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Master's Thesis

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A NORMATIVE ASSESSMENT OF THE LEGAL PHILOSOPHY OF THE  
EUROPEAN UNION USING THE *GRUNDNORM* THEORY OF HANS KELSEN

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I have written the Master's thesis independently.

All works and major viewpoints of the other authors, data from other sources of literature and elsewhere used for writing this paper have been referenced.

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## ABSTRACT

This thesis assesses the normative basis of the law of the European Union according to selected theories of legal and ethical philosophy. Firstly it employs the methodology of legal theorist Hans Kelsen, who envisioned a legal order as a hierarchy of norms with a central norm or *Grundnorm* at the peak of this hierarchy. Ten such norms are identified within the EU Treaties and related documents, and encompass values such as the ‘promotion of peace’, the ‘rule of law’ and ‘democracy’. However, an examination of the jurisprudential approach of the Court of Justice, which occupies a prominent place in the constitutional law of the EU legal order alongside the Treaties, suggests that the *Grundnorm* of the EU law is of a functional nature, and is chiefly concerned with the establishment and maintenance of the European Common Market. An assessment of this *Grundnorm* using the contrasting ethical theories of Kantianism and utilitarianism suggests that the legal philosophy of the European Union is thus *consequentially* ethical, as the European Common Market brings many benefits, but it is not primarily governed by the protection of *deontological* values, with these values consistently subordinated to the Common Market *Grundnorm*. It is then suggested that the functional basis of this *Grundnorm* will create problems for the ethical legitimacy of the EU legal order in the longer term; it has been constructed in this way by the Court of Justice due to the identity crisis of the Community as caused by the on-going democratic deficit. Thus an ideal *Grundnorm* for the EU legal system should have a core basis in ethical values, especially those relating to democracy, human rights and the rule of law.

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## 1. Introduction

### 1.1 Purpose and structure of thesis

The European Union has a population of over 500 million citizens, with the legal system having a sizeable impact on virtually every aspect of their lives. Furthermore, the long-standing principle of supremacy<sup>1</sup>, as established by *Costa v ENEL*<sup>2</sup>, means that where there is a conflict between European Union law and the national law of a Member State, EU law must take primacy.<sup>3</sup> In addition to this highly pervasive influence of EU law internally, the European Union has increasingly played the role of a normative power on the international stage.<sup>4</sup> Thus understanding the EU legal system has a truly ethical core is an extremely important area of inquiry.

This thesis will identify and evaluate the normative basis of the legal system of the European Union using the tools of legal and ethical philosophy, as well as make tentative suggestions as to how this basis might develop in the future. Initially, it will do this by analysing the constitutional sources of EU law, chiefly the EU Treaties and related documents, as well as the jurisprudence of the Court of Justice of the European Union (CJEU)<sup>5</sup>. This analysis will be performed using the theories of legal philosopher Hans Kelsen, who viewed the basis of a legal order as a normative hierarchy with a central norm or *Grundnorm* at its peak. Ten underlying normative values are identified in the Treaties and related documents, including norms such as the *promotion of peace*, *supranationality*, the *rule of law*, the *Common Market*, *associative human rights* and *democracy*. It will be noted that identifying the *Grundnorm* from amongst these core principles requires an examination of the jurisprudence of the CJEU, due to the centrality of this court within the EU legal order. Using the Court's jurisprudence, the

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<sup>1</sup> See Roman Kwiecień, 'The Primacy of European Union Law over National Law Under the Constitutional Treaty', *German Law Journal*, 6.11 (2005), 1479-1496.

<sup>2</sup> *Flaminio Costa v ENEL* [1964] ECR 585 (6/64)

<sup>3</sup> Alan Dashwood, Michael Dougan, Barry Rodger, Eleanor Spaventa and Derrick Wyatt, *Derrick, Wyatt and Dashwood's European Union Law*, 6<sup>th</sup> edn., (Oxford: Hart Publishing, 2011), pp. 270-278

<sup>4</sup> Helene Sjursen 'The EU as a normative power: how can this be?' *Journal of European Public Policy*, 13.2 (2006), (p.235).

<sup>5</sup> The European Court of Justice or the ECJ, officially the *Court of Justice*, is a component part of the three courts of the CJEU.

*Grundnorm* of the EU legal order will be defined; it will be shown that this *Grundnorm* has a *functional* rather than a *values-based* orientation, and is related chiefly to the establishment and operation of the *Common Market*.

The identified *Grundnorm* will then be assessed according to two leading theories of ethical philosophy – the *categorical imperative* of Immanuel Kant and the *utilitarianism* of John Stuart Mill. This assessment will suggest that the *Grundnorm* of EU law is more congenial to *consequentialist* utilitarians than it is to *deontological* Kantians. The shortcomings of the consequentialist philosophy will then be discussed, with the suggestion that the *Grundnorm* of the European Union be developed towards a more Kantian emphasis, specifically via addressing the long-standing and still-existent democratic deficit of the Community. A new *Grundnorm* of the European Union law will then be proposed; a *Grundnorm* with a deontological emphasis on democracy, human rights and the rule of law.

## 1.2 Background: The European Union as a normative power

Professor Ian Manners of the University of Copenhagen has stated:

‘The EU has been, is and always will be a normative power ...’<sup>6</sup>

Similarly Knud Jørgensen and Katie Laatikainen observe;

‘...the EU’s self-image is characterised by a curious blindness to own interests. Instead, the Union tends to present itself as a force for goodness in international society.’<sup>7</sup>

This viewpoint regards the aims of the European Union as an international actor as the promotion of ‘normative principles that are ... universally applicable.’<sup>8</sup> The European Union has been described as ‘Kantian’ power, especially when contrasted with the

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<sup>6</sup> Ian Manners, ‘The normative ethics of the European Union’, *International Affairs*, 84.1 (2008), 65-80(p.65)

<sup>7</sup> Jørgensen, Knud and Laatikainen, Katie ‘The EU and the UN: multilateralism in a new key?’, *Second Pan-European Conference on EU Politics: ‘Implications of a Wider Europe: Politics, Institutions and Diversity* (Bologna: University of Bologna, 2004), p. 15

<sup>8</sup> Manners, ‘The normative ethics of the European Union’, p. 66



‘Hobbesian’ / ‘might makes right’ United States of America<sup>9</sup> or the Realpolitik oriented Russian Federation.<sup>10</sup>

There are a number of arguments supporting this opinion. Firstly, unlike most nation states or military alliances such as the North Atlantic Treaty Organization (NATO), the EU has historically lacked military instruments (although this is no longer the case), and thus tends to take a ‘civilising’ rather than coercive role.<sup>11</sup> In other words, even though it now has military capabilities, the EU still prefers ‘soft’/ ‘civilian’ instruments of negotiation and persuasion, rather than the use or threat of force.<sup>12</sup> Yet it must be noted that the EU has no qualms about employing ‘soft’ coercive instruments such as economic sanctions both internally<sup>13</sup> and externally<sup>14</sup>.

