

TOM FLYNN

THE TRIANGULAR CONSTITUTION

Constitutional Pluralism
in Ireland, the
EU and the
ECHR

THE TRIANGULAR CONSTITUTION

This book offers a new account of modern European constitutionalism. It uses the Irish constitutional order to demonstrate that, right across the European Union, the national constitution can no longer be understood on its own, in isolation from the EU legal order or from the European Convention on Human Rights. The constitution is instead triangular, with these three legal orders forming the points of a triangle, and the relationship and interactions between them forming the triangle's sides. It takes as its starting point the theory of constitutional pluralism, which suggests that overlapping constitutional orders are not necessarily arranged 'on top of' each other, but that they may be arranged heterarchically or flatly, without a hierarchy of superior and subordinate constitutions. However, it departs from conventional accounts of this theory by emphasising that we must still pay close attention to jurisdictional specificity in order to understand the norms that regulate pluralist constitutions. It shows, through application of the theory to case studies, that any attempt to extract universal principles from the jurisdictionally contingent interactions between specific legal orders is fraught with difficulty. The book is an important contribution to constitutional theory in general, and constitutional pluralism in particular, and will be of great interest to scholars in the field.

The Triangular Constitution

*Constitutional Pluralism in Ireland,
the EU and the ECHR*

Tom Flynn

• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are
trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2019

Copyright © Tom Flynn, 2019

Tom Flynn has asserted his right under the Copyright, Designs and Patents Act 1988
to be identified as Author of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any
means, electronic or mechanical, including photocopying, recording, or any information storage
or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for
loss or damage occasioned to any person acting or refraining from action as a result of any
statement in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is
Crown Copyright ©. All House of Lords and House of Commons information used in
the work is Parliamentary Copyright ©. This information is reused under the terms
of the Open Government Licence v3.0 ([http://www.nationalarchives.gov.uk/doc/
open-government-licence/version/3](http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3)) except where otherwise stated.

All Eur-lex material used in the work is © European Union, <http://eur-lex.europa.eu/>, 1998–2019.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Flynn, Tom (Thomas Joseph Sheridan), author.

Title: The triangular constitution : constitutional pluralism in Ireland, the EU and the ECHR / Tom Flynn.

Description: Oxford, UK ; Chicago, Illinois : Hart Publishing, 2019. | Based on author's thesis
(doctoral – University of Edinburgh, 2014) issued under title: Universality of interface norms under
constitutional pluralism : an analysis of Ireland, the EU and the ECHR. |
Includes bibliographical references and index.

Identifiers: LCCN 2019001265 (print) | LCCN 2019001819 (ebook) |
ISBN 9781509916184 (EPub) | ISBN 9781509916160 (hardback)

Subjects: LCSH: Constitutional law—Ireland. | Law—Ireland—European influences. |
International and municipal law—Ireland. | European Union. | Convention for the Protection
of Human Rights and Fundamental Freedoms (1950 November 5) | BISAC: LAW / International.

Classification: LCC KDK12275 (ebook) | LCC KDK12275 .F59 2019 (print) | DDC 342.4—dc23

LC record available at <https://lcn.loc.gov/2019001265>

ISBN: HB: 978-1-50991-616-0
ePDF: 978-1-50991-617-7
ePub: 978-1-50991-618-4

Typeset by Compuscript Ltd, Shannon

To find out more about our authors and books visit www.hartpublishing.co.uk.
Here you will find extracts, author information, details of forthcoming events
and the option to sign up for our newsletters.

Acknowledgements

THERE MAY BE only one name on the front of this book, but it owes its existence, in ways great and small, to a large cast of remarkable people. I am deeply grateful to each of them.

In particular, thanks are due to my PhD supervisors at the University of Edinburgh, Professor Niamh Nic Shuibhne and Dr Cormac Mac Amhlaigh, for their expertise, advice and support. Their generosity and professionalism is boundless. I am also indebted to my internal and external examiners, Professor Neil Walker and Professor Donncha O'Connell, and to the entire research community at Edinburgh Law School.

My editors at Hart Publishing, Bill Asquith and Rosamund Jubber, have been enthusiastic and supportive of this project from the very beginning. Thanks also to Anne Bevan for her meticulous copy editing, and to the production editor, Linda Staniford.

During the development of this book, it has been my privilege first to work at the University of Warwick, and then at the University of Essex. I owe an enormous debt of gratitude to the current and former academic and administrative staff of the Schools of Law at both these institutions. In particular, I would like to thank my friends and colleagues Dr Stephen Connelly, Dr Emily Jones, Professor Theodore Konstadinides, Professor Dora Kostakopoulou, Professor John McEldowney, Dr Tara Mulqueen, Professor Rebecca Probert, Professor Maurice Sunkin, Dr Anastasia Tataryn, Dr Illan rua Wall and Dr Ania Zbyszewska.

Thanks also to Professor Gareth Davies and to Dr Matej Avbelj, and to the participants in the conference on 'Legal Pluralism in the European Union' held at Vrije Universiteit Amsterdam in November 2017.

Special thanks to Alan Bolster, Jodie Graves, Fiona Hegarty, Dr Wendy van der Neut, Dr Inês Sofia Oliveira, Ken Page, Caoimhe Rehill, Philippa-Lucy Reekie, Dr Nayha Sethi and Alison Treacy for their unstinting love, support and friendship.

My comrades Philip Karsgaard, Daniel P McCarthy, Dr Daniel Shand and Luke Smithson are a constant source of strength. May our pilgrimage ever gain momentum.

Finally – but most of all – I would like to thank my parents, Peter and Teresina, my sisters, Rachael and Olivia, my brothers-in-law, Kieran and Donnacha, and my nephew Oliver, for everything. Tolstoy was wrong: not all happy families are alike. This one is unique, and this book is dedicated to them.

