

Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order

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Abstract: *The European Court of Justice's (ECJ's) jurisprudence of fundamental rights in cases such as Schmidberger and Omega extends the court's jurisdiction in ways that compete with that of Member States in matters of visceral concern. And just as the Member States require a guarantee that the ECJ respect fundamental rights rooted in national tradition, so the ECJ insists that international organisations respect rights constitutive of the EU. The demand of such guarantees reproduces between the ECJ and the international order the kinds of conflicting jurisdictional claims that have shadowed the relation between the ECJ and the courts of the Member States. This article argues that the clash of jurisdiction is being resolved by the formation of a novel order of coordinate constitutionalism in which Member States, the ECJ, the European Court of Human Rights and other international tribunals or organisations 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. The doctrinal instruments by which the plural constitutional orders are, in this way, profoundly linked without being integrated are variants of the familiar Solange principles of the German Constitutional Court, by which each legal order accepts the decisions of the others, even if another decision would have been more consistent with the national constitution tradition, 'so long as' those decisions do not systematically violate its own understanding of constitutional essentials. The article presents the coordinate constitutional order being created by this broad application of the Solange doctrine as an instance, and practical development, of what Rawls called an overlapping consensus: agreement on fundamental commitments of principle—those essentials which each order requires the others to respect—does not rest on mutual agreement on any single, comprehensive moral doctrine embracing ideas of human dignity, individuality or the like. It is precisely because the actors of each order acknowledge these persistent differences, and their continuing*

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influence on the interpretation of shared commitments in particular conflicts, that they reserve the right to interpret essential principles, within broad and shared limits, and accord this right to others. The embrace of variants of the Solange principles by many coordinate courts, in obligating each to monitor the others' respect for essentials, creates an institutional mechanism for articulating and adjusting the practical meaning of the overlapping consensus.

I Background

The European Court of Justice (ECJ) is responding to insistent, long-standing demands by the constitutional courts of Member States that it take account of deep national commitments to fundamental rights in its articulation of the economic freedoms that found the single market upon which the EU has grown. Prototypical cases include *Schmidberger*,¹ creating a framework for reconciling freedom of expression and freedom of goods, and *Omega*,² creating a framework for reconciling concerns of dignity and the freedom to provide services. But the ECJ's jurisprudence of fundamental rights creates a new problem by extending the court's jurisdiction in ways that overlap and potentially compete with that of Member States in matters of visceral concern. The problem of competing jurisdictions is compounded by the place of the EU in the international order. Just as the Member States require a guarantee that the ECJ respect fundamental rights rooted in national tradition, so the ECJ insists that the international organisations, such as the Security Council of the United Nations, respect rights constitutive of the EU, on whose behalf it speaks.³ The demand of such guarantees reproduces between the ECJ and the international order the kinds of conflicting jurisdictional claims—disputes over the authority to assert competence or *Kompetenz Kompetenz*—that have shadowed the relation between the ECJ and the courts of the Member States. At the regional international level, there are analogous jurisdictional conflicts between the European Court of Human Rights (ECtHR) and the EU, and between the ECtHR and the national constitutional orders concerning the meaning and scope of fundamental and human rights.

In this article, we argue that the potential clash of jurisdiction is being resolved, at least within the EU, by the formation of a novel order of coordinate constitutionalism in which Member States, the ECJ, the ECtHR and other international tribunals or organisations agree to defer to one another's decisions, provided those decisions respect mutually agreed essentials. This coordinate order extends constitutionalism—understood as the legal entrenching fundamental values rather than the founding act of political sovereignty—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. The doctrinal instrument by which the plural constitutional orders are in this way profoundly linked without being integrated are the familiar *Solange* principles articulated by the German Constitutional Court (Bundesverfassungsgericht or BVerfG).⁴ By the

¹ *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659.

² *Omega Spielhallen—und Automatenaufstellungs—GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

³ Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat*, judgment (Grand Chamber) of 3 September 2008.

⁴ BVerfGE 37, 271 (*Solange I*); English translation at [1974] 2 CMLR 540; 73, 339 (*Solange II*); English translation at [1987] 3 CMLR 225.

Solange principles, each legal order accepts the decisions of the others, even if another decision would have been more consistent with the national constitution tradition, 'so long as' those decisions do not systematically violate its own understanding of constitutional essentials. *Solange* thus commits each order to monitor the jurisprudential output of the others, and to make acceptance of their deviations from national preferences contingent on a continuing finding of equivalence of fundamental results.

The coordinate constitutional order being created by this broad application of the *Solange* doctrine can be understood as an instance of what Rawls called an overlapping consensus: agreement on fundamental commitments of principle—those essentials which each order requires the others to respect as the condition of its own deference to their decisions—does not rest on mutual agreement on any single, comprehensive moral doctrine embracing ideas of human dignity, individuality or the like. 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. It is precisely because the actors of each order acknowledge these differences, and their continuing influence on the interpretation of shared principles in particular conflicts, that they reserve the right to interpret essential principles, within broad and shared limits, as they see fit, and accord this right to others. At the same time, the emergent coordinate order suggests a development of the idea of the overlapping consensus by showing how the *Solange* principles, in obligating each order to monitor the others' respect for essentials, creates an institutional mechanism for articulating and adjusting the practical meaning of these shared ideals. In asserting all this, we are of course taking for granted that there is more to the idea of constitutionalism beyond the state than allowed by those sceptics who maintain that constitutionalism presupposes and therefore is coterminous with Westphalian sovereignty, although we do not respond to such scepticism here.⁵

The body of the argument is in three parts. In the first of these, part II, we reprise the development of the *Solange* doctrine and document the diffusion of it, and its reverse variants, to the ECJ, and the ECtHR as well as courts of the Member States. In part III we show that in recent borderline decisions by the ECJ in *Viking*, *Laval* and *Mangold* (involving old-age discrimination), the jurisprudence of what we will call conditional competence or mutual monitoring has created a body of de-nationalised precedents determinate enough to distinguish judgments consistent with the *Solange* principles from those which are not; and we, show, furthermore, that the the perception of the need for such a distinction is widely shared among the most highly informed participant observers of ECJ decisions—the advocate generals. In part IV we connect the jurisprudence of mutual monitoring to the Rawlsian overlapping consensus, and to the closely related idea of a deliberative polyarchy. We show that the the emergent constitutional order is polyarchic, because, lacking a final decider, it must resolve disputes by exchanges among coordinate bodies, each with a contingent

⁵ For a response to the sceptics, cf B.-O. Bryde, 'International Democratic Constitutionalism', in R. St. J. MacDonald and D.M. Johnston (eds), *Towards World Constitutionalism* (Martinus Nijhoff, 2005), at 103–125 and L.R. Helfer and A.-M. Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', (2005) 93 *California Law Review* 899; see also M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in F.L. Dunoff and J.P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009), at 258–324.

claim to competence; and this polyarchy is deliberative, because the parties are bound in these exchanges to re-examine their interpretations of shared principles—and so, in the end, the underlying views on which these interpretations are based—in the light of arguments presented by the others. These distinctions permit clarification of current, alternative efforts to characterise the emergence of a new form of constitutionalism beyond the state.

II The *Solange* Jurisprudence and its Generalisation

A The ECJ from Economic Freedoms to Fundamental Rights

Of the two post-war European legal orders—the Council of Europe’s European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) and the European Communities—only the ECHR was expressly founded as a human rights organisation with the intention of promoting human rights and democracy in the wider Europe—and of preventing States from relapsing into totalitarianism.⁶ The focus of the second of these two legal systems, now the EU, by contrast, lay in the establishment of the common market—understood as a vehicle towards broader social and political ends. The founding treaties were silent on the matter of fundamental rights. While both legal orders were conceived as a response to World War II and the Holocaust,⁷ human rights and fundamental economic freedoms, then, were understood as belonging to, and constituting, two functionally different, mutually impermeable and separate legal spheres.

The guiding idea—made explicit by the German tradition of a *Wirtschaftsverfassung*—was that of the EU as a liberal transnational order, held together by the principle that Contracting States should not allow the political to contaminate the economic.⁸ The ECJ was correspondingly seen not as a constitutional court but exclusively as a *Fachgericht*—a specialised court with the final judicial say on the European internal market. From this perspective, an interaction, even a tangential contact between Community economic freedoms and national constitutional rights, seemed impossible.⁹

But these expectations were belied, in fits and starts, by developments. In the 1970s, the German constitutional court, moved less by concern for the legitimacy of an emergent European order than by preoccupations with national sovereignty and its own role as the guarantor of essential national rights (the *Wesensgehaltsgarantie* which continues to be central to the self-conception of the *BVG*), expressed concerns about whether EC law should also prevail in case of conflict with fundamental rights protected by the Basic Law. There could, therefore, have been serious conflict between European and domestic law. In response to those concerns, the ECJ—in order to safeguard the principle of

⁶ See A. Moravcsik, ‘The Origins of International Human Rights Regimes: Democratic Delegation in Postwar Europe’, (2000) 54 *International Organisation* 217.

⁷ Complementing domestic responses, which include, in the German constitution, the strong emphasis on human dignity and a case-law emphasising the ‘horizontal effect’ of fundamental rights; cf BVerfG 7, 198 (*Lüth*).

⁸ For theoretical foundations, see F. Böhm, ‘Privatrechtsgesellschaft und Marktwirtschaft’, (1966) 17 *Ordo, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* 75; W. Hallstein, *Europe in the Making* (Allen & Unwin, 1972).

⁹ For a representative view, cf W. Hallstein, ‘Europapolitik durch Rechtsprechung’, in H. Sauerermann and E.J. Mestmäcker (eds), *Wirtschaftsordnung und Staatsverfassung, Festschrift für Franz Böhm* (JCB Mohr, 1975), 205, at 211ff and 213.

supremacy it sought to establish—construed the inclusion of fundamental rights in the Community law system and also the alignment of Community interpretation with the goals of the ECHR: the court, adopting a stance diametrically opposed to its earliest case-law on the subject, proclaimed that ‘fundamental rights [were] enshrined in the general principles of Community law and [therefore] protected by the Court’¹⁰ and that the protection of fundamental rights could effectively be ‘ensured within the framework of the structure and objectives of the Community’;¹¹ and that the ECHR must be accorded ‘special significance’¹² in this respect.

But there is an evident tension between reliance on fundamental principles and respect for the diversity of national traditions of constitutional law: a tension, that is, between the rule of law and democracy, to both of which the EU is committed by Article 6 of the Treaty on European Union (TEU).¹³ Mindful of this tension, the ECJ has been generally careful, in its recent, jurisprudentially transformative decisions, to register and defer to national interpretations of fundamental rights when the national authorities make a compelling case that they have themselves been mindful of their obligations under EU law to balance respect for fundamental rights and economic freedoms, and have done so conscientiously by the means available to them. Consider the following two, much noticed cases.

In the first, *Schmidberger*, the Austrian authorities had allowed a political demonstration by a grassroots environmental group on the Brenner motorway, the main traffic-link between northern Europe and Italy. The demonstration, though peaceful, closed the motorway completely to traffic for almost 30 hours. Schmidberger, a German transport company, argued that the effects of the Austrian authorities’ conduct in allowing the closure infringed his Community rights under Article 28 EC and sued Austria for damages. Thus, the court had to reconcile the conflict between Schmidberger’s invocation of a fundamental economic freedom—here free movement of goods, protected under Article 28 EC—and Austria’s invocation of the fundamental right of its citizens, guaranteed not only under the domestic Austrian constitution but also under Article 10 and Article 11 of the ECHR, to freedom of expression and assembly.

The court, ignoring its earlier and adverse opinions, held that the positive obligation by a state to protect fundamental and human rights could, indeed, constitute public policy requirements sufficient to justify restrictions to basic market freedoms, provided that the restrictions were necessary and proportionate: ‘[T]he interests involved must be

¹⁰ ECJ Case 29/69, *Stauder v City of Ulm*, [1969] ECR 419.

¹¹ ECJ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fuer Getreide und Futtermittel* [1970] ECR 1125, at 1131. Referring to this case, Advocate General Leger in his Opinion in C-87/01, *Commission v CEMR*, 17 September 2002, at para 64 explained: ‘As we know, to establish the existence of a general principle of Community law, the Court carries out a comparative examination of national legal systems. In this connection, it is unanimously agreed that the Court does not seek to determine the arithmetical average of national laws or to fall into line with the lowest common denominator. On the contrary, the Court takes a critical approach and gives the answer which is most appropriate in relation to the structure and aims of the Community’ (references omitted).

¹² ECJ Case C-540/03, *European Parliament v Council of the European Union*, 27 June 2006, para 35.

¹³ See from very different perspectives, respectively, F.G. Jacobs, *The Sovereignty of Law. The European Way* (Cambridge University Press, 2007); F.G. Jacobs, ‘The State of International Economic Law: Re-Thinking Sovereignty in Europe’, (2008) 11 *Journal of International Economic Law* 5; P. Kirchhoff, ‘The Legal Structure of the European Union as a Union of States’, in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Hart, 2006), at 765ff; M. Herdegen, ‘General Principles of EU Law—the Methodological Challenge’, in U. Bernitz, J. Nergelius and C. Gardner (eds), *General Principles of EC Law in a Process of Development* (Kluwer, 2008).

weighed having regard to the circumstances of the case in order to determine whether a fair balance was struck between those interests'.¹⁴

In determining what constitutes a 'fair balance', the court, furthermore, accorded the domestic authorities 'a wide margin of discretion'. Thus, after examining various factors—such as the ongoing collaboration between demonstrators, local authorities, and various motoring organisations before the event—the court concluded that the Austrian authorities were 'reasonably entitled'¹⁵ to consider that the main aim of the demonstration could not be achieved by measures less restrictive of intra-Community trade.

