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Balancing competences: How institutional cosmopolitanism can manage jurisdictional conflicts

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Abstract: Conflicts of competences are ubiquitous in law. They represent a serious challenge, in particular, to global constitutionalism and institutional cosmopolitanism. This article argues from a participant's perspective, following a normative-analytical approach. It develops new taxonomy of competence conflicts. In essence it defends a flexible legal solution to competence conflicts that is inspired by the idea of practical institutional concordance and provides a middle way between strict legal solutions and political appeals for dialogue. Legal authority beyond the state and competence admit of degrees and variability, depending on the legal and factual circumstances of the case at issue. This understanding is enabled by interpreting competences as formal principles. Drawing on research by Alexy and Kumm the details of balancing competences as a distinct legal method are elaborated, using a triadic scale and various factors for determining the concrete weight of a competence. The theory of balancing competences is then applied to the example of competence conflicts in the multilevel system of fundamental rights protection in the EU. In result, a universal but case-sensitive theory is presented that optimally combines flexibility and stability and allows for a pluralist understanding of sovereignty. Institutional cosmopolitanism is thus defended against sceptical pluralism.

Keywords: balancing; competence; EU constitutional law; formal principles; pluralism

I. Introduction

The problem of balancing colliding competences figures prominently among the challenges of global constitutionalism. How these conflicts can be solved without declaring one or the other competence void is one of the greatest constitutional-theoretic puzzles of our time. Glenn has labelled this the problem of 'institutional cosmopolitanism': 'The essential feature of institutional cosmopolitanism is the coexistence of institutions, often on the same territory. Their mutual recognition dispels any notion of a single

locus of sovereign authority and ensures the legitimacy of both.'[1] This article spells out how the idea of institutional cosmopolitanism may work in practice.

The law not only sets standards by means of material rules and substantive principles. It also regulates its own creation and application by means of competence norms.[2] A competence is 'the legally established ability to create legal norms (or legal effects) through and in accordance with enunciations to this effect'.[3] This ability or power is a normative rather than descriptive concept, since it is constituted by legal norms.[4] Norms conferring competences regularly specify certain procedures and conditions the competence is dependent upon.[5] If these conditions are fulfilled, a competence empowers a certain public authority to change the normative situation within a given legal system.[6] Competences can hence be characterized by the general concept *ability* and three specific differences, namely *normativity* ('legally established'), *dispositivity* ('to create legal norms or legal effects')[7] and *declarativity* ('enunciations').[8]

Competences frequently collide with each other. Different public authorities may raise colliding claims to competence. This is the case, for example, in judicial review. The legislature may claim the competence to ultimately decide upon all important matters of society while a constitutional court may claim the competence to control that decision on the basis of human rights. Another classical example of a conflict of competences occurs in the distribution of powers between the federal, the state and the local levels of government. But conflicts of competences are by no means limited to nation-state legal regimes. Rather, they also occur, and more fiercely so, in constitutional orders beyond the state which are characterized by processes of transnationalization, pluralization, fragmentation and globalization.[9] Inconsistencies and regime collisions in public international law, the tension between the European Union and Member State's sovereignty,

[1] HP Glenn, *The Cosmopolitan State* (Oxford University Press, Oxford, 2013) 286.

[2] HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press, Oxford, 1994) 79–99.

[3] A Ross, *Directives and Norms* (Routledge, London, 1968) 130.

[4] Ibid 118, 135.

[5] Hart (n 2) 27–28.

[6] H Kelsen, *General Theory of Norms* (Clarendon Press, Oxford, 1991) 102.

[7] L Lindahl, *Position and Change: A Study in Law and Logic* (D Reidel Publishing Company, Dordrecht, 1977) 85ff; T Spaak, *The Concept of Legal Competence: An Essay in Conceptual Analysis* (Dartmouth, Brookfield, 1994) 21.

[8] Ross (n 3) 130ff.

[9] N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2010); PS Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press, Cambridge, 2012) 23–57. Cf M Rosenfeld, 'Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism' (2008) 6 *International Journal of Constitutional Law* 415.

and the relation between the EU and dispute settlement mechanisms or UN sanctions figure as examples for conflicts of competences in a postnational scenery.

It is submitted that despite differences in detail all these conflicts share the same structure. Hence, they can be solved by the same means. The present article aims at a general theory of solving competence conflicts. It does not purport to formulate a specific theory which would draw on the differences between the various conflict scenarios. That there is need for such a general theory has been often remarked. Kumm, for example, stated with an eye on constitutional conflicts in the EU that 'analytical jurisprudence provides no guidance as to how constitutional conflicts should be resolved'.[10] We do not know yet about a normative and conceptual framework that could help to settle these conflicts systematically. In fact, the very possibility of such a framework is contested. I would like to demonstrate that analytical jurisprudence may well be of help in this respect. The findings of the present article claim to be relevant to all sorts of conflicts of competences, both within and beyond the constitutional state. The theory presented here has universal applicability to any conflict of competences, jurisdictions and constitutional layers.

Conflicts of competences are ubiquitous in law. They figure as a common point of reference in the ongoing debate between sceptical pluralists and pluralistic constitutionalists. By demonstrating how conflicts of competences can be resolved, I mean to contribute to that debate. I would like to strengthen the argument of pluralistic constitutionalists that it is possible to integrate the institutional dimension of the prevailing plurality of legal regimes. The seemingly 'open-ended conflict among fragmentary nodes of authority'[11] can be regulated without eliminating pluralism. I thereby subscribe to a position that has been labelled 'cosmopolitan pluralism'[12] or 'cosmopolitan constitutionalism'.[13] Kumm has advanced theoretical

[10] M Kumm, The Jurisprudence of Constitutional Conflict' (2005) 11 *European Law Journal* 262, 282.

[11] T Isiksel, 'Global Legal Pluralism as Fact and Norm' (2013) 2 *Global Constutionalism* 160, 189.

[12] A Zidar, 'Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law beyond Borders' (2013) 26 *Leiden Journal of International Law* 483, 483; M Kumm, 'Rethinking Constitutional Authority' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, Oxford, 2012) 39.

[13] M Kumm, 'The Cosmopolitan Turn in Constitutionalism' in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009) 258. See also S Besson, 'The Truth about Legal Pluralism' (2012) 8 *European Constitutional Law Review* 354, 357–58; A Stone Sweet, 'The Structure of Constitutional Pluralism' (2013) 11 *International Journal of Constitutional Law* 491, 491–93.

argument that describes 'how legal coherence is possible even in the absence of hierarchical integration' and 'carves out a third way of conceiving of the legal world between hierarchical integration within one legal order, on the one hand, and a radical pluralism on the other, where actors of each legal order proceed without systemic regard for the coherence of the whole'.[14] Thus, my article is directed against sceptical, radical pluralistic accounts.[15]

My purpose is to provide a normative and analytical, rather than empirical, account of competence conflicts. I will adopt an internal point of view taken by a participant in the relevant legal practice, rather than an observer's perspective.[16] I will develop and apply legal theoretical instruments building upon the recent development in principles theory, namely so-called formal principles. In order to demonstrate more specifically how conflicts of competences should be addressed doctrinally, I will use the multilevel system of fundamental rights protection in Europe as an example. The inconsistencies and institutional collisions in that system figure as a prominent example for theorists who endorse sceptical pluralism.[17] I will address the purported overabundance of competing court jurisdictions, namely the so-called Bermuda triangle between the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR) and the national constitutional courts.

My argument proceeds as follows: First, I will analyse the situation of conflicts of competences in more detail (section II). Second, I will categorize the various solutions to conflicts of competences that have been discussed so far, which will allow me to locate and characterize my own approach more clearly (section III). Third, in the main part, I will elaborate in detail how competences can be balanced (section IV). Fourth, I will apply the theory to the conflict between the ECJ and the German Federal Constitutional Court (FCC) (section V).

[14] M Kumm, 'The Moral Point of Constitutional Pluralism' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford University Press, Oxford, 2012) 216, 217.

[15] N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2012); PL Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press, Oxford, 2010); A Fischer-Lescano and G Teubner, 'Regime Collisions' (2004) 25 *Michigan Journal of International Law* 999.

[16] On the distinction between an internal (participant) and an external (observer) perspective, see DE Litowitz, 'Internal versus External Perspectives on Law' (1998) 26 *Florida State University Law Review* 127. See also Kumm, *Rethinking Constitutional Authority* (n 12) 42.

[17] AT Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press, Oxford, 2009) 41–69; Krisch (n 9) 109–52.