Tom Flynn
Colchester
October 2018

Table of Contents

<i>Acknowledgements</i>	<i>v</i>
<i>Table of Cases</i>	<i>xiii</i>
<i>Table of Legislation</i>	<i>xxiii</i>
<i>Introduction</i>	<i>xxv</i>
I. Context: Constitutional Pluralism.....	<i>xxvi</i>
II. Problem: Interface Norms.....	<i>xxvii</i>
III. Field: Justification of Choice of Jurisdictions	<i>xxix</i>
IV. Chapter Outline	<i>xxxi</i>
 1. European Constitutional Pluralism and the Triangular Constitution	<i>1</i>
Introduction	<i>1</i>
I. Constitutional Pluralism's Origins in the EU	<i>2</i>
A. Constitutionalisation and Disorder	<i>2</i>
B. Beginnings: MacCormick's 'Radical Pluralism' and 'Pluralism Under International Law'	<i>5</i>
C. The Three Major Claims of Walker's Pluralism.....	<i>7</i>
II. The Constitutional Pluralists and the Critics	<i>11</i>
A. Constitutionalism and Pluralism: A Contradiction in Terms?....	<i>12</i>
i. Constitutional Pluralism Not Constitutionalist?	<i>14</i>
ii. Constitutional Pluralism Not Pluralist?	<i>19</i>
iii. Reconciling the Dichotomy: Constitutional Pluralism, Pluralist Constitutionalism.....	<i>21</i>
B. 'Going Their Own Ways': Different Conceptions of Constitutional Pluralism.....	<i>23</i>
III. Metaconstitutional Pluralisms	<i>28</i>
A. Sabel and Gerstenberg: Polyarchic Coordinate Constitutionalism.....	<i>30</i>
i. Interface Norms Under Polyarchic Coordinate Constitutionalism	<i>33</i>
B. Maduro: Contrapunctual Law	<i>34</i>
i. Interface Norms Under Contrapunctual Law	<i>35</i>
C. Kumm: Cosmopolitan Constitutionalism	<i>37</i>
i. Interface Norms Under Cosmopolitan Constitutionalism	<i>40</i>
IV. Two Problems of Metaconstitutional Pluralism	<i>44</i>
A. The Rule of Law, Integrity and Epistemology	<i>44</i>
B. The Universality of Interface Norms	<i>51</i>

V.	Triangular Constitutionalism.....	53
A.	The Triangular Constitution as a Composite Constitutional Polyarchy.....	53
B.	From the Triangular Constitution to Triangular Constitutionalism.....	56
2.	The Vertical Frame	60
	Introduction	60
I.	The Terms of Engagement Between Irish Law and EU Law.....	61
A.	Incorporating EU Law in Ireland.....	61
i.	A Closed Legal Order	61
ii.	Opening the Legal Order: A Three-Pronged Approach.....	62
B.	The ‘Licence to Join’ and the ex ante Review of EU Norms.....	65
i.	Domestic Reservation of Ultimate Constitutionality by Conditional Recognition: The European Communities (Amendment) Act 1986	66
ii.	‘Penultimate Judicial Supremacy’ and the Boundaries of Government Action: Title III of the SEA	69
iii.	Analysis: Conditional Recognition, ‘Scope and Objectives’ and the Attitude of the Court.....	71
C.	The ‘Exclusion Clause’ and the ex post Review of EU Norms	75
i.	Ripples and Torpedoes.....	75
ii.	<i>SPUC v Grogan</i> : An Aberration?	77
iii.	The ‘Torpedo Effect’ Torpedoed.....	79
iv.	Analysis: Democratic Legitimacy, ‘Areas of Great Sensitivity’ and a Hierarchy of Norms.....	82
D.	Conclusion: Hierarchy and Polyarchy, Specificity and Universality.....	86
II.	The Irish Legal Order and the European Convention on Human Rights.....	88
A.	The Relationship Defined, Pre- and Post-Incorporation	88
i.	1950–2003: Pride and Prejudice	88
ii.	2003 to the Present Day: The European Convention on Human Rights Act 2003	92
a.	Origins	92
b.	The Act’s Provisions.....	93
B.	The ECHR Act 2003 and Polyarchy.....	95
i.	Otherness and Embeddedness	96
ii.	Unconstitutionality and Unconventionality: A Question of Priority	98
C.	Conclusion: <i>Legislative</i> Interface Norms	100
III.	Conclusion.....	101

3. The Horizontal Frame	103
Introduction	103
I. The Pre-Accession Terms of Engagement Between the EU and the ECHR.....	104
A. The ECHR from the CJEU's Viewpoint.....	104
i. The Normative Status of the Convention Within the EU.....	106
ii. ECtHR Case Law Before the CJEU.....	109
B. The EU from the ECtHR's Viewpoint.....	112
i. Review of Primary EU Law	112
ii. Review of Secondary EU Law.....	113
iii. Review of Actions of the Union's Institutions	116
iv. Institutional Matters: The CJEU's Advocates General and Article 6 ECHR.....	118
C. Conclusions: Metaconstitutional Interface Norms.....	122
II. The Draft Accession Agreement and Opinion 2/13	123
A. Specificity and Autonomy	124
i. Article 53 ECHR and Article 53 of the Charter.....	125
ii. Article 344 TFEU	126
iii. Mutual Trust	127
iv. The Common Foreign and Security Policy (CFSP).....	128
B. Institutional and Procedural Mechanisms.....	129
i. The Co-Respondent Mechanism	129
ii. The 'Prior Involvement' of the CJEU	130
iii. Protocol No 16 ECHR	131
C. Conclusions: Constitutional and Metaconstitutional Interface Norms	132
III. Labour Rights and Constitutional Conflict.....	134
A. The CJEU, Labour Rights and Market Freedoms: An Indelicate Balance?.....	135
i. The Right to Take Collective Action as a Fundamental Right	135
ii. Conceptualising Collective Action	137
iii. Justifying its Exercise.....	138
B. The ECtHR and Labour Rights: The Ground Shifts	141
i. The 'Integrated' Approach to Interpretation and Article 11	143
C. Managing Impending Judicial Conflict in Europe	145
IV. Conclusion.....	149