Furthermore, the preference for civilian over military instruments does not in of itself establish as an ‘ethical’ institution. Proponents of the ‘just war’ theory argues that acts of collective violence can be ‘moral’<sup>15</sup>, while the existing framework of international law permits acts of force under certain circumstances.<sup>16</sup> For example Article 51 of the United Nations Charter recognises the ‘inherent right’ of ‘individual or collective self-defence’ if a Member country of the UN is experiences an ‘armed attack.’ Articles 39 to 42 of the Charter permit the UN Security Council to authorise the use of force where there is a ‘threat to the peace, breach of the peace, or act of aggression.’ Helene Sjursen comments:

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<sup>9</sup> Sjursen, p.238

<sup>10</sup> See James Headley, ‘Is Russia out of step with European norms? Assessing Russia’s Relationship to European Identity, Values and Norms through the Issue of Self-Determination’, *Europe-Asia Studies*, 64.3 (2012), 427-447.

<sup>11</sup> Richard Sakwa, ‘Looking for a greater Europe: From mutual dependence to an international regime’, *Communist and Post-Communist Studies*, 45 (2012), 315-325

<sup>12</sup> *Ibid.*, pp.238-240

<sup>13</sup> Jonas Tallberg, ‘Paths to Compliance: Enforcement, Management, and the European Union’. *International Organization*, 56.3 (2002), 609–643 (p.9)

<sup>14</sup> ‘European Council focuses on Ukraine crisis and further sanctions’, *European Council*, <<http://www.european-council.europa.eu/home-page/highlights/european-council-focuses-on-ukraine-and-further-sanctions?lang=en>> [accessed 26 September 2014]

<sup>15</sup> See Grotius, Vattel, Vitoria and Suarez in *The Classics of International Law*. ed. by James Brown Scott (Washington: Carnegie Institution, 1912)

<sup>16</sup> Nicholas Tsagourias, ‘Necessity and the Use of Force: A Special Regime’, *Netherlands Yearbook of International Law*, 41.2 (2010)

‘What if important norms are clearly and systematically broken? Would this not provoke a responsibility to react rather than to look the other way?’<sup>17</sup>

This viewpoint is perhaps particularly relevant when we consider the current (2014) crisis in the Ukraine, where the EU response has been described as ‘toothless’ and ‘feeble’.<sup>18</sup> In other words, many believe a more strongly coercive response to Russian aggression to be more normatively valid than the current ‘realist’ policy.<sup>19</sup>

A second argument in favour of a ‘normative’ EU is located in an evaluation of the EU external policy. Some observe that EU enlargement policies, particularly with regard to former Soviet bloc countries, are primarily motivated by what ‘ought’ to be done, rather than pragmatism or self-interest.<sup>20</sup> Yet sceptics note that, for example, the EU’s promulgation of human rights in third countries also tend to align with their strategic interests.<sup>21</sup> This potential criticism of ‘hypocrisy’, whether justified or not, does diminish the strength of this argument as a primary indicator of the ethical basis of the European integration project.<sup>22</sup>

Instead, this thesis suggests that the ethical legitimacy of the European Union be evaluated via a study of the core principles of its legal system. Helene Sjursen notes:

‘There is always a risk that actors will follow their own interests even if they know this may harm others, or suspect that others do so, even if they say the opposite. In order to avoid such risks, common rules are necessary. **The law functions as a system of action that makes it possible to implement moral duties** or commitments ... **To ‘act in a normative way’ would be to act in accordance with legal principles** ... The pursuit

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<sup>17</sup> Sjursen, p. 239

<sup>18</sup> Ewen MacAskill, Shaun Walker and Dan Roberts, ‘US rejects criticism of ‘toothless’ sanctions following Crimea referendum’, *The Guardian*, 18 March 2014, <<http://www.theguardian.com/world/2014/mar/17/us-eu-sanctions-russia-ukraine-crimea-referendum>> [accessed 26 September 2014]

<sup>19</sup> Ian Klinke, ‘Postmodern Geopolitics? The European Union eyes Russia’, *Europe-Asia Studies*, 64.5 (2012), 929-947

<sup>20</sup> Sjursen, p. 239

<sup>21</sup> Ibid.

<sup>22</sup> See Licinia Simão, ‘Discursive differences and policy outcomes: EU-Russia relations and security in Europe’, *Eastern Journal of European Studies*, 2.1 (2011), 81-95 for a discussion of the Russian critique of the ‘normative’ nature of EU enlargement policy.

of norms would be legitimate in the sense that it would be **consistent with agreed legal norms.**'

The conceptualisation of the supranational European law as a normative force can be traced to the very early days of European integration. Walter Hallstein, the first President of the European Commission, commented:

'The European Economic Community is a remarkable legal phenomenon. It is a creation of the law; it is a source of law; and it is a legal system.'<sup>23</sup>

Additionally, he upheld the uniqueness of the EU legislative project:

'We have tried to rise above the legal forms and traditions of the past. Many would no doubt call our attempt "revolutionary", and it may well be that future generations will come to regard the philosophical and legal concept underlying Europe's constitution as the most creative achievement in the evolution of jurisprudence in our age, and perhaps even the most original feature in our effort to integrate Europe.'<sup>24</sup>

Hallstein thus interpreted Community law as both a driver and a result of European integration. The EU legal order is completely central to the identity of the European supranational community. Thus in our evaluation of ethical basis of the legal philosophy of the European Union we are, at least to some extent, evaluating whether the European Union *itself* is a truly ethical and normatively-based undertaking.

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<sup>23</sup> Henriette Müller, 'The Point of No Return: Walter Hallstein and the EEC Commission between Institutional Ambitions and Political Constraints', *Les Cahiers européens de Sciences* (2012) Paper No. 03/2012 (p. 10)

<sup>24</sup> *Ibid.*, p. 9

## 2. Theoretical approach

### 2.1 Selected theories

This section describes the main legal and ethical philosophical theories that will be employed by this thesis. They are:

- Positivism
- Hans Kelsen's 'Pure Theory of Law'
- The ethical theories of the 'categorical imperative' and 'utilitarianism'

### 2.2 Positivism versus Natural law

In legal scholarship there are two major approaches to understanding what, in philosophical terms, law actually *is*. These are the *natural law* theory and *positivism*.

