information* and providing *assistance*, which had been decisive in the Supreme Court's refusal to make an Article 177 reference in *Open Door*, and which had been the cause of confusion between the High and Supreme Courts in *Grogan*, did not appear to be important to the ECJ. Instead, the two were elided; the act of providing information subsumed under the rubric of giving assistance generally, the former being an obviously essential part of the latter. This is an altogether more logical approach, lacking the casuistry of attempting to make a nice distinction between the two.

The questions submitted by the High Court to the ECJ were as follows:

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<sup>57</sup> Case C-159/90 *SPUC (Ireland) v Grogan* [1991] ECR I-4685, hereinafter *Grogan (ECJ)*.

<sup>58</sup> *Ibid* at para 5.

Does the organized activity or process of carrying out an abortion or the medical termination of pregnancy come within the definition of ‘services’ provided for in Article 60 [EEC]?

In the absence of any measures providing for the approximation of the laws of Member States concerning the organized activity or process of carrying out an abortion or the medical termination of pregnancy, can a Member State prohibit the distribution of specific information about the identity, location and means of communication with a specified clinic or clinics in another Member State where abortions are performed?

Is there a right at Community law in a person in Member State A to distribute specific information about the identity, location and means of communication with a specified clinic or clinics in Member State B where abortions are performed, where the provision of abortion is prohibited under both the Constitution and the criminal law of Member State A but is lawful under certain conditions in Member State B?<sup>59</sup>

SPUC objected to the ECJ accepting jurisdiction in the case on the grounds, first, that the distribution of information in question was not done in the context of any economic activity and, secondly, that the distribution of information had taken place entirely within Ireland, with no cross-border element. However, the Court held that while these objections may be relevant to the substantive answers to be provided, they were no bar to the Court accepting jurisdiction in the matter.<sup>60</sup> By this logic, it must also then be accepted that Hamilton P’s decision that no issue of EU law had arisen in the High Court in *Open Door* due to the lack of a cross-border element was incorrect, as was demonstrated above in Section 2.1.1.

The Court’s answer to the first question was both brief and affirmative. The plain text of then-Article 60 EEC provides that a ‘service’ within the meaning of the Treaty is any service ‘normally provided for remuneration, in so far as [it is] not governed by the provisions relating to freedom of movement for goods, capital and persons.’<sup>61</sup> Then as now, Article 60 went on to include, at indent (d), activities of the professions. Because abortion is a medical activity which is lawfully practiced and provided for remuneration in several Member States, it must be regarded as a service within the meaning of the Treaties, especially in light of the finding in *Luisi and Carbone*<sup>62</sup> that medical activities fall within the scope of then-Articles 59 and 60

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<sup>59</sup> Ibid at para 9.

<sup>60</sup> Ibid at paras 14–15, citing Case 180/83 *Moser v Land Baden-Württemberg* [1984] ECR 2539.

<sup>61</sup> Article 60 EEC, now Article 57 TFEU.

<sup>62</sup> Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, at para 16.

EEC.<sup>63</sup> As against this, SPUC alleged that abortion could not be regarded as a service due to its gross immorality and because it involves the destruction of the life of an unborn child, which, on SPUC's analysis, and by Irish constitutional law, is a human being.<sup>64</sup> The ECJ's response to this objection was as follows:

Whatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court's first question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practiced legally.<sup>65</sup>

The converse of this statement must also be true, that it is not for the Court to substitute its assessment for that of the legislature (still less that of the people) in those Member States where abortion is *not* legal. But of course, we must bear in mind that the ECJ was emphatically not called upon to rule substantively whether EU law required abortion to be legal.

The second and third questions were similarly easily disposed of on the facts of the case as the ECJ found them. For the Court:

[T]he link between the activity of the [defendants] and medical termination of pregnancies carried out in clinics in another Member State is *too tenuous* for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of Article 59 [EEC].<sup>66</sup>

Accordingly, the defendants' allegation that the restriction on the distribution of information fell foul of the 'no-backsliding' provision of then-Article 62 EEC<sup>67</sup> did not need to be considered by the Court: Article 62 was complementary to Article 59, and the Court having already decided that the 'restriction' at issue was not a 'restriction' within the meaning of Article 59, no further legal issues arose.

Taken together, all of this meant that the second and third questions had to be answered negatively; it was:

[N]ot contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students' associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried

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<sup>63</sup> *Grogan (ECJ)* (n 57) at para 17–18.

<sup>64</sup> *Ibid* at para 19.

<sup>65</sup> *Ibid* at para 20.

<sup>66</sup> *Ibid* at para 24, Case C–362/88 *GB-INNO-BM v Confédération du Commerce Luxembourgeois* [1990] ECR I–667 distinguished, emphasis added.

<sup>67</sup> Which has since been repealed, and read: 'Save as otherwise provided in this Treaty, Member States shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of this Treaty.'

out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.<sup>68</sup>

Before discussing the interface norms at work in the judgment, it is worthwhile to note the Opinion of the Advocate General on the case, which differed substantially from the Court's judgment. Though the AG's Opinion is not law, it provides a useful foil for the discussion to follow.

### 2.1.1.1 *A less reticent approach*

For AG van Gerven, the tenuous link between the defendants and the English clinics was no barrier to a finding that there had been a restriction within the meaning of Article 59. He had little difficulty in deriving from *Luisi and Carbone*<sup>69</sup> and *Cowan*<sup>70</sup> the existence of a right to go to another Member State to receive a service provided there. This is the same logic that was later adopted by the Court itself. However, the Opinion differs in its answer to the next question: whether this gives rise to an ancillary right 'to receive, unimpeded, information in one's own Member State about providers of services in the other Member State and about how to communicate with them.'<sup>71</sup> This the Advocate General answered in the affirmative. He noted the importance that the Court attached to consumer information with respect to goods in *GB-INNO-BM*,<sup>72</sup> argued that this logic applied with no less force to trade in services, and then stated that the right to receive information:

[A]lso holds good where the information comes from a person who is not himself the provider of the services and does not act on his behalf. ... *As a fundamental principle of the Treaty, the freedom to supply services must ... be respected by all, just as it may be promoted by all, inter alia* by means of the provision of information, whether or not for consideration, concerning services which the provider of information supplies himself or which are supplied by another person.<sup>73</sup>

As we have seen, this analysis was not taken up by the Court, without much in the way of explanation as to why not. The Court distinguished *GB-INNO-BM* on the ground that that case concerned restrictions on advertising by the foreign economic operators themselves, but this does not go to the substance of the portion of the

<sup>68</sup> *Grogan (ECJ)* (n 57) at para 32.

<sup>69</sup> *Luisi and Carbone* (n 62) at para 10

<sup>70</sup> Case 186/87 *Cowan v Trésor Publique* [1989] ECR 195 at para 15.

<sup>71</sup> *Grogan (ECJ)* (n 57) Opinion at para 18.

<sup>72</sup> *GB-INNO-IM* (n 66) at para 8.

<sup>73</sup> *Grogan (ECJ)* (n 57) Opinion at para 19, emphasis added.

Opinion emphasised above, that a fundamental principle of the Treaty must be respected by all and may be promoted by all, regardless of whether they have a personal economic stake in its promotion.<sup>74</sup> However, even if the Court had applied AG van Gerven's recommendations in full, this still would have been of little avail to the defendants. The Advocate General went on to confirm that the objective behind the restriction of information in question—the protection of the unborn enshrined in the Irish Constitution—was an imperative requirement of public interest within the meaning of Community law,<sup>75</sup> and that the restriction itself was not disproportionate.<sup>76</sup> What is notable, however, is the *erga omnes* nature of the Advocate General's reasoning: the expansive—indeed, theoretically horizontal in its application—interpretation he gave to the freedom to provide services is quintessentially constitutionalist reasoning, but its breadth is tempered by the recognition of the legitimacy of the imperative requirement of public interest pursued. In this sense, the Opinion in *Grogan (ECJ)* is a precursor to the later decision in *Omega*,<sup>77</sup> which similarly sought to reconcile the requirements of free movement law with national specificities, and contrasts with the much more limited reasoning of the ECJ in its judgment in *Grogan (ECJ)*, which, by its focus on the individual economic links between actors, is more contractual in its nature, casting EU law in this instance as a sort of quasi-private law. Such an approach is in marked contrast to the ECJ's well-known constitutionalising tendencies in other cases, and shows the extent of the Court's wariness of triggering constitutional conflict.

### 2.1.2 The right as part of freedom of expression

The ECJ did not confine itself in *Grogan (ECJ)* to viewing the case from the perspective of the freedom to provide services. Because of the 'tenuous' link

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<sup>74</sup> Ibid.

<sup>75</sup> Ibid at para 26, citing, *inter alia*, Case 30/77 *R v Bouchereau* [1977] ECR 1999; Case 279/80 *Webb* [1981] ECR 3305; Joined Cases 110 and 111/78 *Van Wesemael* [1979] ECR 35; Case 205/84 *Commission v Germany* [1986] ECR 3755; Joined Cases 60 and 61/84 *Cinéthèque and Others v Fédération Nationale des Cinémas Français* [1985] ECR 2605; and Case C-145/88 *Torfaen Borough Council v B&Q* [1989] ECR 3851.

<sup>76</sup> *Grogan (ECJ)* (n 57) Opinion at paras 27–29.

<sup>77</sup> Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

between the defendants and the English clinics, the Court regarded the contested restrictions on information as:

[C]onstitut[ing] a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics established in another Member State.<sup>78</sup>

However, this too did not avail the defendants, who had claimed that the restriction was a breach of fundamental rights, and in particular of Article 10 ECHR.<sup>79</sup> The Court noted that its jurisdiction as regards determining the compatibility of national legislation with fundamental rights is limited to cases where that national legislation falls within the scope of Community law.<sup>80</sup> Though the Court repeated its (by 1991) familiar dictum that fundamental rights, as laid down in particular in the ECHR, set standards the observance of which the Court must ensure, it made no mention of the ‘inspiration; guidelines; special significance’ formula discussed in Chapter 3. In parallel with the argument based on free movement, the lack of an economic link—meaning that no ‘restriction’ arose under Article 59—was fatal to the fundamental rights argument too,<sup>81</sup> and the finding that Ireland’s actions were therefore outwith the scope of Community law foreclosed any further analysis of the issue.

Again, the Opinion of AG van Gerven went further than the Court’s judgment. As we saw in Section 3.1.1, he suggested that there had been a restriction within the meaning of Article 59, though this restriction was motivated by an imperative requirement of public interest and was therefore justified. However, this brings the Member State’s actions within the scope of Union law, and thus subjects them to review for conformance with fundamental rights as general principles of Union law.<sup>82</sup> The Advocate General discussed the restriction in light of the Community’s obligation to uphold fundamental rights and freedoms, and, as was the case with the right to impart and receive information as a corollary of the freedom to provide services, found that the aim behind the restriction was legitimate and the restriction

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<sup>78</sup> *Grogan (ECJ)* (n 57) at para 26.

<sup>79</sup> *Ibid* at para 30.

<sup>80</sup> *Grogan (ECJ)* (n 57) at paras 28–32, citing Case C–260/89 *ERT* [1991] ECR I–2925, at para 42.

<sup>81</sup> *Grogan (ECJ)* (n 57) at paras 28–32.

<sup>82</sup> *Grogan (ECJ)* (n 57) Opinion at para 31. This remains the legal position today, after the Lisbon Treaty and the elevation of the Charter to Treaty status: see Case C–617/10 *Åkerberg Fransson* (n/r) at paras 19–22.



itself was not disproportionate.<sup>83</sup> His analysis on this issue was extensive, and included detailed consideration of the case law of the ECmHR and the ECtHR that existed at that time.<sup>84</sup>

However, the ECtHR itself would soon take a different view. In *Open Door and Dublin Well Woman v Ireland*,<sup>85</sup> as well as the two counselling organisations against which the original injunctions had been issued in *Open Door*, there were four other applicants: two women who had worked as trained counsellors for Well Woman, and two women—Mrs X and Ms Geraghty—who joined in Well Woman’s application ‘as women of child-bearing age.’<sup>86</sup> Despite the Irish Government’s objections, these four women were accorded ‘victim’ status within the meaning of the Convention by the Court by a 15:8 split, the same 15:8 split which went on to uphold the applicants’ complaint that there had been a violation of Article 10 ECHR.

The complaint under Article 10 was that the Supreme Court injunction restraining the applicants from assisting pregnant women to travel abroad to obtain abortions infringed the rights of Open Door and Well Woman and the two counsellors to impart information, as well as the rights of Mrs X and Ms Geraghty to receive information. The complaint was confined to that part of the injunction restraining the provision of information to pregnant women, and not the part restraining the making of travel arrangements or referral to clinics.<sup>87</sup> The Government contested these claims, and argued that Article 10 should be interpreted in the light of Article 2’s protection of the right to life, Article 17’s prohibition on the Convention being interpreted so as to permit the destruction or limitation of the rights it guarantees, and Article 60’s ‘floor’ provision, that the Convention shall not

<sup>83</sup> *Grogan (ECJ)* (n 57) Opinion at paras 30–38.

<sup>84</sup> *Ibid*, citing the ECmHR decisions in *X v UK* (1980) 19 *Decisions and Reports* 244 and *Brüggemann and Scheuten v Germany* (1981) 3 EHRR 244; and the ECtHR cases of *Sunday Times v UK* (1979–1980) 2 EHRR 245; *Markt Intern and Berman v Germany* (1990) 12 EHRR 161; and *Silver and Others v UK* (1983) 5 EHRR 347. Recall Sionaidh Douglas-Scott’s observation, quoted in Chapter 3, that the Advocates General took to referencing Strasbourg jurisprudence long before the ECJ began to do so in its judgments: S Douglas-Scott ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*’ (2006) 43 *Common Market Law Review* 629 at 645.

<sup>85</sup> *Open Door and Dublin Well Woman v Ireland* (1992) 15 EHRR 244, hereinafter *Open Door (ECHR)*.

<sup>86</sup> *Ibid* at para 9.

<sup>87</sup> *Ibid* at para 53.

be construed so as to limit or derogate from any rights or freedoms additionally ensured by the Contracting States or by other agreements to which they are party.<sup>88</sup>

The Government did not contest that the injunction constituted an interference with the counselling services' freedom to impart information, and the Court noted that given the plain terms of the injunction, which restrained the 'servants and agents' of the counselling services from assisting 'pregnant women', there must also have been an interference with the rights of the individual counsellors to impart information, and with the rights of Mrs X and Ms Geraghty to receive information should they become pregnant.<sup>89</sup>

As to whether the interference had been 'prescribed by law' within the meaning of Article 10(2) ECHR, the Court noted the broad powers of the Irish judiciary to vindicate constitutional rights; the horizontal effect given to the Irish Constitution in certain circumstances whereby the infringement of a constitutional right by an individual may be actionable as a constitutional tort; and the interpretation given by the Irish judiciary to the word 'laws' in Article 40.3 of the Constitution<sup>90</sup> so as to include judge-made law.<sup>91</sup> These factors, coupled with the fact that 'the possibility that action might be taken against the corporate applicants must have been, with appropriate legal advice, reasonably foreseeable',<sup>92</sup> led the Court to conclude that the interference had been prescribed by law, a decision reinforced by the fact that Well Woman had actually received legal advice as to its vulnerability to legal action following the coming into force of Article 40.3.3° of the Constitution.<sup>93</sup>

The Court went on to hold that the restriction had aims that were legitimate under Article 10(2) ECHR, and did so in terms very similar to AG van Gerven's Opinion in *Grogan (ECJ)*:<sup>94</sup>

[I]t is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people

<sup>88</sup> Ibid at para 54.

<sup>89</sup> Ibid at para 55.

<sup>90</sup> Which reads, at Article 40.3.1, 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.'

<sup>91</sup> *Open Door (ECHR)* (n 85) at paras 59 and 35, citing *State (Quinn) v Ryan* [1965] IR 70; *Meskill v CIÉ* [1973] IR 121; and *The People v Shaw* [1982] IR 1.

<sup>92</sup> *Open Door (ECHR)* (n 85) at para 60, citing *Sunday Times v UK* (1979–80) 2 EHRR 245.

<sup>93</sup> *Open Door (ECHR)* (n 85) at para 60.