In his Opinion for the case, Advocate General Jacobs, however, was careful to acknowledge, beyond the balancing of rights in any particular case, the general obligation of the court both to give weight to the divergences between the fundamental rights catalogues of the Member States—divergences which 'often reflect the history and particular political culture of a given Member State' (fn 97)—and to recognise that national specificities do not always trump general obligations under Community law. For that reason it cannot 'automatically [be] ruled out that a Member State which invokes the necessity to protect a right recognised by national law as fundamental nevertheless pursues an objective which as a matter of Community law must be regarded as illegitimate'.¹⁶

In the second case, *Omega Spielhallen*,¹⁷ the court again had to balance conflicting fundamental rights and freedoms in the light of the specificities of national constitutional law. In *Omega*, the German authorities had banned a laserdrome game simulating homicide. The applicant company, Omega, challenged this ban as contrary to freedom to provide services under EU law, pointing out that such games were lawfully marketed in the UK and that the equipment and technology were supplied by a British company. For reasons of German history, human dignity is accorded special priority under the German Basic Law and the jurisprudence of the BVG. A decision by the ECJ promoting the internal market despite the German concerns would risk challenges to EC supremacy; but to give primacy to the national concern for fundamental rights would be to the detriment of the internal market. The court allowed German authorities to ban the game, but insisted that this outcome did not depend upon 'a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected'. The court, then, considered the subject matter to belong to a sphere properly left to the Member States. This approach, as we shall show in the next section, amounts to a 'reverse' application of the *Solange II* doctrine initially developed by the BVG.¹⁸

B The ECJ: Relationship to Member State Constitutional Courts and to the ECtHR

As these cases demonstrate, the ECJ has created a framework within its jurisprudence for incorporating adjudication of fundamental rights at the core of national constitu-

¹⁴ *Schmidberger*, *op cit* n 1 *supra*, para 81.

¹⁵ *ibid*, para 93.

¹⁶ *ibid*, para 98.

¹⁷ *Omega Spielhallen—und Automatenaufstellungs—GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

¹⁸ On the terminology of 'reverse application' of *Solange*, cf D. Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in Dunoff and Trachtman, *op cit* n 5 *supra*.

tions. As a result, the question arises of the relation between the fundamental rights jurisprudence of the ECJ and the responsibilities of the constitutional courts of the Member States. In this part we show, first, how the BVerfG articulates in its *Solange* decisions the principles of a mutual contingent regime. In this regime, each legal order—ECJ and Member State—assures itself that the other provides equivalent protection of constitutional essentials and therefore defers to the particular judgments of the other, unless it finds systematic evidence that the condition of equivalence no longer holds. While we assume that the outlines of the *Solange* decisions will be familiar to many readers, we suspect that the scope of its implications for the nature of linkages among constitutional order is not. We show next how the relation between the ECJ and the BVerfG diffuses to other courts, including the ECtHR and, more recently, and in an innovative variant, the Czech constitutional court.

a) *Relationship with the Protection of Fundamental Rights by the BVerfG: 'Cooperation' or Confrontation?*

The German Federal Constitutional Court—by some standards ‘originally one of the national constitutional courts which expressed most scepticism about the Community capacity to safeguard human rights’¹⁹—first systematically addressed its relation to the ECJ in 1974.²⁰ The *Solange I* decision focused on the interpretation of Article 24 I of the German Constitution, which provides that ‘the Federation may by law transfer sovereign powers to international organisations’. Here—at a time when the question of fundamental rights still figured only marginally in the ECJ’s case-law—the BVerfG reserved the right to review the compatibility of Community law with the German Constitution ‘as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity which is adequate in comparison with the catalogue of fundamental rights contained in the Constitution’—that is, as long as the Community system lacked a Bill of Rights and a truly democratic legislative process. The decision was clearly motivated by the belief that the doctrine of primacy of Community law could not override and ‘relativise’²¹ the norms of the German Constitution dealing with constitutional essentials and democracy as ‘an inalienable essential feature of the valid Constitution . . . and one which forms part of the constitutional structure of the Constitution’.²²

But subsequently—after indicating in 1979 that it might modify its position ‘in view of political and legal developments in the European sphere occurring in the meantime’²³—the German court announced in its *Solange II* decision from 1986 that, indeed, ‘a measure of protection of fundamental rights has been established in the meantime . . . which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided for in the

¹⁹ For this characterisation, cf. A. Tizzano, in A. Arnulf, P. Eeckhout and T. Tridimas (eds), *Continuity and Change, Essays in Honour of Sir Francis Jacobs* (Oxford University Press, 2008), 125, at 137.

²⁰ Cf. *op cit* n 4 *supra*.

²¹ Notice that the official translation of the last sentence runs: ‘Article 24 of the Constitution does not without reservation allow it to be subjected to qualifications’. But the original German text, speaking of the ‘Grundrechtsteil des Grundgesetzes’, runs: ‘Ihn zu relativieren, gestattet Article 24 GG nicht vorbehaltlos’.

²² *ibid.*

²³ BVerfG 52, 187; English translation at [1980] 2 CMLR 531.

Constitution'.²⁴ Impressed by the incipient case-law²⁵ of the ECJ concerning fundamental rights, the BVG now reversed its 'Solange-formula': the court would no longer review secondary Community law on the basis of German fundamental rights norms '[s]o long as the European Communities, and in particular in the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and insofar as they generally safeguard the essential content of fundamental rights'.²⁶

As the German court later went on to clarify in a decision of June 2000 concerning the market organisation for bananas (BVerfG 2 BvL 1/97), 'cooperation' in the sense of the *Solange* decisions means in practice that constitutional complaints and submissions by courts to the BVG are inadmissible from the outset if their grounds do not state that European law, including the case-law of the ECJ, does not *generally*—beyond the case at issue—ensure the protection of the fundamental rights unconditionally required by the German Basic Law. So the condition under which the BVG will re-assert its own jurisdiction is demanding: since the assurance of overall equivalence is the aim, no case-by-case congruence of standards of protection is required. In order for the German court to become active again, a complainant or a submitting court would have to establish—by way of a general assessment of the European legal system in its entirety—that there has emerged 'a general decline of the standard of fundamental rights'. Put another way, the BVG is monitoring the EU regime, or the broad doctrines of the ECJ as a whole, rather than judgment by judgment, and insisting that potential complainants accordingly do the same. Insofar as *Schmidberger* and *Omega* establish a similar regime of contingent competence, but looking from the ECJ to the Member States rather than the other way around, we can characterise them as reverse *Solange* decisions. As we shall see below (at IIIC), the BVG has in its recent Lisbon decision in part confirmed, in part revised its outlook.

C Relationship with the Protection of Human Rights by the ECtHR

The problems in relations between the ECJ and the ECtHR are analogous to the relations between the ECJ and the German BVG, and the solutions to these problems have been analogous as well. While the ECJ has never considered the EC to be formally bound by the ECHR and has held that the EC lacked competence to accede to the ECHR,²⁷ the ECJ has affirmed that the ECHR is of 'special significance' in its effort to derive constitutional values common to the Member States. The special significance is formally expressed in Article 6(2) TEU,²⁸ which entrusts the ECJ with a fundamental rights mandate.

²⁴ *Solange II*, *op cit* n 4 *supra*, para 35.

²⁵ *Stauder*, *op cit* n 10 *supra*; *Handelsgesellschaft*, *op cit* n 11 *supra*; Case 4/73 *Nold v Commission* [1974] ECR 491.

²⁶ *Solange II*, *op cit* n 4 *supra*, para 48.

²⁷ ECJ Opinion 2/94 on the Accession of the Community to the ECHR, [1996] ECR I-1759, para 33.

²⁸ Article 6(2) TEU provides: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

In the famous Grand Chamber judgment in the *Bosphorus Airways* case²⁹—which restates the ECtHR's position with regard to monitoring fundamental rights within the Community law system and which, at the same time, touches upon the monitoring by the ECtHR of decisions of international organisations more generally—the ECtHR developed its own *Solange II* formula after reviewing the ECJ's case-law on fundamental rights. The question at issue was whether the seizure of a Serbian aircraft by Irish authorities applying UN sanctions against the former Yugoslavia amounted to a violation of the property rights of an apparently innocent third party: a Turkish company which had chartered the plane. As the UN sanctions were being implemented in the EU by an EC regulation, the Irish Supreme Court had, under the preliminary reference procedure, referred the case to the ECJ. The ECJ found that the Irish authorities had acted lawfully, but the airline then challenged the Irish decision before the ECtHR.

The ECtHR emphasised, first, that a state was not prohibited by the Convention from transferring sovereign power to an international organisation, but—the transfer notwithstanding—remained responsible under Article 1 of the Convention for all its acts and omissions, even if these resulted from compliance with international legal obligations.

Second—and providing a sense of déjà vu with respect to the BVG—the ECtHR emphasised that (i) where state action was taken in compliance with international legal obligations and (ii) where the relevant international organisation protected fundamental rights at a level at least equivalent to what the Convention provides, there was a presumption that the state had not departed from the Convention; a presumption that could be rebutted, if in the circumstances of a particular case, the protection of Convention rights was manifestly deficient.

The ECtHR's endorsement of the principle of equivalent protection (which reflects the *Solange II* formula) reconciles 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.³⁰

D The ECtHR and National Legal Orders

In this part we show that the relation of monitoring and contingent competence established between the ECJ and the Member States in *Schmidberger* and *Omega*, and between the Member States and the ECJ in the *Solange* jurisprudence of the BVG, have close analogies in the relations between the ECtHR and the national legal orders, despite the absence in the latter of any counterpart to the twin doctrines of direct effect and supremacy of EU law that help define the former. The ECtHR's margin of appreciation doctrine plays a role similar to that of the reverse *Solange* jurisprudence of *Schmidberger* and *Omega*—allowing the court to acknowledge and defer to national

²⁹ ECtHR Application No 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHHRR 1.

³⁰ A similar reconciliation, reflecting the *Solange II* formula, has been provided by the Czech constitutional court in its judgment of the Czech Constitutional Court Pl. ÚS 19/08, of 26 November 2008, English version available at http://angl.concourt.cz/angl_verze/doc/pl-19-08.php. The transfer of domestic powers to an international organisation must not, the court insisted, 'go so far as to violate the very essence of the Czech republic as a democratic state governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, and to establish a change of the essential requirements of a democratic state' (headnote 1).

specificities in the understanding of common principles—while the BVG's *Görgülü* doctrine corresponds to *Solange*—allowing the national court to defer to judgments by the ECtHR, as long as the latter provides, in general, equivalent protection of fundamental rights.

a) *The ECHR and the Margin of Appreciation Doctrine*

The ECtHR—a court with compulsory jurisdiction over all Member States to which aggrieved individuals enjoy direct access³¹—conceives the Convention as a 'constitutional instrument of European public order'. This self-conception makes it something of a European constitutional court and so—to the extent their jurisdictions overlap—a potential competitor to the ECJ, just as the latter's fundamental rights jurisprudence puts it in tension with constitutional courts in the Member States. The potential for conflict is increased by the court's avowedly expansive or organic understanding of the European 'ordre public', as reflected in its disposition to treat the Convention not as a contract fixing the will of the Member States but rather as a 'living instrument which must be interpreted in the light of present-day conditions'.³²

But, on the other hand, the court has articulated the concept of a 'margin of appreciation' in order to distinguish a sphere where national authorities—domestic legislators and courts³³—will be making value choices, and often balancing competing values, from a sphere of legitimate intervention by the court, exercising European supervision. Debate focuses on the breadth of this margin of appreciation reserved to states. Where there is 'no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider'.³⁴ Emphasising the 'fundamentally subsidiary role of the Convention', the court accepts that the national authorities have 'direct democratic legitimation and are . . . in principle better placed than an international court to evaluate local needs and conditions'.³⁵ The no-European-consensus formula—in keeping with the principle of subsidiarity—applies in cases which 'raise complex issues and choices of social strategy' and where 'the [domestic] authorities' direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest'.³⁶ Here judicial supervision is confined to a test of whether the domestic policy is 'manifestly without reasonable foundation'.

But the margin of appreciation accorded to a state is more restricted where—as the court ruled in the context of cases concerning the protection of the right to privacy under Article 8 of the ECHR—'a particularly important facet of an individual's exist-

³¹ Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, ETS No 155 (1994), of the text on the website available at <http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm>.

³² ECtHR Application No 53924/00, *Vo v France*, judgment (Grand Chamber) of 8 July 2004, para 82.

³³ 'The Contracting States have a certain margin of appreciation . . . [which] goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court': ECtHR Application No 38224/03, *Sanoma Uitgevers BV v the Netherlands*, 31 March 2009, para 59.

³⁴ ECtHR Application No 44362/04, *Dickson v United Kingdom*, judgment (Grand Chamber) of 4 December 2007, para 78.

³⁵ ECtHR Application no. 36022/97, *Hatton and Others v UK*, judgment (Grand Chamber) of 8 July 2003.

³⁶ *Dickson*, *op cit* n 34 *supra*.

ence or identity is at stake'.³⁷ For example, in *Goodwin v United Kingdom*³⁸—a case involving the rights of post-operative transsexuals to recognition and to non-discrimination—the court ruled that the respondent British Government cannot claim that the matter fell within their margin of appreciation. The applicant, Ms Goodwin, registered at birth as a male, had undergone gender-reassignment surgery and lived in society as a female. But because the state authorities refused to issue a new National Insurance (NI) number, the applicant remained for legal purposes a male. The denial of legal recognition of her gender change subjected Ms Goodwin to numerous discriminatory and humiliating experiences at work and in her everyday life, forcing her to choose between revealing her birth certificate or foregoing certain advantages to which she would otherwise be entitled. According to the respondent government, the refusal to issue a new NI number was justified, because the uniqueness—and by implication the immutability—of the NI number is of critical importance in the administration of the National Insurance system.

In its decision, the court attached 'less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals'.³⁹

Consequently, the court ruled that under Article 8 of the ECHR, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees:

protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings . . . In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.⁴⁰

So the court, relying on a perceived international trend towards legal and moral recognition of transsexuals, acted both as a forum and as a pacemaker and developed the right of privacy into a right to participation and inclusion for marginalised groups where domestic law was found to be deficient.

In *Zaunegger*,⁴¹ another case involving the right to privacy—this time with regard to parental custody—the court, discerning less of a consensus, required only that the municipal authorities decide by case-by-case scrutiny certain questions that had been determined by indefeasible default rules. The case arose in Germany and concerned the question whether fathers of children born out of wedlock have a right to request joint custody over a child even without consent of the mother. Long-standing German custody law assigned custody for children born out of wedlock to the mother. The historical intention was to protect the newborn by making a clear and binding determination of its statutory representative from the first. In view of the life conditions into which children traditionally were born out of wedlock, sole custody was generally granted to the mother. The father, however, could obtain custody only through a joint

³⁷ *ibid*, para 78.