4. The Triangular Frame	151
Introduction	151
Aims and Structure of the Chapter	151
Prologue: The Situation Prior to 1983	155
I. Avoidance, Engagement and Conditional Recognition	158
A. <i>AG (SPUC) v Open Door Counselling and Dublin</i> <i>Well Woman</i>	158
i. Avoidance of Triggering Engagement: The High Court Judgment	159
ii. Engagement Avoided Again, More Narrowly: The Supreme Court Judgment	161
B. <i>SPUC v Grogan</i>	163
i. Engagement Begins: The High Court Judgment	163
ii. <i>Solange</i> in Ireland: The Supreme Court Judgment	164
II. Polyarchic Deliberation	166
A. The Right to Receive and Impart Information	167
i. The Right as a Corollary to the Freedom to Provide Services	167
a. A Less Reticent Approach	169
ii. The Right as Part of Freedom of Expression	171
iii. Political Resolution: The Fourteenth Amendment	177
B. The Right to Travel	178
i. 'A Spurious and Divisive Uniformity'? The High Court Judgment	179
ii. Conflict Avoided, for Now: The Supreme Court Judgment	182
iii. Potential Conflict Resolved Politically: The Thirteenth Amendment	184
C. The Right to Private and Family Life	185
i. (Temporary?) Reverse Conditional Recognition: The Judgment of the Majority	188
ii. Unconvincing Constitutionalism: The Dissent Regarding A & B	191
III. The Nature of the Relationships and the Universality of Interface Norms	196
IV. Conclusion	202
5. Towards Triangular Constitutionalism: Universalising the Triangular Constitution	204
Introduction	204
I. The Triangular Constitution Assessed	205
A. Interface Norms Within the Triangular Constitution: Universal Categories, Particular Norms	208
B. The Principle of Legality	208

C. The Protection of National Specificity.....	212
D. The Principle of Conditional Recognition	216
II. From the Particular to the Universal.....	219
A. The Rule of Law in Dangerous Times	222
B. Jurisdictional Specificity	227
III. Conclusion.....	230
<i>Bibliography</i>	232
<i>Index</i>	243

Table of Cases

Ireland

High Court

<i>A and B v Eastern Health Board, Judge Mary Fahy and C</i>	
[1998] 1 IR 464	189
<i>AG v X</i> [1992] 1 IR 1.....	83, 85, 154, 175–76, 178, 180–82, 184, 194
<i>AG (SPUC) v Open Door Counselling Ltd</i> [1988] IR 593.....	78–79, 158–68, 172, 180, 195, 198, 202
<i>Carmody v Minister for Justice</i> [2005] 1 JIC 2103	97–99
<i>Crotty v An Taoiseach</i> [1987] IR 713	63, 65–71, 73–76, 81, 86–87, 101, 124, 214–15, 217
<i>Dada v Minister for Justice</i> [2006] IEHC 166	97
<i>Doherty v South Dublin County Council (No 2)</i> [2007] 2 IR 696	97
<i>Dublin City Council v Liam Gallagher</i> [2008] IEHC 354.....	100
<i>Foy v an t-Árd Chláraitheoir (No 1)</i> [2002] IEHC 116	97, 101
<i>Foy v an t-Árd Chláraitheoir (No 2)</i> [2007] IEHC 470	97–98, 101, 213
<i>G v An Bord Uchtála</i> [1980] IR 32	157, 159
<i>Heaney v Ireland</i> [1994] 2 ILRM 420	90
<i>Lawlor v Minister for Agriculture</i> [1990] 1 IR 356.....	76–77
<i>Law Society of Ireland v Competition Authority</i> [2006] 2 IR 262	99
<i>Leonard v Dublin City Council</i> [2008] IEHC 79.....	97
<i>Lelimo v Minister for Justice</i> [2004] 2 IR 178	97
<i>Meagher v Minister for Agriculture</i> [1994] 1 IR 329	75, 77
<i>Norris v Attorney General</i> [1984] IR 36	90, 159
<i>Ó Laighléis, In re</i> [1960] IR 93	89, 91
<i>O’Leary v Attorney General</i> [1993] 1 IR 102.....	90
<i>Roche v Ireland</i> (unreported, High Court, 17 Jun 1983)	71
<i>Ryan v DPP</i> [1989] IR 399	180
<i>SPUC v Grogan</i> [1989] IR 753.....	77–82, 85–87, 101, 158, 163–67, 180, 182, 189, 198–99, 206, 210, 214–15, 217–18
<i>The State (Keegan) v Stardust Compensation Tribunal</i> [1986] IR 642.....	83
<i>The State (Quinn) v Ryan</i> [1965] IR 70	71, 173

Court of Criminal Appeal

<i>The People v Shaw</i> [1982] IR 1.....	173
<i>The People (Attorney General) v Cadden</i> (1956) 91 ILTR 97.....	156