<sup>94</sup> *Grogan (ECJ)* (n 57) Opinion at para 26.

against abortion as expressed in the 1983 referendum. The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect.<sup>95</sup>

However, the Government's contention that the relevant provisions of Irish law were intended for the prevention of crime was rejected, seeing as neither the provision of the information in question nor the procurement of an abortion abroad were criminal offences.<sup>96</sup> In light of the finding that the aim of the protection of morals was legitimate, the Court held that it was unnecessary to examine the Government's further contention that the contested Irish law was intended for the protection of the rights of others, which the Government had argued included the unborn. Thus the Court avoided expressing a view as to whether the use of the term 'others' in Article 10(2) ECHR extends to the unborn.<sup>97</sup>

The final question to be decided in relation to the Article 10 complaint was whether the interference was 'necessary in a democratic society' as required by Article 10(2). The Government contended that the Court's approach to this question should be guided by the combined effects of Articles 2, 17 and 60 ECHR, as outlined above, and added that a test of proportionality must be inadequate in a case where the rights of the unborn were in issue.<sup>98</sup> According to the Government, '[t]he right to life could not, like other rights, be measured according to a graduated scale. It was either respected or it was not.'<sup>99</sup> The Government also argued that in granting the injunction, the Supreme Court 'was merely sustaining the logic of Article 40.3.3° of the Constitution. The determination by the Irish courts that the provision of information ... assisted in the destruction of unborn life was not open to review by the Convention institutions.'<sup>100</sup>

The Court dismissed the argument with respect to Article 2, because no question arose in the case as to whether the foetus is encompassed by that provision's guarantee of a right to life, and the Court had not been asked to determine whether a right to abortion is guaranteed under the Convention.<sup>101</sup> The Government's argument

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<sup>95</sup> *Open Door (ECHR)* (n 85) at para 63.

<sup>96</sup> *Ibid* at para 61.

<sup>97</sup> *Ibid* at para 63.

<sup>98</sup> *Ibid* at para 64.

<sup>99</sup> *Ibid* at para 67.

<sup>100</sup> *Ibid*.

<sup>101</sup> *Ibid* at para 66.

against the use of a proportionality test with respect to the right to life was also dismissed, the Court rightly disagreeing that ‘the State’s discretion in the field of the protection of morals is unfettered and unreviewable’.<sup>102</sup> While ‘national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life’,<sup>103</sup> this margin is not unlimited and is still subject to supervision by the Court. For the Court to accept the Government’s argument as to the inappropriateness of a proportionality test ‘would amount to an abdication of the Court’s responsibility under [Article 19 ECHR] “to ensure the observance of the engagements undertaken by the High Contracting Parties ...”’.<sup>104</sup>

Before moving on to the Court’s application of the proportionality test, something must be said about its verdict as regards the injunction’s ‘legitimate aim’ and about the application of the margin of appreciation in the case. I suggest that the (preliminary) deference shown to a democratically-expressed moral choice on the part of a (theoretically) sovereign people—similar in form to the previous statements of a national judge<sup>105</sup> and a member of the ECJ—is emblematic of both what Krisch meant when he described the margin of appreciation as a ‘central political tool in a pluralist order’,<sup>106</sup> and also of the conception of ‘overlapping consensus’ employed by Sabel and Gerstenberg, whereby ‘the parties to an overlapping consensus know that they have reached agreement on essentials ... through differing, only partially concordant interpretations of ... comprehensive ideas.’<sup>107</sup> The right to life is protected under both the Irish Constitution and the ECHR, and is a right of basic and foundational importance in the legal orders of both. But the interpretation given to it by each order is ‘differing, [and] only partially concordant’. In Ireland, the right extends to the unborn (though the precise meaning of this would not be defined until 2013) and is, after *X*, almost absolute. The ECtHR, being a court with supervisory jurisdiction over a diverse array of ‘differing, only partially concordant’

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<sup>102</sup> Ibid at para 68, citing *Norris v Ireland* [1991] 13 EHRR 186 at para 45.

<sup>103</sup> *Open Door (ECHR)* (n 85) at para 68.

<sup>104</sup> Ibid at para 69.

<sup>105</sup> See the judgment of Costello J in *AG v X* (n 1) at 15, discussed below at Section 3.2.

<sup>106</sup> N Krisch ‘The Open Architecture of European Human Rights Law’ (2008) 71 *Modern Law Review* 183 at 210.

<sup>107</sup> CF Sabel and O Gerstenberg ‘Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order’ (2010) 16 *European Law Journal* 511 at 513.

constitutional orders, was never going to come down on one side of the argument or the other, and had not been asked to do so. But, *contra* Krisch, the fact that the ECtHR's jurisdiction and jurisprudence in this sense is *pluralist* does not make it *non-constitutional*, particularly in light of its strong statement, above, that a State's discretion in the field of morals cannot be unfettered or unreviewable—that state power and discretion must be fettered and reviewable is, rather, a fundamental aspect and hallmark of constitutionalism. For the Court to have given Ireland, or any other State, free reign in the way the Government argued for would have been neither constitutionalist nor pluralist but *unconstitutional*—an (illegal) dereliction of the Court's (legal) duty.

In applying the proportionality test, the Court recalled its longstanding *Handyside*<sup>108</sup> doctrine that freedom of expression extends to information or ideas which may offend, shock or disturb; noted that it was not a criminal offence in Ireland to travel abroad for an abortion; and noted further that the information restricted in the case concerned activities which were lawful in other Convention countries.<sup>109</sup> In this regard, the absolute nature of the injunction was striking, in that it was perpetual and took no account of a woman's age, state of health, or reasons for seeking counselling about abortion. This was even more striking in light of the subsequent decision in *AG v X*<sup>110</sup> (to be discussed in the next Section) and, at the oral hearing in *Open Door (ECHR)*, the Government conceded that the injunction could no longer apply to the limited class of women who could in theory receive an abortion within Ireland under the *X* criteria.<sup>111</sup> These reasons alone were sufficient for the ECtHR to find the injunction overbroad and disproportionate,<sup>112</sup> a finding compounded by the facts that the link between the provision of information and the actual procurement of an abortion was not definite;<sup>113</sup> similar information was available in British magazines and phonebooks freely circulating in Ireland;<sup>114</sup> the

<sup>108</sup> *Handyside v UK* [1976] 1 EHRR 737.

<sup>109</sup> *Open Door (ECHR)* (n 85) at para 72.

<sup>110</sup> *Attorney General v X* [1992] 1 IR 1.

<sup>111</sup> *Open Door (ECHR)* (n 85) at para 73.

<sup>112</sup> *Ibid* at para 74. In light of the finding of a violation under Article 10, the Court held that it did not need to examine the applicants' privacy and discrimination arguments under Articles 8 and 14, in particular because these arguments had not been raised in the domestic proceedings (*ibid* at paras 81–83).

<sup>113</sup> *Ibid* at para 75.

<sup>114</sup> *Ibid* at para 76.

injunction was ineffective in that it did not prevent large numbers of women from obtaining abortions abroad;<sup>115</sup> it created a risk to the health of women who, because of a lack of information were seeking abortions later in their pregnancies and were not availing themselves of proper aftercare;<sup>116</sup> and these effects would be worse in the case of poorer and less well-educated women.<sup>117</sup> The Government's arguments regarding Articles 17 and 60 ECHR were of no use in light of the injunction's ineffectiveness in preventing abortion and the availability of information by means other than counselling.<sup>118</sup>

The restriction of information about abortion services available abroad having being found—at least in this case—in violation of the Convention, it was clear that Irish law on the matter was in need of revision or the two legal orders would remain in a state of conflict. However, judgment in *Open Door v Ireland* was handed down on 29 October 1992, and the process of bringing Irish constitutional law into line with Convention norms was in motion even before it was certain that the two were in conflict, as we shall now see.

### 2.1.3 Political resolution: the Fourteenth Amendment

Less than a month<sup>119</sup> after the verdict in *Open Door v Ireland*, three referendums were held, on the Twelfth, Thirteenth and Fourteenth Amendments to the Constitution. The Twelfth and Thirteenth Amendments will be discussed below at Sections 3.2.3 and 3.3. With respect to the Fourteenth Amendment, the Irish electorate was asked whether it agreed with the following text being inserted as a proviso to Article 40.3.3°:

This subsection shall not limit freedom to obtain or make available, in this State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

The Amendment was endorsed by a margin of 59.9% to 40.1%, on a turnout of 65.2%,<sup>120</sup> and the conflict between the Irish and ECHR legal orders was therefore resolved by the adaptation of the Irish order. Though the genesis of the Amendment

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<sup>115</sup> Ibid.

<sup>116</sup> Ibid at para 77.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid at paras 78–79.

<sup>119</sup> On 25 November 1992.

<sup>120</sup> Gallagher (n 18) at 21.

predated the ECtHR's judgment in *Open Door (ECHR)*, that judgment and subsequent public comment thereon cannot have harmed the Amendment's chances of finding public acceptance. The existence of complementary, sometimes competing and conflicting, legal orders, and the way in which they interacted in the resolution (or otherwise) of constitutional conflict demonstrates the dialogic and polyarchic nature of the relationships between the orders.

## 2.2 The right to travel

In the course of his Opinion in *Grogan (ECJ)*, AG van Gerven noted that 'Ireland does not prohibit or seek to prevent a pregnant woman from exercising her right to travel and receive services of termination of pregnancy abroad.'<sup>121</sup> However, this is precisely what Ireland sought to do in the later case of *Attorney General v X*.<sup>122</sup> The discussion of this case here needs to be explained, in that it was not part of any formal 'interaction' or 'dialogue' between Ireland and the EU. However, the verdict in the case had important repercussions as regards EU law, which, as we shall see, ended up being resolved politically rather than legally (or, better, politically *and* legally, rather than *judicially*), in the same manner as the conflict between the Irish and ECHR orders with respect to the availability of information. Moreover, the *X* case is the proximate cause of the subsequent ECtHR judgment regarding the right to a private and family life under Article 8 ECHR, to be discussed below at Section 3.3. Even now, 21 years later, the *X* case arouses controversy in Ireland, both because of the way in which the case came before the courts in the first place, and because of the way in which it was ultimately resolved. Notwithstanding two political attempts to have its meaning restricted, on which more below, the Supreme Court verdict in the case still reflects the law in Ireland.

*X* was a 14 year old girl, pregnant as a result of having being raped by her schoolfriend's father in December 1991. When her parents learned of this in late January 1992, they and their daughter decided to go to England for an abortion. The parents told the Gardaí (the Irish police) of this decision and asked if it would be possible to have tests performed on the foetus in order to prove the rapist's paternity,

<sup>121</sup> *Grogan (ECJ)* (n 57) Opinion at para 13.

<sup>122</sup> *Attorney General v X* [1992] 1 IR 1.

and therefore his guilt, the victim being a minor. An officer explained that such evidence may not be admissible in Ireland, but said that he would make enquiries. Legal advice was sought from the Director of Public Prosecutions, who advised that the evidence would not be admissible, and who then informed the Attorney General of the intentions of the girl and her parents. On the morning of 6 February, the Attorney General applied *ex parte* to the High Court for an interim injunction restraining X and her parents from interfering with the right to life of the unborn; restraining X from leaving Ireland for nine months and restraining her parents from assisting her to leave; and restraining X from procuring or arranging an abortion, whether within or outwith the jurisdiction. The injunctions were granted. That same day, the family had travelled to London for the procedure, but when they learned of the orders of the High Court, they cancelled the procedure and returned to Ireland to challenge the orders, which the Attorney General sought to make permanent.

Crucial to the final outcome of the case was the oral and documentary evidence of the parents, Gardaí and a clinical psychologist regarding X's mental and emotional state. X had 'coldly expressed a desire to solve matters by ending her life',<sup>123</sup> which in the psychologist's opinion 'she was capable [of doing], not so much because she is depressed but because she could calculatingly reach the conclusion that death is the best solution.'<sup>124</sup> The psychologist testified that continuing with the pregnancy would be devastating to X's mental health.<sup>125</sup>

### 2.2.1 'A spurious and divisive uniformity'? The High Court judgment

In the High Court, the defence objected to the grant of the orders on four grounds. First was a jurisdictional issue, that because there had been no legislation regulating the manner in which the equal rights to life of the unborn and pregnant women under Article 40.3.3<sup>o</sup> should be reconciled, the Court could make no order in a case such as this where such a reconciliation was necessary.<sup>126</sup> The second objection related to the substance of X's guaranteed right to life: for the Court to make the order sought would be to prejudice X's right to life because of the very real danger that she would

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<sup>123</sup> Ibid at 8.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid at 10–11.



commit suicide if she was unable to procure an abortion.<sup>127</sup> Third was an argument based on Article 40.4 of the Constitution, and the guarantee contained therein that ‘no citizen shall be deprived of his personal liberty save in accordance with law’.<sup>128</sup> The final objection was based on EU law, that the plain text of then-Articles 59 and 60 EEC, coupled with the ECJ’s interpretation of these provisions in *Luisi and Carbone* and *Grogan (ECJ)*—which had been handed down just months earlier—guaranteed a right to travel to another Member State to avail of services (now definitely including abortion) legally available there. In view of the urgency of the case, the defence did not request an Article 177 EEC reference.<sup>129</sup>

The first objection quickly fell, Costello J invoking the clear ruling in *Open Door* that Article 40.3.3° was self-executing, and required no enabling or explanatory legislation: ‘[c]omplicated and difficult issues of fact may, of course, arise in individual cases but that does not inhibit the court from applying the clear rule of law laid down in [Article 40.3.3°].’<sup>130</sup>

As regards the second objection, Costello J distinguished the present case from those that arise in the ordinary practice of medicine:

In which surgical intervention, necessary to save the life of the unborn, may involve risk to the mother’s life, or in which the surgical invention necessary to save the life of a mother may involve risk to the life of the unborn.<sup>131</sup>

In this case, in which the threat to the life of the pregnant woman arose from the state of mind of the woman herself, Costello J held that he was:

[Q]uite satisfied that there is a real and imminent danger to the life of the unborn and that if the court does not step in to protect it by means of the injunction sought its life will be terminated. ... [T]he *risk* that the defendant may take her own life if an order is made is much less and is of a different order of magnitude than the *certainty* that the life of the unborn will be terminated if the order is not made.<sup>132</sup>

This distinction between risk on one hand and certainty on the other was sufficient for Costello J to regard it as his constitutional duty to protect the life of the unborn,

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<sup>127</sup> *Ibid* at 11.

<sup>128</sup> *Ibid* at 12–13.

<sup>129</sup> *Ibid* at 13. Note that the expedited and urgent preliminary ruling procedures now available under Articles 105–114 of the ECJ’s Rules of Procedure ([2012] OJ L 265/1) did not exist at this time.

<sup>130</sup> *X* (n 122) at 11, citing *Open Door* (n 19) at 623 *per* Finlay CJ.

<sup>131</sup> *X* (n 122) at 11.

<sup>132</sup> *Ibid* at 12, emphasis added.

while still claiming to have had ‘due regard for the equal right to life of the mother’ as required by Article 40.3.3<sup>o</sup>.<sup>133</sup>

Costello J rejected the third objection as being based on a misunderstanding. The defence had based their argument on cases decided under Article 40.4, where the Supreme Court had held unlawful the refusal of bail in criminal cases on the mere suspicion that the accused would commit further crimes if left at liberty.<sup>134</sup> Costello J distinguished these cases in that ‘[t]hey did not decide that the court cannot order a defendant to refrain from doing an unlawful act, if necessary by restraining his or her constitutional right to liberty.’<sup>135</sup>

The fourth objection, the argument based on EU law, also failed. Costello J noted that he was required to determine the issue of EU law raised, and that no request for a preliminary reference had been made, before stating (without reference to ECJ or Irish jurisprudence on the point) that ‘[o]ur courts must enforce Community law; and if that law conflicts with Irish law, including Irish constitutional law, then Community law will prevail.’<sup>136</sup> There was no mention of the rather more ambiguous statements of the Supreme Court in *Grogan*. The Attorney General argued, without disputing the general principles of Community law on which X relied, that Article 40.3.3<sup>o</sup> of the Constitution and its legal consequences—including the jurisdiction of the Court to prohibit travel abroad to procure an abortion—constituted a derogation from Directive 73/148/EEC on grounds of public policy within the meaning of Article 8 of that Directive.<sup>137</sup> Costello J quoted at length from *Bouchereau*,<sup>138</sup> where the ECJ had expounded on the meaning of a ‘public policy’ derogation in the context of Article 48 EEC’s provisions on the free movement of workers; he accepted as valid the Attorney General’s argument that the reasoning in that case could be legitimately transplanted to the context of the Article 59 EEC freedom to provide and receive services; and he held accordingly that:

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<sup>133</sup> Ibid.