The *natural law* theory has ancient origins, originating in the *Summa Theologica* of the medieval theologian Thomas Aquinas. Under the natural law theory, law is the rational standard for conduct. It provides a set of standards for rational agents to guide their choices. Anything at odds with these standards is not law but simply invalid – no law at all.<sup>25</sup> By contrast *positivism* believes in 'the separation, or at least the separability, of law and morals'<sup>26</sup>, or in other words, the existence and content of law is dependent on social facts, rather than its moral merit.

With regard to human rights within the natural law system, natural law theorist John Finnis argues that natural law starting with Aquinas upholds that 'there are rights which every member of our species is entitled to: human rights.'<sup>27</sup> For natural law theorists *intrinsic rights arise from nature and are universal*.

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<sup>25</sup> Mark Murphy, 'Natural Law Jurisprudence', *Legal Theory*, 9 (2003), 241-267, p. 244

<sup>26</sup> Murphy, p. 244

<sup>27</sup> As summarized in Brian Tierney, 'Natural Law and Natural Right: Old Problems and Recent Approaches', *The Review of Politics*, 64.3 (2002), 389-406, p. 391.

This differs from the positivist approach, where rights are defined as freedoms we give up so as to be bound by the law, in accordance with the benefits we receive as part of the social contract. As the early positivist Thomas Hobbes wrote:

‘RIGHT consists in liberty to do, or to forbear; whereas LAW determines and binds ... so that Law and Right differ as much as obligation and liberty ...’<sup>28</sup>

This thesis will follow a *positivist* understanding of what law really is. In other words, this thesis accepts that the posited law of the European Union in the Treaties, related documents and Court of Justice jurisprudence can be described as *law* however this *posited law* may or may not be *moral* or *ethical*. This is not so much a rejection of the natural law theory but essentially a choice of convenience – positivism allows us both to identify the underlying normative structure of the EU legal order and thus assess it independently according to ethical theories. Thus a positivist approach has been selected over natural law primarily due to simpler semantics.<sup>29</sup>

It should also be noted however that the natural law concept that morality and ethics ultimately arise from ‘nature’ – that they have a metaphysical basis and are not merely social constructs – is broadly accepted by this thesis. This means, for example, that certain rights are indeed ‘natural’ and ‘fundamental’ and cannot be denied to individuals in any ethical legal system. This approach contrasts with the purely ‘scientific’ / materialist approach to defining law as advanced by the Nordic school legal philosophers such as Axel Hägerström.<sup>30</sup>

### 2.3 Hans Kelsen’s ‘Pure Theory of Law’: Norms and the *Grundnorm*

There are a number of theoretical frameworks that can be applied to identifying the core principles of a legal system. These encompass theories as diverse as the linguistic

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<sup>28</sup> Thomas Hobbes, *Leviathan*. (Hamilton: McMaster University Archive Edition, 1651), p. 80. The spelling of the quote has been modernized.

<sup>29</sup> See Constanze Semmelmann, ‘General Principles of EU Law: The Ghost in the Platonic Heaven in Need of Conceptual Clarification’, *Pittsburgh Papers on the European Union*, Volume 2, (August 2013), PPEU 2013.7 for how the CJEU has evolved from a natural law to positivist understanding of EU Law.

<sup>30</sup> For an overview of these theories see Stig Strömholm, ‘Scandinavian realism’, *European Review*, 2.3 (1994) 193-199.

positivistic approach of HLA Hart<sup>31</sup>, the interpretivism of Ronald Dworkin<sup>32</sup>, even legal anthropological approaches which view legal principles as ultimately being socially constructed.<sup>33</sup> However the selected and central methodological approach for this thesis is that of legal theorist Hans Kelsen.

Hans Kelsen's theory of law is known as 'The Pure Theory of Law.'<sup>34</sup> The emphasis of his theory lies in the concept of the *norm* as the *a priori* element of all law, with all other elements, including the posited law itself, being mere appendages.

A *norm* is broadly defined as a statement of 'ought-ness', for example if someone commits murder they *ought* to be punished with life imprisonment, or laws enacted by a national parliament *ought* to be permitted by the national constitution. Thus norms in Kelsen's system can have either a functional or ethical orientation.<sup>35</sup>

Kelsen believed that these underlying can be ranked with differing degrees of primacy, thus forming a changeable and expandable hierarchy, called a *Stufenbau*. At the peak of a hierarchy of norms or normative order is the *Grundnorm*.

The *Grundnorm* is the central normative principle of a legal order; the dominant norm to which all the other norms in that order are subordinate to and ultimately derive their validity from.<sup>36</sup> Thus the *Grundnorm* is the very foundation of a posited legal order, *the ultimate purpose and aim of a system of law*.

A notable example of a *Grundnorm* is from Kelsen himself; he identified the *Grundnorm* or 'fundamental value' of the order of international law as 'peace'.<sup>37</sup> As we

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<sup>31</sup> Scott Shapiro, 'The "Hart -Dworkin" debate: A Short Guide for the Perplexed', *Public Law and Legal Theory*, (March 2007), Working Paper No.77

<sup>32</sup> Robert George, 'Natural Law, the Constitution, and the Theory and Practice of Judicial Review', *Fordham Law Review*, 69.6 (2001), 2269-2283

<sup>33</sup> Simon Roberts, *Order and Dispute: An Introduction to Legal Anthropology*, 2<sup>nd</sup> edn., (London: Quid Pro Books, 2013)

<sup>34</sup> Hans Kelsen, *The Pure Theory of Law*, trans. by M. Knight (Berkeley: University of California Press, 1967)

<sup>35</sup> Jörg Kammerhofer, 'Kelsen – Which Kelsen? A Reapplication of the Pure Theory to International Law', *Leiden Journal of International Law*, 22 (2003), 225-249

<sup>36</sup> Kammerhofer, p. 242

<sup>37</sup> Noberto Bobbio and Danilo Zolo, 'Hans Kelsen, the Theory of Law and the International Legal System: A Talk', *European Journal of International Law*, 9 (1998), 355-367, p. 4

shall see, this somewhat foreshadows our Kelsenian analysis of the legal order of the European Union.<sup>38</sup>

The concept of the *Grundnorm* has been criticised for being overly simplistic.<sup>39</sup> For example, a popular contrasting approach to Kelsen in current scholarship, particularly with regard to EU law, is the pluralist model.<sup>40</sup> A pluralist model conceives of the European Union legal order as consisting of ‘multiple, unranked, legal sources’<sup>41</sup>. Proponents of this theory argue that, for example, the various interrelated claims of supremacy made by the CJEU for EU law and the Court of Justice itself within the EU legal order are often disputed by national supreme courts; thus there are inconsistent rules of recognition within EU law.<sup>42</sup> The EU legal system must therefore be understood as ‘pluralist’ rather than monist as it is in Kelsen’s theory.

