

## CONTENTS

Acknowledgements .....	v
List of contributors .....	xvii
Abbreviations .....	xxi
Introduction	
Conflict of Laws and Laws of Conflict – An Introduction to the Research Agenda <i>Rainer Nickel</i> .....	1
1. The Need for a New Approach to Supranational and International Law-Making.	1
2. The Development of a Notion of Supranational Conflicts Law .....	4
3. Mapping the Field: Conflict of Laws and Laws of Conflict .....	7
PART I. DELIBERATIVE SUPRANATIONALISM – LAW AND DEMOCRACY IN THE POST-NATIONAL CONSTELLATION .....	11
Chapter 1. Habermas on Constitutional and Social Democracy in the European Union <i>John P. McCormick</i> .....	13
1. EU Democracy as a Solution to Global Problems .....	15
2. The History of the State as a Guide to the Present .....	17
3. Critical-Historical Limits of Habermas’ Theory of EU Democracy .....	23
4. Conclusion .....	30
Chapter 2. Justice or Democracy? Power and Justification in the EU and other International Organizations <i>Jürgen Neyer</i> .....	33
1. Beyond the Democratic Deficit .....	33
2. Transnational Justice as a Right to Justification .....	35
3. Obstacles to Transnational Justice .....	38

4.	Supranationalism as a New Context for Justice. . . . .	40
4.1.	Transforming Bargaining into Legal Reasoning . . . . .	40
4.2.	Safeguarding Executive Responsiveness . . . . .	43
4.3.	Healing the Achilles' Heel . . . . .	44
5.	Multi-Level Legitimacy: Justice and Democracy . . . . .	46
Chapter 3. Can International Public Goods be Supplied without Multilevel Constitutional Democracy and "Constitutional Justice"?		
	<i>Ernst-Ulrich Petersmann</i> . . . . .	49
1.	Introduction and Summary: From Realism to Multilevel Democratic Constitutionalism in International Law . . . . .	49
2.	Cosmopolitan Reasonableness as a Requirement of UN Human Rights Law and European Law. . . . .	55
3.	Citizen-oriented Reasonableness as a Requirement of Constitutional Justice in International Law. . . . .	57
4.	International Courts as Guardians of Public Reason in Modern International Law . . . . .	59
5.	Constitutional Pluralism: Three Different Kinds of Multilevel Judicial Protection of Citizen Rights in Europe . . . . .	62
5.1.	Multilevel Judicial Protection of EC Law has extended the Constitutional Rights of EC Citizens. . . . .	63
5.2.	Multilevel Judicial Enforcement of the ECHR: the Subsidiary "Constitutional Functions" of the ECtHR . . . . .	64
5.3.	The Diversity of Multilevel Judicial Governance in Free Trade Agreements (FTAs): the Example of the EFTA Court . . . . .	69
6.	Lessons from the European 'Solange Method' of Judicial Co-operation for Worldwide Economic and Human Rights Law? . . . . .	72
6.1.	The "Solange method" of Judicial Co-operation among the German Constitutional Court and the EC Court in the Protection of Fundamental Rights. . . . .	75
6.2.	"Horizontal" Co-operation among the EC Courts, the EFTA Court and the ECtHR in Protecting Individual Rights in the EEA . . . . .	78
7.	Conditional "Solange-co-operation" among International Trade and Environmental Courts Beyond Europe? . . . . .	81
7.1.	The OSPAR arbitral award of 2003 on the MOX Plant dispute. . . . .	81
7.2.	The UNCLOS 2001 provisional measures and 2003 arbitral decision in the MOX Plant dispute. . . . .	82
7.3.	The EC Court judgment of May 2006 in the MOX Plant Dispute. . . . .	82
7.4.	The 2004 IJzeren Rijn Arbitration between the Netherlands and Belgium . . . . .	83
7.5.	The "Solange method" as Reciprocal Respect for Constitutional Justice. . . . .	83
8.	Multilevel Judicial Protection of Constitutional Rights as Pre-condition for International Rule of Law and Democratic Supply of 'International Public Goods . . . . .	85