Supreme Court

<i>AG v X</i> [1992] 1 IR 1.....	83, 85, 154, 175–76, 178, 180–82, 184, 194
<i>AG (SPUC) v Open Door Counselling Ltd</i> [1988] IR 593.....	78–79, 158–68, 172, 180, 195, 198, 202
<i>Byrne v Ireland</i> [1972] IR 241	159
<i>Campus Oil v Minister for Industry</i> [1983] IR 82	164
<i>Carmody v Minister for Justice</i> [2010] 1 IR 635	97–100
<i>Crotty v An Taoiseach</i> [1987] IR 713	63, 65–71, 73–76, 81, 86–87, 101, 124, 214–15, 217
<i>DPP v Delaney</i> [1997] 3 IR 453	83
<i>Educational Company of Ireland v Fitzpatrick (No 2)</i> [1961] IR 345	159
<i>G v An Bord Uchtála</i> [1980] IR 32	157, 159
<i>Heaney v Ireland</i> [1996] 1 IR 540.....	90
<i>Lobe & Osayande v Minister for Justice</i> [2003] IESC 1	91
<i>McGee v Attorney General</i> [1974] IR 284	156–57, 159
<i>Mead</i> (unreported, Supreme Court, 26 Jul 1972).....	159
<i>Meagher v Minister for Agriculture</i> [1994] 1 IR 329	75, 77
<i>Meskell v CIÉ</i> [1973] IR 121	159, 173
<i>Murphy v Roche</i> [1987] IR 106	100
<i>Nathan v Bailey Gibson</i> [1998] 2 IR 162	75–77
<i>Norris v Attorney General</i> [1984] IR 36	90, 159
<i>Ó Laighléis, In re</i> [1960] IR 93	89, 91
<i>O’Leary v Attorney General</i> [1995] 1 IR 254	90
<i>Ryan v Attorney General</i> [1965] IR 294	91, 156
<i>Ryan v DPP</i> [1989] IR 399	180
<i>Society for the Protection of Unborn Children v Grogan</i> [1989] IR 753	77–82, 85–87, 101, 158, 163–67, 180, 182, 189, 198–99, 206, 210, 214–15, 217–18
<i>The People v O’Callaghan</i> [1966] IR 501	180
<i>The People (DPP) v MS</i> [2003] 1 IR 606	89
<i>The People (DPP) v Shaw</i> [1982] IR 1.....	83
<i>The State (Keegan) v Stardust Compensation Tribunal</i> [1986] IR 642.....	83
<i>The State (Quinn) v Ryan</i> [1965] IR 70	71, 173
<i>The State (Woods) v Attorney General</i> [1969] IR 385	99
<i>Wireless Dealers’ Association v Fair Trade Commission</i> (unreported, Supreme Court, 14 Mar 1956)	71

Other National Courts

Czech Constitutional Court

Judgment of 31 Jan 2012, Pl ÚS 5/12, <i>Slovak Pensions XVII</i> ('Holubec')	38,
	77, 209, 230

German Federal Constitutional Court

<i>Application of Wünsche Handelsgesellschaft, Re the</i> (Case 2 BvR 197/83), [1987] 3 <i>Common Market Law Review</i> 225 (‘Solange II’)	xvi, 4
<i>Brunner v European Union Treaty</i> (Case 2 BvR 2134/92 and 2959/92 JZ 1993, 1100), [1994] 1 <i>Common Market Law Review</i> 57	5
<i>Gauweiler</i> (Case 2 BvR 2728/13), order of 14 Jan 2014, available in English at < www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html >	xviii
<i>Gauweiler</i> (Case 2 BvR 2728/13), judgment of 21 Jun 2016, available in English at < www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html >	6
<i>Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel</i> (Case 2 BvL 52/71), [1974] 2 <i>Common Market Law Review</i> 540 (‘Solange I’)	xvi, 3–4
<i>Ratification of the Treaty of Lisbon, Re</i> (Case 2 BvE 2/08) [2010] 3 <i>Common Market Law Review</i> 13	xviii, 6

United Kingdom House of Lords

<i>R v Secretary of State for Transport, ex parte Factortame</i> [1991] 3 All ER 769	5
---	---

United States Supreme Court

<i>Brown v Allen</i> (1953) 344 US 443	48
<i>Griswold v Connecticut</i> (1965) 381 US 479	157
<i>Marbury v Madison</i> (1803) 5 US 137	32
<i>Roe v Wade</i> (1973) 410 US 113	157

Court of Justice of the European Union

General Court

<i>AC-Treuhand v Commission</i> (Case T–99/04) (ECLI:EU:T:2008:256, [2008] ECR II–1501	107
<i>Connolly v Commission</i> (Case T–203/95) ECLI:EU:T:1999:101, [1999] ECR II–443	117

<i>Connolly v Commission</i> (Joined Cases T-34/96 and T-163/96) ECLI:EU:T:1999:102, [1999] ECR II-463	117
<i>Connolly v Commission</i> (Case T-214/96) ECLI:EU:T:1999:103, [1999] ECR II-517	117
<i>Mannesmannröhren-Werke v Commission</i> (Case T-112/98) ECLI:EU:T:2001:61, [2001] ECR II-729	107
<i>Mayr-Melnhof Kartongesellschaft v Commission</i> (Case T-347/94) ECLI:EU:T:1998:101, [1998] ECR II-1751	107
 <i>Court of Justice</i>	
<i>Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms</i> (Opinion 2/94) ECLI:EU:C:1996:140, [1996] ECR I-1759	105-06, 109, 114, 132
<i>Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms</i> (Opinion 2/13) ECLI:EU:C:2014:2454	51-52, 104-06, 108, 111, 116, 118, 122-34, 145, 147-50, 207, 213, 221
<i>Åkerberg Fransson</i> (Case C-617/10) EU:C:2013:105	108, 125, 136, 172
<i>Amministrazione delle Finanze dello Stato v Simmenthal</i> (Case 106/77) ECLI:EU:C:1978:49, [1978] ECR 629	38
<i>Arben Kaba v Secretary of State for the Home Department (Kaba II)</i> (Case C-466/00) ECLI:EU:C:2003:127 (Opinion), ECLI:EU:C:2002:447 (Judgment), [2003] ECR I-2219	120, 211
<i>Bosman</i> (Case C-415/93) ECLI:EU:C:1995:293, [1995] ECR I-4921	137, 140
<i>Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Minister for Transport, Energy and Communications and others</i> (Case C-84/95) ECLI:EU:C:1996:179, [1996] ECR I-3953	108
<i>Cinéthèque and Others v Fédération Nationale des Cinémas Français</i> (Joined Cases 60 and 61/84) ECLI:EU:C:1985:329, [1985] ECR 2605	170
<i>Comet BV v Produktschap voor Siergewassen</i> (Case 45/76) ECLI:EU:C:1976:191, [1976] ECR 2043	38
<i>Commission v European Investment Bank</i> (Case C-15/00) ECLI:EU:C:2003:396, [2003] ECR I-7281	3
<i>Commission v Germany</i> (Case 205/84) ECLI:EU:C:1986:463, [1986] ECR 3755	170
<i>Commission v Germany</i> (Case C-271/08) ECLI:EU:C:2010:183 (Opinion), ECLI:EU:C:2010:426 (Judgment) [2010] ECR I-7091	148
<i>Commission v Ireland</i> (Case C-459/03) ECLI:EU:C:2006:345, [2006] ECR I-4635	106