<sup>134</sup> Ibid at 12, citing *Ryan v DPP* [1989] IR 399 and *The People v O’Callaghan* [1966] IR 501.

<sup>135</sup> *X* (n 122) at 12.

<sup>136</sup> Ibid at 13.

<sup>137</sup> Ibid at 13–14.

<sup>138</sup> Case 30/77 *R v Bouchereau* [1977] ECR 1999 at 2013–2014, citing Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337 at 1350. Note that *Bouchereau* had also formed the basis of AG van Gerven’s finding in his Opinion in *Grogan (ECJ)* that the aim of Article 40.3.3<sup>o</sup> constituted an imperative requirement of public interest within the meaning of Community law (see above at Section 3.1.1.1).

I can find no provision or principle of Community law which would prohibit the exercise of the discretionary power to derogate in the manner contained in the Eighth Amendment. On the contrary, Community law already recognises that within the Community wide cultural differences exist and has permitted derogations which flow from such differences. I can see no reason why it should refuse to do so when the derogation by a Member State arises because of deeply held convictions on moral issues. *Indeed, I think the attainment of the fundamental objectives of the Treaty is enhanced by laws which assist in the development of a Community in which legitimate differences on moral issues are recognised and which does not seek to impose a spurious and divisive uniformity on its members on such issues.*<sup>139</sup>

Finally, Costello J noted that ‘[i]n considering certain issues of public policy in Community law it may be relevant to consider the jurisprudence of the [ECtHR].’<sup>140</sup> This is perhaps surprising, given the historically rather sceptical attitude of the Irish judiciary to the Convention and its lack of incorporation into Irish law at the time (outlined in Chapter 2); the fact that the ECJ itself had yet to refer to the jurisprudence of the ECtHR at this point (outlined in Chapter 3); and the fact that no Convention argument had been raised by the defence. However, Costello J’s analysis on the point was terse and made no reference to any specific case decided by the ECtHR. Instead, he merely noted that ‘the case law of that court has allowed ... national authorities a margin of appreciation in relation to laws dealing with moral issues’,<sup>141</sup> and stated (but did not expand on this) that he did not think that the power to stop a woman going abroad for an abortion was disproportionate to the aim of Article 40.3.3°. On the contrary, without such a power, the right to life afforded to the unborn ‘would in many cases be worthless.’<sup>142</sup>

Having ruled against all of the defendants’ objections, Costello J held in favour of the Attorney General and made permanent the interim injunction.

As was suggested in Chapter 2, Costello J’s point about the objectives of the Treaty being endangered by the imposition of a ‘spurious and divisive uniformity’ was well made, particularly in the subsequent light of the ECJ’s decision in *Omega*. We can also discern within it something of Maduro’s requirements of vertical and horizontal coherence. Though it is essentially an argument from national specificity (and therefore potentially appealing ‘horizontally’ to the courts of other Member

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<sup>139</sup> *X* (n 122) at 15, emphasis added.

<sup>140</sup> *Ibid* at 16.

<sup>141</sup> *Ibid*.

<sup>142</sup> *Ibid*.

States, for better or for worse), it is also vertically coherent, couched as it is in the ECJ's own language of the fundamental objectives of the Treaty, and thus of the integrity and efficacy of EU law. However, the decision also contains a very strong and unqualified statement of the primacy of EU law, and this without reference to authority. The nature of this statement fits well with the Luxembourg understanding of that principle, but it is odd with regard to the Supreme Court's more qualified, unanimous, and at the time very recent, pronouncements in *Grogan*. The High Court judgment in *X* therefore demonstrates a certain inconsistency in terms of interface norms. The effect of the judgment was to limit an individual's freedom to travel to another Member State to avail of a service, something which AG van Gerven had indirectly warned against in his Opinion in *Grogan (ECJ)*,<sup>143</sup> and yet the High Court made no attempt to shield its decision from the rigours of EU law by invoking the Supreme Court's application of the principle of conditional recognition in *Grogan*. In this instance, at least, it would seem that quite aside from not being universal across the Union, the interface norms at work were not even universal within the domestic jurisdiction.

### 2.2.2 Conflict avoided, for now: the Supreme Court judgment

On appeal to the Supreme Court, the judgment of the High Court was reversed by a 4:1 split decision. The Court was unanimous on three points: that the Attorney General had acted properly in bringing the matter before the Courts;<sup>144</sup> that the provisions of Article 40.3.3° were self-executing and required no enabling legislation;<sup>145</sup> and that the Constitution must be interpreted harmoniously, involving a changing hierarchy of rights in a case of conflict between them, generally headed by the right to life, the destruction of which is irreversible.<sup>146</sup> The most important aspect of the Supreme Court judgments is the interpretation given to Article 40.3.3°,

<sup>143</sup> *Grogan (ECJ)* (n 57) Opinion at para 13.

<sup>144</sup> *X* (n 122) at 47 *per* Finlay CJ; at 62 *per* Hederman J; at 77–78 *per* McCarthy J; at 88 *per* O'Flaherty J, upholding the finding of Costello J at 9. This was almost certainly done in view of the considerable public opprobrium the AG's actions in the case had attracted, at least in certain sections of the media. Only Egan J was silent on the issue.

<sup>145</sup> *Ibid* at 50–51 *per* Finlay CJ; at 62 *per* Hederman J; at 80–81 *per* McCarthy J; at 88 *per* O'Flaherty J; at 90–91 *per* Egan J.

<sup>146</sup> *Ibid* at 53 *per* Finlay CJ; at 73 *per* Hederman J; at 78–79 *per* McCarthy J; at 87–88 *per* O'Flaherty J; at 92 *per* Egan J.

and specifically its statement that the State's guarantee to respect, defend and vindicate the life of the unborn extended only 'as far as practicable' and must be 'with due regard to the equal right to life of the mother'. For the majority of the Court (Finlay CJ, McCarthy, O'Flaherty and Egan JJ; Hederman J dissenting), these two aspects of Article 40.3.3° meant that, in the words of Finlay CJ:

[T]he proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of [Article 40.3.3°].<sup>147</sup>

Because the thrust of the judgments was such as to authorise a lawful abortion *even within* the jurisdiction—the risk to X's life flowing from her suicidal state—it therefore followed that no order could be sustained which purported in any way to prohibit or inhibit X from obtaining an abortion, whether at home or abroad. As a result, the previously central question of the right to travel, whether under the Constitution or the Treaty, was no longer relevant. X and her parents now being free to deal with her situation as they saw fit, their arguments based on Community law, which had been offered in the alternative to their Constitutional arguments, did not need to be considered.

While the Supreme Court in *X* did clarify the meaning of Article 40.3.3°, in particular that it permitted abortion in Ireland under very narrowly-drawn circumstances, it left the law in relation to the freedom to travel abroad to procure an abortion (or services more generally) less clear than it had found it. For Finlay CJ and Hederman and Egan JJ, the right to travel could *never* trump the right to life of the unborn if the two rights were in conflict.<sup>148</sup> This was not the case for O'Flaherty J, who held that an injunction restraining travel from the jurisdiction interfered to an 'extraordinary degree with the individual's freedom of movement', and also constituted—in the present case—an unwarranted interference with the authority of the family.<sup>149</sup> McCarthy J went even further, holding that the right to travel could *never* be curtailed because of a particular intent, going so far as to state that 'if I

<sup>147</sup> Ibid at 54.

<sup>148</sup> Ibid at 57–59 *per* Finlay CJ; at 73 *per* Hederman J; at 92 *per* Egan J.

<sup>149</sup> Ibid at 87–88. The Constitution at Article 41.1.1° 'recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.'

proclaim my intent to explode a bomb or shoot an individual in another country, I cannot lawfully be prevented from leaving my own country for that purpose.<sup>150</sup>

Although—or perhaps because of the fact that—all of these conflicting statements were *obiter dicta*,<sup>151</sup> their combined effect was to leave Irish law on the freedom to travel, both under the Constitution and with respect to EU law, in a very confused state indeed.

Taking these statements together, and although no aspect of EU law was discussed in any detail, the fact remains that a majority of the Court was of the opinion that the right to travel (logically under both Irish law as an aspect of the liberty of the individual and under EU law as a right ancillary to the freedom to provide services) must *always* be subordinated to the Irish constitutional conception of the right to life. The fact that these comments were *obiter* was scant comfort, in that they set up the distinct possibility that in a future case, where the life of the pregnant woman seeking an abortion abroad was held *not* to be in danger (or that the risk to her life was not ‘probable’ or ‘substantial’ enough, under the test enunciated by the Court), then her right to travel could be curtailed in order to prevent the abortion taking place. Of course, in such a case, it is unlikely that the woman’s reason for travelling would ever become known to any organ of the State, particularly considering that, in light of the State’s actions in *X*, pregnant women travelling abroad would not be inclined to *let* their intentions become known. The unlikelihood of the situation arising does not, however, lessen the potential incompatibility between the laws of Ireland and of the EU. In this sense, this aspect of the judgments in *X* owes rather more to Kumm’s national constitutional supremacy or democratic statism than to any other conception of European constitutionalism, and bears little resemblance to the ostensibly *communautaire*—but still, I argue, pluralist in the sense of being vertically and horizontally coherent—reasoning of the High Court. Moreover, it makes only partial use of the principle of avoidance. While the resolution of the case on grounds of national law meant that the arguments based on EU law did not have to be considered—and thus conflict in this specific instance was avoided—the general tenor of the majority’s opinions

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<sup>150</sup> Ibid at 84–85.

<sup>151</sup> Ibid at 57 *per* Finlay CJ.

regarding the subordination of the right to travel to the right to life of the unborn left the door open for conflict in a future case.

### 2.2.3 Potential conflict resolved politically: the Thirteenth Amendment

The uncertainty surrounding a woman's right to leave the jurisdiction—and Ireland's conformance to EU law with respect to services—did not last long. As noted above in Section 3.1.2.1, three referendums were held on 25 November 1992. The Thirteenth Amendment proposed to insert the following text as a proviso to Article 40.3.3°:

This subsection shall not limit freedom to travel between the State and another state.

The electorate accepted this proposal, by a margin of 62.4% to 37.6%, on a turnout of 65.3%,<sup>152</sup> and thus the uncertainty caused by the *X* case, and Ireland's potential breach of EU law, was ended. As was the case with the right to receive and impart information, the potential for conflict between legal orders was resolved by political means. It would be a stretch, however, to imagine that removal of the potential incompatibility between Irish and EU law was the sole reason for the Amendment's endorsement by the electorate. Public concern with the treatment of the victim in *X*—including those opposed to abortion as a general, abstract matter—and with the idea of pregnant women being effectively detained within the jurisdiction were more likely explanations.

## 2.3 The right to private and family life

Along with the Thirteenth and Fourteenth Amendments, the Twelfth Amendment proposed to insert the following additional text as a proviso to Article 40.3.3°:

It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction.<sup>153</sup>

As is clear, the aim of this amendment was to keep the essence of the Supreme Court's judgment in *X*—that abortion was permissible in Ireland in order to save the

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<sup>152</sup> Ibid.

<sup>153</sup> Referendum (Amendment) (No 2) Act 1992, S 1.

life (but not the health) of the pregnant woman—but to restrict it by removing the risk of suicide as a ground justifying such a procedure. On a turnout of 64.9%, the amendment was rejected by a margin of 65.4% to 34.6%.<sup>154</sup> Accordingly, the rule in *X* would remain the law. A further attempt was made similarly to restrict the circumstances under which abortion is legal in Ireland on 6 March 2002, which also failed, but by the much narrower margin of 50.4% to 49.6%, on a turnout of 42.7%.<sup>155</sup>

Despite the failure of these two attempts to reverse the decision in *X* at least insofar as the threat of suicide is concerned, no related legislation was enacted. It is this failure to legislate which led to the ECtHR case of *A, B & C v Ireland*.<sup>156</sup> The case differs substantially from those discussed above in that the applicants were not claiming that state *action* had breached their rights under the Convention, but rather state *omission*. Moreover, the case did not arise from any domestic legal proceedings but was instead entirely freestanding. As was the case with *X*, it is therefore not part of any formal (judicial) dialogue. However, the judgments of the majority and a partly dissenting majority of the Grand Chamber in the case reveal an interesting disconnect between the institutional self-images of the two sets of judges which is of particular relevance to the present discussion, because it may lead us to prefer the more nuanced (and, in this sense, heterarchical) approach of the majority over the more constitutionally (and, in this sense, hierarchically) ambitious approach of the dissent.

All of the applicants had travelled from Ireland to England in order to procure abortions, A for what the ECtHR termed reasons of health and well-being (in view of her history of alcohol addiction, post-natal depression, and difficult family and financial circumstances); B for reasons of well-being (she did not feel ready to have a child); and C because she feared that her pregnancy put her life at risk, having previously undergone three years of chemotherapy for a rare form of cancer.<sup>157</sup>

A and B complained that the prohibition of abortion on health and well-being grounds in Ireland was a violation of their rights not to be subject to inhuman and

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<sup>154</sup> Gallagher (n 18) at 21.

<sup>155</sup> *Ibid.*

<sup>156</sup> *A, B & C v Ireland* (2010) 53 EHRR 13.

<sup>157</sup> *Ibid* at paras 13–26 and 125.



degrading treatment under Article 3 ECHR; to private and family life under Article 8; to an effective remedy under Article 13; and not to be discriminated against under Article 14. C's complaint was that the failure to implement legislation under Article 40.3.3° of the Constitution following the *X* case—and the failure of the referendums to narrow its implications—meant that she had no appropriate means of establishing her right to a lawful abortion in Ireland on the grounds of a risk to her life, and thus she alleged violation of the same rights as A and B, along with a further violation of her right to life under Article 2.

It was mentioned above that the case was freestanding, and did not arise from any domestic legal proceedings. The Irish Government therefore objected to the ECtHR hearing the case on the ground that the applicants had not exhausted their domestic remedies as required by Article 35 ECHR. As regards A and B, the Court rejected this argument, it being abundantly clear from the judgment in *X*, and the lack of a change in the law since then, that any domestic constitutional challenge to the unavailability in Ireland of abortion for reasons of health or well-being had no chance of success.<sup>158</sup> Furthermore, the Court noted the residual, subsidiary and sub-constitutional nature of the incorporation of the Convention into Irish law under the ECHR Act 2003, which, as shown in Chapter 2, places no legal obligation on the State to amend domestic law in the event of a declaration of incompatibility being granted. This being the case, a request for such a declaration would not constitute an effective remedy.<sup>159</sup> As regards C, the Court joined the objection to the merits of her complaint.<sup>160</sup>

C's Article 2 complaint was held to be manifestly ill-founded for lack of evidence, and her associated complaint under Article 13 fell with it.<sup>161</sup> All three applicants' Article 3 complaints were also held to be manifestly ill-founded on account of the treatment complained of not reaching the minimum level of severity required by the Court's case law, and again the linked Article 13 complaints also

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<sup>158</sup> Ibid at paras 142–149.

<sup>159</sup> Ibid at para 150, recalling the Court's similar judgments in relation to the UK Human Rights Act 1998: *Hobbs v UK* App no 63684/00 (decision, ECtHR, 18 Jun 2002); *Burden v UK* (2008) 47 EHRR 38 at paras 40–44.

<sup>160</sup> *A, B & C v Ireland* (n 156) at para 156.

<sup>161</sup> Ibid at paras 157–159.

fell.<sup>162</sup> The case was therefore decided on the basis of the Article 8 complaints. Because of the differing reasons of A and B, on the one hand, and C on the other for having had their abortions (and thus for their complaints under the Convention), the Court addressed the two situations separately.