³⁸ ECtHR Application No 28957/95, *Christine Goodwin v United Kingdom*, judgment of 11 July 2002.

³⁹ *ibid*, para 91.

⁴⁰ *ibid*, para 90.

⁴¹ ECtHR Application No 22028/04, *Zaunegger v Germany*, judgment of 3 December 2009.

declaration. German law explicitly precluded courts from imposing joint parental custody against the mother's will by court order. Accordingly, German law did not provide for judicial examination as to whether attribution of joint parental authority would suit the child's best interests. The mother's approval requirement was based on the notion that parents who could not agree to make custody declarations were highly likely to come into conflict when specific questions relating to the child's custody were at stake, causing painful disputes detrimental to the child's interests. If the parents lived together but the mother refused to make a joint custody declaration, the case was considered exceptional and the mother presumed to have serious reasons for the refusal, based on the child's interest. This legal regime was confirmed by the BVG in a 2003 decision in which the court also obliged the legislator to keep any developments under observation and to verify the default presumptions.

In *Zaunegger*, the applicant—whose paternity was certified from the beginning and who had lived with the mother and the child for about five years and provided for the child's daily needs—complained that court refusal of joint custody infringed his right to respect for his family life and discriminated against him, an unmarried father, on the basis of his gender and his marital status (as divorced fathers would have stronger claims to custody than his).

The ECtHR agreed with *Zaunegger*. The court rejected the assumption that joint custody against the will of the mother is *prima facie* antithetic to the child's interest. The court acknowledged the wide margin of appreciation in custodial matters, but pointed to the evolving context in this sphere and to the growing number of unmarried parents. Although there exists no European consensus as to whether fathers of children born out of wedlock have a right to request joint custody even without the consent of the mother, the common point of departure in the majority of Member States—contrary to the German law—was that decisions regarding the attribution of custody are to be based on the child's best interest, as determined, in the event of conflict between the parents, by court scrutiny. The court also rejected the argument that imposition of joint custody by a court would automatically cause conflicts between the parents contrary to the child's best interests. To the contrary, it noted that when the father once held parental authority, because the parents were married at the time of birth, married thereafter or opted for joint parental authority, domestic German law itself provides for a full judicial review of the attribution of parental authority and resolution of conflicts between separated parents.

There was therefore no basis for treating the father of a child born out of wedlock differently from a father who had originally held parental authority and later separated from the mother or divorced. The Convention, as a 'living instrument which must be interpreted in the light of present day conditions', assumes *vis-à-vis* national law the role of a pacemaker by providing aggrieved individuals a remedy not available under domestic constitutional law and by forcing domestic legislators and courts to address evolving contextual circumstances. The court does not 'legislate'—it does not create a new right to request joint custody even against the will of the mother—but it does make clear that the German Government had failed to show that there was a reasonable relationship of proportionality between the general exclusion under German law of judicial review of the initial attribution of sole custody to the mother and the aim pursued—the child's best interests. If the baseline assumption is that the nation state has an absolute right to regulate questions of family custody, then of course *Zaunegger* reduces the Member States' margin of appreciation. But imposition of a requirement to resolve these matters by deliberation, case by case, rather than applying an inflexible

rule, seems to be a minimal restriction. (Indeed on some accounts of democracy it could be regarded as democracy enhancing, as it enlarges the possibilities for reasoned participation by actors with direct stakes in the outcome of decisions directly affecting them.)⁴²

By contrast, in other cases, the court emphasised the State's margin of appreciation in the choice of means and methods in securing compliance with Article 8 of the ECHR and in discharging its positive obligation under that Article. The underlying conflict in the case of *Odièvre v France*⁴³ was between a child's fundamental right to have access to information about her biological origins and ascendants, protected under Article 8 of the ECHR, and, on the other, the mother's right, for a series of reasons specific to her and concerning her personal autonomy, to keep her identity as the child's mother secret. Other important interests came into play, such as the need to protect the health of mother and child during pregnancy and at the birth, and the need to prevent abortion or infanticide. The court here had to perform a 'balancing of interests' test to resolve this multipolar conflict—foetus, infant, adult daughter, mother, state—and examine whether in the present case the French system, which contrary to other legislative systems under the Council of Europe is weighted in favour of the protection of maternal anonymity, struck a reasonable balance between the competing rights and interests. The court's majority, emphasising the margin of appreciation, reached a decision that concerns only France, not other countries, which remain free to use different means, while seeking to limit as far as possible the conflict between the general interest and the individual rights of the mother and child. To use an analogy from EC law, the ruling resembles a 'directive' under Article 249 EC. Such directives require Member States to achieve a particular result without dictating the instruments and methods for achieving it.

And in those areas of law where genuine, deep and intractable moral disagreement persists, the court, relying on the lack-of-European-consensus argument, widens the national margin of appreciation. In the case of *Vo v France*,⁴⁴ the court was faced with a woman who intended to carry her pregnancy to term and whose unborn child was expected to be viable, at the very least in good health. Because of a medical error (a doctor confused two patients with similar surnames, in part due to the poor organisation of the hospital) she had to have a 'therapeutic' abortion. A claim for compensation in the administrative courts—which would have had fair prospects of success and which would have allowed the applicant to obtain damages from the hospital—was barred by the expiration of a four-year limitation period. Hence, the issue before the court was exclusively whether the involuntary killing of an unborn child against the mother's wishes should be treated as a criminal offence in the light of Article 2 of the Convention, protecting the right to life.

In its judgment, the court ruled that it was unnecessary to determine whether Article 2 of the ECHR was applicable, holding that even assuming it was, there has been no violation on the facts. It was, as the court said, 'neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention',⁴⁵ because, in the circumstances

⁴² See R. Keohane, S. Macedo and A. Moravcsik, 'Democracy-Enhancing Multilateralism', (2009) 63 *International Organisation* 1.

⁴³ ECtHR Application No. 42326/98, *Odièvre v France*, judgment of 13 February 2003.

⁴⁴ *Vo*, *op cit* n 32 *supra*.

⁴⁵ *ibid*, para 85.

of this case—even assuming that Article 2 *was* applicable—‘an action for damages in the administrative courts could be regarded as an effective remedy that was available to the applicant’.⁴⁶ The court pointed out that because of the absence of a European consensus and of the ongoing debate both in France and in Europe ‘the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a “living instrument which must be interpreted in the light of present-day conditions”’.⁴⁷

The margin of appreciation doctrine—even if its scope remains controversial⁴⁸—allows the court to combine a commitment to a deep principle with a more experimental and dialogic form of review. The ECtHR and the national legal orders interact and draw on each others’ interpretations; and the ECtHR also encourages negotiations among and across the comprehensive national legal orders and publics over the applied meaning of a legal principle. The ECtHR provides an initial framework, which may consolidate over time into a freestanding principle through the practice of evolutive interpretation. The initial framework is open to revision through repeated ‘argumentative games’ through repeated litigation; but once consolidation has taken place, the court intervenes into domestic legal orders where the standard of protection is found to be deficient, as measured against a European-wide constitutional standard. In this way, the margin of appreciation doctrine is an equivalent to the *Solange II* doctrine: addressed to the national legal orders, it forces those orders to develop standards which are equivalent to an evolving Convention standard, but at the same time acknowledges the autonomy of those orders and avoids taking sides in disputes that remain specific to the national orders.

b) *The BVG and the ECtHR*

The guarantees of the ECHR only establish obligations of ‘result’, without specifying the means to be used. Hence, the ECHR leaves it to the state parties themselves to decide autonomously in what way to enforce the duty to comply with its provisions: the Convention ‘takes a neutral attitude towards the domestic legal system’⁴⁹—it does not purport to determine the internal mechanisms by which Member States will secure that their organs observe the Convention; its imperatives are entirely output-oriented.⁵⁰

Within Germany, the Convention has the status of a federal statute.⁵¹ Within the domestic hierarchy of norms, then, the Convention ranks below the Constitution. Accordingly, ‘German courts must observe and apply the Convention within the limits

⁴⁶ *ibid.*, para 94.

⁴⁷ *ibid.*, para 82.

⁴⁸ Dissenting Opinion of Judge Ress, para 1 and para 8.

⁴⁹ BVG 2 BvR 1481/04 (*Görgülü*), para 45.

⁵⁰ But see L.R. Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’, (2008) 19 *European Journal of International Law* 125, who observes that the court is tightening up in this respect, moving in more on the autonomy of Member States with regard to issues of compliance and remedies. For a similar observation, cf M. Tushnet, *Weak Courts, Strong Rights* (Princeton University Press, 2008), arguing that the court’s technique has been to narrow the margin of appreciation over time (at 71). Yet, to the extent that those observations are accurate, the importance of the question of the interrelation between the ECtHR and national constitutional courts addressed in this section increases.

⁵¹ *Görgülü*, *op cit* n 49 *supra*, para 31, with references to BVerfGE 74, 358 (370); 82, 106 (120).

of methodologically justifiable interpretation like other statute law of the Federal Government'.⁵²

However, while the provisions of the Convention—given their status as federal statutory law—'are not a direct constitutional standard of review in the German legal system',⁵³ the rank of the Convention as a federal statute is reinforced and strengthened by the German Constitution's openness or friendliness to and 'commitment to international law'.⁵⁴ As a consequence and part of this friendliness to international law, the German court ascribed a 'constitutional significance' to the ECHR, which points far beyond its norm-hierarchical rank as merely statutory law and which mirrors the conception of the ECHR by the ECtHR as an instrument of 'European public order'.

Given this 'constitutional significance', the guarantees of the Convention, despite their rank as statutory law, 'influence the interpretation of the fundamental rights and constitutional principles of the Basic Law'.⁵⁵ Hence, the text of the Convention and the case-law of the ECtHR serve, 'on the level of constitutional law',⁵⁶ as 'guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the German Basic Law'—they have a 'radiating effect' on the proper understanding of the Basic Law. Notice that according to the German court, the decisions of the ECtHR—while binding only *inter partes*—nevertheless 'have particular importance for Convention law as the law of international agreements, because they reflect the current state of development of the Convention and its protocols'.⁵⁷ In accordance with the rule of law principle of the German Constitution, ECtHR judgments are binding on all German state organs, including the courts.⁵⁸

But to this radiating effect, the German court has in its 2004 *Görgülü* decision added a procedural component, which is part of the 'constitutional significance' of the Convention. The 'procedural component' allows a complainant to challenge *indirectly* the violation of a Convention right before the German Federal Constitutional Court by arguing that, in the interpretation of a fundamental right, the jurisprudence of the ECtHR relevant to the coinciding Convention right was disregarded. Such disregard would amount to a breach of the rule-of-law principle enshrined in Article 20 III of the German Constitution.⁵⁹ So the German court created a way of itself reviewing the interpretation and application of Convention rights; 'the Federal Constitutional Court'—as the court puts it in *Görgülü*—'is indirectly in the service of enforcing international law',⁶⁰ thereby 'promoting a joint European development of fundamental rights (*gemeineuropäische Grundrechtsentwicklung*)'.⁶¹

But while the German court emphasises the German Constitution's friendliness to international law, it also attaches a sovereignty-oriented reservation: 'The Basic Law'—as the court says—'. . . does not waive the sovereignty contained in the last instance in the German constitution'⁶² and it 'does not seek a submission to non-

⁵² *ibid.*, para 32.

⁵³ *ibid.*, para 32.

⁵⁴ *ibid.*, para 33 ('Gebot der Völkerrechtsoffenheit und Völkerrechtsfreundlichkeit').

⁵⁵ *ibid.*, para 32.

⁵⁶ *ibid.*

⁵⁷ *ibid.*, para 38.

⁵⁸ *ibid.*, para 46.

⁵⁹ *ibid.*, para 53.

⁶⁰ *ibid.*, para 61.

⁶¹ *ibid.*, para 62.

⁶² *ibid.*, para 35.

German acts of sovereignty that is removed from every constitutional limit and control'.⁶³ The 'friendliness to international law' can take effect only within the—albeit very broad—framework of the democratic and constitutional system of the Basic Law as higher law (a theme to which we return in the discussion of the *Lisbon* decision).⁶⁴

An important practical consequence of this constitutional reservation lies in its 'shielding-effect' of excluding the enforcement of an ECtHR decision 'in a schematic way'.⁶⁵ Individual application proceedings under Article 34 of the ECHR before the ECtHR are intended to decide specific individual cases in the bi-polar, two-party relationship between the complainant and the state party. But, in particular in private law cases, courts have to structure multipolar fundamental rights situations—for example, the interests involved in *Görgülü* were those of the foster parents, the child and the natural father. In such constellations, it is the task of the domestic courts to integrate a decision of the ECtHR into the relevant legal area of the national legal system with its own groups of cases and graduated legal consequences.⁶⁶ And it is in such constellations that to apply 'schematically' an ECtHR decision could lead to a breach of domestic constitutional norms.

Yet even in multipolar fundamental rights situations, German courts must give precedence to interpretation in accordance with the Convention.⁶⁷ But 'the Convention provision as interpreted by the ECtHR' must be supplemented with the fundamental rights of the party who may have 'lost' in the proceedings before the ECtHR and who 'was possibly not involved in the proceedings at the ECtHR'⁶⁸ in an overall process of balancing. In this process, domestic courts are under a duty—as the German court puts it—to 'take into account' the ECHR and the decisions by the ECtHR. So the ECtHR has to exercise judicial restraint—and this restraint resembles the restraint which the German Federal Constitutional Court has to observe *vis-à-vis* the interpretation of subconstitutional law which remains the prerogative of the ordinary courts. The German Federal Constitutional Court may intervene only in case of a fundamentally incorrect view of the significance of a German fundamental right; and, in a similar vein, the ECtHR is held to intervene only in order to correct a fundamentally incorrect view of the significance of a Convention right.

So the relationship between the three European legal systems—EU rights; Convention rights; domestic fundamental rights—is characterised less by hierarchy (or a contest between claims to hierarchy), than by an effort to achieve rule-of-law oriented coordination in an overall system with no final decider and no Archimedean point. Private litigation at the behest of aggrieved individuals sets in motion a process in which each court must explain its concerns, and its respective law, in terms that can be understood and shared across plural legal regimes. The tools of this inter-regime deliberative process are the reciprocal deployment of the *Solange* formula; the duty to 'take into account' the evolutive, dynamic interpretation of Convention rights; and the reciprocal stipulation of inter-regime reservations which keep open the door for respectful dissent and forces inter-regime transparency.