<i>Commission v Luxembourg</i> (Case C–319/06) ECLI:EU:C:2008:350, [2008] ECR I–4323.....	135, 141
<i>Connolly v Commission</i> (Case C–273/99 P) ECLI:EU:C:2001:126, [2001] ECR I–1575.....	117
<i>Connolly v Commission</i> (Case C–274/99 P) ECLI:EU:C:2001:127, [2001] ECR I–1611.....	117
<i>Cowan v Trésor Publique</i> (Case 186/87) ECLI:EU:C:1990:102, [1989] ECR 195	170
<i>Dassonville</i> (Case 8/74) ECLI:EU:C:1974:82, [1974] ECR 837.....	161
<i>Decker</i> (Case C–120/95) ECLI:EU:C:1998:167, [1998] ECR I–1831	136
<i>Draft Agreement Between the Community and the Countries of EFTA Relating to the Creation of the EEA</i> (Opinion 1/91) ECLI:EU:C:1991:490, [1991] ECR I–6079	106
<i>Emesa Sugar (Free Zone) NV v Aruba</i> (Case C–17/98) ECLI:EU:C:2000:70, [2000] ECR I–675.....	119
<i>ERT</i> (Case C–260/89) ECLI:EU:C:1991:254, [1991] ECR I–2925.....	105, 171
<i>Eugen Schmidberger, Internationale Transporte und Planzüge v Austria</i> (Case C–112/00) ECLI:EU:C:2003:333, [2003] ECR I–5659	31, 136–40
<i>Firma Foto-Frost v Hauptzollamt Lübeck-Ost</i> (Case 314/85) ECLI:EU:C:1987:452, [1987] ECR 4199	38, 76
<i>Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn</i> (Case 28/67) ECLI:EU:C:1968:17, [1968] ECR 143	3
<i>Flaminio Costa v ENEL</i> (Case 6/64) ECLI:EU:C:1964:66, [1964] ECR 585	3, 69
<i>Francovich v Italy</i> (Case C–6/90) ECLI:EU:C:1991:428, ECR I–5357.....	75
<i>GB-INNO-BM v Confédération du Commerce Luxembourgeois</i> (Case C–362/88) ECLI:EU:C:1990:102, [1990] ECR I–667	169–70
<i>Gebhard</i> (Case C–55/94) ECLI:EU:C:1995:411, [1995] ECR I–4165	139–40
<i>Geitling v High Authority</i> (Joined Cases 36, 37, 38 & 40/59) ECLI:EU:C:1960:36, [1960] ECR 423.....	4, 105
<i>Georgios Orfanopoulos v Land Baden-Württemberg</i> (Joined Cases C–482/01 and C–493/01) ECLI:EU:C:2004:262, [2004] ECR I–5257	108
<i>Gouvernement de la Communauté française and Gouvernement wallon v Gouvernement flamand</i> (Case C–212/06) ECLI:EU:C:2007:398, [2008] ECR I–1683	121
<i>Hauer v Land Rheinland-Pfalz</i> (Case 44/79) ECLI:EU:C:1979:290, [1979] ECR 3727.....	4
<i>Hoechst v Commission</i> (Joined Cases 46/87 and 227/88) ECLI:EU:C:1989:337, [1989] ECR 2859	110, 118, 145, 200, 210
<i>Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien</i> (Case C–208/09) ECLI:EU:C:2010:806, [2010] ECR I–13693.....	31, 85, 182, 215

<i>Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel</i> (Case 11/70) ECLI:EU:C:1970:114, [1970] ECR 1125.....	3, 69, 200
<i>ITWF & FSU v Viking Line</i> (Case C-438/05) ECLI:EU:C:2007:292, [2007] ECR I-10779	34, 86, 135–41, 143, 145–49, 195, 216
<i>Kadi and Al Barakaat v Council and Commission</i> (Joined Cases C-402/05 P and C-415/05 P) ECLI:EU:C:2008:461, [2008] ECR I-6351.....	3, 31, 37, 108, 202, 209
<i>Kamberaj</i> (Case C-571/10) EU:C:2012:233	108
<i>Kohll</i> (Case C-158/96) ECLI:EU:C:1998:171, [1998] ECR I-1931	136
<i>Laserdisken ApS v Kulturministeriet</i> (Case C-479/04) ECLI:EU:C:2006:549, [2006] ECR I-8089	106
<i>Laval un Partneri v Svenska Byggnadsarbetareförbundet</i> (Case C-341/05) ECLI:EU:C:2007:809, [2007] ECR I-11767	34, 85–86, 135–41, 143, 145–49, 195, 216
<i>Limburgse Vinyl Maatschappij NV and Others v Commission</i> (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P) ECLI:EU:C:2002:582, [2002] ECR I-8375.....	110, 150, 210
<i>Luisi and Carbone v Ministero del Tesoro</i> (Joined Cases 286/82 and 26/83) ECLI:EU:C:1984:35, [1984] ECR 377	168, 170, 179
<i>Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus Miesto Savivaldybės Administracija</i> (Case C-391/09) ECLI:EU:C:2011:291, [2011] ECR I-3787	31, 85, 182, 215
<i>Mangold v Helm</i> (Case C-144/04) ECLI:EU:C:2005:709, [2005] ECR I-9981.....	34
<i>Marleasing SA v La Comercial Internacional de Alimentación SA</i> (Case C-106/89) ECLI:EU:C:1990:395, [1990] ECR I-4135	75
<i>Meki Elgafaji, Noor Elgafaji v Staatsecretaris van Justitie</i> (Case C-465/07) ECLI:EU:C:2009:94, [2009] ECR I-921	108
<i>Melloni</i> (Case C-399/11) ECLI:EU:C:2013:107	125–27, 146
<i>Moser v Land Baden-Württemberg</i> (Case 180/83) ECLI:EU:C:1984:233, [1984] ECR 2539.....	168
<i>Nold v Commission</i> (Case 4/73) ECLI:EU:C:1974:51, [1974] ECR 491.....	4
<i>NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen</i> (Case 26/62) ECLI:EU:C:1963:1, [1963] ECR 1.....	2
<i>Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn</i> (Case C-36/02) ECLI:EU:C:2004:614, [2004] ECR I-9609	xvi, 31, 84–85, 136–38, 147, 171, 182, 200, 215–16

