

The Intertwinement of Legal Orders
A Critical Reconstruction of Theories of Jurisprudence

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De vervlechting van rechtsordes
Een kritische reconstructie van theorieën van recht

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Promotiecommissie

Promotoren:

Prof.mr.dr. H.S. Taekema

Prof.dr.mr. W. van der Burg

Overige leden:

Prof.dr. E. Hey

Prof.dr.mr. R. Janse

Dr. D. Kyritsis

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Chapter 1

Critical reconstruction in jurisprudence

1 Introduction

In 2000 and 2001, a father of a child born in Leipzig filed petitions for custody and access rights at the Wittenberg district court in Germany. In the district court's final decision of 2001, the court ordered that the applicant, Mr. Görgülü, should have sole custody of his child. German authorities filed an appeal following this decision. Contrary to the district court, the court of appeal decided against Mr. Görgülü and ordered that the child should remain with his foster parents. After a number of further proceedings and the German Federal Constitutional Court's (*Bundesverfassungsgericht*) decision not to hear Mr. Görgülü's constitutional complaint, the father turned to an international court, the European Court of Human Rights.¹ In 2004, The European Court of Human Rights decided in favor of Mr. Görgülü. The Strasbourg Court held that Germany had failed to respect its obligations under article 8 of the Convention, which secures a right to family life.² However, Mr. Görgülü's claim to custody and access rights was only partly awarded in the German courts system following the decision of the European Court of Human Rights.³ Unable to accept this outcome, the father turned to the Federal Constitutional Court to file a constitutional complaint. The Federal Constitutional Court decided that the German constitution, the Basic law, had been violated because the court of appeal had failed to take into account the case law of the

¹ See BVerfGE 111, 307 (2004) (*Görgülü*), paras 2-12 on these decisions.

² *Görgülü v Germany* App no 74969/01 (ECtHR, 26 February 2004).

³ See BVerfGE 111, 307 (2004) (*Görgülü*), paras 13-19 on these decisions.

European Court of Human Rights.⁴ The Federal Constitutional court also considered the following about the relation between the German legal order and international law:

The Basic Law is intended to achieve comprehensive commitment to international law, cross-border cooperation and political integration in a gradually developing international community of democratic states under the rule of law. However, it does not seek a submission to non-German acts of sovereignty that is removed from every constitutional limit and control. Even the far-reaching supranational integration of Europe, which accepts the order to apply a norm, when this order originates from Community law and has direct domestic effect, is subject to a reservation of sovereignty, albeit one that is greatly reduced (see Article 23.1 of the Basic Law). The law of international agreements applies on the domestic level only when it has been incorporated into the domestic legal system in the proper form and in conformity with substantive constitutional law.⁵

The case of Mr. Görgülü illustrates that in European liberal democracies a plurality of legal orders exists. Given the existence of a plurality of legal orders, individuals may appeal to legal norms of different legal orders. Mr. Görgülü, for example, relied on German family law, international human rights law and the German constitution in his pursuit for custody and access to his child. Moreover,

⁴ See Hartwig 2005 for a detailed account of these decisions. On the significance of the *Görgülü* case in the field of European human rights law, see Krisch 2010, 110-113.

⁵ BVerfGE 111, 307 (2004) (*Görgülü*), para 36 [unofficial English translation issued by the Federal Constitutional Court]. The official decision in German reads as follows: 'Das Grundgesetz will eine weitgehende Völkerrechtsfreundlichkeit, grenzüberschreitende Zusammenarbeit und politische Integration in eine sich allmählich entwickelnde internationale Gemeinschaft demokratischer Rechtsstaaten. Es will jedoch keine jeder verfassungsrechtlichen Begrenzung und Kontrolle entzogene Unterwerfung unter nichtdeutsche Hoheitsakte. Selbst die weitreichende supranationale europäische Integration, die sich für den aus der Gemeinschaftsquelle herrührenden innerstaatlich unmittelbar wirkenden Normanwendungsbefehl öffnet, steht unter einem, allerdings weit zurückgenommenen Souveränitätsvorbehalt (vgl. Art. 23 Abs. 1 GG). Völkervertragsrecht gilt innerstaatlich nur dann, wenn es in die nationale Rechtsordnung formgerecht, und in Übereinstimmung mit materiellem Verfassungsrecht inkorporiert worden ist.'

officials of different legal orders may claim authority over a citizen. German district and appellate courts, the European Court of Human Rights and the German Federal Constitutional Court have heard Mr. Görgülü's arguments. The case of Mr. Görgülü also illustrates that legal orders may be highly intertwined. A norm from one legal order may be considered legally relevant in another legal order. For example, the rights enshrined in the European Convention on Human Rights have been invoked by Mr. Görgülü in the German legal order. Officials may also take into account the exercise of authority by officials of other legal orders. Some German courts, for example, relied on the case law of the European Court of Human Rights in their decision. In some cases, the intertwining of legal orders may be perceived as problematic. Legal norms of different legal orders may conflict and an official may contest the authority of officials of other legal orders. In the case of Mr. Görgülü, some German courts gave restricted effect to the European Convention on Human Rights and the case law of the European Court of Human Rights. German courts and the Federal Constitutional Court had opposing views on the question whether and under which conditions the European Convention on Human Rights should have priority over German law, and in particular the German constitution.

My aim in this study is to make sense of the intertwining of legal orders in European liberal democracies from the perspective of jurisprudence.⁶ Theories of jurisprudence may provide answers to theoretical questions that arise from the intertwining of legal orders. For example, in the case of Mr. Görgülü the question may be posed how German officials determine whether the European Convention on Human Rights should be applied in the German legal order. These theoretical questions also concern the potential conflict and contestation that is inherent to the intertwining of legal orders. For example, why did some German courts contest the authority of the European Court of Human Rights? Many legal theories do not provide an adequate account of the complex relations between legal orders. A critical reconstruction of theories of jurisprudence may yield a more promising account of the intertwining of legal orders. Answers to theoretical questions that

⁶ In this study, I focus on the intertwining of legal orders in European liberal democracies. However, the intertwining of legal orders is not a distinctively European phenomenon. See Twining 2009.

arise from the intertwinement of legal orders may be formulated by critically reconstructing theories of jurisprudence.

In this introductory chapter, I will first provide an outline of the central characteristics of the intertwinement of legal orders in European liberal democracies. Building on Paul Schiff Berman's theory of global legal pluralism, I will argue that legal orders should be considered relatively autonomous in light of the intertwinement of legal orders (section 2). Interconnections between legal orders exist when legal norms from one legal order are incorporated or given effect in another legal order and the exercise of power by officials from other legal orders is accepted. Frictions between legal orders emerge when conflicts between legal norms arise or the authority of officials of other legal orders is contested. I will illustrate what pressing theoretical questions are raised by the intertwinement of legal orders on the basis of three examples from positive law (section 3). I will claim that these theoretical questions center on the notions of validity and authority. Theories of jurisprudence should help us to make sense of these theoretical questions. However, Berman's theory of global legal pluralism lacks a convincing legal theoretical framework from which the complex relations between legal orders can be understood. Moreover, many available theories of jurisprudence do not provide an adequate account of the interconnections and frictions between legal orders. Critical reconstructions of positivist, interpretive and pragmatist legal theories may yield more promising accounts of the intertwinement of legal orders (section 4). Moreover, a novel theoretical account of the intertwinement of legal orders in European liberal democracies may be constructed by synthesizing the relative strengths of positivist, interpretive and pragmatist legal theories. On a methodological level, I will argue that John Rawls' method of reflective equilibrium can be used to critically reconstruct theories of jurisprudence and to formulate a novel theoretical account of intertwinement of legal orders (section 5). Finally, I will provide an outline of the arguments made in subsequent chapters (section 6).

2 The intertwinement of legal orders

An insightful account of the intertwinement of legal orders can be found in Paul Schiff Berman's theory of global legal pluralism.⁷ His theory of global legal pluralism provides a descriptive and normative framework to explain and normatively assess the complex relations between legal orders. From a descriptive point of view, Berman argues that a jurisdictional hybridity exists in which numerous domestic and international legal orders overlap. He defines jurisdictional hybridity as: 'normative overlap among international, state, and nonstate entities. This overlap includes instances when two different communities wish to assert jurisdiction to adjudicate a dispute as well as instances when a decision maker in one place is asked to apply the norms of a different community – what is sometimes called jurisdiction to prescribe or (especially in the Anglo-American system) choice of law.'⁸ On this view, legal norms of different legal orders may be legally relevant and officials of different legal orders may claim to exercise legitimate power. For example, different domestic and international legal norms may be considered legally relevant in a particular legal order.⁹ Jurisdictional hybridity may also lead to frictions between legal orders as legal norms of different legal orders can conflict, and officials may contest the authority of other officials.

From a normative point of view, Berman disagrees with two common responses to the frictions between legal orders that arise from jurisdictional hybridity. He calls these sovereigntist and universalist responses.¹⁰ Sovereigntists argue that frictions between legal orders may be resolved by giving priority to legal norms and officials of domestic legal orders. Berman maintains that the sovereigntist response is unconvincing for a number reasons. Firstly, sovereigntists are mistaken to argue that the authority of the state is the ultimate source of legal

⁷ Berman 2012. See also Berman 2013; 2016.

⁸ Berman 2012, 23.

⁹ Berman 2012, 25–44.

¹⁰ Berman 2012, 10.

obligation, and legal norms and officials are inherently tied to a territory.¹¹ Secondly, sovereigntists incorrectly assume that states are the only legitimate source of legal obligation.¹² Numerous actors, such as, for example, the Council of Europe and the European Union, create legal norms and claim to exercise legitimate power vis-à-vis states. Thirdly, sovereigntists are unable to acknowledge that states do not always pursue consistent policies. International law empowers individuals to challenge these state policies.¹³ Universalists maintain that the frictions between legal orders that arise from jurisdictional hybridity should be prevented by harmonization. On this view, a legal framework, such as, for example, centered on free trade or human rights, may be used to harmonize legal norms across different legal orders. Nonetheless, Berman considers that a legal framework to harmonize legal norms is objectionable. There are inherent differences between legal orders that should not be erased on the basis of harmonization. Moreover, legal harmonization may also introduce an undesirable power dynamic in which actors are able to impose their legal norms at the expense of weaker actors.¹⁴

In light of these objections Berman claims that sovereigntist and universalist responses to the frictions between legal orders that arise from jurisdictional hybridity are unpersuasive. Sovereigntists incorrectly assume that frictions between legal orders may be resolved by giving priority to domestic law and officials, while universalists wrongly believe that frictions may be overcome through legal harmonization. Berman claims that frictions between legal orders are unavoidable and should be mitigated through procedures and institutions. Procedures and institutions may help to articulate and further structure the intertwinement of legal orders. For example, the doctrine of the margin of appreciation, the principle of subsidiarity or policies of mutual recognition may help to mitigate the frictions

¹¹ Berman 2012, 63-96

¹² Berman 2012, 96-113.

¹³ Berman 2012, 113-121.

¹⁴ Berman 2012, 131-132.

between legal orders without abolishing the complex relations between legal orders altogether.¹⁵

Although I agree with Berman that sovereigntist and universalist responses to jurisdictional hybridity are unconvincing, I maintain that his descriptive account of global legal pluralism is unpersuasive for two reasons. Firstly, Berman's theory of global legal pluralism lacks a convincing legal theoretical framework from which the complex relations between legal orders can be understood. He maintains that global legal pluralism can be understood on the basis of a conventionalist legal theory. In a conventionalist legal theory, law is what people generally accept as law. Or as Berman explains: '[i]n any event, the important point is that scholars studying the global legal scene need not rehash long and ultimately fruitless debates (both in philosophy and in anthropology) about what constitutes law and can instead take a nonessentialist position: treating as law that which people view as law.'¹⁶ However, a conventionalist legal theory does not provide a convincing legal theoretical framework from which the intertwinement of legal orders can be understood. Firstly, in a conventionalist legal theory no clear distinction can be drawn between law and other social practices.¹⁷ For example, what people generally consider as law may be similar to their understanding of other social norms. Therefore, a theoretical account of law is needed that distinguishes law from other social practices. Secondly, people may disagree on how law should be understood.¹⁸ For example, people may conceptualize law differently. However, a conventionalist legal theory does not explain how this disagreement may be overcome. Therefore, a more adequate theoretical account of the intertwinement of legal orders is needed, one that can overcome the drawbacks of a conventionalist legal theory.

The second reason why Berman's descriptive account of global legal pluralism is unpersuasive is because it overemphasizes the frictions between legal

¹⁵ Berman 2012 152-189.

¹⁶ Berman 2012, 56. [footnotes omitted] Berman refers to Brian Tamanaha's work on a conventionalist understanding of law. See, for example, Tamanaha 2001.

¹⁷ Halpin 2014, 181.

¹⁸ Cotterrell 2018, 85.

orders. Berman's focus on conflicts between legal norms and contestation between legal officials, and the procedures and institutions to articulate and mitigate them, reinforces the view that legal orders should be considered autonomous. A view he actually wishes to dispel: '[u]sing pluralism, we can conceive of a legal system as both autonomous and permeable; outside norms (both state and nonstate) affect the system but do not dominate it fully.'¹⁹ However, when legal orders are relatively autonomous, their relations are not solely defined by friction. Legal norms of different legal orders do not necessarily conflict when they are considered legally relevant in multiple legal orders and the authority of officials is not always contested. Building on Berman's theory of global legal pluralism, I maintain that the intertwinement of legal orders should be approached in terms of both interconnection and friction. Interconnections between legal orders exist when a legal norm is incorporated or given effect in other legal orders. Interconnections between legal orders also exist when officials accept the authority of officials of other legal orders. Frictions between legal orders arise when legal norms of different legal orders conflict, or when the authority of officials of other legal orders is contested. In the following subsections, I will discuss these characteristics of the intertwinement of legal orders in more detail.

It should be highlighted that the intertwinement of legal orders is a multifaceted phenomenon. In this study, I explore the intertwinement of legal orders in European liberal democracies. EU law and the European Convention on Human Rights have a profound impact on the domestic legal orders of European liberal democracies.²⁰ Therefore, I will examine the complex relations between EU law and the European Convention on Human Rights on the one hand, and domestic legal orders on the other hand. I will also explore the intertwinement of EU law and the European Convention on Human Rights. However, I will not explore the interconnections and frictions between different regimes of international law as

¹⁹ Berman 2012, 25.

²⁰ See Weiler 2017 on the impact of EU law on domestic legal orders of European liberal democracies. See Keller and Sweet 2008 on the impact of the European Convention on Human Rights.

such.²¹ For example, the complex relations between international trade law and other regimes of international law, such as, environmental law and human rights law, and the institutions that deal with these complex relations may also be explored from the perspective of jurisprudence. In this study, I will focus on the relations between EU law and the European Convention on Human Rights. I will also not explore the ways in which domestic law is intertwined with international law as such. Numerous international institutions, such as, for example, the United Nations Security Council and the World Bank, exercise public authority.²² Some legal scholars have argued that public law notions may therefore be used to explore and normatively assess how these international institutions exercise their public authority.²³ However, in this study, I will only touch upon how domestic human rights law is intertwined with the European Convention on Human Rights. Nevertheless, my focus on European liberal democracies provides an interesting test case for theories of jurisprudence. The intertwining of legal orders in European liberal democracies concerns the complex relations between domestic and international legal orders, and the relation between EU law and the European Convention on Human Rights as such.

2.1 Reception and conflicts of legal norms

In legal orders that are intertwined, norms of one legal order may be considered legally relevant in another legal order. Firstly, a legal norm may be incorporated in a legal order. For example, a treaty provision may be incorporated in a domestic legal order through national legislation. Legislatures may take additional measures when a norm is incorporated in a legal order. EU directives, for example, leave room for EU member states to decide on how the goals set out in these directives should

²¹ See, for example, the contributions in Young 2012; Alter and Raustiala 2018.

²² See, for example, Krisch 2017; Zürn 2018. On the global dimensions of law and legal institutions, see Walker 2014.

²³ See, for example, Kingsbury, Krisch and Stewart 2005 on global administrative law; Von Bogdandy, Goldmann and Venzke 2017 on public international authority.

be achieved.²⁴ Secondly, reception includes giving effect to a norm of another legal order. For example, courts may apply legal norms of other legal orders in their decisions. Thirdly, the reception of a legal norm may concern the interpretation of that norm in another legal order. For example, a national court may accept a particular interpretation of a legal norm that has been developed in the case law of an international court. In some cases, the reception of a legal norm may seem obligatory from the perspective of another legal order. Again, EU law may be used as an illustration here. In the field of EU law, the doctrine of supremacy stipulates that primary and secondary EU legislation should trump domestic law in the legal orders of the member states.²⁵ The relation between EU law and domestic law in the domestic legal orders of the member states depends on how EU law is incorporated or given effect and how these legal norms are interpreted. This means that officials in the member states may fail to take the necessary steps to secure the reception of EU law.

Given the intertwinement of legal orders, legal norms of one legal order may conflict with norms of other legal orders. Conflicts may arise when a norm is incorporated in a legal order. For example, conflicts between domestic and international law may emerge when treaty provisions are implemented through national legislation without due regard for consistency with domestic law. Legislatures may therefore need to enact new law or amend existing law in order to resolve norm conflicts. Conflicts may also arise after a legal norm has been incorporated in the new legal order or when a norm is given effect. When these conflicts arise, courts may consider which decision best resolves inconsistencies between these norms. Executive officials may disregard some legal norms in their decision in order to avoid a conflict between legal norms. Lastly, conflicts may arise on the interpretation of a legal norm. For example, the interpretation of an international human rights norm by an international court may conflict with how national courts and legislatures understand that human right as enshrined in the constitution. It may be the case that legal norms stipulate how conflicts should be

²⁴ Art 288 of the Treaty on the Functioning of the European Union (TFEU).

²⁵ Case 6/64 *Costa v ENEL* [1964] ECR 585.

avoided or resolved within a legal order. For example, many constitutions contain provisions that stipulate under which conditions international law should trump domestic law.²⁶

2.2 Accepted and contested authority of officials

Officials apply, enact or amend legal norms. In intertwined legal orders, officials may rely on the authority of officials of other legal orders in their exercise of power. For example, a legislature may incorporate EU law into national legislation following an extensive legislative process in the European Union, and courts may rely on the case law of the Court of Justice of the European Union when giving effect to EU law. A distinction should be made between acceptance of authority in a strong and weak sense. Acceptance in a strong sense entails that officials defer to the authority of officials of other legal orders. For example, an official may incorporate legal norms for the overriding reason that they have been enacted in another legal order. Acceptance in a weak sense signifies that officials do not always defer to the authority of officials of other legal orders in their exercise of power. Officials may rely on the authority of other officials but their exercise of power is not solely dependent on deference. For example, officials may accept decisions of courts from other legal orders as authoritative. Nevertheless, in many cases the authority of these officials does not solely rely on deference to case law of other courts. More considerations play a role when officials exercise their power. An example concerning the authority of the European Court of Human Rights may serve as an illustration of acceptance in a strong and weak sense. Members to the European Convention on Human Rights (ECHR) are obligated to protect the rights that are laid down in the treaty and its additional protocols.²⁷ Citizens who claim that the rights of the Convention have been violated can turn to the European Court of

²⁶ For example, article 94 of the Dutch Constitution reads as follows: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.'

²⁷ Art 1 ECHR.

Human Rights to submit a complaint.²⁸ An extensive body of case law has developed in which the European Court of Human Rights assesses individual complaints of Convention violations. Strong acceptance would require officials in the member states to defer to the case law of the European Court of Human Rights. Acceptance in a weak sense entails that the case law of the European Court of Human Rights is not an exclusive consideration in the exercise of power by officials in the member states.

The authority of officials of other legal orders may be contested. For example, courts in domestic legal orders may outright reject the case law of the European Court of Human Rights. However, in most cases the authority of an official is contested because its claim to authority is only partly accepted. The relation between the European Court of Justice and high courts in the EU member states may be used as an example here.²⁹ Following the landmark case of *Costa/ENEL*, it can be argued that legal norms enacted by EU officials should have supremacy over domestic law.³⁰ However, high courts in the domestic legal orders of the member states have not always fully accepted the supremacy doctrine of EU law.³¹ In Germany, for example, the Federal Constitutional court has argued that EU law should not trump the fundamental rights enshrined in the German constitution.³² This illustrates that officials may not always fully accept the authority of officials in other legal orders.

3 Three examples from positive law

In order to illustrate what theoretical questions are raised by the intertwining of legal orders, I will discuss three examples from positive law concerning EU law, the

²⁸ Art 34 ECHR.

²⁹ When I refer to the European Court of Justice, I mean to denote the Court of Justice as described in Art 19 of the Treaty on European Union.

³⁰ Case 6/64 *Costa v ENEL* [1964] ECR 585.

³¹ Alter 2001.

³² BVerfGE 37, 271 (1974) (*Solange I*).

European Convention on Human Rights, and the relationship between EU law and the European Convention on Human Rights. My claim in this section is modest. I do not wish to assert that these examples provide a comprehensive descriptive account of the intertwinement of legal orders in its doctrinal context. Instead, I wish to make explicit what theoretical questions are raised by the intertwinement of legal orders in European liberal democracies. In my view, theoretical questions that are raised by the intertwinement of legal orders center on the notions of legal validity and authority. The notion of legal validity explains under which conditions a norm is legally valid in a legal order. Conflicts between legal norms bring to light that the validity of a legal norm may be challenged. The notion of legal authority clarifies under which conditions the exercise of power by an official is considered legitimate. In intertwined legal orders, the contestation of the authority of officials signals disagreement on the conditions of legitimate exercise of power by officials.

Lawyers in intertwined legal orders may occasionally be confronted with theoretical questions associated with the intertwinement of legal orders. A lawyer may be faced with questions that touch upon the validity of a legal norm or the authority of an official. Theories of jurisprudence may help to clarify and provide answers to these theoretical questions. In the following section, I will argue that many theories of jurisprudence are unable to provide answers to the theoretical questions that are raised by the intertwinement of legal orders.

It should be noted at the outset that the three examples from positive law that I discuss in this section all focus on courts and their decisions. More generally, in this study I do not discuss how the intertwinement of legal orders affects legislative and executive officials. It could therefore be argued that these examples from positive law reinforce a court-centric view that is prevalent in many theories of jurisprudence.³³ However, many of the legal theories I explore in this study are

³³ On this bias, Waldron notes: '[t]he fact is that modern legal philosophers in Britain and America are not really interested in legislatures and legislative structure at all. Those things, we tend to say, are for political science or public choice theory, not for philosophy. Tell a legal philosopher about legislative structure, and he will say, impatiently, 'When do we get to talk about the Supreme Court and how judges should decide cases?' And so we rest lazily content with an image of legislation – Rex's law – that was

focused on courts and judicial decision-making. In this study, my aim is to assess whether these theories of jurisprudence can be critically reconstructed to provide a more promising account of the intertwinement of legal orders. The examples from positive law that I discuss in this section will be used to critically reconstruct these legal theories and to illustrate their strengths and weaknesses. Future research may determine whether these legal theories can explain how the intertwinement of legal orders affects legislative and executive officials. Moreover, although my examples from positive law focus on courts and their decisions, the theoretical questions that touch upon legal validity and authority are also of relevance to legislative and executive officials. For example, decisions of executive officials should be based on valid legal sources and legislatures claim authority as rule-making institutions by enacting legislation. Nevertheless, further research may explore to what degree the intertwinement of legal orders raises similar questions about validity and authority.

3.1 EU law

In intertwined legal orders, a legal norm may be considered supreme over other forms of law partly in virtue of it being enacted by an official of another legal order. For example, from the perspective of the EU legal order, norms of EU law should trump domestic law in the member states. Or as the Court of Justice argued in the landmark decision *Costa/ENEL*: ‘the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.’³⁴ On this view, officials in the legal orders of the member states should accept that EU law should trump domestic law.

already being called in question six hundred years ago by jurists who took their vocation a little more seriously than we do.’ Waldron 1999, 67.

³⁴ Case 6/64 *Costa v ENEL* [1964] ECR 585. The doctrine of supremacy has been further developed in Case 106/77 *Simmenthal* [1978] ECR 629.

However, in the EU member states, the doctrine of EU supremacy has not always been fully accepted.³⁵ The German Federal Constitutional Court has been a determined critic of the doctrine of supremacy. In its decisions, the Federal Constitutional Court has argued on the basis of three grounds that the supremacy of EU law may be restricted.³⁶ The Federal Constitutional Court has argued that the supremacy of EU law may be restricted on the basis of fundamental rights, the competences of EU institutions, and the constitutional identity of the German constitution.³⁷ In *Internationale Handelsgesellschaft*, the Court of Justice explicitly denied that the supremacy of EU law may be restricted on the basis of fundamental rights enshrined in a constitution.³⁸ However, in its *Solange* decisions the Federal Constitutional Court maintained that EU law may not trump fundamental rights norms in the German legal order. In *Solange I*, the Federal Constitutional Court argued that EU law should be supreme over German law only insofar as EU law respects the fundamental rights enshrined in the German constitution.³⁹ This would enable the Federal Constitutional Court to review EU law on the basis of the German constitution. However, in *Solange II*, the Federal Constitutional Court decided that it would only review the constitutionality of EU law if the European Union fails to respect the requirements of fundamental rights protection as laid down in the German constitution.⁴⁰ In a subsequent decision, the Federal Constitutional Court affirmed *Solange II*. Moreover, it considered that a constitutional complaint that challenges the constitutionality of EU law on the basis of fundamental rights is admissible if the fundamental rights protection of the European Union has fallen below the level of protection of the German constitution.⁴¹ Therefore, challenging the supremacy of EU law on the basis of fundamental rights has become less feasible.

³⁵ See Alter 2001.

³⁶ On the constitutional nature of these grounds, see, for example, Kumm 1999; Von Bogdandy and Schill 2011.

³⁷ For an overview of the case law on these three grounds, see Payandeh 2011; Faraguna 2017.

³⁸ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

³⁹ BVerfGE 37, 271 (1974) (*Solange I*).

⁴⁰ BVerfGE 73, 339 (1986) (*Solange II*).

⁴¹ BVerfGE 102, 147 (2000) (*Bananas*).

The supremacy of EU law has also been challenged by the German Federal Constitutional Court on the basis of two other grounds. In the *Maastricht* decision, the Federal Constitutional Court maintained that it has the authority to review whether EU institutions have exercised their authority on the basis of the competences that have been set out in the foundational treaties of the EU.⁴² The Federal Constitutional Court argued that EU institutions should respect the democratic principles that are enshrined in the German constitution. On this view, EU law may be disregarded when EU institutions have not exercised their authority according to their assigned competences. For example, a decision of the Court of Justice of the European Union or regulations adopted by the European Parliament and the Council may be disregarded when these EU institutions have acted *ultra vires*. Nevertheless, in its *Honeywell* decision, the German Federal Constitutional Court has decided that it will only subject EU law and its institutions to an *ultra vires* review when the Court of Justice of the European Union has given a preliminary ruling on the subject matter.⁴³

Lastly, the Federal Constitutional Court has challenged the supremacy of EU law on the basis of the constitutional identity of the German constitution. In the *Lisbon* decision, the Federal Constitutional Court considered that EU law and its institutions should respect the German state in its exercise of authority in areas of constitutional importance.⁴⁴ Areas of constitutional identity include, for example, criminal law and fiscal policy. Recently, in its first ever request for a preliminary ruling, the Federal Constitutional Court has requested a preliminary ruling on the legality of the Outright Monetary Transactions program that was adopted to combat the Euro-crisis. In its request, the Federal Constitutional Court asked the Court of Justice of the European Union whether EU institutions exceeded their competences and whether Outright Monetary Transactions program violated the constitutional

⁴² BVerfGE 89, 155 (1993) (*Maastricht*). Currently, the foundational treaties of the European Union are the Treaty on European Union and the Treaty on the Functioning of the European Union.

⁴³ BVerfGE 126, 286 (2010) (*Honeywell*). Courts may request a preliminary ruling of the Court of Justice of the European Union on the interpretation of EU law or the validity of acts of EU institutions. See Art 267 TFEU. In practice, the European Court of Justice gives preliminary rulings. See also Art 256 TFEU.

⁴⁴ BVerfGE 123, 267 (2009) (*Lisbon*).

identity of the German constitution. In *Gauweiler*, the European Court of justice affirmed the legality of the Outright Monetary Transactions program.⁴⁵ Following this preliminary ruling, the German Federal Constitutional Court concluded that Outright Monetary Transactions program was not *ultra vires*, nor that it conflicted with the constitutional identity of the German constitution.⁴⁶

These decisions raise more general questions concerning the validity of EU law in domestic legal orders and the authority of the Court of Justice of the European Union vis-à-vis high courts in the member states. What are the validity criteria of EU law in the domestic legal orders of the member states? Do these conditions follow purely from legal norms internal to the domestic legal order, such as, for example, the constitution, or are there other requirements that need to be fulfilled? It could also be argued that the German constitution protects moral rights.⁴⁷ This would entail that the conditions under which a legal norm should be considered valid in the German legal order, are moral in nature. Thus, the resistance of the German Federal Constitutional Court to the doctrine of EU supremacy raises theoretical questions on the validity of EU law in the legal orders of the member states. Theoretical questions can also be posed about the relations between the Court of Justice of the European Union and courts in the member states. For example, what is the nature of the relations between national courts and the Court of Justice of the European Union if officials in the member states claim sole authority to determine their relation with the EU legal order? It could also be argued that neither the German Federal Constitutional Court nor the Court of Justice of the European Union has the ultimate authority to determine the validity of EU law or the competences of EU institutions. What does this entail for the relation between the Court of Justice of the European Union and officials in the member states? Therefore, further reflection is needed on how the relations between national courts and the Court of Justice of the European Union should be conceptualized.

⁴⁵ Case C-62/14 (*Gauweiler*) [2015] ECLI:EU:C:2015:400.

⁴⁶ BVerfGE 142, 123 (2016) (OMT).

⁴⁷ See, for example, Dworkin 1978.

3.2 The European Convention on Human Rights

The European Court of Human Rights has become an important human rights court in European liberal democracies. An extensive body of case law has developed on the basis of the individual complaints procedure, which many, but not all, courts in the legal orders of the signatory states follow.⁴⁸ Between the European Court of Human Rights (ECtHR) and national courts relatively harmonious relations have emerged. Or as Krisch describes: ‘in spite of this divergence on fundamentals, the interplay between the different levels of law has been remarkably harmonious and stable. There have hardly been open clashes; instead, mutual accommodation and convergence have been the norm, facilitated by the flexible and responsive strategies of the courts involved, and especially of the ECtHR itself.’⁴⁹ Thus, the European Court of Human Rights has considerable influence in the domestic legal orders.

Despite the relatively harmonious relations between the European Court of Human Rights and national courts, these relations may be strained. The relation between the European Court of Human Rights vis-à-vis the Dutch Council of State may serve as a striking example.⁵⁰ In a number of decisions, the European Court of Human Rights has been highly critical of the constitutional role of the Dutch Council of State (*Raad van State*).⁵¹ In the Dutch legal order, the Council of State has two functions, an advisory and adjudicative function. The Council has an advisory function in the legislative process, but also reviews government decisions in its adjudicative function. Currently, the advisory and adjudicative functions of the Council of State are reflected in its two divisions: the Advisory Division and the Administrative Jurisdiction Division. In the *Bentham* case, the Strasbourg Court criticized the administrative appeal procedure in Dutch administrative law. In this

⁴⁸ In some signatory states general compliance with the European Convention on Human Rights is absent. For an overview, see Keller and Sweet 2008.

⁴⁹ Krisch 2010, 152.

⁵⁰ On the authority of the Strasbourg Court in the Dutch legal order, see Huls 2012; Oomen 2016.

⁵¹ On the reception of the case law of the European Court of Human Rights in the Dutch legal order, see De Wet 2008.

procedure the Council of State issues an advisory opinion for the Crown. The Crown takes a decision on administrative appeal by royal decree based on the advisory opinion of the Council of State.⁵² The European Court of Human Rights argued that this procedure violated the right to a fair trial because an advisory opinion of the Council of State may be set aside by the Crown. Following this case, the administrative appeal procedure was abolished. Measures were taken by the Dutch government to ensure that the Administrative Jurisdiction Division of the Dutch Council of State decides on appeal in these cases.⁵³

In the *Procola* case concerning the Luxembourg Council of State, the European Court of Human Rights highlighted the importance of an institutional separation between the advisory and adjudicative functions.⁵⁴ The advisory and adjudicative functions should be separated to ensure that the Luxembourg Council of State is an independent and impartial tribunal as defined in article 6 of the Convention. In *Procola*, the Strasbourg Court considered: '[i]n the context of an institution such as Luxembourg's Conseil d'Etat the mere fact that certain persons successively performed these two types of function in respect of the same decisions is capable of casting doubt on the institution's structural impartiality.'⁵⁵ Following this decision, measures were taken by the Dutch government in order to ensure that members of the Council of State who have given advice in the legislative process on draft legislation do not review cases that concern legislation that they have previously assessed.⁵⁶

In *Kleyn*, the Strasbourg Court affirmed that the Administrative Jurisdiction Division of the Dutch Council of State is an independent and impartial tribunal as defined in article 6 of the European Convention on Human Rights.⁵⁷ Nevertheless, the European Court of Human Rights warned that the co-existence of the two functions of the Council of State could lead to a violation of the Convention in some

⁵² *Bentham v The Netherlands* App no 8848/80 (ECtHR, 23 October 1985).

⁵³ De Wet 2008, 239.

⁵⁴ *Procola v Luxembourg* App no 14570/89 (ECtHR, 28 September 1995).

⁵⁵ *Procola v Luxembourg* App no 14570/89 (ECtHR, 28 September 1995) para 45.

⁵⁶ De Wet 2008, 239.

⁵⁷ *Kleyn and others v The Netherlands* App no 39343/98; 39651/98; 43147/98; 46664/99 (ECtHR, 6 May 2003).

cases. Therefore, legislation was adopted in order to ensure an institutional separation between the advisory and adjudicative functions of the Dutch Council of State. The legislation stipulates that members of the Council of State should not carry out advisory and adjudicative tasks concurrently.⁵⁸ Finally, in the *Salah Sheekh* decision, the Strasbourg Court found a violation of the European Convention on Human Rights because the Administrative Jurisdiction Division of the Dutch Council of State failed to commit to a full review of asylum cases on appeal.⁵⁹ The European Court of Human Rights argued that no adequate assessment had been made by national authorities to ensure that the applicant would not be subjected to torture following expulsion. Moreover, the applicant maintained that an appeal to the Administrative Jurisdiction Division of the Dutch Council of State would have been pointless. The European Court of Human Rights agreed with the applicant and argued that: ‘the Administrative Jurisdiction Division may in theory have been capable of reversing the decision of the Regional Court, in practice a further appeal would have had virtually no prospect of success.’⁶⁰ Therefore, in the *Salah Sheekh* decision, the Strasbourg Court criticized national authorities and the Council of State for their failure to adequately take into account the Convention.