Chapter 4. The European Union and “Otherness”: Can The European Union Reinforce Global Justice? A View from International Law	
<i>Alicia Cebada Romero</i> . . . . .	91
1. Introductory Remarks . . . . .	91
2. The European Union as an “Open” Community. . . . .	93
3. The Ways in Which the EU, as an International Actor, Can Propel Transnational Justice Forward: The Characterisation of the EU as a “Smart” Civilian Power . . . . .	96
4. The Subtle Influence of the European Union – the Pledge for Solidarity . . . . .	100
4.1. The External Side of the European Union’s Social Agenda . . . . .	103
4.2. Examples of the Influence of the European Union: the Latin-American Case. . . . .	106
5. The Problems of the European Union to Stick to its Civilian Power Paradigm. . . . .	110
6. Concluding Remarks . . . . .	112
 Chapter 5. On “Europe’s American Dream”	
<i>John Erik Fossum</i> . . . . .	113
1. Introduction . . . . .	113
2. The “Dream” . . . . .	116
2.1. A New Beginning: The U.S as Polity Model . . . . .	117
2.1.1. Brief Description of the Phenomenon . . . . .	117
2.1.2. Justification for Why Europeans Would See This as Relevant to the EU . . . . .	119
2.2. The “City on the Hill”. . . . .	120
2.2.1. Description of the Phenomenon . . . . .	120
2.2.2. Justification for Why Europeans Would See This as Relevant to the EU . . . . .	121
2.3. The “Words of Power” . . . . .	122
2.3.1. Description of the Phenomenon . . . . .	122
2.3.2. Justification for Why Europeans Would See This as Relevant to the EU . . . . .	123
2.4. A Coherent Model? . . . . .	124
3. The European Union . . . . .	125
3.1. Constitution-making European Style . . . . .	125
3.2. Not the City for Europe . . . . .	127
3.3. The “Power of Words” . . . . .	128
4. Canada – Closer to Europeans’ American Dream? . . . . .	129
4.1. From Counter-Revolution to Charter Revolution . . . . .	129
4.2. Canada – EU: Towards Post-National Convergence? . . . . .	131
4.3. Canada – also Propounds the “Power of Words”. . . . .	132
5. Concluding Reflections . . . . .	133

Chapter 6. European Citizenship and the Disillusion of the Common Man <i>Michelle Everson</i> .....	135
1. Introduction .....	135
2. Maastricht: The False Promise of the Homo Economicus? .....	136
3. The End of Nation and History within European Citizenship .....	139
4. Union Citizenship Fallito (1): Nation and History Bite Back .....	143
5. Union Citizenship Fallito (2): Class Bites Back .....	146
5.1. The Empirical Traces of Class Exclusion .....	146
5.2. The Legal Consolidation of Class Exclusion .....	150
6. The Responsibilities of Legal Method in European Law .....	153
 Chapter 7. About Deliberative Supranationalism, Comitology and other Heroes <i>Ellen Vos</i> .....	 155
1. “Comitology is Our Hero!” .....	155
2. DSN II, Comitology and Foodstuffs .....	159
2.1. Comitology as a Co-operative System .....	159
2.2. The Food Sector .....	160
3. Concluding Remarks: Another Hero .....	164
 Chapter 8. The Significance of General Administrative Law for European Administrative Law <i>Karl-Heinz Ladeur</i> .....	 167
1. The Development of a “Europeanised General Administrative Law” .....	167
1.1. Learning Processes between General and Specific Administrative Law on the National Plane .....	167
1.2. Disruption through European Law? .....	170
2. Europeanised Administrative Law as a Consequence of the Pluralisation of the Public Interest .....	172
2.1. Does the Principle of Effet Utile make the General Administrative Law a <i>Quantité Négligeable</i> ? .....	172
2.2. The Standardisation of General Administrative Law without an “Ordering Principle”? .....	174
2.3. The EC as an Association of States and the Need for a Novel Law of Conflicts .....	175
3. Forms of a General Administrative Law of Open Government .....	179
3.1. EC Law as Conflicts Law: Transnational Administrative Acts .....	179
3.2. A New Supervisory Law for the Delimitation of Divergences amongst the Association of States .....	180
3.3. Mutual Learning inside a Pluralised Administrative Legal Order .....	181
3.4. Differentiation through the Europeanisation of Administrative Law. The Example of the Precautionary Principle .....	183

4.	The “Ordering Idea” of a “Conflicts Law”: Reconstruction of a Europeanised General Administrative Law . . . . .	184
4.1.	A Practical Example for a Productive Irritation of the German Administrative Law through European “Influence” . . . . .	184
4.2.	The Organisation of “Information Networks” as an “Ordering Idea” of a Europeanised Administrative Law . . . . .	186
5.	Synopsis . . . . .	187
Chapter 9. Formalisation or De-formalisation through Governance?		
	<i>Poul F. Kjaer</i> . . . . .	189
1.	Introduction . . . . .	189
2.	The Expansion of Knowledge . . . . .	190
3.	The Evolution of European Science Co-operation . . . . .	191
4.	The European Research Area . . . . .	193
5.	The OMC in Research and Development . . . . .	195
6.	The Function of the OMC . . . . .	197
PART II. TRANSNATIONAL REGULATION AND SOCIETAL CONSTITUTIONALISM:		
CONFLICT OF LAWS OR LAWS OF CONFLICT? . . . . .		201
Chapter 10. The Corporate Codes of Multinationals:		
Company Constitutions Beyond Corporate Governance and Co-determination		
	<i>Gunther Teubner</i> . . . . .	203
1.	Private Juridification: Corporate Codes as Law without the State . . . . .	205
2.	Civic Constitutionalisation: Elements of a Communal Constitution . . . . .	208
3.	International Judicialisation: Corporate Codes in Conflict with State Laws . . . . .	210
4.	Regulatory Hybridisation: The Mixing of Private and Public Policy . . . . .	211
5.	Inter-organisational Co-operation: The Extension of the Corporate Codes into Production Networks . . . . .	212
Chapter 11. Taking Constitutionalism Beyond the State		
	<i>Neil Walker</i> . . . . .	215
1.	Introduction . . . . .	215
2.	The Statist Legacy and the Problem of Definition . . . . .	216
3.	The Frames of Transnational Constitutionalism . . . . .	222
4.	The Five Frames Considered . . . . .	224
5.	The Five Frames in Transnational Context . . . . .	230
6.	The Antinomies of Transnational Constitutionalism . . . . .	233