With respect to A and B, it was found that there had been an interference with their rights under Article 8's private life component, but that this was 'in accordance with law' under Article 8(2).<sup>163</sup> Furthermore, the interference was held to have been in pursuit of a legitimate aim, the Court confirming its earlier finding on the same point in *Open Door v Ireland*, and reiterating its subsequent statement in *Vo v France*<sup>164</sup> that it was not just undesirable but also impossible to answer the question of whether the unborn was a person within the meaning of Article 2.<sup>165</sup> The applicants' argument—based on opinion polls they had submitted in evidence—that the views of the Irish people had significantly changed since the passage of Article 40.3.3° in its original form in 1983 was held not to be sufficient to rebut this finding.<sup>166</sup>

In the final leg of the analysis—the proportionality test of whether the interference was 'necessary in a democratic society'—the majority held that owing to the 'acute sensitivity'<sup>167</sup> of the moral and ethical issues at stake, a broad margin of appreciation should, in principle, be accorded to the Irish State. However, the Court went on to note that the question of whether there was consensus as to how rights should be reconciled in a particular area was essential to determining the breadth of the margin of appreciation in such matters, and that the question of a developing consensus had long played a role in the development and evolution of the Convention's protections, and its interpretation as a 'living instrument',<sup>168</sup> which Krisch has described as another of the 'central political tools in a pluralist order'.<sup>169</sup> The Court then held that there *is* a consensus amongst a substantial number of the

<sup>162</sup> *Ibid* at paras 160–164, citing *Ireland v UK* (1978) 2 EHRR 25 at para 162; *Lotarev v Ukraine* App no 29447/04 (judgment, ECtHR, 8 Apr 2010) at para 79.

<sup>163</sup> *A, B & C v Ireland* (n 156) at paras 216–221.

<sup>164</sup> *Vo v France* (2005) 40 EHRR 259.

<sup>165</sup> *A, B & C v Ireland* (n 156) at paras 222–228.

<sup>166</sup> *Ibid* at para 226.

<sup>167</sup> *Ibid* at para 233.

<sup>168</sup> *Ibid* at para 234.

<sup>169</sup> Krisch (n 106) at 210.

States of the Council of Europe towards allowing abortion on grounds wider than those in Irish law—indeed, only three of the 47 Contracting States have more restrictive abortion laws than Ireland.<sup>170</sup> However, the consensus in this case did *not* decisively narrow the margin of appreciation to be afforded to Ireland:

Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected ..., the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. It follows that, even if it appears ... that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition ... struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the convention.<sup>171</sup>

It therefore followed that, in light of the right to travel for an abortion and the availability of travel and suitable medical care in Ireland, the interference was not disproportionate, and A and B's Article 8 rights were held not to have been violated. The very different reasoning of a minority of the Grand Chamber on this issue will be discussed below.

### 2.3.1 (Temporary?) reverse conditional recognition: the judgment of the majority

With respect to C, matters were different. Because her argument was that her rights had been violated by the State's failure to legislate with respect to the Supreme Court's judgment in *X*, her complaint fell to be examined under the State's positive obligations under Article 8.<sup>172</sup> Reiterating that there was a broad margin of appreciation for States to decide the circumstances under which abortion should be permissible, the Court stated that:

[O]nce that decision is taken the legal framework devised for this purpose should be 'shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention.'<sup>173</sup>

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<sup>170</sup> *A, B & C v Ireland* (n 156) at para 235.

<sup>171</sup> *Ibid* at para 237.

<sup>172</sup> *Ibid* at paras 244–246.

<sup>173</sup> *Ibid* at para 249, quoting the Court's judgment in *SH and Others v Austria* [2011] ECHR 1879.

However, despite the decision having been taken as long ago as 1992, no legal framework had been devised at all, ‘shaped in a coherent manner’ or otherwise. Returning to her alleged non-exhaustion of domestic remedies, the Government claimed that C could have sought mandatory orders in the High Court requiring doctors to terminate her pregnancy.<sup>174</sup> The ECtHR did not consider this an effective remedy, quoting a judgment of McCarthy J in another abortion case (not directly relevant to questions of pluralism) that it would be wrong to turn the High Court into a ‘licensing authority’ for abortions.<sup>175</sup> Accordingly, the uncertainty caused by the lack of legislation following *X*, and especially the lack of effective and accessible procedures to establish the right to an abortion, led the Court to conclude that the State had failed in its positive obligations to C, and found a violation of Article 8.<sup>176</sup>

The Court held fast to its *Open Door (ECHR)* finding of a legitimate aim (the protection of morals as decided domestically) and the relevance of a broad margin of appreciation, and this even in the face of a finding of a broad European consensus on the issue of abortion with which Ireland is at odds. This, I suggest, can be taken as a warning. European and Irish developments in the time between *Open Door (ECHR)* and *A, B & C* were not, in this case, sufficient to dislodge the legitimacy finding in *Open Door (ECHR)*, but it would be going too far to suggest that this is going to be the case for all time coming. As a court of subsidiary and supervisory jurisdiction, the ECtHR (or rather, a majority of the Grand Chamber) was unprepared to pre-empt the future domestic development of the law, but was perfectly prepared to put domestic actors on notice, even if not literally and specifically. Further evidence of this is the way in which the Court repeated a finding of McCarthy J in *X*:

In the context of the eight years that have passed since [Article 40.3.3°] was adopted and the two years since [*Grogan*] the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable.

If a failure to legislate with respect to Article 40.3.3°, adopted in 1983, was ‘inexcusable’ in 1992, what word could adequately describe such persistent inertia in 2010? Perhaps wisely, the Grand Chamber did not offer one, but the specific invocation by an international court of a domestic Supreme Court judge’s damning

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<sup>174</sup> *A, B & C v Ireland* (n 156) at para 256.

<sup>175</sup> *Ibid* at para 258, citing *A and B v Eastern Health Board, Judge Mary Fahy and C* [1998] 1 IR 464.

<sup>176</sup> *A, B & C v Ireland* (n 156) at paras 259–268.

indictment of State failure to act furthers the argument that *A, B & C* constitutes a dialogic, pluralistic warning to the State, articulating the ECtHR's own position while still leaving room for the ('voluntary'?) adjustment of domestic preferences. The Court was not (yet) prepared to find the lack of provision for abortion on health and well-being grounds in breach of the Convention, but was perfectly prepared to find the lack of implementation of a right pronounced by the State's *own* highest judicial actors, eighteen years previously, to be so. Maduro's principle of vertical coherence is relevant here: what could be more vertically coherent than pointing out that the 'inexcusable' nature of a State's failure to act was initially pronounced by a domestic actor?

Of course, *dialogue* requires two voices, so it is important to note the results of the ECtHR's prompting of the Irish legislature with respect to *C*, and the effective operationalisation of the very limited right to an abortion outlined in *X*. Both parties in the current Irish coalition Government committed in their manifestos for the 2011 election to act on the ruling, and the new Government announced the formation of an expert group to examine how to proceed in June 2011.<sup>177</sup> The group reported on 27 November 2011.<sup>178</sup> Any discussion of abortion in Ireland will generate controversy, but events conspired to push the issue to the very top of the agenda. One month previously, a pregnant woman had died of septicaemia while miscarrying in hospital in Galway, having requested, and been denied, an abortion.<sup>179</sup> The final result was the enactment of the Protection of Life During Pregnancy Act in July 2013, which establishes specific, highly restrictive means by which a woman may procure an abortion within the State in accordance with the *X* criteria, that is, in case of risk to her life, including from the threat of suicide, but not of risk to her health.<sup>180</sup> Though the relevant sections of the Offences Against the Person Act 1861, outlined above in Section 1.2, were repealed,<sup>181</sup> the 2013 Act went on to create a new offence, that of

<sup>177</sup> 'Expert group on abortion to be set up by November' *Irish Times* (Dublin, 17 June 2011).

<sup>178</sup> *Report of the Expert Group on the Judgment in A, B and C v Ireland* (Department of Health, Dublin, available at <[http://www.dohc.ie/publications/pdf/Judgment\\_ABC.pdf](http://www.dohc.ie/publications/pdf/Judgment_ABC.pdf)>)

<sup>179</sup> Full details are to be found in the Health Service Executive investigation into the incident, available at <<cdn.thejournal.ie/media/2013/06/savita-halappanavar-hse-report.pdf>>, and the subsequent Health Information and Quality Authority investigation, available at <[www.hiqa.ie/system/files/Patient-Safety-Investigation-UHG.pdf](http://www.hiqa.ie/system/files/Patient-Safety-Investigation-UHG.pdf)>.

<sup>180</sup> Protection of Life During Pregnancy Act 2013, Ss 7–9.

<sup>181</sup> *Ibid*, S 5.

intentional destruction of unborn life,<sup>182</sup> punishable by a fine, up to 14 years imprisonment, or both.<sup>183</sup> Though the Act does at least attempt to make effective the previously entirely theoretical right to an abortion in *X* case circumstances, whether it will pass muster at Strasbourg (or even in the Irish courts) remains to be seen.

### 2.3.2 Unconvincing constitutionalism: the dissent regarding A & B

The Grand Chamber of the ECtHR was unanimous in finding a violation of Article 8 with respect to C, but a significant minority of eight judges dissented with respect to A and B, holding that there had in fact been a violation of Article 8 in their case. The dissent's argument centred on the relationship between European consensus and the margin of appreciation, the minority disagreeing with the majority's assessment of the issue, and I argue that their reasons for doing so lean very heavily—indeed, openly so—towards the constitutional end of the spectrum, aligning well in the process with Mac Amhlaigh's conception of the ECHR legal order as being distinctively *constitutionally* pluralist by reason of the overarching metaconstitutional frame of the Convention.<sup>184</sup>

The dissent repeated the majority's finding that there was a broad consensus amongst a substantial majority of Contracting States that abortion should be legal in circumstances much wider than in Ireland, and stated that:

According to the Convention case-law, in situations where the Court finds that a consensus exists among European States on a matter touching upon a human right, it usually concludes that the consensus decisively narrows the margin of appreciation which might otherwise exist if no such consensus were demonstrated. This approach is commensurate with the 'harmonising' role of the Convention's case-law: indeed, one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence.<sup>185</sup>

As should immediately be obvious, this is quintessentially constitutionalist reasoning, with its focus on the universality and integrity of the Convention system

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<sup>182</sup> Itself defined legislatively for the first time, as 'such a life during the period of time commencing after implantation in the womb of a woman and ending on the complete emergence of the life from the body of the woman.' (Ibid, S 2(1)).

<sup>183</sup> Ibid, S 22.

<sup>184</sup> C Mac Amhlaigh 'Questioning Constitutional Pluralism' (forthcoming, paper on file with author) at 36.

<sup>185</sup> *A, B & C v Ireland* (n 156) at para 5 of the partial dissent.

within the territories of the Contracting States. The minority went on to note that this harmonising role is not unlimited, and that one limit upon it is in cases where there is, first, no clear European consensus on how (or whether) to protect a particular human right from State violation and, second, the alleged Convention violation concerns a relative right which can be balanced against ‘other rights or interests also worthy of protection in a democratic society’.<sup>186</sup> In such cases, the Court allows a (limited) margin of appreciation to the States to make this balance for themselves, ‘preferring not to become the first European body to “legislate” on a matter still undecided at European level.’<sup>187</sup> The broad European consensus in favour of less restrictive abortion laws was therefore sufficient for the minority to find Ireland’s restrictions beyond the limits of its margin of appreciation. In so finding, the minority was critical of the majority’s rather more complex analysis regarding the issue of consensus, calling it ‘the first time that the Court has disregarded the existence of a European consensus on the basis of “profound moral views”’.<sup>188</sup>

There are three serious flaws with the analysis of the minority, which may lead us to prefer the more nuanced (and less rigidly ‘constitutionalist’) approach of the majority. First, the dissenters were of the opinion that:

[The question of when life begins] was not the issue before the Court, and undoubtedly the Court is not equipped to deal effectively with it. The issue before the Court was whether, regardless of when life begins—before birth or not—the right to life of the foetus can be balanced against the right to life of the mother, or her right to personal autonomy and development, and possibly found to weigh less than the latter rights or interests.<sup>189</sup>

This is emphatically not the issue that was before the Court. What is more, the question as formulated here makes little sense. The rights to life of the foetus and of the woman *cannot* be weighed and balanced against each other ‘regardless of when life begins—before birth or not’, because the answer to the balancing question will differ greatly depending on the answer to the question of when life begins. The question of whether the rights of the foetus can *possibly* be found to weigh less than the competing rights of the pregnant woman leads us inexorably to a particular answer: yes, they can, as the laws of a number of Contracting States make clear.

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<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid at para 9 of the partial dissent.

<sup>189</sup> Ibid at para 2 of the partial dissent.

However, for this possibility to be sufficient to narrow the margin of appreciation in the case ignores the *reasons* behind the differing abortion laws of the States forming part of the consensus, and thus whether the consensus is relevant.<sup>190</sup>

The analysis of the European consensus in both the majority and minority judgments was restricted to the laws currently in force, with no evidence before the Court regarding their relevant context: do they recognise, even in a contingent or limited way, a right to life vested in the foetus? Are they the result of some balancing exercise under national law, by which the relative strength of the rights of the foetus (if any) and of the pregnant woman can be determined? Do they flow from some specific and fundamental moral choice on the part of the citizenry or their representatives, or do they flow instead or in addition from ordinary politics, or medical and scientific opinion, or some particular aspect of the State's political history, or from a multitude of sources and factors? The answers given to these questions will differ in each national context, considerably lessening the strength of the dissent's assertion that the existence of a general consensus regarding the circumstances under which abortion should be permissible necessarily narrows the particular margin of appreciation to be afforded to Ireland in the case. Accordingly, a more nuanced, contingent approach, such as that of the majority, is preferable, and this leads directly to the question of the universality of interface norms. Just as the way in which abortion is regulated across Europe is jurisdictionally-specific, so too must be the norms applied in regulating the interactions between legal orders on the issue.

Secondly, and related to the foregoing, is the fact that the dissenting judgment does not attempt seriously to engage with the majority's reasoning as to *why* the consensus identified should not narrow Ireland's margin of appreciation. This reasoning is worth recalling:

Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected ..., the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother.<sup>191</sup>

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<sup>190</sup> This idea of a *relevant* consensus is the essential thrust of Judge Finlay Geoghegan's brief concurring opinion in the case.

<sup>191</sup> *A, B & C v Ireland* (n 156) at para 237.



This is an altogether more justifiable view. The whole Court was in agreement that the question of when life begins was not in issue. In any event, the Convention neither requires nor prohibits that the State should afford a right to life to the foetus. It therefore follows, particularly in light of the moral element of the argument, that a wide margin of appreciation should be afforded to how the State resolves the question. If this is the case, by what logic may we then move the goalposts by narrowing the margin of appreciation, not at the level of principle itself (the right to life of the foetus), but at the level of the *application* of that principle (how this balances with the rights of the pregnant woman)? Contrary to the dissenting argument, the mere fact that the current law in most Contracting States with respect to abortion is wider than in Ireland—and regardless of the prior question of whether this consensus is a relevant consensus—does not change the essential fact that if a State is to be afforded a wide margin of appreciation in determining the extent to which the life of the foetus ought to be protected, then it must logically also be afforded a similarly wide margin in any subsequent balancing or reconciliation exercise, the rights of the two entities at issue (both human persons within the logic of Irish law, and this without offence to the Convention) being as interconnected as their biology. Again, the specificity of the law and practice at issue leads us away from a universal conception of interface norms.