These decisions raise the question why the Strasbourg Court and the Council of State have opposing interpretations of what Convention rights entail. In these decisions, the European Court of Human Rights scrutinizes the Council of State for its exercise of authority in the Dutch legal order. In the *Bentham* and *Kleyn* decisions, the Strasbourg Court scrutinizes the dual function of the Council of State in light of article 6 of the Convention. Over a number of years, legislative reforms have been enacted to secure a stricter separation of functions for the Council of State in the Dutch legal order. Although the Administrative Jurisdiction Division of the Dutch Council of State is now considered an independent and impartial tribunal, its role in the Dutch legal order was criticized again in *Salah Sheekh*. In the *Salah Sheekh* decision, the European Court of Human Rights criticized the Council of State on the

⁵⁸ De Wet 2008, 239-240.

⁵⁹ *Salah Sheekh v The Netherlands* App no 1948/04 (ECtHR, 11 January 2007).

⁶⁰ *Salah Sheekh v The Netherlands* App no 1948/04 (ECtHR, 11 January 2007) para 123.

basis of article 3 of the Convention. These decisions raise the question why the European Court of Human Rights and the Council of State have opposing normative views on how authority should be exercised in relation to fundamental rights, even though measures have been taken to ensure that the case law of the European Court of Human Rights is given effect. Adams and Van der Schyff raise a similar point in relation to the *Salah Sheekh* case:

To its credit the government of the day responded quickly by adjusting its asylum policy to meet the requirements as set out in the *Salah Sheekh* case. However, this does not address the cultural and institutional issue of constitutional checks and balances when it comes to realising constitutional and rule of law values in the Netherlands. Although the *Salah Sheekh* case might not be evident of everyday adjudication in the Netherlands, it does pose the question whether the courts are not too reticent in adjudicating sensitive matters such as asylum practice and policy. Treaty review might exist, but its exercise must not be allowed to fade into the sunset if it is to fulfil any role in helping to maintain the rule of law.⁶¹

Thus, the *Bentham*, *Kleyn* and *Salah Sheekh* decisions bring to light that further clarification is needed to explain why the Strasbourg Court and the Council of State diverge in how authority should be exercised in relation to fundamental rights. And, moreover, why did the Dutch government take measures following the decisions of the European Court of Human Rights?

3.3 The relationship between EU law and the European Convention on Human Rights

In the previous examples, I have illustrated how domestic legal orders are intertwined with EU law and the European Convention on Human Rights. However, the intertwinement of these legal orders also touches upon the

⁶¹ Adams and Van der Schyff 2017, 374. [footnote omitted]

relationship between EU law and the European Convention on Human Rights. Obligations under EU law and the Convention may overlap. EU member states are obligated to take the necessary measures to give effect to EU law. For example, states may need to enact new legislation or amend existing legislation in order to give effect to an EU directive. Currently, all EU member states are signatories of the European Convention on Human Rights. This means that EU member states should also respect the fundamental rights as enshrined in the Convention. Obligations under EU law and the Convention may conflict in some cases. The European Court of Human Rights has paid close attention to the frictions that could therefore arise between the human rights regimes of the Council of Europe and the European Union.⁶² In the *Matthews* case, the European Court of Human Rights emphasized that states should fulfill their obligations under the Convention, even when they have transferred competences to international organizations, such as, for example, the European Union.⁶³ However, in *Bosphorus*, the Strasbourg Court also maintained that it would not review whether EU member states have violated the European Convention on Human rights in giving effect to obligations under EU law, as long as the European Union provides equal protection to human rights.⁶⁴ Thus, *Bosphorus* limits the indirect review of EU law on the basis of the European Convention on Human Rights.⁶⁵

Article 6 of the Treaty on European Union (TEU) creates an obligation for the EU to accede to the European Convention on Human Rights: '[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'⁶⁶ Moreover, the EU Charter of Fundamental Rights (EU

⁶² For an overview of the extensive case law, see Douglas-Scott 2006; Glas and Krommendijk 2017.

⁶³ *Matthews v United Kingdom* App no 40302/98 (ECtHR, 15 July 2002).

⁶⁴ *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005).

⁶⁵ It should be noted that in *Michaud v France* App no 12323/11 (ECtHR, 6 December 2012) the European Court of Human Rights argued that the presumption of equal human rights protection does not apply when states have discretion in how they give effect to EU law or have failed to request a preliminary ruling from the Court of Justice of the European Union on the interpretation of EU law.

⁶⁶ Art 6 para 2 TEU.

Charter) stipulates that the human rights enshrined in the Charter should have the same meaning and scope as the corresponding rights in the European Convention on Human Rights.⁶⁷ This suggests that frictions between the human rights regimes of the Council of Europe and the European Union are unlikely. However, in *advisory opinion 2/13* on the Draft Agreement on Accession the European Court of Justice argued that accession would violate the supremacy of EU law.⁶⁸ Firstly, EU accession could entail that member states guarantee a higher level of fundamental rights protection than EU law.⁶⁹ Secondly, EU accession would impede on the mutual trust of member states to give effect to EU law.⁷⁰ Thirdly, the European Court of Justice argued that EU accession could undermine the preliminary ruling procedure.⁷¹ Accession to the European Convention on Human Rights is unlikely in the near future in light of *advisory opinion 2/13*. Nevertheless, the European Court of Human Rights has upheld the presumption of equal human rights protection after *advisory opinion 2/13*. In *Avotiņš*, the Strasbourg Court affirmed the *Bosphorus* presumption. The European Court of Human Rights argued that states should presume that EU member states provide an equal level of protection of human rights when they give effect to EU law.⁷²

The relationship between EU law and the European Convention on Human Rights raises the question why frictions between these legal orders emerge, even when legal norms are harmonized to a great degree. The advisory opinion of the European Court of Justice suggests that EU accession to the European Convention on Human Rights would violate the supremacy of EU law and the authority of the European Court of Justice to interpret EU law. Can the European Court of Human

⁶⁷ Art 52 para 3 EU Charter.

⁶⁸ Opinion 2/13 EU EU:C:2014:2454. On the relation between EU supremacy and accession, see Gragl 2013.

⁶⁹ Opinion 2/13 EU EU:C:2014:2454, para 189. See also Case C-399/11 *Melloni* ECLI:EU:C:2013:107. In this case, the Spanish Constitutional Court requested a preliminary ruling on the implementation of the European Arrest Warrant. The Spanish Constitutional Court argued that the execution European Arrest Warrant should not violate fundamental rights enshrined in the Spanish constitution. However, the European Court of Justice opposed this line of reasoning in *Melloni*.

⁷⁰ Opinion 2/13 EU EU:C:2014:2454, para 194.

⁷¹ Opinion 2/13 EU EU:C:2014:2454, para 199.

⁷² *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016).

Rights exercise its authority in such a way that this would not impede on the authority of the European Court of Justice? It could be argued that more harmonization between these human rights regimes would reduce the chance that contestation between the Luxembourg and Strasbourg Court would arise. However, this depends on how the authority of these courts is understood. If the authority of the European Court of Justice and the European Court of Human Rights depends solely on the correct application of legal norms, no frictions between legal orders would arise when the legal norms in question are harmonized. If the authority of the Luxembourg and the Strasbourg Court depends on other factors, frictions between the human rights regimes of the Council of Europe and the European Union can still emerge. Thus, clarification is needed on the conditions under which officials may exercise legitimate power in relation to each other and how their authority is related to the interpretation and application of legal norms.

4 **Making sense of the intertwinement of legal orders**

Legal theories help us to make sense of the theoretical questions that are posed in the discipline of law. On this view, the discipline of jurisprudence offers us insight into notions fundamental to law. As Cotterrell explains:

Jurisprudence is not an application to law of the protocols of disciplines such as philosophy, sociology, economics, or anthropology. Its orientation is not a *focusing down* from one or more of the disciplines to the special topic of 'law'. It has to be a *projection up* from law as a regulatory practice and experience into any realms of theory that can support that practice or make sense of that experience.⁷³

⁷³ Cotterrell 2018, 55. See also Van Hoecke 1986. Building on Cotterrell's view on jurisprudence, I understand jurisprudence as the discipline engaged in conceptualizing law in order to explain law's central characteristics. Therefore, when I refer to legal theories or theories of jurisprudence, I mean theories that aim to provide an account of the central characteristics of law. Jurisprudence and its theories should be distinguished from the discipline of philosophy of law. In philosophy of law, theoretical

Unfortunately, many legal theories do not account for the interconnections and frictions between legal orders. This blind spot can be partly explained because some theories of jurisprudence do not treat international law as an integral part of their account of law.⁷⁴ Even when theories of jurisprudence conceptualize international law, they often provide a distorted account. Take, for example, H.L.A. Hart's claim on international law in the last chapter of *The Concept of Law*.⁷⁵ Hart maintains that norms of international law create obligations but that we cannot determine under which conditions norms of international law are valid, how they should be created, and how disputes concerning these norms should be resolved. In chapter 2 of this study, I will argue that this claim is unconvincing, even in light of Hart's own legal theory.⁷⁶ Hart's treatment of international law is a paradigmatic example of how this area of law is treated in legal theories.⁷⁷ Consequently, because theories of jurisprudence have a blind spot for international law the intertwinement of legal orders remains largely unexplored.

Theories of jurisprudence that do not account for the intertwinement of legal orders are confronted with a problem. If they do not explain the complex relations between legal orders, they cannot make sense of a central characteristic of law in these legal orders. Moreover, the theoretical questions that are raised by the intertwinement of legal orders remain ambiguous. However, legal theories that do not account for the intertwinement of legal orders should not be abandoned

questions about law are posed that do not arise in legal practice itself. On this distinction, see also Robertson 2017 and Cotterrell 2018.

⁷⁴ Twining 2009.

⁷⁵ Hart 1994.

⁷⁶ Hart maintains that valid legal norms can be identified with rules of recognition, created on the basis of rules of change, and enforced with rules of adjudication. These are called secondary rules. In chapter 2 of this study, I will argue that from the perspective of Hart's positivist legal theory these secondary rules can be identified in international law.

⁷⁷ On Hart's treatment of international law Waldron notes: 'One can't help thinking that the feel of this chapter – it seems like an afterthought, it departs quite markedly from the flow of the main argument of the book's later chapters, and it is not revisited at all in the 1994 Postscript – has contributed to a sense among analytic jurists in the positivist tradition that jurisprudential issues associated with international law are issues of marginal significance, mostly not worth the attention of serious legal philosophers.' [footnote omitted] Waldron 2013, 209-210. See also Murphy 2017.

outright. A critical reconstruction of theories of jurisprudence may remedy this problem by providing new and improved explanations of international law and the intertwinement of legal orders. A critical reconstruction of legal theories may also yield answers to the theoretical questions that are raised by the complex relations between legal orders. In this study, I seek to incorporate new elements in theories of jurisprudence to offer a more convincing understanding of the intertwinement of legal orders, while maintaining the central insights of these theories. A critical reconstruction of these legal theories will enable me to assess how these theories can make sense of the intertwinement of legal orders. Therefore, the central research question that I seek to answer in this study is the following:

How may a critical reconstruction of theories of jurisprudence help to make better sense of the intertwinement of legal orders?

Central in this study are H.L.A. Hart's positivist legal theory, Ronald Dworkin's interpretive legal theory, and Karl Llewellyn and Philip Selznick's pragmatist legal theories. They are legal theories from the three main traditions of jurisprudence. Following Tamanaha, a distinction can be made between analytical, normative and socio-legal traditions of jurisprudence.⁷⁸ Hart's positivist legal theory is usually situated in the analytical tradition of jurisprudence. Analytical legal philosophers maintain that a legal theory should provide conceptual clarity. A legal theory should clarify the meaning of legal notions and ought to provide insight into how these notions structure our social life. Legal philosophers in the normative tradition of jurisprudence maintain that a legal theory should construct a justification of law. Dworkin's interpretive legal theory is generally perceived as part of this tradition of jurisprudence. He maintains that a legal theory should present law in its best light. Legal philosophers committed to socio-legal jurisprudence maintain that a legal theory should provide an account of the social practice of law. Llewellyn and Selznick's pragmatist legal theories are often situated in this tradition of jurisprudence.⁷⁹ They incorporate insights from sociology and anthropology to

⁷⁸ Tamanaha 2017.

⁷⁹ It should be noted that Philip Selznick was a sociologist. However, the inclusion of Selznick is justified in light of the interdisciplinary approach of theorists in the socio-legal tradition of jurisprudence. I

reach a sociologically informed understanding of law. The first sub-question that I aim to answer in this study is:

How can theories from the analytical, normative and socio-legal traditions of jurisprudence make sense of the intertwinement of legal orders?

It should be noted that critics could object to my claim that legal theories should be able to make sense of the intertwinement of legal orders. Two objections may be raised at this point. Firstly, critics may disagree with my claim that theories of jurisprudence face a problem when they cannot account for the intertwinement of legal orders. Secondly, critics may argue that I overstate my claim that theories of jurisprudence should be able to make sense of law's central characteristics. In my view, both objections are unpersuasive.

Some legal philosophers in the analytical tradition of jurisprudence maintain that legal theories should make sense of law's universal characteristics.⁸⁰ On this view, legal theories should be able to explain law in all societies, of past, present and future. Legal philosophers engage in conceptual analysis in order to reach a clear understanding of the universal characteristics of law. Conceptual analysis may be defined as: 'reflection on the application of familiar concepts or categories to particular cases by appeal to intuitions, until something like necessary and sufficient conditions for the application of those concepts or categories emerge.'⁸¹ The interconnections and frictions between legal orders may not be considered a universal characteristic of law because it is only a central characteristic of law in contemporary legal orders. Analytical legal philosophers may therefore argue that theories of jurisprudence do not face a problem when they cannot account for the intertwinement of legal orders. The interconnections and frictions between legal orders are merely contingent characteristics of law.

develop this argument in chapter 4. In this chapter, I also discuss Lon Fuller's typology of enacted and interactional law to explain how legal norms should be understood from a legal pragmatist perspective. Although Fuller is often associated with the normative tradition in jurisprudence, there is a close kinship between his legal theory and American pragmatist philosophy. See Winston 1988; Rundle 2012, 46-47.

⁸⁰ See, for example, Dickson 2001; Raz 2009a; Shapiro 2011; Gardner 2012.

⁸¹ Giudice 2015, 18.

The claim that theories of jurisprudence should only account for law's universal characteristics of law is highly problematic. Firstly, the idea that universal characteristics of law may be identified is unconvincing. Law is a social concept and its characteristics are dependent on time and place. Some concepts have universal characteristics. For example, the atomic structure of water, H₂O, is a universal characteristic of the concept of water. However, law is a product of human action and thus its characteristics do not exist independently from human existence.⁸² Or as Tamanaha explains: '[w]ater has a fixed chemical structure independent of what humans think, whereas law is constructed through the meaningful actions of humans; the features of law are contingent on and shaped by human subjectivity and purposes while the essential properties of water are not.'⁸³ Moreover, social concepts like law are essentially ambiguous. No single legal theory is able to make sense of every characteristic of law. This entails that theories of jurisprudence provide different insights on the central characteristics of law.⁸⁴ Secondly, the idea that legal philosophers may gain insight into law's universal characteristics through conceptual analysis should also be considered problematic. Legal philosophers cannot engage in conceptual analysis without relying on prior beliefs on law.⁸⁵ For example, the intertwinement of legal orders will not be considered an important topic in the field of jurisprudence if the autonomy of legal orders is considered the appropriate starting point of a legal theory. However, given the interconnections and frictions legal orders, a more fruitful starting point of a legal theory is the relative autonomy of legal orders.

Does this mean that legal theories from the analytical tradition should be abandoned altogether? In my view, this is unwarranted. Following Giudice, I maintain that legal theories in the analytical tradition should be understood as constructive conceptual explanations of law. Or as Giudice explains the move from conceptual analysis to constructive conceptual explanation: 'conceptual analysis

⁸² Tamanaha 2017, 58-62.

⁸³ Tamanaha 2017, 59.

⁸⁴ Van der Burg 2014, 42-45.

⁸⁵ Giudice 2015, 27-30; Tamanaha 2017, 62-65.

concerns itself with elucidating or making explicit what is already implicit in some particular culture's self-understanding of law, constructive conceptual explanation attempts to correct, revise or improve on what might be mistaken, distorting or parochial in that self-understanding when tested against observable social reality.⁸⁶ On this view, law is a social concept and its characteristics are dependent on time and place. Therefore, when critically reconstructing Hart's positivist legal theory, I will understand his theory as a constructive conceptual explanation of law's central characteristics.⁸⁷

Critics may also argue that I overstate my claim that theories of jurisprudence should be able to make sense of law's central characteristics. Critics may argue that the validity of a legal theory depends primarily on the quality of the arguments it provides to support its philosophical claims. However, this objection wrongly assumes that the argumentative force of a legal theory can be seen in isolation of the conception of law it aims to explain. In my view, the philosophical claims of a legal theory are inherently linked with a particular conception of law's characteristics and thus these two domains cannot be fully distinguished. Legal theories put forward philosophical claims about law and arguments to support these claims. These philosophical claims about law are made in light of an often implicit understanding of law's central characteristics. On this view, debates in the field of jurisprudence revolve around a continuing mutual adjustment of philosophical claims about law and their conception of the central characteristics of law. Postema captures this point well when he characterizes the discipline of jurisprudence as a sociable science: 'legal theory, which makes reflective understandings explicit, and seeks critical self-awareness of practice-shaping understandings of law, must acknowledge not only that reflective understandings change over time, but also that such changes, reflecting changes in the practice in response to changes in its social and political context, are intrinsic to the nature of the practice.'⁸⁸ Thus, legal philosophical claims and arguments are inherently linked to a particular conception

⁸⁶ Giudice 2015, vi.

⁸⁷ On Hart's positivist legal theory as a constructive conceptual explanation, see Giudice 2015, 67-89.

⁸⁸ Postema 2016, 23. See also Cotterrell 2003 and Coyle 2017.

of law.⁸⁹ A critical reconstruction of a legal theory may yield a more promising understanding of law, while maintaining its central insights and arguments.

Following my critical reconstruction of these theories of jurisprudence, I will identify relative strengths and weaknesses for my positivist, interpretive and pragmatist accounts of the intertwinement of legal orders. I will maintain that a novel account of the notions of validity and authority may be constructed that can make better sense of the intertwinement of legal orders by synthesizing the relative strengths of these legal theories. I will argue that a novel account should overcome two challenges. Firstly, this account should be able to explain how valid legal norms of other legal orders are identified, even when lawyers persistently disagree under which conditions these norms should be considered valid. Moreover, this account should be able to conceptualize the authority of officials even when officials of different legal orders diverge on how legitimate power should be exercised. Secondly, a novel account of the intertwinement of legal orders should be able to explain the interconnections between legal orders without abandoning the notion of legal order as such. Thus, in the last part of this study, I seek to answer a second sub-question:

What theoretical account of legal validity and authority is best justified in light of the intertwinement of legal orders?

My account of the intertwinement of legal orders means to provide a more convincing legal theoretical framework to understand the complex relations between legal orders when compared to Berman's theory of global legal pluralism.⁹⁰ Berman relies on a conventionalist legal theory. In a conventionalist legal theory, law should be understood as what people generally accept as law.⁹¹ My account of the intertwinement of legal orders can overcome the shortcomings of a conventionalist legal theory that I have discussed earlier. Firstly, conventionalist

⁸⁹ In the next section, I explain in more detail the tension between the argumentative soundness of a legal theory and its ability to provide an insightful account of law's central characteristics.

⁹⁰ Berman 2012.

⁹¹ Tamanaha 2001.

legal theories are unable to provide a precise account of what law is.⁹² By synthesizing the relative strengths of my positivist, interpretive and pragmatist accounts of the intertwinement of legal orders I will develop an account of law in intertwined legal orders. Secondly, conventionalist legal theories cannot explain what understanding of law is most convincing when we disagree on how law should be understood.⁹³ I will formulate a convincing account of law in intertwined legal order by confronting my positivist, interpretive and pragmatist accounts of the intertwinement of legal orders with each other. Therefore, my theoretical account of legal validity and authority in intertwined legal orders can overcome the shortcomings of a conventionalist legal theory.

5 Critical reconstruction

In the following chapters, I use the method of reflective equilibrium to critically reconstruct legal theories and to formulate a theoretical account of the notions of validity and authority. In *A Theory of Justice*, John Rawls introduces the method of reflective equilibrium to explain how a moral theory should be justified.⁹⁴ For Rawls, the aim of the method is to justify general moral principles by finding a balance between considered judgments about what we deem morally right and the general principles that justify these considered judgments. Reflective equilibrium refers to the balance that is reached by mutually adjusting considered judgments and general principles. Although originally introduced by Rawls as a method to justify a moral theory, I will use the method of reflective equilibrium to critically reconstruct legal theories. The justification and critical reconstruction of a theory both revolve around the mutual adjustment of the claims of a theory and the central characteristics of a

⁹² Halpin 2014, 181.

⁹³ Cotterrell 2018, 85.

⁹⁴ Rawls 1999a. See also Daniels 1996; Van der Burg and Van Willigenburg 1998.

practice it aims to explain. Therefore, the method of reflective equilibrium may also be used to critically reconstruct theories of jurisprudence.⁹⁵

When justifying a moral theory on the basis of the method of reflective equilibrium a distinction is often made between narrow and wide reflective equilibrium.⁹⁶ Reflective equilibrium in a narrow sense is aimed at the justification of general moral principles in light of considered judgments. For example, narrow reflective equilibrium is reached when a set of deontological moral principles is formulated against the background of considered judgments. This type of reflective equilibrium is narrow in two respects. Firstly, narrow reflective equilibria, such as, for example, a set of deontological or teleological moral principles, are formulated in isolation from each other. These sets of moral principles are not confronted with each other. Secondly, reflective equilibrium in a narrow sense does not touch upon the underlying justification of moral principles. For example, a broader reflective equilibrium is needed to evaluate whether deontological moral principles are more convincing than teleological moral principles. Wide reflective equilibrium is aimed at the justification of general moral principles in light of considered judgments and background theories. Under wide reflective equilibrium a balance is reached between considered judgments, general moral principles and background theories. For example, different narrow reflective equilibria and their background theories may be confronted with each other to assess whether deontological or teleological principles are more convincing. Or as Rawls explains the broader scope of wide reflective equilibrium: 'we investigate what principles people would acknowledge and accept the consequences of when they have had an opportunity to consider other plausible conceptions and to assess their supporting grounds.'⁹⁷

In this study, I follow a three-step approach to the critical reconstruction of theories of jurisprudence. In the first step, I examine what the most coherent account is of the central claims of each legal theory when considered in light of its

⁹⁵ My understanding of the method of reflective equilibrium is deeply influenced by Dworkin's constructive account of the method of reflective equilibrium. See Dworkin 1978, 160.

⁹⁶ Rawls 1999b, 288-291.

⁹⁷ Rawls 1999b, 289.

methodological background. For example, Hart's rule-centered account of law should be understood in light of his commitment to conceptual clarity and his aim to understand law in a general and descriptive sense. This first step can best be compared to reflective equilibrium in a narrow sense because my aim is to present the most coherent account of each legal theory. For Rawls, narrow reflective equilibrium is aimed at finding a balance between considered judgments and moral principles. In this first step, considered judgments are equivalent to the central claims of a legal theory, while the moral principles are equivalent to the methodological background in which these claims should be situated.

In the second step, I critically reconstruct three contrasting accounts of the intertwinement of legal orders based on the work of Hart, Dworkin, Llewellyn and Selznick. My aim in this step is to formulate three accounts of the intertwinement of legal orders by reaching a balance between the revision of positivist, normative and pragmatist legal theories and the continuation of their central claims that I have identified in the first step. International law and the intertwinement of legal orders are introduced as elements in a balance that is reached between these theories and the practice they aim to explain. I will use the three examples from positive law as concrete illustrations of the intertwinement of legal orders that these legal theories should address. This second step can best be seen as an intermediate position between narrow and wide reflective equilibrium. By incorporating international law and the intertwinement of legal orders a new balance is reached between theory and practice. In this step, I do not confront my positivist, interpretive and pragmatist accounts of the intertwinement of legal orders accounts with each other. Thus, wide reflective equilibrium is only partly reached. In this step, I will also identify the relative strengths and weaknesses of each account of the intertwinement of legal orders. I will evaluate how each account conceptualizes the reception and conflicts of legal norms, and the acceptance and contestation of authority of officials. When evaluating these accounts, I will use the three examples from positive law to illustrate their strengths and weaknesses.

The third step is to formulate a novel theoretical account of the notions of validity and authority. In this final step, I will formulate a more convincing account of the complex relations between legal orders by synthesizing the relative strengths

of my positivist, interpretive and pragmatist accounts of the intertwinement of legal orders that I have identified in the second step. I will argue that a synthesis may be reached by constructing a theoretical account of the notions of legal validity and legal authority in intertwined legal orders by confronting my positivist, interpretive and pragmatist accounts of the intertwinement of legal orders with each other. I will develop my account of legal validity by amending the common view that valid law can be identified on the basis of conventional criteria. My account of legal authority will be constructed on the basis of a critique of a content-independent understanding of authority.⁹⁸ In this step, the three examples from positive law will be used to illustrate how my account of the notions of validity and authority can make better sense of the intertwinement of legal orders. My novel theoretical account of the notions of validity and authority signals a wide reflective equilibrium because competing accounts of the intertwinement of legal orders will be confronted with each other. The notion of middle-range theories may be used to illustrate my point. Robert Merton has used the notion of middle-range theories to criticize sociologists who construct macro-theories of society.⁹⁹ In the third and final step, my aim is not to construct a general legal theory. Instead, I will construct a middle-range legal theory on legal validity and authority that holds for intertwined legal orders.

It should be emphasized that the use of the method of reflective equilibrium in this study excludes a number of potential candidates for critical reconstruction. Reflective equilibrium cannot be reached for theories of jurisprudence that consider the autonomy of legal orders a central characteristic of law. Legal theories that give center stage to the autonomy of legal orders are, for example, Hans Kelsen's positivist legal theory and Niklas Luhmann's socio-legal theory.¹⁰⁰ Critical reconstruction of these legal theories based on the method of reflective equilibrium will lead to the rejection of the intertwinement of legal orders as such or to a theory that is reconstructed beyond recognition. This point may be illustrated with Hans

⁹⁸ In this study, my aim is to understand the intertwinement of legal orders in European liberal democracies from the perspective of jurisprudence. Therefore, I will not explore the authority of officials from the normative point of view of legal and political philosophy.

⁹⁹ Merton 1968.

¹⁰⁰ Kelsen 1945; Luhmann 2004.

Kelsen's positivist legal theory. Kelsen conceptualizes law in terms of a hierarchical system of legal norms that is constituted by a foundational norm, called the basic norm.¹⁰¹ From the perspective of Kelsen's positivist legal theory, the relations between legal orders are regulated by this basic norm. However, the claim that law should be understood as a hierarchical system of legal norms that is constituted by a foundational norm is antithetical to the subject matter of this study. A positivist account of the intertwinement of legal orders based on Kelsen's positivist legal theory would reduce the relations between legal orders to a system of hierarchy. However, if the notion of a foundational norm is abandoned, a central insight of Kelsen's legal theory is lost. Given my aim to make sense of the intertwinement of legal orders, I will not critically reconstruct legal theories that regard the autonomy of legal orders a central characteristic of law.

6 Outline of this study

In the remaining chapters of this study, I will develop the following arguments. In chapter 2, I critically reconstruct a positivist account of the intertwinement of legal orders based on Hart's positivist legal theory. I will argue that a central claim of Hart's legal theory is that law should be understood in terms of a rule-governed practice. In my positivist account of the intertwinement of legal orders, I will introduce the notion of a secondary rule of external recognition to explain why primary rules of other legal orders are applied. The strength of a positivist account of the relations between legal orders is that it is able to clarify why legal norms of other legal orders are applied and how conflicts between norms arise. However, how relations between officials of different legal orders exist remains underexplored.

In the next chapter, I will discuss Dworkin's interpretive legal theory to critically reconstruct an interpretive account of the intertwinement of legal orders. Dworkin maintains that officials should apply legal norms in light of a consistent

¹⁰¹ Kelsen 1945.

and coherent justification that support these norms. In my interpretive account of the intertwinement of legal orders, I will introduce the notion of integrity as a constructive filter to explain how rules and principles of different legal orders can be made part of a consistent and coherent justification. On this view, officials of different legal orders may be part of a joint project in which they exercise their authority in light of their own understanding of integrity. The main strength of an interpretive account of the intertwinement of legal orders is its ability to clarify the interconnections and frictions between legal orders by how integrity is constructed. Nonetheless, the focus on integrity entails that persistent frictions between legal orders cannot be articulated.

In chapter 4, I explore Llewellyn and Selznick's legal theories to critically reconstruct a pragmatist account of the intertwinement of legal orders. Legal pragmatists understand law as a social practice. Based on Fuller's typology of enacted and interactional law, I will maintain that legal norms emerge from the interactional expectations that are central to the social practice of law. In my pragmatist account of the intertwinement of legal orders, I will argue that the relations between legal orders should be understood in terms of intersecting sub-practices. On this view, legal norms and officials may be considered authoritative in light of the interactional expectations of citizens and officials. The main strength of a pragmatist account of the intertwinement of legal orders is its contextual focus. Whether a legal norm or official of another legal order is considered authoritative depends on a contextual argument that takes into account the interactional expectations of citizens and officials. However, in my pragmatist account of the intertwinement of legal orders the interconnections between legal orders remain largely implicit. Only when frictions arise will the boundaries between different legal orders become clear.

At the outset of chapter 5, I sum up the relative strengths and weaknesses of my positivist, interpretive and pragmatist accounts of the intertwinement of legal orders. On the basis of these relative strengths and weaknesses I will identify two challenges that a novel account of the interconnections and frictions between legal orders should overcome. My critical reconstruction of the notions of validity and authority moves away from a positivist understanding of law, and presents a non-

positivist account of the intertwinement of legal orders that integrates Dworkin's interpretive legal theory and Fuller and Selznick's pragmatist legal theories. The starting point of my argument on validity is the common view that valid legal norms may be identified on the basis of generally shared criteria. I will locate this view in Hart's positivist legal theory. However, I will argue that this view of legal validity is untenable. Instead, I will maintain that validity criteria are best understood as inherently contestable. My argument of authority will be formulated against the common view that authority is best understood as content-independent. This entails that the legitimate exercise of power by officials is not dependent on substantive reasoning. This view can be located in Hart's positivist legal theory too, but will be discussed more extensively in relation to Joseph Raz's conception of authority. I will defend the claim that a content-dependent account of authority can better explain the authority relations between officials of different legal orders. Lastly, I will sketch out possible lines of future research based on this study.

Chapter 2

H.L.A. Hart's positivist legal theory: rules of external recognition

1 Introduction

H.L.A. Hart's positivist legal theory provides insights on diverse topics such as the relation between law and morality, coercion and sovereignty. The most comprehensive insights of Hart's legal theory concern the nature of rules and the role of officials in identifying valid legal rules. In this chapter, I will critically reconstruct a positivist account of the intertwinement of legal orders based on Hart's positivist legal theory. Central to Hart's legal theory is the idea that law should be understood in terms of primary and secondary rules. In each legal order primary rules exist that constitute obligations. Officials follow secondary rules to identify valid primary rules, adjudicate disputes and enact new primary rules.

This chapter starts out with situating Hart's legal theory in the analytical tradition of jurisprudence (section 2). Legal philosophers in the analytical tradition maintain that a legal theory should clarify notions that are central to law and explain how these notions structure social life. Hart also argues that law is best understood in a general and descriptive sense. Central to his positivist legal theory is the idea that law should be understood in terms of rules and officials. In each legal order, primary rules are followed by citizens. Officials follow secondary rules of change, adjudication and recognition (section 3). Hart maintains that secondary rules are absent in the field of international law. However, I will argue that international law should be understood as a legal order because secondary rules of rules of change, adjudication and recognition can be identified (section 4). Moreover, some regimes of international law are best considered distinct legal orders that are embedded in the general legal order of international law. In my positivist account of account of

the intertwinement of legal orders, I will introduce the notion of a secondary rule of external recognition to explain why primary rules of other legal orders may be considered valid (section 5). Finally, I will address the strengths and weaknesses of my positivist account of the intertwinement of legal orders.

2 The analytical tradition: Hart's positivist legal theory

Hart's legal theory is usually considered part of the analytical tradition in jurisprudence. Analytical legal philosophers maintain that a legal theory should elucidate notions such as rules and obligations and provide insight into how these notions structure social life.¹ It is also important to highlight the general and descriptive aims of Hart's theory. Hart maintains that a legal theory should account for all legal orders and should take the point of view of participants of legal practice.

In this section, I will explain why Hart's positivist legal theory should be situated in the analytical tradition of jurisprudence. With his legal theory, Hart aims to provide conceptual clarity by elucidating notions that are central to law and by showing how these notions provide the normative structure of social relations.

2.1 Conceptual clarity

Hart's aim as a legal philosopher is to provide conceptual clarity. Conceptual clarity can be reached by elucidating the meaning of legal notions and by reflecting on how these notions structure social life.² Hart emphasizes that linguistic definitions alone do not bring us much closer to answers to philosophical questions related to law.³ He maintains that legal philosophers should also show how these notions structure

¹ Giudice 2015, 2-3.

² Hart 1994, 13-14. On the role of linguistic philosophy in Hart's legal theory, see MacCormick 2008, 23-29.

³ Hart 1983b; 1983d; Hart 1994, 13-14.

social relations. Important in this respect is the performative nature of language.⁴ The language we use is performative in nature in that legal notions create a web of meaning that regulate social relations. Or as Hart explains, '[h]ere, against the background of social conventions, words are used not as they most frequently are to describe the world, but to bring about certain changes.'⁵ Thus, conceptual clarity can be reached by elucidating the meaning of legal notions and by making clear how these notions structure social life. However, Hart's commitment to conceptual clarity may be misunderstood in light of his claim that *The Concept of Law* can be understood 'as an essay in descriptive sociology'.⁶ In my view, this does not entail that his legal theory is sociological in nature. Hart's claim should be understood in light of his commitment to conceptual clarity. By reflecting on the linguistic use of legal notions, legal philosophers do not merely provide us with definitions. Clarifying legal notions also enables legal philosophers to explain how these notions regulate social relations.⁷

Hart often makes distinctions in order to achieve conceptual clarity. This may be illustrated with an example on rule following.⁸ Hart maintains that there is a difference between being obliged and having an obligation.⁹ For example, one could argue that one is generally obliged to follow a rule. Hart compares this to a situation in which a person is held at gunpoint. Someone who is held at gunpoint will consider himself obliged to follow every instruction of the gunman. We intuitively do not consider such a situation a convincing example in which rules are being followed. Instead, we generally think that to have an obligation entails that one is following a rule.¹⁰ Following a rule implies that there is a standard for evaluation of individual behavior. Hart calls this standard the internal aspect of a

⁴ Hart 1983a, 4.

⁵ Hart 1983d, 276.

⁶ Hart 1994, vi.

⁷ Hart 1994, 14.

⁸ Hart 1994, vi.

⁹ Hart 1994, 82.

¹⁰ Hart 1994, 85.

rule.¹¹ Having an obligation means that you follow a rule in light of its internal aspect, and not because you assume that non-compliance will be sanctioned, as, for example, in the gunman situation. Thus, conceptual clarity can be reached by elucidating the distinction between *being obliged* and *having an obligation*, and by showing how this distinction explains rule following in general.