II. Conflicts of competences

Taxonomy of competence conflicts

Conflicts of competences arise in multiple forms. Their discussion can be facilitated if these forms are distinguished by means of the following taxonomy. First, conflicts of competences can be interpreted as possessing either a political or a legal nature. If interpreted in the political sense competence conflicts are representing the brute facts of colliding claims to power and address the question of the correct political handling of these claims. Consequently solutions are searched for in the political sphere, like simply enforcing one's claim to competences or negotiating compromise. Pointing towards the informal dialogue of judges[18] or appealing to judicial self-restraint ultimately also supposes a political nature of the conflict since both are referred to as empirical facts and as being dependent upon the professional ethics of the judges. The common core of political approaches is the assumption that the solution to conflicts of competences is not to be found in legal norms. In sharp contrast to these approaches this article interprets conflicts of competences as a legal problem which has to be solved by employing legal rather than political or ethical means.

Second, competence conflicts can be classified as either logical or functional. A conflict is functional if divergent normative positions lead to teleological tensions, without the necessity of deontic contradiction.[19] A conflict is logical, in contrast, if the colliding competences amount to deontic antinomy.[20] The functional concept of conflict exhibits the weakness of blurring the line between political and legal conflicts. I will hence employ the logical concept of a conflict here.

Third, conflicts of competence must not be confused with material conflicts. Material conflicts consist of contradicting substantial decisions. They occur, for example, if different courts interpret the same legal norm differently. In contrast, formal conflicts concern colliding abilities to make substantial decisions. Conflicts of competence are formal conflicts. There are, however, connections between material and formal conflicts. On the

[18] A Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99, 112; A Slaughter, 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1103, 1108; A Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191, 195ff; RB Ahdieh, 'Between Dialogue and Decree' (2004) 79 *New York University Law Review* 2029, 2050ff.

[19] Kelsen (n 6) 124–25; R Wolfrum and N Matz, *Conflicts in International Environmental Law* (Springer, Berlin, 2003) 7.

[20] Ross (n 3) 168–74; C Perelman, *Logique juridique. Nouvelle rhétorique* (Dalloz, Paris, 1976) 39; H Kelsen, *Pure Theory of Law: William Ebenstein, translation* (2nd edn, New York, 1969) section 34e.

one hand, any material decision is not only a decision about the substantial matter in question. At the same time, it is also a decision on the assignment of competences. This can be seen in the case of judicial review. A constitutional court delivering a judgment on a statute which violates fundamental rights does not only settle that substantial issue, but also decides upon the delineation between its own competence to exercise judicial control and the competence of the democratically elected legislature to decide.[21] To put this point more generally: Any decision upon a substantial matters entails an implicit claim that the authority has the relevant competence. On the other hand, material conflicts may arise if colliding competences are exercised in such a way that they result in substantial conflict. This is not necessarily so: If two authorities claim a specific competence, there is formal conflict, but if they deliver identical material decisions upon the same matter or if one of the authorities chooses not to act upon its competence at all, then no material conflict arises. If, in contrast, they deliver divergent material decisions, then a material conflict arises over and above the formal conflict. Competences establish a possible Ought (dispositivity) which is only be transformed to a definite Ought if the competence is acted upon (declarativity). This institutional act can thus figure as a bridge between formal and material conflicts. We may hence characterize material conflicts as a form of outbreak of formal conflicts.

Fourth, conflicts of competence can either be actual or potential. This differentiation follows from the definitional element of dispositivity. Since the very concept of a competence draws to the legally established possibility to change the normative situation, having a competence is not automatically tantamount to acting upon it. Rather, the competence holder is free whether she will act upon the competence. As long as one of the competence holders does not act upon her competence, the conflict of competences is merely potential. Only when she issues the institutional act the conflict may become actual.

Fifth, conflicts of competence can either be abstract or concrete. An abstract conflict is independent of any concrete circumstances of specific cases. The relation between the competences of two authorities is then discussed without regard to any cases. A concrete conflict, in contrast, is dependent upon specific circumstances. I shall employ the concrete concept in this article.

In sum, I will analyse a specific concept of conflicts of competences which interprets these conflicts as having a legal, logical, formal, actual

[21] Cf R Alexy, 'Kollision und Abwägung als Grundprobleme der Grundrechtsdogmatik' (2001) 6 *World Constutional Law Review* 181, 207.

and concrete nature. One of the most imminent examples for a conflict with these five characteristics is the contested protection of fundamental rights in the so-called Bermuda Triangle of courts in the European Union.

The Bermuda Triangle of rights protection in the European Union

The process of European integration is a process of an expansion of fundamental rights protection. The growing constitutionalization of the EU legal order has significantly strengthened the relevance of fundamental rights within the EU legal order, given that the role of human rights is characterized by processes of optimization, activity and ubiquity.[22] An important promoter of this increased relevance is the inherent connection between fundamental rights and the proportionality test.[23] The current multilevel system of rights protection in the EU comprises national fundamental rights, the Charter rights, the European Convention and the market freedoms.

These overlapping protection layers can bring about 'multiple points of access' to rights protection for the individuals and 'healthy competition' among the different authorities.[24] However, the disintegrated coexistence of 'multiplicities and divergences' causes also severe disadvantages.[25] These disadvantages can be classified as either material or formal conflicts.[26] Material conflicts arise when two legal orders profess to protect the same right, but interpret this right differently or strike different balances when it comes to a collision with competing values.[27] In that respect, an overabundance of fundamental rights protection can attain 'Kafkian complexity'.[28] Formal conflicts, in contrast, arise between the respective

[22] Cf R Alexy, 'Zur Struktur der Grundrechte auf Schutz' in J Sieckmann (ed), *Die Prinzipientheorie der Grundrechte: Studien zur Grundrechtstheorie Robert Alexys* (Nomos, Baden-Baden, 2007) 105, 105; S Besson, 'The European Union and Human Rights' (2006) 6 *Human Rights Law Review* 323, 324–26, 343–45.

[23] M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, Oxford, 2012) 1–5.

[24] A Stone Sweet, 'A Cosmopolitan Legal Order' (2012) 1 *Global Constitutionalism* 53, 62; L Zucca, 'Monism and Fundamental Rights' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford University Press, Oxford 2012) 331, 331.

[25] P Allott, 'Europe and the Dream of Reason' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, Cambridge, 2003) 202, 217. Cf Glenn (n 1) 203–58.

[26] Bossuyt and Verrijdt refer to these two categories as the 'two perils' of multilevel human rights protection; see M Bossuyt and W Verrijdt, 'The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment' (2011) 7 *European Constitutional Law Review* 355, 355–56.

[27] F Fontanelli, 'How Interpretation Techniques Can Shape the Relationship between Constitutional Courts and the European Union' (2010) *King's Law Journal* 371, 388; Pérez (n 17).

[28] S Douglas-Scott, 'A Tale of Two Courts' (2006) 43 *Common Market Law Review* 629, 639.

competences of the courts involved. In particular, the delineation of the competences of the ECJ, the ECtHR and national constitutional courts is a matter of concern.

Formal conflicts endanger the rule of law, legal certainty and the coherence and effectiveness of fundamental rights protection. Judges playing ping-pong may cause effective rights protection to disappear in a Bermuda Triangle of courts. The ECJ has long established the clear and straightforward position that it is the sole and final arbiter on EU law.[29] This claim to an exclusive competence follows from a legal monism that establishes the strict and absolute supremacy of EU law over any Member State's law in order to ensure the uniform application of the EU's legal order and, ultimately, the rule of law in the supranational sphere.[30]

The ECJ's competence to constitutional review is contested, however, by a number of national constitutional courts, including the FCC.[31] On the basis of a democratic statism accentuating statehood, sovereignty and democratic self-government, the FCC has put forward quite an array of concerns oscillating between an affable position towards the EU and a position emphasizing national sovereignty.[32] These concerns regard the protection of national fundamental rights, the protection against EU legal acts which are ultra vires and the protection of the identity of the national constitution.[33]

The details and variations of this development do not interest here. It suffices to note the conflict between the two courts' competences. In order to pinpoint the conflict of competences between the ECJ and the FCC as clearly as possible, I would like to reconstruct it with the help of the notion of preference relations. If we note K_I for the ECJ's competence, K_m for the FCC's competence and P for preference, the competence claim raised by the ECJ can be put like this:[34]

[29] ECJ, Costa/ENEL, ECR 1253, para 12 (15 July 1964); ECJ, Kommission/Luxemburg, ECR I-3207, para 38 (2 July 1996); ECJ, Internationale Handelsgesellschaft, ECR 1125, para 3 (17 December 1970).

[30] M Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?' (1999) 36 *Common Market Law Review* 351, 353–55.

[31] For a helpful overview, see FC Mayer, 'Multilevel Constitutional Jurisdiction' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, Oxford, 2010) 399, 400–21.

[32] Kumm (n 30) 363–70.

[33] BVerfGE 37, 271; BVerfGE 73, 339; BVerfGE 89, 155; BVerfGE 123, 267; BVerfGE 126, 286. Cf Kumm's 'three lines of national constitutional resistance' (n 10) 264–65.