While the first and second objections to the majority's reasoning relate to their conception of European consensus and its effect on the margin of appreciation (and are thus procedural or metaconstitutional), the third relates more to the substantive question of the rights and wrongs of abortion. That is not the concern of this chapter; but this third difficulty must be discussed in the present context because of the way in which it relates to the institutional self-image of the dissenting minority. The minority did not confine itself to noting the European consensus with respect to abortion, but went on to justify it, holding that:

This seems to us a reasonable stance for European legislation and practice to take, given that the values protected—the rights of the foetus and the rights of a living person—are, by their nature, unequal: on the one hand there are the rights of a person already participating, in an active manner, in social interaction, and on the other hand there are the rights of a foetus within the mother's body, whose life has not been definitively determined as long as

the process leading to the birth is not yet complete, and whose participation in social interaction has not even started.<sup>192</sup>

This sentence contains a point which is entirely valid, even if we allow for the fact that the minority's use of language in the juxtaposition of the rights of the 'foetus' and the rights of a 'living person' is question-begging (and telling) in light of the specific earlier finding that the case was *not* about when 'life' begins.<sup>193</sup> What is much more difficult to understand is the sentence which immediately follows:

In Convention terms, it can also be argued that the rights enshrined in that text are mainly designed to protect individuals against State acts or omissions while the former participate actively in the normal everyday life of a democratic society.<sup>194</sup>

This is a bizarre statement. Quite aside from being entirely unprecedented (the prefix '[i]n Convention terms' thereby being rendered meaningless), it is about as far from being vertically coherent as one could imagine. Taken to its conclusion, it seems to imply that the sick, the disabled, the shy, the lonely, the depressed, the agoraphobic and the misanthropic are somehow deserving of less protection under the Convention against state acts or omissions because they may not 'participate actively in the normal everyday life of a democratic society', which itself is left undefined. Even if not taken to the extreme of being applied to these categories of adults, and only used as a justification for weighing the foetus's right to life less heavily than the pregnant woman's competing rights, it is not an argument that makes any sense from within the internal perspective of Irish constitutional law, or from the perspective of a Convention which is agnostic as to the right to life of the foetus. As was clear to the Court from the voluminous evidence before it regarding restrictions on abortion in Ireland, a fundamental part of the justification for the judicial vindication of the right to life of the unborn is the fact that the foetus is not in a position to vindicate those rights for him or herself. Put simply, the above quoted passages went too far: rather than confining themselves to pointing out that the life of a foetus is necessarily contingent and the life of a woman is a life in being, and drawing conclusions from

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<sup>192</sup> Ibid at para 2 of the partial dissent.

<sup>193</sup> The exact same point had been made more succinctly by McCarthy J in the course of his judgment in *X*: '[t]he right of the girl here is a right to a life in being; the right of the unborn is to a life contingent; contingent on survival in the womb until successful delivery.' (*X* (n 122) at 79).

<sup>194</sup> *A, B & C v Ireland* (n 156) at para 2 of the partial dissent.

this, the minority went on to make a bold yet highly suspect statement as to the purpose of the Convention and the characteristics of those it protects.

The reason this is important for the present analysis is because of the resultant gap between the dissent's *constitutional ambitions* and the *quality of its constitutional reasoning*. The major issue of the case was formulated by the dissent in a way that permits of only one answer: there was no investigation as to whether the European consensus was a relevant consensus; there was no attempt to engage with the majority's reasoning on the margin of appreciation; and the dissent contained exactly the sort of unthinking generalisation that apex courts ought to avoid because of the potential to create problems in cases beyond the present. And yet despite all this, the judgment was couched in the language of constitutionalism, of 'gradually creat[ing] a harmonious application of human rights protection'<sup>195</sup> across Europe. But with a view gradually to creating this harmonious application of human rights protection, which decision as regards A and B is preferable? I suggest that the decision of the majority, which I have categorised above as being dialogic and pluralist, is superior. By its application of the margin of appreciation doctrine—what Sabel and Gerstenberg have called reverse conditional recognition<sup>196</sup>—it seeks to engage, rather than impose, and prefers to postpone conflict in the hope that it can be properly avoided by other means (particularly by politics), rather than ensuring conflict—both constitutional and political—by means of reasoning which is of doubtful rigour, of doubtful justifiability to the national legal order, and of doubtful coherence with respect to the Convention itself.

### 3 THE NATURE OF THE RELATIONSHIPS AND THE UNIVERSALITY OF INTERFACE NORMS

The foregoing has described in detail the means by which an issue of human rights under national constitutional law entered the European legal discourse; the responses and reactions of the different sites of constitutional authority within the deliberative polyarchy of the triangular constitution; and the means by which conflict, when it

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<sup>195</sup> Ibid at para 5 of the partial dissent.

<sup>196</sup> Sabel and Gerstenberg (n 107) at 519–520.

arose, was resolved. In this regard, let us consider the whole of Article 40.3.3° as it now appears in the Irish Constitution, post-amendment:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate that right

This subsection shall not limit freedom to travel between the State and another state.

This subsection shall not limit freedom to obtain or make available, within the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

As constitutional provisions go, this one is messy. Despite this, and regardless of whether one imagines the underlying philosophy of the Article to be right or wrong, there is an obvious normative value inherent in a legal and constitutional system which does not regard itself as the be-all and end-all of the articulation and vindication of rights, justice and the common good, but is instead structurally open to adjustment and reinterpretation in light of the claims of other legal actors and individuals, whether these be expressed in an internal or external forum. The concept of deliberative polyarchy describes precisely such a constitutional configuration, lending weight to the normative claim of constitutional pluralism. But what does the foregoing reveal with respect to the metaconstitutional interface norms regulating the relationships between legal orders?

I suggest that the universality of these norms—a claim made openly by Kumm and inherent in the work of Maduro—is seriously called into question by the evidence presented. As was noted in Section 2.2.2, Kumm’s interface norms of legality, subsidiarity, democracy and the protection of rights fit well with the Irish Supreme Court’s decision in *Grogan*. However, as was also noted above, this is hardly surprising given that they were formulated with specific reference to the relationship between the EU and its Member States, citing in particular the Irish Constitution’s provisions on abortion.<sup>197</sup>

With respect to the right to receive and impart information, the Irish courts repeatedly subordinated this right—whether under the national constitution or under European law of either species—to the Constitution’s particular formulation of the right to life. Whether or not one agrees with the right’s particular application to the

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<sup>197</sup> Kumm (n 46) at 297.

unborn, this subordination is justifiable on its own terms because of the unqualified and foundational nature of the right to life, both under the Constitution and the Convention. But in metaconstitutional terms, what is notable is the role played by what I have termed the principle of avoidance. While reticence to involve the EU legal order is clear from both the High and Supreme Court judgments in *Open Door*, we can also see the principle at work in *Grogan (ECJ)*. Whereas AG van Gerven had been willing to deal with the substance of the issue—and this in a way which would still have accommodated national concerns—the ECJ adopted a less ambitious approach in its finding that the economic link between the Irish counselling services and the English providers of abortion services was ‘too tenuous’. Restrictions on free movement go to the very core of the EU’s constitutional order, as expounded and defended by the ECJ. In a contemporaneous assessment of the judgment, O’Leary wrote that:

Beyond the recognition of abortion as a service, the progressive approach forged by the Court in the area of services was forgotten. Furthermore, recent developments expanding the power of the Court in its assessment of national legislation in the light of the Community’s fundamental rights principles sit uneasily with the refusal to engage in any such analysis in *Grogan* ... Taken unawares by the nature and the subject matter of the preliminary ruling requested, the Court was unwilling to act as arbiter in such an unfriendly arena. No doubt it was aware of the Irish Supreme Court’s barely restrained protest in *Grogan*. Content to assert a role for Community law, it left the resolution of the case to national law. This judicial restraint is legally and logically acceptable, particularly given the delicate and controversial nature of the issue. What is not acceptable is the legal method employed by the Court and its failure substantively to dispose of the case ... on the grounds of Community law at its disposal.<sup>198</sup>

There is the obvious difficulty that we cannot know what the Court’s judgment might have been if the Supreme Court had adopted a less assertive stance in *Grogan*, but nonetheless, by far the most important factor for the ECJ was the first question referred, whether abortion constitutes a service within the meaning of the Treaty. As is plain from the judgment, and from the Court’s previous decisions, the ruling that it does could never have been otherwise without undermining the integrity of the Court’s jurisprudence. Moreover, the Court’s refusal to take into account SPUC’s moral objection to classifying abortion as a service demonstrates an awareness of its own institutional limitations as regards the many Member States where abortion is

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<sup>198</sup> O’Leary (n 47) at 156.

regulated more liberally than in Ireland. But the ECJ, in attempting to recognise the limits of its own authority, ability, and legitimacy, undermined its own jurisprudence on free movement. It is true that the importance to the ECJ—and to the Union and its law more generally—of the second and third questions referred was of a much lesser degree. The questions were narrowly phrased, focusing specifically on the question of abortion—and not services generally—and the attempt to frame the third question in the abstract, with talk of Member State A and Member State B, surely fooled no-one. It was specifically noted in the Advocate General’s Opinion that Ireland was not (yet, as it turned out) seeking to prevent pregnant women from travelling to avail of services lawfully available abroad<sup>199</sup>—something which would rightly have exercised the Court—and neither were criminal sanctions threatened. Accordingly, it is no great leap of the imagination to see the restriction at the heart of the case—on the provision of information regarding the location and contact details of foreign abortion clinics in a jurisdiction where abortion is illegal—as a local matter of minor importance, at least from the perspective of the freedom to provide and receive services.

However, this does not justify the ECJ’s ‘ducking’<sup>200</sup> of the issue. The approach of AG van Gerven, which I characterised above in Section 2.1.1.1 as a precursor to the later judgment in *Omega*—itself a modified application of the principle of conditional recognition—would have allowed the Court to have regard to its own limited competence and jurisdiction while still safeguarding the core of its jurisprudence. Let us bear in mind that the restriction of information in *Grogan* was already subject to challenge in Strasbourg (a fact of which the ECJ would have been aware), and the ECtHR had yet to rule on the issue. Given the dark tone of what Ireland’s Supreme Court had to say about the potential for conflict with EU law; given the very limited impact of the restriction on the provision of services throughout the Union; and given the ECJ’s (at least then) limited experience and expertise as regards non-economic fundamental rights, the approach of AG van Gerven would still have safeguarded the ‘uniformity and efficacy’<sup>201</sup> of EU law, as

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<sup>199</sup> *Grogan (ECJ)* (n 57) Opinion at para 13.

<sup>200</sup> O’Leary (n 47) at 156.

<sup>201</sup> See, *inter alia*, Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 at para 3.

the ECJ requires itself and others to do, without precipitating inter-order conflict *and* without undermining the jurisprudence on free movement with the finding that a ‘too tenuous’ economic link was fatal to the engagement of EU law.

This point can be extended to the right to receive and impart information as protected by Article 10 ECHR. Though the ECJ did not enter into any discussion of the issue, AG van Gerven had found that the fundamental right to freedom of expression had been breached, but that this breach was necessary and proportionate. Problematically, this is *not* the decision arrived at by the ECtHR a short time later in *Open Door (ECHR)*, where that Court found the restriction overbroad and disproportionate on several grounds. But this potential disconnect between the two Courts could easily have been remedied—as conflicts between Luxembourg and Strasbourg go, the constitutional difficulties it would have raised would have been more similar to the cases following *Hoechst*<sup>202</sup> and *Orkem*<sup>203</sup> than to the much more serious disconnect following *Demir and Baykara*<sup>204</sup> and *Enerji Yapı-Yol Sen*,<sup>205</sup> discussed in Chapter 3. The ECJ’s application of a principle of avoidance in *Grogan (ECJ)*, therefore, may have had the effect of staving off constitutional conflict both with a Member State and with the ECtHR, but it did so at the expense of the integrity of the ECJ’s own jurisprudence.

In rejecting the Government’s claim in *Open Door (ECHR)* that the State’s discretion in moral matters was unfettered and unreviewable, the ECtHR’s decision was quintessentially constitutionalist and demonstrates that Court’s institutional self-image as the guardian of the Convention. However, this was tempered by the ECtHR’s emphasis that Ireland’s (broad) margin of appreciation in the area was restricted by the breadth, permanence, practical ineffectiveness and socially unequal effects of the restriction on information about abortions available abroad—concerns which were as vertically coherent as they were coherent within the Convention legal order itself. A similar approach was employed nearly 20 years later in *A, B & C*, with the Court being unwilling to go so far as to find Ireland’s (lack of) abortion laws in breach of the Convention with respect to A and B. However, with respect to C, the

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<sup>202</sup> Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859.

<sup>203</sup> Case 374/87 *Orkem v Commission* [1989] ECR 3283.

<sup>204</sup> *Demir and Baykara v Turkey* (2009) 48 EHRR 54.

<sup>205</sup> *Enerji Yapı-Yol Sen v Turkey* (2009) ECHR 2251.

Court effectively put Ireland on notice that this sensitivity to national specificity is neither definitive nor permanent. This approach, applying the margin of appreciation doctrine as a principle of reverse conditional recognition, is in sharp contrast to the approach of the minority dissent in the case, which relied on questionable assumptions about the nature of European consensus and a questionable interpretation of the purpose of the Convention to reach an altogether more rigid conclusion than that of the majority. Indeed, the minority dissent casts the ECtHR as exactly the kind of European Supreme Court which it would be under a hierarchical construction of the Convention legal order, not as a court of subsidiary and supervisory jurisdiction, playing its part in polyarchic deliberation, which is what emerges from the majority judgment.

What emerges from the decisions taken together is a distinctively constitutional—yet emphatically pluralist—legal universe, well captured by the notion of overlapping consensus. With respect to the different fundamental rights in question—information, travel and private and family life—we have seen that conflict between the legal orders, both actual and potential, was ultimately resolved by Ireland modifying its Constitution or its laws. However, this emphatically does not cast Ireland as being in any way *subordinate* to the two European legal orders. Rather, the citizens (in the case of constitutional amendment) and the legislature (in the case of law reform) were modifying domestic arrangements in light of (but not at the behest of) the positions of legal orders beyond the domestic.

Like the Irish Constitution's protection of the right to life of the unborn, much of this is nationally specific and historically contingent. The Constitution's amendability only by referendum is unusual in Europe, and the way in which the Irish courts, the ECJ and the ECtHR interacted in their decisions is predicated not just on the legal relationships that these institutions share (which can be generalised across the Union), but also on the specific ways in which the cases came before the courts, the specific ways in which the courts dealt with the issues at hand, and the general historic praxis of interaction and cooperation between the courts. It was noted in Chapter 2 that there are probably at least as many instances of specific national constitutional provisions—jealously guarded by national courts—as there are Member States of the Union. The above has demonstrated that with respect to



one of these—abortion in Ireland—the norms employed by courts at each site in the European polyarchy were contingent and specific to the case at hand. Certainly, some major threads can be drawn out—the principle of avoidance for one. But though this is a principle that courts can employ in seeking to avoid conflict in balancing the claims of overlapping legal orders, it is altogether looser and more general than the tightly-formulated interface norms proposed by Krisch. Avoidance and (reverse) conditional recognition are exactly the sort of tools that can be employed within a deliberative polyarchy to constitutionalise an overlapping consensus, but they are not a ready-made, step-by-step, *a priori* guide for the resolution of constitutional conflict.

#### 4 CONCLUSION

Having looked at the ‘vertical’ relationships between Ireland and both European legal orders in Chapter 2, and at the ‘horizontal’ (but frequently in practice ‘triangular’) relationship between the EU and the ECHR in Chapter 3, this Chapter sought to examine the way in which all three legal orders have interacted with respect to one specific national constitutional provision. The way that this interaction played out—encompassing the right to receive and impart information both under the Treaties and under the Convention, the right to travel, and the right to a private and family life—demonstrates the contingent nature of such interaction, which, in another case, in another country, may well have involved different rights or gone a different way. Though (very) general metaconstitutional principles can be drawn out from the various judgments, we cannot derive hard and fast, universally applicable norms from them.

However, the main series of cases under discussion above occurred 20 years ago and the ECJ’s case law as regards fundamental rights has developed significantly since then, *Kadi*<sup>206</sup> being a recent and seminal example. Recall that Sabel and Gerstenberg have noted that this extension of the ECJ’s jurisdiction may ‘overlap and potentially compete with that of Member States in matters of visceral

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<sup>206</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351.

concern'.<sup>207</sup> We can easily add to this that it may overlap and potentially compete with that of the ECtHR, as we saw with respect to labour rights in Chapter 3. If the 1986–1992 dialogue—from *Open Door* to the amendment of Article 40.3.3° of the Constitution with respect to the rights to travel and to information—had in fact not occurred until, say, 2006–2012, the outcome of the cases may have been very different indeed, especially in light of the more specifically political, rather than solely economic, basis of the Union as opposed to the Community; the growth of the ECJ's fundamental rights jurisprudence; and the rather more rigidly constitutionalist dissent in *A, B & C*.

The purpose of the next Chapter is, therefore, to take what we have learned from Chapters 2, 3 and 4, and analyse it holistically, with respect to the three legal orders as they relate and interact today.

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<sup>207</sup> Sabel and Gerstenberg (n 107) at 512.