2.2 General and descriptive aims

Hart's positivist legal theory follows from its general and descriptive aims.¹² A legal theory is general, in Hart's view, if it holds for all legal orders. His legal theory does not only hold for the English legal order, but for any legal order where rules play a central role.¹³ Some legal philosophers in the analytical tradition of jurisprudence maintain that a legal theory should be universal in scope. On this view, a legal theory should hold for all legal orders, independent of time and place.¹⁴ For example, Scott Shapiro argues that a general legal theory also holds for extraterrestrial legal orders if the citizens in these legal orders, "aliens", are able to follow legal rules.¹⁵ Following Giudice, I maintain that Hart's positivist legal theory should not be considered universal in scope. Hart's legal theory should be considered a constructive conceptual explanation of law that is dependent on time and place.¹⁶ This means that Hart identifies necessary and sufficient conditions for law of our time. For example, Hart maintains that a legal order exists when citizens generally follow primary rules and officials follow secondary rules.¹⁷ This is an important necessity claim because he argues that no secondary rules can be found in international law.

¹¹ Hart 1994, 56.

¹² Hart 1994, 239-240.

¹³ Hart 1994, 239.

¹⁴ See, for example, Dickson 2001; Raz 2009a; Shapiro 2011; Gardner 2012.

¹⁵ Shapiro 2011, 406-407.

¹⁶ Giudice 2015, 67-89.

¹⁷ Hart 1994, 116.

Next to the general scope of his legal theory, Hart claims that law is best understood in descriptive terms, without recourse to moral arguments. This point can be illustrated with his distinction between the internal and external point of view. Hart introduces this distinction to clarify two different ways of understanding law.¹⁸ Hart claims that from an internal point of view law should be conceptualized in terms of rules because individuals who follow the law will justify their behavior in terms of following legal rules. Law can also be understood in terms of individual behavior, external to how individuals view themselves when they follow the law. For example, from an external point of view one can investigate how individuals generally stop before red traffic lights.¹⁹ Hart takes a moderately external point of view.²⁰ He maintains that legal philosophers should describe law from the point of view of individuals who follow the law, but without morally justifying this perspective.

3 Hart on legal rules and officials

Hart presents his legal theory in *The Concept of Law* against the background of his critique of Austin's positivist legal theory.²¹ Austin claims that law should be understood in terms of general commands that, if necessary, are enforced by authorities. In Austin's positivist legal theory general commands issued by a sovereign authority should be followed in order to avoid sanctions. However, Hart maintains that law cannot be fully captured in terms of general commands because this does not properly explain why individuals actually follow the law. Instead, he highlights the role of legal rules and in particular, what he calls the 'internal aspect

¹⁸ Hart 1994, 89-90. On the internal/external distinction in legal theories, see Tamanaha 1999, 175-183.

¹⁹ Hart 1994, 90.

²⁰ See, for example, Van Hoecke and Ost 1993, 42.

²¹ Austin 1995. Hart's critique is presented in chapters II, III and IV of *The Concept of Law* (Hart 1994, 18-78).

of rules'.²² Hart argues that we follow the law because inherent to legal rules are standards of behavior that we generally accept as authoritative.

Hart's positivist legal theory will be explored in this section. I will first examine Hart's distinction between primary and secondary rules. Primary rules create obligations. These primary rules can be changed, disputes concerning these rules can be adjudicated, and valid primary rules can be identified when secondary rules of change, adjudication and recognition are followed. I will then explore the role of officials in a legal order. If officials do not follow secondary rules a legal order ceases to exist.

3.1 Primary and secondary rules

Central to Hart's positivist legal theory is the idea that law is best understood in terms of rules and officials. Hart contrasts habits with rules to explain why rules create obligations.²³ Firstly, habits are common patterns of behavior that individuals can diverge from without disapproval, while noncompliance with rules will generally be condemned. Secondly, a majority of individuals will generally accept the standard of behavior inherent to a rule. Thirdly, and most importantly, Hart stresses the 'internal aspect of rules' or the standard inherent to a rule on the basis of which individuals are held accountable.²⁴ Rules are not simply patterns of behavior, but rules also provide a standard on the basis of which individuals are held accountable for their behavior. Rules inform us what behavior is appropriate whereas habits do not entail such standards. To illustrate the difference between habits and rules Hart introduces an example concerning the game of chess.²⁵ How players move their chess pieces on a chessboard could be viewed in terms of habits; patterns of behavior that players generally follow when playing a game of chess. However, this neglects the fact that rules inform players of how particular pieces

²² Hart 1994, 56.

²³ Hart 1994, 55-56.

²⁴ Hart 1994, 56. Hart uses the term standard in relation to the internal aspect of rules.

²⁵ Hart 1994, 56-57.

should be moved across the board. We should therefore speak of rules instead of habits in this context. The internal aspect of the rules concerning the game of chess inform players how pieces should be moved and players of the game will therefore condemn noncompliance with these rules. Hart emphasizes that individuals do not follow rules because they feel that they are obligated.²⁶ Individuals have what Hart calls a 'critical reflective attitude' towards the rules they follow.²⁷ This means that individuals follow rules because they accept the standards of behavior inherent to these rules.

Rules only give rise to obligations when there is considerable resistance to noncompliance.²⁸ An example that Hart provides of rules that do not establish obligations are rules of etiquette. Individuals who do not follow rules of etiquette will generally not be met with considerable disapproval by others.²⁹ Legal rules give rise to obligation because both citizens and officials will usually denounce noncompliance. Joseph Raz's distinction between first-order and second-order reasons provides a helpful example of how rules may give rise to obligations.³⁰ First-order reasons are reasons for individuals to behave in a particular way. Second-order reasons influence the decision-making process of individuals in which different first-order reasons are considered. These second-order reasons provide reasons to follow or disregard particular first-order reasons. Raz calls secondary reasons that require us to disregard particular first-order reasons exclusionary reasons.³¹ These second-order reasons exclude particular first-order reasons in the decision-making process of individuals. An example that Raz provides is of a soldier who receives an order from a higher-ranking officer.³² This order provides a first-

²⁶ Hart 1994, 57.

²⁷ Hart 1994, 57.

²⁸ Hart 1994, 86-87.

²⁹ Hart 1994, 86.

³⁰ Raz 1999, 36. I do not wish to imply here that Raz's argument is fully compatible with Hart's theory of legal positivism. Raz is critical of Hart's argument on rules. See, for example, Raz 1999, 53-58. However, Raz's distinction between first-order and second-order reasons provides an illustrative example of how rules may give rise to obligations.

³¹ Raz 1999, 39.

³² Raz 1999, 38.

order reason to act in a particular way, and it excludes other first-order reasons by way of second-order exclusionary reasons. Exclusionary reasons ensure that no other first-order reasons will compel the soldier to disobey the order given by the higher-ranking officer. Rules provide both first-order reasons and exclusionary reasons.³³ Rules provide us with reasons to act in a particular way in the form of first-order reasons, and rules exclude first-order reasons by way of exclusionary reasons. Individuals who follow a rule will have a first-order reason to behave or refrain from behaving a certain way, and will have a second-order exclusionary reason to exclude other particular first-order reasons.

Rules play an important role in legal, social and moral orders. Hart explains the difference between legal and non-legal orders with the distinction between primary and secondary rules. In each legal order, primary and secondary rules exist. Primary rules should be seen as rules that constitute obligations.³⁴ Primary rules encompass both private and public law obligations. Provisions in a contract that stipulate the obligations of parties or provisions that restrict government decisions are examples of primary rules. Hart identifies three types of secondary rules: rules of change, rules of adjudication and rules of recognition.³⁵ Officials follow rules of change when they introduce new primary rules or when they amend or abolish existing primary rules. Citizens may also create primary rules. For example, citizens follow secondary rules of change when they enter into a contract. Officials settle disputes over contested non-compliance of primary rules by following rules of adjudication. When judges adjudicate criminal cases or when judges determine whether a party has breached a contract, rules of adjudication are being followed. Lastly, officials follow rules of recognition when they identify valid primary legal rules.

Central to a legal order is the interdependence of primary and secondary rules, or what Hart's calls 'the union of primary and secondary rules.'³⁶ Legal rules

³³ Raz 1999, 76-77.

³⁴ Hart 1994, 91.

³⁵ Hart 1994, 94-98.

³⁶ Hart 1994. 79

are amended with secondary rules of change, enforced with secondary rules of adjudication and identified with secondary rules of recognition. This union of primary and secondary rules establishes a legal order. Hart illustrates this union of primary and secondary rules by explaining how secondary rules solve challenges in rule-governed societies or 'primitive communities' that do not have rules of change, adjudication and recognition.³⁷ Hart argues that three deficiencies are overcome with secondary rules. Firstly, rules of recognition ensure that there is clarity under which conditions primary rules are valid. Without rules of recognition, citizens and officials cannot be fully certain whether a rule is legally valid.³⁸ Secondly, rules of change enable citizens and officials to enact new rules or to amend existing ones. Primary rules only change gradually if these secondary rules do not exist.³⁹ Thirdly, rules of adjudication ensure that disputes are resolved in a decisive manner.⁴⁰ When these challenges are overcome, a legal order is established in which primary and secondary rules form a union: '[t]he introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world; since each remedy brings with it many elements that permeate law: certainly all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system.'⁴¹

3.2 Officials

Next to the distinction between primary and secondary rules, Hart's positivist legal theory centers on the role of officials in upholding the validity of secondary rules.

³⁷ Hart 1994, 91.

³⁸ Hart 1994, 94-95.

³⁹ Hart 1994, 95-96.

⁴⁰ Hart 1994, 96-98.

⁴¹ Hart 1994, 94. Hart does not use the term 'legal order' to signal a union of primary and secondary rules. Instead, he refers to 'legal systems.' However, in to avoid terminological confusion in the following chapters, I will use the term 'legal order.' Thus, when I refer to a legal order I am concerned with a union of primary and secondary rules.

Here it is important to explore the two necessary conditions of a legal order.⁴² The first condition is that a majority of citizens needs to follow the primary rules of a legal order. Hart claims that citizens will generally take an internal point of view towards primary rules. Citizens may have other motives for following primary rules. For example, strict enforcement may encourage citizens to follow rules. Thus, citizens do not necessarily need to take an internal point of view towards primary rules for a legal order to exist. The second condition for the existence of a legal order is that officials need to accept the rules of change, adjudication and recognition of a legal order. Officials need to take an internal point of view to these secondary rules. This means that officials need to understand secondary rules as standards that should be followed.

Officials are those individuals and organizations who follow the secondary rules of a legal order and accept them as general standards.⁴³ Disputes can be resolved and if necessary executed by officials by following rules of adjudication. Primary rules are enacted, amended or abolished by officials when rules of change are followed. Judges follow rules of change when they cannot reach a decision on the basis of existing primary rules. On Hart's view, judges have discretion in these cases, and are permitted to make new primary rules with their decisions.⁴⁴ Officials follow rules of recognition when they identify valid primary rules based on generally accepted validity criteria. Based on these criteria officials are able to identify valid primary rules.⁴⁵ In every legal order, a rule of recognition exists that Hart describes as supreme and ultimate. This rule of recognition is supreme in that

⁴² Hart 1994, 116-117.

⁴³ For examples, see Lamond 2013, 111. This entails a circular line of reasoning: an individual or organization is an official because he follows secondary rules that are generally accepted as standards by officials. On this circularity, see Culver and Giudice 2010, 6-14. Although Culver and Giudice argue that further arguments have been made to accommodate this circular line of reasoning, authors generally embrace this circularity when addressing this issue. Culver and Giudice 2010, 11-14. For example, Tamanaha argues that officials and secondary rules come into being concurrently. See Tamanaha 2001, 141.

⁴⁴ Hart 1994, 144.

⁴⁵ Hart 1994, 115.

no other rules are able to overrule the criteria of validity of this secondary rule.⁴⁶ This rule of recognition is ultimate in that the validity of this secondary rule does not follow from any other rule in a legal order.⁴⁷ Officials follow the rule of recognition because they accept it as an ultimate and supreme standard on the basis of which valid primary rules can be identified.

Secondary rules of change, adjudication and recognition may be codified. For example, a rule of recognition could be laid down in a constitution or a statute.⁴⁸ Although the supreme and ultimate rule of recognition of a legal order can be codified, the validity of this secondary rule is dependent on the general acceptance of officials of its validity criteria. Hart emphasizes this point by describing the rule of recognition in terms of a convention. On Hart's view, the rule of recognition is followed because the general acceptance of the validity criteria is a reason for officials to follow this secondary rule. Hart explains this point in the postscript of *The Concept of Law*: '[r]ules are conventional social practices if the general conformity of a group to them is part of the reasons which its individual members have for the acceptance'.⁴⁹ This underlines that in a legal order officials need to accept the validity criteria that follow from the rule of recognition.

It is important to stress the importance of officials in upholding a legal order by following its secondary rules, and in particular, the rule of recognition. From the perspective of Hart's legal theory, officials must accept the criteria of validity of the rule of recognition. If officials do not follow the rule of recognition, a legal order collapses. The stringent relation between the rule of recognition and officials can be illustrated with Hart's argument on the validity of laws and regulations under the Nazi regime.⁵⁰ From the perspective of Hart's positivist legal theory, primary rules can be valid under repressive conditions, such as, for example, under the Nazi

⁴⁶ Hart 1994, 106.

⁴⁷ Hart 1994, 107.

⁴⁸ See, for example, the contributions in Adler and Himma 2009 on the U.S constitution in relation to the rule of recognition.

⁴⁹ Hart 1994, 255. On the development of Hart's views on the rule of recognition, see Dickson 2007.

⁵⁰ See Hart 1983c. Following a critical response by Lon Fuller a debate ensued between Hart and Fuller on the relation between law and morality. Fuller 1958.

regime, as long as officials accept the rule of recognition. This demonstrates the important role of officials in upholding a legal order, next to citizens who generally need to follow primary rules.

4 International law as a legal order

In the last chapter of *The Concept of Law*, Hart explores international law in light of the argument made in the previous chapters of the book that law should generally be understood in terms of rules and officials. In this last chapter, Hart poses the question whether secondary rules can be found in international law. He maintains that international law lacks secondary rules: '[i]t is indeed arguable, as we shall show, that international law not only lacks the secondary rules of change and adjudication which provide for the legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules.'⁵¹

In this section, I will argue that secondary rules of change, adjudication and recognition can be found in international law. This entails that international law should be considered a legal order. Moreover, I will maintain that some regimes of international law, such as, for example, EU law and the law of the Council of Europe, are best understood as legal orders embedded in general international law. In these regimes, rules of recognition exist that are distinct from the secondary rules of recognition of general international law. Moreover, in some of these regimes distinct secondary rules of change and adjudication exist. In these regimes, distinct secondary rules are followed, next to the rules of change, adjudication and recognition of general international law. Therefore, a number of international legal orders can be identified that are embedded in the legal order of general international law.

⁵¹ Hart 1994, 214.

4.1 International law and secondary rules

Hart maintains that there are two general uncertainties that trouble lawyers in accepting international law as law.⁵² Firstly, lawyers often do not consider international law to be law because there is no enforcement of international legal rules. This assumes that law can be understood in terms of general commands that are enforced by authorities. Hart points out that his legal theory demonstrates that such a line of reasoning is unconvincing. We generally understand law not in terms of general commands that are enforced, but in terms of rules perceived from an internal point of view.⁵³ He also considers that some rules of international law might secure essential basic needs of individuals, which require general enforcement. Hart seems to allude here to an argument he has made on rules that are indispensable for any legal order to exist.⁵⁴ Hart calls these rules the minimum content of natural law.⁵⁵ For example, constraints on the use of violence could be seen as part of the minimum content of natural law of any legal order.⁵⁶ However, Hart explains that in international law by and large peace between states has existed, therefore not requiring enforcement of such rules. He maintains that international law is generally perceived from an internal point of view, meaning that rules of international law are followed in light of their inherent standards of behavior.⁵⁷ This entails that international law fulfills the first necessary condition of a legal order. On this view, primary rules of international law are generally followed. Moreover, primary rules of international law are generally understood from an internal point of view.

Hart points out that a second uncertainty that troubles lawyers is the supposed conflictual nature of state sovereignty and international law. States are considered sovereign, but also under the obligation to follow rules of international

⁵² Hart 1994, 216.

⁵³ Hart 1994, 217-218.

⁵⁴ Waldron 2013, 212-213.

⁵⁵ Hart 1994, 193.

⁵⁶ Hart 1994, 194-195; 218.

⁵⁷ Hart 1994, 220.

law. State sovereignty may thus seem constrained in some respects.⁵⁸ Hart maintains that this does not provide a convincing line of reasoning. International law does not limit the sovereignty of states. Instead, state sovereignty is constructed through international law.⁵⁹ The view that states have unrestricted sovereignty is unconvincing because this view disregards the rule governed character of international law. If one assumes that international law originates from unrestricted state sovereignty, no convincing argument can be given that explains how legal obligations emerge in international law. For example, this view begs the question how legal obligations come into being when states conclude a treaty.⁶⁰ Or as Hart explains: 'in order that words, spoken or written, should in certain circumstances function as a promise, agreement, or treaty, and so give rise to obligations and confer rights which others may claim, *rules* must already exist providing that a state is bound to do whatever it undertakes by appropriate words to do.'⁶¹ Hart also notes that not all rules of international law can be considered to follow from consent of sovereign states.⁶²

Although these two uncertainties are unwarranted, Hart claims that international law should be considered a 'regime of primary rules' which is very similar to a domestic legal order in content, but not in form.⁶³ International law is different in form to domestic law because no international secondary rules of change, adjudication and recognition exist. Hart argues that rules of change are absent because there is no legislative official that enacts or amends primary rules.⁶⁴ Secondary rules of adjudication are also not part of international law. For example, he does not consider the International Court of Justice an authoritative official in settling disputes because the Court does not have compulsory jurisdiction.⁶⁵ Finally,

⁵⁸ Hart 1994, 220.

⁵⁹ Hart 1994, 224.

⁶⁰ Hart 1994, 225.

⁶¹ Hart 1994, 225.

⁶² Hart 1994, 226.

⁶³ Hart 1994, 227.

⁶⁴ Hart 1994, 214.

⁶⁵ Hart 1994, 232-233.

Hart maintains that no rule of recognition is generally followed in international law.⁶⁶ Surprisingly, he argues that a rule of recognition does not need to be followed for primary rules to be considered authoritative.⁶⁷ Nevertheless, he acknowledges that there is a possibility that a rule of recognition could develop in international law.⁶⁸

I agree with Hart that primary rules of international law can also be considered binding in the absence of a rule of recognition. However, he misses the point here, in my view. In his legal theory, the existence of a rule of recognition, next to secondary rules of change and adjudication, is a necessary condition of a legal order. Thus, the absence of a rule of recognition implies that international law does not constitute a legal order. International law may be considered a legal order if secondary rules could be identified. Nonetheless, Hart's claim that secondary rules are absent in international law entails that it does not constitute a legal order. One could object to my argument and maintain that Hart never explicitly denied that international law is law. However, based on this line of reasoning Hart's claim that legal orders are constituted by primary and secondary rules collapses. He distinguishes between these types of rules to explain the difference between legal and non-legal orders. If the existence of secondary rules is not a necessary condition of a legal order all rule-governed practices are law. Rules of international law would be considered law, irrespective of whether secondary rules of change, adjudication and recognition exist beyond domestic legal orders.

Hart's remark in 1961 that secondary rules of international law may develop in the future has caught up with reality. In my view, secondary rules of change, adjudication and recognition can be identified in the field of international law today. Consider first secondary rules of change. Payandeh has pointed out that secondary rules of change are generally followed when primary rules of international law are

⁶⁶ Hart 1994, 233-234.

⁶⁷ Hart 1994, 234-235.

⁶⁸ 'Perhaps international law is at present in a stage of transition towards acceptance of this and other forms which would bring it nearer in structure to a municipal system.' Hart 1994, 236.

established.⁶⁹ For example, the growing importance of international organizations, such as the United Nations, illustrates that these institutions are considered authoritative in enacting new rules of international law.⁷⁰ Moreover, Waldron has pointed out that the Vienna Convention on the Law of Treaties has codified many secondary rules of change of international law.⁷¹ Secondary rules of adjudication can also be observed in the field of international law. International courts and tribunals, such as, for example, the International Court of Justice, adjudicate disputes over primary rules between states.⁷² Hart's claim that the International Court of Justice cannot be considered an official because it does not have compulsory jurisdiction, does not follow from his previous argument on secondary rules of adjudication. Compulsory jurisdiction is not a necessary condition for the existence of a secondary rule of adjudication.⁷³ Finally, a rule of recognition exists in international law that is supreme and ultimate. Officials identify primary rules of international law by following a rule of recognition. This can be illustrated with article 38(1) of the ICJ statute. Payandeh has pointed out that article 38(1) of the ICJ statute stipulates what valid sources of international law are.⁷⁴ Treaties, custom and general principles are considered valid sources of international law. Article 38(1) of the ICJ statute brings to light that a general agreement exists on the validity criteria of primary rules of international law. This means that generally accepted criteria are followed when valid primary rules of international law are identified.⁷⁵

Critics could object to my claim that a rule of recognition exists in international law. Disagreement concerning the validity of primary rules of international law illustrates that there is no generally followed rule of recognition.⁷⁶ However, disagreement on the validity of primary rules of international law does

⁶⁹ Payandeh 2010, 982-985.

⁷⁰ Payandeh 2010, 983-984.

⁷¹ Waldron 2013, 217.

⁷² Payandeh 2010, 985-987.

⁷³ Waldron 2013, 215-216.

⁷⁴ Payandeh 2010, 989-990.

⁷⁵ See also Besson 2010.

⁷⁶ See, for example, Prost 2012, 91-105.

not necessarily imply that no rule of recognition exists. It is important to bear in mind two distinctions. Firstly, a distinction should be made between the content of the rule of recognition and the application of this secondary rule.⁷⁷ The rule of recognition in international law provides validity criteria that officials follow when they identify valid primary rules. Officials and citizens may disagree whether the rule of recognition has been correctly applied in relation to a primary rule or set of primary rules. Disagreement on the application of the rule of recognition does not necessarily entail that the rule of recognition is not generally accepted by officials. Secondly, a distinction should be made between cases that concern the core meaning of the rule of recognition and penumbra cases.⁷⁸ We generally agree on the core meaning of a rule, but we will inevitably encounter cases that challenge our common understanding of the meaning of a rule. Hart calls these penumbra cases. Although we may disagree on the meaning of the rule of recognition in a penumbra case, we may still follow this secondary rule because we generally agree on its core meaning.

The importance of the distinctions between the content and application of the rule of recognition, and between core and penumbra cases can be illustrated with the validity of customary international law. Rules of customary international law are understood to be valid when they fulfill two criteria: a consistent state practice and a general conviction. In the field of international law there has been an ongoing debate on how these two criteria should be applied.⁷⁹ Although we may disagree on the meaning of the validity criteria of rules of customary international law in penumbra cases, the notions of state practice and general conviction have a core meaning that enables us to determine the validity of a rule of customary law. If we would identify rules of customary international law based on disparate and conflicting validity criteria no core cases would exist. Moreover, it should be stressed

⁷⁷ See Coleman 1998, 20-21.

⁷⁸ Hart 1994, 128. Coleman stresses that a positivist legal theory allows for disagreement on both the content of the rule of recognition and its core meaning. See Coleman 2001, 99. However, a rule of recognition does not exist when we disagree on its content and core meaning. Unsurprisingly, Dworkin maintains that Coleman's legal theory is very close to his own anti-positivist account of law. See Dworkin 2006, 189.

⁷⁹ See, for example, Prost 2012, 97-102.

that disagreement on the application of the rule of recognition is also common in domestic legal orders.⁸⁰ In domestic legal orders, officials and citizens may disagree whether the validity criteria of the rule of recognition are fulfilled, and thus whether a particular primary rule should be considered valid. Disagreement concerning the application of the rule of recognition may therefore arise in both international law and domestic legal orders.

4.2 From international law to international legal orders

Hart's account of international law is unpersuasive now because secondary rules of change, adjudication and recognition can be identified beyond domestic legal orders. Since the publication of *The Concept of Law* in 1961, international legal practice has changed in ways that Hart could probably not have foreseen.⁸¹ It should be stressed that today's international legal practice challenges Hart's account of international law in another respect. The fragmentation of international law in the second half of the 20th century into different and specialized legal regimes and institutions challenges the idea that international law is a unified field.⁸² Although Hart did not consider international law a legal order, his approach assumes it should be considered a single coherent field. Hart's approach to international law should be reconsidered in light of the fragmentation of this field into different regimes. I maintain that some regimes of international law are best understood as legal orders that are embedded in general international law. For example, EU law and the law of the Council of Europe should be considered international legal orders.⁸³ These legal orders have their own rules of recognition, and in some respects their own rules of change and adjudication. However, not all secondary rules in these legal orders are

⁸⁰ Waldron 2013, 220; Culver and Giudice 2010, 29; Payandeh 2010, 991.

⁸¹ See also Payandeh 2010, 979.

⁸² On fragmentation, see Prost 2012, 4-8. See also the report of the International Law Commission on the fragmentation of international law. ILC 2006.

⁸³ See, for example, Von Bogdandy 2008 on EU law as a legal order and Krisch 2012, 109-152 on the Council of Europe, and in particular the European Convention on Human Rights.

distinct from the secondary rules of general international law. Thus, these regimes are best seen as distinct legal orders, but embedded in the legal order of general international law.⁸⁴

The most important reason why some regimes of international law should be understood as international legal orders is that they have their own rule of recognition. In these regimes, officials identify some valid primary rules on the basis of secondary rules of recognition that only hold for a particular regime. For example, the Court of Justice of the European Union, may review the validity of secondary EU legislation, such as, for example, directives or regulations, based validity criteria that hold for the EU.⁸⁵ These validity criteria do not hold for other regimes of international law. Another reason why some regimes of international law are best understood as international legal orders is that officials increasingly follow their own secondary rules of adjudication or change. For example, the European Court of Human Rights has its own distinct approach to settling disputes.⁸⁶ And the legal order of the European Union contains its own secondary rules of change that stipulate how secondary EU legislation should be enacted by EU institutions.⁸⁷ Thus, some regimes of international law have their own rules of recognition, change and adjudication.

Two examples help to illustrate my argument that regimes of international law that contain their own secondary rules are embedded in the legal order of general international law. My first example concerns EU law.⁸⁸ EU law is contained in primary and secondary legislation. The Treaty on European Union and the Treaty on the Functioning of the European Union form the primary legislation of the European Union. These foundational treaties have come into being on the basis of the rules of change of general international law.⁸⁹ Member states have signed and

⁸⁴ For example, many rules of customary international law and *jus cogens* are best seen as part of the legal order of general international law.

⁸⁵ Arts 263 and 267 TFEU.

⁸⁶ *Letsas* 2013.

⁸⁷ See Arts 293-299 TFEU.

⁸⁸ See also MacCormick 1996.

⁸⁹ See Craig 2010 for a historical account of the foundational treaties of the European Union.

ratified treaties to adopt and amend the foundational treaties of the European Union. This illustrates that rules of change of general international law are followed to enact and amend the primary legislation of the European Union. The secondary legislation of the European union encompasses the legal norms enacted on the basis of primary EU legislation. For example, EU institutions may adopt directives or regulations to exercise its competences as laid down in the foundational treaties.⁹⁰ When secondary legislation of the European Union is adopted, rules of change are followed that only hold for the EU legal order. EU institutions follow these rules of change to enact or amend secondary legislation. This illustrates that rules of change are also followed that are distinct from the rules of change of general international law. However, when states conclude a treaty, they do not follow these rules of change. Instead, states follow rules of change of general international law to conclude a treaty. Therefore, EU law is best considered a legal order that is embedded in the legal order of general international law.

My second example concerns the law of the Council of Europe. In the legal order of the Council of Europe, the European Court of Human Rights follows distinct secondary rules of adjudication and recognition when disputes concerning the European Convention on Human Rights are resolved.⁹¹ The Strasbourg Court has its own approach to the interpretation and application of the rights enshrined in the Convention that cannot be understood solely on the basis of the rules of interpretation of general international law. These rules of interpretation can be found in the Vienna Convention on the Law of Treaties (VCLT). Or as Letsas explains: “[c]lose as its methods are to the general rule of purposive interpretation under art 31 VCLT, the European Court has created its own labels for the interpretative techniques that it uses such as ‘living-instrument’, ‘practical and effective rights’, ‘autonomous concepts’ etc.”⁹² The European Court of Human Rights considers the Convention a living instrument. This entails that the Convention rights cannot be understood based on the meaning commonly given to human rights

⁹⁰ Art 288 TFEU.

⁹¹ See Arts 33 and 34 ECHR.

⁹² Letsas 2007, 59. See also Letsas 2013.

norms at the time the Convention was adopted. Human rights enshrined in the European Convention on Human Rights should be interpreted in light of current and common standards that may differ from the human right standards in the signatory states.⁹³ In its approach, the European Court of Human Rights stresses that obligations under the Convention should be understood in light of a growing societal consensus on issues of principle.⁹⁴ The living instrument approach of the European Court of Human Rights also signals the existence of a distinct rule of recognition. The Strasbourg Court does not identify valid human rights norms solely on the basis of the Convention. The European Court of Human Rights considers what human rights follow from the Convention in light of a growing societal consensus. However, whether the European Convention on Human Rights should be considered valid as such, depends on the rules of recognition of general international law. This illustrates that the legal order of the Council of Europe is also embedded in the legal order of general international law.

5 A positivist account of the intertwinement of legal orders

In this section, I will critically reconstruct a positivist account of the intertwinement of legal orders based on Hart's legal theory. Although Hart has made some suggestions why officials apply valid primary rules of other legal orders, I will argue that these suggestions fail to fully explain the complex relations between legal orders. In my positivist account of the intertwinement of legal orders, I will introduce the notion of a rule of external recognition in order to make sense of the intertwinement of legal orders. Rules of external recognition entail validity criteria

⁹³ Letsas 2013, 108-109.

⁹⁴ Letsas 2013, 119. On Letsas' view, the Strasbourg Court has moved from a conservative to a progressive approach to the living instrument doctrine: 'In sum, the new Court has moved away from placing decisive weight on the absence of consensus amongst contracting states and from treating it as the ultimate limit on how far it can evolve the meaning and scope of Convention rights. The new Court treats the ECHR as a living instrument by looking for *common values* and *emerging consensus* in international law.' Letsas 2013, 121-122.

that officials follow when they determine whether a primary rule of another legal order should be applied. Finally, I will assess the strengths and weaknesses of my positivist account of the intertwinement of legal orders. I will evaluate how the notion of a rule of external recognition can explain how norms are incorporated in a legal order and how norm conflicts are resolved, and whether this notion can clarify the relations between officials of different legal orders.

5.1 Rules of external recognition

Central to Hart's positivist legal theory is the idea that each legal order has its own secondary rules of change, adjudication and recognition. Valid primary rules are recognized in light of a supreme and ultimate rule of recognition. The recognition of a valid primary rule is dependent on a rule-governed practice of a legal order. This means that a rule of recognition cannot establish validity criteria of primary rules of other legal orders. For example, the validity of a primary rule in an international legal order is not dependent on a rule of recognition of another international legal order or a domestic legal order. This also holds for primary rules in domestic legal orders. The validity of a primary rule in a domestic legal order is not dependent on a rule of recognition in any other domestic or international legal order.

Although secondary rules of change, adjudication and recognition are tied to a legal order, this does not necessarily hold for primary rules. A primary rule may be considered valid in multiple legal orders. Hart emphasizes this point in his discussion of Hans Kelsen's work on the relation between domestic and international law.⁹⁵ In this discussion, Hart criticizes Kelsen's idea of a monist legal system.⁹⁶ He maintains that Kelsen's idea of a monist legal system is unconvincing because it does not acknowledge that each legal order has its own rule of recognition that determines the validity of primary rules in that legal order. On Hart's view, the validity of domestic law does not follow from international law, nor is the validity

⁹⁵ On the debate between Hart and Kelsen, see Giudice 2013.

⁹⁶ Hart 1983f, 311. Hart calls this Kelsen's doctrine of the unity of law. See Hart 1983f, 309.

of international law determined by domestic law. To illustrate his point, Hart introduces an example concerning the validity of Soviet laws in the English legal order.⁹⁷ Soviet laws are valid because Soviet officials recognize these laws as valid. English law may stipulate that under certain conditions Soviet laws should be considered valid in the English legal order. However, this does not mean that Soviet laws are valid in the Soviet legal order because English rules stipulate this. Whether Soviet laws should be considered valid in the English legal order does not depend on the rule of recognition of the Soviet legal order. English officials determine whether Soviet laws should be applied in the English legal order. English rules may, for example, purport to validate primary rules of other legal orders, such as, for example, Soviet laws, in the English legal order.⁹⁸

In his exchange with Kelsen, Hart provides some suggestions that could further clarify why officials recognize valid primary rules of other legal orders as valid. However, he also admits that these ideas should be further developed.⁹⁹ Hart's first suggestion is to distinguish between the recognition and the application of primary rules of other legal orders.¹⁰⁰ On this view, officials recognize the validity of primary rules of other legal orders, but they do not actually apply these rules. The recognition of rules of other legal orders by officials entails that identical primary rules are created. Officials do not apply primary rules of other legal orders. Instead, they apply primary rules that are identical to rules of other legal orders. For example, when English officials consider Soviet laws valid in their legal order, they apply rules that are identical to those in the Soviet legal order.¹⁰¹ By recognizing the validity of Soviet laws in the English legal order, English primary rules are created that are identical to those in the Soviet legal order. The distinction between the recognition and application of primary rules may also be applied to the reception of the European Convention on Human Rights in domestic legal orders. On this view, when officials in domestic legal orders apply the Convention rights, they apply

⁹⁷ Hart 1983f, 319; 335-336; 341.

⁹⁸ Hart speaks of 'validate purport'. See Hart 1983f, 317ff.

⁹⁹ Hart 1983f, 342.

¹⁰⁰ Hart 1983f, 340-341.

¹⁰¹ Hart 1983f, 341.

primary rules that are identical to the rights enshrined in the Convention. Recognition in the domestic legal order entails the creation of human rights norms that are identical to the European Convention on Human Rights. Thus, primary rules of other legal orders are not applied directly, but require prior recognition.

By distinguishing between recognition and application, Hart incorrectly assumes a dualist framework for all legal orders. By recognizing the validity of primary rules of other legal orders, new rules are created that are clones or duplicates in content. Hart ignores that the creation of a new primary rule depends on the secondary rules of change in a legal order. Some legal orders can be characterized as relatively monist, meaning that primary rules of other legal orders do not need to be duplicated before they can be applied. Some legal orders can be characterized as relatively dualist, meaning that primary rules of other legal orders need to be duplicated before these rules can be applied. Hart assumes that all primary rules of other legal orders need to be duplicated. However, whether a primary rule of another legal order should be duplicated depends on secondary rules of change and not on recognition by officials as such. Moreover, Hart's distinction between the recognition and application of primary rules of other legal orders does not provide any clarification why officials actually apply these rules.¹⁰²

Hart's second suggestion is to distinguish between original and derivative recognition.¹⁰³ Original recognition concerns the validity criteria that officials follow within a particular legal order when identifying valid primary rules. Derivative recognition entails that some primary rules are valid in light of the fact that officials in another legal order consider these primary rules valid. On Hart's view, rules of private international law illustrate derivative forms of recognition.¹⁰⁴ Rules of private international law regulate, for example, when a contract should be considered valid in another legal order. When Dutch officials recognize the validity of a contract that has been signed in another legal order, this affirmation by Dutch officials is derivative of the recognition by other officials. Whether a foreign contract

¹⁰² Hart acknowledges this point. See Hart 1983f, 341.