[34] I am using the variable K for competence. K denotes the German term Kompetenz which is familiar to the English reader of EU law. The obvious alternative variable C denoting the English term competence would have the disadvantage of being ambiguous, since C is introduced in Figure 2 as denoting the circumstances of a case. I owe this use of the variables to a suggestion made by an anonymous referee.

$$K_l \, P \, K_m$$

Figure 1. Preference Relation according to the ECJ

Figure 1 reads: The ECJ's competence has preference over the FCC's competence. From the perspective of the FCC, however, the picture is different: The preference of the ECJ's competence is dependent upon certain circumstances, namely the EU legal order providing sufficient protection of both fundamental rights and the identity of national constitutions and the EU legal act not being ultra vires. In order to acknowledge this dependency on circumstances, we can add the variable C_1:

$$(K_l \, P \, K_m) \, C_1$$

Figure 2. Preference Relation according to the FCC

It is important to note that, if the circumstances were different, the preference relation may well be the other way round, according to the FCC. This is the case, e.g., if the EU legal order would not protect fundamental rights in an appropriate way anymore, a situation that can be described as circumstances C_2:

$$(K_m \, P \, K_l) \, C_2$$

Figure 3. Preference Relation according to the FCC (reversed)

In Figure 3 the FCC's competence has preference over the ECJ's competence. A comparison of all three Figures allows for three important insights. First, there is a clear contradiction between Figure 3 (preference of K_m) and Figure 1 (preference of K_l), demonstrating the conflict between the ECJ's and the FCC's competences. Second, there is an important difference between Figure 1, representing the view of the EJC, on the one hand, and Figures 2 and 3, representing the view of the FCC, on the other. Figure 1 is an unconditional preference relation, signalling an unconditional supremacy of the ECJ: K_l has always preference over K_m. In contrast, Figures 2 and 3 are conditional preference relations, making the preference of either of the competences dependent upon certain circumstances. Third, we can note that the difference between Figures 2 and 3 pictures precisely the change between Solange I and Solange II. In Figure 2, representing Solange II, the preference of the ECJ's competence K_l is justified by and dependent upon the ECJ guaranteeing the protection of fundamental

rights to a degree essentially equivalent to the level of protection prescribed by the German Constitution.[35] Hence the FCC suspends its own competence K_m for the time being. This is not equivalent to the situation in Figure 1, since the FCC only refrains from exercising its competence on a case-by-case basis.[36] In Figure 3, which in contrast represents Solange I, the preference of the FCC's competence K_m is justified by and dependent upon the absence of an appropriate protection of fundamental rights in EU law.

III. Political and legal solutions

An analytical perspective reveals that all solutions to the conflict of competences problem can be categorized in two groups. They are either political or legal. I will argue that political solutions are insufficient from the perspective of the law. I will moreover distinguish two types of legal solutions and explain my own account, namely flexible legal solutions.

Why political solutions are insufficient from the perspective of the law

Given the serious difficulties in coming to terms with conflicts of competences, political solutions enjoy an enormous popularity. The view that conflicts of competences need to be resolved politically has been labelled as the 'no legal issue thesis' by Kumm.[37] Legal scholarship encourages political solutions by pointing to radical pluralism.[38] Radical pluralists salute the resolution of competence conflicts on the basis of politics rather than law.[39] Krisch even resigns from advancing any solution '[b]y leaving questions of fundamental norms and ultimate authority undecided'.[40] Political solutions ask the judges to cooperate in a friendly, harmonic, strategically clever, mutually respectful manner. The informal dialogue of judges is supposed to be supportive in that respect.[41] The overall

[35] BVerfGE 73, 339.

[36] Cf Kumm (n 30) 363.

[37] Kumm (n 10) 269–70. See also N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press, Oxford, 1999) 79–136.

[38] Krisch (n 9) 109–52.

[39] Zucca, *Monism and Fundamental Rights* (n 24) 340.

[40] Krisch (n 9) 152. See also: '[P]luralism is characterized precisely by the *absence* of a legal and institutional framework to regulate disputes between sub-orders.' Ibid 241 (emphasis added).

[41] Slaughter (n 18) 112, 195ff and 1108; Ahdieh (n 18) 2050ff.

aim is to exercise colliding competences in 'judicial comity'.[42] However, these solutions ultimately delegate the solution of competence conflicts to the personality and cooperative attitude of individual judges. Political solutions depend on the mere empirical fact of 'voluntary' and 'spontaneous' practices.[43] The political character of these solutions becomes very clear when they are labelled 'supranational judicial *diplomacy*'.[44] Irrespective of whether these political solutions are accurate as an empirical description of legal reality, law is a primarily normatively oriented discipline and must therefore endeavour to provide guidance and legitimacy on the basis of normative criteria.[45] All models which delegate the solution of competence conflicts to personal cooperative attitudes and voluntariness ultimately leave the solution to chance. Cooperation and judicial self-restraint may be relevant from the observer's perspective, but they do not provide guidance for the normatively structured participant's perspective.[46] Judicial comity and judicial dialogue belong to the extralegal, factual dimension of motives and power-preserving strategies, rather than to the dimension of legal reasons.[47] All in all, political approaches 'too hastily' give up 'on what law, and constitutional law in particular, is all about: legal certainty and the legal constraint of power'.[48]

Strict legal solutions

Legal solutions are distinguished from political solutions by raising a claim for legal correctness, rather than a claim to political

[42] Y Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, Oxford, 2003) 260; Y Shany, *Regulating Jurisdictional Relations between National and International Courts* (Oxford University Press, Oxford, 2007) 172–75; N Lavranos, 'The Solange-Method as a Tool for Regulating Competing Jurisdictions among International Courts and Tribunals' (2008) 30 *Loyola of Los Angeles International and Comparative Law Review* 275, 276, 334; F Fontanelli and G Martinico, 'Focusing on Courts' in FG Snyder and I Maher (eds), *The Evolution of the European Courts: Institutional Change and Continuity* (Bruylant, Brussels, 2009) 37, 55–56; JS Martinez, 'Towards an International Judicial System' (2003) 56 *Stanford Law Review* 429; E D'Alterio, 'From Judicial Comity to Legal Comity' (2011) 9 *International Journal of Constitutional Law* 394; Glenn (n 1) 165–86.

[43] G Martinico, 'Judging in the Multilevel Legal Order' (2010) *King's Law Journal* 257, 269.

[44] L Scheek, 'The Relationship between the European Courts and Integration through Human Rights' (2005) 65 *Heidelberg Journal of International Law* 837, 875 (emphasis added).

[45] Cf F Fontanelli, 'Yuval Shany' (2009) 20 *European Journal of International Law* 1297, 1299.

[46] M Raabe, *Grundrechte und Erkenntnis* (Nomos, Baden-Baden, 1998) 292; Cf Kumm, *Rethinking Constitutional Authority* (n 12) 42.

[47] 'The problem here is that this kind of judicial politics is primarily geared to the preservation of relative power of the courts … .' Zucca, *Monism and Fundamental Rights* (n 24) 340.

[48] Mayer, *Multilevel Constitutional Jurisdiction* (n 31) 426.

adequateness.[49] Legal solutions have two subtypes, namely strict and flexible approaches. The strict approach solves conflicts of competences by referring to strict legal hierarchy in Kelsen's sense. Strict legal solutions establish clear orders of precedence between the colliding legal systems and the competences of its authorities.[50] Strict legal approaches solve competence conflicts by giving either the one or the other competence absolute, unconditional precedence. Such solutions to competence conflicts are well established in the constitutional order within a state, e.g. in the different appeal stages of the judiciary. They are also sought after for conflicts beyond the state. The ECJ's position on the unconditional supremacy of EU Law over any Member State's law is a strict legal solution.[51] The same is true of the diametrical opposite which calls for an absolute precedence of the respective national constitutional court.[52] Both positions share the same premise, namely that supremacy must be strict, hierarchical and unconditional.[53] Suggestions to establish a special competence court to resolve the conflicts also rely on a strict legal solution, in this instance a procedural one.[54]

A serious weakness with strict legal solutions, however, is that they aim at 'mutual exclusion rather that the coordinated coexistence' of different legal orders and judiciary actors.[55] Yet the main task in the multilevel system of European fundamental rights protection is coordination, not subordination. Strict legal solutions fall short of the plurality of constitutions in the multilevel system. The major drawback of strict legal solutions is that they cannot account for the coexistence and validity of

[49] M Klatt, 'Robert Alexy's Philosophy of Law as System' in M Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, Oxford, 2012) 1, 5–6, 15–16, 17–18; R Alexy, 'Law and Correctness' in M Freeman (ed), *Current Legal Problems* (Oxford University Press, Oxford, 1998) 205; Klatt and Meister (n 23) 68–70.

[50] Cf Zucca, *Monism and Fundamental Rights* (n 24) 342.

[51] See Figure 1 above and S Oeter, 'Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte' (2007) 66 *VVDStRL* 361, 366. Kumm labels this position as 'European Constitutional Supremacy' (n 10) 266.