Chapter 12. Transnational Borrowing Among Judges: Towards a Common Core of European and Global Constitutional Law? <i>Rainer Nickel</i> . . . . .	239
1. Introduction . . . . .	239
2. The U.S. Sonderweg: Parochialism, or the Fight against ‘Juristocracy’? . . . . .	242
3. The New Senator Class in Action: Venice Commissions, Constitutional Court Conferences, and Global Constitutionalism Seminars. . . . .	247
3.1. The Council of Europe and its Venice Commission . . . . .	249
3.2. Networking . . . . .	250
3.3. Academic Support. . . . .	252
4. European Constitutionalism: From Borrowing and Lending to Hierarchisation? . . . . .	253
5. Casework: The Practice of European Constitutionalism . . . . .	256
5.1. The <i>Omega</i> Case (European Court of Justice) . . . . .	256
5.2. The Case <i>Von Hannover v Germany</i> (European Court of Human Rights) . . . . .	258
6. Constitutional Conflicts Law . . . . .	260
 Chapter 13. Regime-Collisions, Proceduralised Conflict of Laws and the Unity of the Law: On the Form of Constitutionalism Beyond the State <i>Florian Rödl</i> . . . . .	 263
1. The “Conflict of Laws” Approach in Constitutionalism Beyond the State . . . . .	263
2. Universalism versus Particularism in Private International Law Theory . . . . .	265
2.1. Classical and Modern Universalism . . . . .	265
2.2. The Political Particularism Prevailing Today. . . . .	268
3. The Form of Conflict of Laws in Constitutionalism beyond the State. . . . .	268
3.1. Fischer-Lescano’s and Teubner’s Law of Regime-Collisions . . . . .	268
3.1.1. Epistemically Grounded Particularism . . . . .	269
3.1.2. The Reason to Submit Regimes to Conflict Rules. . . . .	271
3.1.3. Really an Anti-Universalism? . . . . .	272
3.2. Joerges’ Proceduralised Law of Conflict of Laws . . . . .	274
3.2.1. The Reason to Submit Legal Orders to Conflict Rules. . . . .	274
3.2.2. A Plea against Judicial Dominance. . . . .	275
3.2.3. Underlying Teleological Universalism . . . . .	276
4. Conclusion. . . . .	277
 Chapter 14. The Chameleon State. EU Law and the Blurring of the Private/Public Distinction in the Market <i>Miguel Poiares Maduro</i> . . . . .	 279
1. The Concept of an Undertaking. . . . .	280
2. Article 10 and Competition Rules Granting Public form to Private Behaviour. . . . .	284

3.	Golden Shares .....	287
4.	Conclusion .....	290

PART III. SOCIAL RIGHTS AND SOCIAL JUSTICE –		
CAN “THE SOCIAL” SURVIVE EUROPEAN INTEGRATION? .....		293

Chapter 15. From <i>Effet Utile</i> to <i>Effet Neolibéral</i> A Critique of the New Methodological Expansionism of the European Court of Justice <i>Christoph U. Schmid</i> .....		295
--	--	-----

1.	Introduction .....	295
2.	Judicial Expansionism in the Elaboration of the European Economic Constitution .....	297
3.	Recent Judicial Expansionism Translating into Neoliberal Results .....	299
3.1.	The Court’s Articulation of Fundamental Rights and Market Freedoms .....	300
3.1.1.	Freedom of Services Versus Trade Unions’ Right to Collective action: the Viking, Laval and Rüffert Cases .....	302
3.2.	The Excessive Application of the Pre-emption Doctrine in Secondary Law .....	307
3.2.1.	The Posted Workers Directive .....	308
3.2.2.	The Interpretation of the Posted Workers Directive in <i>Laval</i> and <i>Rüffert</i> .....	310
3.2.3.	Methodological Critique .....	311
3.3.	Evaluation .....	312
4.	A Plea for a New Constitutional Role of the EC in the European Multi-level System .....	313