¹⁰³ Hart 1983f, 341-342.

¹⁰⁴ Hart 1983f, 342.

is legally valid in the Dutch legal order is dependent on another secondary rule of recognition, for example one followed by officials in the German or French legal order. A similar example can be given on EU law. In the legal order of EU law, secondary EU legislation is considered valid on the basis of validity criteria that are followed in the EU legal order. Officials may consider EU law valid in the domestic legal order because these legal norms are valid in the legal order of the European Union. On this view, the validity of EU law in the domestic legal orders is derivative of the rule of recognition in the legal order of the European Union. Thus, the distinction between original and derivative recognition brings to light that there are two sources of legal validity in a legal order. A primary rule may be considered valid in light of the rule of recognition internal to a legal order or the validity of a primary rule is derivative of a rule of recognition in another legal order.

Although Hart's second suggestion explains the difference between identifying valid primary rules internal to a legal order and identifying valid primary rules of other legal orders, no clear distinction between original and derivative recognition can be made. Derivative forms of recognition are not solely dependent on a rule of recognition in another legal order. Take, for example, the validity of a foreign contract in a legal order. The validity of a foreign contract in the Dutch legal order is not merely derivative of its validity in another legal order. Its validity also depends on the criteria followed by Dutch officials. Dutch officials can decline to declare a foreign contract valid, or may refuse to enforce a foreign contract based on validity criteria that are part the Dutch legal order. This illustrates that derivative forms of recognition also depend on rules of recognition internal to a legal order. Thus, the distinction between original and derivative recognition is a matter of degree.

Hart's two suggestions do not provide an adequate account of why officials recognize primary rules of other legal orders as valid. However, a positivist account of the intertwinement of legal orders can be critically constructed based on his legal theory. When considered in light of the central claim that the recognition of valid primary rules is best understood in terms of a rule-governed practice internal to a legal order, I suggest that a new type of secondary rule should be introduced: a rule of external recognition. A legal order includes two types of rules of recognition.

Officials follow a rule of recognition when they identify primary rules internal to their legal order, and they follow a rule of external recognition when they identify valid primary rules of other legal orders. Rules of external recognition may be codified in legislation or a constitution. However, like other rules of recognition, their validity depends on the general acceptance of officials in practice. These two types of rules of recognition form the supreme and ultimate rule of recognition of a legal order. There is also an important difference between rules of internal and external recognition. Rules of external recognition are not a necessary condition for the existence of a legal order. Legal orders may exist without rules of external recognition because officials may have never considered whether a primary rule of another legal order should be considered valid. However, rules of external recognition are a necessary element of a positivist account of the intertwinement of legal orders.¹⁰⁵ In the absence of this notion it is unclear from a positivist perspective why officials recognize primary rules of other legal orders as valid.¹⁰⁶

Critics may argue that the notion of a rule of external recognition overlooks the fact that officials in one legal order may claim to determine the validity of primary rules in other legal orders. This would imply that the validity of a primary rule is not solely dependent on a rule of external recognition. For example, based on the doctrine of supremacy it could be argued that the validity of EU law in domestic legal orders is not solely dependent on the recognition by officials in the domestic legal orders. Instead, EU officials claim to determine the validity of EU law. However, when considered in light of Hart's central claim that secondary rules are tied to a legal order, this line of reasoning is unpersuasive. If EU officials determine the validity of EU law in the legal orders of the domestic states this would imply that a secondary rule of the EU legal order validates primary rules in other legal orders. In my view, Hart would object to this line of reasoning because it assumes

¹⁰⁵ See also Michaels 2017, 113.

¹⁰⁶ A related notion of linkage rules can be found in Von Daniels 2010. However, Von Daniels fails to take into account the importance of rules in Hart's positivist legal theory. Linkage rules do not explain why officials apply rules of other legal orders from an internal point of view: '[i]n contrast to primary and secondary rules and their interpretation, linkage rules are *not* accessible to the participants of a legal system from an internal point of view, but only from a descriptive view.' See Von Daniels 2010, 163.

that valid primary rules can be identified on the basis of rules of recognition of another legal order. Hart's example on Soviet laws highlights that each legal order has a rule of recognition that determines the validity of primary rules, even if these primary rules originate from another legal order. Although it may be the case that EU officials may claim to determine the validity of EU law in the legal orders of the member states, the recognition of EU law in domestic legal orders is ultimately dependent on secondary rules in the domestic legal orders. The *Solange*, *Maastricht*, and *Lisbon* decisions of the German Federal Constitutional Court illustrate how officials determine the conditions of validity of EU law in the German legal order.¹⁰⁷ If these validity criteria are not met, EU law will not be considered valid by German officials. For example, the rule of external recognition in the *Lisbon* decision dictates that primary rules of EU law can only be considered valid insofar these rules do not violate the constitutional identity of the German constitution. Thus, valid primary rules are identified on the basis of a rule of recognition internal to a legal order.

The example on EU law can also be read in a different way. On this view, an official in an EU member state may be motivated to give effect to EU law because he considers himself part of a shared practice in which domestic and EU officials give effect to EU law. Coleman argues, for example, that recognition can be understood as a 'shared cooperative activity.'¹⁰⁸ He maintains that officials identify valid primary rules by following a rule of recognition that is embedded in a practice of shared intentions or a collective attitude.¹⁰⁹ If recognition is understood in terms of a shared cooperative activity, officials of different legal orders may inform each other insofar their intentions partly overlap or intersect. Officials may have good reasons to apply primary rules of other legal orders when their practice of recognition intersects with other legal orders. For example, officials in a domestic legal order may consider that their practice of recognition partly intersects with the

¹⁰⁷ BVerfGE 37, 271 (1974) (*Solange I*); 73, 339 (1986) (*Solange II*); 102, 147 (2000) (*Bananas*); 89, 155 (1993) (*Maastricht*); 123, 267 (2009) (*Lisbon*).

¹⁰⁸ Coleman 2001, 96. Coleman relies on Michael Bratman's notion of shared cooperative activities. See, for example, Bratman 1992.

¹⁰⁹ Coleman 2001, 96-97.

practice of recognition of EU officials. This would entail that officials of both legal orders partly share a collective attitude when applying EU law.

However, when considered in light of Hart's legal theory, officials in domestic legal orders ultimately follow rules of recognition that are tied to a legal order when identifying valid primary rules of EU law. Although a practice of recognition can be understood in light of a collective attitude of officials, this practice revolves around following secondary rules to identify valid primary rules. Valid law cannot be identified on the basis of shared intentions. The rules of recognition that are followed in a shared cooperative activity govern how valid primary rules should be identified. Or as Coleman explains the nature of a shared cooperative activity (SCA): 'the sense in which the SCA is conventional is plain. Its existence does not depend on the arguments offered on its behalf, but rather on its being practiced—on the fact that individuals display the attitudes constitutive of shared intentions.'¹¹⁰ This means that a practice of recognition exists when rules are followed to identify valid legal rules. Officials of different legal orders may inform each other in light of a shared cooperative activity, but ultimately follow rules of external recognition to determine whether a primary rule of another legal order should be considered valid.

It should be noted that Ralf Michaels also makes a distinction between rules of internal and external recognition.¹¹¹ Although influenced by Hart's positivist legal theory, Michaels' account of rules of external recognition is substantively informed by systems theory:

The emerging concept of laws is a positivist one in a strong sense. It assumes that the definition and the creation of law are themselves operations by the legal system. In this sense, the concept of law is an autopoietic one. However, in emphasizing that legal systems mutually constitute each other, the concept also has an allopoeitic aspect to it. While the law at large is autopoietic, individual legal systems are not; they mutually constitute each other through mutual recognition.¹¹²

¹¹⁰ Coleman 2001, 158.

¹¹¹ Michaels 2017.

¹¹² Michaels 2017, 91.

On this view, rules of external recognition explain why an order should be considered a legal order. A view Michaels actually ascribes to Hart.¹¹³ However, this mischaracterizes Hart's legal theory, in my view. In Hart's legal theory, the existence of a legal order does not depend on the recognition by officials in other legal orders. Although the validity of some primary rules is derivative of their validity in another legal order, the mutual recognition of legal orders is not a necessary condition of their existence. Thus, my positivist account of the intertwinement of legal orders departs from Michaels' account of rules of external recognition in an important respect. Legal orders are not mutually constitutive. A legal order exists when citizens follow primary rules and officials follow secondary rules.

5.2 The strengths and weaknesses of a positivist account of the intertwinement of legal orders

Secondary rules of external recognition explain why legal norms are incorporated in a legal order. Officials identify valid primary rules of other legal orders by following secondary rules of external recognition. Officials accept, from an internal point of view, the criteria inherent to secondary rules of external recognition to determine the validity of a primary rule. It is important to stress that the validity of primary rules of other legal orders is dependent on these criteria. For example, in domestic legal orders, rules of external recognition determine under which conditions primary rules of international law should be incorporated. Whether treaty provisions are valid in the Dutch legal order depends on the validity criteria inherent to the Dutch secondary rules of external recognition that officials follow. Rules of external recognition highlight that the validity of primary rules ultimately rests on recognition in a particular legal order. Although we may consider primary rules of other legal orders to be directly applicable or to have direct effect, their validity

¹¹³ 'recognition is constitutive for the identity of law as law. This resembles the idea, supported by Hart and attacked by Griffiths, that a normative order becomes law only once it is (externally) recognized.' Michaels 2017, 105.

depends on the criteria inherent to rules of external recognition of a particular legal order.

Conflicts between legal norms that arise following incorporation can be resolved on the basis of the rule of recognition. Each legal order has a rule of recognition that is supreme and ultimate in that no other rules can overrule or justify its validity. Rules of internal and external recognition follow from the supreme and ultimate rule of recognition of a legal order. Norm conflicts may be resolved on the basis of this supreme and ultimate rule of recognition.¹¹⁴ For example, the rule of recognition may stipulate how conflicts between domestic and international law should be resolved. Thus, conflicts between primary rules in a particular legal order can be resolved in light of the validity criteria that follow from the supreme and ultimate rule of recognition.

Rules of recognition cannot be used to resolve conflicts between primary rules that are part of different legal orders. For example, a citizen may feel compelled to follow norms from different legal orders that apply simultaneously, such as, a domestic and international legal norm. A conflict would arise if a citizen would follow norms from both the legal orders. These norm conflicts cannot be resolved based on rules of recognition because these secondary rules are tied to a particular legal order. Following MacCormick, these norm conflicts can be termed radical pluralism because in a positivist understanding of law there is no legal way to resolve these conflicts. On this view, a political decision should be made to resolve these conflicts.¹¹⁵ For example, political decisions can be made following judicial dialogue between officials of different legal orders. Or as Letsas explains this point in the context of EU law: 'The image of judicial dialogue in the EU presupposes, indeed it is premised upon, the understanding of constitutional pluralism that legal positivism offers us. It is seen as the cure to the problem of multiple and inconsistent

¹¹⁴ Hart 1994, 95.

¹¹⁵ 'Acceptance of a radically pluralistic conception of legal systems entails acknowledging that not every legal problem can be solved legally. The problem in principle is not that of an absence of legal answers to given problems, but of a superfluity of legal answers.' MacCormick 1999, 119. Although MacCormick uses the notion of radical pluralism in the context of EU law, it may be used more generally.

rules of recognition and the absence of any law governing what courts should decide. Judicial dialogue stands and falls with positivism's assumptions about the nature of law.¹¹⁶ Given the general and descriptive nature of a positivist understanding of law these extra-legal decisions fall outside the scope of a positivist account of the intertwinement of legal orders. No further explanation can be given on the basis of Hart's legal theory on how these norm conflicts are resolved, other than that officials may aim to resolve these conflicts through political decision-making.

The acceptance and contestation of the authority of officials also remains underexplored in my positivist account of the intertwinement of legal orders. From the perspective of Hart's legal theory, each legal order contains its own secondary rules of change, adjudication and recognition. Based on the secondary rules of change, adjudication and recognition officials exercise authority in a particular legal order. Officials follow secondary rules of change and adjudication when enacting new primary rules or adjudicating disputes. When officials identify valid primary rules of other legal orders, they follow secondary rules of external recognition. Secondary rules are considered valid because officials understand them as general standards in their legal order. However, seen in this light, no relations exist between officials of different legal orders. In some cases, officials of different legal orders may be considered part of a shared practice. For example, officials may feel motivated to rely on the authority of officials of other legal orders. Nevertheless, whether the authority of officials of other legal orders is accepted, ultimately depends on the secondary rules of external recognition that are tied to a legal order. Thus, no relations between officials of different legal orders exist in my positivist account of the intertwinement of legal orders.

The main strength of my positivist account of the intertwinement of legal orders is its ability to make sense of the general criteria we rely on when we determine the validity of primary rules of other legal orders. Rules of external recognition explain why we incorporate legal norms of other legal orders. Conflicts

¹¹⁶ Letsas 2012, 94.

between legal norms internal to a legal order may be resolved on the basis of the supreme and ultimate rule of recognition. How conflicts between norms from multiple legal orders that apply simultaneously are resolved remains unclear. Resolving these conflicts requires a political decision and goes beyond the descriptive scope of a positivist understanding of law. Another weakness of my positivist account of the intertwinement of legal orders is its inability to explain how relations between officials of different legal orders may exist. Secondary rules of change, adjudication and recognition are tied to a legal order and the exercise of authority by officials is constitutive of the secondary rules that are tied to a particular legal order. Therefore, relations between officials cannot be conceptualized in a positivist account of the intertwinement of legal orders.

6 Conclusions

In this chapter, I have explored Hart's positivist legal theory to critically reconstruct a positivist account of the intertwinement of legal orders. Hart's legal theory should be understood against the background of his commitment to analytical jurisprudence. On this view, legal philosophers should clarify notions that are central to law and explain how these legal notions structure social life. Hart also maintains that law is best understood in a general and descriptive sense. This means that a legal theory should hold for all legal orders and should take the perspective of a participant without morally justifying this internal point of view. Central to Hart's legal theory is the idea that law should be understood in terms of primary rules that constitute obligations and secondary rules that officials follow when enacting primary rules, settling disputes and identifying valid primary rules. Although Hart maintains that secondary rules cannot be found in international law, I have argued that secondary rules can be identified beyond domestic legal orders. Moreover, some regimes of international law, such as, for example, EU law and the law of the Council of Europe, are best understood as legal orders that are embedded in the legal order of general international law. In these regimes distinct secondary

rules are followed, next to rules of change, adjudication and recognition of general international law.

In my positivist account of the intertwinement of legal orders I have introduced the notion of a rule of external recognition to explain why legal norms of other legal orders are considered valid. Rules of internal and external recognition are two sides of the same coin of the supreme and ultimate rule of recognition of a legal order. Conflicts between legal norms may be resolved on the basis of this secondary rule. However, conflicts between norms of different legal orders that apply simultaneously can only be resolved on the basis of a political decision because secondary rules are inherently tied to a legal order. The exercise of authority by officials follows from the secondary rules of change, adjudication and recognition internal to a legal order. No relations between officials of different legal orders exist in my positivist account of the intertwinement of legal orders.

Chapter 3

Ronald Dworkin's interpretive legal theory: constructive integrity

1 Introduction

Ronald Dworkin's interpretive legal theory aims to conceptualize law in light of the fact that we actually deeply disagree on how law should be understood. This kind of disagreement also exists in legal practice. Lawyers may disagree on whether a rule or principle should be applied because no simple test exists that could be used to resolve their disagreement. Dworkin's legal theory explores how legal philosophers and lawyers address these kinds of disagreements. He maintains that disagreement is inherent to the argumentative nature of law: '[o]f course, law is a social phenomenon. But its complexity, function, and consequence all depend on one special feature of its structure. Legal practice, unlike many other social phenomena, is *argumentative*.'¹ This has lead Dworkin to argue that, despite our disagreement, we aim to apply legal norms consistently and in light of their coherent justification.

In this chapter, I start out with situating Dworkin's legal theory in the normative tradition of jurisprudence (section 2). Dworkin maintains that legal philosophers should aim to construct legal theories that show law in its best light. Although we may deeply disagree on how we should understand legal practice, legal philosophers should construct a justification of law that best explains how law constrains the exercise of public power. This interpretive approach is also embedded in legal practice itself. Citizens and officials have an obligation to reflect on what rights and obligations they have as members of a community of principle. In his

¹ Dworkin 1986, 13.

interpretive legal theory, Dworkin argues that we apply legal norms in light of a coherent justification of the values of fairness and justice (section 3). Our commitment to the value of integrity highlights that we aim to apply legal norms consistently and in light of a coherent justification of the values of political morality. I will illustrate the importance of integrity with his account of adjudication in hard cases. Dworkin has attempted to conceptualize international law from the perspective of his interpretive legal theory (section 4). On his view, the central point of international law revolves around the duty of mitigation and the principle of salience. However, I will present a more convincing interpretive account of international law that addresses the role of integrity. Furthermore, I will develop an interpretive account of the intertwinement of legal orders based on Dworkin's notion of integrity (section 5). In an interpretive account of the intertwinement of legal orders, integrity should be understood as a constructive filter through which legal norms and authority claims of officials are assessed. Lastly, I will evaluate the strengths and weaknesses of this interpretive account of the intertwinement of legal orders.

2 The normative tradition: Dworkin's interpretive legal theory

Dworkin has developed his interpretive legal theory in light of the view that legal philosophers should construct a justification of law. He maintains that legal philosophers should aim to provide a legal theory that explains how law constrains the exercise of public power. This interpretive approach is also embedded in the practice of law itself. On this view, citizens and officials are part of a community of principle in which they have a responsibility to critically reflect on what rights and obligations they have.

In this section, I will situate Dworkin's legal theory in the normative tradition of jurisprudence. Although we may deeply disagree on how law should be understood, legal philosophers should aim to construct a legal theory that shows law in its best light. Citizens and officials also take an interpretive approach when they follow or apply legal norms. I will explain this point with Dworkin's notion of

the Protestant interpretive attitude. The Protestant interpretive attitude entails that citizens and officials may determine what rights and obligations have normative force in a legal order.

2.1 Law as an interpretive concept

Dworkin maintains that law should be considered an interpretive concept.² This means that legal philosophers should aim to provide a legal theory that shows law in its best light. Dworkin describes interpretive concepts as follows: '[w]e share an interpretive concept when our collective behavior in using that concept is best explained by taking its correct use to depend on the best justification of the role it plays for us.'³ Different conceptions can be formulated for an interpretive concept. For example, two opposing conceptions can be distinguished for the concept of democracy. A majoritarian conception of democracy implies governing by majority while a partnership conception entails governing by a community as a whole.⁴ A theory of democracy should support a conception that best explains the central point of democracy. For example, Dworkin maintains that a partnership conception provides a more convincing explanation of democracy than a majoritarian conception.⁵ Law is also an interpretive concept. Or as Dworkin explains: '[l]aw is an interpretive concept. Judges should decide what the law is by interpreting the practice of other judges deciding what the law is. General theories of law, for us, are general interpretations of our own judicial practice.'⁶ Dworkin argues that the central point of law is to constrain the exercise of public power.⁷ On this view, a legal theory should explain how law constrains the exercise of public power. For example, in *Law's Empire* Dworkin evaluates conventionalist and pragmatist accounts of legal

² Dworkin 1986, 87; 2006, 12; 2011, 404.

³ Dworkin 2011, 158.

⁴ Dworkin 2011, 382-385.

⁵ Dworkin 2011, 392.

⁶ Dworkin 1986, 410.

⁷ Dworkin 1986, 93.

practice as interpretive counterparts of positivist and realist theories of law, and explores how these theories could discredit his own interpretive legal theory.⁸

Dworkin argues that law should be considered an interpretive concept because this explains why we may deeply disagree on how law should be understood.⁹ To clarify this point Dworkin distinguishes between criterial, natural kind and interpretive concepts.¹⁰ We generally agree on the existence criteria of criterial concepts. Dworkin explains that the concept of a book, for example, can be considered a criterial concept because we generally agree on the appropriate criteria on the basis of which objects can be identified as a book. If we disagree whether something should be called a book, we refer to these shared criteria to settle our disagreement.¹¹ Natural kind concepts have characteristics that are inherent to the natural world. Dworkin mentions that species of animals, such as, for example, lions can be considered natural kind concepts. We refer to these natural characteristics when we disagree on whether an animal should be called a lion.¹² Dworkin points out that an important similarity between criterial and natural kind concepts is that disagreement concerning these concepts can be resolved based on a test.¹³ For example, whether something is a book or a lion can be determined in light of a test that follows from generally accepted criteria or natural characteristics of these concepts. Legal theories that conceptualize law in terms of a criterial or natural kind concept ultimately fail to adequately address that there is no generally shared test to determine what the most insightful explanation of law is. An interpretive legal theory does not settle our disagreement, but aims to provide the best possible explanation of how law constrains the exercise of public power.

⁸ Dworkin 1986, 114-175.

⁹ Dworkin has called this theoretical disagreement. See Dworkin 1986, 5.

¹⁰ Dworkin 2006, 9-12; 2011, 158-163.

¹¹ Dworkin 2011, 158-159. Dworkin argues that Hart's legal theory conceptualizes law as a criterial concept because the rule of recognition provides shared criteria on the basis of which valid legal rules can be identified. See Dworkin 1986, 34-35; 2006, 225-226.

¹² Dworkin 2011, 159.

¹³ Dworkin 2011, 160.

Although we may deeply disagree on how law should be understood, Dworkin maintains that we have no good reasons to be skeptical about the possibility of arriving at a convincing interpretive understanding of law. He distinguishes between two forms of skepticism: internal and external.¹⁴ External skepticism denies that one can objectively determine whether interpretive legal theories provide an insightful explanation of law's central point. For example, different competing legal theories seem tenable because no objective arguments can be given which interpretive understanding best explains how law constrains the exercise of public power. Dworkin maintains that this form of skepticism assumes an Archimedean point of view from which all interpretive accounts of law can be assessed. However, an Archimedean point of view does not exist. The claim that we cannot objectively determine whether interpretive legal theories provide an insightful explanation of law can only follow from an assessment that takes into account to which degree these theories succeed in showing law in its best light. Thus, this form of skepticism is untenable because it wrongly assumes that an Archimedean point of view exists from which interpretive accounts of law can be assessed.¹⁵

Internal skepticism denies that we can reach a coherent interpretive understanding of law. Two forms of internal skepticism may be distinguished. The first type of internal skepticism entails that an interpretive understanding of law may contain conflicting dimensions. Dworkin illustrates this point with a tort law case in which two conflicting legal principles point towards opposing legal decisions.¹⁶ Both principles seem relevant to the case. Dworkin argues that a judge should reach a decision by considering how these conflicting principles have relative weight. In the case of two opposing legal principles, a judge will need to determine which principle provides the most convincing argument in light of a more abstract justification of these principles. Or as Dworkin explains: 'some nonarbitrary scheme of priority or weighting or accommodation between the two, a scheme that reflects

¹⁴ Dworkin 1986, 78.

¹⁵ Dworkin 1996.

¹⁶ Dworkin 1986, 268-271.

their respective sources in a deeper level of political morality.’¹⁷ Thus, this type of internal skepticism is unconvincing because contradicting elements in an interpretive understanding of law may be given relative weight.

The second type of internal skepticism entails that an interpretive understanding of law is inherently incoherent. For example, an interpretive legal theory may consist of two contradictory elements which cannot be given relative weight in a more abstract justification.¹⁸ This can also mean that different interpretive legal theories can be constructed that each explains a distinct aspect of law’s central point. Dworkin calls this type of skepticism, global internal skepticism.¹⁹ Global internal skepticism poses a challenge to Dworkin’s legal theory in two respects. Firstly, if global internal skepticism should be accepted this would entail that no interpretive understanding of law can be reached that holds for law as a whole. At best, Dworkin’s legal theory provides a partial explanation of law’s central point. Secondly, this form of skepticism challenges the central claim of Dworkin’s legal theory that legal norms are applied in light of their coherent justification. However, Dworkin maintains that no convincing claim has been made that proves that our interpretive understanding of legal practice is inherently contradictory. No convincing positive arguments have been presented that justify the claim that our interpretive understanding of law is plagued by incoherence.²⁰

2.2 The Protestant interpretive attitude

Entrenched in Dworkin’s interpretive understanding of law is the view that citizens have a responsibility to critically reflect on what rights and obligations they have in a legal order.²¹ Dworkin explains this responsibility in terms of a Protestant attitude:

¹⁷ Dworkin 1986, 269.

¹⁸ Dworkin 1986, 273-274.

¹⁹ Dworkin 1986, 272.

²⁰ See Dworkin 2008 in response to Waldron 2008. See also, Dworkin 2011, 88-96.

²¹ One could argue that it is unlikely that all citizens and officials in a legal order have a Protestant interpretive attitude. For example, some citizens and officials may claim to rely on generally shared

‘[l]aw’s empire is defined by attitude, not territory or power or process. (...) It is a Protestant attitude that makes each citizen responsible for imagining what his society’s public commitments to principle are, and what these commitments require in new circumstances.’²² This attitude entails that in principle each citizen should be able to determine what rights and obligations he has in a legal order. For example, citizens in the Dutch legal order should be able to determine what rights and obligations they have under Dutch law. This attitude is Protestant in nature because we are able to construct an account of legal practice by ourselves within a community.²³ This interpretive attitude does not contradict the fact that citizens and officials may disagree on what rights and obligations they have. They may, for example, discuss what rights follow from their interpretive understanding of law’s central point. Moreover, the Protestant attitude requires the existence of a community in which individuals can reflect on what rights and obligations are binding upon them. Dworkin calls this community a community of principle.²⁴

Dworkin’s Protestant attitude explains why an interpretive understanding of law can only provide a provisional explanation of how law constrains the exercise of public power. Citizens and officials may always contest what rights and obligations they have in a legal order. Here it is helpful to discuss the three interpretive stages that Dworkin distinguishes. When we aim to understand interpretive concepts like law, we follow three stages: a pre-interpretive, an interpretive and a post-interpretive stage. In the pre-interpretive stage, there is a provisional and often implicit understanding between individuals on what law is.²⁵ Without this minimal and provisional consensus, no discussion could follow on

criteria to identify valid rules and principles. However, from the perspective of Dworkin’s legal theory these practitioners have not yet realized that, on further scrutiny, we may deeply disagree on these criteria.

²² Dworkin 1986, 413.

²³ On this Protestant interpretive attitude see Postema 1987. See also the exchange between Postema and Dworkin on integrity and the Protestant interpretive attitude. Postema 2004; Dworkin 2004.

²⁴ Dworkin 1986, 214.

²⁵ Dworkin 1986, 65-66. Postema captures this dimension of the Protestant interpretive attitude well: ‘[i]nterpretation starts from "pre-interpretive" agreement regarding the boundaries and typical elements of the practice. Consensus fixes the object of interpretation, but not the interpretation’. Postema 1987, 297

which conception of law provides the most insightful account. In the interpretive stage, we aim to construct the most convincing justification that show law in its best light.²⁶ Certain aspects of our pre-interpretive understanding of legal practice may be disregarded in the interpretive stage, or new elements may be introduced to justify our interpretive understanding of law. In the post-interpretive stage, we reflect on what this interpretive understanding entails. For example, in the post-interpretive stage, we consider which decision a judge should take.²⁷ Nevertheless, no clear distinction can be made between the pre-interpretive and post-interpretive stage. Or as Dworkin explains: '[i]nterpretation folds back into the practice, altering its shape, and the new shape encourages further reinterpretation'.²⁸ When a decision is reached in the post-interpretive stage it will become part of our implicit and pre-interpretive understanding of law is. This implicit understanding may become contested, and therefore examined in the interpretive stage. In the post-interpretive stage citizens and officials will consider what this interpretive understanding entails. Thus, the Protestant interpretive attitude explains why we can only reach a provisional interpretive understanding of law.

Some of Dworkin's critics have argued that an interpretive approach necessarily relies on criterial foundations. On this view, a justification of law's central point is grounded in consensus because it starts out from generally accepted claims about law. We start out with a criterial conception in the pre-interpretive stage and switch to an interpretive conception in the interpretive and post-interpretive stages.²⁹ For example, we could construct an interpretive understanding of law by building further on Hart's concept of a rule of recognition.³⁰ Nevertheless, from the perspective of Dworkin's legal theory this critique should be considered unconvincing. We do not switch from a criterial to an interpretive concept of law. Firstly, the Protestant interpretive attitude demands only a provisional agreement

²⁶ Dworkin 1986, 66.

²⁷ Dworkin 1986, 66.

²⁸ Dworkin 1986, 48.

²⁹ See, for example, the discussion in Stavropoulos 1996, 136-143.

³⁰ However, this does not mean that Hart's legal theory provides a convincing interpretive understanding of law. See Guest 2013, 69-72.

between individuals on what the boundaries of law as a practice are. Based on this provisional agreement citizens and officials may reflect on what the most convincing explanation of law's central point is. Secondly, this line of critique assumes that a generally shared test exists that could inform us how law should be conceptualized in a legal theory. No such test exists because we may deeply disagree on what the central point of law entails.

3 Dworkin on integrity in law

The central claim of Dworkin's legal theory is that we aim to interpret legal norms consistently and in light of a coherent account of the values of political morality. This theory builds on the argument developed in his earlier work that law should be conceptualized in terms of rules and principles and that judges sometimes need to reflect on what the underlying justification of these rules and principles is. The notion of integrity highlights that we interpret legal rules and principles in light of a coherent account of their underlying values. Dworkin's most elaborate illustration of the importance of integrity in law concerns adjudication.

In this section, I will explore Dworkin's interpretive legal theory in light of the notion of integrity. Dworkin asserts that we interpret legal rules and principles in light of the values of fairness and justice. The notion of integrity explains why we aim to rely on a coherent account of the values of justice and fairness when we interpret legal norms. Dworkin's claim that we interpret legal norms in light of a coherent account of political morality can be illustrated with how judges reach a decision in a hard case. When judges need to decide on a hard case, they aim to reach a decision that is justified in light of previous decisions and the values of justice and fairness.

3.1 Justice, fairness and integrity

Dworkin's legal theory revolves around the claim that we interpret legal norms in light of their coherent justification. Some elements of this legal theory have been developed in his early work.³¹ In his early work, Dworkin maintains that we should understand law in terms of rules and principles. Rules are binary in that they apply or do not apply to a particular case. Principles have a dimension of weight.³² Principles are important in hard cases where rules are unable to inform judges which decision should be taken. In explaining how judges decide hard cases, Dworkin develops an argument that is central to his interpretive legal theory. When deciding on hard cases judges construct an argument that explains which general principles clarify and justify the applicable legal rules.³³ For example, when interpreting a constitutional provision in a hard case a judge will consider how this provision is part of and informed by a set of constitutional principles. This set of constitutional principles explains how we should understand the provisions of our constitution and which interpretation of these provisions is justified.³⁴

In his later work, Dworkin explores more in depth how we interpret rules and principles in light of their justification.³⁵ He argues that the justification we rely on when we apply rules and principles can be understood as a coherent set of values of a political morality. Dworkin makes a distinction between justice and fairness.³⁶ The value of justice represents the substantive moral beliefs in a community and the political decisions that have been taken to implement these moral beliefs. For

³¹ Dworkin 1978.

³² Dworkin 1978, 24-27.

³³ Dworkin 1978, 101-105.

³⁴ Dworkin 1978, 106-107.

³⁵ Dworkin 1986; 2006; 2011. Some critics argue that there is a difference between Dworkin's views in his early work and his subsequent work. See, for example, Shapiro 2007. Similar to Dworkin, I consider his work to establish a coherent line of reasoning on how we interpret rules and principles in light of underlying values. See Dworkin 2006, 232-240 in which he discredits Shapiro's claim that he changed his views in subsequent work.

³⁶ Dworkin 1986, 164-165. Dworkin also identifies procedural due process as a separate value. However, he disregards this value in his argument on integrity. I follow Dworkin in his focus on justice and fairness.

example, legal rules and principles may give expression to our notions of justice by granting rights to individuals. The value of fairness brings to light that members of a community should have the opportunity to participate in procedures that ensure that just political decisions are taken. Legal rules and principles may, for example, ensure participation in political decision-making procedures. Thus, a justification of rules and principles will touch upon substantive issues of justice and procedural issues of fairness.

Next to the values of justice and fairness, Dworkin considers the value of integrity to be central to our justification of legal norms.³⁷ His argument on integrity follows from his objection to compromises on issues of moral principle. Checkerboard laws aim to resolve persistent disagreement on issues of justice in a community through compromise.³⁸ For example, persistent disagreement may exist in a community on product liability in private law cases.³⁹ One could argue that strict liability should not be established while others could maintain that strict liability should be established for all products. A compromise on product liability could settle this issue by enacting legal rules and principles that ensure strict liability for only a number of products.⁴⁰ Dworkin argues that we consider these checkerboard laws intuitively wrong in light of another value, rather than justice or fairness.⁴¹ We consider checkerboard laws intuitively wrong because they entail a lack of coherence between the values of justice and fairness that underlie the norms of checkerboard laws. Dworkin maintains that the value of integrity is part of our political morality because we generally believe that we should construct a coherent account of the values that underlie legal rules and principles. No unprincipled compromise should be made by enacting checkerboard laws. Or as Jeremy Waldron explains: 'Integrity, in Dworkin's theory, is a response to the fact that the various political decisions currently in force in a given society, coming as they do from

³⁷ Dworkin 1986, 166.

³⁸ Dworkin 1986, 179.

³⁹ Dworkin 1986, 178.

⁴⁰ Dworkin 1986, 178.

⁴¹ Dworkin 1986, 183.

different sources, are not guaranteed to cohere with one another.’⁴² Thus, the value of integrity entails a commitment towards a coherent account of the values of justice and fairness in a legal order.

Although the value of integrity entails a commitment towards a coherent account of the values of justice and fairness that underlie rules and principles, disagreement may still arise on what these values entail in a particular case. We may disagree, for example, on what the right to free speech implies. Nevertheless, Dworkin argues that we share a commitment to integrity.⁴³ He explains this point through the metaphor of a theatre of debate. He maintains that we may fundamentally disagree on how we view the values of justice and fairness. In a pluralist community it is likely that different moral views are reflected in legal rules and principles. Despite disagreement that may exist concerning the values of justice and fairness, the value of integrity entails a shared commitment to constructing a coherent account of the values underlying legal rules and principles. Integrity provides a theater of debate in which our disagreement concerning justice and fairness can be articulated, and points out our shared commitment to construct a coherent justification when applying legal rules and principles.⁴⁴ Dworkin’s metaphor of a theatre of debate also illustrates the duty of individuals to consider what rights and obligations they have in a legal order. One may enter in a debate with other individuals on what the most coherent account of the values of political morality is.