⁶³ *ibid.*, para 36.

⁶⁴ Cf below, at IIIC.

⁶⁵ *Görgülü*, *op cit* n 49 *supra*, Headnote 1 and para 50.

⁶⁶ *ibid.*, para 58.

⁶⁷ *ibid.*, para 62.

⁶⁸ *ibid.*, para 50.

C The Autonomy of the ‘Municipal’ Legal Order and the Primacy of the International Law

In this section, we address the place of the EU—understood as a ‘municipal’ legal order—in the international legal order. Just as the Member States ‘constitutionalise’ the EU by requiring it to respect fundamental rights, so the EU ‘constitutionalises’ the international legal order by requiring it to do the same. This second and more general process of ‘constitutionalisation’ is in some ways more complex than the first because the EU must pursue its autonomous interpretation of fundamental rights with due regard to a rich backdrop of existing international human rights standards, which deeply inform its own national traditions, and that (especially via the decisions of the ECtHR) of the ECJ.

a) The ECJ and the UN

In *Van Gend en Loos*,⁶⁹ the court characterised the Community legal order as a ‘new legal order of international law’. But very soon the court abandoned the international law qualification and emphasised the autonomy of the Community legal system *vis-à-vis* international law.⁷⁰ Despite the treaty-basis of Community law, the EU conceived itself as a ‘community based on the rule of law’,⁷¹ more akin to domestic or municipal law, of a federal type, than to public international law.⁷² As a result, the question arises as to what extent the ECJ should recognise the ‘domestic’ effects of international law, and what are those effects.

The dilemma which the court faces is exemplified in the recent *Kadi* judgment of the Grand Chamber of the ECJ. At issue in the *Kadi* and *Barakaat* judgments were Community regulations freezing the assets of suspected supporters of terrorism. Those Community regulations implemented Common Foreign and Security Policy (CFSP)—common positions of the Council of the EU—which, in turn, implemented UN resolutions adopted by the UN’s Security Council. The Security Council had also established a Sanctions Committee, responsible for ensuring that states implement the measures imposed by the UN Resolutions; and this Sanctions Committee had published a list of the entities and persons whose funds were to be frozen. The European Community simply copied that list. Yusuf and Kadi challenged the resulting regulations as violating their fundamental rights—in particular, the right to be heard, the right to effective judicial protection and the right to property. The dilemma, then, was that the court could either stress the primacy of resolutions made under Chapter VII of the UN Charter in international law and allow for only very limited judicial review on the basis of fundamental rights, or the court could emphasise the relevant internal constitutional framework based on judicial review and the importance of fundamental rights, but at the risk of undermining its obligations under the UN Charter.

The Court of First Instance—in a judgment which was subsequently set aside by the Grand Chamber of the ECJ—gave primacy to the obligation of the EU Member States to respect obligations arising under the Charter of the United Nations, and refused to

⁶⁹ *Algemene Transport-en Expeditie Onderneming van Gend en Loos NV v Nederlandse Belastingadministratie* [1963] ECR 1.

⁷⁰ Joined Cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, 3 September 2008, para 282.

⁷¹ Case 294/83, *Les Verts v Parliament*, 23 April 1986.

⁷² P. Eeckhout, ‘EU External Relations Law’, in Arnulf *et al*, *op cit* n 19 *supra*, at 329.

review the transposition of the Security Council list. To reach this result, the Court of First Instance had to argue that, although the EU itself is not a member of the UN, the Community may not infringe the obligations imposed on its Member States by the UN Charter. Review by the Court of First Instance of the Community's terrorism regulations would amount to an indirect review of the lawfulness of the UN resolutions in the light of fundamental rights protected by Community law, and this would be impermissible because 'determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts, subject only to the inherent right of individual or collective self-defense mentioned in Article 51 of the Charter'.⁷³

The Court of First Instance accordingly declared that it will undertake indirect judicial review only when that review is 'highly exceptionally' and 'extend[s] to determining whether the superior rules of international law falling within the ambit of jus cogens have been observed'.⁷⁴ But the Court of First Instance considered that resolutions of the Security Council and decisions by the Sanctions Committee did not authorise Community institutions to provide, at the time of implementation, for 'any Community mechanism whatsoever for the examination or re-examination of individual situations'.⁷⁵ The Court's Grand Chamber, by contrast, annulled the EC regulation in question and considered that obligations imposed by an international agreement cannot have the effect of setting aside the EU's own constitutional norms on the protection of fundamental rights (as reaffirmed in the court's *Schmidberger* jurisprudence).

First, while acknowledging that UN resolutions under the UN Charter do have primacy in international law, the court found that the Charter:

does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Member States of the United Nations a free choice among various possible models for transposition of these resolutions into their domestic legal order.⁷⁶

Given this element of choice, the court concluded that primacy itself does not rule out judicial review of the contested EC regulation in the light of fundamental freedoms and does not authorise any derogation from the foundational constitutional principles enshrined in Article 6 (1) EU—principles of liberty, democracy and respect for human rights and fundamental freedoms. So, while, in terms of a constitutional hierarchy of norms within Community law, Security Council Resolutions do possess primacy over secondary (ie statutory) Community law, this primacy does not extend to primary ('higher') Community law—ie 'to the general principles of which fundamental rights form part'.⁷⁷ Thus, UN resolutions do not legitimate exceptions to the principle that all EU and EC acts need to comply with fundamental rights. To treat them as though they did would constitute an—undue—form of deference of law to politics.

⁷³ *op cit* n 70 *supra*, para 210.

⁷⁴ *ibid*, para 231.

⁷⁵ *ibid*, para 258 (Kadi), para 328 (Yusuf).

⁷⁶ *ibid*, para 298.

⁷⁷ *ibid*, para 308.

Second, while the court emphasised the role of choice in the transposition of UN resolutions, it firmly rejected the argument—on which, in part, the Court of First Instance decision turned—that the ECJ must forgo judicial review of the EC regulation because fundamental rights are adequately protected at the UN level through the procedures available before the Sanctions Committee. The court insisted, on the contrary, that ‘the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto’.⁷⁸ (par. 323).

So the ECJ must ‘ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law’.⁷⁹ A non-judicial, merely intergovernmental, procedure, at the UN level, cannot guarantee the efficacy of fundamental rights and therefore cannot induce the ECJ not to assert its own jurisdiction. The principle of effective judicial protection, as the Grand Chamber stresses, is a general principle of law with roots in the constitutional traditions common to the Member States of the EU and in Articles 6 and 13 of the ECHR. These principles give rise to an obligation of the Community authorities to enable the addressee of terrorism-related sanctions to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in applying to the Community judicature.⁸⁰

Critics of the Grand Chamber decision accuse the ECJ of having decided the case exclusively by reference to internal ‘municipal’ or parochial constitutional precepts and, ultimately, of being inconsequential: for the ECJ would not possibly accept the same treatment from the Member State constitutional courts when dealing with a challenge to the constitutionality of a Community measure.⁸¹ They warn against the mistake of ‘reading into the decision’ something which they say cannot be found there—a *Solange*-style dialogic element. Defenders of the decision, who have in our view the more compelling position, reply that the fundamental rights norms considered by the court are norms which are widely shared among the 27 EU Member States; are supported by the ECHR; and are similar to the values which the UN itself seeks to promote and enforce and which are enshrined in the UN human rights instruments such as the International Covenant on Civil and Political Rights. They see the decision as an incentive for the further development of, rather than as a retreat from, international law. They analogise it, correctly in our view, to *Solange I*: as long as the UN does not itself guarantee effective judicial protection, the ECJ will enforce European human rights norms.⁸² As Eeckhout persuasively argues:

The main lesson which international law needs to draw from the *Kadi* judgment is that, since it increasingly affects, in ever more direct ways, the position of individuals, it needs to develop much better mechanisms for the protection of individual rights. If such better protection had been afforded in *Kadi*,

⁷⁸ *ibid*, para 323.

⁷⁹ *ibid*, para 326.

⁸⁰ *ibid*, para 337.

⁸¹ J. Weiler, ‘Editorial’, (2009) 19(5) *European Journal of International Law* 1 (on *Kadi*); G. de Burca, *The European Court of Justice and the International Legal Order after Kadi*, Jean Monnet Working Paper No 01/09. But even these critics of the reasoning in *Kadi* agree with the outcome, and for this reason we regard this case as less contested or controversial than those treated in part III.

⁸² P. Eeckhout, ‘Kadi and Al Barakaat: Luxembourg is not Texas—or Washington’, *EJIL Analysis* (25 February 2009).

I am convinced that the court would have been much more inclined to defer to the Resolution. In fact, the court intimated that a kind of *Solange* approach towards international law is not excluded . . . And there would have been no need to engage with the argument if no *Solange* approach were conceivable.⁸³

b) *The ECJ and the ECtHR: Autonomy, but Compatibility*

The ECJ expressly stated that when interpreting the scope, in the Community legal order, of a fundamental right guaranteed under the ECHR, it must ‘take into account’⁸⁴ or ‘take into consideration’⁸⁵ the case-law of the ECtHR. This formula strikingly echoes the approach adopted by the BVG with regard to the ECtHR on the status of Convention law within domestic German law in the *Görgülü* case.

The Grand Chamber decision in *Elgafaji* concerned the Common European Asylum System established by Council Directive 2004/83/EC and the question of the eligibility for ‘subsidiary protection status’ under that Directive. Mr and Mrs Elgafaji—both Iraqi citizens—had applied for temporary residence permits in the Netherlands, arguing that they would be exposed to real risk, if they were expelled to Iraq. In support of this claim, they pointed out that Mr Elgafaji—a Shiite Muslim—had worked between 2004 and 2006 for a British firm providing security for personnel transport between the airport and the ‘green’ zone and that his uncle, employed by the same firm, had been killed by militia following a terrorist act. A short time later, a letter threatening ‘death to collaborators’ was fixed to the door of the residence which Mr Elgafaji shared with his wife, a Sunni Muslim.

Yet the Dutch authorities refused to grant temporary residence permits, arguing that Mr and Mrs Elgafaji had not established the real risk, in their individual circumstances, of a serious and individual threat to which they claimed they were exposed in their country of origin. According to Article 2(e) of the Directive, a person who does not qualify as a refugee, but ‘would face a real risk of suffering serious harm’ in her country of origin, is ‘eligible for subsidiary protection’. In Article 15, the Directive defines ‘serious harm’ by reference to ‘death penalty or execution’ (a); to ‘torture or inhuman or degrading treatment or punishment’ (b); or to a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or national armed conflict’ (c). But recital 26 in the Directive’s Preamble limits the reach of these qualifying circumstances in stating that ‘[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm’.

In response to the reference by the Dutch appeals court, the ECJ’s Grand Chamber held that the existence of a ‘serious and individual threat’ can exceptionally be considered to be established already in situations in which a person may be exposed to a risk by reason of a general background of indiscriminate violence characterising the armed conflict. So no evidence is required, in those ‘exceptional’ situations (as opposed to situations denoted by ‘normally’ in recital 26), that the applicant is specifically targeted by reasons of factors particular to his personal circumstances.

But the court did not infer that answer from Article 3 of the ECHR, which provides that no one shall be subjected to torture or inhuman or degrading treatment or punishment, nor from the case-law of the ECtHR, which had provided a very similar

⁸³ *ibid.* For a related discussion, cf P. Eeckhout, ‘A Panorama of Two Decades of EU External Relations Law’, in Arnulf *et al*, *op cit* n 19 *supra*, at 323–337.

⁸⁴ ECJ Case C-310/04, *Commission v SLG Carbon* [2006] ECR I-5915, para 43.

⁸⁵ ECJ Case C-465/07, *Elgafaji and another v Staatssecretaris van Justitie*, judgment (Grand Chamber) of 17 February 2009, para 28.

solution to the problem.⁸⁶ Rather, the court gave an independent interpretation to Community provisions, announcing that:

while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.⁸⁷

The court added that its interpretation of Article 15(c) of the Directive ‘is fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR’.⁸⁸

The decision emphasises the autonomy of the Community law system, while at the same time it acknowledges the requirement of compatibility with the ECHR as a constraint under which independent interpretation operates. Independence works in two ways: it ensures that Community courts do not determine the meaning of Article 3 of the ECHR which prevails (non-interference with the domain of the ECHR);⁸⁹ and it provides Community courts with a margin to interpret human rights principles against the comprehensive background of the Community legal order and to accommodate shared principles to the specific requirements and goals of that order (autonomy of EC law).

III Borderline Cases in the Light of the *Solange* Jurisprudence

The ECJ’s extension of balancing to fundamental rights, in the context of a general and widely noticed increase in the scope and significance of international rule making—including both ‘global administrative law’ and international human rights law—has re-animated three, closely related anxieties about the intervention of foreign judges in municipal domestic law. While all three are marked by their origin in the ambit of the EU, they represent general concerns that will inevitably be provoked by the emergence of anything resembling the coordinate constitutionalism, based on mutual, contingent claims to competence, of the kind described here. One is the fear that balancing is simply the Trojan Horse by which the economic freedoms sap the vitality of social rights from within.⁹⁰ Münch, for instance, describes the jurisprudence of the ECJ as ‘more appropriate for the market citizen of liberalism than for the political citizen of republicanism or for the social citizen of welfare states in the social democratic or conservative sense’.⁹¹ The ECJ’s decisions in *Laval* and daughter cases attempting to

⁸⁶ The ECJ refers to, but does not discuss, the ECtHR’s decision in *NA v The United Kingdom* from 17 July 2008, in particular, its para 115–117.

⁸⁷ *op cit* n 85 *supra*, para 28.

⁸⁸ *ibid*, para 44.

⁸⁹ To a similar effect, see the Opinion by Advocate General Maduro, at paras 19 and 20.

⁹⁰ By implication advocates of this line of argument hold that certain—for example ‘social’—rights are to be asserted unconditionally, without regard to their relation and possible conflict with other rights. The view is perhaps best understood as an expression of the neo-corporatist idea that the ‘social’ domain—including collective bargaining and social welfare—should make its own, separate law, for instance through collective bargaining or ‘social dialogue’.