Yet this approach, although useful in many ways, ignores the admittedly highly theoretical concept of *legal validity*. This is best illustrated by example. Judge Smith *believes* that statement x is legally valid. Judge Jones *believes* that statement x is not legally valid. Although such a situation might seemingly reflect ‘inconsistent rules of recognition’ as supported by the pluralist theory, this implicitly subordinates the validity of a legal norm to the opinion of a judge; in other words the concept of legal validity is robbed of all pragmatic use. Legal validity becomes “legal validity”; it can only be understood *subjectively*. Rather *legal validity*, if it is to be a meaningful concept at all, is an *objective* truth that is *recognised* by a judge. So in this example either Judge Smith or Judge Jones must be mistaken, although in practical terms it may be uncertain as to which judge is wrong.<sup>43</sup>

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<sup>38</sup> Richard Latta, ‘Hans Kelsen and the Bindingness of Supra-National Legal Norms’, *Thesis*, (Atlanta: Georgia State University, 2012), p. 12

<sup>39</sup> *Ibid.*

<sup>40</sup> See for example Nicholas Barber, ‘Legal Realism, Pluralism and Their Challengers’, *Oxford Legal Studies*, Research Paper No.76/2012 (2012) and Nicholas Barber, ‘Pluralism and the European Union’, *European Law Journal*, 12.3 (2006), 306–32.

<sup>41</sup> Barber, ‘Pluralism and the European Union’, p. 1

<sup>42</sup> *Ibid.*, p. 18

<sup>43</sup> Alexander Somek, ‘Kelsen Lives’, *The European Journal of International Law*, 18.3 (2007), 409-451, (pp.424-25)

For Kelsen, validity within a legal order is ‘one and indivisible.’ *As there is only one legal validity there can only be one legal system.* For Kelsen, the indivisible nature of legal validity suggests that a legal order always possesses an underlying normative structure, and by extension a dominant norm giving validity to that structure, the *Grundnorm*.<sup>44</sup>

The rejection of legal validity as an objective concept by pluralists suggests that they are not really talking about law *per se* but rather how legal structures actually work in the ‘real world’. This is of course an extremely important area of inquiry, but not congenial to the purposes of this thesis, which as noted is primarily concerned with answering a normative question ‘in’ law rather than ‘about’ law. Alexander Somek has commented with regard to the pluralist theory;

‘...alleged legal structures (in pluralist thought) internally cease to have normative force. Instances of pluralism yield evidence that strategies of regime-management involve the hybrid mixing of rules of thumb, technical expertise and processes of mutual accommodation. **Their operation may not be susceptible to construction in legal terms.**’<sup>45</sup>

If the Kelsenian concept of a single legal validity is accepted over and against the pluralist approach, then this suggests the underlying normative basis of a legal system can in fact be identified, and is thus not ultimately dependent on the views of a Court or similar adjudicating body. Thus if EU law truly has an underlying normative structure, then the question as to whether the EU legal order has an ultimate ethical basis can be given an answer with at least some degree of objective certainty.

Yet at the same time it is not claimed that Kelsen’s theory offers the only, or even necessarily the best, explanation of the nature of the EU legal philosophy. The primary reason for the selection of Kelsen over and above competing legal theories is that the ‘toolbox’ that his theory provides is highly congenial for the purposes of this thesis, which is to gain insight into the underlying *normative* framework of the EU legal

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<sup>44</sup> Somek, p. 425

<sup>45</sup> Ibid.



system.<sup>46</sup> Recall that for Kelsen the posited law always has a derivative nature; it is always reliant on an underlying norm that can always be ranked. Even if the *concept* of the Kelsenian norm, with the associated *Grundnorm*, is wholly or partially rejected, surely this analytical framework does at least give some insight into the overall normative basis of the European Union legal project which, as noted above, continually makes claims about its normative basis of ‘goodness’. Kelsen gives us a persuasive, rather than a definitive, answer as to the core normative basis of EU law; it is acknowledged that other theories may ‘model’ the legal system of the EU in a more ‘realistic’ fashion, yet these lack Kelsen’s primary focus on the *norm* as the basic unit of a posited legal system.

## 2.4 Ethical theories

Once the *Grundnorm* of EU law is identified, our positivist approach separating law and morality allows us to assess it using the two most prominent theories of ethics to answer the research questions; they are the *categorical imperative* and *utilitarianism*.

### 2.4.1 The *categorical imperative*

The *categorical imperative* was originally articulated by eighteenth century philosopher Immanuel Kant in his book *Critique of Practical Reason*.<sup>47</sup> Kant defined the moral worth of an action is in its accordance with the ‘conception of law in itself.’ The effect expected from an action, even if it is ‘the promotion of the happiness of others’ is irrelevant to its moral worthiness. Kant states this principle as ‘I am never to act otherwise than so that I could also will that my maxim should become a universal law.’ Kant argued that the ‘common reason’ of men always has in view this universal principle.

Kant discussed the example of whether it is right to make a promise under duress even if there is no intention to keep it. Kant distinguishes between the prudence and rightness

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<sup>46</sup> See Nik de Boer, ‘Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms? A normative enquiry based on John Rawls political philosophy’, *Utrecht Law Review*, 9.1 (2013), 148-168 for a similar normatively focussed approach using a Rawlsian framework.

<sup>47</sup> Immanuel Kant, *The Critique of Practical Reason* (1787). Project Gutenberg ebook. The summary and all the quotes from Kant in this section are based on this edition.

of such an action. The action may or may not be prudent – it may extricate a party from present difficulty by means of the falsehood or there may be the consequence of later injury as a result of the lie. In the latter case the individual may then resolve never to make false promises as a result, but such a resolve would only be based on the fear of the consequences. By contrast, by applying the ‘universal maxim’ question outlined above; ‘Would extricating myself from difficulty via a false promise hold good as a universal law, for myself as well as others?’ the lack of moral rightness in the action is instantly identified; the application of this ‘maxim’ universally would lead to no promises at all.