**CHAPTER 5:**  
**INTERFACE NORMS WITHIN THE TRIANGULAR CONSTITUTION:**  
**UNIVERSAL CATEGORIES, PARTICULAR NORMS**

**INTRODUCTION**

In this thesis, I have posited the relationship between the modern European state (represented by Ireland), the EU and the ECHR—the triangular constitution—as an instance of overlapping consensus in a deliberative polyarchy in the sense described by Sabel and Gerstenberg. In each of the previous three chapters, I have suggested that the specific interface norms employed by the judicial actors at each site in the polyarchy in regulating the relationships between the different systems vary in their nature, from the legislative, through to the constitutional, to the metaconstitutional. While we might well expect sub-constitutional and constitutional interface norms—being creatures of their own legal systems—to lean away from the universal, and towards the historically contingent and jurisdictionally specific, this tendency has also been evident with respect to the metaconstitutional interface norms employed.

Chapters 2 and 3 focused on the three ‘sides’ of the triangular constitution in turn, and illustrated the nature of the relevant relationships and the interface norms thereunder with reference to a broad range of cases over a long period of time. Chapter 4 broadened the focus jurisdictionally, dealing simultaneously with all three sides of the triangle; and narrowed the focus jurisprudentially, dealing with the specific issue of the regulation of abortion and its various manifestations across different sites in the polyarchy.

The purpose of this Chapter is, first, to tie these threads together by to engaging with the tripartite deliberative polyarchy as it currently stands, and, secondly, to demonstrate the hypothesis of the non-universality of metaconstitutional interface norms. Section 2 will briefly restate the structure of the polyarchy in order to ground the discussion, in Section 3, of the particular interface norms at work. The Chapter will then conclude that the specific norms at work in regulating the relationships between legal orders are necessarily contingent, and that the attempt to universalise them results not in specific, universally applicable norms, but merely in broad

categories that must be concretised in given cases and circumstances to offer any guidance.

## 1 THE EVOLVING STRUCTURE OF THE POLYARCHY

It was noted in Chapter 1 that the idea that constitutionalism and pluralism are irreconcilable is perfectly true if we take the classical, documentary constitutionalism of the state as our sole point of reference for what counts as constitutionality. As an organisation of (still) sovereign states based on (reversibly) conferred powers, the EU could never claim to be constitutional in this sense; and as an international treaty—even one overseen and interpreted by an autonomous international court—the ECHR’s claim to constitutionality would be even weaker. However, when we broaden our concept of constitutionalism to include the evolutionary, as I have argued we must, the claims to the constitutional nature of their respective jurisdictions and their respective legal orders made by the ECJ<sup>1</sup> and the ECtHR<sup>2</sup> are perfectly plausible. These orders are not constitutional in *exactly the same way* in which the legal orders of Ireland and other European states are, but this is precisely because the two European orders are not states. The evolutionary nature of these non-state constitutional orders is further reflected in the evolutionary nature of the tripartite deliberative polyarchy of which they form two parts. The relationships between Ireland, the EU and the ECHR have changed over time, due to Treaty and constitutional amendment, judicial (re)interpretation of the constitution(s), and legislative changes. This section will briefly recapitulate the structure of this triangular constitution as it currently stands in order to frame the discussion on interface norms that then follows.

Ireland is a Member State of the EU, and this membership is specifically authorised by a provision of the Irish Constitution, inserted and repeatedly updated by referendum.<sup>3</sup> From within the internal perspective of Irish law, norms of EU law derive their legal force from an Act of the Oireachtas,<sup>4</sup> and these norms are ostensibly immunised from challenge on national constitutional grounds by a

<sup>1</sup> Case 294/83 *Parti Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339 at para 23.

<sup>2</sup> *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* [2005] ECHR 440 at para 156.

<sup>3</sup> See, now, Arts 29.4.3°–5°.

<sup>4</sup> European Communities Act 1972, as amended.

constitutional exclusion clause<sup>5</sup> The widespread orthodoxy is that this exclusion clause has a ‘torpedo’ effect on the rest of the Constitution, ‘whereby [it] destroy[s] the effect of every other provision’.<sup>6</sup> However, it was suggested in Chapter 2 that this interpretation is unprincipled; is at odds with a unanimous decision of the Supreme Court, which has never been reversed;<sup>7</sup> and therefore does not reflect what has actually happened in constitutional practice. It is more principled, more justifiable, and more accurate to regard the exclusion clause as having a ‘ripple effect’, ‘whereby [it] temporarily displace[s], without destroying the effect, of the other provisions.’<sup>8</sup>

Ireland is also a signatory to the ECHR. Not only is the Convention binding on Ireland as a matter of international law, but, since 2003, Convention rights are themselves also enforceable (sub-constitutional) norms of domestic law,<sup>9</sup> and Irish courts are obliged to take ‘due account of the principles laid down’ in the jurisprudence of the ECtHR.<sup>10</sup>

The Irish constitutional order is not, therefore, self-contained, but rather intricately linked with the European orders. A vast swathe of what we can properly call *Irish* law (that is, law having effect within Ireland) has its origin outwith the domestic legal order. Moreover, though the Irish High and Supreme Courts retain their interpretive authority over the Irish Constitution, interpretive authority over the other two sources of what we can properly call Irish *constitutional* law rests with the ECJ and the ECtHR. In short, the Irish legal system does not operate, and cannot be analysed, in isolation.

Similarly, the legal order of the EU cannot be looked at in isolation from its Member States. Regardless of whether we regard EU law as being autochthonous or dependant on national law for its legitimacy, it is on the authorities and institutions—including the courts—of the Member States that the ECJ depends for the actual enforcement of its jurisprudence. This division of labour between the ECJ and

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<sup>5</sup> Art 29.4.6°.

<sup>6</sup> M Cahill ‘Constitutional Exclusion Clauses, Article 29.4.6°, and the Constitutional Reception of European Law’ (2011) 18(2) *Dublin University Law Journal* 74 at 90.

<sup>7</sup> *Society for the Protection of Unborn Children v Grogan* [1989] IR 753.

<sup>8</sup> Cahill (n 6) at 90.

<sup>9</sup> European Convention on Human Rights Act 2003.

<sup>10</sup> *Ibid*, S 4.

national judiciaries occupies a central role in the constitutional development of the Union, as the ECJ has attempted to reconcile its own autonomy and prerogatives with those of the national judiciaries with which it is in a dialogic and symbiotic relationship.

Moreover, the ECHR is a part of the law of the EU (whether imported through the medium of the general principles of Union law<sup>11</sup> or the Charter<sup>12</sup>); the EU will shortly accede to the ECHR; and, even before this accession, the ECJ's level of protection of fundamental rights may not fall below that of the ECtHR.<sup>13</sup> Accordingly, the jurisprudence of the ECtHR is of greater normative force within the EU under the Charter than it is within Ireland under the ECHR Act 2003.

Finally, the ECtHR has subsidiary and supervisory jurisdiction over all 28 EU Member States, 19 other members of the Council of Europe, and, soon, the EU itself. As the court with supreme interpretive authority over the Convention—which is itself enforceable within Ireland and the EU—the ECtHR's judgments form an integral part of the constitutional make-up of both.

Such is the deliberative polyarchy of the triangular constitution. But a fundamental and distinctive feature of this polyarchy is its asymmetry. First, each of the three constitutional sites in the polyarchy partially differs from the others and also partially overlaps: in their nature, structure, origins, functions, and purpose. Secondly, and as a result of this, each order within the polyarchy relates to the others in different ways. The metaconstitutional interface norms posited by Kumm and Maduro are ostensibly universal criteria that can be employed in regulating these relationships. The two sets of interface norms differ amongst themselves (with Kumm's, for example, being a prescriptive set of substantive criteria, and Maduro's being rather looser sets of epistemic requirements). However, the preceding chapters have seriously called into question their ostensible universality, and it is to this question that we now turn.

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<sup>11</sup> Art 6(3) TEU.

<sup>12</sup> Art 52(3) of the Charter.

<sup>13</sup> Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17 at 303/33.

## 2 INTERFACE NORMS IN THE TRIANGULAR CONSTITUTION

It was noted in Chapter 1 that Kumm's 'cosmopolitan constitutionalism' serves a dual purpose. It provides a set of ostensibly universal metaconstitutional principles that allow us to determine, first, when heterarchy is preferable to hierarchy in the relations between legal orders, and, secondly, how that heterarchy should be structured in those cases where heterarchy is, in fact, preferable.<sup>14</sup> Accordingly, the first—and keystone—of Kumm's metaconstitutional interface norms is the principle of legality, whereby 'national courts should start with a strong presumption that they are required to enforce EU law, national constitutional provisions notwithstanding.'<sup>15</sup> This presumption is then rebuttable through the application of three further interface norms: the principles of subsidiarity, democracy, and the protection of basic rights. Of these three, the principle of subsidiarity is the most tightly embedded in—and therefore most difficult to extricate from—the Member State-EU relationship with reference to which it was developed by Kumm. Moreover, it played no part in any of the instances of interaction and (potential) conflict discussed in this thesis, and will therefore form no part of the discussion to follow. In Chapter 2, I characterised the principle of democracy (or democratic legitimacy) as a means of protecting national specificity, and this is the title under which it will be analysed here. Similarly, in Chapter 1, I noted that the principle of the protection of basic rights is essentially a recitation of the *Solange* principle of conditional recognition. Again, this is the nomenclature that will be used below.

### 2.1 The principle of legality

Though phrased with specific reference to EU law, it is not difficult to generalise the principle of legality to take into account the relationship between the EU and the ECHR. Kumm himself adopts such a generalised version of the principle in his account of *Kadi*,<sup>16</sup> where he sees the principle of legality considered, and departed

<sup>14</sup> M Kumm 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism' in M Avbelj and J Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart, 2012) at 65.

<sup>15</sup> M Kumm 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty' (2005) 11 *European Law Journal* 262 at 299.

<sup>16</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351.

from, in the ECJ's review of the UN's lack of judicial protection for those subject to sanctions regimes mandated by the Security Council.<sup>17</sup> The evidence adduced in the preceding chapters allows us to draw two major conclusions regarding the principle of legality as an ostensibly universal metaconstitutional interface norm. First, it *is*, in fact, capable of universal application. But, secondly, this is only because at the level of application, it is *not*, in fact, *metaconstitutional* at all. These seemingly—but not—contradictory conclusions must be explained in greater detail.

None of the cases of actual and potential conflict considered in this thesis were instances of open rebellion on the part of the Irish or EU courts with respect to the law of the Union or the Convention, along the lines of the Czech Constitutional Court's recent *Slovak Pensions* case.<sup>18</sup> Quite the contrary: in each case, the courts were careful to stress the weight that must be attached to the norms of the more encompassing system, whether these norms were followed, departed from, or such a departure was threatened. But importantly, when we find the principle of legality being applied by the Irish courts with respect to the EU or the ECHR, this is only because *it is a norm specifically commanded by the Irish legal system*. In the case of the Irish-EU relationship, the principle of legality finds legislative expression in Section 2 of the ECA 1972:

From the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties.

Sections 2 and 3 of the ECHR Act 2003 perform a similar function in the Irish-ECHR relationship, requiring courts to interpret the law in accordance with the Convention 'in so far as possible', and requiring organs of the state to perform their functions in a Convention-compatible manner. With respect to the EU and the ECHR, the Convention is nowadays part and parcel of EU law at a constitutional level, whether through Article 6(3) TEU or Article 52(3) of the Charter,

The principle of legality, therefore, rather than being an external, freestanding constitutional-norm-about-constitutional-norms, is better regarded as being merely the generalised and delocalised expression of the particular legislative or

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<sup>17</sup> Kumm (n 14) at 62–63.

<sup>18</sup> Judgment of 31 Jan 2012, Pl ÚS 5/12, *Slovak Pensions XVII*.



constitutional mandate by which the norms of a more encompassing legal order become applicable within a less encompassing order. The precise nature and normative strength of this applicability will necessarily vary from order to order, particularly given the asymmetry of the polyarchy adverted to above in Section 2. This then poses a further difficulty for the principle's ostensible universality—the principle of legality is a *rebuttable* presumption and, for Kumm, the criteria justifying its rebuttal are ‘countervailing concerns of sufficient weight that suggest [that the more encompassing norm should not be applied].’<sup>19</sup> But whether the ‘countervailing concerns’ are of ‘sufficient weight’ or not will again differ according to jurisdictional circumstance. In the case of EU law in Ireland, the interpretation one gives to Article 29.4.6°—‘torpedo’ or ‘ripple’—will be determinative. If the ‘exclusion clause’ really does have a ‘torpedo’ effect on the rest of the Constitution, then the principle of legality expressed in the ECA 1972 is not, in fact, rebuttable, but definitive. As we have seen, in *Grogan*—the sole decided case where the matter came to a head—the Irish Supreme Court opted for a ‘ripple’ interpretation, signalling its (potential) refusal to subordinate the Constitution’s protection of the right to life of the unborn to the ‘exclusion clause’, and, through the ‘exclusion clause’, to the requirements of EU free movement law.

The Irish courts have never refused to follow the jurisprudence of the ECtHR since the coming into force of the ECHR Act 2003, but that Act’s incorporation of the Convention ‘subject to the Constitution’, its requirement for the courts merely to take ‘due account’ of Strasbourg jurisprudence, and its requirement that the law be interpreted in accordance with the Convention only ‘in so far as possible’ leave open the possibility of disagreement, and thus the rebuttal of the principle of legality. But as with EU law in *Grogan*, in such a case, the criteria establishing what constitutes a ‘countervailing concern’ of ‘sufficient weight’ will be criteria *internal* to Irish constitutional law, and not the freestanding exceptions—democratic legitimacy, fundamental rights—posited by Kumm.

There is one area where the application of the principle of legality in a properly *metaconstitutional* sense is evident: the ECJ’s case law with respect to the Convention. However, this only holds true prior to the elevation of the Charter to the

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<sup>19</sup> Kumm (n 14) at 65.

status of primary EU law. The presumption that ECtHR jurisprudence should be followed—evident in the ECJ’s reversal of its *Hoechst*<sup>20</sup> and *Orkem*<sup>21</sup> jurisprudence in the light of subsequent developments at Strasbourg<sup>22</sup>—did not, at this stage in the development of the EU-ECHR relationship, arise from primary EU law, but rather from the ECJ’s own metaconstitutional jurisprudence on the relations between the orders, specifically the ‘inspiration; guidelines; special significance’ formula. Despite the cogency of de Witte’s argument that Article 6(3) TEU specifically imports the norms of the Convention as general principles of EU law,<sup>23</sup> this interpretation has only recently—and partially—made its way into the ECJ’s judgments. The closest that the ECJ has come to disagreement with the ECtHR as to the requirements of the Convention is with respect to the compatibility of its procedures and the role of the Advocates General with Article 6 ECHR, an issue which was again resolved prior to the elevation of the Charter to Treaty status. In *Kaba II*,<sup>24</sup> though AG Ruiz-Jarabo Colomer’s Opinion had expressed serious concerns regarding the cogency of the relevant ECtHR case law in a manner redolent of Kumm’s criteria justifying rebuttal of the presumption of legality,<sup>25</sup> the ECJ did not engage with this reasoning, and instead avoided outright conflict (but maintained its possibility) by deciding the case on different grounds. The ECtHR subsequently defused the potential conflict between the orders through the application of the *Bosphorus*<sup>26</sup> presumption of equivalent protection in *Kokkelvisserij*.<sup>27</sup>

Following the elevation of the Charter to Treaty status, the principle of legality with respect to the relationship between EU and ECHR law is no longer

<sup>20</sup> Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859.

<sup>21</sup> Case 374/87 *Orkem v Commission* [1989] ECR 3283.

<sup>22</sup> Case C-94/00 *Roquette Frères SA v DGCCRF* [2002] ECR I-9011, following *Niemitz v Germany* (1992) 16 EHRR 97 and *Société Colas Est v France* (2004) 39 EHRR 373, reversing *Hoechst* (n 20); Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV and Others v Commission* [2002] ECR I-8375, following *Funke v France* (1993) 16 EHRR 297, reversing *Orkem* (n 21).

<sup>23</sup> B de Witte ‘The Use of the ECHR and Convention Case Law by the European Court of Justice’ in P Popelier, C Van de Heyning and P van Nuffel (eds) *Human Rights Protection in the European Legal Order: The Interaction Between the European and National Courts* (Cambridge: Intersentia, 2011) at 19–24.

<sup>24</sup> Case C-466/00 *Arben Kaba v Secretary of State for the Home Department (Kaba II)* [2003] ECR I-2219.