⁴² Waldron 1999, 189.

⁴³ Dworkin 1986, 211. The theatre of debate metaphor has been further developed by Jeremy Waldron. See Waldron 2004.

⁴⁴ ‘In short, each accepts political integrity as a distinct political ideal and treats the general acceptance of that ideal, even among people who otherwise disagree about political morality, as constitutive of political community.’ Dworkin 1986, 211.

3.2 Integrity in adjudication

In his legal theory, Dworkin pays particular attention to the role of integrity in adjudication. How judges decide hard cases provides a clear illustration of how legal rules and principles are applied in light of their coherent justification. Although integrity is a notion that is central to law generally, adjudication illustrates the significance of integrity in particular.⁴⁵ Dworkin maintains that adjudication revolves around two dimensions: fit and justification.⁴⁶ He argues that judges consider which decision best fits the existing body of case law and asserts the most coherent justification of these decisions. Dworkin illustrates these two dimensions by comparing adjudication with writing a chain novel.⁴⁷ A story of a chain novel is made up of chapters written successively by different writers. When a writer is working on a new chapter, he needs to ensure that the story is connected to the previous chapters. The reader will be confused when the new chapter is inconsistent with the story of the chain novel. The writer also needs to decide on how the story should progress. Dworkin explains that the writer should decide on how he wishes to continue the story in a new chapter. The dimension of fit explains the aim of the writer to ensure that a new chapter should be consistent with the previous chapters. The dimension of justification touches upon the writer's aim to contribute to a faithful continuation of the story. In adjudication, these two dimensions of fit and justification can also be identified. The dimension of fit entails that judges consider which decision is best justified in light of previous case law. The dimension of justification requires judges to reach a decision that asserts the most coherent justification of previous decisions.

Generally, judges attempt to do justice to the dimensions of fit and justification when reaching a decision. A judge aims to ensure that his decision is in

⁴⁵ The fact that Dworkin pays particular attention to adjudication does not mean that his legal theory centres solely on adjudication. Dworkin's objection to checkerboard laws, for example, illustrates the importance of integrity in legislation.

⁴⁶ Dworkin 1986, 239.

⁴⁷ Dworkin 1986, 228-238.

line with past case law and is justified in light of general moral principles. However, not every decision warrants an extensive exploration into case law and the values of political morality. Whether judges need to consciously reflect on the dimensions of fit and justification depends on whether they are confronted with an argument that challenges their common understanding of the relevant legal rules and principles. Hard cases challenge our common understanding of rules and principles because it is not clear from the outset which decision should be reached.⁴⁸ In order to reach a decision in a hard case a judge needs to determine which decision best fits with previous case law and asserts a coherent justification of the relevant rules and principles. Dworkin calls this exploration a justificatory ascent because judges need to take a more abstract perspective on the values that inform rules and principles.⁴⁹ In his earlier work, Dworkin uses the metaphor of the godlike judge Hercules to explain how judges reflect on the justification of rules and principles in hard cases.⁵⁰ Judge Hercules is able to reflect on the justification of rules and principles on the most general and abstract level, constructing a coherent account of the values of justice and fairness.

A critic could object to the metaphor of judge Hercules because judges should not be held responsible for constructing fully coherent interpretive legal theories.⁵¹ Although Dworkin agrees that in practice no judges like Hercules exist, the godlike Hercules illustrates that in reaching a decision in a hard case judges inevitably touch upon the underlying values of legal rules and principles. On this view, the dimensions of fit and justification are important in both easy and hard cases.⁵² In hard cases the dimensions of fit and justification need to be made explicit in order to determine which decision is best justified. Easy cases do not challenge the common understanding of legal rules and principles. Nevertheless, Dworkin stresses that in hard cases one cannot control how far the justificatory ascent will go

⁴⁸ On hard cases see Dworkin 1978, 83ff.

⁴⁹ Dworkin 2006, 53.

⁵⁰ See, for example, Shapiro 2011, 312-313.

⁵¹ See for example the discussion in Dworkin 1986; 263-266; 2006, 65-72.

⁵² Dworkin 1986, 265-266.

into the values of political morality.⁵³ In some hard cases, a judge may need to reflect on the most general and abstract values of a legal order. Thus, judges rely on the dimensions of fit and justification, but they do not always need to commit to an extensive exploration of case law and the values that underlie rules and principles.

4 Integrity in international law

Dworkin's interpretive legal theory is concerned primarily with domestic legal orders. A posthumously published article titled *A New Philosophy of International Law* revealed that Dworkin intended to explore international law from the perspective of his legal theory.⁵⁴ In this article, Dworkin argues that international law should be conceptualized in light of the principle of salience. The principle of salience entails that rules and principles of international law should be considered applicable insofar they increase the legitimacy of a state. Dworkin's account of international law invites further reflection on the question how law beyond domestic legal orders should be conceptualized from the perspective of his interpretive legal theory.

In this section, I will critically assess Dworkin's account of international law. I seek to evaluate the force of Dworkin's argument that international law should be understood in light of the principle of salience. I will defend the claim that a more convincing interpretive account of international law can be constructed by building on the notion of integrity. The moral gravitational force of norms of international law is distinct from the justification of legal norms in domestic legal orders. Moreover, the notion of integrity explains why norms of international law are applied in light of their own coherent justification.

⁵³ Dworkin 2006, 55.

⁵⁴ Dworkin 2013. On the relevance of Dworkin's interpretive theory for international law before the publication of this article, see Çali 2009.

4.1 Salience or integrity?

In his article Dworkin considers why norms of international law are followed even though there is no test to determine under which conditions these norms should be applicable. Or as Dworkin explains: '[e]ven though almost everyone agrees that "international law" is really law, and that the rules and principles set out in documents of that kind are part of it, the question of *why* these documents constitute some kind of legal system is crucial because how these rules and principles should be interpreted hinges in it.'⁵⁵ Although it may seem as if Dworkin is primarily interested in the system-like qualities of international law, he emphasizes the differences between his approach and that of legal positivists. Dworkin criticizes legal positivists because they approach international law as a criterial concept. Legal positivists claim that the question whether norms of international law should be applied, ultimately depends on a test, such as, for example, one that follows from the rule of recognition. Dworkin argues that a positivist account of international law revolves around state consent because consent can be established based on such a test.⁵⁶ Dworkin's critique of legal positivist accounts of international law is best understood in light of his more general claim that law should be conceptualized as an interpretive concept.⁵⁷ On this view, there is no general test to determine whether norms of international law should be applied.

Dworkin maintains that the central point of international law is to support and improve the legitimacy of the state. Or as he explains: '[i]f a state can help to facilitate an international order in a way that would improve the legitimacy of its own coercive government, then it has a political obligation to do what it can in that

⁵⁵ Dworkin 2013, 3.

⁵⁶ 'Many contemporary international lawyers have tried to do what Hart did not: construct a doctrinal account of international law from his version of positivism. They assume that a sovereign state is subject to international law but, on the standard account, only so far as it has *consented* to be bound by that law, and they take that principle of consent to furnish an international rule of recognition.' [footnote omitted] Dworkin 2013, 5. However, positivist accounts of international law do not necessarily focus on state consent. See, for example, H.L.A. Hart's views on international law, discussed in the previous chapter.

⁵⁷ Dworkin 2013, 11-12.

direction.⁵⁸ Dworkin explains the central point of international law in terms of a duty of mitigation. On this view, states should mitigate the possible dangers of international rules and principles that violate their legitimacy. The notion of legitimacy is connected to the idea that rules and principles should be seen as part of a community of principle. Legal norms are applied in light of the values of this community of principle.⁵⁹ States have an obligation to improve their legitimacy through international law in four ways. States should further fundamental rights of citizens, protect citizens against forms of aggression by other states, cooperate with other states and ensure the existence of procedures that enhance citizen participation.⁶⁰ Thus, the duty of mitigation requires states to support and improve their legitimacy through international law.

The duty of states to support and improve their legitimacy through international law can also be captured by what Dworkin calls the principle of salience. The principle of salience entails that a state has an obligation to follow norms of international law when this enhances its legitimacy and the legitimacy of international law.⁶¹ Following Dworkin's terminology, international rules and principles have moral gravitational force: '[a]s more nations recognize a duty to accept and follow widely accepted principles, those principles, thus even more widely accepted, have greater moral gravitational force.'⁶² The gravitational force of international law entails that it has a 'snowballing effect' on states. States are pulled towards acceptance of norms of international law that improve their legitimacy and the legitimacy of international law. Dworkin provides two historical examples of the gravitational force of international law. Firstly, Dworkin argues that *jus ad bellum* (international law on the use of force) and *jus in bello* (international humanitarian

⁵⁸ Dworkin 2013, 17.

⁵⁹ Dworkin 2013, 11. Dworkin explains a community of principle in *Law's Empire* as follows: '(...) the promise that law will be chosen, changed, developed, and interpreted in an overall principled way. A community of principle, faithful to that promise, can claim the authority of a genuine associative community and can therefore claim moral legitimacy – that its collective decision are matters of obligation and not bare power – in the name of fraternity.' Dworkin 1986, 214.

⁶⁰ Dworkin 2013, 17-18.

⁶¹ Dworkin 2013, 19.

⁶² Dworkin 2013, 19-20.

law) have developed against the background of shared Christian beliefs. Secondly, principles have developed from Roman law that are now generally shared among Western states. These principles are known as *ius gentium*.⁶³

Dworkin maintains that article 38 of the ICJ Statute illustrates the central role of salience in the field of international law today.⁶⁴ Article 38 considers treaties, customary law and general principles valid sources of international law. However, legal positivists generally consider article 38 of the ICJ Statute an illustration of a rule of recognition. On this view, treaties, customary law and general principles create legal obligations on the basis of state consent. Nevertheless, Dworkin argues that consent-based accounts of international law are unable to explain why state consent necessarily creates legal obligations.⁶⁵ Instead, the legal sources of article 38 of the ICJ Statute are binding in light of their moral gravitational force: '[a]ccording to the positivist account that makes consent fundamental, these sources flow – imperfectly – from the very idea of law as based in consent. On the account I describe, they flow instead from the moral demands, on which the legitimacy of an international system depends.'⁶⁶

Dworkin's account of international law is insightful in some respects. In his account he attempts to conceptualize international law as an interpretive concept and considers what interpretive understanding shows international law in its best light. However, Dworkin's account of international law is ultimately unconvincing because he fails to connect his arguments with his interpretive legal theory in two important respects.⁶⁷ Firstly, Dworkin wrongly assumes that the central point of international law is derivative of the legitimacy of the state. On this view, the moral gravitational force of international law has no independent weight. The salience principle entails that states are obliged to follow international law only if this enhances their legitimacy. However, in Dworkin's interpretive legal theory the

⁶³ Dworkin 2013, 20.

⁶⁴ Dworkin 2013, 21-22.

⁶⁵ Dworkin 2013, 6-10.

⁶⁶ Dworkin 2013, 22.

⁶⁷ On the discontinuity between Dworkin's interpretive legal theory and his account of international law, see Scarffe 2016.

justification of legal norms follows from a coherent account of their underlying values. Dworkin does not provide a clear and convincing argument why the moral gravitational force of norms international law should be dependent on the state.⁶⁸ Moreover, it is unclear in Dworkin's account of international law what the moral gravitational force is of legal norms enacted by international organizations, such as, for example, the European Union.⁶⁹

Secondly, Dworkin's interpretive account of international law largely ignores the Protestant interpretive attitude that is embedded in legal practice. The Protestant attitude entails that citizens and officials should be able to reflect on how legal norms follow from the values of justice and fairness of a community of principle. However, in his account of international law Dworkin fails to address what community or communities of principle support international law. While Dworkin's legal theory is concerned with how citizens and officials apply legal norms in light of their underlying values, his account of international law does not explain how international rules and principles are applied in light of the dimensions of fit and justification. Thus, an interpretive account of international law should make sense of how citizens and officials apply norms of international law in light of their underlying values.⁷⁰

The first weakness of Dworkin's interpretive account of international law can be resolved by acknowledging that norms of international law require a justification that may differ from domestic law. This point may be illustrated with Letsas' interpretive account of the European Convention on Human Rights. Letsas argues that the human rights enshrined in the Convention are interpreted in light of their underlying moral aims. He emphasizes that the human rights of the Convention entail notions that are often understood differently in the legal orders of the states that have signed and ratified the Convention. Therefore, Letsas maintains

⁶⁸ See also Christiano 2016, 56.

⁶⁹ Dworkin 2013, 20-21.

⁷⁰ See also Palombella 2015. However, like Dworkin, Palombella maintains that international law has no independent moral gravitational force: 'the "political morality" of the international system can only enjoy a second level status, that is, the integrity of its values has a derivative status not a self-standing substantive content.' Palombella 2015, 10.

that the Convention entails autonomous concepts: ‘the autonomous concepts of the Convention enjoy a status of semantic independence—their meaning is not to be equated with the meaning that these very same concepts possess in domestic law.’⁷¹ On this view, the Strasbourg Court should consider which conception of the Convention rights shows them in their best light. Letsas argues that the values of legality and liberalism justify the Strasbourg Court’s interpretation of the Convention rights.⁷² Letsas’ interpretive account of the European Convention on Human Rights illustrates that the justification of the rights enshrined in the Convention may differ from the justification of human rights in domestic legal orders.

The second weakness of Dworkin’s interpretive account of international law can be overcome by highlighting the role of integrity. The notion of integrity explains how citizens and officials aim to apply norms of international law consistently and in light of their coherent justification. Letsas’ interpretive account of the European Convention on Human Rights illustrates that the application of the Convention rights require adherence to the dimensions of fit and justification: ‘the relevant actors understand the ECHR rights in a non-conventionalist way: these rights need not be the same as what the Contracting States (or the majorities in them) take them to be; rather their basis is some substantive moral principle that justifies them and calls for consistent application.’⁷³ Dworkin seems to be aware of the importance of integrity in the field of international law, but he fails to articulate how integrity plays a role when norms of international law are applied.⁷⁴ A commitment to integrity in international law does not necessarily imply the existence of one single community of principle.⁷⁵ The notion of integrity entails that the application of norms of international law require their own underlying justification. On this view, different regimes of international law may be identified based on their specific

⁷¹ Letsas 2007, 42.

⁷² Letsas 2007, 5; 99-119.

⁷³ Letsas 2007, 40.

⁷⁴ Dworkin 2013, 22.

⁷⁵ See also Çali 2009, 815. Although Çali wrongly reduces integrity to the principle of equal concern and respect, she acknowledges that different communities of principle can be identified in international law.

underlying justification.⁷⁶ For example, EU law may be seen as a regime that is informed by a distinct set of values, such as, for example, the rule of law and human dignity, as set out in the Treaty on European Union.⁷⁷ Thus, distinctions may be drawn between regimes of international law in light of how the notion of integrity is constructed.

5 An interpretive account of the intertwinement of legal orders

In this section, I develop an interpretive account of the intertwinement of legal orders by building further on the notion of integrity. I will argue that in an interpretive account of the intertwinement of legal orders integrity can best be seen as a constructive filter in which dimensions of fit and justification can be distinguished. The dimension of fit entails that we apply rules and principles of other legal orders when they can be made consistent with other legal norms. The dimension of justification demands that these legal norms can be made coherent with one's own conception of the values of justice and fairness. I will also build on the notion of integrity to develop an interpretive account of the relations between officials of different legal orders. In an interpretive account of the intertwinement of legal orders, officials of other legal orders are considered authoritative when their exercise of authority is consistent with past decisions and coherent with one's own conception of the values of political morality. Finally, I will assess the strengths and weaknesses of my interpretive account of the intertwinement of legal orders.

⁷⁶ Jovanović makes a similar claim in arguing that Dworkin is not sufficiently aware of the fragmentation of international law. See Jovanović 2015, 456-457.

⁷⁷ Art 2 TEU. On the development of the values underlying EU law, see Weatherill 2016, 393-419.

5.1 The constructive filter of integrity

In Dworkin's interpretive legal theory, the notion of integrity is central to his claim that we apply rules and principles in light of a coherent understanding of the values of fairness and justice. Integrity encompasses two dimensions: fit and justification. A legal norm should be consistent with other legal norms in a legal order (fit), and support the most coherent justification of the values of political morality (justification). In my view, the notion of integrity can be further developed to explain why legal norms of other legal orders are applied. The dimensions of fit and justification explain how a citizen or official may need to consciously reflect on whether a legal norm of another legal order fits in the existing body of law in a legal order and is justified in light of a coherent justification. Take, for example, a judge in a domestic legal order who is requested to apply a norm of international law. The judge will consider whether the norm of international law is consistent with legal norms in the domestic legal order and whether this norm can be justified in light of his conception of the values of political morality. A decision on a legal claim that is based on domestic and international legal norms can be reached by exploring which decision best fits the existing body of law in the domestic and international legal orders, and is justified in light of a coherent justification of both sets of human rights norms.

An illustrative example of how integrity can be easily reached, can be found in Jeremy Waldron's account of modern forms of *ius gentium*. Waldron defines *ius gentium* as: 'a body of world law that helps particular legal systems dispose of certain difficult problems within their own jurisdiction or problems that, though internal, require some dimension of harmonization with other jurisdictions.'⁷⁸ He explains that *ius gentium* finds its origin in Roman legal scholarship and is generally understood as a set of principles shared among legal orders. The existence of these legal norms also signals a normative consensus on particular issues of political

⁷⁸ Waldron 2012, 32.

morality.⁷⁹ Waldron maintains that human rights are a contemporary example of *ius gentium*. Human rights can be found in domestic and international legal orders and these legal norms signal a normative consensus that extends across different legal orders.⁸⁰ Although Waldron's account of *ius gentium* principles is informed by the claim that judges should refer to decisions of courts of other legal orders, a more general point can be made in relation to the notion of integrity.⁸¹ Integrity can easily be attained when *ius gentium* principles are applied. These legal norms exist across legal orders and thus fit in the existing body of law of a legal order. Moreover, the justification of *ius gentium* follows from a normative consensus across domestic and international legal orders.

Waldron's account of *ius gentium* principles illustrates that integrity can easily be attained when legal norms are consistent across different legal orders and are informed by normative consensus. However, in most cases where rules and principles of different legal orders are applied the question can arise whether integrity can be attained in terms of fit and justification. The dimension of fit requires legal norms of different legal orders to be consistent with each other. This may not always be the case. Norms of different legal orders may be inconsistent. The dimension of justification entails that legal norms of different legal orders are applied in light of a coherent justification. Legal norms may reflect different values. For example, Letsas' interpretive account of the European Convention of Human Rights illustrates that Convention rights entail autonomous concepts that may differ from how officials in the legal orders of the member states interpret human rights.⁸² Therefore, Waldron's account of contemporary *ius gentium* principles must presuppose a very abstract normative consensus across different legal orders. Even if this normative consensus would exist, it is implausible that this justification could actually inform us how to apply human rights provisions. This raises the question

⁷⁹ Waldron 2012, 33-35.

⁸⁰ Waldron 2012, 32-33.

⁸¹ Waldron 2012, 109-141.

⁸² Letsas 2007, 40. However, it should be stressed that Convention rights cannot encompass fully autonomous concepts if courts in domestic legal orders also apply these rights. If Convention rights entail fully autonomous concepts only the Strasbourg Court would apply them.

how integrity can be attained when norms of different legal orders are not *prima facie* consistent, or informed by different underlying values.

Building on Dworkin's interpretive legal theory, I maintain that integrity can best be seen as a constructive filter through which we assess which norms of other legal orders should be applied. Integrity compels a citizen or official to consider which rules and principles can be made consistent in an existing body of law of a particular legal order and coherent in light of a conception of the values of political morality.⁸³ Inconsistency between legal norms of different legal orders may be accommodated by assigning relative weight to these norms in light of a more abstract justification. For example, a judge may argue that norms of international law should trump domestic law because these international norms should be given relative weight in light of the justification of these different norms. Incoherence between the justification of norms of different legal orders may be also be accommodated in a more abstract justification. For example, the justification of norms of international law may be made coherent with the judge's conception of the values of political morality. However, in some cases, inconsistencies between norms of different legal orders cannot be given relative weight in a more abstract justification or these norms can only be understood in light of radically opposing justifications. In these cases, integrity is reached by disregarding norms that cannot be made consistent in light of a coherent justification. Take, for example, a judge in a domestic legal order who needs to determine whether to apply a norm of international law that is inconsistent with the body of law in his own legal order and incoherent with his conception of the values of political morality. Assuming that domestic legal rules and principles fit the existing body of law and provide the most coherent justification of the values of political morality, the judge will construct integrity in such a way that he will disregard these norms of international law. Thus, integrity functions as a constructive filter because legal norms of other legal orders

⁸³ See also Eleftheriadis 2010. However, Eleftheriadis views integrity as a system-like quality of legal orders: '[i]ntegrity is achieved because the international law respects in principle the claims of the constitutional order and vice versa. It is achieved through mutual deference.' Eleftheriadis 2010, 384.

are only applied if they can be made consistent in a body of existing law and against the background of one's conception of the values of political morality.

The notion of integrity may also be used to develop an interpretive account of the relations between officials of different legal orders. This requires a more actor-driven account of integrity. Kyritsis' interpretive account of the relations between legislatures and courts illustrates how such an actor-driven account of integrity may be developed. Kyritsis maintains that the relations between legislatures and courts should be considered part of a joint project. He argues that courts and legislatures: 'participate in a joint institutional project aimed at governing. They *share* the authority to govern. But their relationship is truly one of *shared authority* only to the extent that it is structured in a way that serves the point of the joint project; for this to be the case, it is necessary – though not sufficient – that the project accord with principles of political morality regarding the proper allocation of government power.'⁸⁴ Kyritsis views the dimensions of fit and justification in terms of content and institutional design.⁸⁵ For example, when judges interpret a statute they take into account the rights and obligations that should follow from a statute and their institutional role vis-à-vis other officials in the legal order.⁸⁶ Thus, in an actor-driven account of integrity officials share their authority because they take into consideration their institutional role.

Kyritsis's interpretive account of the relations between courts and legislatures can be extended to the relations between officials of different legal orders.⁸⁷ When officials of different legal orders are committed to a joint project, their exercise of power involves relations of shared authority. On this view, each official aims to contribute to a central point, and shares its authority in light of the moral aims of this joint project. Letsas' interpretive account of EU law may be used as an illustration of how officials of different legal orders are part of a joint project in which

⁸⁴ Kyrtisis 2015, 12.

⁸⁵ Kyrtisis 2015, 70.

⁸⁶ Kyrtisis 2015, 70-71. Kyritsis explains this point in terms of the dimensions of content and institutional design.

⁸⁷ It should be noted that Kyritsis downplays the role of integrity and thus would probably object to my focus on integrity. See Kyrtisis 2015, 101-104.

they aim to give effect to EU law.⁸⁸ He suggests that we should understand EU law as a joint project in which officials of the EU and the member states are committed to shared goals, such as, for example an internal market: '[m]ost EU measures seek to advance goals (such as a common market) that work to the mutual advantage of Member States and their citizens. EU and national institutions have to coordinate in the choice of means (such as free movement of goods, or common currency) for pursuing those goals, otherwise the joint venture will fail.'⁸⁹ On this view, domestic and EU officials are part of a joint project in which the exercise of authority is informed by the moral aims of shared goals, such as an internal market.⁹⁰ No official has the ultimate authority to determine what rights and obligations follow from EU law because these officials are part of a joint project.⁹¹ Officials of different legal orders are part of a dialectical interplay in which they aim to support a shared goal.

Although EU law provides a good illustration of how relations between officials of different legal orders can be understood in an interpretive account of the intertwinement of legal orders, it should be highlighted that there is no external point of view from which considerations of institutional design or cooperation can be assessed. In my view, Letsas fails to take into account that integrity cannot be constructed from an external point of view.⁹² The notion of constructive integrity highlights that considerations of institutional design or cooperation are always assessed in light of one's own conception of integrity. Integrity is thus inherently perspectival. Integrity compels officials to decide from their own point of view

⁸⁸ Letsas 2012.

⁸⁹ Letsas 2012, 101.

⁹⁰ Letsas argues that this does not hold for human rights. Given their fundamental nature, human rights are not a matter of coordination between officials. See Letsas 2012, 101.

⁹¹ 'if the relevance and normative weight of EU norms is partly premised on the moral significance of there being an ongoing scheme of cooperation between Member States, then *nobody* is to decide what falls within the competence of the EU because this question is objectively determined by moral facts to do with principles of social cooperation.' Letsas 2012, 100.

⁹² 'Human rights are not criterial concepts whose meaning is exhausted by their common usage across Contracting States. They are meant to express a moral commitment to objective principles of liberal democracy.' Letsas 2007, 11. He makes a similar claim in his interpretive account of EU law. See Letsas 2012, 100-102.

whether they should take part in institutional cooperation. This means that a court or legislature will determine what kind of institutional cooperation between officials of different legal orders should be maintained from the point of view of their own conception of integrity. The perspectival nature of integrity can be illustrated with the *Solange*, *Maastricht* and *Lisbon* decisions of the German Federal Constitutional Court.⁹³ In a series of decisions, the Federal Constitutional Court considered that EU law should be applied in the German legal order when EU law respects conditions as set out in the German constitution. On this view, EU law and its institutions should respect fundamental rights, the competences that have been conferred to EU institutions by virtue of the German constitution and the constitutional identity of the German state. From the perspective of the Federal Constitutional Court, EU law could not be made consistent in light of their conception of the values of political morality. In these decisions, the Federal Constitutional Court was able to make explicit how it constructs integrity from the point of view of the German legal order.

The perspectival nature of integrity can also be illustrated with the relationship between the European Court of Justice and the European Court of Human Rights. In the *Bosphorus* and *Avotiņš* decisions, the European Court of Human Rights argued that it will not review whether states have violated the Convention when giving effect to EU law, as long as the EU provides an equal level of human rights protection.⁹⁴ Thus, from the perspective of the European Court of Human Rights, a dialectical interplay may exist between the Strasbourg and Luxembourg Courts. However, from the perspective of the European Court of Justice such a dialectical interplay can only exist if the supremacy of EU law is respected.⁹⁵ This illustrates that the European Court of Justice and the European Court of Human Rights construct integrity differently. Although institutional cooperation between officials of different legal orders may be justified, there is no

⁹³ BVerfGE 37, 271 (1974) (*Solange I*); 73, 339 (1986) (*Solange II*); 102, 147 (2000) (*Bananas*); 89, 155 (1993) (*Maastricht*); 123, 267 (2009) (*Lisbon*).

⁹⁴ *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005); *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016).

⁹⁵ Opinion 2/13 EU EU:C:2014:2454. *Melloni* suggests a similar view on the relations between national courts and the Luxembourg Court. See Case C-399/11 *Melloni* ECLI:EU:C:2013:107.

external point of view from which relations between officials may be understood. Thus, an official is informed by his own conception of integrity when he assesses whether and how he should take part in institutional cooperation.

5.2 The strengths and weaknesses of an interpretive account of the intertwinement of legal orders

In light of our conception of integrity we incorporate rules and principles of other legal orders. On this view, officials incorporate legal norms of other legal orders if they can be made consistent with the norms in their legal order and coherent in light of their conception of the values of political morality. Inconsistency between norms or incoherence in their justification may be resolved by giving relative weight to these norms and their underlying justification in light of a more abstract justification. However, in some cases inconsistency between norms of different legal orders or incoherence in their justification cannot be given relative weight in a more abstract justification. For example, a judge in a domestic legal order will not give effect to a norm of another legal order if this norm cannot be made consistent with domestic law and coherent in his conception of the values of political morality. However, a norm of another legal order will be incorporated if this norm can be made consistent with existing law and made coherent in light of justification of the values of justice and fairness. On this view, integrity should be seen as a constructive filter, sifting out legal norms that cannot be made consistent and coherent.

Although the incorporation of legal norms and the possibility of norm conflicts can be articulated in an interpretive account of the intertwinement of legal orders, persistent conflicts between norms cannot be conceptualized. A conflict between norms of different legal orders challenges the interpretive understanding of a citizen or judge of the relevant legal rules and principles. In order to solve such a conflict, one needs to take into account the dimensions of fit and justification. A conflict between norms of different legal orders can be resolved by giving relative weight to these norms and their underlying justification in light of a more abstract justification. However, persistent conflicts between norms of different legal orders

do not exist in an interpretive account of the relations between legal orders. Legal norms that conflict with one's own conception of integrity are disregarded. Here Letsas' claim that '[l]aw, on the non-positivist account, will turn out to be essentially *harmonic*' is correct in the sense that persistent conflicts between norms of different legal orders cannot be articulated.⁹⁶ Thus, norm conflicts are resolved or disregarded in light of one's conception of integrity.

The intertwinement of legal orders also concerns the exercise of authority by officials. In Dworkin's legal theory, the authority of an official is dependent on the question whether its exercise of power is consistent with its previous decisions and justified in light of the values of political morality. Kyritsis captures this point well in relation to the authority of adjudicative officials: '[i]n order to perform his role adequately, the judge must always look over his shoulder to see whether the legislature has decided something that is relevant to the case before him. If he finds in the legislative record a pertinent decision, he must further ascertain whether he has a special kind of moral reason to give it effect.'⁹⁷ In some cases, officials of different legal orders are part of a joint project in which they exercise authority in relation to each other. For example, EU law can be understood in terms of a joint project in which national courts and the Court of Justice of the European Union share their authority.⁹⁸

Although officials of different legal orders may be considered part of a joint project, they understand authority claims from their point of view. This entails that officials consider how authority is best exercised in light of their own conception of integrity. This point can be illustrated with the decisions of the German Federal Constitutional Court that challenge the supremacy of EU law. Assuming that EU law entails a joint project in which EU member state officials share authority with the Court of Justice of the European Union, how these officials understand relations across legal orders depends on their conception of integrity. From the perspective of the Court of Justice of the European Union, EU law should trump domestic law,

⁹⁶ Letsas 2012, 99.

⁹⁷ Kyritsis 2015, 91.

⁹⁸ Letsas 2012.

such as, for example, the German constitution. However, from a German perspective, EU law should only be applied in the German legal order insofar as these norms can be made consistent and coherent in the German conception of integrity. Thus, an interpretive account of the relations between legal orders brings to light how officials accept or contest the authority of other officials in light of their own conception of integrity.

And although an interpretive account of the intertwinement of legal orders can explain why officials accept or contest the authority of other officials in light of their conception of integrity, no argument can be given why officials persistently construct integrity differently. From the perspective of Dworkin's interpretive legal theory, disagreement may exist on how officials exercise their authority. One could argue that the *Solange* decisions of the German Federal Constitutional Court illustrate that this kind of disagreement is often resolved in practice over time.⁹⁹ However, in some cases persistent contestation is not resolved. Even when officials of different legal orders are part of a joint project, officials may differ in how they exercise their authority in a legal order. Cases such as *Bentham*, *Kleyn* and *Salah Sheekh* illustrate that officials of different legal orders may disagree on how authority should be exercised even though it seems that they are committed to a joint project.¹⁰⁰ In these cases, the Dutch Council of State and the European Court of Human Rights are both committed to the protection of fundamental rights, but disagree on how these rights should be applied. Cases such as *Bentham*, *Kleyn* and *Salah Sheekh* pose a challenge to an interpretive account of the intertwinement of legal orders because officials do not always construct integrity in the same way over time even though they seem committed to a joint project. Thus, an interpretive account of the intertwinement of legal orders is unable to explain why persistent contestation between officials of different legal orders exist.

⁹⁹ BVerfGE 37, 271 (1974) (*Solange I*); 73, 339 (1986) (*Solange II*); 102, 147 (2000) (*Bananas*).

¹⁰⁰ *Bentham v The Netherlands* App no 8848/80 (ECtHR, 23 October 1985); *Kleyn and others v The Netherlands* App no 39343/98; 39651/98; 43147/98; 46664/99 (ECtHR, 6 May 2003); *Salah Sheekh v The Netherlands* App no 1948/04 (ECtHR, 11 January 2007).

The main strength of an interpretive account of the intertwinement of legal orders is its ability to explain these complex relations even though conflict and contestation may exist. Norms of other legal orders may be incorporated or given effect when they fit with the existing body of law and are coherent in light of a conception of the values of political morality. Norms of different legal orders may be inconsistent or represent different values. For example, a judge may be confronted with norms that in some respects conflict with the existing body of law in his legal order or may conflict with his conception of the values of political morality. Norm conflicts are resolved by considering how norms and their underlying justification should be given relative weight in light of a more abstract justification. Relations between officials of different legal orders may develop when these officials are part of a joint project. On this view, the exercise of authority by other officials is accepted in light of one's own conception of integrity. The central weaknesses of an interpretive account of the intertwinement of legal orders is its inability to make sense of persistent conflict and contestation. If norm conflicts cannot be resolved the conflicting rules and principles will be disregarded because they cannot be made part of a consistent and coherent conception of integrity. This also holds for the authority of officials. Persistent contestation of the authority of officials cannot be articulated. Persistent conflicts and contestation undermine the central idea of Dworkin's interpretive legal theory that integrity functions as a constructive filter through which we may remedy conflict and contestation between legal orders.

6 Conclusions

In this chapter, I have explored Dworkin's interpretive legal theory with a particular focus on the notion of integrity. Dworkin maintains that law should be conceptualized as an interpretive concept because we may fundamentally disagree on how law should be understood. When we apply a rule or principle, we rely on a justification of the underlying values of these legal norms. The Protestant interpretive attitude entails that citizens and officials may determine what rights and

obligations follow from their conception of integrity. I have illustrated the value of integrity with Dworkin's account of adjudication. On Dworkin's view, judges aim to reach a decision that fits in the existing body of case law and asserts the most coherent account of the values of political morality. Surprisingly, Dworkin fails to connect his interpretive account of international law with his interpretive legal theory. I have argued that a more convincing interpretive account on international law centers on the notion of integrity. The value of integrity compels us to consistently apply norms of international law in light of a justification that is distinct from domestic law.

In my interpretive account of the intertwinement of legal orders I have argued that integrity can best be seen as a constructive filter. On this view, we sift out rules and principles of other legal orders that cannot be made consistent in an existing body of law and made coherent in light of one's conception of the values of political morality. Possible norm conflicts are resolved in light of a more abstract justification of these legal norms. Relations of officials of different legal orders exist when officials are committed to a joint project. Nonetheless, relations between officials will always be considered in light of their own conception of integrity. The main strength of an interpretive account of the relations between legal orders is its ability to make sense of both the interconnections and frictions between legal orders. However, persistent norm conflicts and contestation between officials cannot be explained in an interpretive account of the intertwinement of legal orders.

Chapter 4

Karl Llewellyn and Philip Selznick's pragmatist legal theories: intersecting sub-practices

1 Introduction

Karl Llewellyn and Philip Selznick's pragmatist legal theories incorporate insights from the social sciences to construct a sociologically informed account of law. Legal pragmatists like Llewellyn and Selznick often make a distinction between law's functional and ideal dimension. On this view, law contributes to social ordering, but is also oriented towards values and ideals. In this chapter, I explore Llewellyn and Selznick's legal theories to critically reconstruct a pragmatist account of the intertwinement of legal orders. I will argue that the intertwinement of legal orders should be understood in terms of intersecting legal sub-practices. A multitude of norms and officials are perceived authoritative when different legal sub-practices intersect.