According to Kant, the key moral question an individual must ask himself in any situation is therefore ‘Can you also will that your maxim should become a universal law?’ If the answer is negative, then the action cannot be pursued, but not because of any disadvantage accruing to the individual or any other party, but because of the duty owed to the universal and practical law.

The *categorical imperative* is thus defined as:

‘Treat humanity, whether in your own person or in that of any other, in every case, as an end and never as a means only.’

Kant and his followers thus take a *deontological* approach to ethics; the moral worth of an action is evaluated according to its intrinsic rightness rather than its consequential outcomes. A Kantian legal system takes ‘... a deontological approach to normative power (emphasizing) the rationalization of duties and rules ... **the approach emphasizes the means** through which actions are motivated and practised. In this respect, much weight is placed on the establishment of law, including both rights and duties ...’<sup>48</sup>

Hence it is suggested that a legal system with a Kantian basis would have the upholding and ethical values at its centre; in other words we would expect the *Grundnorm* of such a legal order to have a *deontological* ethical basis.

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<sup>48</sup> Manners, ‘The normative ethics of the European Union’, p. 77

## 2.4.2 Utilitarianism

In his famous essay ‘Utilitarianism’<sup>49</sup> John Stuart Mill defines the main problem in philosophy as the ‘criterion of right and wrong’ which he also described as the *summum bonum* (highest good) or the foundation of morals. He highlighted that this controversy, which he defines as the struggle between popular morality and utilitarianism, has existed since Plato.

The utilitarian answer to the controversy is the ‘Greatest Happiness Principle’, with Mill stating this as ‘actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.’ He describes ‘happiness’ as pleasure and the absence of pain, with ‘unhappiness’ being the opposite. Maximisation of pleasure and freedom from pain is thus the desired end of Utilitarian morality.

Thus the Utilitarian definition of what is morally right is not just the happiness of the agent, but that of all involved parties. Mill invoked the Golden Rule of Christianity: To do unto others as you would be done by<sup>50</sup>, and to love your neighbour as yourself<sup>51</sup>, as the ‘ideal perfection’ of his system of morality. Application of utility would then entail, firstly, that laws and social arrangements would place the ‘happiness’ (or ‘interest’) of every individual in harmony with the whole, and secondly, that education should establish in the mind of all individuals an ‘indissoluble association’ between his own happiness and that of the whole.

The formal definition of Utilitarianism is thus:

‘That happiness is desirable, and the only thing desirable, as an end; all other things being only desirable as means to that end.’

Promoters of this ethical theory generally summarize its validity as follows: it is self-evident that all persons desire happiness; happiness therefore must be a good; and so if

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<sup>49</sup> John Stuart Mill, *Utilitarianism* (1896). Project Gutenberg ebook. The summary and all the quotes from Mill in this section are based on this edition.

<sup>50</sup> Matthew 7:12

<sup>51</sup> Mark 12:31

the happiness of a person is a good to that person then the general happiness must be a good to the aggregate of all persons in society.

Returning to the assessment of the legal philosophy of the European Union, utilitarian ethicists are more focused on the impact and implications of the EU legal order for its citizens and other affected parties rather than its origins and underlying principles. The Utilitarian approach is thus *teleological*, focussing on ends or *consequences*, rather than *deontological*, focussing on means.

Thus for a utilitarian ethicist, the *Grundnorm* of a moral legal order must emphasise *consequentially ethical outcomes*. The *Grundnorm* of such a legal system is thus *teleological* rather than *deontological*.

### 3. Methodological approach

#### 3.1 Scope

In line with the ‘purist’ positivist approach of Kelsen, this thesis defines European Union law as law that is expressed in its primary, secondary and supplementary sources; chiefly the EU Treaties, as well as the closely associated case law of the Court of Justice and other courts. The focus will be on the Treaties and case law currently *in force* (essentially the post-Lisbon Treaty EU legal environment) but there will also be some consideration of prior iterations of the Treaties, expired legal instruments and overturned court rulings where such historical examination gives insight into the current situation. The complex interaction of the various organs of the EU polity in the drafting and implementation of Community law such as the Commission, the Member State governments, the Council and so on are mostly outside the scope of this thesis, which is interested in understanding EU law as it is posited in these core documents; EU law ‘as is’. As previously stated, it is research ‘in’ law, rather than research ‘about’ law.<sup>52</sup>

#### 3.2 Research questions

The research questions are formally stated as follows:

1. What is the *Grundnorm* of European Union law?
2. Can the *Grundnorm* of European Union law be considered ethical in either deontological (Kantian) and/or teleological (utilitarian) terms?
3. What is the ideal future *Grundnorm* for the legal order of the European Union?

To answer the first question, we will identify the core normative values as articulated in the primary documents of the European Union in line with Kelsen’s theory of the norm as the *a priori* element of all law. A detailed analysis of the jurisprudence of the Court of Justice will then reveal which of these values can be labelled as the *Grundnorm*, which will be formally defined and stated. This will then permit us to answer the second question; the identified *Grundnorm* will be evaluated according to

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<sup>52</sup> See Appendix for general notes on the nature of legal research.

the two competing ethical theories – *deontological Kantianism* and *utilitarian consequentialism*. The answer to the final question is more nuanced and will somewhat rely on which of the two ethical theories is preferable for a truly moral legal system, a somewhat subjective judgment influenced by the biases of the author. These conclusions will also be influenced by the classical natural law concept of intrinsic right and wrong being the basis of all true law.

## 4. The Principles of European Union Law

### 4.1 Normative statements within the primary documents of the European Union

The primary documents of the European Union as of 2014 are:

- The Treaty on European Union ('TEU' or simply 'the Treaty').
- The Treaty on the Functioning of the European Union ('TFEU').
- The Charter of Fundamental Rights of the European Union ('Charter of Fundamental Rights' or simply 'the Charter').

It should be noted that the Lisbon Treaty of 2009 renamed the Treaty Establishing the European Communities<sup>53</sup> as the Treaty on the Functioning of the European Union (TFEU), gave legal force to the Charter of Fundamental Rights (CFR), and made significant changes to the substance of all the Treaties.

There is no hierarchical relationship between these three primary documents, even though the Treaty on European Union (TEU) is almost always listed first. Article 1 of the TEU and Article 1(2) of the TFEU provide for the same 'legal value' for the TEU and the TFEU while Article 6(1) of the TEU states that the Charter of Fundamental Rights has equal legal value with the Treaties.