[52] T Schilling, 'The Autonomy of the Community Legal Order' (1996) 37 *Harvard International Law Journal* 389, 409. Kumm labels this position 'National Constitutional Supremacy'; see Kumm (n 10) 266.

[53] Avbelj labels this position convincingly as 'the hierarchical model'; see M Avbelj, 'Supremacy or Primacy of EU Law—(Why) Does it Matter?' (2011) 17 *European Law Journal* 744, 746–47.

[54] JHH Weiler, 'The European Union Belongs to its Citizens' (1997) 22 *European Law Review* 150, 155–56; Lindseth (n 15) 266–77.

[55] Fontanelli (n 45) 1299.

more than one *Grundnorm* in the European Union.[56] As a matter of principle strict legal solutions are incapable of giving resilient answers to competence conflicts between entangled legal systems. In the competition of competences they necessarily and completely blind out one of the competitors. I conclude that strict legal approaches do not help to solve the conflict of competences in the multilevel system of European Fundamental rights protection.[57]

Tertium datur: *Flexible legal solutions*

The inadequacy of strict legal solutions tempts many legal scholars to turn to politics. The serious weakness with this approach is that it rests on the mistaken premise that the abandonment of strict hierarchies would inevitably lead into the domain of the political. Thereby it overlooks the possibility of a third option, lying in between the Scylla of strict legal solutions and the Charybdis of political solutions. This third option the model defended here belongs to, a model of flexible legal solutions.[58] Scholars often overlook this third option.[59] Weiler and Haltern, e.g., represent the problem as if the alternative were purely between having 'a conversation' of many actors or a 'hierarchical structure with the ECJ at the top'.[60] The former alternative is political, while the latter is strictly legal in character.

As for the character of flexible legal solutions, I would like to stress three points: First, it provides truly an effective solution of competence conflicts. This is relevant because the idea of having various degrees of competence may lead to the objection that it was hard to see how an institution or a legal order could be competent to a certain degree only, e.g., 'three-quarters competent'. In the end of a balancing procedure a preference relation between the colliding competences is established, allowing for a clear judgment as to which competence prevails in the circumstances of the case. The outcome is a full competence, not just a fraction of a competence. Thus it truly settles the matter as far as this case is

[56] Pérez (n 17) 67; K Culver and M Giudice, 'Not a System but an Order' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford University Press, Oxford, 2012) 54, 62–68; Kumm (n 30) 384.

[57] N MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1, 10; Bossuyt and Verrijdt (n 26) 362–63; R Barents, 'The Precedence of EU Law from the Perspective of Constitutional Pluralism' (2009) 5 *European Constitutional Law Review* 421, 435.

[58] For a flexible legal solution see also Avbelj's 'heterarchical model' which also defends the possibility of conditional primacy; see (n 53) 750–54.

[59] Cf Kumm (n 30) 374 fn 46: 'The existence of a third approach is rarely contemplated'.

[60] JHH Weiler and U Haltern, 'The Autonomy of the Community Legal Order' (1996) 37 *Harvard International Law Journal* 411, 447.

concerned, rather than stepping down to sceptical pluralism's quietism. Flexible legal solutions thereby avoid the unappealing self-resignation of constitutional law theory in regard to transnational phenomena à la Krisch.[61]

Second, the solution is legal rather than political. It applies legal principles. The possibility of anchoring a flexible solution within the law is often overlooked. Von Bogdandy, for example, claims that the relation between the EU legal order and Member States' constitutional law was 'unregulated'.[62] Likewise, Jestaedt has put forward the claim that in a situation of collision between various legal systems, a choice is necessary between different instances of a Grundnorm which can 'neither be justified nor criticized on normative grounds'.[63] Contrary to von Bogdandy I argue that the relation is indeed legally regulated, however, not by legal rules, but by legal principles. In contrast to Jestaedt I would like to submit that a choice between different instances of a Grundnorm may be legal in character, if legal reasons are applied to justify this choice.

Third, the solution defended here is flexible rather than strict. It is flexible because the preference relation between the colliding competences will always be relative to the legal and factual circumstances of the case at hand. This is similar to the dynamic institutional balance among the authorities of the EU which is also dependent upon the particular procedure and may also shift over time.[64] From the perspective of EU constitutional law the most important consequence of a flexible legal solution is that it enables us to separate primacy and supremacy as two distinct categories of relation between levels of the law.

The separation of primacy and supremacy

The possibility of separating primacy and supremacy is often neglected. Jestaedt claims that 'a precedence of EU law cannot be verified legal-theoretically without accepting a hierarchy'.[65] Krisch also assumes that 'normative authority flows *exclusively* from hierarchy'.[66] However,

[61] See (n 39) above.

[62] A von Bogdandy, 'Founding Principles' in Bogdandy and Bast (n 31) 11, 32.

[63] M Jestaedt, 'Der Europäische Verfassungsverbund' in R Krause, W Veelken and K Vieweg (eds), *Recht der Wirtschaft und der Arbeit in Europa: Gedächtnisschrift für Wolfgang Blomeyer* (Duncker & Humblot, Berlin 2004) 637, 669.

[64] Cf A Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 *Common Market Law Review* 361, 386; S Prechal, 'Institutional Balance' in T Heukels, N Blokker and M Brus (eds), *The European Union after Amsterdam: A Legal Analysis* (Kluwer Law International, The Hague, 1998) 273, 274; K Lenaerts and A Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance' in C Joerges (ed), *Good Governance in Europe's Integrated Market* (Oxford University Press, Oxford, 2002) 35, 38.

[65] Jestaedt (n 63) 664.

[66] Stone Sweet (n 13) 493 (emphasis added).

a precedence relation between competences is well possible without implying a monolithic structure.[67] The Spanish Constitutional Court has lucidly argued that due to the distinction between *supremacía* (supremacy/highest rank) and *primacía* (precedence/primacy) a precedence of EU law is not in contradiction to the supremacy of Member States' law:

> Primacy … is not necessarily sustained on hierarchy, but rather on the distinction between the scopes of application of different regulations, principally valid, of which, however, one or more of them have the capacity for displacing others by virtue of their preferential or prevalent application due to various reasons. … The supremacy of the Constitution is therefore compatible with application systems which award applicative preference to regulations of legislation other than the national legislation as long as the Constitution itself has set forth said provision.[68]

My own model well matches this account. It allows for conditional preference relations between the colliding competences which establish a primacy without depending upon a higher rank of the competence that enjoys precedence. Thus, contrary to Jestaedt, precedence without strict hierarchy is possible, namely in the form of a soft, flexible hierarchy based on conditional precedence. GA Cruz Villalón has also argued in this direction:

> Case-law demonstrates how the European Union principles of legal certainty and institutional autonomy may, where appropriate, place conditions on the effectiveness of the primacy of European Union law.[69]

IV. Competences in balance

The idea of institutional practical concordance

Getting colliding competences into balance is equivalent to achieving a status of institutional practical concordance.[70] Neither competence is denied validity or abolished completely, but both of them must recede as much as

[67] R Bieber and I Salomé, 'Hierarchy of Norms in European Law' (1996) 33 *Common Market Law Review* 907, 909.

[68] Spanish Tribunal Constitucional, *Declaration 1/2004 (Unofficial translation): 13 December 2004*, accessed 29 September 2014, <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/DTC122004en.aspx>. Cf Mayer, *Multilevel Constitutional Jurisdiction* (n 31) 431 fn 246; Avbelj (n 53).

[69] ECJ, Elchinov ECR I-08889, para 27 (GA Cruz Villalón 10 July 2010).

[70] On practical concordance of material principles, see K Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th edn, Müller, Heidelberg, 1995) 28. Hesse's idea is here transferred to formal principles.

is necessary to realize a certain degree of the other competence respectively.[71] This idea is equivalent to what the ECJ has established in regard to the relation between the various authorities *within* the EU, namely the principle of institutional balance: 'Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions.'[72] It is submitted that the same idea is relevant to the relation between the EU and the Member States.[73] In result, a conditional preference relation between the various layers of sovereignty is established.[74] Contrary to the ECJ's opinion, the supremacy of EU law is not to be constructed as a formal superiority. Rather, it is 'created by deference to Union law's claim to supremacy whose extent has to be determined by balancing'.[75]

The main advantage of institutional practical concordance is that it allows for overcoming the aporia of understanding legal authority as binary-coded by establishing different degrees of sovereignty. This is very much resembling what Glenn has insinuated under the label of 'institutional cosmopolitanism'.[76] Until now this idea has not been sufficiently explored in the literature. Only few researchers have followed this route. Von der Groeben has claimed that any solution 'must provide for a balancing of the competing sovereignty claims between the European Union and the Members States'.[77] It is Mattias Kumm's achievement to have advanced the idea of an optimization model of competence to the utmost degree to date.[78] It allows for the unity of the multilevel system in spite of the plurality of constitutional layers without relying on the existence of only

[71] This flexible approach is used by the UK Supreme Court to determine the relationship between the legislature and reviewing courts, see Supreme Court UK, *R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent)*, *R (on the application of AM) (AP) (Respondent) v The Director of Public Prosecutions (Appellant)* UKSC 38, paras 102, 298 (25 June 2014).