In this chapter, I will first argue that Llewellyn and Selznick are committed to socio-legal jurisprudence because their theories incorporate insights from the social sciences (section 2). Their legal theories should also be understood against the background of American pragmatist philosophy, and in particular the claim that facts and values are entangled. Legal pragmatists like Llewellyn and Selznick conceptualize law as a social practice in which a functional and ideal dimension can be identified (section 3). Law's functional dimension makes clear how law contributes to social ordering, while its ideal dimension highlights the values and ideals that are embedded in its practice. Llewellyn and Selznick's legal theories lack a solid account of legal norms. Therefore, I will build on Fuller's typology of enacted and interactional law to argue that legal norms emerge from interactional expectations between citizens and officials. In the following section, I will develop a

pragmatist account of international law (section 4). Lastly, I will critically reconstruct a pragmatist account of the intertwinement of legal orders and introduce the notion of intersecting legal sub-practices (section 5).

2 The socio-legal tradition: Llewellyn and Selznick's pragmatist legal theories

Karl Llewellyn and Philip Selznick's legal theories should be situated in the socio-legal tradition of jurisprudence because their theories incorporate anthropological and sociological insights. Moreover, Llewellyn and Selznick's legal theories should be understood against the background of American pragmatist philosophy.

In this section, I will argue that legal philosophers committed to socio-legal jurisprudence are naturalists in a methodological sense. On this view, legal theories cannot be based solely on *a priori* claims, but should also build on *a posteriori* claims about law. Llewellyn and Selznick's legal theories build on *a posteriori* claims about law. I will also argue that Llewellyn and Selznick's contextual and value-laden account of law is informed by the pragmatist idea that fact and values are entangled.

2.1 Methodological naturalism

Legal theories in the socio-legal tradition are informed by the naturalist idea that philosophical reasoning cannot be based solely on *a priori* claims. An *a priori* claim is justified in light of a concept itself. *A posteriori* claims are based on experience. For example, 'all bachelors are unmarried' is an *a priori* claim because no *a posteriori* knowledge of bachelors is needed to justify this claim.¹ Naturalists deny that we can do philosophy solely based on *a priori* claims because philosophers inevitably rely on claims that follow from experience. Or as Leiter explains this point: '[t]he naturalist, following Quine, rejects the idea that there could be a "first philosophy",

¹ Baehr 2016, cited in Tamanaha 2017.

a philosophical solution to problems that proceeds *a priori*, that is, prior to any experience.² This means that legal theories cannot rely solely on *a priori* claims. A legal theory should incorporate an economic, sociological or anthropological perspective to incorporate *a posteriori* claims about law. Legal theories in the socio-legal tradition may also be rooted in the practical experience of lawyers.³ Two types of methodological naturalism can be distinguished.⁴ Firstly, methodological naturalists may argue that philosophical insights should be coherent with *a posteriori* claims. This entails that legal theories should not contradict with *a posteriori* claims about law. Secondly, methodological naturalists may argue that philosophers should only use methods that contribute to *a posteriori* knowledge. For example, empirical methods may be used to construct a legal theory.

Llewellyn and Selznick's legal theories are informed by the first type of methodological naturalism. They rely on *a posteriori* claims from the social sciences to arrive at a sociologically informed legal theory. Llewellyn's legal theory takes inspiration from an anthropological study on the Cheyenne native Americans, which Llewellyn conducted with Edward Hoebel.⁵ Based on Hoebel's anthropological work, Llewellyn presents a more general legal theory.⁶ Selznick also relies on social scientific insights in his legal theory. For example, his developmental model of law and his study on the emergence of public law values in the relations between employers and employees of American industry are informed by sociological studies and theories.⁷ These insights are central to Selznick's argument that law should be understood as a social practice governed by the master ideal of legality.

² Leiter 2007, 34. [footnote omitted]

³ Tamanaha 2017; Cotterrell 2018.

⁴ See Leiter 2007, 34.

⁵ Llewellyn and Hoebel 1941.

⁶ Llewellyn 1940.

⁷ Selznick 1969; Nonet and Selznick 2001.

2.2 Value-ladenness and contextualism

In order to understand fully Llewellyn and Selznick's legal theories it is important to highlight the influence of American pragmatist philosophy in their work.⁸ American pragmatist philosophy is a school of philosophical ideas founded by Charles Peirce, William James and John Dewey, and further developed by thinkers, such as, for example, Richard Rorty and Hilary Putnam.⁹ A pragmatist idea that informs Llewellyn and Selznick's legal theories in particular is the view that facts and values are necessarily entangled.¹⁰ Pragmatist philosophers maintain that we cannot understand social phenomena from a purely descriptive point of view because humans necessarily ascribe value to the world. Evaluation is embedded in how we understand and perceive social phenomena because there is no non-evaluative point of view from which we understand our world. This may be illustrated with Richard Rorty's critique of the metaphor of the mind as a mirror. Rorty maintains that it is common to see philosophy as an attempt to grasp the world from an objective and non-normative point of view.¹¹ He argues that the metaphor of the mind as a mirror is misleading: '[t]he picture which holds traditional philosophy captive is that of the mind as a great mirror, containing various representations – some accurate, some not – and capable of being studied by pure, nonempirical methods.' On Rorty's view, we cannot study the world from an objective and non-normative point of view because we as individuals necessarily perceive our world from a value-laden perspective. This means that we do not have access to a 'value-free vocabulary' to understand and conceptualize our world.¹²

⁸ Some legal pragmatists maintain that pragmatist philosophy can be of no relevance to a legal theory. See, for example, Grey 1998; Posner 2003. In this section, I show how pragmatist philosophy has successfully been incorporated in Llewellyn and Selznick's legal theories. See also the extensive study in De Been 2008 on the influence of pragmatist philosophy in the American Legal Realist movement.

⁹ Bernstein 2010.

¹⁰ Putnam 2002.

¹¹ Rorty 2009, 12.

¹² Rorty 2009, 364.

Pragmatists maintain that human inquiry is value-laden because our aim to understand our world is fueled by the human need to solve practical problems. From a pragmatist perspective human action drives human inquiry. This point may be illustrated with John Dewey's critique of spectator theories of knowledge. Dewey maintains that spectator theories of knowledge are incorrect because they falsely assume that philosophy is a matter of perceiving objective truth. Instead, human inquiry entails an active engagement with real felt problems. Or as he explains: '[i]f we see that knowing is not the act of an outside spectator but of a participator inside the natural and social scene, then the true object of knowledge resides in the consequences of direct action.'¹³ This means that human inquiry is inherently contextual because it is driven by our aim to grasp our practical needs and direct human action. Thus, from a pragmatist perspective human inquiry is contextual in nature.

Llewellyn and Selznick's contextual and value-laden account of law is informed by the pragmatist idea that facts and values are entangled. Llewellyn considers law primarily as a social practice that contributes to social ordering. Adjudicating disputes, managing expectations, attributing authority, establishing common goals and institutionalizing these activities contribute to maintaining social relations. Llewellyn argues that these law-jobs contribute to the survival and flourishing of society.¹⁴ This means that these law-jobs should be seen as purposive activities that contribute to the wellbeing of society. Nevertheless, Llewellyn's primary focus is on how the law-jobs contribute to the survival of society.¹⁵ However, in Selznick's legal theory, values play a more prominent role. Selznick conceptualizes social practices, such as, for example, law, in light of their master ideals and often reflects on whether these master ideals themselves should be considered justifiable. He maintains that law should be understood in light of the master ideal of legality.¹⁶ Krygier distinguishes between four stages of value-

¹³ Dewey 2008, 157.

¹⁴ Llewellyn 1940.

¹⁵ See also Twining 2009, 107.

¹⁶ Selznick 1969.

ladenness to clarify the growing importance of values in Selznick's work.¹⁷ In the first stage, values are considered important to how individuals view themselves and their behavior. In the second stage, values are considered important to the researcher's understanding of social practices. In the third stage, social practices, such as, for example, law, are evaluated in light of their inherent values. In the fourth and last stage, social practices are evaluated in light of one's own personal values. In each successive stage, values play a more prominent role in the way law is understood. Krygier explains that Selznick's ideas have developed into the fourth stage of personal evaluative assessment over time. At times it is difficult to distinguish between the different stages in his later work.¹⁸

Some critics have argued that pragmatist legal theories are devoid of substantive insights. On this view, pragmatist legal theories are methodological in nature, only emphasizing the importance of scientific methods and insights.¹⁹ However, this critique should be considered unpersuasive for two reasons. Firstly, this critique mischaracterizes the role of *a posteriori* claims in pragmatist legal theories. *A posteriori* claims about law are an integral part of legal theories in the socio-legal tradition. Disregarding the important role of social science insights in Llewellyn and Selznick's legal theories would lead to an impoverished view of these theories. Secondly, pragmatist legal theories offer substantive insights in that they conceptualize law as a purposive practice. Here it is helpful to distinguish between purposiveness in a thin and thick sense. Llewellyn is committed to a purposive account of law in a thin sense because he does not assign law a central value. However, this does not mean that law does not have any normative point. The performance of the law-jobs contributes to the survival and flourishing of society. Selznick, on the other hand, conceptualizes law as a purposive practice in a thick sense. He assigns values to social practices, such as law. In his work, Selznick went

¹⁷ Krygier 2012 204-205.

¹⁸ Krygier 2012, 205-206.

¹⁹ Tamanaha 1999, 34-35.

beyond a 'clinical assessment' of the values central to the social practices and often considered whether the values themselves are justifiable.²⁰

3 Llewellyn and Selznick on law as a social practice

Both Llewellyn and Selznick consider law to be a social practice in which a functional and ideal dimension can be distinguished. Llewellyn's legal theory primarily addresses the functional dimension of law by explaining how adjudicating disputes, managing expectations, attributing authority, establishing common goals and the institutionalization of these activities contributes to social ordering. Selznick's legal theory pays more attention to the ideal dimension by highlighting the values embedded in the social practice of law.

In this section, I will explore Llewellyn and Selznick's legal theories in light of law's functional and ideal dimension. Implicit in Llewellyn and Selznick's account of law is the view that legal norms emerge in light of social interactions. Building on the work of Lon Fuller, I will construct an account of legal norms from a legal pragmatist perspective and argue that legal norms are rooted in interactional expectations.

3.1 Law's functional and ideal dimensions

Pragmatist legal theories conceptualize law in terms of a social practice. A social practice may be defined as 'any coherent and complex form of socially established co-operative human activity.'²¹ Social practices are interactional in nature because they arise out of social relations between individuals. For example, Llewellyn's law-jobs theory illustrates how the adjudication of disputes is crucial for the maintenance

²⁰ Krygier 2012, 206.

²¹ Van der Burg 2014, 25. Van der Burg partly relies on MacIntyre's notion of a practice. See also Tamanaha 1999, 167-172 on the notion of a practice.

of social relations.²² In Selznick's legal theory, law is also conceptualized as a social practice that sustains social relations: '[p]ositive law is the product of legal problem solving. The legal order has the job of producing positive law as society's best effort to regulate conduct and settle disputes.'²³ Law can be distinguished from other social practices because each social practice is oriented towards a central point.²⁴ In Llewellyn's law-jobs theory, the central point of law entails the performance of five law-jobs. In Selznick's legal theory, the central point of law is understood in light of the master ideal of legality; the progressive reduction of arbitrary power through positive law.

In a social practice, different sub-practices may be identified. Legal sub-practices may be identified by highlighting the types of social relations that law regulates. For example, public and private law can be understood as legal sub-practices. In public law, social interactions primarily concern vertical relations between officials and citizens, while in private law social interactions concern horizontal relations between citizens. Moreover, law's relative autonomy as a social practice should also be taken into account when distinguishing between legal sub-practices. The variance in significance of law's central point brings to light different legal sub-practices. Consider, for example, the difference between legislation and adjudication in terms of values.²⁵ Legislation is a sub-practice of law aimed at adopting legal rules. In this sub-practice, legal values play a more indirect role because legislation requires a balance between legal values and values of other social practices. For example, legislation may incorporate political values, such as, economic growth or a clean environment. In the sub-practice of adjudication legal values play a more direct role because dispute resolution in concrete cases should generally exclude political considerations. This does not entail that political values do not play a role in adjudication. The judge may take into account the political values that have informed legislation when he applies legal rules in a concrete case.

²² Llewellyn 1940, 1375-1376.

²³ Selznick 1961, 99.

²⁴ Twining 2009, 110-111.

²⁵ Taekema 2003, 190-191.

However, these political values play a more indirect role in adjudication when compared to the sub-practice of legislation.²⁶

In conceptualizing law as a social practice, legal pragmatists often distinguish between its functional and ideal dimension. The functional dimension of law explains how law contributes to social ordering. On this view, law does not necessarily lead to social order. Instead, law's functional dimension brings to light how the social practice of law helps to maintain social relations.²⁷ Law's ideal dimension pertains to the values and ideals that are embedded in social practices. Values capture the central aims pursued by individuals in a practice. Ideals address the unrealized aspects of these values.²⁸ Llewellyn relies on the distinction between law's functional and ideal dimension when distinguishing between the 'bare-bones' and 'questing' aspects of five law-jobs.²⁹ Similarly, Selznick separates the 'baseline' from the 'flourishing' of social practices.³⁰ Although Llewellyn and Selznick distinguish between law's functional and ideal dimension, they each focus on a particular dimension in their legal theories. Llewellyn's legal theory pays more attention to the functional dimension, while Selznick's work highlights law's ideal dimension.

Llewellyn's law-jobs theory identifies five different law-jobs.³¹ These law-jobs are seen as activities that are carried out by individuals in a community. Llewellyn's theory is informed by an anthropological study he conducted with Edward Hoebel. This anthropological study shows, for example, that in native American societies community leaders carry out these tasks. Llewellyn maintains that these law-jobs are to be found in any well-functioning society. These law-jobs can be identified for a society as a whole, but also for any distinct part.³² The first

²⁶ Taekema 2003, 190-191; Van der Burg 2014, 157-158.

²⁷ On the difference between social order and social ordering, see Twining 2009, 97-99.

²⁸ I adopt Taekema's terminology on values and ideals. See Taekema 2003.

²⁹ Llewellyn 1940, 1375.

³⁰ Selznick 1992, 34.

³¹ Llewellyn and Hoebel 1941, and presented concisely in Llewellyn 1940.

³² Llewellyn 1940, 1374.

law-job concerns the adjudication of disputes between individuals.³³ The second law-job is aimed towards preventing such disputes by regulating expectations. For example, managing the expectations between individuals through legal norms will contribute to this goal.³⁴ The third law-job concerns the attribution of authority to officials. This law-job ensures that it is clear who may assign authority to officials.³⁵ The fourth law-job concerns what Llewellyn calls net drive. This law-job entails that in a given practice the three other law-jobs are done in light of a common goal. Therefore, the fourth law-job ensures that a society is given direction by establishing common goals and carrying out the law-jobs in light of these goals.³⁶ Llewellyn also identifies a fifth law-job, called juristic method. The law-job of juristic method entails the institutionalization of these law-jobs through organizations. For example, courts resolve dispute on the basis of procedures through which parties can present their legal claims.³⁷

In his legal theory, Llewellyn pays particular attention to how these five law-jobs contribute to social ordering. Llewellyn distinguishes between the ‘bare-bones’ and ‘questing’ aspects of adjudicating of disputes, managing expectations, attributing authority, establishing common goals and the institutionalization of these activities.³⁸ The ‘bare-bones’ aspect of the law-jobs clarifies how these activities contribute to social ordering. On this view, the performance of these law-jobs is necessary for the survival of society: ‘Each alone, and all together, present first of all a basic aspect, one of pure survival, a bare-bones. The job must get done *enough* to keep the group going.’³⁹ Llewellyn makes a distinction between two elements of the ‘questing’ aspect of these law-jobs.⁴⁰ Firstly, the performance of these law-jobs may be improved in terms of efficacy. For example, disputes can be resolved more

³³ Llewellyn 1940, 1375-1376.

³⁴ Llewellyn 1940, 1376-1383.

³⁵ Llewellyn 1940, 1383-1387.

³⁶ Llewellyn 1940, 1387-1391.

³⁷ Llewellyn 1940, 1392-1395.

³⁸ Llewellyn 1940, 1375.

³⁹ Llewellyn 1940, 1375.

⁴⁰ Llewellyn 1940, 1375.

quickly. Secondly, the performance of these law-jobs may be improved in light of more general societal values. Llewellyn highlights the connection between the law-job of establishing common goals and the more general value of justice: 'it is under this Net Drive focus that one can most readily pick out that phase of the Justice ideal which looks to long-range welfare of the Entirety.'⁴¹ However, what the value of justice entails and how this value is related to law remains unclear in Llewellyn's law-jobs theory.

Selznick's legal theory provides a more comprehensive account of law's ideal dimension. He maintains that social practices should be studied in light of their implicit values and ideals: 'It is impossible to understand any of these phenomena without also understanding what ideal states are to be approximated. In addition we must understand what forces are produced within the system, and what pressures exerted on it which inhibit or facilitate fulfilling the ideal.'⁴² The central value of a social practice is called its master ideal. The master ideal of law is legality.⁴³ What the master ideal of legality entails changes over time, given the social context in which law develops. This can be illustrated with Selznick and Nonet's argument that in western liberal democracies law has shifted towards responsive forms.⁴⁴ In many western liberal democracies, law is considered to protect individuals from arbitrary exercise of power through institutionalized procedures and legal rules. Nonet and Selznick call these forms of law autonomous.⁴⁵ Autonomous law has developed out of repressive forms of law. Under repressive law, law is used to further the aims of those in power.⁴⁶ Autonomous law entails a separation between politics and law. In many western liberal democracies law also functions as an instrument to further substantive justice. Nonet and Selznick call these forms of law responsive.⁴⁷ Nonet and Selznick argue that the shift from autonomous law to

⁴¹ Llewellyn 1940, 1391.

⁴² Selznick 1961, 87.

⁴³ Selznick 1961; 1969; Nonet and Selznick 2001.

⁴⁴ Nonet and Selznick 2001.

⁴⁵ Nonet and Selznick 2001, 54.

⁴⁶ Nonet and Selznick 2001, 33.

⁴⁷ Nonet and Selznick 2001, 78.

responsive law entails a shift in conception of the master ideal of legality. In responsive forms of law legality entails a commitment towards substantive justice while under autonomous law the value of legality entails a commitment towards procedural fairness.⁴⁸

Selznick's legal theory provides a more extensive account of law's ideal dimension compared to Llewellyn. Similar to Llewellyn, Selznick distinguishes between the 'baseline' and 'flourishing' of a social practice.⁴⁹ Selznick acknowledges the importance of the functional dimension of social practices. However, his main concern is under which conditions values embedded in a social practice can flourish and how we can contribute to their realization, for example, by institutionalizing values through organizations: '[i]n normative systems, it should be noted, terms like "maintenance" and "survival" are relevant but not adequate. They do not prepare us for observing, when it occurs, the evolutionary development of the system toward increased realization of its implicit ideals.'⁵⁰ For example, in his study on the emergence of public law principles in the relations between employers and employees of American industry, Selznick explores whether principles of the rule of law have become important in contexts that are generally understood to be part of private law.⁵¹ When compared to Llewellyn's law-jobs theory, Nonet and Selznick's developmental model also provides an account of the relation between legal values and justice. Although I agree with Nonet and Selznick that different conceptions of the master ideal of legality have developed in western liberal democracies, the shift towards responsive law points towards the emergence of another central value next to legality. Following Taekema, I maintain that Nonet and Selznick's developmental model illustrates that in responsive forms of law justice has become a central value next to legality.⁵² Legal orders in which autonomous and responsive forms of law can be identified should therefore be understood in light of two values: legality and justice. Legality entails a commitment towards the reduction of arbitrary exercise of

⁴⁸ Nonet and Selznick 2001, 16.

⁴⁹ Selznick 1992, 34.

⁵⁰ Selznick 1961, 91.

⁵¹ Selznick 1969.

⁵² Taekema 2003, 183-184.

power through positive law. Justice demands a commitment to the values of fairness and equality. Fairness entails that individuals have an equal say, while equality requires individuals to treat similar cases alike.⁵³

3.2 The interactional underpinnings of legal norms

A drawback of Llewellyn and Selznick's legal theories is that they do not explain how legal norms emerge from the interactional expectations of law as a social practice. Postema's account of Fuller's typology of enacted law and interactional law provides an insightful account of how legal norms are embedded in the interactional expectations of law as a social practice. Moreover, Fuller's ideas share many affinities with legal pragmatist legal theories.⁵⁴ Therefore, I will construct a legal pragmatist account of legal norms by using Postema's account of Fuller's typology of enacted law and interactional law.⁵⁵ In Fuller's typology, two forms of law are distinguished: enacted and interactional law. Enacted law entails legal norms that have been promulgated by officials. Enacted forms of law imply a vertical relation between an official and the addressee of a legal norm, a citizen or another official. Legal norms laid down in statutes, for example, can be considered enacted law. Interactional law entails legal norms that arise out of sustained social interactions between citizens. Interactional forms of law therefore concern horizontal relations. For example, customary law comes into being based on social interaction instead of formal enactment by officials.

There is an important commonality between enacted and interactional forms of law. Both enacted and interactional law should be embedded in

⁵³ Taekema 2003, 192.

⁵⁴ On the affinities between American pragmatist philosophy and Lon Fuller's ideas see Winston 1988; Rundle 2012, 46-47.

⁵⁵ Postema 1999; Fuller 1981. It should be noted that Postema uses a different terminology. Instead of distinguishing between enacted and interactional law he relies on Fuller's distinction between made and implicit legal rules. See Postema 1999, 256. This latter distinction is confusing because it suggests that implicit legal rules, such as customary law and contracts, are not explicit in nature. This is not the case. I follow Van der Burg 2014, 99 in distinguishing between enacted and interactional forms of law.

interactional expectations. For legal norms to have normative force they must be consistent with the underlying interactional expectations that citizens have with regard to what behavior is prescribed or prohibited.⁵⁶ In the case of interactional law, interactional expectations between individuals have developed into norms, based on which individuals can anticipate each other's behavior. In the case of enacted law, individuals expect officials to enact legal norms that are congruent with the interactional expectations concerning their meaning and scope.⁵⁷ Fuller maintains that this entails a reciprocal relation between official and norm addressee.⁵⁸ Citizens are expected to follow legal norms insofar as they are consistent with general interactional expectations and officials are expected to enact legal norms that are congruent with the interactional expectations of citizens.

Enacted and interactional legal norms help to sustain social interactions in different ways. Interactional law entails legal norms that help to stabilize interactional expectations. For example, customary law encompasses interactional norms that help to stabilize interactional expectations between citizens. Enacted laws, on the other hand, have normative force by virtue of the officials that sustain interactional expectations.⁵⁹ An important aspect of how officials are able to sustain social interactions through legal norms is by coordination. Enacted laws may contribute to the coordination of social interactions between individuals, but also between different officials. Officials may solve coordination problems when there are different possibilities to further social interactions.⁶⁰ Take, for example, statutory traffic laws. Different types of traffic laws may be adopted to protect traffic users. If statutory traffic laws can improve the conditions for all traffic users, officials may decide to regulate traffic in a particular way through legal norms. Coordination by officials may be necessary in cases where this would improve the social interactions

⁵⁶ Postema 1999, 265.

⁵⁷ Postema 1999, 261.

⁵⁸ Postema 1999, 264.

⁵⁹ Postema 1999, 274-275.

⁶⁰ On the coordinative function of law, see Postema 1982, 174. See also Ehrenberg 2016, 182-187.

of all citizens.⁶¹ On this view, officials can be seen as referees.⁶² Their decisions help to further the interactional expectations of the players who are committed to the game. Referees determine which decisions need to be taken in order to sustain and further develop the interactional expectations of the players. Similar to referees, officials should contribute to the interactional expectations by way of coordinating social interactions.

Pragmatists highlight that legal norms are rooted in the problem-solving ability of individuals. Pragmatist philosopher John Dewey argues, for example, that legal norms should be understood as working hypotheses. Legal norms are working hypotheses because they offer workable solutions to problems that have been encountered in the past. This means that the normative force of a legal norm is contextually dependent: 'But if they [legal rules] are conceived as tools to be adapted to the conditions in which they are employed rather than as absolute and intrinsic "principles," attention will go to the facts of social life, and the rule will not be allowed to engross attention and become absolute truths to be maintained intact at all costs.'⁶³ Nonetheless, the contextual nature of the normative force of legal norms should not be overemphasized. Legal pragmatists do not mean to suggest that in following legal norms we always consciously establish whether a norm provides a workable solution to sustain social relations. The normative force of legal norms will often remain implicit because these norms are embedded in interactional expectations. Legal norms are habitually followed because their normative force follows from these expectations. For example, citizens will generally follow contracts, rules of customary law and legislation when these norms are congruent with the underlying interactional expectations concerning their meaning and scope. Only when these underlying interactional expectations are called into question do citizens or officials need to consciously reflect on whether a legal norm provides a workable solution to sustain social relations. Thus, when enacted and interactional

⁶¹ Enacted laws may also serve other functions, such as, for example, expressing generally shared values. On the symbolic function of law see, for example, Zeegers, Witteveen and Van Klink 2005.

⁶² Postema 1999, 275.

⁶³ Dewey 1998. 361.

legal norms are congruent to their underlying interactional expectations they will generally be followed.⁶⁴

The view that legal norms should be understood in terms of working hypotheses entails that they can be considered both a means and an end-in-themselves. Here it is important to highlight the pragmatist idea of means and ends entanglement.⁶⁵ On this view, ends cannot be justified in isolation from their means. For example, whether you want to go to a picnic depends on the means at your disposal to make it an enjoyable picnic. Means also influence the ends individuals wish to pursue. For example, going on a picnic may become an end worth pursuing because you have the means to pursue this end.⁶⁶ Means and ends are also contextually dependent. Going on a picnic may be considered an end in one context, but it may also be considered a means to a particular end in other contexts. Given the interdependence of means and ends, a legal norm can be considered both a means and an end-in itself. Depending upon the context in which a legal norm is understood, it may be pursued in light of the central point of the practice or law, or a legal norm may be followed as a means to other ends. Or as Taekema explains: 'legal rules can be part of a purposive activity, even if such activity is contrary to the purposes for which the rules were adopted. The means created by law can often be put to use in different ways, sometimes turning out to be more flexible than intended.'⁶⁷

It is important to highlight that for legal pragmatists the distinction between legal and non-legal norms is dependent on the context in which a norm is experienced. This may be illustrated with two examples from the field of private law.⁶⁸ In tort law, a party may be held liable based on standards that implicitly refer to social or moral norms, such as, for example, a moral duty of care. Judges rely on the interactional expectations of the parties concerning this standard in order to

⁶⁴ Taekema 2017, 124.

⁶⁵ Selznick 1992, 328.

⁶⁶ Selznick 1992, 328.

⁶⁷ Taekema 2017, 125.

⁶⁸ Taekema 2014, 144-148.

decide whether a legal norm has been violated. A similar example can be given in contract law. When disputes arise between parties, a contract will be interpreted in light of the interactional expectations the parties had in relation to each other when they concluded the agreement. These interactional expectations are not purely legal; they can only be understood when moral and social norms are taken into account. When judges review cases that deal with liability and contract, the norms that are applied can be considered primarily legal. Liability rules provide remedies to compensate for harmful social interactions, such as, for example, negligence. Contracts help to regulate social interactions by further formalizing the expectations of parties through legal norms and by creating a fair balance between the burdens of the parties. Liability rules and contracts should therefore be considered primarily legal in nature. However, liability rules and contracts cannot be understood in isolation from other social practices. Although liability rules and contracts can be considered primarily legal, they also contribute to, for example, economic growth and social customs. Thus, the context in which interactional expectations are understood is of importance to determine whether a norm should be considered primarily legal in nature.

4 International law as a social practice

Llewellyn and Selznick have formulated their legal theories with Native American communities and industrial relations in mind. They did not consider how their legal theories might apply to law beyond a domestic context. In this section, I explore how international law should be understood from the perspective of Llewellyn, Selznick and Fuller's legal theories.

In this section, I explore the functional and ideal dimension of international law. When applied to international law, Llewellyn's law-jobs theory illustrates that adjudicating disputes, managing expectations, attributing authority, establishing common goals and the institutionalization of the law-jobs contribute to social ordering between states and individuals in an international context. Building on

Brunnée and Toope's interactional account of international law, I will claim that the master ideal of international law is legality.

4.1 The functional and ideal dimensions of international law

In its functional dimension, international law contributes to social ordering between states and individuals.⁶⁹ This can be illustrated by applying Llewellyn's law-jobs theory to EU law. The first law-job of Llewellyn's legal theory concerns dispute resolution. The Court of Justice of the European Union resolves disputes concerning the validity and interpretation of EU law.⁷⁰ The second law-job involves preventive channeling. The institutions of the European Union manage expectations by way of issuing decisions, guidelines, norms and best practices. For example, the European Parliament and the Council manage expectations by enacting directives and regulations.⁷¹ The third law-job of Llewellyn's legal theory concerns the attribution of authority. Different EU institutions exist that exercise authority over a particular subject matter. For example, the European Central Bank supervises banks in the member states, while the European Parliament, the Council and the Commission play a role in the legislative process of the European Union.⁷² The fourth law-job concerns the establishment of common aims and purposes. EU law may be understood against the background of, for example, free trade, human rights or the protection of a clean environment.⁷³ The fifth and final law-job of juristic method explains how EU institutions may carry out these tasks. On this view, EU institutions have institutionalized some of the other law-jobs.

The ideal dimension of international law concerns the values and ideals embedded in its practice. The values of international law capture the central aims

⁶⁹ See Twining 2000, 75-82; Twining 2009, 103-107, for an application of Llewellyn's law-jobs theory to international law.

⁷⁰ Arts 263 and 267 TFEU.

⁷¹ Arts 14 and 16 TEU.

⁷² Arts 132 and 294 TFEU.

⁷³ Arts 2 and 3 TEU. See also Weatherill 2016, 393-419.

pursued by states and individuals. The ideals of international law pertain to the unrealized aspects of these values. In Selznick's legal theory, the central value of law is legality.⁷⁴ In my view, the master ideal of legality also captures the central value of international law. Following Selznick's account of this master ideal, legality in international law can be understood as the progressive reduction of arbitrary exercise of power among states and individuals through positive law. The orientation of states and individuals towards legality in international law may be further explained with Brunnée and Toope's interactional account of international law. Brunnée and Toope's account of international law draws extensively on the work of Lon Fuller, which I have used to explore the interactional underpinnings of legal norms. Brunnée and Toope maintain that international law entails a practice of legality in which actors consider norms legally valid in light of their interactional expectations and the value of legality.⁷⁵ International law entails a social practice in which states, international organizations and individuals are committed to norms that are congruent to interactional expectations and conform to the value of legality. Brunnée and Toope define legality in terms of eight criteria.⁷⁶ On this view, norms of international law should comply with these eight criteria of legality.

A downside of Brunnée and Toope's interactional account of international law is that it does not consider enacted law a distinct form of international legal norms. Brunnée and Toope maintain that all legal norms are interactional in nature because these norms exist on the basis of the interactional expectations of actors who follow these norms. Therefore, Brunnée and Toope do not consider enacted law a distinct form of international law: 'it is not enough to cast socially shared understandings in legal form; they cannot simply be 'posited'. Positive law may be an element of interactional law, often even an important element, but it is not necessarily coextensive with it.'⁷⁷ However, this line of reasoning is unconvincing.⁷⁸ International organizations also establish legal norms, in particular in order to

⁷⁴ Selznick 1961; 1969; Nonet and Selznick 2001.

⁷⁵ Brunnée and Toope 2010.

⁷⁶ These eight criteria are derived from Fuller's notion of the internal morality of law. See Fuller 1969.

⁷⁷ Brunnée and Toope 2010, 69.

⁷⁸ See also Van der Burg 2014, 109-110.

coordinate social interactions. Enacted forms of law in international law include decisions issued by courts and legal norms enacted by international organizations, such as, for example, the European Union. International organizations are able to coordinate social relations on the international level by further developing interactional expectations through enacted laws. For example, EU institutions may aim to solve coordination problems in international trade between member states when social interactions can develop in disparate ways. These coordination problems may be resolved by EU institutions by enacting legal norms that improve the conditions for all member states. EU institutions may, for example, improve the conditions for all member states when they gain an advantage in international trade vis-à-vis non-EU members. Therefore, enacted law is best considered a distinct form of international law.

Nevertheless, Brunnée and Toope's interactional account of international law illustrates that international legal norms can be seen as both a means and an end-in-themselves. On their view, the normative force of legal norms cannot be reduced to their compliance with the eight criteria of legality.⁷⁹ International legal norms may be invoked in light of the values embedded in the practice of international law. Or as Brunnée and Toope explain: 'Fidelity is generated, and in our terminology obligation is felt, because adherence to the eight criteria of legality (a 'practice of legality') produces law that is legitimate in the eyes of the persons to whom it is addressed.'⁸⁰ Nevertheless, in many cases legal norms may be followed in light of other values. Take, for example, EU law. Member states may incorporate or give effect to EU law because these legal norms adhere to the criteria of legality. However, member states may also incorporate or give effect to EU law because these legal norms establish a common market. On this view, economic interests contribute to determining whether EU law should be followed. The importance of other, non-legal, values in law may also be illustrated in light of the relative insignificance of

⁷⁹ 'Explaining commitment is not the same as explaining compliance. We argue that commitment does indeed pull towards compliance. However, 'compliance pull' does not predict whether actors will in fact comply, or explain exhaustively why they do or do not comply.' Brunnée and Toope 2010, 92.

⁸⁰ Brunnée and Toope 2010, 27.

the value of justice in international law. Ratner's notion of the thin justice of international law is insightful here. His account of international law illustrates that international legal norms may further political values that are not central to the social practice of international law. Ratner's thin conception of justice refers to a commitment to international peace between states and respect for basic human rights.⁸¹ Based on an extensive study of international law, Ratner argues that many fields of international law fail to comply with even a thin conception of justice.⁸² Justice should therefore not be considered a master ideal of international law. However, legality should be considered the master ideal of international law.

5 A pragmatist account of the intertwinement between legal orders

In this section, I develop a pragmatist account of the intertwinement of legal orders. I will argue that legal orders should be understood as legal sub-practices, and that the intertwinement of legal orders should be seen in terms of intersecting legal sub-practices. On this view, norms and officials may become authoritative when they are congruent to the interactional expectations of citizens and officials in a particular sub-practice. Additionally, I will assess the strengths and weaknesses of my pragmatist account of the intertwinement of legal orders.

5.1 Intersecting sub-practices

At the outset, it is important to highlight that pragmatist legal theories conceptualize law in terms of practices and sub-practices. This raises the question whether a pragmatist account of the intertwinement of legal orders can be formulated. In order to understand how legal orders are understood from the perspective of pragmatist

⁸¹ Ratner 2015, 89-90.