These documents, although they cannot be formally appellated as the 'EU Constitution'<sup>54</sup>, are nonetheless generally considered to have a constitutional nature within the EU legal order.<sup>55</sup> Thus our initial examination for the central normative basis of EU law will focus on them. In Kelsenian terms, these 'constitutional' documents exist at the peak of the EU law normative hierarchy, although as we shall see they are not the sole sources of the 'constitutional' or foundational law of the European Union.

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<sup>53</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 UNTS 11 ("EEC Treaty"; "Treaty of Rome")

<sup>54</sup> The Treaty Establishing a Constitution for Europe, Dec. 16, 2004, OJ 2004 C 310 was not ratified.

<sup>55</sup> Klaus-Dieter Borchardt, *The ABC of European Union law*, (Luxembourg: Publications Office of the European Union, 2010), p. 29

A cursory overview of the core documents of the European Union suggests a strong ethical orientation. The preamble of the TEU makes reference to:

‘... the universal values of inviolable and inalienable **rights of the human person, freedom, democracy, equality and the rule of law** ... CONFIRMING the attachment to the **principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law** ...’<sup>56</sup>

This normative dimension of the Union is reiterated in Article 2 of the Treaty, which states:

‘The Union is **founded** on the **values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights** ...’

Similar normative statements can be found in Article 3 and Article 10(1) of the Treaty.

From this basis, Ian Manners has identified nine normative principles via an examination and assessment of the EU Treaties and other closely related documents.<sup>57</sup> These principles are re-evaluated and occasionally renamed and redefined below, in order to adapt them to Kelsenian methodology; additionally Professor Manners identifies both *Supranationality* and the *Rule of Law* as a single principle<sup>58</sup>, whereas this thesis separates them as in spite of their close relationship, as these norms have distinct emphases. Thus ten primary normative principles of EU law are identified.

#### 4.1.1 Promotion of Peace

Article 3(1) of the Treaty on European Union (TEU) states:

‘The Union’s aim is to promote peace, its values and the well-being of its peoples.’<sup>59</sup>

The most obvious aspect of the ‘promotion’ of peace within the EU legal environment is a country’s membership within the EU itself; Article 49 states:

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<sup>56</sup> Treaty on the European Union (consolidated version), OJ 2008 C 115, Preamble

<sup>57</sup> Manners, ‘The normative ethics of the European Union’, pp. 68-75

<sup>58</sup> *Ibid.*, p. 71

<sup>59</sup> Art 3(1), TEU



‘Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union ...’

Thus potential membership of the EU is offered to ‘any European State’ – closer co-operation between these ‘European’ countries is obviously a driver of peace in Europe. To understand the over-riding presence of this value within the Treaties, it may be helpful to conduct an examination of the historical foundations of European integration.

The Schuman Declaration of 1950, which ultimately led to the establishment of the European Coal and Steel Community (ECSC) in 1951, described the motivation for European integration as;

‘...to make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible.’<sup>60</sup>

This philosophy is also reflected by another Community ‘founding father’, the aforementioned Walter Hallstein. He commented:

‘The war experience had been too overwhelming and clear-cut for the idea of a union to be opposed any longer – at least in theory.’<sup>61</sup>

Elsewhere Hallstein critiqued the concept of independent national sovereignty in Europe stating that this system;

‘... failed. It failed the only test that would have justified its continuance into our century: it failed to preserve peace.’<sup>62</sup>

Tommaso Padoa-Schioppa comments:

‘After experiencing political oppression and war in the first half of the twentieth century, Europe undertook to build a **new order for peace** ... Despite its predominantly economic content, the European Union is an eminently political construct.’<sup>63</sup>

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<sup>60</sup> The Schuman Declaration, May 9, 1950

<sup>61</sup> Quoted in Müller, p. 8

<sup>62</sup> Ibid.

Yet while the *promotion of peace* could have been legitimately identified as absolutely central to the European integration project at its commencement, this normative focus has shifted substantially in the subsequent development of the EU legal order. The shift in focus is perhaps particularly highlighted by the development of Community defence and security law. In line with the explicit goal promulgated by the Schuman Declaration, there were also plans at about the same time to establish the European Defence Community (EDC), which would eventually have led to a European political union. Amongst other things, implementation of the EDC would have created a common European army. Logically, countries that share a military are highly unlikely to go to war, and thus such a policy would arguably be highly supportive of peace within Europe. However the 1952 Treaty establishing the EDC failed to be ratified by the French parliament. This very early hesitation to a more deeply integrative approach to security and defence with the ultimate aim of European federalism would continue to influence the development of the basis of Community law.

The most immediate example of this hesitancy was the Treaty of Rome of 1957 which had the stated objective of ensuring;

‘...the economic and social progress of their countries by common action to eliminate the barriers which divide Europe ... (via) pooling their resources to preserve and strengthen peace and liberty.’<sup>64</sup>

‘Pooling of resources’ amongst the signatories was thus now understood primarily in economic, rather than military or political, terms, in order to achieve peaceful ends. Enrico Spolaore<sup>65</sup> identifies two major reasons for this historical and on-going resistance to a European federalist approach to defence and security. The first reason relates to political economy. Europe consists of heterogeneous populations with a diversity of languages, culture and identity. From an economic perspective, defence is a

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<sup>63</sup> Tommaso Padoa-Schioppa, *The Euro and Its Central Bank. Getting United After the Union*, (Cambridge MA: MIT Press, 2004), p. 1

<sup>64</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 UNTS 11, Preamble

<sup>65</sup> Enrico Spolaore, ‘What Is European Integration Really About? A Political Guide for Economists’, *Journal of Economic Perspectives*, 27.3 (2013), 125-44

public good – federalization of this public good would lead to considerable economies of scale. Yet such an arrangement would also lead to a monopolisation of coercive power over a territory. Historically, such centralization has only been achieved by dictatorial rulers. The European integration project has always been respectful of the benefits arising from the heterogeneity of the European continent (i.e. Member State sovereignty) as well as the principles of democracy.

The second reason relates to the role of Germany. At the inception of European integration West Germany was militarily weak, having suffered defeat in the Second World War as well as still being occupied by the Allied victors. Thus pooling of military resources imposed few costs on the FRG. As Germany increasingly ‘normalized’ as a sovereign state, the heterogeneous costs of joining a military-based union increased for this country. The resurgence in the German economy during the post-war period increased this country’s influence within the Community, and thus these rising heterogeneous costs of were given greater weight at the Community level.