<i>Ordre des barreaux francophones et germanophone and Others</i> (Case C–305/05) ECLI:EU:C:2007:383, [2007] ECR I–5305	108
<i>Orkem v Commission</i> (Case 374/87) ECLI:EU:C:1989:387, [1989] ECR 3283	110, 118, 145, 200, 210
<i>P v S</i> (Case C–13/94) ECLI:EU:C:1996:170, [1996] ECR I–2143	105
<i>Parti Ecologiste ‘Les Verts’ v Parliament</i> (Case 294/83) ECLI:EU:C:1986:166, [1986] ECR 1339	3
<i>R v Bouchereau</i> (Case 30/77) ECLI:EU:C:1977:172, [1977] ECR 1999	170, 181
<i>Roquette Frères SA v DGCCRF</i> (Case C–94/00) ECLI:EU:C:2002:603, [2002] ECR I–9011	110, 150, 210
<i>Rüffert v Land Niedersachsen</i> (Case C–346/06) ECLI:EU:C:2008:189, [2008] ECR I–1989	135, 141
<i>Ruiz Zambrano</i> (Case C–34/09) ECLI:EU:C:2010:560 (Opinion), [2011] ECR I–1177	161
<i>Rutili</i> (Case 36/75) ECLI:EU:C:1975:137, [1975] ECR 1219	105
<i>Schindler</i> (Case C–275/92) ECLI:EU:C:1993:944, [1994] ECR I–1039	84
<i>Sgarlata and others v Commission</i> (Case 40/64) ECLI:EU:C:1965:36, [1965] ECR 215	4, 105
<i>SPUC (Ireland) v Grogan</i> (Case C–159/90) ECLI:EU:C:1991:378, [1991] ECR I–4685	78, 166–73, 178–79, 181–82, 198–200, 215–16
<i>Stauder v City of Ulm</i> (Case 29/69) ECLI:EU:C:1969:57, [1969] ECR 419	4, 105
<i>Stork v High Authority</i> (Case 1/58) ECLI:EU:C:1959:4, [1959] ECR 17	4, 105
<i>Torfaen Borough Council v B&Q</i> (Case C–145/88) ECLI:EU:C:1989:593, [1989] ECR 3851	170
<i>Van Duyn v Home Office</i> (Case 41/74) ECLI:EU:C:1974:133, [1974] ECR 1337	181
<i>Van Wesemael</i> (Joined Cases 110 and 111/78) ECLI:EU:C:1979:8, [1979] ECR 35	170
<i>Varec SA v Etat belge</i> (Case C–450/06) ECLI:EU:C:2008:91, [2008] ECR I–581	108
<i>Walrave and Koch</i> (Case 36/74) ECLI:EU:C:1974:140, [1974] ECR 1405	137
<i>Webb</i> (Case 279/80) ECLI:EU:C:1981:314, [1981] ECR 3305	170
<i>Weber v Parliament</i> (Case C–314/91) ECLI:EU:C:1993:109, [1993] ECR I–1093	3
<i>Wouters and Others</i> (Case C–309/99) ECLI:EU:C:2002:98, [2002] ECR I–1577	137

Council of Europe

European Commission of Human Rights

<i>Brüggemann and Scheuten v Germany</i> (1981) 3 EHRR 244	172
<i>M & Co v Germany</i> (1990) 64 <i>Decisions and Reports</i> 138.....	112, 114–15
<i>van Volsem v Belgium</i> App No 14641/89 (decision, ECmHR, 9 May 1990).....	142
<i>X v UK</i> (1980) 19 <i>Decisions and Reports</i> 244	172
<i>X & X v Germany</i> App no 342/57 (decision, ECmHR, 4 Sep 1958).....	112