[72] ECJ, *Parliament v Council ECR I-02067*, para 22 (22 May 1990).

[73] Supreme Court of Estonia, Constitutional judgment 3-4-1-6-12, para 130 (12 July 2012); C Ginter, 'Constitutionality of the European Stability Mechanism in Estonia' (2013) 9 *European Constitutional Law Review* 335, 343–47.

[74] Mayer, *Multilevel Constitutional Jurisdiction* (n 31) 430: '*conditional* principle of primacy' (emphasis added).

[75] M Borowski, 'Legal Pluralism in the European Union' in AJ Menéndez and JE Fossum (eds), *Law and Democracy in Neil MacCormick's Legal and Political Theory* (Springer, Dordrecht, 2011) 185, 206.

[76] Cf Glenn (n 1) 12, 265–76, 286.

[77] C von der Groeben, 'Book Review of Aida Torres Pérez. Conflicts of Rights in the European Union. A Theory of Supranational Adjudication' (2011) 22 *European Journal of International Law* 296, 300. See also I Canor, 'Harmonizing the European Community's Standard of Judicial Review?' (2002) 8 *European Public Law* 135, 166; Bossuyt and Verrijdt (n 26) 385–86.

[78] Kumm (n 10); Kumm, *The Cosmopolitan Turn in Constitutionalism* (n 13); Kumm, *Rethinking Constitutional Authority* (n 12). See also T Kleinlein, 'Judicial Lawmaking by Judicial Restraint?' (2011) 12 *German Law Journal* 1141, 1171.

one Grundnorm.[79] Notwithstanding the idea of balancing competences is already present in the literature, the details of how institutional practical concordance is to be established are missing to date. It is the main aim of the present article to provide further insights in that respect.

Conflicts of competences as conflicts of formal principles

Conflicts of competences can be constructed as conflicts of rules or as conflicts of principles. The difference between the two options lies in the solution of the conflicts.[80] Rule conflicts are solved by either reading an exception clause into one of the rules, or by declaring one of the rules invalid. In contrast, conflicts of principles are solved by means of balancing. Balancing results in a conditional preference relation between the colliding principles which realizes each of them optimally, given the legal and factual circumstances in a concrete context.[81]

Competences can only be submitted to a balancing procedure if they are reconstructed as principles. It is submitted that competences are a specific kind of principles, namely formal principles, as opposed to material principles.[82] Both kinds of principles must be strictly separated.[83] Material principles, e.g., human rights or the principle of the social welfare state, directly establish substantive legal content. In contrast, formal principles establish who is in charge of deciding upon substantive legal content. Democracy, for example, is a formal principle since it establishes the competence of the democratically elected legislature to decide upon the most important normative issues of society. Formal principles depict the authoritative dimension of certain legal decisions within a legal system.[84]

Some scholars think that formal principles do not have any content unless the material decision is made by the competent authority, and when such decision is made, then that material content figures as the content of

[79] Kumm (n 30) 375.

[80] Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, Oxford, 2002) 48–54.

[81] R Alexy, 'Balancing, constitutional review, and representation' (2005) 3 *International Journal of Constitutional Law* 572, 573–74; Kumm (n 10) 306; Kumm, *Rethinking Constitutional Authority* (n 12) 59; see also Avbelj (n 53) 762: 'maximising the interests of all three levels involved'.

[82] Alexy, *A Theory of Constitutional Rights* (n 80) 82.

[83] J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174, 205.

[84] M Borowski, 'The Structure of Formal Principles' in M Borowski (ed), *On the Nature of Legal Principles* (Franz Steiner, Stuttgart, 2010) 19, 26; R Alexy, 'Comments and Responses' in M Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, Oxford, 2012) 329, 329.

the formal principle.[85] In sharp contrast to that view, the present article argues formal principles require that the competence granted must be optimized. This precisely is their content. The object of optimization is the authoritative power to establish material content. In the constitutional state, for example, the constitution requires to realize as much unfettered freedom of the legislature as possible. This entails the competence of the legislature to restrict human rights in order to protect other important values and interests. At the same time constitutional states often establish a control competence of a constitutional court, exercising judicial review in the light of human rights.[86] Again, the constitution prescribes to optimize this control competence as much as possible. Both the legislature's competence to decide and the court's competence to constitutional review must prima facie be realized to the greatest extent possible. However, they pull into different directions. Only a balancing procedure can establish the definite degree of realization of both formal principles.

Understanding competences as (formal) principles rather than rules allows for establishing a variability of competence, a 'sliding scale of competence'.[87] Legal authority admits of degrees.[88] This variability of competences qua formal principles is of the utmost importance in reconstructing transnational scenarios and multilevel systems like the European Union. The question is therefore not, whether the ECJ should always have the ultimate say or, alternatively, this is the task of the Member State court. The problem of European constitutionalism is not a matter of either/or, but a matter of degree. Any decision by the ECJ or by a national constitutional court is not only a material decision on which rights citizens enjoy, but also necessarily an (often implicit) decision on the distribution of competences between the EU and the Member State.[89] Both the ECJ and the Member State courts

[85] Borowski, *The Structure of Formal Principles* (n 84) 30. See also M Borowski, 'Die Bindung an Festsetzungen des Gesetzgebers in der grundrechtlichen Abwägung' in L Clérico and J Sieckmann (eds), *Grundrechte, Prinzipien und Argumentation* (Nomos, Baden-Baden 2009) 99, 125: 'The exercise of a formal principle always concretizes the optimization object of the formal principle as regards content' (translated by author).

[86] Cf M Klatt, 'Positive Rights – Who Decides? Judicial Review in Balance' (2015) 13 *International Journal of Constitutional Law* (forthcoming).

[87] Cf J Rivers, 'Proportionality, Discretion and the Second Law of Balancing' in G Pavlakos (ed), *Law, Rights and Discourse: Themes from the Legal Philosophy of Robert Alexy* (Hart Publishing, Oxford, 2007) 167, 170.

[88] R Provost, 'Judging in Splendid Isolation' (2008) 56 *American Journal of Comparative Law* 125, 148–53: 'degree of bindingness', 'spectrum of bindingness'. J Rivers, 'Constitutional Rights and Statutory Limitations' in M Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, Oxford, 2012) 248, 254; Kumm, *The Cosmopolitan Turn in Constitutionalism* (n 13) 289: 'graduated authority'.

[89] Alexy (n 21) 207, referring to the constitutional order within a state.

engage in rational discourses. There is a competition of these discourses, and formal principles are the key to determine whether the ECJ or the Member State court shall decide the issue.

Balancing competences

The structure of balancing follows from Alexy's law of balancing, which reads: 'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.'[90] Originally this law of balancing was meant by Alexy to cover the balancing of material principles. I would like to submit that it is also applicable to the balancing of formal principles, i.e. competences. According to this law of balancing, the balancing of competences consists of three steps.[91] The first step consists in establishing the degree of non-satisfaction to a first competence. In the second step, the importance of satisfying the competing competence is established. Finally, in the third step it is established whether the importance of satisfying the latter competence justifies the non-satisfaction of the former. These three steps operationalize the idea of practical concordance of competences.

As a heuristic instrument a triadic scale may be employed to determine the concrete weight of a competence. This scale consists of the stages light, moderate and serious.[92] The weight of a Member State's constitutional court's competence to decide, in a given case, could be light, moderate, or serious, depending on the circumstances. Conversely the ECJ's competence to decide could also be light, moderate, or serious. Depending on which values are assigned to the colliding competences, the third step of balancing will then establish a preference of either of the two competences.[93] For example, a competence with a serious weight prevails over a colliding competence with a moderate or light weight.

The law of balancing determines the internal structure of balancing competences. Any solution to a conflict of competences that follows this

[90] Alexy, *A Theory of Constitutional Rights* (n 80) 102. On the second law of balancing, relating to epistemic reliability, see Klatt and Meister (n 23) 11, 80–83.

[91] Cf Klatt and Meister (n 23) 10.

[92] Ibid (n 23) 12–13, 34–36; R Alexy, 'The Weight Formula' in J Stelmach, B Brozek and W Zaluski (eds), *Studies in the Philosophy of Law. Frontiers of the economic analysis of law* (Jagiellonian University Press, Crakow, 2007) 9, 15.