It is with this background that the Common Security and Defence Policy (CSDP), as described by the current iteration of the Treaties, best be understood. Article 42(1) of the TEU describes the goal of the CSDP as;

‘... providing an operational capacity drawing on civil and military assets. It shall provide the Union with an **operational capacity drawing on civil and military assets**. The Union may use them on missions outside the Union for **peace-keeping, conflict prevention and strengthening international security ...**’

This vaguely defined ‘operational capacity’ has certain limitations on its ambit. Article 4(2) TEU states:

‘...national security remains the **sole responsibility of each Member State.**’

Additionally Article 42(2) states that implementation of the CSDP;

‘... shall not prejudice the **specific character of the security and defence of certain Member States** and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organization (NATO) ...

(The CSDP will) be compatible with the common security and defence policy established within that framework.’

To further underline that the CSDP does not create a military alliance of the flavour of NATO, Article 42(7) TEU states:

‘If a Member State is the victim of armed aggression on its territory, the other Member States shall have toward it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. **This shall not prejudice the specific character of security and defence policy of certain Member States ...**’

Compare this with the uncompromising character of Article 5 of the North Atlantic Treaty;

‘The Parties agree that an **armed attack against one or more of them in Europe or North America shall be considered an attack against them all** and consequently they agree that, if such an armed attack occurs, each of them ... will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force...’<sup>66</sup>

An additional component of the provision of security in the EU is provided by Article 222 (TFEU), the so-called ‘Solidarity Clause.’ Article 222 provides for the Union and its Member States to act in ‘a spirit of solidarity’ if a Member State is subject to a natural disaster or a terrorist attack; the Article permits such activities to include mobilisation of ‘military resources.’ However Article 222(3) requires that those decisions that have ‘defence implications’ be made unanimously by the Council. Again we see a strongly constrained approach to the potential usage of military instruments in the current Treaty framework.

As previously noted, the absence or subordinate role of military instruments in the Community has been occasionally used as an argument for the ‘peaceful’ nature of the

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<sup>66</sup> Art. 5, North Atlantic Treaty, Washington DC, 4 April, 1949

undertaking, especially when contrasted with the arguably more militaristic United States. Yet as we have seen this policy has been influenced by the concerns of political economy and perhaps even *Realpolitik*, rather than any over-riding ethical commitment to ‘peace’. Additionally, it could be argued that, in the current international situation, with an increasingly aggressive Russian Federation making implicit and explicit threats against some EU Member States and EU partner countries, the minimalist military unity established by the Treaties actually *demotes* rather than *promotes* peace in Europe.

The CSDP is of course just one aspect of the external policy motivations and instruments provided for by the EU Treaties. The Laeken Declaration of 2001 stated somewhat ambitiously;

‘Does Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples? ... (Europe has) responsibilities in the governance of globalisation ... (which it) needs to shoulder.’<sup>67</sup>

In light of this, a primary aim of the 2009 Lisbon Treaty was to establish a better organised and more coherent foreign policy for the Union, which again is to a large extent another aspect of the *promotion of peace* norm. As Article 8(1) of the TEU states:

‘The Union shall develop a special relationship with neighbouring countries ... characterised by close and **peaceful relations** based on cooperation.’

The TFEU describes some of the specifics of this external action with the aim of ‘peaceful relations’, which include establishing;

‘... all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and

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<sup>67</sup> *The Laeken Declaration*, Dec.15, 2001, Laeken, Belgium, European Union document SN 273/01

Development ... (as well as) relations as are appropriate with other international organisations.’<sup>68</sup>

Gosalbo Bono notes;

‘... although not a state, the European Union is a subject of international law and may act in international fora, conclude international agreements, is legally responsible according to international law, and possess a right of legation (active and passive).’<sup>69</sup>

The Treaties also provide competence to various EU bodies to externally represent the Union in particular areas, with the broad aim of the promotion of peace.<sup>70</sup> The Lisbon Treaty has also instituted a new office – with Article 18(1) of the TEU providing for the appointment of the High Representative of the Union for Foreign Affairs and Security Policy. Article 18(2) TEU states that the High Representative shall ‘conduct’ the common foreign and security policy of the Union as mandated by the Council while Article 27(2) states that the High Representative will conduct political dialogues with third parties on behalf of the Union at international conferences and with international organizations. Article 27(3) creates the European External Action Service (EEAS) to assist the High Representative in fulfilling his or her mandate. Additionally Article 221 (TFEU) tasks the Union delegations at both third countries and international organizations to represent the Union for both CFSP and non-CFSP activities.

On the surface, it does seem that impressive structure of external relations offices and bodies does display strong commitment to the *promotion of peace* norm, if we recall that stated goals of the Laeken Declaration and the Treaties. However, as we shall see, the EU has some characteristics of a national federation but is not one; the result of this is that while the Member States have sacrificed aspects of their sovereignty to the EU, each individual Member State remains an individual actor in and subject of international

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<sup>68</sup> Art. 220, TFEU

<sup>69</sup> Gosalbo Bono, ‘The Organization of the External Relations of the European Union in the Treaty of Lisbon’, in *The European Union’s external relations a year after Lisbon*, ed. by P. Koutrakos, (University of Bristol: Centre for the Law of EU External Relations, 2011), p.15

<sup>70</sup> See for example Art. 17(1), TEU.

law. Thus the EU has considerably ‘fragmentation’ in the governance and hence the conduct of its external relations.<sup>71</sup>

In conclusion, as European integration has developed, the *promotion of peace* normative value seems to have diminished in importance as the Community legal order has developed. Yet at the virtual inconceivability of a war between EU Member States, and in particular the cessation of the historic enmity between France and Germany, still suggests that this normative value has primary status within the EU legal order.