European Court of Human Rights

<i>A, B & C v Ireland</i> (2010) 53 EHRR 13.....	186–91, 193–94, 201, 203, 214, 218, 221
<i>Airey v Ireland</i> (No 1) (1979–80) 2 EHRR 305	90
<i>Avotiņš v Latvia</i> App no 17502/07 (judgment, ECtHR, 23 May 2016)	149
<i>Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland</i> (2005) ECHR 440.....	xvi, 18, 31, 114–19, 121–23, 129, 131, 145–46, 149–50, 207, 211, 213, 215, 218
<i>Burden v UK</i> (2008) 47 EHRR 38.....	187
<i>Chiragov v Armenia</i> App no 13216/05 (judgment, ECtHR, 16 Jun 2015)	56
<i>Connolly v 15 Member States of the EU</i> App no 73274/01 (decision, ECtHR, 9 Dec 2008)	116, 207
<i>Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA v the Netherlands</i> App No 13645/05 (decision, ECtHR, 20 Jan 2009)	120, 211
<i>Demir and Baykara v Turkey</i> (2009) 48 EHRR 54	142–45, 147–48, 200
<i>Dudgeon v UK</i> (1982) 4 EHRR 149.....	90
<i>Enerji Yapı-Yol Sen v Turkey</i> (2009) ECHR 2251.....	142, 144–45, 200
<i>Funke v France</i> (1993) 16 EHRR 297.....	110, 210
<i>Goodwin v UK</i> (2002) 35 EHRR 18	34, 98, 112
<i>Handyside v UK</i> (1976) 1 EHRR 737	175
<i>Hobbs v UK</i> App no 63684/00 (decision, ECtHR, 18 Jun 2002)	187
<i>Hrvatski Liječnički Sindikat v Croatia</i> App no 36701/09 (Judgment, ECtHR, 27 Nov 2014)	148
<i>Ireland v UK</i> (1978) 2 EHRR 25.....	187
<i>James and Others v United Kingdom</i> App no 8793/79 (judgment, ECtHR, 21 Feb 1986)	92
<i>JJ v the Netherlands</i> (1999) 28 EHRR 168	119
<i>KDB v the Netherlands</i> (1998) ECHR 20;	119
<i>Kress v France</i> (2001) ECHR 382.	119–121
<i>Lawless v Ireland</i> (1961) 1 EHRR 1	89
<i>Lobo Machado v Portugal</i> (1996) 23 EHRR 79.....	119

<i>Loizidou v Turkey (preliminary objections)</i> App no 15318/89	
(1995) Series A no 310.....	18, 31, 56
<i>Lotarev v Ukraine</i> App no 29447/04 (judgment, ECtHR, 8 Apr 2010)	187
<i>Markt Intern and Beerman v Germany</i> (1990) 12 EHRR 161.....	172
<i>Matthews v UK</i> (1999) 28 EHRR 361.	113–15, 117
<i>Michaud v France</i> (2012) ECHR 2030.....	115, 131, 146
<i>MSS v Belgium and Greece</i> (2011) 53 EHRR 2	115
<i>N v UK</i> (2008) 47 EHRR 885	142
<i>National Union of Belgian Police v Belgium</i> (1979–80) 1 EHRR 578.....	142
<i>Niemitz v Germany</i> (1992) 16 EHRR 97	110, 210
<i>Norris v Ireland</i> (1991) 13 EHRR 186	90, 174
<i>Open Door and Dublin Well Woman v Ireland</i> (1992)	
15 EHRR 244	163, 172–74, 176–77, 187, 189, 200–01, 214
<i>Reinhardt and Slimane-Kaïd v France</i> (1998–II) 28 EHRR 59.	119
<i>Schettini and Others v Italy</i> App no 29529/95 (decision, ECtHR, 9 Nov 2000)	142
<i>Schmidt and Dahlström v Sweden</i> (1976) 1 EHRR 632	136, 141–42, 144
<i>SH and Others v Austria</i> (2011) ECHR 1879.....	189
<i>Silver and Others v UK</i> (1983) 5 EHRR 347	172
<i>Société Colas Est v France</i> (2004) 39 EHRR 373	110, 210
<i>Sunday Times v UK</i> (1979–1980) 2 EHRR 245	172–73
<i>Sunday Times v United Kingdom (No 2)</i> (1991) ECHR 50	5
<i>Swedish Engine Drivers Union v Sweden</i> (1976) 1 EHRR 617	142, 144
<i>UNISON v UK</i> App no 53574/99 (decision, ECtHR, 10 Jan 2002).	142
<i>Vermeulen v Belgium</i> (2001) 32 EHRR 15 (fix in text)	119–20
<i>Vo v France</i> (2005) 40 EHRR 259.....	187

Table of Legislation

Ireland

Department of Health, ‘General Scheme of a Bill to Regulate Termination of Pregnancy’, 27 Mar 2018, <health.gov.ie/wp-content/uploads/2018/03/General-Scheme-for-Publication.pdf>	191
European Communities Act 1972	62–64, 66, 86, 96–97, 159, 206, 209–10
European Convention on Human Rights Act 2003	58, 88, 90, 92–102, 107, 111, 187, 206–07, 209–10
Health (Family Planning) Act 1979	157
Protection of Life During Pregnancy Act 2013	78, 154–55, 190
Referendum (Amendment) (No 2) Act 1992	185
Thirty-sixth Amendment of the Constitution Act 2018	152–53, 178

(Former) United Kingdom of Great Britain and Ireland

Offences Against the Person Act 1861	90, 155–56, 190
Statute Law Revision Act 1892	156
Statute Law Revision (No 2) Act 1893	156

United Kingdom of Great Britain and Northern Ireland

Human Rights Act 1998	94–95, 128, 187
-----------------------------	-----------------

European Union

Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage [1976] OJ L 278	113
Charter of Fundamental Rights of the European Union [2016] OJ C 202/2	103, 108–12, 125–26, 127, 133–36, 143, 144, 146–48, 207, 209–11

Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172.	160, 181
Declaration on Article 6(2) of the Treaty on European Union [2016] OJ C 202/1, 337.....	125
Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17	110, 207
Parliament and Council Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services [1997] OJ L 18/1	136
Protocol (No 1) on the Role of National Parliaments in the European Union [2010] OJ C 83/203 and Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2010] OJ C 83/206	41
Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2016] OJ C 202/273	125
Rules of Procedure of the Court of Justice [2012] OJ L 265/1	179
Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306	108
Treaty on European Union (Treaty of Amsterdam) [1997] OJ C 340	107
Treaty on European Union (Treaty of Maastricht) [1992] OJ C 191	107

Introduction

THIS IS A work of applied constitutional theory. It takes as its field of study three interacting legal orders – those of Ireland, the European Union and the European Convention on Human Rights – and posits them as a unified, yet non-unitary, whole: a triangular constitutional order. In doing so, it draws on the rich literature of the concept of constitutional pluralism in order to posit a new way of thinking about constitutionalism in Europe, one that refuses, as a matter of principle, to regard any part of the constitutional whole – national, Union or Convention – as the final arbiter of constitutionality, or the possessor of ultimate normative authority over the other parts.