<sup>25</sup> *Ibid* (Opinion) at para 105.

<sup>26</sup> *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* [2005] ECHR 440

<sup>27</sup> *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA v the Netherlands* App No 13645/05 (decision, ECtHR, 20 Jan 2009).

metaconstitutional in nature, but is rather the logical result of the Charter's own provisions regarding the status of the Convention and Strasbourg jurisprudence in EU law. This alteration to the terms of engagement between the two European orders may yet have important repercussions for the manner in which the current disconnect between the jurisprudence of the ECJ and the ECtHR—on labour rights—is resolved. However, as was made clear in Chapter 3, the resolution of this conflict could take a number of forms, and may be further influenced by the EU's accession to the ECHR. What is clear, however, is that whether rebutted or not, the principle that the ECJ should apply the law of the Convention and the jurisprudence of the ECHR—notwithstanding its own prior, conflicting articulation of the requirements of the Convention and of EU law—will derive from the primary law of the EU, and not from a freestanding metaconstitutional principle.

Taken together, all of this implies that Kumm's metaconstitutional principle of legality *is in fact capable of universal application*, but only because it is a generalised statement of *what is already the law*. This universal applicability is therefore *at the expense of what makes the principle metaconstitutional*. The ECJ's obligation to provide a standard of protection of Convention rights at least equivalent to that of the ECtHR is an obligation imposed by the terms of primary EU law itself. Similarly, each Member State of the EU has its own jurisdictionally specific means by which norms of EU law and the Convention become effective within the legal order. In the particular case of Ireland, this is achieved by legislation, strengthened in the case of EU law by a constitutional 'exclusion clause'. As a result, neither the substantive presumption of legality, nor the (possible, differing) means by which that presumption might be rebutted, is external or freestanding in nature. Rather, they are historically contingent and intimately connected with jurisdictional circumstance. Kumm's principle of legality is therefore caught in a trap: when viewed as universally applicable, it is not in fact metaconstitutional. When viewed as metaconstitutional, it is too general and abstract in its statement and requirements to be universally applicable. This problem with the first and keystone of Kumm's interface norms then filters down through the others, as we shall now see.

## 2.2 The protection of national specificity

In elaborating what he describes as the principle of democracy or democratic legitimacy, Kumm states that:

Given the persistence of the democratic deficit on the European level ... national courts continue to have good reasons to set aside EU Law *when it violates clear and specific constitutional norms that reflect essential commitments of the national community*.<sup>28</sup>

The attempt to generalise this interface norm so that it might be applied also to the relationship between the EU and the ECHR is rather more difficult than was the case with the principle of legality, but it is not impossible. As was suggested in Chapter 3, concern for national specificity in the Member State-EU relationship has parallels on the EU-ECHR side of the triangle with concern for the autonomy, uniformity, and specificity of Union law as a specifically non-state legal system. Though this concern may be justified on many grounds, democracy is almost certainly not one of them, for precisely the reasons of democratic deficit identified by Kumm. However, this is not necessarily fatal for the potential universal applicability of the principle, provided that we recast it in these specific circumstances as a method of protecting specifically ‘*post-national specificity*’.

In this regard, the ECJ’s filtering of the Convention through its (metaconstitutional) ‘inspiration; guidelines; special significance’ formula allowed room for manoeuvre in a potential case where a provision of the Convention or its interpretation by the ECtHR might strike at the heart of the EU legal order. However, concern for the specificity of the EU finds its strongest expression not in the jurisprudence of the ECJ, but rather in the jurisprudence of the ECtHR in the pre-accession era; and in the specific terms of the Draft Accession Agreement<sup>29</sup> in the post-accession era to come. The *Bosphorus* presumption of equivalent protection (itself an application of the principle of conditional recognition, to be discussed below in Section 3.3) is the means by which the ECtHR operationalises this concern for EU specificity prior to EU accession. The sheer strength of this presumption is

<sup>28</sup> Kumm (n 15) at 300, footnote omitted, emphasis in original.

<sup>29</sup> *Fifth Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights: Final Report to the CDDH* (Council of Europe, 47+1(2013)008rev2, available at <[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1\(2013\)008rev2\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf)>, hereinafter ‘Draft Accession Agreement’).

demonstrated by the highly deferential approach of the ECtHR to matters of EU law in applying the presumption in *Kokkelvisserij*. While this presumption of equivalence will be lifted upon EU accession to the Convention, the autonomy and specificity of EU law will instead be accommodated—though arguably to a lesser extent—by the terms of the Accession Agreement. The co-respondent mechanism will absolve the ECtHR of the need to apportion responsibility for breaches of the Convention between the Member States and the EU—and thus effectively decide questions of substantive EU law—leaving this instead to be worked out within the Union. The ‘prior involvement’ mechanism will ensure that the ECJ will first have the opportunity to remedy breaches of the Convention, or to (re)interpret EU law in accordance with the Convention. Therefore, while it is not theoretically impossible to generalise the principle of the protection of ‘post-national specificity’ so that it can encompass the relationship between the EU and the ECHR, the evidence suggests that it is unnecessary to do so: the ECtHR’s application of the (metaconstitutional) principle of conditional recognition already provides for such protection, and this protection will shift from the metaconstitutional and jurisprudential to the constitutional and institutional following ratification of the Accession Agreement.

Generalising the principle to the relationship between Ireland and the ECHR is less difficult, but as was the case with the principle of legality, Kumm’s principle of democracy attempts to serve a purpose that is in fact already served by domestic law and practice. The sub-constitutional status of the Convention in Irish law not only permits but also obliges the domestic judiciary to prefer constitutional norms to those of the Convention in cases of conflict. As the case of *Foy (No 2)*<sup>30</sup> demonstrates, where developments in ECtHR jurisprudence render Irish law or practice incompatible with the Convention’s requirements, the domestic law or practice can be—and will be—remedied judicially, provided that this is possible within the terms of the Constitution. Where such judicial remedy is impermissible, three possibilities arise. First, the legislature can amend the law, as happened following the adverse judgment with respect to C in *A, B & C v Ireland*.<sup>31</sup> Second, the Constitution can be amended by referendum, as happened with the adoption of the Fourteenth

<sup>30</sup> *Foy v an t-Árd Chláraitheoir (No 2)* [2007] IEHC 470.

<sup>31</sup> *A, B & C v Ireland* (2010) 53 EHRR 13.

Amendment following the adverse judgment in *Open Door v Ireland*.<sup>32</sup> Third, the incompatibility between Irish law and the ECHR might simply continue unresolved, leaving Ireland in breach of its international obligations and subject to the Council of Europe's diplomatic enforcement (or, better, 'monitoring') mechanisms. This would have been the case had the Fourteenth Amendment been rejected by the electorate, and would almost certainly have been the case if the dissenting minority of the Grand Chamber with respect to A and B in *A, B & C* had, in fact, been in the majority. But in each of these three cases, the domestic judiciary has no need of a *metaconstitutional* principle justifying the rebuttal of the (legislative) presumption of legality—its own domestic terms of reference not only permit but oblige such a rebuttal where conflict between the orders cannot be resolved judicially, whether this is on grounds of democratic legitimacy, national specificity, both, or neither.

With respect to the Irish-EU relationship, matters are more complex, but no more promising for the ostensible universality of the interface norm. First, by focusing his interface norm of democratic legitimacy on issues of national specificity, Kumm elides two separate—though related—issues into one. In imposing the requirement, in *Crotty*,<sup>33</sup> that any Treaty amendment which would alter the 'scope and objectives'<sup>34</sup> of the Union be put to a further referendum, the Supreme Court was clearly concerned with democratic legitimacy, but *not* with national specificity. Though the Irish constitutional provisions regarding the locus of constituent power and the means by which the Constitution may be amended are specific to that State, there is nothing nationally specific about the idea of popular sovereignty.

Secondly, even on the abortion issue—where democratic legitimacy and national specificity *do* overlap—the way in which the issue came to a head and the way in which the Supreme Court phrased and structured its decision in *Grogan* bear little resemblance to the interface norm as Kumm presents it, despite the fact that the Irish constitutional provision on the right to life of the unborn specifically informed Kumm's development of the principle, and despite the further fact that this development post-dated the decision in *Grogan*. The orthodox, 'torpedo' interpretation of Article 29.4.6 would have rendered the presumption of legality

<sup>32</sup> *Open Door and Dublin Well Woman v Ireland* (1992) 15 EHRR 244.

<sup>33</sup> *Crotty v An Taoiseach* [1987] IR 713.

<sup>34</sup> *Ibid* at 767 *per* Finlay CJ.

absolute, and no interface norm would justify its rebuttal. But by holding fast to its obligation to uphold and vindicate constitutional rights, even in the face of a conflicting constitutional norm which seemed to exempt EU law from the requirement of compatibility with these rights, the Supreme Court in *Grogan* was *not disapplying EU law*, but rather *indicating the possibility*—but no more than this—that it *might* do so. Though the particular constitutional norm that the Supreme Court sought to insulate from the potential rigours of EU free movement law—Article 40.3.3°’s protection of the right to life of the unborn—is an example of national specificity, it is the *fundamentality* of the right, rather than the specificity of its formulation, which motivated the Court—if the constitutional norm at issue had been nationally specific but had also been capable of being limited in certain circumstances, the Supreme Court’s approach may well have been less assertive. Being a constitutionally guaranteed *absolute* right, it ‘must be fully and effectively protected by the courts’.<sup>35</sup> Moreover:

[I]t cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right.<sup>36</sup>

Seen in the light of *Crotty* and *Grogan*, Kumm’s interface norm of democracy, rather than being a universally applicable, *a priori* metaconstitutional principle, is instead cast as a somewhat inaccurate *ex post* rationalisation of difficult circumstance, which not only confuses two separate issues—democratic legitimacy and national specificity—but also cannot account for historical constitutional practice.

As was the case with the ECtHR’s *Bosphorus* presumption with respect to EU law, it is also the case that the ECJ’s jurisprudence is in fact capable of taking national specificity into account and reconciling its exigencies with those of Union law. The divergence between the judgment of the ECJ and the Opinion of the Advocate General in *Grogan (ECJ)* predated *Omega*,<sup>37</sup> and illustrates the advantages for both legal orders of the *Omega* approach. AG van Gerven had considered that the restriction of information at issue fell within the scope of Community law; but that

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<sup>35</sup> *Grogan* (n 7) at 764–765.

<sup>36</sup> *Ibid* at 769.

<sup>37</sup> Case C–36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I–9609.

the restriction was justified because its objective qualified as an imperative requirement of public interest within the meaning of Community law.<sup>38</sup> However, the ECJ went on to avoid the issue altogether by holding that the ‘tenuous’ link between the Irish students’ unions and the British abortion providers took matters outside the scope of Community law. While clearly motivated by a desire to avoid precipitating constitutional conflict, this decision rode roughshod over the Court’s previous jurisprudence on potential restrictions on freedom of movement, a consequence that could have been avoided by the adoption of the Advocate General’s rather more nuanced approach. The ECJ subsequently developed precisely such an approach in some cases—though the effective and uniform application of EU law is of foundational importance to the ECJ’s jurisprudence, it is going to far too argue that it is *the* most important constitutional norm in Europe. AG van Gerven’s Opinion in *Grogan (ECJ)* and the subsequent judgment in *Omega* illustrate the ECJ’s recognition of this fact. Certainly, in attempting to reconcile national specificity with the requirements of the Treaties, the ECJ will not always get it ‘right’ from a national perspective—as the reaction to *Viking*<sup>39</sup> and *Laval*<sup>40</sup> demonstrates—but the point is that rather than being the sole responsibility of national courts, reconciling national specificity with EU law is rather, like so much else in EU law, a shared, dialogic, deliberative enterprise between the national and Union judiciaries. Such a vision of relations between legal orders leaves little room for the universal applicability of Kumm’s principle of democracy.

### 2.3 The principle of conditional recognition

The last of Kumm’s metaconstitutional interface norms is the protection of fundamental rights, by which he means that the principle of legality can be rebutted if the enforcement of a norm of EU law would violate a basic right guaranteed by a Member State constitution.<sup>41</sup> However, if ‘the guarantees afforded by the EU amount to structurally equivalent protections, then there is no more space for national courts

<sup>38</sup> Case C–159/90 *SPUC (Ireland) v Grogan* [1991] ECR I–4685 (*Grogan (ECJ)*) (Opinion) at para 26.

<sup>39</sup> Case C–438/05 *ITWF & FSU v Viking Line* [2007] ECR I–10806.

<sup>40</sup> Case C–341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I–11845.

<sup>41</sup> Kumm (n 15) at 294.



to substitute the EU's judgment on the rights issue with their own.'<sup>42</sup> The principle is therefore essentially a recitation of the *Solange* principle of conditional recognition. Whereas Kumm posits the principle as a substantive interface norm that can be applied in order to protect fundamental rights, Sabel and Gerstenberg's conception is less prescriptive and somewhat more subtle. Though their 'coordinate constitutionalism' is a species of metaconstitutional pluralism, Sabel and Gerstenberg expressly discount the possibility of substantive interface norms being posited in the abstract.<sup>43</sup> Rather than being a substantive norm, the principle of conditional recognition on this account is a *jurisgenerative mechanism*, allowing for the dialogic articulation, re-articulation and adjustment of requirements and perspectives in a deliberative polyarchy. In light of the evidence adduced in this thesis, Sabel and Gerstenberg's conception of the principle is to be preferred.

The major problem with conceiving of the principle of conditional recognition as a freestanding metaconstitutional interface norm capable of universal application is that it begs the most important question: *conditional on what?* The answer 'conditional on the protection of fundamental rights' only begs the question further, because, given the asymmetries of the triangular constitution and the only partially overlapping nature of their conceptions and articulations of fundamental rights, what one order regards as sufficiently fundamental to justify the withholding of legal recognition may not arouse similar concerns in an another order, even one situated similarly in the polyarchy.

Though the principle is capable of being phrased or posited in the abstract, it is devoid of meaningful content at this stage and offers us no guidance in the resolution of conflict. It is only when the principle is concretised in a particular case that it becomes capable of fulfilling the role of an interface norm, but—as was the case with the principle of legality—this can only come at the expense of the principle's metaconstitutionality. The problem is therefore one of epistemology: it is only from an epistemic vantage point situated *within* a constitutional order, looking out, that the principle becomes meaningful. Kumm partially recognises this problem in his admission that the weakness of the claim to universality 'lies in the fact that it does

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<sup>42</sup> Ibid at 299.

<sup>43</sup> CF Sabel and O Gerstenberg 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 *European Law Journal* 511 at 550.

not guarantee that the results [the application of an interface norm] leads to will be the same in every legal order'.<sup>44</sup> However, this is much more than a weakness of the claim. Rather, it is fatal to it. Consider the application of the principle of conditional recognition by the Irish Supreme Court in *Crotty*. The 'scope and objectives' test is one that is particularly within the interpretive domain of the Irish courts, and any Treaty amendment which broadened the 'scope and objectives' of the Union would require popular authorisation by referendum. But this is only because of the specific nature and provisions of the Irish constitution—in another jurisdiction, other methods of Treaty ratification—usually parliamentary—might suffice. Similarly, in *Grogan*, the effect of the judgment was to hold open the possibility of the loyal application of Luxembourg jurisprudence so long as that jurisprudence does not 'set at nought the constitutional guarantees for the protection within the State of a fundamental human right'.<sup>45</sup> A statement such as this is only *metaconstitutional* in the very thin sense that it concerns the relationships between legal orders. It is substantively situated within the constitutional order and, accordingly, its frame of reference is limited to that order.

The same problem presents itself in the 'horizontal' frame: the ECtHR's *Bosphorus* presumption, though an application of an ostensibly universal principle, is necessarily specific to the particular—unique—relationship it has to the ECJ. It is the means by which the ECtHR reconciles the triply conflicting requirements of maintaining its own interpretive authority over the Convention, respecting the autonomy of EU law, and still ensuring that the Convention rights continue to be guaranteed in the face of EU action. The doctrine of the margin of appreciation, as applied by the majority judgment in *A, B & C*, sees the principle applied in reverse, the ECtHR reconciling state autonomy with the requirements of the Convention by means of a conditional, supervised, temporally contingent leeway. In both cases, the substantive principles being applied—the presumption of equivalence or the margin of appreciation—are much more than the mere application of a universal metaconstitutional interface norm. Instead, they are substantive doctrines in their

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<sup>44</sup> Kumm (n 15) at 300.