⁹¹ R. Münch, ‘Constructing a European Society by Jurisdiction’, (2008) 14(5) *European Law Journal* 519.

reconcile freedom of establishment with the right to collective bargaining have been the focal point for this objection. A second concern, the mirror image of the first, is that balancing will clear the way for a vast extension of social and economic rights by judicial fiat, in plain disregard of the legitimacy requirements of democratic process. The ECJ's decision in *Mangold*, finding a right to protection against old-age discrimination that antedates positive legislation addressed to the matter, has become the focal point for this concern. The third concern is that whether, by interfering too much in the protection of economic freedoms, or too much in the protection of social and economic rights, alien courts such as the ECJ, as viewed from the Member States, are simply denying national communities the measure of control of their collective life chances inherent in the very idea of sovereignty. The BVG's recent *Lisbon* decision, holding that Germany's adhesion to the Lisbon constitutional treaty is lawful, but subject to certain reservations, is the most recent focal point of this concern. In this part we take up these borderline decisions to show that, in the first two, the *Solange* jurisprudence limits—and is seen by the Advocates General, who provide the most extensive and influential commentary on doctrine in use in the ECJ, as limiting—the extent to which judges can disregard national constitutional traditions, and EU procedures protecting them, to impose their own preferences either for economic freedom or for social and economic rights. With regard to the third concern—fear of the loss of sovereign fate control as expressed in the *Lisbon* decision—we show that even in giving voice to this persistent worry the BVG reaffirms its commitments to the *Solange* framework and thus acknowledges, by what it affirms and the inability to articulate an alternative, that there is, for now, no conceptually coherent way of going back, and that concerns of national of autonomy are likely to be addressed by refining the *Solange* jurisprudence rather than by abandoning it.

A *The Viking and Laval Line of Cases*

In *Viking*⁹² and its daughter cases, *Laval*,⁹³ *Rüffert*⁹⁴ and *Luxembourg*,⁹⁵ the general question was whether overriding public interests in the protection of workers and their right to collective action could be considered equivalent to fundamental rights in their potential to restrict Community freedoms, and, if so, whether the restrictions—to freedom of establishment in *Viking* and to freedom to provide services in *Laval*—were justified by the particulars of the disputes. In *Viking*, and to a lesser but sufficient extent *Laval*, we argue, the ECJ followed *Solange* principles, by affirming the need to balance clashing fundamental rights, delegating to national entities the responsibility for determining the balance appropriate in particular cases, and only intervening when the national authorities did not exercise the delegated authority. In *Rüffert* and *Luxembourg*, we argue, the question is closer, but there is a reasonable case to be made for the ECJ's interpretation of the legislative authority—the Posted Worker Directive—applicable to the disputes.

Viking owned a vessel that was running at a loss because of direct competition from Estonian vessels operating the same route and paying lower wages to its Estonian crew

⁹² ECJ, Case C-438/05, *Viking*, 11 December 2007.

⁹³ ECJ, Case C-341/05, *Laval*, 18 December 2007.

⁹⁴ ECJ Case C-346/06, *Rüffert*, 3 April 2008.

⁹⁵ ECJ Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg*, 19 June 2008.

than Viking was paying under the terms of a collective bargaining agreement with the Finnish Seamen's Union (FSU). Viking's response was to cut its costs by reflagging the vessel to Estonia. Fearing redundancies, FSU asked ITF, an international federation of transport workers' unions, to request all its affiliates to boycott negotiations with Viking. The aim was clearly to frustrate the firm's exercise of its Community right to freedom of establishment, inasmuch as the boycott would deny Viking the same treatment in the host Member State (Estonia) as that enjoyed by other economic operators established in that state. Viking applied to the court for an injunction against the boycott.

In its decision, the Grand Chamber of the ECJ extended the balancing framework established in *Schmidberger* to include the public interest in protection of worker rights, affirming that 'the right to take collective action, including the right to strike, must . . . be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the court ensures . . .'.⁹⁶

Referring explicitly to its ruling regarding limitations on the free movement of goods in *Schmidberger*, the court accordingly went on to point out that the protection of fundamental rights constitutes 'a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty . . .'.⁹⁷ Indeed, the Court stresses, in *Viking* and in the subsequent *Laval* case, that economic objectives and social objectives are to be considered as co-original: that the EU has 'not only an economic but also a social purpose' and that the free trade objectives must be 'balanced against the objectives pursued by social policy, which include . . . improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour'.⁹⁸

But, of course, balancing two rights excludes the unconditional vindication of either; so the application of the *Schmidberger* framework means that a public interest justification of collective action authorises what is necessary to achieve the objective pursued, but no more. In *Viking*, the court states this requirement, that means be proportionate to ends, this way: ' . . . as regards the collective action taken by FSU, even if that action could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat'.⁹⁹

The ECJ then instructs the referring domestic court to establish the relevant facts, retaining for itself the right to 'provide guidance'¹⁰⁰ regarding the normative 'constitutional' framework under which the balancing between free market objectives and 'policy in the social sphere' must take place.

In her critique of the court's decision in *Viking*, Catherine Barnard has argued that the very fact that the court insists on balancing between the social and the economic within the framework of proportionality means that the decision has put the 'social' on

⁹⁶ *Viking*, *op cit* n 92 *supra*, paras 44 and 47.

⁹⁷ *ibid*, para 45.

⁹⁸ *ibid*, para 79.

⁹⁹ *ibid*, para 81.

¹⁰⁰ *ibid*, para 85.

the backfoot.¹⁰¹ Once collective action is viewed as a ‘restriction’ of the right to establishment as a fundamental economic freedom, social interests have to defend themselves against the economic. The recognition of the right to strike as a fundamental social right has little more than rhetorical value, because the justifications put forward by the trade unions are subject to close scrutiny, unmitigated by references to ‘margin of appreciation’.¹⁰² But this criticism fails, because the right to strike is never absolute, but always subject to balancing and to a proportionality test—also within the domestic context. Recognition of the full spectrum of fundamental rights at the EU level entails the recognition that some rights will always ‘horizontally’ clash with others and that balancing is therefore inevitable. In *Schmidberger* and *Omega*, the court considered that the protection of fundamental rights is a legitimate interest that justifies a restriction of the obligations imposed by treaty-based economic freedoms. The right to collective action to protect host country workers from social dumping is recognised as an imperative reason of general interest that can justify a restriction of economic freedoms. According to the framework established in *Schmidberger* and *Omega*, wherever possible, the court should defer to domestic courts in striking a balance and in the application of the proportionality test. This the court arguably did also in *Viking*. The important message in the above cases is not that social interests have to defend themselves from the economic, but that the ECJ now takes the social into account when interpreting what were once stand-alone economic rights.¹⁰³ Indeed, subsequently, the court explicitly considers the dangers of ‘social dumping’ and considers the right to take collective action for the protection of workers against social dumping as an overriding reason of public interest.¹⁰⁴ Social rights, then, are not exceptions that need to be justified against a market-making rule; but fundamental freedoms and fundamental rights are principles that compete at the same normative level and must be reconciled with one another.

Whereas the landmark decision in *Viking* was about a direct, ‘horizontal’ clash between economic freedoms and fundamental social rights, the subsequent decisions in the cases *Laval* and *Rüffert*, which concern the posting of workers, turned on the interpretation of the Posted Workers Directive 96/71/EC and the related question whether the court in those decisions respected the legislative framework for balancing created by the Directive in the very same domain—working conditions—as in *Viking*. In *Rüffert*, the court clarified the conclusion already reached in *Laval* that a protection which is not ‘required’ in ways defined by the Directive cannot be justified under Article 49 EC on the grounds of worker protection. The import of its decision is thus unintelligible without consideration of the goals and structure of the Directive.

¹⁰¹ Cf C. Barnard, *Employment Rights, Free Movement Under the EC Treaty and the Services Directive*, Europa Institute Mitchell Working Paper Series 5/2008, at 14; see also C. Barnard, ‘Social Dumping or Dumping Socialism? Case Note on *Laval* and *Rüffert*’, (2008) 67 *Cambridge Law Journal* 262.

¹⁰² Cf Barnard, *ibid.*; S. Deakin, *Regulatory Competition after Laval*, available at <http://www.cbr.cam.ac.uk/pdf/WP364.pdf>; F. Scharpf, *The Only Solution is to Refuse to Comply with the ECJ Rulings*, available at http://www.boeckler.de/164_92433.html; see also 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(1) *European Law Journal* 1.; R. Rehbahn, *Grundrechte und Grundfreiheiten im Kollektiven Arbeitsrecht vor dem Hintergrund der neuen EuGH Rechtsprechung*, available at [http://www.etui.org/en/Headline-issues/Viking-Laval-Rueffert-Luxembourg/2-Articles-in-academic-literature-on-the-judgements/\(offset\)/45](http://www.etui.org/en/Headline-issues/Viking-Laval-Rueffert-Luxembourg/2-Articles-in-academic-literature-on-the-judgements/(offset)/45).

¹⁰³ On socio-economic rights within the domestic law context, see Tushnet, *op cit* n 50 *supra* (exploring the idea of how weaker forms of judicial review may actually allow for stronger social welfare rights).

¹⁰⁴ Recital 103.

The overall objective of the Directive is to strike a balance among three divergent policy goals: promotion of the free movement of services; protection of the workers in the host state from competition from workers from home states where labour costs and labour protection are lower; the protection of posted workers by improving their conditions of employment.¹⁰⁵ Its central provision is Article 3, which requires host states to extend their protections of certain working conditions to workers temporarily posted in their territory. To do this they must use a prescribed set of instruments (statutes, administrative rule, collective bargaining agreements), applied in ways that do not result in the creation of new barriers to trade. Thus Article 3(1) requires host states to apply to posted workers their own rules regarding matters such as maximum work periods, minimum rest periods, or minimum rates of pay, regardless of the law applicable to the employment relationship in the posted workers' home state. The crucial proviso is that those rules are set out in legislation or in some other form that is, in a relevant sense, applicable to host-state employees generally, and not aimed at 'protecting' posted workers in a way that actually protects domestic workers from exposure to foreign competitors.

What this requirement of generality exactly means was, predictably, controversial and is at the centre of the ECJ's *Rüffert* case. In *Rüffert*, the referring German court asked the ECJ whether the treaty's rules on free service delivery (Article 49 EC) precluded provisions of a statute—the Public Procurement Act of Lower Saxony—requiring contractors to agree to pay workers deployed on the contract a minimum level of pay. Contractors had to agree to impose a similar obligation on sub-contractors, and one of the enforcement mechanisms was the imposition of a 'contractual penalty' (a 'Vertragsstrafklausel') of up to 10% of the contract's value in the case of 'culpable breach' of the provision. Minimum wages are, indeed, listed in Article 3(1). But the court decided that those statutory provisions were in fact precluded by Article 3(1) because the relevant collective agreement had not been extended properly.

Davies¹⁰⁶ provides the necessary background: Germany did have an extension system, and its minimum-wage agreement for the construction industry—the TV Mindestlohn—had in fact been extended to all employers for the relevant region by the 'Arbeitnehmerentsendegesetz'—a federal statute which seeks to transpose Directive 96/71 into domestic law. In *Rüffert*, the contract between Lower Saxony and the building company (for the building of a prison) contained a declaration regarding compliance with the collective agreements, and, specifically, with the minimum-wage provision of the 'Buildings and public works collective agreement'.¹⁰⁷ The difficulty was—as Lower Saxony later confirmed in response to a written question from the court—that the 'Buildings and public works agreement', unlike the TV Mindestlohn, had not been extended and declared universally applicable within the meaning of the *Arbeitnehmerentsendegesetz*.¹⁰⁸ Nor did the case-file—as the court observed—contain any evidence to support the conclusion that the 'Buildings and public works agreement' was nevertheless capable of being treated as universally applicable within the meaning of Article 3(1).¹⁰⁹ As a result, the binding effect of the 'Buildings and public works

¹⁰⁵ Cf Recital (5) of the Preamble.

¹⁰⁶ P. Davies, 'Case C-346/06, *Rüffert v Land Niedersachsen* [2008] IRLR 467 (ECJ)' (2008) 37(3) *Industrial Law Journal* 293.

¹⁰⁷ *Rüffert*, *op cit* n 94 *supra*, rec 10.

¹⁰⁸ *ibid*, rec 26.

¹⁰⁹ *ibid*, rec 26.

agreement' covered only a part of the construction sector falling within its geographical area. Yet, it required rates of pay well above those required by the TV Mindestlohn. Because the rate of pay had not been fixed according to the procedures laid down in Article 3(1), it could not be considered to constitute a minimum rate of pay within the meaning of Article 3(1).¹¹⁰

An additional issue was whether the statute of the Public Procurement Act could be rescued by Article 3(7) of the Directive, which says that the Directive does 'not prevent application of terms and conditions of employment which are more favorable to workers'. In his Opinion in *Rüffert*, Advocate General Bot had argued that this Directive does not stand in the way of an enhanced national protection of posted workers. In his view, Article 3(7) permits the eclipse of defined mandatory protective rules in force in the host state not only (as plainly intended) by the rules of the service provider's home state, if those rules are more favourable to the posted workers, but also by rules of the host state itself that do not meet the requirement of Article 3(1).¹¹¹ The court disagreed. Read narrowly, it argued, Article 3(7) does indeed allow superior home state rules to trump host state rules that are inferior for posted workers. But read very broadly, as Advocate General Bot proposed, the Article would eviscerate the limits on exclusionary forms of 'protection' set out in Article 3(1) and therefore frustrate a core purpose of the Directive: increasing cross-border provision of services—for otherwise Article 3(7) would render Article 3(1) meaningless.¹¹²

The subsequent case *Commission v Luxembourg* concerned the interpretation of Article 3(10) of Directive 96/10. Article 3(10) allows for exceptions to the restrictions set out in Article 3(1), provided that those exceptions are 'so crucial for the protection of the political, social, or economic order in the Member State concerned as to require compliance by all persons present on the national territory of that Member State and all legal relationships within that state'.¹¹³ The case turned on the question whether national labour law provisions by the Grand Duchy of Luxembourg could count as 'public-order legislation' or 'public policy exceptions' within the meaning of Article 3(10).¹¹⁴ In legislation transposing the Posted Workers Directive, the Grand Duchy invoked this exemption to justify the requirement that all workers posted to its territory by linked by a written contract of employment to their home country employer, and that all rates of remuneration, not only minimum wages of any form, be indexed to the cost of living, among others. The Grand Duchy contended that the imposition of those obligations were imperative to the national public interest, inasmuch as they were deemed to be indispensable to the maintenance of good labour relations in Luxembourg. The European Commission challenged that classification, arguing that the Grand Duchy had incorrectly transposed Article 3(1) and 3(10) into domestic law by

¹¹⁰ *ibid*, rec 31.