⁸² Ratner 2015, 410-415.

legal theories, a distinction should be made between social practices and their sub-practices. Legal pragmatists maintain that law should be conceptualized as a social practice that is oriented towards a central point. In its functional dimension, law contributes to social ordering. In its ideal dimension, law is oriented towards the value of legality, and in some cases also the value of justice. Legal sub-practices may be identified by highlighting the types of social relations that law regulates. On this view, public and private law can be understood as legal sub-practices. Moreover, the variance in significance of law's central point should also be taken into account. For example, adjudication should be distinguished from legislation because the value of legality plays a more prominent role in judicial decision-making, while the legislative process is more oriented towards political values.⁸³

When seen in this light, legal orders should be seen as sub-practices in the social practice of law. They are centered on particular social relations, informed by implicit interactional expectations, and sustained by citizens and officials. Instead of thinking about law in terms of legal orders, law should be conceptualized in terms of legal sub-practices and their relations to each other. Relations between sub-practices exist when individuals or officials perceive multiple legal norms and officials relevant to their social interactions. For example, within the context of a single legal order the sub-practices of private and public law may be considered of relevance to social interactions from the perspective of a citizen or an official. Relations between legal sub-practices may also encompass different legal orders. For example, legal norms and officials of EU law may be invoked as authoritative in the context of a domestic legal order. This raises the question how legal norms and officials of different legal orders may become important to how individuals view themselves and their behavior.

De Sousa Santos' notion of interlegality may be used as a starting point to illustrate how legal norms and officials of multiple legal sub-practices may be authoritative. Although De Sousa Santos introduces the notion of interlegality in the context of his postmodern legal theory, this notion provides a helpful starting point

⁸³ Taekema 2003, 190-191.

of how a pragmatist account of the intertwinement of legal orders may be further developed. The notion of interlegality entails that individuals consider different legal norms and officials authoritative in their social interactions. Individuals follow and invoke legal norms and officials of a multitude of sub-practices that they consider authoritative. On this view, it is of no real importance to which legal order a norm or official belongs. De Sousa Santos explains interlegality as 'different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life.'⁸⁴ De Sousa Santos' notion of interlegality highlights that legal norms and officials of different legal orders may be considered authoritative in light of the interactional expectations that individuals have. Norms and officials of a multitude of legal orders are followed because they are congruent to the interactional expectations of a citizen or official.⁸⁵

De Sousa Santos' notion of interlegality illustrates how a multitude of legal norms and officials may be considered authoritative in a particular context. Different legal orders may intersect because multiple legal norms and official support social interactions. Or as De Sousa Santos explains: '[o]ur legal life is constituted by an intersection of different legal orders, that is, by *interlegality*.'⁸⁶ A downside of De Sousa Santos' account of interlegality, is that law is reduced solely to a means to further particular ends. Hoekema captures this point well: '[t]he notion of interlegality gets its full vigour only if we firmly commit ourselves to an important change in epistemological outlook. This is the change towards the taking into account of the selective use of legal orders by concrete persons as a resource for the promotion of their interests.'⁸⁷ On this view, individuals invoke a particular norm to pursue their interests or they may turn to an official that will likely support their interests.⁸⁸ However, in a pragmatist account of law, legal norms and officials should

⁸⁴ De Sousa Santos 1995, 473.

⁸⁵ See, for example, on interlegality in terms of customary and state law, Simon Thomas 2017; religious norms and state law, Bano 2012; international human rights and informal norms, McConnachie 2014.

⁸⁶ De Sousa Santos 1995, 473.

⁸⁷ Hoekema 2005, 11. See also Eckert 2014 and Taekema 2018.

⁸⁸ Von Benda-Beckmann 1981; Eckert 2014.

not merely be seen as an instrument. Law is a social practice that also has a distinct point. To clarify this argument, it is helpful to use Cotterrell's distinction between instrumentalist and expressivist socio-legal theories of law.⁸⁹ Instrumentalist socio-legal theories see law's normative force in terms of its instrumental use. Individuals view law as an instrument to further their ends. Norms or officials are seen as a means to further values that are external to law. Expressivist conceptions locate the normative force of law in the values and ideals that are embedded in the practice of law. This means that individuals follow legal norms or appeal to officials in light of legal values and ideals.

Legal pragmatist legal theories take a middle position between instrumentalist and expressivist socio-legal theories.⁹⁰ Law cannot be seen solely as an instrument because instrumental use of law requires individuals to reflect on the values and ideals that are implicit in the practice of law. Take, for example, the enactment of traffic laws by a legislative official. These traffic laws will not be considered authoritative when they impede on the principles of legality such as retroactivity and non-contradiction.⁹¹ Legislation also furthers values that are not central to the social practice of law. Traffic laws may also contribute to a clean environment, for example. Thus, the normative force of law cannot be reduced to values and ideals that are embedded in its practice, nor should it be located solely in values and ideals that are not distinctly legal. However, the normative force of law does not only follow from values that are implicit in law and other social practices. In most cases law is habitually followed. This means that purposive use of law is restricted to cases where a norm or exercise of official authority is considered problematic. In these cases, context is important to evaluate whether a norm of official should be considered authoritative. For example, new traffic laws may conform to the principles of retroactivity and non-contradiction, but fail to stabilize interactional expectations when these norms do not build further on the expectations

⁸⁹ Cotterrell 2018, 206.

⁹⁰ Taekema 2017, 127-128; Cotterrell 2018, 212-214.

⁹¹ On these principles in relation to legality, see Fuller 1969.

of traffic users. Thus, whether law is considered authoritative also depends on a contextual argument that takes into account interactional expectations.

When seen in this light, the intersections of legal sub-practices remain largely implicit. The boundaries between legal sub-practices become visible when conflicts arise between legal norms or the authority of an official is contested.⁹² The *Bentham*, *Kleyn* and *Salah Sheekh* cases may serve as an illustration of the boundaries between the Dutch law and the European Convention on human rights.⁹³ In these cases, the Dutch Council of State and the European Court of Human Rights have different normative views on how the relations between executive, judicial and legislative officials should take shape. In *Bentham* and *Kleyn* the dual function of the Council of State was scrutinized in light of the right to a fair trial. In these decisions, the Strasbourg Court is critical of the Council of State because it fulfills both an advisory role in the Dutch legislative process and an adjudicative role in administrative law cases. In *Salah Sheekh* the Strasbourg Court also scrutinized the Council of State because it did not rely on information other than the executive government, thus failing to fully assess the asylum case at hand. In these decisions, the European Court of Human Rights deems the relation between the Council of State and executive and legislative officials in the Dutch legal order problematic. The Strasbourg Court values a stricter separation between the legislative, executive and adjudicative functions of officials in national legal orders. Thus, the boundaries between the Dutch legal order and the legal order of the Council of Europe became visible because contestation arose.

The *Bentham*, *Kleyn* and *Salah Sheekh* decisions illustrate how interactional expectations play a persistent role in how the normative force of a norm or official is perceived. Norms and officials are considered authoritative when they are congruent with the interactional expectations of individuals in a particular legal sub-practice. Historically, the constitutional role of the Dutch Council of State

⁹² See also Taekema 2018.

⁹³ *Bentham v The Netherlands* App no 8848/80 (ECtHR, 23 October 1985); *Kleyn and others v The Netherlands* App no 39343/98; 39651/98; 43147/98; 46664/99 (ECtHR, 6 May 2003); *Salah Sheekh v The Netherlands* App no 1948/04 (ECtHR, 11 January 2007).

encompasses two functions. Firstly, the Council of State fulfills an advisory role in the legislative process. And secondly, the Council of State acts as a court in administrative law cases.⁹⁴ Following these decisions of the Strasbourg Court, legislation was introduced to make a more clear distinction between the advisory and adjudicative functions of the Council of State. Nevertheless, the Council of State remains to have a dual constitutional role in the Dutch legal order. Despite these decisions, no widespread contestation has surfaced in the Dutch legal order that calls into question the authority of the Dutch Council of State.⁹⁵ This illustrates that interactional expectations play a persistent role in how citizens and officials perceive the authority of norms and officials in a legal order. In due course, interactional expectations concerning the Council of State may change. For example, Dutch citizens may instigate such a change by persistently challenging the role of the Council of State. Nevertheless, the Council of State is generally perceived as a legitimate official in the Dutch legal order.

5.2 The strengths and weaknesses of a pragmatist account of the intertwinement of legal orders

In a pragmatist account of the intertwinement of legal orders, citizens and officials are informed by norms of a multitude of legal sub-practices. Legal sub-practices intersect when norms from different sub-practices support social interactions. In most cases, these legal norms are habitually followed because they are congruent to interactional expectations of citizens and officials in a legal order. For example, norms from different domestic and international legal sub-practices are considered to have normative force when their meaning and scope fit the expectations of citizens and officials. This means that in most cases norms are not deliberately incorporated or given effect in a legal order. Legal norms emerge in social relations of a particular sub-practice when these norms are congruent to interactional

⁹⁴ These two functions are enshrined in the Dutch constitution. See article 73.

⁹⁵ De Wet 2008.

expectations. However, in some cases, norms from one legal sub-practice may be purposively invoked in another sub-practice. For example, citizens may appeal to norms of a sub-practice of international law in the context of a domestic legal order. The value-ladenness of law and its contextual nature determine the normative force of these legal norms. On the one hand, the values and ideals embedded in a particular legal sub-practice limit the purposive use of legal norms. When norms of international law violate values and ideals that are central to the domestic legal order, their normative force will be rejected. Moreover, the context in which a legal norm is invoked also determines its normative force. These norms may be congruent to the interactional expectations of officials and citizens in the domestic legal order. Thus, reception encompasses both the tacit emergence of a legal norm and the deliberate appeal to a legal norm from another legal sub-practice.

Legal pragmatists accept that some degree of incoherence is inherent to law as a social practice. Consider, for example, Fuller's typology of interactional and enacted forms of law. Interactional legal norms that emerge from horizontal relations between citizens may be in tension with enacted legal norms that have been formulated by officials. This type of incoherence is inherent to the practice of law as there is no settled hierarchy between interactional and enacted forms of law. Nevertheless, incoherence in the practice of law does necessarily lead to conflicts between legal norms. Whether incoherence between interactional and enacted forms of law constitutes a conflict, depends on whether this incoherence is perceived as problematic. For example, citizens may turn to officials to contest the incoherence between interactional and enacted forms of law in a legal order. From a legal pragmatist perspective, norm conflicts are resolved in a contextual and ad-hoc way. Following Dewey, legal norms are seen as working hypotheses. They offer workable solutions to problems that have been encountered in the past.⁹⁶ On this view, conflicts between legal norms may be resolved by considering what workable solution is justified in light of the orientation towards legal values and ideals. For example, courts or legislatures may attempt to resolve incoherence between interactional and enacted forms of law by enacting new legal norms. Officials may

⁹⁶ Dewey 1998.

also give room for the emergence of interactional legal norms that can overcome a conflict between norms. Nevertheless, resolving conflicts between legal norms is an open-ended process. Whether conflicts are resolved depends on whether a workable solution can be found that sustain interactional expectations within the context in which the conflict arose.

Interactional expectations are also central to the acceptance or contestation of the authority of officials. Officials are considered authoritative when their exercise of authority is congruent with the interactional expectations of citizens and officials. For example, an official in international law may become authoritative in other legal sub-practices because its exercise of authority is congruent to interactional expectations of citizens and officials in these sub-practices. The authority of an official is contested when its exercise of authority does not fit in existing interactional expectations of citizens and officials in other legal orders. The *Bentham*, *Kleyn* and *Salah Sheekh* cases illustrate that interactional expectations are inherently contextual and thus may differ in sub-practices. In these cases, the constitutional role of the Dutch Council of State vis-à-vis other Dutch officials was contested by the European Court of Human Rights. From the point of view of the Strasbourg Court, the Dutch Council of State should not fulfil a role as a legislative advisor and high court in administrative law cases. When considered in the context of Dutch constitutional law the Council of State has legitimately fulfilled this role, playing both a part in the legislative process and in the adjudication of administrative law cases. This illustrates that the acceptance or contestation of the authority of an official is bound by the contextual expectations of citizens and officials within a legal order. Given the inherently contextual nature of interactional expectations officials may not always be accepted as authoritative in other legal sub-practices.

The main strength of a pragmatist account of the intertwinement of legal orders is its contextually informed argument on the normative force of legal norms and officials. Norms and officials of a multitude of sub-practices inform social interactions. The intertwinement of legal orders should primarily be seen as an implicit practice in which norms and officials of different legal orders have normative force. Norm conflicts and the contestation between officials may be resolved by considering how interactional expectations can be sustained in the

absence of further incoherence. However, resolving frictions between legal orders in context has its limits. Because interactional expectations are inherently contextual frictions between legal orders cannot always be resolved. The *Bentham*, *Kleyn* and *Salah Sheekh* cases illustrate the contextual nature of interactional expectations in a legal order. A weakness of a pragmatist account of the intertwinement of legal orders is that it reduces the interconnections between legal orders largely to an implicit practice. Only when norm conflicts emerge or when the authority of an official is contested, will the boundaries between different sub-practices become clear. For example, in the *Bentham*, *Kleyn* and *Salah Sheekh* cases the boundaries between the sub-practices of Dutch constitutional law and the European Convention on Human Rights are apparent because the authority of the Strasbourg Court is not fully accepted. However, what the boundaries between these sub-practices are in the absence of conflict or contestation remains ambiguous. Thus, in a pragmatist account of the intertwinement of legal orders the interconnections between legal orders remain largely implicit.

6 Conclusions

In this chapter, I have explored Karl Llewellyn and Philip Selznick's legal theories to construct a pragmatist account of the intertwinement of legal orders. I have argued that Llewellyn and Selznick incorporate insights from the social sciences to construct a socio-legal theory. Moreover, their socio-legal theories should be situated against the background of the pragmatist idea of the entanglement of fact and value. In legal pragmatist legal theories, law is conceptualized as social practice in which a functional and ideal dimension can be identified. Although both dimensions are addressed in Llewellyn and Selznick's legal theories, they each emphasize a particular dimension of law. Llewellyn shows how adjudicating disputes, managing expectations, attributing authority, establishing common goals and institutionalizing these law-jobs contribute to social ordering; law's functional dimension. Selznick's legal theory emphasizes law's ideal dimension. Embedded in the social practice of law are values and ideals. Llewellyn and Selznick pay little

attention to legal norms. I relied on Fuller's typology of interactional and enacted law to explain how legal norms develop in social interactions. Officials have a coordinative function, they aim to sustain and further develop interactional expectations between citizens through legal norms.

Legal pragmatists like Llewellyn and Selznick have not considered how international law should be conceptualized. However, international law can be explained using their legal theories. I have argued that the central value of international law is legality, the reduction of arbitrary exercise of power. Based on my exploration of the work of Llewellyn, Selznick and Fuller, I have argued that the intertwining of legal orders should be understood in terms of intersecting legal sub-practices. The inherently contextual nature of a pragmatist account of the relations between legal orders explains why legal norms and officials are perceived as legitimate. However, in a pragmatist account of the intertwining of legal orders the interconnections between legal orders are largely implicit.

Chapter 5

Making sense of the intertwinement of legal orders: justificatory and interactional dimensions

1 Introduction

In the previous chapters of this study, I have critically reconstructed positivist, interpretive and pragmatist accounts of the intertwinement of legal orders. These accounts provide illuminating insights on the interconnections and frictions between legal orders. However, none of these accounts have been able to provide a fully convincing explanation. Therefore, in this chapter I will formulate a novel account of the intertwinement of legal orders that synthesizes the relative strengths of these positivist, interpretive and pragmatist legal theories. In my view, a more convincing account of the intertwinement of legal orders should explain how valid legal norms are identified in light of persistent disagreement and why officials may persistently diverge in their exercise of authority, but without disavowing the notion of a legal order as such.

In this chapter, I will first summarize the strengths and weaknesses of my positivist, interpretive and pragmatist accounts of the intertwinement of legal orders. By exploring the strengths and weaknesses of these accounts I can demonstrate what challenges a more convincing theoretical account of the interconnections and frictions between legal orders should address (section 2). I will first focus on the notion of legal validity (section 3). Even though validity criteria may seem to exist in practice, identifying a valid legal norm requires one to rely on a more abstract justification of a norm. In some cases, this justification needs to be made explicit in order to address disagreement on the validity of a legal norm of another legal order. Moreover, disagreement on the validity of a legal norm can also be addressed by considering whether a legal norm fits in existing patterns of

interactional expectation between citizens and officials in a legal order. I will then turn to the notion of legal authority. I will argue that the exercise of legitimate power by officials is best understood on the basis of a content-dependent account of legal authority (section 4). I will maintain that relations between officials of different legal orders should be seen as part of a joint project in which officials share their authority. The acceptance of a claim to authority is dependent on its relation with the shared goals of this joint project. Moreover, in order to fully make sense of how officials of different legal orders exercise their authority in relation to each other, interactional expectations should also be taken into account. Finally, I will reflect on how future research may build further on this study (section 5).

2 Towards a novel account of the intertwinement of legal orders

In this section, I will first outline the relative strengths and weaknesses of my positivist, interpretive and pragmatist accounts of the intertwinement of legal orders. From these relative strengths and weaknesses, I will draw out two challenges that a novel account should address. In chapter 2, I have critically reconstructed a positivist account of the intertwinement of legal orders based on Hart's legal theory. Hart conceptualizes law in terms of rule-governed practice in which primary and secondary rules can be identified. A legal order consists of primary rules that are generally followed by citizens and secondary rules of change, adjudication and recognition that are accepted as standards by officials. In my positivist account of the intertwinement of legal orders, rules of external recognition explain why a norm of another legal order is incorporated or given effect. Norm conflicts that may arise after incorporation can be resolved on the basis of the supreme and ultimate rule of recognition of a legal order. However, my positivist account is unable to explain how conflicting norms that are valid simultaneously are resolved. On this view, conflicting primary rules may be valid in different legal orders. In my positivist account of the intertwinement of legal orders, officials exercise their authority by following secondary rules of change, adjudication and recognition that are internal

to a legal order. The exercise of authority by officials of other legal orders is accepted when secondary rules internal to a legal order are followed. This means that no relations between officials of different legal orders exist in a positivist account of the intertwinement of legal orders.

In chapter 3, I have explored Dworkin's legal theory to critically reconstruct an interpretive account of the intertwinement of legal orders. Central to Dworkin's interpretive legal theory is the notion of integrity. In light of integrity we aim to apply legal norms consistently and informed by a coherent justification. For example, when judges decide hard cases, they aim to reach a decision that fits in the existing body of case law and is justified in light of the underlying principles. In my interpretive account of the intertwinement of legal orders, I have introduced the notion of integrity as a constructive filter to explain the interconnections and frictions between legal orders. The strength of my interpretive account of the intertwinement of legal orders is its ability to explain the complex relations between legal orders even when frictions arise. Legal norms are incorporated or given effect in a legal order when they can be made consistent and coherent. Conflicts between legal norms may be resolved in a more abstract justification of these legal norms. However, persistent conflicts between different legal norms cannot be articulated. In my interpretive account of the intertwinement of legal orders relations between officials of different legal orders are seen as part of a joint project in which they share authority. This explains why officials may accept or contest the authority of officials of other legal orders. Nonetheless, my interpretive account is unable to make sense of why officials may persistently exercise their authority differently in a joint project.

In chapter 4, Llewellyn and Selznick's pragmatist legal theories were central in my pragmatist account of the interrelations and frictions between legal orders. Llewellyn and Selznick conceptualize law as a social practice that revolves around a functional and ideal dimension. Law's functional dimension explains how law contributes to social ordering, while the ideal dimension highlights the values and ideals embedded in the practice of law. I have argued that from the perspective of pragmatist legal theories the intertwinement of legal orders should be understood in terms of intersecting legal sub-practices. On this view, multiple legal norms of different legal sub-practices are considered authoritative. The contextual nature of

my pragmatist account can explain why legal norms are considered authoritative. This contextual account also explains why the exercise of authority by an official is accepted. However, the reception of legal norms and the acceptance of authority of officials remains a largely implicit practice in a pragmatist account of the intertwinement of legal orders.

From these relative strengths and weaknesses two challenges can be drawn out that a novel account of the intertwinement of legal orders should address. Firstly, a theoretical account of the notion of legal validity is needed that explains how valid legal norms can be identified even when persistent disagreement exists on the question under which conditions norms of other legal orders are valid. Hart's positivist legal theory may explain the reception of legal norms when agreement exists under which conditions legal norms should be considered valid. However, Hart's positivist legal theory cannot explain how valid legal norms are identified in light of disagreement; while Dworkin's interpretive legal theory cannot fully explain why such disagreement may persist. Pragmatist legal theories explain how disagreement on the validity of a legal norm may be rooted in the interactional expectations of citizens and officials, but lack a clear notion of legal order when these frictions do not arise. Thus, a theoretical account of the notion of legal validity is needed that addresses why disagreement on validity criteria may persist that does not abandon the notion of legal order altogether. Secondly, a theoretical account of the notion of legal authority is needed that reveals how officials of different legal orders exercise authority in relation to each other even when they diverge on how legitimate power should be exercised. Hart's positivist legal theory is unable to conceptualize the relations between officials of different legal orders as such. Dworkin's interpretive legal theory explains why officials of different legal orders exercise their authority as part of a joint project, but is unable to make sense of why officials may persistently diverge in how they exercise their authority relative to each other. My reconstruction of Llewellyn and Selznick's pragmatist brings to light how interactional expectations play a role in the contestation of an official's authority. However, it is unclear in pragmatist legal theories how interconnections between legal orders exist without disregarding the notion of legal order as such.

In the following sections, I will develop a novel theoretical account of the intertwinement of legal orders that addresses these two challenges. This account departs from a positivist understanding of law in two crucial respects. Firstly, I will argue that in intertwined legal orders valid legal norms cannot be identified solely on the basis of social facts. Generally accepted validity criteria do not explain how we recognize valid legal norms in a legal order. Secondly, I will maintain that the authority of officials in intertwined legal orders cannot be understood solely in content-independent terms. In order to understand relations between officials of different legal orders a content-dependent account is needed that takes into account how officials substantively exercise their power.

My theoretical account of the intertwinement of legal orders will provide a more convincing legal theoretical framework from which the complex relations between legal orders can be understood when compared to conventionalist legal theories.⁹⁷ On this view, law is what people generally accept as law. However, conventionalist legal theories are unable to provide a precise account of what law is and cannot explain how we should make sense of law when people conceptualize law differently. In the following sections, I will argue that legal validity and authority is best understood in light of law's justificatory and interactional dimensions. On this view, valid legal norms may not always be identified on the basis of generally accepted validity criteria. These validity criteria are contestable. Nonetheless, the validity of a legal norm may be justified in light of the underlying values of a legal order or the interactional expectations between citizens and officials. I will also maintain that the authority of officials should be understood in content-dependent terms. In my view, officials have a dual commitment when they exercise their authority. On the one hand, officials are part of shared practices with officials of other legal orders. On the other hand, officials are part of the practice internal to their legal order. The justificatory and interactional dimensions of authority explain how officials exercise their power across different legal orders.

⁹⁷ Tamanaha 2001. For example, Berman's theory of global legal pluralism relies on a conventionalist understanding of law. Berman 2012, 56.

3 The contestability of legal validity

When lawyers discuss a judicial decision or a provision of an Act of Parliament, they normally assume that they are referring to valid legal sources. For example, when a decision is informed by relevant case law, we have good reasons to follow it. Similarly, we generally maintain that Acts of Parliament should be followed when the appropriate procedures have been followed by the legislature. The conditions under which we should consider a judicial decision or Act of Parliament valid may also be called the grounds of law.⁹⁸ Based on the grounds of law we can determine the validity of a legal norm. Invalid legal norms do not need to be followed because they lack the binding character of valid legal norms. This common understanding of legal validity can also be found in positivist legal theories.⁹⁹ Legal positivists consider the grounds of law to function as a set of generally accepted criteria. Hart, for example, maintains that we identify valid legal norms by following the rule of recognition. This rule of recognition is conventional in nature.¹⁰⁰ Officials follow the rule of recognition because they generally agree on the validity criteria that follow from this rule.¹⁰¹ This view may also be extended to the recognition of valid legal norms of other legal orders. In chapter 2, I have introduced the notion of a rule of external recognition in my positivist account of the intertwinement of legal orders to explain how legal norms of other legal orders are recognized as valid.

The claim that we can identify valid legal norms of other legal orders based solely on conventional criteria is unconvincing because a general agreement on these

⁹⁸ Dworkin 1986, 4.

⁹⁹ Raz 2009b, 41-45.

¹⁰⁰ Hart 1994, 255. Conventionalist accounts of law have also been defended in Coleman 2001; Den Hartogh 2002; Marmor 2001; 2009. According to Dickson, Hart declared the rule of recognition to be conventional in nature in his postscript to *The Concept of Law*. See, Dickson 2007. See, for example, Green 1999 and Dickson 2007 who are critical of the conventionalist dimension of Hart's positivist legal theory.

¹⁰¹ 'Hart's position—widely misunderstood and mistakenly criticized—is that law is made possible by an interdependent convergence of behavior and attitude: a kind of *convention* or social practice that we might characterize as an "agreement" among officials on the criteria for membership in the category "law".' Coleman 2001, 75.

criteria does not always exist. This point may be illustrated with a hypothetical example that concerns the validity of international legal norms in a domestic legal order. Imagine, for example, that in a domestic legal order legislation has been enacted by the legislature and that the provisions of this act are applied by national courts. Following the enactment of these norms in the domestic legal order a treaty has been signed and ratified by the state. An international court has jurisdiction over cases of alleged treaty violations. This international court has decided on complaints of applicants who argue that the state has violated its treaty obligations. Assume that officials in the domestic legal order have recognized the validity of the act, and that the international court has recognized the validity of the treaty provisions.

Many would argue that in this example the validity of the treaty provisions in the domestic legal order depends on the generally accepted validity criteria that are followed by officials in that legal order. On this view, officials incorporate or give effect to treaty provisions when the state has signed and ratified the treaty. A constitution may include provisions that stipulate under which conditions treaty provisions gain validity within the domestic legal order and when international legal norms should trump domestic law.¹⁰² Let us assume that a number of judges in the domestic legal order have applied the treaty provisions and rely on the case law of the international court when interpreting these legal norms. This signals that judges have recognized the validity of the treaty provisions in the domestic legal order. However, if no other officials apply the treaty provisions, can we still maintain that there is general agreement about the conditions under which legal norms of other legal orders are valid? This casts doubt on the view that a general agreement on the validity criteria of legal norms of other legal orders always exists. In some cases, there may be no general agreement among officials on the validity criteria of legal norms of other legal orders.

¹⁰² For example, article 94 of the Dutch constitution stipulates that international legal norms should trump domestic law if these norms should be considered binding on all persons: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.'

My hypothetical example may be considered redundant. It could be argued that validity criteria do not need to be explicitly endorsed by all officials in a legal order. On this view, generally accepted validity criteria exist to identify valid legal norms, but they may often remain implicit in practice.¹⁰³ However, the claim that we can identify valid legal norms of other legal orders based on implicit validity criteria is nonetheless unconvincing because these criteria are contestable. Disagreement on the validity criteria of legal norms of other legal orders may arise between officials, signaling the contestability of the grounds of law. The *Solange*, *Maastricht* and *Lisbon* decisions illustrate this point.¹⁰⁴ In the past, officials acting on behalf of the German state have signed and ratified the Treaty establishing the European Economic Community, the predecessor of the European Union. Following the landmark case of *Costa/ENEL*, the Treaty establishing the European Economic Community and the secondary legislation that follows from this treaty should trump domestic law.¹⁰⁵ However, not all German officials are committed to giving unrestricted effect to EU law in the German legal order. Although the German state has signed and ratified the Treaty establishing the European Economic Community, courts have objected to the supposed unrestricted effect of EU law. For example, in the *Solange* decisions the German Federal Constitutional Court argued that secondary EU legislation can only be considered valid in the German legal order insofar as it does not violate the fundamental rights enshrined in the German constitution. In the *Maastricht* and *Lisbon* decisions, the Federal Constitutional Court argued on the basis of other grounds that the supremacy of EU law may be restricted in the German legal order. Thus, the view that officials in the German legal order generally agree under which conditions EU law should have effect in the German legal order is implausible. Even though conventional validity criteria may seem to exist in practice, disagreement may arise on the question under which conditions legal norms of other legal orders should be considered valid.

¹⁰³ On the relation between the practice of identifying valid legal norms and the rule of recognition, see Coleman 2001, 77-83.

¹⁰⁴ BVerfGE 37, 271 (1974) (*Solange I*); 73, 339 (1986) (*Solange II*); 102, 147 (2000) (*Bananas*); 89, 155 (1993) (*Maastricht*); 123, 267 (2009) (*Lisbon*).

¹⁰⁵ Case 6/64 *Costa v ENEL* [1964] ECR 585.

Critics may also object to my claim on the contestability of the grounds of law and argue that officials only disagree in exceptional cases whether a legal norm should be considered valid. Indeed, it is plausible that in most cases we will have an intuitive sense of what the grounds of law are for legal norms. Otherwise this would mean that officials always disagree on whether a norm should be considered legally valid. However, it should be stressed that an absence of widespread disagreement does not prove the existence of conventional validity criteria. The *Solange*, *Maastricht* and *Lisbon* decisions illustrate that we may think of legal validity in terms of conventional criteria, but this view is unable to explain why we disagree on the validity of a legal norm. Conventional validity criteria only explain how valid legal norms are identified when we generally agree on such criteria. Officials will generally aim to determine the validity of a legal norm even though disagreement has surfaced that concern the grounds of law. An account of legal validity is therefore needed that is also able to explain how valid legal norms are identified in the face of disagreement on the grounds of law.¹⁰⁶

The contestability of conventional validity criteria brings to light that we may deeply disagree on what the grounds of law entail in a legal order. In order to resolve disagreement concerning the grounds of law one needs to determine how validity criteria are embedded in a more general justification of law. Questions, such as, for example, “Do we have a general obligation to give effect to legal norms of other legal orders?” and “Should norms of other legal orders be given effect when they violate fundamental rights?” can only be answered by constructing a justification of the validity of a legal norm. Or as Dworkin explains: ‘[w]e construct a conception of law – an account of the grounds needed to support a claim of right enforceable on demand in that way – by finding a justification of those practices in a larger integrated network of political value.’¹⁰⁷ Dworkin provides an argument how such questions can be answered. When officials claim that a legal norm should be considered valid, they maintain that this norm fits in an existing body of law and is supported by its underlying values and ideals. Thus, the recognition of valid law

¹⁰⁶ On the limited explanatory force of rules of recognition, see also Waldron 2009.

¹⁰⁷ Dworkin 2011, 405

implies a justificatory claim in which we locate a norm in a body of case law, legislation and other legal norms, and their underlying values and ideals. A justificatory ascent may resolve conflicts between different norms because it assigns relative weight to legal norms in a more abstract justification.¹⁰⁸ This argument, in turn, may be embedded in a more abstract justification of law's central point.¹⁰⁹

The contestability of conventional validity criteria also follows from the interactional underpinnings of legal norms. As legal pragmatists have argued, legal norms emerge and shape social interactions. Take, for example, Fuller's typology of enacted and interactional law.¹¹⁰ This typology illustrates why some legal norms emerge in the vertical relations between officials and citizens, while other legal norms emerge in the horizontal relations between different citizens. Understanding the differences between enacted and interactional law requires one to take into account how legal norms emerge from and shape social interactions. Fuller's typology of enacted and interactional law cannot be constructed solely on the basis of a justificatory ascent in which these legal norms are considered part of a practice that has a central point. The validity of a legal norm also depends on the interactional expectations between citizens and officials in a legal order. For example, whether a norm from another legal order should be considered valid is dependent on the expectations of citizens and officials concerning its meaning and scope. Contrasted with Dworkin's justificatory ascent, this justification of the validity of a legal norm can be called an interactional descent. An interactional descent may resolve disagreement concerning the validity of a legal norm because it provides a contextual argument of why a legal norm may fit in existing patterns of interactional expectations between citizens and officials.

It should be stressed that my account of legal validity does not deny that we often seem to rely on generally accepted criteria to determine the validity of legal norms of other legal orders. These criteria may be found in case law or legislation.

¹⁰⁸ Dworkin 2011, 53.

¹⁰⁹ On the most general level, law can be understood as a social practice aimed towards the values of legality and justice. Dworkin 1986; Nonet and Selznick 2001.

¹¹⁰ Postema 1999.

However, these legal sources do not adequately explain why disagreement may arise on the validity of a legal norm of another legal order. For example, many officials will rely on provisions of their constitution to determine under which conditions legal norms of international law are valid. These constitutional provisions can be seen as an expression of conventional validity criteria. Although constitutional provisions may seem to express general validity criteria, they are contestable along justificatory and interactional lines. Constitutional provisions may invite disagreement under which conditions legal norms of other legal orders should be considered valid, how these legal norms should be ranked and how conflicts between legal norms of different legal orders should be resolved. When disagreement arises on why a legal norm should be recognized as valid, arguments need to be put forward that justify the validity or invalidity of that norm. In my view, this disagreement may be addressed on the basis of a justification that takes into account the orientation of legal norms towards legal values and ideals or a contextually informed justification that explains how legal norms sustain interactional expectations. Thus, disagreement invites a justificatory ascent or an interactional descent that go beyond the provisions that are considered to express the validity criteria in question.

One could infer from my account of validity that this notion should be understood to be gradual in nature. A justificatory ascent explains why a legal norm is considered valid against the background of the central values of law. For example, legal norms may be considered valid in light of a justification of their underlying values and ideals. The realization of these values and ideals is a matter of degree. This would imply that the validity of a legal norm is a matter of degree too. A similar argument can be made for the interactional dimension of the grounds of law. Legal norms have normative force when they support the interactional expectations of citizens and officials. Nevertheless, not all legal norms are congruent to the interactional expectation of citizens and officials in a legal order. In some cases, legal norms are not followed because they do not fit the interactional expectations of citizens and officials. These legal norms can be considered a dead letter because without a connection to existing interactional expectations officials and citizens will disregard these legal norms. Thus, the gradual nature of the notion of legal validity

seems to follow from the tension between the justificatory and interactional dimensions of the grounds of law. An interactional descent explains why a legal norm is considered valid because it fits current interactional expectations between citizens and officials. Nevertheless, an interactional descent may not always fully justify why a legal norm should be considered valid. Legal norms that emerge from social interactions will be considered invalid when they are contrary to legal values or ideals embedded in the practice of a legal order. On the other hand, a justificatory ascent may explain why a legal norm has normative force in light of the values and ideals embedded in legal practice. Nevertheless, if this legal norm does not fit with the interactional expectations of citizens and officials it will be considered dead letter.

However, I maintain that validity cannot be fully understood to be gradual in nature. A norm may become legally valid because its normative force is invoked in light of values and principles embedded in the practice of a legal order or for the reason that this norm conforms to the interactional expectations of citizens and officials. On this view, the weight of the justificatory and interactional dimensions of the grounds of law may change over time. Nonetheless, validity is also an inherently synchronic notion. Whether a norm should be considered legally valid depends on a decision that is taken at a particular point in time and in a particular context of a legal order. For example, imagine a judge who needs to determine whether a norm is legally valid. He may pursue a justificatory ascent to determine whether a legal norm can be justified in light of its underlying legal values. He may also consider an interactional descent to determine whether the norm is congruent to the interactional expectations of citizens and officials. The judge may acknowledge that the legal norm is now more justified along justificatory or interactional lines than before. Nonetheless, he needs to take a decision whether the legal norm should be considered valid or invalid. At a given point in a time and given the particular context in a legal order, the judge needs to decide on whether a norm should be considered legally valid. In some cases, the justificatory and interactional dimensions may point in different directions. Nevertheless, a judge will need to reach a decision that is best justified in light of these dimensions. In my view, this decision should not be considered indeterminate because the justificatory

and interactional dimensions of the grounds of law cannot be fully distinguished. Interactional expectations are partly based on the values and ideals that are embedded in the practice of law and social interactions often give expression to values and ideals. Thus, decisions on the validity of a legal norm should find a balance in the tension between the justificatory and interactional dimensions of the grounds of law.