[93] The situation of a stalemate, occurring in the scenarios light/light, moderate/moderate and serious/serious, will not be considered further here. See Klatt and Meister (n 23) 58.

internal structure is internally justified.[94] This, however, does not settle the issue. It is decisive to justify the evaluation of the weights of the competences. This is the task of the so-called external justification. It must be done with regard to the specific circumstances of a concrete case because formal principles 'can adopt different weights in different situations'.[95] External justification depends on arguments external to the balancing itself, regarding the concrete weight of an interference with a competence. External justification is the linking bridge between balancing as a distinct legal method and the general theory of legal argumentation.[96]

In order to shed more light on the external justification, we may consider a variety of factors that can be employed to determine the concrete weight of a competence.[97] Following the principle of universalizability as a fundamental principle of discourse theory, these factors adopt the form of weighting rules.[98] A first factor that influences the weight of the competence of a certain authority is the *democratic legitimacy* of that authority.[99] The higher the democratic legitimacy of a competence is, the more important this competence is. Democratic legitimacy admits of degrees.[100] In the UK the democratic legitimacy of Parliament is used to pay 'greater deference to an Act of Parliament than to a decision of the executive or subordinate measure'.[101] Kumm has used this factor to

[94] On the difference between internal and external justification, see Klatt and Meister (n 23) 54; M Klatt and J Schmidt, 'Epistemic Discretion in Constitutional Law' (2012) 10 *International Journal of Constitutional Law* 69, 74; R Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press, Oxford, 1989) 221, 230.

[95] Alexy, *Comments and Responses* (n 84) 438.

[96] Klatt, *Robert Alexy's Philosophy of Law as System* (n 49) 20–21; M Klatt, 'An Egalitarian Defense of Proportionality-Based Balancing' (2014) 12 *International Journal of Constitutional Law* 891, 897–99; Alexy, *A Theory of Constitutional Rights* (n 80) 107, 109.

[97] For a flexible approach to the relationship between the legislature and reviewing courts in the UK, using a variety of factors, see Supreme Court UK, *R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent), R (on the application of AM) (AP) (Respondent) v The Director of Public Prosecutions (Appellant)* UKSC 38 (25 June 2014) at para 73.

[98] Cf Alexy (n 94) 249.

[99] A Kavanagh, 'Deference of Defiance?' in G Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, Cambridge, 2008) 184, 184; JA King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409, 428–29. Rejecting democratic legitimacy as a factor, however, J Jowell, 'Judicial deference' (2003) *Public Law* 592.

[100] Cf Rivers, *Constitutional Rights and Statutory Limitations* (n 88) 254; ADP Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press, Cambridge, 2012) 107–13.

[101] *International Transport Roth GmbH v Secretary of State for the Home Department* 2003 QB 728, 765 (Court of Appeal (England and Wales) 13 May 2003). Cf Rivers (n 83) 204.

justify a control competence of the national courts over EU Law, 'given the persistence of the democratic deficit on the European level'.[102] This factor is also present in the ECtHR's practice of determining the scope of the margin of appreciation.[103]

A second factor is the significance of the *material principles* at stake. The more intensely a decision interferes with a material principle, e.g., a human right or a collective good, the less important is the authority's competence to decide autonomously and the greater the weight to be accorded to a court's competence to control that decision.[104] If material principles are not affected at all, the importance of the competence of the primary decision-maker is very high and the importance of the competence of judicial review is quite low.[105] The factor of material principles is used by the ECtHR to determine the scope of the margin of appreciation:

> The scope of the margin of appreciation enjoyed by the national authorities will depend … on the nature of the right involved. … The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Government.[106]

A third factor that influences the weight of the competence of the primary decision-maker is the *quality of the decision*. The better the quality of the primary decision, the more weight is to be assigned to the competence of the decision maker and the more serious is any interference with that

[102] Kumm (n 10) 300.

[103] A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press, Oxford, 2012) 76–102.

[104] Cf Supreme Court UK, *R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent), R (on the application of AM) (AP) (Respondent) v The Director of Public Prosecutions (Appellant)* UKSC 38 (25 June 2014) at para 111; AP Lester and D Pannick, *Human Rights Law and Practice* (2nd edn, LexisNexis, London, 2004) 97; E Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press, Oxford, 2009) 106–37; G Pavlakos and J Pauwelyn, 'Principled Monism and the Normative Conception of Coercion Under International Law' in MD Evans and P Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Hart Publishing, Oxford, 2011) 317, 323.

[105] BVerfGE 88, 203, para 188. See also BVerfGE 45, 187, para 175. See also *Skinner v Eklahome*, 316 US 5335, 541 (1942); *United States v Carolene Products Co*., 304 US 144, 152n.4 (1938).

[106] ECHR, *Gillow v The United Kingdom*, para 55 (24 November 1986). Cf E Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) *Heidelberg Journal of International Law* 240, 264. See also *A v Secretary of State for the Home Department* UKHL 56, section 108 (House of Lords 16 December 2004).

competence by means of judicial review.[107] For example, the quality of parliamentary engagement with the human rights issue is used as a 'deference-increasing factor' by the United Kingdom courts.[108] The quality of the primary decision can be assessed by evaluating the arguments given for its justification. The more extensive and convincing those arguments are, the better is the quality of the decision. It also matters whether the primary decision-maker has special expertise relevant to the issue. Special expertise presumptively strengthens the weight of the competence to decide. This factor is familiar from US federalism.[109] Lastly, the quality and effectiveness of the particular legal system as a whole may also influence the assessment of the quality of the primary decision. The better the performance of the legal system in general is, the more weight is to be assigned to the primary decision-maker. Clear procedural rules and consistency of political aim-setting, for example, can be indicative here. Conversely, if the legal system displays a great extent of legislative or administrative dysfunction, the weight of an international court's competence to control is strengthened.

The last factor that shall be considered here is *subsidiarity*. The more a certain authority is protected by the principle of subsidiarity, the more weight is to be assigned to its competence and the more serious any infringement with that competence is. This factor protects the Member States against usurpation of power by EU institutions.[110] It is also present in ECHR law.[111] An aspect indicating a greater protection by the principle of subsidiarity is a situation where one of the colliding authorities is closer to the issue of the case as far as time, location, or the facts are concerned.[112]

[107] A Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, Oxford, 2011) 262–64. See also *United States v Carolene Products Co.*, 304 US 144, 152 n.4 (1938).

[108] Cf A Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory' (2014) 34 *Oxford Journal of Legal Studies* 443, 25–30.

[109] LE Teitz, 'Taking Multiple Bites of the Apple' (1992) 26 *International Law* 21, 57, section 3e: 'substantive law likely to be applicable and the relative familiarity of the affected court with that law'. See also Kavanagh, *Deference of Defiance?* (n 99) 184; King (n 99) 433ff; M Wesson, 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12 *Human Rights Law Review* 221, 239.

[110] Kumm (n 10) 300; D Edward, 'Subsidiarity as a Legal Concept' in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing, Oxford, 2012) 93. For a critical account, see A Follesdal, 'The Principle of Subsidiarity as a Constitutional Principle in International Law' (2013) 2 *Global Constitutionalism* 37.

[111] Legg (n 103) 61–62.

[112] Teitz (n 109) 56, section 3c; *International Transport Roth GmbH v Secretary of State for the Home Department*, 2003 QB at 767, per Laws LJ; Brems (n 106) 290–91.

The principle of subsidiarity is weakened, in contrast, if homogenization or coordination requires a more centralized approach.[113]

It is a vital aspect of the balancing approach that none of these factors is determinative per se.[114] Rather, all relevant factors have to be considered.[115] Balancing competences is therefore a quite complex endeavour.[116]

The objection from Kompetenz-Kompetenz

It may be objected to the model proposed here that it leaves the decisive question in the open, namely who is competent to balance competences. This is the issue of *Kompetenz-Kompetenz*. A *Kompetenz-Kompetenz* is an instance of a competence, since it can be defined as the normatively established ability to create a competence norm or to change the legal situation with regard to a competence by means of an institutional act. It is thus a second-order competence. Since the *Kompetenz-Kompetenz* is a competence it follows that the model of balancing competences could also be used for determining who is competent to balance competences. This, however, would only take the problem one level higher and seems to lead to an infinite regress problem.

I would like to stress that the model of balancing competences is not designed to resolve the issue of *Kompetenz-Kompetenz* in the first place. Rather, its main point is to demonstrate how legal discourses on competence conflicts can and should be framed. It provides a solution to the problem of what kinds of arguments have to be used in order to justify, challenge, or defend a claim to competence inherent in an official legal proposition. All legal authorities are bound to justify their own competence vis-à-vis any colliding competences. Brandom's game of giving and asking for reasons and Alexy's discourse-theoretical theory of legal argumentation

[113] ECJ, *Åklagaren v Hans Åkerberg Fransson*, paras 41–46 (GA Cruz Villalón 12 June 2012). F Fontanelli, 'Hic Sunt Nationes' (2013) 9 *European Constitutional Law Review* 315, 320–22.

[114] US Supreme Court, *Colorado River Water Conservation District v. United States*, 424 US 800, 818; cf Teitz (n 109) 46.

[115] Supreme Court UK, *R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent), R (on the application of AM) (AP) (Respondent) v The Director of Public Prosecutions (Appellant)* UKSC 38 (25 June 2014) at para 75: 'must depend on all the circumstances'; cf rule J9 in Alexy (n 94) 250.