These are inauspicious times for such a proposal. Though the proposed remedies differ, the diagnosis is widely shared: Europe is unwell. Ten years ago, as the Lisbon Treaty finally came into force, the hope was that the European Union's 'semi-permanent Treaty revision process'¹ was at an end, and the enlarged Union could settle into a period of stability and consolidation. It was not to be: the decade since has been one of multiple, overlapping crises – financial, economic, political and constitutional – which have strained the very sinews of the European project, and have resulted in an atmosphere of conflict and fragmentation. With the United Kingdom narrowly voting to leave the Union in 2016, and the electoral rise across the continent of political forces – reductively and unhelpfully grouped together as 'populists' – exhibiting various kinds of nativism, racism and authoritarianism, the question of how the Union and its Member States relate to one another has attained a new resonance. This book does not propose some all-encompassing solution, and, as we shall see, is suspicious of any universal constitutional master-theory by which all Europe's ills can be cured. Neither the Union nor its Member States have showered themselves in glory in the past decade, and in different ways each has been tried and found wanting. The proposal is therefore more modest: a constitutional worldview that acknowledges the advantages and disadvantages of constitutionalism at the national, supranational and international level, and attempts to institute a balance between these three levels, allowing the space for political and legal contestation required of any constitutional order worthy of the name, while still respecting the need for legal stability and certainty.

¹ B de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process' in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (Oxford, Hart Publishing, 2002) 39.

I. CONTEXT: CONSTITUTIONAL PLURALISM

‘National law’ and ‘international law’ were once quite easily distinguishable. The former operated within the territorial and conceptual borders of the Westphalian nation state; the latter dealt with the interstices between these states. However, the years since 1945 have seen the rise of one of the defining features of modern public law: the non-state legal system or normative order. This phenomenon entails, as its logical corollary, a shift or transfer of institutional normative power away from traditional actors, such as states and governments, and towards various international, transnational and supranational organisations – public,² private³ and sometimes a hybrid of the two⁴ – with concomitant difficulties for received notions of public accountability and democratic legitimacy. Though frequently possessed of the kind of jurisgenerative authority once thought the sole preserve of state legal orders, non-state legal systems lack many of the features commonly thought essential for the legitimation of the exercise of public power. Furthermore, given that this transfer of power has occurred without states *relinquishing* their claims to sovereignty and autonomy (the ‘transfer’ in this sense perhaps better characterised as a ‘pooling’), the prospect arises of legal conflict between the state and non-state orders in cases where their jurisdictions overlap.

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

² Such as the United Nations.

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

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

⁵ N Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review* 317, 318.

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

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

⁸ See, *inter alia*, E-U Petersmann, ‘The WTO Constitution and Human Rights’ (2000) 3 *Journal of International Economic Law* 19; DZ Cass, *The Constitutionalization of the World Trade*

The focus of this book is on one particularly promising, yet particularly controversial, manifestation of this discourse: constitutional pluralism. However, as Matej Avbelj and Jan Komárek point out, '[t]he concept has gained so many meanings that often the participants in the debate talk past each other, each endorsing a different understanding of what constitutional pluralism actually means'.⁹ These different understandings of the idea will be outlined in chapter one, but, at its simplest, constitutional pluralism is the notion that interacting legal systems that are (or claim to be) constitutional in nature need not – and should not – necessarily be regarded as being *hierarchically* arranged, with one 'on top of' the others. Rather, the relationships between the orders can be conceived of *heterarchically*, so that conflict between them can be avoided, managed and ultimately resolved interactively and dialogically, without necessarily relegating one legal order to an inferior status or, conversely, privileging it over and above the others. This is a significant departure from the tradition of state-based constitutionalism, which presupposes and requires a hierarchical arrangement of the legal order. Of the many different conceptions of constitutional pluralism in the literature, this book focuses on a particular subset: the 'metaconstitutional'¹⁰ theories, which seek to posit or discover an overarching normative framework for the management and resolution of conflict between constitutional orders while still preserving their autonomy, and not integrating them into a new whole. This metaconstitutional framework – a system of constitutional norms about constitutional norms – serves a bridging function between the orders, providing certain adjudicative principles, or 'interface norms' by which they can accommodate and manage the competing claims of each other order in the given constitutional heterarchy. However, analysis of these interface norms reveals an interesting – and significant – problem.

II. PROBLEM: INTERFACE NORMS

It is important to distinguish at the outset between two different kinds of interface norm. First, there are the *substantive* 'norms-at-the-interface' between legal orders. By this, I mean the norm or norms around which a concrete case of interaction or potential conflict between legal orders revolve, such as the conflict between the right to human dignity and the freedom to provide services in the

Organization (OUP 2005); JL Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law' (2006) 17 *European Journal of International Law* 647; J Lawrence, 'Contesting Constitutionalism: Constitutional Discourse at the WTO' (2013) 2 *Global Constitutionalism* 63.

⁹M Avbelj and J Komárek (eds), 'Four Visions of Constitutional Pluralism (symposium transcript)' EUI Working Papers LAW 2008/21, 1.

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

Court of Justice of the European Union (CJEU) case of *Omega*,¹¹ or between the right to property and a state's international obligations in the European Court of Human Rights (ECtHR) case of *Bosphorus*.¹² Any norm can become a norm-at-the-interface if its application in a given case gives rise to questions of jurisdictional overlap between legal orders; this book will consider many of them, but they are not its focus.

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

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

¹¹ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* ECLI:EU:C:2004:614, [2004] ECR I-9609.

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

¹³ N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford, Oxford University Press, 2010) 285–86.

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

¹⁵ N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999) 14–15.