¹¹¹ *ibid*, rec 94.

¹¹² *ibid*, rec 33. A similar dispute, concerning, *inter alia*, a clause requiring an automatic adjustment of rates of remuneration to the costs of living under the law of the host state arose in *Luxembourg*, *op cit* n 95 *supra*. The Grand Duchy had argued that such a clause constituted a mandatory public policy imperative under Art 3(10) by protecting workers from the effects of inflation and thereby ensuring good labour relations in Luxembourg. But, in response, the court pointed out that Luxembourg had failed to provide evidence to what extent the application to workers posted in Luxembourg was capable of achieving those objectives: rec 53ff.

¹¹³ *Luxembourg*, *op cit* n 94 *supra*, rec 29, referring to ECJ Joined Cases C-369/96 and C-376/96, *Arblade and Others* [1999] ECR I-8453, rec 30.

¹¹⁴ *Luxembourg*, *ibid*, rec 29.

imposing obligations on home-country undertakings beyond those permitted by Directive 96/10.

The court agreed with the Commission. Referring to its *Omega* case, it pointed out that the notion of a public policy exemption must be interpreted strictly and cannot be determined unilaterally by each Member State, in particular when cited by a Member State as justification for a derogation from the fundamental principle of the freedom to provide services on which the Directive was based, and even if Member States were still, in principle, free to determine the requirements of public policy in the light of their national needs.¹¹⁵ Thus, the concept of public policy does allow Member States a margin of discretion within the limits imposed by the Treaty and by the Directive and monitored by the court. But Luxembourg was unable to meet its stringent burden of proof and to provide appropriate evidence to enable the necessity and proportionality of its measures which were likely to dissuade the exercise of freedom to provide services to be evaluated. So the burden of proof was on Luxembourg to show how the measures they refer to should count as public policy exemptions. Although the unions do not figure in that case, it is clear that the unions would prefer those measures and that labour relations are in some sense better, if the unions are happy. But the Grand Duchy only had cited in a general manner the objectives of protecting the purchasing power of workers and good labour relations without having established whether and to what extent the application to posted workers of a rule concerning automatic indexation is capable of achieving those objectives.¹¹⁶ The case *Commission v Luxembourg*, then, can be seen as yet another instance of a Member State—either on its own or in conjunction with trade unions—testing the limits of the margin of appreciation granted by the Posted Workers Directive. The outcome in each of the above cases depends not on a general—quasi-legislative—statement by the court as to how the multipolar conflict between freedom of services, protection of posted workers against social dumping and protection of host state workers against competition from home state workers should be resolved. Rather, the court offers a proceduralising and contextualising approach to the underlying fundamental conflict within the enlarged EU between the commitment to a liberal market economy and social policy commitments: the Court obligates the parties to the conflict, via the referring court, to do the balancing that is necessary here, thereby shifting the burdens of providing mutually acceptable justifications to the parties themselves.

Critics of the decisions particularly in *Laval* and *Rüffert* have objected to the alleged ‘lack of loyalty by the court with regard to the democratic process at European level’.¹¹⁷ The legislative intention in adopting Directive 96/71/EC, they argue, was to coordinate the statutory protection of posted workers, but not to interfere with national regulation of collective actions. The Preamble to the Directive explicitly states in recital 22—which is not discussed by the court—that the Directive ‘is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions’.¹¹⁸

¹¹⁵ *ibid*, rec 30ff.; 49ff. Cf also the Opinion of Advocate General Trstenjak, para 42.

¹¹⁶ *ibid*, rec 52ff.

¹¹⁷ J. Malmberg and T. Sigeman, ‘Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice’, (2008) 45 *Common Market Law Review* 1115, at 1145.

¹¹⁸ *ibid*; Joerges and Rödl, *op cit* n 102 *supra*; for further background, cf B. Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’ (2007) 13(3) *European Law Journal* 279. Moreover, critics accuse the court of establishing a state of affairs proposed by the Commission in the Bolkestein Directive on Services (Proposal COM (2004) 2 final); a proposal which was subsequently withdrawn in the

But read in the light of the foregoing observations, the outcome in *Laval* and *Rüffert* and *Commission v Luxembourg* does not appear to be an attack on the right to bargain collectively or on workers' rights more generally. In her nuanced assessment of the case-law, Advocate General Kokott comments:¹¹⁹

In this respect, I would like to emphasise one particular aspect to which many critics, who, for example, consider the *Laval* judgment an indicator of the demise of the right to strike, do not pay sufficient attention in my view. One should be aware of the fact that the Court of Justice, in the relevant judgments, ruled only on the particular question referred for a preliminary ruling . . . For example, in the *Laval* judgment it underlined the national context in which the collective measures were embedded . . . The court of Justice has not made a *general* statement on the relation between fundamental freedoms and fundamental rights. In particular, it has not found in its recent rulings in question that the right to strike or, worse, human dignity must in principle take second place to fundamental freedoms. Rather, fundamental freedoms and fundamental Community rights are at the same level and must be harmonised. By placing particular emphasis on the specific characteristics of the cases, the court of Justice, in my view, clearly shows its intention to diversify its rulings on the basis of the particularities of future proceedings referred for preliminary rulings.

The Swedish government, evidently interpreting the judgment on these lines, took steps to revise the national labour law model, which was already widely seen as troubled.¹²⁰ In 2008, the Employment Minister established the Laval Committee (Lavalutredningen) to propose changes in Swedish legislation in response to the *Laval* judgment. The Committee was charged with protecting the fundamental role of Swedish social partners in regulating pay and other terms and conditions in the labour market, but reconciling this protection with respect for predictability and transparency of collective bargaining contracts required by the ECJ in *Laval*. The Laval Committee found that it

democratic process leading to the final Services Directive 2006/123/EC. But the complex history of the Directive weighs against this reading and supports rather the argument that, in deciding not to follow Advocate General Bot, the court acted within the legislative framework and so remained faithful to the compromise achieved by the democratic process at the European level. In Davies' definitive account, the legislative history is the story of attempts to reconcile the desire to increase cross-border service with continued autonomy of domestic labour law. The labour-importing Member States had, in this situation, a strong hand because of the ECJ's *Rush* jurisprudence (*Rush Portuguesa* [1990] ECR I-1417), according to which Community law does not preclude Member States from extending their legislation, or collective labour agreements, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established. Nonetheless, providers and users of cross-border services in the construction industry and the European Commission allied to press for some restrictions on host-state discretion in this area, given the recognition of the need for at least a minimal harmonisation on the provision of services. The initial proposal by the Commission was to impose a time condition: the ECJ's *Rush* ruling would only apply to postings of more than three months; however, the Member States did not accept this policy. The eventual compromise was a directive which recognises the primacy of the law and collective agreements in the host country as the regulatory framework for the employment conditions of posted workers, but limits the measures having such primacy to a narrowly defined core of mandatory rules defined in Art 3.1. The exacting research undertaken by Menz on national response strategies for Europeanisation suggests that complex arrangements at the national level are widespread and that judicial vigilance with regard to those arrangements is legitimate: G. Menz, *Varieties of Capitalism and Europeanization. National Response Strategies to the Single European Market* (Oxford University Press, 2008).

¹¹⁹ See the website available at http://www.bmas.de/coremedia/generator/26986/2008_07_16_symposium_eugh_kokott.html.

¹²⁰ For an instructive overview, cf A. Davesne, 'The Laval Case and the Future of Labour Relations in Sweden', (2009) 1 *Les Cahiers Européens*. But see also for the Laval Committee, C. Stråth, *Action in Response to the Laval judgment*, Swedish Government Official Reports, Stockholm, December 2008, available at <http://www.sweden.gov.se/content/1/c6/11/77/22/fa71ed8c.pdf> and, as to the subsequent endorsement of the proposal by the government, <http://www.sweden.gov.se/sb/d/586/a/133290>.

was, indeed, 'possible to find a solution to the problems that arose through the *Laval* judgment within the Swedish labour market model'.¹²¹ This could be accomplished by mutual adjustment of foreign employers and domestic unions: the former would be asked to comply with Swedish collective agreements, while the latter would have to agree to more transparent wage-setting rules and limiting contractual terms to the core domain defined in Article 3(1) of the Posted Workers Directive. In the Committee's conception, the Swedish Work Environment Authority would act as a 'liaison office' for the contracting parties, with the aim of 'making it easier for foreign providers of services to find information and quite generally to enhance predictability regarding which terms and conditions of employment are to apply upon a posting to Sweden'.¹²² Hence, the formal Swedish response to the *Laval* judgment so far is to delegate the task of striking a fair and context-sensitive balance between fundamental freedoms and fundamental Community rights to the social partners themselves, assisted and monitored by the liaison office acting on behalf of the state and through it the EU.

B *Mangold*

The *Mangold* case¹²³ concerned the question whether old-age discrimination is a general principle of Community law. Mr Mangold, then 56 years old, concluded with Mr Helm, a practising lawyer, a fixed-term employment contract. The duration of the contract was based on the statutory provision of the German Article 14(3) TzBfG, which is intended to make it easier to conclude fixed-term contracts with older workers, defined as those aged 52 or more years, by permitting conclusion of a fixed-term employment contract without having to provide a justification for this limitation.¹²⁴ The parties had agreed that there was no reason for the fixed term of this contract other than that set out in Article 14(3) above; all other grounds for limiting the term of employment accepted in principle by the legislature were expressly excluded from this agreement. Indeed, the parties to the conflict—both lawyers—had deliberately sought for a way for having Article 14(3) TzBfG declared incompatible with EC law; so the legal dispute was, in this sense, artificial. According to Mr Mangold, the limitation of his contract was, although in keeping with Article 14(3) of the TzBfG, incompatible with the Framework Agreement, which aims at improving the quality of fixed-term work by ensuring the application of the principle of non-discrimination and at preventing the abuse arising from the use of successive fixed-term contracts, and with Directive 2000/78. Mr Helm, by contrast, took the view that clause 5(1)(a) of the Framework Agreement, which allows Member States to introduce anti-discrimination measures 'in a manner which takes account of the needs of specific sectors and/or categories of workers', permitted the use of fixed-term contracts in this case for older

¹²¹ Report, *ibid*, p 28.

¹²² *ibid*.

¹²³ ECJ, Case C-144/04, *Mangold v Helm*, 22 November 2005.

¹²⁴ Section 14(1) TzBfG permits the conclusion of fixed-term contracts if there are objective grounds for doing so, as enumerated in a list. Section 14(2) TzBfG permits the conclusion of up to three fixed-term employment contracts without objective justification for the first two years of employment with a specific employer ('new employment exception'). Section 14(3) TzBfG permits conclusion of a fixed-term employment contract without justification, if the worker has reached the age of 58 by the time the fixed-term contract begins; a threshold which was later lowered to the age of 52 for the period between 2003 and 2006. Section 14(3) also prohibits the transformation of an employment contract of unlimited duration into a fixed-term contract.

workers. The period prescribed for the implementation of Directive 2000/78/EC into domestic law had neither expired when the fixed-term employment contract was concluded nor when the decision was handed down.

The ECJ's central—and controversial—finding was that ‘the principle of non-discrimination on grounds of age must be . . . regarded as a general principle of Community law’.¹²⁵ Consequently, the ‘observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age’.¹²⁶ The Court stated that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation; rather, ‘the source of the actual principle underlying the prohibition of those forms of discrimination’ is to be found ‘as is clear from the [first] and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States’.¹²⁷ According to the Court, it is therefore:

the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide . . . the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law [and] to guarantee the full effectiveness of the general principle of non-discrimination in respect of age.¹²⁸

Mangold's critics have accused the court of a judicial usurpation of prerogatives that—given the policy conflict at stake between the policy of opening-up labour markets to older workers and the policy of implementing the principle of non-discrimination on grounds of age—belong, at least in part, to the EC and domestic legislators. They take issue with the impact of judicial law making on democratic choices and call for a greater degree of sensitivity to concerns of subsidiarity, democratic legitimacy and institutional balance.

Thus, Advocate General Geelhoed, in his Opinion in *Chacón Navas*, points to ‘potentially far-reaching consequences, economic and financial, which such prohibitions of discrimination may have in horizontal relationships among citizens and in vertical relationships between public authorities and interested citizens’¹²⁹ and which are best addressed by national legislators. The ECJ's contention that non-discrimination on grounds of age must be regarded as a general principle of EC law amounts to the ‘creation of an Archimedean position, from which the prohibitions of discrimination defined in Article 13 EC can be used as a lever to correct, without the intervention of the authors of the Treaty or the Community legislature, the decisions made by of the Member States in the exercise of the powers which they—still—retain’.¹³⁰ But the implementation of non-discrimination prohibitions entails ‘painful, if not tragic, choices when weighing up the interests in question, such as the rights of disabled or older workers versus the flexible operation of the labour market or an increase in the level of participation of older workers’;¹³¹ choices which are the domain

¹²⁵ *Mangold*, *op cit* n 123 *supra*, para 75.

¹²⁶ *ibid*, para 76.

¹²⁷ *ibid*, para 74.

¹²⁸ *ibid*, paras 77ff.

¹²⁹ Opinion of Advocate General Geelhoed, ECJ, Case C-13/95, *Chacón Navas*, rec 50.

¹³⁰ *ibid*, rec 54.