[116] Cf Alexy, *A Theory of Constitutional Rights* (n 80) 346. The list of factors employed in this article is not conclusive. In national constitutional orders, e.g., the nature of the issue at stake is also deemed relevant. The more the case relates to controversial issues of social policy or contested moral or religious questions, the higher is the weight of Parliament's assessment, cf Supreme Court UK, *R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent), R (on the application of AM) (AP) (Respondent) v The Director of Public Prosecutions (Appellant)* UKSC 38 (25 June 2014) at 297, but see ibid, 191.

provide the background here.[117] In this sense, the objection from *Kompetenz-Kompetenz* misses the point of the present article.

Furthermore, solving competence conflicts by pointing to a second-order *Kompetenz-Kompetenz* in a way would reintroduce the strict hierarchical model by the back door. Balancing competences, in contrast, is anchored in the flexible legal model. As for the specific example discussed below, namely the competence conflicts between the EU and Member States, Avbelj has lucidly demonstrated that the challenge is to regulate 'the relationship between the autonomous legal orders, ie between the two sovereign levels in European integration', precisely because there is no hierarchy *between* the legal orders'.[118] There is no overarching *Kompetenz-Kompetenz* in the pluralist European legal setting. Rather, each authority is ultimately supreme within its own legal order. The present article seeks to provide remedy to this situation by spelling out the details of the argumentative exercise capable of solving competence conflicts notwithstanding a *Kompetenz-Kompetenz* is lacking.

V. The competence conflict between the ECJ and Member States' courts

The competence conflict between the ECJ and Member States' courts has a high relevance since it may lead to an 'evaporation' of responsibility.[119] While the ECJ claims an unconditional supremacy of EU Law, and hence, does not rely on any balancing of competences, the German FCC has claimed a control competence dependent upon certain circumstances, regarding the protection of fundamental rights, the protection of the identity of the national constitution and the protection against ultra vires legal acts.

It is a central point of the present article that the same structural conflict lies behind the varying details of these different control areas. In essence, we are dealing with different versions of the same problem.[120] Hence, the same legal solution must be applied in all three areas of conflict, namely a balancing of competences. In this article, I will address the conflict only as far as the protection of fundamental rights is concerned.

[117] RB Brandom, *Making It Explicit. Reasoning, Representing, and Discursive Commitment* (Harvard University Press, Cambridge, MA, 1994); Alexy (n 94).

[118] Avbelj (n 53) 750 (original emphasis).

[119] Mayer, *Multilevel Constitutional Jurisdiction* (n 31) 434.

[120] Cf C Möllers, 'German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only under Exceptional Circumstances' (2011) 7 *European Constitutional Law Review* 161, 166.

Fundamental rights protection and the Solange method

The balancing approach matches perfectly with the Solange method. This is not only true in respect to the balancing results, namely case-sensitive, conditional preference relations between the control competences of the ECJ and the FCC. The so-long-as terminology clearly indicates the dependency on the circumstances of the case. It is also true in respect to the argumentative justification of those preference relations. In Solange I the circumstances of the case were such that the EU had not developed a protection of rights equivalent to the protection under the German constitution. Hence, the factor of material principles strongly supported the control competence of the FCC.[121] Due to the lack of adequate rights protection in the EU legal order, the consequences for the protection of material principles would have been very serious if the control competence of the FCC had been denied. At the same time the control competence of the ECJ is weakened by the factor of material principles because the consequences for rights protection which result from denying the ECJ any preference are negligible if the EU does not provide a substantial rights protection anyway. In Solange II the circumstances had changed considerably since the EU standard of fundamental rights had by then 'been formulated in content, consolidated and adequately guaranteed'.[122] Therefore the factor of material principles at that time operated exactly the other way round: The weight of the ECJ's competence is strengthened, while the FCC's competence is not strengthened any more.[123] As for the other factors, it is worth noting that in Solange I the FCC used also the factor of democratic legitimacy to underline the weight of its own competence.[124] Furthermore, the FCC in Solange II uses the factor of the quality of the ECJ's jurisdiction as far as rights protection is concerned to emphasize the higher weight of the ECJ's competence.[125] All in all, these considerations justify an evaluation of the FCC's competence as high and an evaluation of the ECJ's competence as moderate in Solange I as well as an evaluation of the FCC's competence as moderate and an evaluation of the ECJ's competence as high in Solange II. Thus, the preference relation between the colliding competences is dependent upon the 'present state of integration of the Community'.[126] The dynamics which follow from this dependency can be very well reconstructed in the balancing model.

[121] Cf G Beck, 'The Problem of Kompetenz-Kompetenz' (2005) 30 *European Law Review* 46, 57–58.

[122] BVerfGE 73, 339 at para 103.

[123] Kumm (n 10) 299–300.

[124] BVerfGE 37, 271 at para 26.

[125] BVerfGE 73, 339 at para 103: 'particularly through the decisions of the European Court'.

[126] BVerfGE 37, 271 at para 26.

Banana Market

Building upon the Solange II jurisdiction the FCC introduced a general standard of review in its *Banana Market* decision in 2000:

> Therefore, the grounds for a submission by a national court of justice or of a constitutional complaint which puts forward an infringement by secondary European Community Law of the fundamental rights guaranteed in the Basic Law must state in detail that the protection of fundamental rights required unconditionally by the Basic Law is not *generally* assured … .[127]

In consequence, the Solange II criterion (whether the EU provides adequate rights protection) is not to be evaluated with regard to the specific case at issue, but by means of a general comparison of abstract protection standards at the national and the supranational level.

This decision is referred to by the current FCC president as the 'procedural solution'.[128] This is a false labelling, downplaying the decision's relevance. The solution is procedural only insofar the FCC declares constitutional complaints inadmissible from the outset if their grounds do not state that the evolution of EU law generally has declined below the required standard of fundamental rights. However, the relevance of the judgment does not end with stating new requirements of admissibility. Rather, in substance the judgment alters the criterion for deciding upon the merits of the complaint and this criterion merely acts forwards upon the admissibility as well. Commentators agree that the barrier of admissibility erected by the general standard in *Banana Market* is so high that it is extremely unlikely that any complaint will ever meet this criterion.[129]

The key question is whether the general standard can be rationally justified. There are basically two possibilities for reconstructing the general standard, a simple and a complex one. The simple reconstruction uses the general high standard of rights protection in the EU as an external argument to evaluate the importance of the FCC's control competence as moderate, maybe even as light, and the weight of the ECJ's competence as high. Thus ceteris paribus the ECJ's competence prevails. This simple reconstruction, however, suffers from a category error. The weights of

[127] BVerfGE 102, 147 para 63 (emphasis added). The unofficial English translation, available at the website of the FCC, is incorrect since it continues with 'in the in respective case' (para 39 in the English translation). This case-relatedness is, however, clearly not intended by the FCC.

[128] A Voßkuhle, 'Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) 6 *European Constitutional Law Review* 175, 192.

[129] Cf ibid 'unlikely that this admissibility threshold may ever be passed'.

the competences are concrete variables, pointing to the importance of realizing the respective competences in certain cases with specific circumstances. The FCC's general standard, however, abandons the case-sensitivity. The general standard is by definition irrelevant for determining the concrete weights of the competences. Concrete weights can only be justified by means of concrete considerations.

This leads the way to the more complex reconstruction. It adds a new pair of variables to the balancing, namely the abstract weights of the competences. The abstract weight is the weight a competence has relative to other competences, but irrespective of concrete circumstances of specific cases. It is submitted that the general standard introduced in *Banana Market* is relevant for the abstract weight of the competences. Now several constellations have to be considered. The most easily solvable constellation is when the concrete weights of the colliding competences are identical. They cancel each other out, and in consequence it is solely the abstract weights that will determine the balancing result. It is this constellation that the FCC may have had in mind in *Banana Market*. However, the concrete weights remain to be relevant, in particular when they are not identical. Hence, the FCC is mistaken in simply ignoring the concrete weights by introducing the general standard.

Moreover, it is possible that we see a reversal effect in the balancing result: Suppose a constellation where the EU level generally provides a high protection standard, but fails extraordinarily in the concrete case. The concrete weight of the FCC's control competence will then, following the factor of material principles, increase. If this increase is strong enough, due to heavy consequences for the rights holder, it may well outweigh the higher abstract weight of the ECJ's competence, bringing about a reverse preference relation: The FCC's competence prevails.

The general standard in *Banana Market* is incapable of capturing this reversal effect. The criterion used by the FCC for determining the formal merits of the case is incomplete. It simply ignores the concrete weights of the competences and pretends as if one could determine the preference relation between colliding competences by means of abstract considerations alone. This shortcut, however, is only possible in the constellation where the concrete weights are identical. Even then they have to be considered in order to establish that they are identical. In essence, the FCC not only forgoes to determine the specific case as far as material principles are concerned, it also resigns from establishing the concrete weight of its own control competence. It also follows that the view that it was extremely unlikely that any complaint would ever meet the admissibility barrier is mistaken. A single outlier case in which the infringement with fundamental rights is very serious in spite of the general satisfactory protection suffices.