An example concerning the human rights regimes of the European Union and the Council of Europe may illustrate the tension between the justificatory and interactional dimensions of the grounds of law. The EU Charter of Fundamental Rights requires that human rights enshrined in the Charter should provide the same level of protection in terms of meaning and scope as the European Convention on Human Rights.¹¹¹ This means that the legal norms of the Convention have been given effect in the EU legal order. When considered in light of the justificatory dimension of legal validity, the harmonization of these human rights regimes suggests that the Convention rights may easily be applied in the context of the EU legal order. However, even though these human rights regimes are harmonized to a great degree, both in terms of legal norms and values, frictions between these human rights regimes have surfaced. In *advisory opinion 2/13*, the Luxembourg Court argued that the EU accession to the Convention would impede on the foundations of EU law.

The interactional dimension of legal validity may explain why these frictions arise even though these legal norms have been harmonized to a great degree. The Luxembourg Court interprets and applies EU law in relation to other EU officials, the officials in the member states and their citizens. The Strasbourg Court, on the other hand, interprets the Convention rights against the background of different interactional expectations. The European Court of Human Rights primarily reviews individual complaints of Convention violations. For example, in the *Bosphorus* and *Avotiņš* decisions, the European Court of Human Rights considered that it would not review whether a member state has violated the

¹¹¹ Art 52 para 3 EU Charter.

Convention when giving effect to EU law, if EU human rights protection does not fall below the level of protection of the European Convention on Human Rights.¹¹² However, in *advisory 2/13 opinion*, the Luxembourg Court argued that EU accession would impede on the autonomy of EU law.¹¹³ In my view, this illustrates how the justificatory and interactional dimensions of the grounds of law may point in different directions. The justificatory dimension points toward further interconnections between the human rights regimes of the European Union and the Council of Europe, while the interactional dimension highlight the frictions that may arise between these legal orders.

4 The content-dependency of legal authority

Up until this point, I have focused on how the validity of legal norms should be understood in intertwined legal orders. I will now turn to the question how the authority of legal officials should be conceptualized in light of the intertwining of legal orders. The notion of legal authority explains the role of officials who apply, enact or amend legal norms. When discussing the notion of legal authority legal philosophers generally distinguish between citizens and officials. In some legal theories the distinction between citizens and officials carries important weight. Hart, for example, argues that officials need to follow secondary rules of change, adjudication and recognition for law to exist.¹¹⁴ In other legal theories the distinction between citizens and officials has less importance. For example, in Dworkin's interpretive legal theory citizens and officials have an equal obligation to consider which rights and obligations follow from valid law.¹¹⁵ However, in constructing my account of legal authority I will focus primarily on officials given their practical

¹¹² *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005); *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016).

¹¹³ Opinion 2/13 EU EU:C:2014:2454.

¹¹⁴ Hart 1994, 116.

¹¹⁵ Dworkin 1986, 413.

importance. For example, courts are important in a legal order because they claim to have the authority to resolve disputes through legally binding decisions.

An account of the notion of legal authority makes sense of the conditions under which we consider the exercise of authority by officials to be justified. This means that we should accept a claim to authority when it entails a legitimate exercise of power. Legal authority is often understood as content-independent. This means that the legitimate exercise of power is not dependent on how it is substantively exercised. This common understanding of legal authority is prevalent in positivist legal theories.¹¹⁶ In this conception of authority, directives are followed because they follow from officials as such. Raz, for example, locates the authority of officials in their reason-giving ability. Officials provide better overall reasons to citizens who follow their directives when compared to citizens who need to rely on their own practical reasoning to determine their behaviour. Raz therefore calls his account of authority the service conception of authority. His service conception of authority is built on three theses. Firstly, the exercise of power by an official should aim to exclude a number of reasons to act or refrain from acting in a particular way. Raz calls this the pre-emption thesis.¹¹⁷ Secondly, the exercise of power by an official should be based on reasons that are relevant to the practical reasoning of citizens. Raz calls this the dependence thesis.¹¹⁸ Thirdly, Raz maintains that the exercise of authority should make it more likely that those affected will follow the directives. This means that citizens do not need to determine themselves how they should act. Raz calls this the normal justification thesis of his service conception of authority.¹¹⁹

Although it seems sensible to consider the authority of officials to be content-independent, this view should be deemed unpersuasive. Firstly, it is important to highlight that content-independent accounts of authority often go hand in hand with the claim that valid legal norms can be identified on the basis of social facts alone. Or as Schauer succinctly puts it: 'Law's subjects are expected to obey the

¹¹⁶ Hart 1982; Raz 1986.

¹¹⁷ Raz 1986, 46.

¹¹⁸ Raz 1986, 47.

¹¹⁹ Raz 1986, 53.

rules and precedents because of their source and status, regardless of whether they are persuaded by the content of their reasoning, and even if they are *not* persuaded by the content of their reasoning.¹²⁰ Raz, for example, argues that the identification of valid legal norms is solely dependent on social sources. No moral considerations are of relevance when officials determine the validity of a legal norm.¹²¹ However, in the previous section I have argued that this view should be considered unpersuasive. At first sight it may seem that valid legal norms may be identified on the basis of generally accepted validity criteria. Nevertheless, these criteria are contestable and may require further justification that touches upon the justificatory and interactional dimensions of the grounds of law.

Another reason why the authority of officials should not be considered content-independent is that such an account of legal authority is unable to make sense of how relations exist between officials across different legal orders. Take Raz's service conception of authority as an example. Roughan explains that Raz's account of legal authority is plagued by two problems. Firstly, she maintains that Raz's service conception of legal authority does not explain how citizens should rank officials that each legitimately claim authority. Citizens may be confronted with officials that claim authority without a clear understanding how to order these claims. Roughan calls this the rankings problem because Raz's account of authority does not enable citizens to categorize officials in terms of a hierarchy.¹²² Secondly, Roughan also maintains that Raz's account of legal authority suffers from an identification problem. In Raz's service conception of authority it is unclear how citizens should determine the authority of an official when he is confronted with different claims to authority. In some cases, citizens may attempt to determine the authority of an official by considering all relevant reasons to exercise their power. However, in light of Raz's pre-emptive thesis this type of practical reasoning should be excluded. Moreover, in other cases it will take an unreasonable length of time for

¹²⁰ Schauer 2009, 63.

¹²¹ Raz 2009b, 41-45.

¹²² Roughan 2013, 114-115.

citizens to adequately determine the authority of an official.¹²³ The rankings and identification problems call into question the adequacy of a content-independent account of legal authority to make sense of the relations between officials of different legal orders.

Roughan's diagnosis of the problems of Raz's content-independent account of authority is convincing. However, her own account of legal authority is in need of a more convincing content-dependent justification. Roughan maintains that an adequate account of legal authority is relative: '[r]elative authority here means more than simply concurrent or co-existing or comparable authority; rather it is authority whose legitimacy is mutually constitutive and mutually constraining between two persons or bodies which *prima facie* have the standing of authority, but which cannot alone have independent legitimacy because of the existence of the other and the need for interaction.'¹²⁴ However, Roughan's account of authority does not explain why the exercise of power by officials should be deemed legitimate as such, other than that officials should cooperate with each other. Rodriguez-Blanco has pointed out that Roughan's relative account of authority needs to be grounded in order to avoid infinite regress.¹²⁵ Take, for example, the exercise of authority of two parents over a child. In Roughan's account the authority of the parents are relative to each other, meaning that their exercise of power is constrained by considerations of cooperation. However, in order to cooperate, parents need to consider what justifies their authority. Otherwise, this may lead to an infinite regress in which parents refer to each other as individuals who claim to exercise legitimate power. Rodriguez-Blanco therefore points out that Roughan is in need of a justification that adequately explains parenthood as such. On the basis of this justification parents may consider how they should cooperate in their exercise of authority.¹²⁶ Thus, a more convincing content-dependent justification is needed that explains how legal authority may be exercised under relative conditions. A content-dependent account

¹²³ Roughan 2013, 115-116.

¹²⁴ Roughan 2013, 138.

¹²⁵ See Rodriguez-Blanco 2016, 198.

¹²⁶ Rodriguez-Blanco 2016, 198-199.

of authority can provide an account of the conditions under which the legitimate exercise of power by officials across different legal orders is justified.

In order to develop a content-dependent account of authority I will further build on Dworkin's account of legal authority. From the perspective of Dworkin's legal theory, the authority of officials follows from their commitment to consistency with previous directives and coherence with the underlying values of their decisions in a shared practice. This has been further elaborated in Kyritsis' Dworkinian account of the relations between courts and legislatures. Kyritsis argues that courts and legislatures can be seen as officials in a joint project.¹²⁷ The authority of officials is dependent on their commitment to the aims of this joint project and their institutional role that they adopt to pursue these aims. Courts and legislatures 'participate in a joint institutional project aimed at governing. They *share* the authority to govern. But their relationship is truly one of *shared authority* only to the extent that it is structured in a way that serves the point of the joint project; for this to be the case, it is necessary – though not sufficient – that the project accord with principles of political morality regarding the proper allocation of government power.'¹²⁸ Kyritsis illustrates these relations of shared authority with the doctrine of constitutional review. From the perspective of his Dworkinian account of legal authority, constitutional review should not be seen as a restriction on the authority of the legislature. Instead, constitutional review should be understood as part of the joint project in which legislative and adjudicative officials share the authority to legitimately exercise power in a system of checks and balances.¹²⁹ Thus, a content-dependent account of authority sees the exercise of authority in light of the commitment of officials of different legal orders towards the shared goals of a joint project.

My content-dependent account of legal authority could be confronted with a powerful objection at the outset. Based on Dworkin's own legal theory critics may argue that the exercise of authority by officials is necessarily embedded in the

¹²⁷ Kyritsis 2015, 93-131.

¹²⁸ Kyritsis 2015, 12.

¹²⁹ Kyritsis 2015, 113. On constitutional review in an interpretive understanding of law, see Kyritsis 2017.

political morality of a particular legal order. This would imply that the exercise of legitimate power cannot extend across different legal orders because legal authority is necessarily grounded in a practice of a particular legal order. Although Dworkin's legal theory entails that the exercise of authority should be seen in light of the political morality of a particular legal order, this does not mean that officials of different legal orders cannot be considered part of a shared practice. In my reconstruction of Dworkin's legal theory, I have argued, for example, that the commitment of officials to integrity in a legal order may compel them to reach decisions that are informed by decisions from officials of other legal orders. Relations between officials of different legal orders can be understood in terms of a shared practice in which these officials exercise their authority in light of a central point.¹³⁰

EU law can be used to demonstrate how officials of different legal orders may be considered part of a shared practice in which authority is exercised. Take, for example, national courts and the Court of Justice of the European Union. These officials are part of the EU legal order and the legal orders of the EU member states. However, conceptualizing national courts solely as part of domestic legal orders does not explain how national courts exercise their authority on matters of EU law. The relations between national courts and the Court of Justice of the European Union make better sense when these officials are seen as part of a practice in which they are oriented towards shared goals, such as, for example, an internal market, the rule of law and democracy. The Court of Justice contributes to this shared commitment by explaining the scope and meaning of EU legal norms through the preliminary ruling procedure, while national courts contribute to this practice by reviewing the validity of domestic law in light of EU legal norms. On this view, national courts and the Court of Justice of the European Union contribute to underlying values of the EU legal order and the legal orders of the member states. When national courts and the Luxembourg Court are seen as part of a practice oriented towards an internal

¹³⁰ Compare Kyritsis 2015, 160-164 on the potential of an interpretive account of the relations between officials of different legal orders.

market, the rule of law and democracy, they share the authority to legitimately exercise power in matters of EU law.

It should be highlighted that in intertwined legal orders officials have a dual commitment. On the one hand, officials are part of shared practices with officials of other legal orders. On the other hand, officials are also committed to the practice internal to their own legal order. In EU law, for example, the exercise of authority by domestic officials is part of a shared practice with EU officials. These domestic officials are also committed to the practice of their own legal order. Therefore, an institutional constraint exists for officials that are committed to joint projects such as EU law. The dual commitment of officials may lead to differences in normative views on how authority should be exercised. For example, officials of national and international legal orders may be committed to the protection of fundamental rights, but may at some point diverge on how a particular right should be interpreted or applied. These differences may exist within a shared practice in which officials of different legal orders take part insofar these differences can be accounted for in the officials' conception of the dimensions of fit and justification. This dual commitment can be upheld when the exercise of power of officials of other legal orders can be made consistent with previous decisions and coherent with the underlying values of these decisions in a particular legal order. The *Solange*, *Maastricht* and *Lisbon* decisions of the German Federal Constitutional Court illustrate that this institutional constraint may stand in the way of this dual commitment.¹³¹ For example, in the *Solange I* decision, the Federal Constitutional Court rejected the authority of EU officials because their exercise of authority do not satisfy the institutional constraints of fundamental rights protection in the German legal order. Only when these constraints have been satisfied is the authority of EU officials accepted. Although the Federal Constitutional Court now considers that EU law and its institutions respect the fundamental rights of the German constitution, the dual commitment of German officials remains.

¹³¹ BVerfGE 37, 271 (1974) (*Solange I*); 73, 339 (1986) (*Solange II*); 102, 147 (2000) (*Bananas*); 89, 155 (1993) (*Maastricht*); 123, 267 (2009) (*Lisbon*).

In my account of legal authority officials have a dual commitment when they exercise their power. However, this does not fully explain why officials may exercise their authority differently. For example, why do national courts accept the European Court of Justice as the primary arbiter on the scope and meaning of EU legal norms? In his interpretive account of EU law, Letsas suggests that this question can be answered by considering how officials in the legal orders of the EU member states conceptualize the moral point of this practice: '[w]hat matters is that all courts converge in following the same boundaries, *regardless of who set them*. Once some or most courts have set a boundary, then later courts have a reason to follow it, not because the former courts had ultimate authority to set boundaries, but because moral reasons of coordination and efficacy require so.'¹³² This highlights the importance of interactional expectations in how national courts and the European Court of Justice understand their role when they exercise their authority. Letsas implies that interactional expectations follow from the underlying moral point of EU law.¹³³ However, in my view, the interactional dimension of law cannot be reduced to its justificatory dimension. The role of the European Court of Justice as the primary arbiter of EU law cannot be fully explained by considering how officials in the legal orders of the EU member states conceptualize their dual commitment to authority. Even though officials in the legal orders of the EU member states may be committed to the joint project of EU law, this does not necessarily imply that they will exercise their authority uniformly. Interactional expectations give insight into how officials exercise their authority in a given context.

In my view, interactional expectations explain why officials exercise their authority differently, even though they are part of a shared practice. Given the

¹³² Letsas 2012, 100. Letsas distinguishes between the exercise of authority concerning fundamental rights and other matters, such as, for example, the internal market. He maintains that fundamental rights should always be respected given their overriding moral importance, while the exercise of authority by officials in others areas also requires them to consider how they should exercise their power legitimately in relation to each other. I do not wish to determine here whether fundamental rights have this overriding moral importance. For a critique of this argument, see, for example, Waldron 1999.

¹³³ Kyritsis makes a similar point when he argues that cooperation between officials of different legal orders may be morally required. See, Kyritsis 2015, 162.

contextual foundations of interactional expectations it is very likely that officials of different legal orders will never exert their authority uniformly. Interactional expectations emerge and are supported in the practice of a particular legal order. For example, national courts and the European Court of Human Rights may be seen as part of a shared practice committed to the protection of fundamental rights. In this shared practice, national officials and the Strasbourg Court exercise their authority in light of a shared goal of a joint project; the protection of human rights. In this practice, interactional expectations give further shape to how officials exercise their authority. For example, in *Bentham, Kleyn and Salah Sheekh*, the Dutch Council of State and the Strasbourg Court differed in normative views on how the Convention should be interpreted.¹³⁴ Nevertheless, following each of these decisions, the Dutch government took measures to ensure that the case law of the European Court of Human Rights was given effect in the Dutch legal order. This also illustrates the tension between law's interactional and justificatory dimensions. In order for officials in the Dutch legal order to be part of a shared practice committed to the protection of fundamental rights, they must also take into account how other officials, such as, for example, the European Court of Human Rights, conceptualize the central point of this practice. If no measures had been taken to give effect to these decisions in the Dutch legal order, the Strasbourg Court would have further scrutinized the Council of State. Interactional expectations may explain why officials exercise their authority differently. Nevertheless, in order for officials of different legal orders to be part of a shared practice, they must also take into account how officials in that practice conceptualize its central point.

¹³⁴ *Bentham v The Netherlands* App no 8848/80 (ECtHR, 23 October 1985); *Kleyn and others v The Netherlands* App no 39343/98; 39651/98; 43147/98; 46664/99 (ECtHR, 6 May 2003); *Salah Sheekh v The Netherlands* App no 1948/04 (ECtHR, 11 January 2007). See also *Procola v Luxembourg* App no 14570/89 (ECtHR, 28 September 1995).

5 Looking ahead: future lines of research

In the previous sections, I have sought to make sense of the complex relations between legal orders from the perspective of my non-positivist account of the intertwinement of legal orders. In this section, I will sketch potential lines of future research that may build on this study. The first line of research concerns the critical reconstruction of other legal theories in light of the intertwinement of legal orders. For example, Kelsen's positivist legal theory and Luhmann's socio-legal theory may shed a very different light on the interconnections and frictions between legal orders.¹³⁵ However, reflective equilibrium is not an adequate method to critically reconstruct these theories. As I have argued in chapter 1, using the method of reflective equilibrium on these legal theories will either lead to a rejection of the intertwinement of legal orders as such or a rejection of their basic tenets. An alternative method should be used to critically reconstruct legal theories that assert the autonomy of legal orders. Foundationalist methods from the field of ethics may be used, for example, to critically reconstruct these legal theories without abandoning their central tenets. Further research is needed on the methodology of theory reconstruction in order to assess how legal theories may be critically reconstructed on the basis of this method. Although a methodology debate in the field of jurisprudence has surfaced, the topic of theory reconstruction is notably absent.¹³⁶ Thus, before other legal theories may be critically reconstructed in light of the intertwinement of legal orders, further research is needed on the methodology of theory reconstruction in jurisprudence.

A second line of research may explore how my non-positivist understanding of law may be further developed to bridge the gap between different disciplines in legal academia. My central claim that legal validity and authority in intertwined legal orders should be understood in light of its justificatory and interactional dimensions may be further developed to construct an argument that

¹³⁵ Kelsen 1945; Luhmann 2004.

¹³⁶ See, for example, the contributions in Banas; Dyrda and Gizbert-Studnicki 2016.

seeks to create common ground between legal philosophers and socio-legal scholars. Often, theories of legal philosophers and socio-legal scholars are pitted against each other. On this view, the object of study, concepts, and methods of legal philosophers and socio-legal scholars are seen as radically different. However, a non-positivist understanding of law may be further developed in order for sociologically informed theorists and legal scholars to support each other's theories.¹³⁷ Postema's characterization of jurisprudence as a sociable science may help to illustrate my point. Postema distinguishes between the internal and external social character of jurisprudence: '[i]t is 'externally sociable' in respects of its openness to interaction and partnership with other modes of inquiry and it is 'internally sociable' in respect of its synechist methodological orientation or mentality.'¹³⁸ This study contributes to an internally sociable jurisprudence because my critical reconstruction of legal theories is aimed at broadening their explanatory scope to incorporate international law and the intertwinement of legal orders. My novel account of legal validity and authority may be applied to other contexts and connected to sociological, historical and legal theories. This will contribute to an externally sociable jurisprudence because my non-positivist understanding of law may be further developed in cooperation with other disciplines in legal academia.

6 Conclusions

In this chapter, I have developed a theoretical account of the intertwinement of legal orders that centres on the notions of legal validity and authority. This account synthesizes the relative strengths of my positivist, interpretive and pragmatist accounts of the intertwinement of legal orders that I have critically reconstructed in the previous chapters. My novel theoretical account of the intertwinement of legal orders I have defended two central claims. Firstly, I have argued that legal validity should be seen as a contestable notion. Validity criteria may inform us under which

¹³⁷ Taekema and Van der Burg 2014; Cotterrell 2018.

¹³⁸ Postema 2016, 29.

conditions legal norms should be considered valid, but these criteria are contestable. Why legal norms of another legal order should be considered valid depends on a justification that explains in which light the recognition of legal norms of other legal orders should be understood. Moreover, interactional expectations may also help to ground a legal norm in existing patterns of social relations. Secondly, I have argued that legal authority should be understood as a content-dependent notion. On this view, the legitimacy of an official is dependent on how it substantively exercises its authority. I have explored Raz's content-independent account of authority to illustrate why a substantive conception of authority is needed. In my view, the exercise of legitimate power by officials of different legal orders should be seen as part of a practice in which the exercise of authority is aimed towards the shared goals of this practice. Interactional expectations help to make sense of how officials exercise their authority differently. Claims to authority may be contested when citizens and officials have opposing interactional expectations. Finally, I have explored two possible lines of future research that may be further developed on the basis of this study. Firstly, further research is needed on the methodology of critical reconstruction in the field of jurisprudence. A different method of critical reconstruction is needed for legal theories that consider law an autonomous practice. Secondly, further research will reveal how my non-positivist understanding of law legal theory can help to integrate theories from socio-legal scholars and legal philosophers.

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Summary

In European liberal democracies a plurality of legal orders exist. These legal orders are also highly intertwined. The intertwinement of legal orders raises theoretical questions. Lawyers in intertwined legal orders may be confronted with these questions. For example, should legal norms of other legal orders trump domestic constitutional law? And why do judges sometimes rely on the authority of officials of other legal orders when they exercise their authority? Theories of jurisprudence may provide answers to these questions. However, many available legal theories do not provide an adequate account of the complex relations between legal orders. A better understanding of the intertwinement of legal orders may be reached by critically reconstructing theories of jurisprudence. Moreover, by introducing new elements to these legal theories, answers may be formulated to the theoretical questions that are raised by the complex relations between legal orders. Therefore, in this study, I investigate how a critical reconstruction of theories of jurisprudence may contribute to a better understanding of the intertwinement of legal orders in European liberal democracies.

In my view, the intertwinement of legal orders should be defined in terms of interconnection and friction. Interconnections between legal orders exist when a norm of one legal order is incorporated or given effect in another legal order. This also includes giving effect to an interpretation of a legal norm of another legal order. Interconnections also exist when officials rely on the authority of officials of other legal orders. For example, a judge in a domestic legal order may rely on the authority of international courts when reaching his decision. Frictions between legal orders exist when conflicts between norms emerge. Frictions between legal orders also exist when officials reject the authority of officials of other legal orders. Based on examples from positive law, I maintain that the intertwinement of legal orders raises theoretical questions that concern the validity of legal norms and the authority of officials. Many available theories from the analytical, normative and socio-legal traditions of jurisprudence are unable to account for the intertwinement of legal

orders. A critical reconstruction of legal theories may provide more adequate accounts of the intertwinement of legal orders. In this study, I identify the relative strengths and weaknesses of a positivist, interpretive and pragmatist account of the intertwinement of legal orders.

In my positivist account of the intertwinement of legal orders, I critically reconstruct H.L.A. Hart's positivist legal theory. Hart's positivist legal theory should be seen as part of the analytical tradition of jurisprudence. Central to Hart's legal theory is the distinction between primary and secondary rules. Primary rules create obligations and are followed by citizens. Secondary rules are followed by officials. Officials follow rules of recognition to identify valid primary rules. They follow rules of adjudication when disputes concerning primary rules are resolved. Officials follow rules of change when new primary rules are introduced. In my positivist account of the intertwinement of legal orders, I introduce the notion of rules of external recognition to explain why norms of other legal orders are incorporated or given effect. Conflicts between norms of different legal orders may be resolved on the basis of the rule of recognition. However, in my positivist account of the intertwinement of legal orders, it is unclear how conflicts between norms of different legal orders are resolved that are valid simultaneously. Moreover, it is unclear how relations between officials of different legal orders should be explained in my positivist account of the intertwinement of legal orders.

In my interpretive account of the intertwinement of legal orders, I critically reconstruct Ronald Dworkin's interpretive legal theory. Dworkin's legal theory should be situated in the normative tradition of jurisprudence. Dworkin's interpretive legal theory centers on the idea that we interpret legal norms in light of the value of integrity. The value of integrity requires lawyers to interpret legal norms consistently in light of existing law and coherent in light of the values of political morality. In my interpretive account of the intertwinement of legal orders, I argue that integrity should be understood as a constructive filter. The value of integrity explains how legal norms of other legal orders are made consistent in light of existing law and coherent in light of the values of political morality of a legal order. The notion of integrity also explains why officials may accept or contest the authority of officials of other legal orders. Officials of different legal orders may be part of a

practice in which they share their authority. However, persistent conflicts between legal norms or persistent contestation of the authority of officials remains unexplained in my interpretive account.

My pragmatist account of the intertwinement of legal orders is critically reconstructed on the basis of the pragmatist legal theories of Karl Llewellyn and Philip Selznick. Llewellyn and Selznick's legal theories are best considered part of the socio-legal tradition of jurisprudence. In Llewellyn and Selznick's legal theories law is understood as a social practice that contributes to social ordering and is oriented towards legal values and ideals. Based on the work of Lon Fuller, I maintain that legal norms are rooted in interactional expectations. In my pragmatist account of the intertwinement of legal orders, I argue that legal orders should be understood as interconnected sub-practices. Legal norms and officials of different sub-practices may have normative force in light of the interactional expectations and the values of a legal order. In my pragmatist account, the interconnections between legal orders is an implicit practice. The boundaries between different legal orders emerge when conflicts between legal norms arise or when the authority of an official is contested. A weakness of my pragmatist account of the intertwinement of legal orders, is that it blurs the notion of legal order.

My positivist, interpretive and pragmatists accounts of the complex relations between legal orders have relative strengths and weaknesses. In the last part of this research, I construct a more convincing understanding of the intertwinement of legal orders based on my interpretive and pragmatist accounts. I maintain that validity is best understood as a contestable notion in which justificatory and interactional dimensions should be distinguished. Moreover, I also argue that the authority of officials should be understood in content-dependent terms. Officials of different legal orders may be part of a shared practice. Officials exercise their authority in light of the interactional expectations and values of his legal order and these shared practices.

Samenvatting

Europese liberale democratieën worden gekenmerkt door een pluraliteit aan rechtsordes. Deze rechtsordes zijn in toenemende mate met elkaar vervlochten. De vervlechting van rechtsordes roept theoretische vragen op waar juristen in deze rechtsordes mee geconfronteerd kunnen worden. Dienen bijvoorbeeld rechtsregels van andere rechtsordes voorrang te hebben op grondwettelijke normen? En waarom baseert een rechter zich soms op het gezag van rechterlijke organen in andere rechtsordes? Rechtstheorieën kunnen antwoorden op deze vragen bieden. Echter, veel huidige rechtstheorieën hebben onvoldoende oog voor de complexe relaties tussen rechtsordes. Een kritische reconstructie van deze rechtstheorieën kan bijdragen aan een beter begrip van de vervlechting van rechtsordes. Door nieuwe elementen toe te voegen aan bestaande rechtstheorieën kunnen antwoorden geformuleerd worden op de theoretische vragen die de complexe relaties tussen rechtsordes oproepen. In dit proefschrift onderzoek ik daarom hoe een kritische reconstructie van huidige rechtstheorieën kan bijdragen aan een beter begrip van de vervlechting van rechtsordes in Europese liberale democratieën.

In dit onderzoek definieer ik de vervlechting van rechtsordes als de interconnectie en frictie tussen rechtsordes. Interconnecties tussen rechtsordes bestaan wanneer rechtsregels worden geïncorporeerd of toegepast uit een andere rechtsorde. De interpretatie van een norm uit een andere rechtsorde kan ook worden toegepast. Interconnecties tussen rechtsordes bestaan ook wanneer overheidsorganen zich beroepen op het gezag van overheidsorganen uit andere rechtsordes. Een nationale rechter kan zich bijvoorbeeld beroepen op rechtspraak van internationale rechterlijke organen. Fricties tussen rechtsordes ontstaan wanneer rechtsregels van verschillende rechtsordes conflicteren of wanneer overheidsorganen het gezag van organen uit andere rechtsordes afwijzen. Aan de hand van voorbeelden uit het positieve recht betoog ik dat de vervlechting van rechtsordes theoretische vragen oproept over de geldigheid van rechtsregels en het gezag van overheidsorganen. Bestaande rechtstheorieën uit de analytische,

normatieve en sociologische tradities binnen de rechtsfilosofie kunnen de complexe relaties tussen rechtsordes niet afdoende verklaren. Echter, door bestaande rechtstheorieën kritisch te reconstrueren, kunnen betere verklaringen voor de vervlechting van rechtsordes gevonden worden. In dit onderzoek identificeer ik de sterke en zwakke aspecten van een positivistische, interpretatieve en pragmatische verklaring van de vervlechting van rechtsordes.

Een rechtspositivistische verklaring van de vervlechting van rechtsordes construeer ik op basis van de rechtstheorie van H.L.A. Hart. Harts positivistische rechtstheorie dient gesitueerd te worden in de analytische traditie van de rechtsfilosofie. Van groot belang in Harts rechtstheorie is het onderscheid tussen primaire en secundaire regels. Primaire regels creëren juridische rechten en verplichtingen. Deze primaire regels worden gevolgd door burgers. Secundaire regels worden gevolgd door overheidsorganen. Op basis van herkenningregels kunnen overheidsorganen geldige primaire regels identificeren. Geschillen over primaire regels worden opgelost op basis van rechtspraakregels. Nieuwe primaire regels worden gemaakt op grond van veranderingsregels. In mijn rechtspositivistische verklaring van de vervlechting van rechtsordes introduceer ik het begrip externe herkenningregels. Externe herkenningregels verklaren waarom rechtsregels uit andere rechtsordes geïncorporeerd of toegepast worden. Conflicten tussen rechtsregels binnen in een rechtsorde kunnen opgelost worden op basis van herkenningregels. Echter, het is onduidelijk hoe conflicten opgelost worden tussen rechtsregels die in verschillende rechtsordes geldig zijn. Een ander zwak aspect van mijn rechtspositivistische verklaring van de vervlechting van rechtsordes ziet op overheidsorganen. Relaties tussen overheidsorganen van verschillende rechtsordes kunnen niet goed verklaard worden in een rechtspositivistische verklaring.

Een interpretatieve verklaring van de vervlechting van rechtsordes construeer ik aan de hand van de rechtstheorie van Ronald Dworkin. Dworkins interpretatieve rechtstheorie behoort tot de normatieve traditie binnen de rechtsfilosofie. In zijn rechtstheorie stelt Dworkin dat we rechtsregels toepassen in het licht van het ideaal van integriteit. Het ideaal van integriteit houdt in dat de toepassing van een rechtsregels consistent dient te zijn en gerechtvaardigd in het licht van de onderliggende waarden van het recht. In mijn interpretatieve verklaring

van de vervlechting van rechtsordes betoog ik dat integriteit begrepen moet worden als een constructieve filter. Het ideaal van integriteit verklaart hoe rechtsregels consistent gemaakt worden in het licht van het geldende recht en coherent op basis van de onderliggende waarden van een rechtsorde. De notie van integriteit als constructieve filter kan ook verklaren waarom overheidsorganen het gezag van andere overheidsorganen accepteren of afwijzen. Overheidsorganen van verschillende rechtsordes kunnen deel uitmaken van een gedeelde praktijk waarin zij gezag delen. Een zwak aspect van mijn interpretatieve verklaring is de afwezigheid van een overtuigende uitleg van aanhoudende conflicten tussen rechtsregels en onenigheid over het gezag van overheidsorganen van andere rechtsordes.

In mijn pragmatische verklaring van de vervlechting van rechtsordes staan de pragmatische rechtstheorieën van Karl Llewellyn en Philip Selznick centraal. De rechtstheorieën van Llewellyn en Selznick behoren tot de sociologische traditie in rechtsfilosofie. Llewellyn en Selznick menen dat het recht begrepen moet worden als een sociale praktijk. Recht is zowel een ordeningsmechanisme, als een praktijk waarin waarden en idealen ingebed zijn. Op basis van het werk van Fuller betoog ik tevens dat in een pragmatisch rechtsbegrip interactionele verwachtingen een belangrijke basis vormen voor de normatieve gelding van rechtsregels. In mijn pragmatische verklaring van de vervlechting van rechtsordes betoog ik dat rechtsordes begrepen moeten worden als sub-praktijken die met elkaar verbonden zijn. Rechtsregels en overheidsorganen van verschillende sub-praktijken kunnen normatieve gelding hebben omdat ze aansluiten bij de interactionele verwachtingen en de waarden en idealen binnen een rechtsorde. In mijn pragmatische verklaring is de interactie tussen rechtsordes in beginsel een impliciete praktijk. Het onderscheid tussen verschillende rechtsordes wordt duidelijk als conflicten tussen rechtsregels ontstaan of als het gezag van een overheidsorgaan betwist wordt. Een zwak aspect van mijn pragmatische verklaring is daarom dat het rechtsorde begrip deels vervaagt.

Mijn positivistische, interpretatieve en pragmatische verklaringen hebben relatieve sterke en zwakke punten. In het laatste deel van dit onderzoek bied ik een meer overtuigende verklaring van de vervlechting van rechtsordes door de relatieve

sterke aspecten van mijn interpretatieve en pragmatische verklaringen te synthetiseren. In mijn eigen theoretische verklaring van de complexe relaties tussen rechtsordes dient rechtsgeldigheid opgevat te worden als een betwistbaar begrip. Daarnaast betoog ik dat het gezag van overheidsorganen afhankelijk is van de inhoud van juridische besluiten. Overheidsorganen van verschillende rechtsordes kunnen deel uitmaken van een gedeelde praktijk. Een overheidsorgaan oefent gezag uit in het licht van de interactionale verwachtingen en waarden van zijn eigen rechtsorde en van gedeelde praktijken.

Curriculum Vitae

Thomas Riesthuis (1989) was born and raised in Rotterdam. He studied law and philosophy of science at Erasmus University Rotterdam. During his studies, Thomas worked as a student-assistant at Erasmus School of Law and participated in the Honours Master Class: Research Lab. In 2013, he joined the department of Sociology, Theory and Methodology of Erasmus School of Law to pursue a PhD in law. In his doctoral research, he explored how a critical reconstruction of theories of jurisprudence may contribute to a better understanding of the intertwinement of legal orders. Thomas has been a visiting research student at Queen Mary University of London (2015) and a visiting researcher at the Max Planck Institute for Comparative Public Law and International Law (2017). In 2017, Thomas joined Utrecht University as a lecturer in legal theory.