¹³¹ *ibid*, rec 55.

the legislator. In a similar vein, Advocate General Mazak argues considers it a ‘bold proposition and a significant move’¹³² and ‘far from compelling’,¹³³ to infer judicially, ‘solely from the general principle of equal treatment, the existence of a specific prohibition of discrimination on the ground of age’.¹³⁴ Advocate General Sharpston agrees with the ECJ in *Mangold* that ‘the origins of the principle . . . lie neither in Directive 2000/78 as an implementing directive, nor indeed in Article 13 EC as such. They must be found in a prior time and place’.¹³⁵ But she also points out that this does not render Article 13 EC nor Directive 2000/78 redundant and that ‘any argument to the effect that if a principle prohibiting discrimination on grounds of age had already existed, Article 13 EC or Directive 2000/78 would have been unnecessary is fundamentally misconceived’. It is, according to her, ‘precisely *because* the general principle of equality has now been recognised also to include equality of treatment irrespective of age that an enabling legislative provisions such as Article 13 EC becomes necessary and is duly used as basis of legislative intervention’.¹³⁶ Indeed, ‘[d]etailed legislation will be needed [in order to] to classify the application of particular criteria in particular circumstances as acceptable or unacceptable and to give binding legal effect to that classification’.¹³⁷

These compelling criticisms of *Mangold*, together with the ongoing discussion of the *Viking* and *Laval* cases, suggest two straightforward clarifications (or clarificatory reassertions) of the *Solange* principles. The first is that in affirming the validity of a basic right the reviewing court must defer to the greatest extent possible to the legislative and judicial decisions of the legal order it is reviewing. It is conceivable that the BVG, especially in the light of the *Lisbon* decision that we take up next, could take the occasion of its pending review of *Mangold* to articulate a *Solange III* doctrine, according to which it reserves the right to intervene not only when the ECJ ignores altogether consideration of fundamental rights, but also when the ECJ imposes its own interpretation of such rights in complete disregard of legitimate national diversity in their interpretation. The second, a close corollary of the first, is that reviewing courts may only impose their principled understanding of fundamental rights when, in the case before them, it is palpable that there is essentially no margin of appreciation because implementation of the right entails, exceptionally, policy choices that are *de minimis*, as in the question of issuing a new identity card or not in *Goodwin*.

C *Lisbon*

In its *Lisbon* decision,¹³⁸ the Second Senate of the BVG has in part reaffirmed, in part revised, and in part raised open-ended questions about its previous jurisprudence. The BVG was asked whether the Act Approving the Treaty of Lisbon was a breach of the right to vote, protected under Article 38.1 of the Basic Law, which is considered equivalent to a fundamental right and guarantees every citizen entitled to vote the right

¹³² *Mangold*, *op cit* n 123 *supra*, para 89.

¹³³ *ibid*, para 94.

¹³⁴ *ibid*, para 89.

¹³⁵ *ibid*, para 44.

¹³⁶ *ibid*, para 50.

¹³⁷ *ibid*, para 56. See also D. Schiek, ‘The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Legislation’, (2006) 35(3) *Industrial Law Journal* 329.

¹³⁸ BVerfG, 2 BvE 2/08 vom 30 June 2009, English version available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

to elect the Members of the German parliament. The BVG found that the Act was compatible with the requirements of the Basic Law, in particular with the principle of democracy,¹³⁹ but also found that the rights of participation of the German Bundestag and the Bundesrat have not been elaborated to the required extent.¹⁴⁰

Against this backdrop, the BVG affirms more broadly the central tenets of its previous *Solange* jurisprudence, emphasising its commitment to European integration, paired with an insistence on a right to dissent from judgments from the ECJ in exceptional cases. The BVG acknowledges that both the Basic Law's openness towards European law and current European law:

demand, with the idea of a Union-wide legal community, the restriction of the exercise of the Member States' judicial power. No effects that endanger integration are intended to occur by the uniformity of the Community's legal order being called into question by different applicability decisions of courts in Member States. The Federal Constitutional court has put aside its general competence, which it had originally assumed, to review the execution of European Community law in Germany against the standard of the fundamental rights of the German constitution (see BVerfGE 37, 271 (283)), and it did so trusting in the Court of Justice of the European Communities performing this function accordingly. . . .¹⁴¹

The BVG casts itself in the role of the ECJ with regard to the UN Security Council in *Kadi*. There is, according to the BVG, 'no contradiction to the aim of openness to international law, if the legislature, exceptionally, does not comply with the law of international agreements—accepting, however, corresponding consequences in international relations—provided this is the only way in which a violation of fundamental principles of the constitution can be averted'¹⁴² and 'if exceptionally, and under special and narrow conditions, the Federal Constitutional Court declares European Union law inapplicable in Germany'.¹⁴³ The BVG suggests a non-hierarchical relationship between itself and the ECJ, explaining:

The Court of Justice of the European Communities based its decision of 3 September 2008 in the Case of *Kadi* on a similar view according to which an objection to the claim of validity of a United Nations Security Council Resolution may be expressed citing fundamental legal principles of the Community (ECJ, Joined Cases C-402/05 P and C-415/05 P, EuR 2009, p. 80 (100 et seq.)). The Court of Justice has thus, in a borderline case, placed the assertion of its own identity as a legal community above the commitment that it otherwise respects. Such a legal figure is not only familiar in international legal relations as reference to the *ordre public* as the boundary of commitment under a treaty; it also corresponds, at any rate if it is used in a constructive manner, to the idea of contexts of political order which are not structured according to a strict hierarchy. Factually at any rate, it is no contradiction to the objective of openness towards European law, ie to the participation of the Federal Republic of Germany in the realisation of a united Europe (Preamble, Article 23.1 sentence 1 of the Basic Law), if exceptionally, and under special and narrow conditions, the Federal Constitutional Court declares European Union law inapplicable in Germany.¹⁴⁴

The open-ended questions concern the evolution of the EU with regard to the Federal Republic and whether the EU will take on the form of a federal state, and, if not, how the BVG will defend the identity of the German Constitution in the face of continued expansion of EU powers outside the nation state and where it is inconsistent with the categories of the traditional nation state. The BVG recognises two legitimate outcomes:

¹³⁹ *ibid.*, para 274.

¹⁴⁰ *ibid.*, para 406.

¹⁴¹ *ibid.*, para 337.

¹⁴² *ibid.*, para 340.

¹⁴³ *ibid.*, para 340.

¹⁴⁴ *ibid.*, para 340.

either the EU becomes a fully fledged federal state (Bundesstaat), with a demos that directly elects an executive and a fully competent European Parliament, or the EU remains an association of states (Staatenverbund), where the Member States remain ‘fully democratically organised’;¹⁴⁵ retain the ‘responsibility for integration’;¹⁴⁶ and with it the right to ‘withdrawal from the European union of integration (*Integrationsverband*)’,¹⁴⁷ without thereby becoming guilty of ‘a secession from a state union (*Staatsverband*)’.¹⁴⁸ The list of areas where the BVG sees the possibility of an extension of EU powers which would impermissibly encroach on domestic prerogatives of sovereignty is long. The policy domains which are ‘sensitive’ for domestic democracy are those:

which shape the citizens’ circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament. Essential areas of democratic formative action comprise, *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology.¹⁴⁹

But it is hard to know what to make of those reservations given the commitment to *Europarechtsfreundlichkeit* and the repeated emphasis that dissent is presumed to be a rarity. The most natural way to reconcile the development of the EU and the integrity and prerogatives of democratic self-determination is the *Solange II* jurisprudence. The EU has broad commitments to general principles of law, within which the Member States retain significant autonomy in interpreting and implementing the overarching commitment. The preceding discussion of *Viking*, *Laval* and *Mangold* suggests that a clarification of the spheres of responsibility is underway.

IV Constitutionalising an Overlapping Consensus and the Unity of the Legal Order

The EU is a ‘community based on the rule of law’ more than any other contemporary international organisation; yet authority in the European and international constitutional system involves no formal super- or subordination of legal sources and remains horizontal in character. In this section we argue that the interrelation between the plural legal orders can be characterised by an analogy to a Rawlsian overlapping consensus.

¹⁴⁵ *ibid.*, para 298.

¹⁴⁶ *ibid.*, para 236.

¹⁴⁷ *ibid.*, para 233.

¹⁴⁸ *ibid.*, para 233.

¹⁴⁹ *ibid.*, para 249. As the BVG summarises, the reserved domains are ‘decisions on substantive and formal criminal law (1), on the disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior (2), the fundamental fiscal decisions on public revenue and public expenditure, with the latter being particularly motivated, *inter alia*, by social-policy considerations (3), decisions on the shaping of circumstances of life in a social state (4) and decisions which are of particular importance culturally, for instance as regards family law, the school and education system and dealing with religious communities (5)’.

For present purposes, a Rawlsian overlapping consensus has two essential features. 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. Because it is itself a freestanding moral conception, an overlapping consensus creates bonds different from those created by a mere *modus vivendi* or compromise contingent on a fortuitous balance of forces. ‘Since’—as Rawls explains—‘different premises may lead to the same conclusions, we simply suppose that the essential elements of the political conception, its principles, standards, ideals, are theorems, as it were, at which comprehensive doctrines in the consensus intersect or converge’.¹⁵⁰

But second, and crucially, an overlapping consensus arises 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. Rawls distinguishes three stages in that interaction. First, certain liberal principles come to be accepted in much the same way as the principle of toleration came to be a *modus vivendi* following the Reformation: as the only workable alternative to endless and destructive civil strife. Establishing these guarantees puts them beyond the calculus of interests and entrenches them as boundary conditions on political contest.¹⁵¹ At this stage, the connection between the principles of justice and the various comprehensive views is loose; there is slippage. Should there be recognition of incompatibility between the principles and the wider doctrines, then it may be the doctrines that are revised in light of the principles rather than the reverse.¹⁵² In the second stage, there is, as part of an emerging constitutional consensus, agreement on the kind of public reason—the kinds of reasons acceptable in arguments—that applying liberal principles of justice involves.¹⁵³ The third stage results directly from the success of the first two, as the operation of the basic political institutions and the public use of reason reinforce each other, and, in turn, encourage the cooperative virtues of social life. Procedurally, the focus of an overlapping consensus is ‘a class of liberal conceptions that vary within a certain more or less narrow range’¹⁵⁴ and ‘compete with one another’.¹⁵⁵ Its substance are measures required ‘to assure that the basic needs of all citizens can be met so that they can take part in political and social life’.¹⁵⁶

This three-step procedure exactly mirrors the development of the EU. The EU itself was a product of historical contingencies—a response to the horrors of the past and, concomitantly, to the insight that the European nation states could not solve political and economic problems on their own. Certain areas of decision making—initially associated with the idea of a *Wirtschaftsverfassung*—were taken off the agenda of exclusively domestic decision making and established as European supranational norms with primacy over domestic law. At the same time, however, primacy encourages the cooperative virtues of public life and the ECJ recognised the important part played by principles which have emerged to qualify the strict application of market-making rules and which are fundamentally different from these rules in their scope and effect.

¹⁵⁰ J. Rawls, ‘The Idea of an Overlapping Consensus’, (1987) 7(1) *Oxford Journal of Legal Studies* 1, at 9.

¹⁵¹ Rawls, *Political Liberalism* (Columbia University Press, 1993), at 159ff and 161.

¹⁵² *ibid.*, at 160.

¹⁵³ *ibid.*, at 162.

¹⁵⁴ *ibid.*, at 164.

¹⁵⁵ Rawls, *op cit* n 150 *supra*, at 7; Rawls, *op cit* n 151 *supra*, at xlviii.

¹⁵⁶ Rawls, *op cit* n 151 *supra*, at 166.

The *Solange* jurisprudence can thus be seen as a device for institutionalising an overlapping consensus: for giving judicial recognition and form to the historical process, and transforming the latter, incipiently, into a kind of (coordinate) constitutionisation of national and transnational legal orders. *Solange I* was a catalyst for the ECJ to make explicit the shared values or commitments in the constitutional traditions of the Member States. *Solange II*, in turn, acknowledges the freestanding character of the ECJ's development of shared fundamental principles. Reverse *Solange II* indicates the continuing acceptance from the standpoint of a freestanding conception of legitimate diversity at the nation state level. Each coordinate court establishes the frameworks within which the others of the same (linked) constitutional order resolve cases. Courts reconsider these frameworks in accordance with the decisions arising under them. The autonomy which they grant each other is referred to in the language of the ECtHR as the margin of appreciation. The symmetrical criticism of judicial overreaching in *Mangold* and *Laval* underscores that the courts must limit themselves to mutual framework setting, unless the domestic act or decision under review lies outside the range of reasonable conceptions, such as in the ECtHR's landmark *Goodwin* case, where the court had to safeguard an individual right, and the policy choices relevant to protecting that right were *de minimis*.¹⁵⁷ More generally, the *Solange* jurisprudence is itself the first and best example of this framework jurisprudence—it is a master framework for creating other frameworks and with them the necessity and methods for establishing mutual regard of constitutional traditions. *Solange* establishes a freestanding substantive and procedural commitment to the EU overlapping consensus. It is therefore unsurprising that, despite its genesis in a national context, it operates as a thoroughly denationalised body of constitutional precedent.¹⁵⁸ More exactly, by creating a framework for mutual monitoring, it creates a de-nationalised precedent for

¹⁵⁷ As L. Wildhaber, former president of the ECHR, points out at http://www.echr.coe.int/NR/rdonlyres/2738F4D8-C03C-4E94-BF6E-CD8E83D9C6DC/0/2004_Johannesburg_Constitutional_Court.pdf (footnotes omitted) with regard to margin of appreciation, 'Without going into details one could roughly summarise the gist of the court's case-law in this respect by saying that the larger the common ground in the law and practice of the Contracting States, the narrower the margin of appreciation will be for States that depart from the European consensus, whilst diversity in law and practice pleads in favour of a wider margin. One could hardly find a better illustration of this approach than in the court's caselaw on transsexualism, which has recently seen some quite interesting developments. In the *Cossey* judgment from 1986 against the United Kingdom, the court found that the nonrecognition for legal purposes of a post-operative transsexual's new sexual identity did not amount to a violation of Article 8 of the Convention, as the respondent State had not exceeded its margin of appreciation. Concerning the scope of this margin, the court noted that at that time there was little common ground among the Contracting States in this area and that, generally speaking, the law appeared to be in a transitional stage. Accordingly, this was an area in which Contracting Parties enjoyed a wide margin of appreciation. This approach was basically confirmed in a number of subsequent cases, all against the United Kingdom. Yet in the recent landmark judgment in the case of *Christine Goodwin v. the United Kingdom*, the Grand Chamber of the Court overturned the case-law on this issue and found a violation of Article 8, relying *inter alia* on the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals. Thus the respondent Government could no longer in the court's opinion claim that the matter fell within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right claimed by the applicant. In other words, comparative law considerations here had the effect of sizing down the margin of appreciation from the question *whether* to the question *how* gender reassignment was to be legally recognised'.