Chapter 16. Public Service, Autonomy and Community Law <i>Nina Boeger</i> .....		315
--	--	-----

1.	Introduction .....	315
2.	Public Service, Law and Autonomy .....	317
3.	Community Law and the Community “Compact” .....	320
4.	Continental and Anglo-Saxon Public Service Traditions .....	322
5.	Liberalisation and the Community Legislation .....	325
6.	What Public Service Obligations Do and Do Not Do .....	327
7.	Conclusion .....	333

Chapter 17. Services of General Economic Interest (SGEI) and Universal Service Obligations (USO) as an EU Law Framework for Curative Health Care <i>Wolf Sauter</i> .....		335
---	--	-----

1.	Introduction .....	335
1.1.	Article 86(2) as an Exception to the Treaty Rules for Undertakings .....	335
1.2.	The Research Question in Detail .....	336

1.3.	Scope	337
1.4.	Structure	337
2.	The Legal Basis and Basic Purpose of Article 86(2)	337
2.1.	Legal Basis	337
2.1.1.	Article 86 EC	337
2.1.2.	Article 16 EC	338
2.1.3.	Article 36 Charter on Fundamental Rights	340
2.2.	The Role and Structure of Article 86 EC	340
3.	The Debate on Services of General Economic Interest	342
3.1.	Scope of the Debate	342
3.2.	Position on Services of General Economic Interest of the Main Actors	344
3.2.1.	Commission	344
3.2.2.	Member States	345
3.2.3.	The Court of Justice	345
4.	Definition Issues	346
4.1.	Overlapping and Incomplete Definitions	346
4.1.1.	Focus on Services of General Economic Interest and Universal Service Obligations	347
4.2.	The Lack of a Definition of Services of General Economic Interest	347
4.2.1.	Act of Entrustment	349
4.2.2.	Existence Derived from Broader Legal Context	350
4.3.	The Definition of Universal Service	350
5.	Services of General Economic Interest, Universal Service Obligations and Market Failure	353
5.1.	Examples of Universal Service Defined at EU Level	353
5.1.1.	Natural Gas	353
5.1.2.	Electricity	353
5.1.3.	Postal Services	354
5.1.4.	Electronic Communications	354
5.2.	Services of General Economic Interest in Relation to Universal Service Obligations	355
5.2.1.	Proportionality	355
5.2.2.	Public Service Compensation	356
5.3.	Services of General Economic Interest and Market Failure	357
6.	Scope of the Article 86(2) EC Exemption	359
6.1.	The Concepts of Undertaking and Solidarity	360
6.1.1.	Undertakings	360
6.1.2.	Solidarity	361
6.1.3.	Rule of Reason	362
6.2.	EU Law Rules Affected by Article 86(2) EC	362
6.3.	Proportionality and Pre-emption	363
6.4.	A Three Step Approach	366
6.4.1.	Choice of Organisation	367



7.	Compensation for Public Service Obligations . . . . .	368
7.1.	Four-Part Test . . . . .	368
7.2.	The Commission Notice and Decision . . . . .	369
8.	Particular Reasons for Researching Services of General Economic Interest in Hospital Care . . . . .	370
9.	Conclusion . . . . .	373
PART IV. CONCLUSIONS . . . . .		375
Chapter 18. Integration Through Conflicts Law. On the Defence of the European Project by Means of Alternative Conceptualisation of Legal Constitutionalisation		
	<i>Christian Joerges</i> . . . . .	377
1.	Introduction . . . . .	377
2.	Structuring the Argument . . . . .	378
3.	The Social Deficit within the Integration Project . . . . .	379
3.1.	The De-Coupling of the Economic from the Social Constitution . . . . .	379
3.2.	Europe as Agent of Reform . . . . .	381
4.	The De-coupling of Economic and Social Constitutions as a Challenge to Law . . . . .	382
4.1.	The Internal Market as Agent of Inter-statal Redistribution . . . . .	383
4.2.	The De-Coupling of the Social from the Economic Constitution as a “Social” Integration Compromise . . . . .	385
4.3.	The Project of the Constitutional Treaty . . . . .	387
5.	The Conflicts Law Alternative . . . . .	389
5.1.	European Law as Supranational Conflicts Law . . . . .	389
5.2.	Exemplary Application . . . . .	392
5.2.1.	<i>Viking</i> and the Relationship between Economic and Labour Law . . . . .	393
5.2.2.	<i>Viking</i> and the Strike as a Social Right . . . . .	395
5.2.3.	<i>Laval</i> and the Limits to the Doctrine of Pre-emption . . . . .	395
5.2.4.	<i>Rüffert</i> and the Determination of the Purpose of National Laws . . . . .	398
5.3.	The ECJ as <i>Pouvoir Constituant</i> ? . . . . .	399
6.	Conclusion . . . . .	399