Reverse Solange

The Solange method has been transferred to the perspective of the Union by the proposal of a 'Reverse Solange': '[O]utside the Charter's scope of application, a Union citizen cannot rely on EU fundamental rights as long as it can be presumed that their respective essence is safeguarded in the Member State concerned.'[130] This proposal can be reconstructed as the result of a balancing of competences. The arguments brought forward by the authors to justify their proposal match quite well with the factors of my balancing model as spelled out above. By drawing on the principles of subsidiarity (Article 5, 1 TEU) and the protection of the identity of national constitutions (Article 4, 2 TEU), they use the factor of subsidiarity to justify a higher concrete weight of the control competence of the Member States' courts.[131] Under the specified circumstances (it can be presumed that the essence of fundamental rights is protected in the Member State concerned), the competence of Member States' courts has a higher concrete weight. If, on the other hand, the overall protection level in the particular legal system declines significantly, then the ECJ's control competence may prevail, according to the factor of the quality of the decision, because the performance of the legal system in general matters for that quality. The authors refer to the situation of media freedom in Hungary in that respect.[132]

However, the authors of the Reverse Solange proposal neglect that the factor of the quality of the decision and the factor of material principles may weaken the national control competence under certain circumstances. The balancing of competences must always be sensitive to the circumstances of the concrete case. Whenever Member States' courts, for example, provide only rudimentary protection, the factor of the quality of the decision weakens their control competence, and in consequence the competence of the ECJ may prevail. However, the proposal does not account for these situations since it borrows the general standard approach from *Banana Market*: 'How then, could the presumption of compliance be rebutted? In light of what has just been said, not by simple and isolated fundamental rights infringements. Instead, one has to look for violations of the essence of fundamental rights which in number or seriousness account for *systemic* failure and are not remedied by an adequate response within the respective national system.'[133] This general standard approach is a serious weakness. The Reverse Solange proposal is vulnerable to the

[130] A von Bogdandy *et al.*, 'Reverse Solange' (2012) 49 *Common Market Law Review* 489, 508.
[131] Ibid 508–9.
[132] Ibid 493–94.
[133] Ibid 513.

same objection as *Banana Market*. It does not distinguish between concrete and abstract weights of competences, and in result it ignores situations in which the concrete weight of the ECJ's competence is so high that the Member State court's competence is overridden.

Data Retention

The last case I would like to consider is the judgment concerning the constitutionality of the data retention in the Telecommunications Surveillance Act.[134] While paying lip service to its established Solange II jurisprudence, the FCC in effect departed from it. It exercised a de facto fundamental rights review of secondary EU law, in spite of the fact that settled case law as spelled out above did not allow for it.[135] It held that the complaints were admissible even insofar as the challenged provisions implement a Directive which does not allow for any discretion of the Member States in that particular respect.[136] This is clearly in contradiction to the established jurisprudence since with the circumstances being identical (non-discretionary, cogent Directive; provision of adequate protection of fundamental rights at EU level), the FCC had previously accepted the precedence of the ECJ's competence, whereas it proclaimed a preference of its own competence in *Data Retention*.

The FCC, without explicitly saying so, rests this most significant change to the established jurisprudence on the difference between a competence to control and a competence to dismiss a legal provision. The established Solange II criteria are no longer relevant for the competence to control, but only for the competence to dismiss. The FCC in fact reformulates the conditional preference relation between the competences. On the one hand, this volte-face allows for reconciling a preference of the ECJ's competence to dismiss with the FCC's competence to control. It is of course logically possible to maintain divergent preference relations if they are referred to different competences. On the other hand, understanding the difference between the competence to control and the competence to dismiss is only the first step. The decisive question is whether the change in the preference relations between the competences to control can be rationally justified.

This question is to be answered by balancing the FCC's competence to control and the ECJ's competence to control, using the factors outlined above. Two aspects are vital in that respect. Both of them are only briefly mentioned as an aside in the FCC's judgment. First, the FCC stresses that the storage of telecommunications traffic data without occasion constituted a particularly

[134] BVerfGE 125, 60.
[135] Cf Möllers (n 120) 162.
[136] BVerfGE 125, 60 at para 182.

serious infringement with fundamental rights.[137] The FCC uses the factor of material principles here to strengthen the weight of its own competence to control. This is all the more important since the ECJ in its previous decision on data retention failed completely to address the fundamental rights concerns raised by the applicant.[138] I conclude that the *Data Retention* case can be interpreted as an instance of the possibility of a reversal effect which I underlined above in my criticism of the *Banana Market* decision. Ceteris paribus, the seriousness of the infringement with fundamental rights justifies the higher weight of the FCC's control competence.

The second aspect regards the fact that the constitutional complaint directly challenged the implementing Act. Thus, the complainants had been unable to achieve a preliminary reference to the ECJ before the non-constitutional courts. Only a referral to the ECJ, however, could ensure that the latter may make a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union declaring the Directive void and thus opening the way for a review of the challenged provisions by the standard of German fundamental rights. Consequently, only the constitutional complaint to the FCC could open the way for a review of the challenged provisions by the standard of German fundamental rights. This way would have been blocked completely if the FCC had applied its established Solange II criteria to its competence to control, rather than merely to its competence to dismiss. The circumstances of the case signal a new factor not mentioned in my list above, namely the factor of reasonable evasion. The easier it is for the complainant to gain legal protection with the help of other means, the less important is the court's competence. Since in the present case there was no other possibility for the complainant to reasonably evade, the FCC's competence to control was strengthened.

VI. Results

This article has spelled out both in theoretical terms and in practical detail how conflicts of competences in the national and in the transnational sphere can be solved without declaring one or the other competence void or relying on political rather than legal instruments. Resting on new taxonomy of competence conflicts this article developed a specific concept of competence conflicts which interprets the conflicts as having a legal, logical, formal, actual and concrete nature. It then categorized the various solutions offered in the literature by separating political from legal solutions and distinguishing strict and flexible subtypes within the latter category. It was argued that

[137] Ibid para 241.
[138] Cf ECJ, *Ireland v Parliament and Council*, ECR I-00593 (10 February 2009).

both political and strict legal solutions are inadequate. Only flexible legal solutions provide truly effective solutions to competence conflicts while avoiding the serious disadvantages of the other types.

Flexible legal solutions operate by two means, namely a separation between primacy and supremacy and an understanding of competences as a distinct kind of legal norms, namely formal principles. Inspired by the idea of institutional practical concordance I established the variability of competence that allows for different degrees of legal authority and diverse preference relations between the colliding competences, depending on the legal and factual circumstances of the case at issue. Transferring Alexy's law of balancing to formal principles, I elaborated on the process of balancing competences which consists of three distinct steps. In order to determine the concrete weight of a competence along a triadic scale of light, moderate and serious, various factors may be used. Five factors were dealt with here, namely democratic legitimacy, the significance of material principles, the quality of the decision, subsidiarity and reasonable evasion. Drawing on the example of conflicts in the multilevel system of fundamental rights protection in the EU, I reconstructed the position of the German FCC as an attempt to balance its competence vis-à-vis the ECJ's competence. In the course of this discussion, the Solange method and the proposal of a Reverse Solange were discussed and criticized. As the discussion of this example demonstrates, balancing competences allows for reconciling two optimization requirements, namely the requirements to realize as much as possible the full effects of both national constitutional law and EU law, both being 'of equal importance'.[139]

The theory of balancing competences defended in this article features three distinct characteristics. First, it focuses on the general structure of competence conflicts both within and beyond the state, and hence it has a very wide, if not universal applicability. It is important to note that such a general theory, while context-independent as such, is still sensitive to the concrete circumstances of the respective case. It is hence, second, flexible, dynamic, and capable of reflecting changes to the legal systems and competences involved in developing varying preference relations between those systems and competences. Third, it avoids binary-coded quick solutions by structuring a process of optimization of both colliding principles, thus allowing for a 'pluralist understanding of sovereignty' which is normatively inclusive and 'combines continuity with change'.[140] The theory of balancing competences shares these three characteristics with Kumm's approach[141] I conclude that institutional cosmopolitanism is

[139] Bossuyt and Verrijdt (n 26) 384.

[140] Cf M Avbelj, 'Theorizing Sovereignty and European Integration' (2014) 27 *Ratio Juris* 344, 356.

[141] Cf Kumm (n 10) 300; see also Avbelj's heterarchical model, Avbelj (n 53) 750–54.

not only an intriguing theory, but also quite applicable in more practical terms. An implication of this is the possibility to rationally reconstruct the idea of pluralistic constitutionalism beyond the state, rather than to succumb to the scepticism of radical pluralism.