¹⁵⁸ On a related idea of a denationalisation, cf G. de Burca and O. Gerstenberg, 'The Denationalisation of Constitutional Law', (2006) 47(1) *Harvard International Law Journal* 243.

de-nationalising precedents, which, loosened from their moorings in national constitutional tradition, can become part of the overlapping consensus.

Table 1 summarises the doctrinal linkages of this structure.

Because this emergent constitutional order has no highest court or final decider, it can also be characterised as a polyarchy: each court reserves the right to assert its jurisdiction if it is convinced that there is a violation of shared principles. Decision making is horizontal rather than vertical, in the sense that adjudication by one court of the boundaries of shared fundamental principles is contingent on the acceptance of overall outcomes by the others. The commitment to principles shared by all and the possibility that other orders, if convinced that fundamental rights on their understanding are imperiled, will assert their jurisdiction, induce each court to consider its decisions in light of reasons acceptable to all the others. The periodic reconsideration of framing principles entailed by this continuing mutual regard makes the judicial polyarchy deliberative.

Observe an important parallel to polyarchy in the realm of public law regulation. In the public law regulatory architecture, framework goals (such as full employment, social inclusion, ‘good water status’, a unified energy grid) and measures for gauging their achievement are established by joint action of the Member States and EU institutions. Lower-level units (such as national ministries or regulatory authorities and the actors with whom they collaborate) have the freedom to advance these ends as they see fit. But in return for this autonomy, they must regularly report their performance and participate in a peer review comparing their results with those of others pursuing alternative means to the same general ends. Finally, the framework goals, performance measures and decision-making procedures themselves are periodically revised by the actors, including such new participants whose views come to be seen as required for full and fair deliberation.¹⁵⁹

From this vantage point, it is possible to take a fresh look at the current discussion about pluralism and constitutionalism in international law. We do this chiefly to clarify and situate our own argument, and without any pretense of doing full justice to the complexity of the others. Nonetheless, crude as they are, the distinctions we draw mark substantial differences in conceptualising the reconfigurations of national and international law manifest in the cases above.

Pluralists believe that different legal orders are wholly disjoint or fundamentally incommensurate. Only politics or the shared norms of professionalism¹⁶⁰ can achieve a mutual accommodation among them. Some of the most exigent versions of pluralism argue that that legal pluralism is an expression of law’s quintessential indeterminacy—for example, two (or, indeed, many) different orders might overlap with no one authorised to sort out which prevails.¹⁶¹ They point to the experience of conflicts, gaps, ambiguities in the legal fabric that cannot be definitely closed or reconciled by the canons of legal argument. Some pluralists argue that indeterminacy should be seen not as a defect or limitation but as an emancipatory sign of

¹⁵⁹ Sabel and Zeitlin, ‘Learning from Difference’, (2008) 14(3) *European Law Journal* 271.

¹⁶⁰ D. Kennedy, ‘One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream’, (2007) 31 *New York University Review of Law and Social Change* 641; but see D. Kennedy, emphasising the role of constructive interpretation or strategic ‘legal work’, in ‘A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation’, in *Legal Reasoning, Collected Essays* (The Davis Book Publishers, Co, 2008), 154–173, at 158.

¹⁶¹ *idem, op cit.*

Table 1. Doctrinal Linkages

No Deference		Deference	
<p><i>Solange I</i> Municipal legal order will assert its jurisdiction over international legal order until that order provides equivalent level of protection of constitutional essentials BVG, <i>Int'l Handelsgesellschaft</i>; ECJ, <i>Kadi</i></p>	<p><i>Solange II</i> Municipal legal order will only assert its jurisdiction over international legal order if that order systematically discontinues provision of equivalent level of protection of constitutional essentials. BVG, <i>Wünsche Handelsgesellschaft</i>; BVG, <i>Bananenmarktverordnung</i>; ECtHR, <i>Bosphorus</i></p>	<p>Reverse <i>Solange II</i> ECJ will only assert its jurisdiction over a national legal order if that national legal order pursues an objective which cannot be reconciled with any legitimate interpretation of Community law ECJ, <i>Schmidberger</i>, <i>Omega</i>, <i>Viking</i></p>	<p>Evaluate equivalence of broad domains of coordinate legal order 'wholesale review'</p>
<p>No Margin of Appreciation Court (ECtHR) will not defer to municipal order, if European consensus or if accepted humanitarian grounds for intervening (alternative conditions) ECtHR, <i>Goodwin</i></p>	<p>Margin of Appreciation Court (ECtHR) will defer to municipal legal order if there is no European consensus and if municipal order remains within a range of reasonable interpretations (cumulative conditions) ECtHR, <i>Vo</i></p>	<p>Reverse Margin of Appreciation Municipal order will seek independent interpretation of municipal standards, but with due regard to international human rights standards BVG, <i>Görgülü</i>; ECJ, <i>Elkafaji</i></p>	<p>Evaluate particular decisions of the coordinate legal order, particularly when these arguably infringe inviolable core rights of the individual 'retail review'</p>

professional freedom and openness to persuasion, precisely because we do not know what the law determines.

Constitutionalists, by contrast, recognise and discover a source of legitimacy that is higher than the individual states. The contrast is with classical international law as well-ordered anarchy. According to the classical Westphalian model, states used international law to regulate their international affairs, but the regulation of their own domestic affairs—their *domaine réservé*—knew no restrictions. A traditional constitutionalist model of international law, on the contrary, assumes a hierarchy of norms in which domestic or municipal norms can be reviewed against the higher law of constitutional principles.¹⁶² Judges take the treaties—negotiated and ratified by the states often as a matter of mere trade-off or compromise—at their word (though not by the letter of their text) and extend the meaning of its provisions far beyond what the drafters contemplated by applying common law methods of interpretation.

Contemporary constitutionalists, then, all assume the integrity of the legal order and of international community. But they differ significantly in conceptualising this integrity.

Kumm, for example, builds on Dworkin's work and proposes a principle of 'best fit' of EC law with the diverse orders of state law that operates as an argumentative constraint on the ECJ's creative role in developing the law.¹⁶³ Halberstam, in an approach inspired by US federalism, argues that there is no comprehensive hierarchy in the international legal order, but that the absence of hierarchy does not lead to chaos. Rather, it permits the emergence of an order of a new type, integrated by a 'spontaneous and decentralised mutual accommodation among various constitutional actors' and maximising the values of rights, voice, expertise.¹⁶⁴

Others, by contrast, take intermediate approaches which straddle constitutionalism and pluralism. One of these, defended by Habermas, is inspired by Kantian federalism.¹⁶⁵ Habermas proposes a graduated, three-tiered hierarchical system in which each tier is vested with powers corresponding to its resources of legitimacy. On this account, peacekeeping and human rights are vested at the supranational level of the UN. Decisions at this level are based not on shared reason but on 'negative affective responses to perceived acts of mass criminality'—a 'basis for judgment provided

¹⁶² P.-M. Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', (1998–1999) 31 *New York Journal of International Law and Politics* 791.

¹⁶³ M. Kumm, 'The Jurisprudence of Constitutional Conflict', (2005) 11(3) *European Law Journal* 262. He explains the principle of best fit as follows (at 286): '*The task of national courts is to construct an adequate relationship between the national and the European legal order on the basis of the best interpretation of the principles underlying them both. The right conflict rule or set of conflict rules for a national judge to adopt is the one that is best calculated to produce the best solutions to realise the ideals underlying legal practice in the European Union and its Member States.* Just as the constraints that judges face are not appropriately defined exclusively by reference to a rule of recognition, the resources that are available to guide their decision-making are not ultimately defined by an ultimate legal rule, but by legal practice seen as a whole. The relevant question is, therefore: what is the interpretation of the relationship between national constitutions and the EU constitution that *best fits and justifies legal practices in the European Union, seen as a whole?* Or alternatively: what makes national and European constitutional practice in Europe appear in its best light?'

¹⁶⁴ cf. B. Ackerman, 'The New Separation of Power', (2000) 113 *Harvard Law Review* 633, professional, democracy and protection of fundamental rights.

¹⁶⁵ For a most recent restatement and summary, see J. Habermas, 'The Constitutionalisation of International Law and the Legitimation Problems of a Constitution for World Society', (2008) 15(4) *Constellations* 444.

by common cultural dispositions' that is somehow 'slender but robust'.¹⁶⁶ Global economic policy is a matter of technical coordination conducted by ongoing negotiation as exemplified by the EU. Democratic legitimation is available only in the nation state.¹⁶⁷

Weiler, too, has taken an intermediate approach.¹⁶⁸ 'Constitutional tolerance' describes an informal ethos of mutual deference among distinct European polities, with different legal regimes and constitutional traditions. The doctrines of direct effect and supremacy subject:

the European peoples to the discipline of democracy even though the European polity is composed of distinct peoples. It is a remarkable instance of Constitutional Tolerance to accept to be bound by a decision not by 'my people' but by a majority among peoples which are precisely not mine—a people, if you wish, of 'others.' I compromise my self-determination in this fashion as an expression of this kind of internal—towards myself and external—towards others—tolerance.¹⁶⁹

Constitutional Tolerance thus resembles a demilitarised and spontaneous constitutional patriotism, and so emancipates the very notion of a constitution for the inevitable hubris of collective self-assertion as a distinctive polity.

With reference to these distinctions, the jurisprudence of mutual monitoring is clearly a constitutionalist approach. Against pluralism, it insists that the linkages which govern the coexistence of various legal orders are legal, not merely political or based on informal accommodation within a shared ethos of professionalism (as a meta-legal *grundnorm*).

Against the intermediate approaches, we argue that the spheres or tiers are in horizontal dialogue with each other. The ECJ's jurisprudence in *Kadi* stands for the idea that the same fundamental rights—Article 6(1) of the ECHR as a right of access to a court—apply across all the spheres and penetrate and transform them. Similarly, the ECJ's *Viking*, *Laval* and *Rüffert* cases have put the question of the efficacy of fundamental social rights within the transnational sphere of economic policy and technical coordination on the agenda. The idea of constitutional tolerance resonates with the idea of an overlapping consensus between legal orders by recognising the persistent difference of citizens living together in a constitutional regime, and the facts of interpretive disagreement. But whereas constitutional tolerance is a matter of disposition and ethos, the jurisprudence of the ECJ, of the ECtHR, and of national courts,

¹⁶⁶ Habermas, in his book *The Divided West* (Polity, 2006), at 143, writes: 'If the international community limits itself to securing peace and protecting human rights, the requisite solidarity among world citizens need not reach the level of the implicit consensus on thick political value-orientations that is necessary for the familiar kind of civic solidarity among fellow-nationals. Consonance in reactions of moral outrage toward egregious human rights violations and manifest acts of aggression is sufficient. Such agreement in negative affective responses to perceived acts of mass criminality suffices for integrating an abstract community of world citizens. The clear negative duties of a universalistic morality of justice—the duty not to engage in wars of aggression and not to commit crimes against humanity—ultimately constitute the standard for the verdicts of international courts and the political decisions of the world organisation. This basis for judgment provided by common cultural dispositions is slender but robust'.

¹⁶⁷ On one reading, Habermas' position can be understood as an extension to the global level beyond the state of his idea that deliberative democracy depends on a vigilant public sphere. Read from a different standpoint, his essay suggests an approximation to the Rawlsian view, which sees international organisations as a compliment to, and continuation of, an already existing contractarian framework.

¹⁶⁸ The following draws on J.H.H. Weiler, 'On the Power of the Word: Europe's Constitutional Iconography', (2005) 3 *International Journal of Constitutional Law* 173; 'A Constitution for Europe? Some Hard Choices', (2002) 40(4) *Journal of Common Market Studies* 563.

¹⁶⁹ Weiler, 'On the Power of the Word', *ibid.*, at 188. On constitutional patriotism generally, cf now J.-W. Müller, *Constitutional Patriotism* (Princeton University Press, 2006).

underlines the proceduralist dimension of constitutional legitimacy of persistent difference and asserts the need for mutual monitoring as an instrument of assuring conformity to common constitutional essentials even in revising them.¹⁷⁰

With regard to these distinctions, the *Solange* jurisprudence, and the ideas of overlapping consensus and of deliberative polyarchy, are a member of the constitutional family, but a distinct one. An overlapping consensus does not form a cohesive whole. Agreement on fundamentals supposes and is periodically re-examined and revised in the light of continuing disagreements about the correct application of fundamental principles.¹⁷¹ 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 or the maximisation of a combination of values such as voice, expertise and rights by which to harmonise all decision making.¹⁷²

Rather than search for the deep coherence of disparate orders, we have argued, the new jurisprudence focuses on the linkages by which they are robustly but not—because not—rigidly connected: the mutually contingent Kompetenz-kompetenz of legal orders. Courts monitor each others' regimes to safeguard core rights, while allowing for, and deliberatively responding to, variations in their application as anticipated by the margin-of-appreciation doctrine. By focusing on doctrinal-legal linkage via mutual monitoring, we have argued, courts in this way render operational an overlapping consensus between pluralistic legal orders. This quiet and apparently modest innovation—asserting jurisdiction while agreeing to defer conditionally to the jurisdiction of others—opens up the possibility of a constitutionally consequential globalisation of law—outside the state and without a global constitution.

¹⁷⁰ A view close to ours is Stone Sweet's account of constitutional pluralism. He proposes a perspective that considers the international system's pluralist and constitutionalist features simultaneously and thereby overcomes the dichotomy between pluralism and constitutionalism. But he develops his view from an external or behaviouralist perspective; see his 'Constitutionalism, Legal Pluralism, and International Regimes', (2009) 16 *Indiana Journal of Global Legal Studies* 621.

¹⁷¹ On the debate on reasonable disagreement in constitutional interpretation, see F. Michelman, 'Unenumerated Rights Under Popular Constitutionalism', (2006) 9 *University of Pennsylvania Journal of Constitutional Law* 121.

¹⁷² In fairness to Halberstam, however, the treatment of rights, voice and expertise is preliminary and it is not clear in what way they are to constrain constitutional adjudication.