<sup>45</sup> *Grogan* (n 7) at 769.

own right, with their own specific case law, based within the epistemic confines of the Convention.

Accordingly, we can well regard the principle of conditional recognition as a jurisgenerative *mechanism* in Sabel and Gerstenberg's sense, a framework the particular application of which will differ depending on jurisdiction, subject matter, and much else. What we cannot do is posit it in the abstract, as a universally applicable norm-about-constitutional-norms, because when stated so generally, the principle is stripped of the action-guiding potential that it only acquires at the level of site-specific application.

### 3 CONCLUSION

The research question that this thesis sought to answer is as follows: *Are the interface norms between legal orders the same regardless of the relationship between the orders themselves and between the institutional actors involved?*

In light of the evidence presented, I submit that they are not. It is perfectly permissible and possible to posit broad, freestanding *categories* into which the various norms applied in regulating the relationships between legal orders in a polyarchy may fall. Such taxonomies are important and useful in helping us to analyse these inter-order relationships. However, the fundamental problem is that these categories are just that—categories, rather than substantive action-guiding rules or principles. For the actual rules or principles that regulate the relationships between legal orders—the substantive interface norms at work—we must assume a viewpoint internal to the legal system in question, and take into account its own constitutional text and its own particular *telos*. But when we do this, the norms cease to be metaconstitutional, and are so far evolved from their abstract description that they are incapable of universal application. When we then zoom back out of a particular legal order, and attempt to metaconstitutionalise the particular constitutional interface norms at work, we lose precisely what it was that made those norms useful in the first place, and are left back with mere categories, not norms.

## CONCLUSION

This aim of this thesis has been to test the assumption that the metaconstitutional interface norms regulating the relationships between legal orders under certain conceptions of constitutional pluralism are universally applicable in nature. The jurisdictional setting for the analysis was the ‘triangular constitution’ of Ireland, the EU, and the ECHR, which I have characterised as being an instance of coordinate constitutionalism in a deliberative polyarchy. While the individual orders in the polyarchy cannot be analysed or understood properly in isolation, this does not amount to the polyarchy being a single, unified legal order.

Chapter 1 began by tracing the origins of the theory of constitutional pluralism in the work of Neil MacCormick, who sought to reconcile the competing sovereignty-claims of the EU and its Member States, and continued to outline Neil Walker’s development of the theory. At its simplest, the theory holds that different, interacting legal orders, state and non-state, do not necessarily need to be arranged hierarchically, as traditional constitutional theories demand. Rather, the relations between legal orders can be considered heterarchically, whereby the acquiescence of one order to the norms of another in one instance need not have the effect of rendering the entirety of that first order subordinate to the second.

The initial—and potentially fatal—criticism that ‘constitutional pluralism’ is a contradiction in terms, constitutionalism and pluralism being irreconcilable opposites, was then addressed, and it was suggested that rather than being irreconcilable, the two notions are in fact end points on a spectrum: constitutionalism can be pluralised, and pluralism can be constitutionalised. Attention then turned to one of the normatively thickest ways in which such a reconciliation is attempted: the theories of metaconstitutional pluralism, which seek to posit or identify certain freestanding, overarching norms-about-constitutional-norms—metaconstitutional interface norms—by which the relations between pluralistically-situated legal orders can be constitutionalised.

Charles Sabel and Oliver Gerstenberg’s characterisation of the European legal universe as being an instance of coordinate constitutionalism in a deliberative polyarchy founded on an overlapping consensus was adopted as the model for the analysis of the thesis. The advantages of the model are that, first, it leaves open the

possibility of either hierarchy or heterarchy manifesting themselves in the relations between legal orders in given cases, without demanding either in every circumstance, and, secondly, it is broad enough to encompass not just the relations between the EU and its Member States, but also between these legal orders and the ECHR. But though their theory is metaconstitutional in nature, Sabel and Gerstenberg specifically do not seek to posit individual metaconstitutional interface norms regulating the relations within the polyarchy. Rather, their focus is temporal: the principle of conditional recognition, in its various jurisdictionally-specific manifestations, is the jurisgenerative mechanism by which such norms are worked out over time, rather than having been posited in advance. The theory is therefore rather more descriptive than prescriptive, but, crucially, is still theoretically compatible with some of the more prescriptive accounts of interface norms in the literature: we can accept the description of the European legal sphere as being a deliberative polyarchy without necessarily accepting Sabel and Gerstenberg's account of how different sites in the polyarchy relate to each other, and instead import differing accounts of interface norms in order to test their applicability.

The next conception of metaconstitutional pluralism considered was the 'contrapunctual law' of Miguel Poiares Maduro. Under this conception of the theory, analogous to the musical notion of counterpoint, certain 'contrapunctual' principles are to be found in European judicial practice, whereby different, seemingly conflicting voices can in fact result in harmony, rather than cacophony. As an account of 'best practice' in the mutual working-out of the requirements of EU law, Maduro's theory is both descriptive and prescriptive: the contrapunctual principles can in fact be identified in historical practice, and ought to be put into effect in future cases. The underlying claim, therefore, is that these principles are universally applicable. However, the principles are so broadly phrased that though they may well be universally applicable, they do not offer much in the way of guidance as to how conflict should actually be managed. The contrapunctual principles—the interface norms of contrapunctual law—did not therefore form a key part of the analysis of the thesis.

The 'cosmopolitan constitutionalism' of Mattias Kumm, however, makes rather stronger claims, justifying its being placed at the centre of the analysis. For Kumm,

four freestanding, external, metaconstitutional interface norms can be, and ought to be, applied in regulating the relationships between legal orders. First is the principle of legality, which establishes a rebuttable presumption that the norms of the more encompassing legal order should be applied, notwithstanding the conflicting demands of the less encompassing order. The principles justifying the rebuttal of the presumption are then threefold: the principles of subsidiarity; democratic legitimacy (which in actual effect amounts to the protection of national specificity); and the protection of fundamental rights (which similarly amounts to a recitation of the *Solange* principle of conditional recognition).

Chapter 1 then concluded by considering two problems of these metaconstitutional pluralisms. First was the accusation that any kind of constitutional pluralism, metaconstitutional or otherwise, is necessarily destructive to the rule of law. Put most forcefully by Julio Baquero Cruz, this criticism, if true, would be fatal. However, I suggested that the objection is overstated, and that while it may serve us well as a warning not to become too attached to the notion of constitutional heterarchy, it is not a trump, forcing us always to retreat into hierarchy.

The second problem formed the research question of the thesis: the assumption in the literature that metaconstitutional interface norms are universally applicable by nature, and are the same regardless of the orders in question or the subject matter. This claim is explicit in Kumm's work, and implicit in that of Maduro. However, these theories were developed with reference to a quite limited range of European—and particularly German—jurisprudence, and it appeared at least arguable that when broadened to take into account the relations between the EU and other Member States, and the relationship between the EU and the ECHR, the principles may not in fact be fit for the purpose of regulating inter-order relationships, at least not without considerable modification to take into account jurisdictional circumstance, taking them far beyond their freestanding origins.

Accordingly, the thesis then proceeded to analyse these interface norms—and particularly Kumm's principles of cosmopolitan constitutionalism—in light of the triangular constitutional relationship between Ireland, the EU, and the ECHR.

Chapter 2 parsed this relationship in the 'vertical' frame, outlining the particular way in which the Irish legal order relates to those of the EU and the ECHR; the

means by which the norms of these European orders become effective within Ireland; and the actual historical experience of conflict between them. In the case of the EU, it was argued that the orthodox account of Irish constitutional law being subordinated to that of the EU by means of the constitutional ‘exclusion clause’ is both unprincipled on its own terms and contradicted by actual practice. Accordingly, we need not view the relationship as being hierarchical, and the possibility of the two orders being polyarchic in nature is preserved. In the regulation of this polyarchy, we find principles being applied that do bear a certain basic, low-level resemblance to those posited by Kumm. However, these principles—conditional recognition, democratic legitimacy—in their actual application are highly jurisdictionally specific, and, what is more, they are expressly *constitutional* rather than *metaconstitutional* in nature. They could not therefore be applied universally without stripping them of the specific normative content by which they performed the task of regulating the relationships between legal orders.

The relationship between Ireland and the ECHR is different, as one might expect given the differing natures and purposes of the two European legal orders. Having been incorporated at the sub-constitutional level, the interface norms regulating the relationship are neither constitutional nor metaconstitutional, but in fact *legislative*. Being products of the national political system, they therefore could not be universal in application, and bear little resemblance to Kumm’s principles of cosmopolitan constitutionalism.

Chapter 3 considered matters in the ‘horizontal’ frame, dealing with the relationship between the EU and the ECHR. This is a dynamic relationship, which has changed over time and will continue to do so, at least until the EU completes its accession to the ECHR. Initially an instance of mere comity between non-state courts, the relationship has been progressively formalised and institutionalised. While the specific interface norms regulating the relationship—particularly the principle of legality on the part of the ECJ and that of conditional recognition on the part of the ECtHR—are directly comparable to those posited by Kumm, their actual operation in the non-state sphere is much more than the simple transposition of norms developed with reference to the EU-Member State relationship. Given the differences in the field of application, the formulation of the interface norms at work

must be modified accordingly. We therefore found the principles of legality and condition recognition being employed in the dialogic reconciliation of two conflicting aims: the preservation of each order's autonomy and prerogatives; while still respecting those of the counterpart non-state order. However, this (metaconstitutional) reconciliation is currently challenged by the disconnect between the two European orders' approaches to labour rights—a disconnect that may remain unresolved until the EU's accession to the Convention is complete, when the terms of engagement between the orders will shift from the metaconstitutional to the constitutional, as set out in the Treaties, the Charter, and the Accession Agreement.

Chapter 4 then broadened the focus jurisdictionally and narrowed the focus jurisprudentially, taking as its case study the various instances of polyarchic deliberation on the question of the legal status of abortion in Ireland. In this 'triangular' frame, we ran up against the limits of metaconstitutional methods of conflict management in two cases, where conflict between the state and non-state legal orders could only be resolved by the amendment of the national Constitution. That the various rights at issue, particularly that of freedom of expression, came into play as differing requirements of the EU legal order and that of the Convention demonstrate what Sabel and Gerstenberg meant by overlapping consensus, where the same fundamental notion receives similar, but only partially concordant, protection in different legal orders, and the gaps between these conceptions must be bridged. Though the means employed to bridge these gaps—judicial (re)interpretation, legislation, constitutional amendment—can be placed in broad metaconstitutional categories, their particular manifestations in actual practice were historically contingent and jurisdictionally specific.

Accordingly, it was submitted in Chapter 5 that close study of the triangular constitution of Ireland, the EU and the ECHR seriously calls into question the universality of metaconstitutional interface norms. It is perfectly possible to place the various means—metaconstitutional, constitutional, and legislative—by which polyarchically-arranged legal orders manages their interrelations in *broad categories*, but these categories are then so loose and general in their formulation that they cannot serve as action-guiding rules and principles. When concretised in actual



cases, these interface norms then become too jurisdictionally specific to re-generalise across the European legal sphere.

Therefore, while it is indeed possible to constitutionalise the plural or to pluralise the constitutional; under such a reconciled, polyarchic legal regime, the universal and the particular seem to remain stubbornly separate. This finding highlights the importance of continued, close, careful analysis of the intricacies of the individual cases that make up the jurisprudence of the European polyarchy, and the intricacies of the individual jurisdictions from which they arise. The polyarchy is not an indivisible whole, and cannot be analysed as one. Rather, to the extent that the universal exists, it must be shaped by reference to the particular.

## APPENDIX 1: TABLE OF LEGISLATION

### IRELAND

European Communities Act 1972

Health (Family Planning) Act 1979

Referendum (Amendment) (No 2) Act 1992

European Convention on Human Rights Act 2003

Protection of Life During Pregnancy Act 2013

### (FORMER) UNITED KINGDOM OF GREAT BRITAIN AND IRELAND

Offences Against the Person Act 1861

Statute Law Revision Act 1892

Statute Law Revision (No 2) Act 1893

### UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Human Rights Act 1998

### EUROPEAN UNION

Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172

Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage [1976] OJ L 278

Treaty on European Union (Treaty of Maastricht) [1992] OJ C 191

Parliament and Council Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services [1997] OJ L 18/1

Treaty on European Union (Treaty of Amsterdam) [1997] OJ C 340

Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17

Treaty of Lisbon [2007] OJ C 306

Protocol (No 1) on the Role of National Parliaments in the European Union [2010]

OJ C 83/203

Protocol (No 2) on the Application of the Principles of Subsidiarity and

Proportionality [2010] OJ C 83/206.

Rules of Procedure of the Court of Justice of the European Union [2012] OJ L 265/1

Charter of Fundamental Rights of the European Union [2012] OJ C 326/02

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*In re Ó Laighléis* [1960] IR 93

*The State (Quinn) v Ryan* [1965] IR 70

*G v An Bord Uchtála* [1980] IR 32

*Roche v Ireland* (unreported, High Court, 17 Jun 1983)

*Norris v Attorney General* [1984] IR 36

*The State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642

*Crotty v An Taoiseach* [1987] IR 713

*AG (SPUC) v Open Door Counselling Ltd* [1988] IR 593

*Ryan v DPP* [1989] IR 399

*SPUC v Grogan* [1989] IR 753

*Lawlor v Minister for Agriculture* [1990] 1 IR 356

*AG v X* [1992] 1 IR 1

*O'Leary v Attorney General* [1993] 1 IR 102

*Meagher v Minister for Agriculture* [1994] 1 IR 329

*Heaney v Ireland* [1994] 2 ILRM 420

*A and B v Eastern Health Board, Judge Mary Fahy and C* [1998] 1 IR 464

*Foy v an t-Árd Chláraitheoir (No 1)* [2002] IEHC 116

*Lelimo v Minister for Justice* [2004] 2 IR 178

*Carmody v Minister for Justice* [2005] 1 JIC 2103

*Law Society of Ireland v Competition Authority* [2006] 2 IR 262

*Dada v Minister for Justice* [2006] IEHC 166

*Doherty v South Dublin County Council (No 2)* [2007] 2 IR 696

*Foy v an t-Árd Chláraitheoir (No 2)* [2007] IEHC 470

*Leonard v Dublin City Council* [2008] IEHC 79

*Dublin City Council v Liam Gallagher* [2008] IEHC 354

## Court of Criminal Appeal

*The People (Attorney General) v Cadden* (1956) 91 ILTR 97

*The People v Shaw* [1982] IR 1

## Supreme Court

*Wireless Dealers' Association v Fair Trade Commission* (unreported, Supreme Court, 14 Mar 1956)

*In re Ó Laighléis* [1960] IR 93

*Educational Company of Ireland v Fitzpatrick (No 2)* [1961] IR 345

*The State (Quinn) v Ryan* [1965] IR 70

*Ryan v Attorney General* [1965] IR 294

*The People v O'Callaghan* [1966] IR 501

*The State (Woods) v Attorney General* [1969] IR 385.

*Byrne v Ireland* [1972] IR 241

*Mead* (unreported, Supreme Court, 26 Jul 1972)

*Meskeil v CIÉ* [1973] IR 121

*McGee v Attorney General* [1974] IR 284

*G v An Bord Uchtála* [1980] IR 32

*The People (DPP) v Shaw* [1982] IR 1

*Campus Oil v Minister for Industry* [1983] IR 82

*Norris v Attorney General* [1984] IR 36

*The State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642

*Murphy v Roche* [1987] IR 106

*Crotty v An Taoiseach* [1987] IR 713

*AG (SPUC) v Open Door Counselling Ltd* [1988] IR 593

*Ryan v DPP* [1989] IR 399

*Society for the Protection of Unborn Children v Grogan* [1989] IR 753

*AG v X* [1992] 1 IR 1

*Meagher v Minister for Agriculture* [1994] 1 IR 329

*O'Leary v Attorney General* [1995] 1 IR 254

*Heaney v Ireland* [1996] 1 IR 540

*DPP v Delaney* [1997] 3 IR 453

*Nathan v Bailey Gibson* [1998] 2 IR 162

*Lobe & Osayande v Minister for Justice* [2003] IESC 1

*The People (DPP) v MS* [2003] 1 IR 606

*Carmody v Minister for Justice* [2010] 1 IR 635

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