#### 4.1.2 Supranationality

The EU is arguably one of the quintessential examples of *supranationality*. Article 47 of the TEU explicitly attributes legal personality to the supranational institution of the EU. Additionally the value is upheld via the *acquis communautaire*, the governance provided by the European Union legal system itself.<sup>72</sup> The supranational legal regime is applied to the Member States via the long established Court of Justice doctrine of supremacy.<sup>73</sup> Yet to fully understand the development and current status of this normative value within the EU legal order it may be once again helpful to examine the views of ‘founding father’ Walter Hallstein. Hallstein was deeply impressed and influenced by the United States model of federal liberal democracy, and much of his work as both politician and legal scholar was to ‘import’ the US federalist model to Europe.<sup>74</sup> Henriette Müller summarises Hallstein’s conceptualisation of the functions of the Community as follows:

‘Firstly, it is a legal system with contracts, treaties and legal institutions; secondly, a legal entity composed of states under the rule of law; and thirdly, the balance of power within the Community is determined by law and not by power or force – as had mainly been the case in international relations prior to 1945; fourthly, it is built on trust and

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<sup>71</sup> Ramses Wessel, ‘Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the New Constitution for Europe’, (Twente: Centre for European Studies, University of Twente, 2004), CES Working Paper 3/04

<sup>72</sup> Manners, ‘The normative ethics of the European Union’, p. 71

<sup>73</sup> *Flaminio Costa v ENEL* [1964] ECR 585 (6/64)

<sup>74</sup> Quoted in Müller, p. 8

confidence among the countries and its peoples; and finally, it serves as lever for integration – **integration through law.**'

Hallstein conceived of the Commission as the executive body of the Community, with a will independent of the Member States governments, in simplified terms the Commission would occupy the same place in the Community legal order as the Federal government does in the United States of America.<sup>75</sup>

Yet Hallstein's vision for a 'United States of Europe', aside from meeting strong political resistance from various quarters, has also not been reflected in the current permutation of the Treaties, which limits the areas where the EU can operate via long-established principles including conferral, subsidiarity and proportionality<sup>76</sup>.

Application of these principles, as well as others related to them, have the overall effect of a protective approach to the sovereignty of the Member States where they still possess 'competencies' apart from the Union; this in turn leads to a de-emphasis of the *supranationality* norm within the EU legal order, as state sovereignty has a somewhat dichotomous relationship with this value. As we shall see, the constrained approach to implementation of *supranationality* has also been reflected numerous times in Community law jurisprudence as well as the *sui generis* nature of the EU itself.

#### 4.1.3 Rule of Law

As previously noted, the European Union is pre-eminently a creation of law, and thus the normative value of the rule of law is intrinsic to its very nature. This is also formally articulated in the Treaties. Both the Preamble and Article 2 of the TEU uphold the 'rule of law' as one of the values upon which the European Union is 'founded', and this is also explicitly stated in the Preamble of the Charter of Fundamental Rights.

In addition, the Treaties strongly uphold the norms of international law, with Article 3(5) of the TEU stating that the Union will uphold;

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<sup>75</sup> Quoted in Müller, pp. 9-10

<sup>76</sup> Art.4(1) and Art.5, TEU



‘... strict observance (of) and (assistance with the further) development of international law, including respect for the principles of the United Nations Charter.’

Compliance with the norms of international law is also specifically articulated in Article 21 (TEU) where the aims of the EU external policy are described; in Article 214 (TFEU) with regard to humanitarian aid operations conducted by the EU; in Article 49 of the Charter where criminal offences against international law are recognised alongside those of national law; and in Article 53 of the Charter where it is stated that the rights protection provided by the Charter will not adversely affect those rights and freedoms protected by international law and international agreements. Related to the last two Articles, it could indeed be argued that the entire human rights framework established by the Lisbon Treaty is itself an explicit recognition of the binding character of international law.<sup>77</sup>

Yet this articulation of the rule of law and the closely associated recognition of international law principles within the EU primary documents seems to have an interdependent relationship with other Treaty values such as human freedom, dignity, democracy and so forth. In other words within the EU legal order this normative value of rule of law is not distinct, but must be understood in the light of other values.<sup>78</sup>

#### 4.1.4 Common Market

Article 3(3) of the TEU states:

‘The Union shall establish an **internal market**. It shall work for the sustainable development of Europe based on balanced **economic** growth and price stability ...’

Ian Manners<sup>79</sup> labels this norm as ‘Social Freedom’, noting that Article 3(2) of the Treaty states:

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<sup>77</sup> See Sionaidh Douglas-Scott, ‘The European Union and Human Rights after the Treaty of Lisbon’. *Human Rights Law Review*, 11.4 (2011), 645-682.

<sup>78</sup> Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’, *Jean Monnet Working Paper* 04/09 (New York: New York University School of Law, 2009), p.64

<sup>79</sup> Manners, ‘The normative ethics of the European Union’, pp. 69-70

‘The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the **free movement of persons** is ensured ...’<sup>80</sup>

However the ‘freedom’ described in Article 3(2) seems to relate primarily to the ‘free movement of persons’, one of the four market-related freedoms of the EU.<sup>81</sup> In other words, the ‘freedom’ described here primarily has an *economic* basis.

Manners also identifies ‘freedoms’ such as freedom of thought, freedom of expression and freedom of assembly, as expressly articulated in Article 14 of the Charter of Fundamental Rights as well as being implicitly provided for in the accession to the European Convention for the Protection of Human Rights,<sup>82</sup> as part of his identified ‘Social Freedom’ norm. However these values are perhaps best considered distinct from the economic ‘freedom’ as provided by the internal market. Instead, this thesis considers these socially-oriented freedoms as part of the secondary ‘associative human rights’ norm discussed below.

As our subsequent discussion of Court of Justice jurisprudence will illustrate, the economically-focussed *Common Market* norm, considered as distinct from norms related to ‘social freedom’ or other values, ethically-oriented or otherwise, occupies an absolutely central position in the EU legal order.

#### 4.1.5 Democracy

Article 10(1) of the TEU states:

‘The functioning of the Union shall be founded on representative democracy.’

Article 10(2) creates the concept of European citizenship, noting that these citizens are represented by both the European Parliament (EP) and their democratically elected Member State governments. Article 10(3) enumerates a ‘right to participate’ in the ‘democratic life’ of the Union. Additionally, the Lisbon Treaty<sup>83</sup> introduced the

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<sup>80</sup> Art. 3(2), TEU

<sup>81</sup> Arts. 39-60, TFEU

<sup>82</sup> Art. 6, TEU

<sup>83</sup> See Juan Mayoral, *Democratic improvements in the European Union under the Lisbon Treaty*:

mechanism of the European Citizens' Initiative (ECI) which permits citizens to directly 'invite' the Commission to initiate legal proposals via referenda.<sup>84</sup>

Various other Treaty Articles describe the democratic rights of EU citizens such as the right to apply to the European Ombudsman and address EU institutions in any Treaty language.<sup>85</sup> The Charter of Fundamental Rights also upholds democracy as a principle of EU law.<sup>86</sup>

Outside of the 'four walls' of the Treaties, it should also be noted that the European Union also has a long tradition of promoting democracy as part of both pre-accession<sup>87</sup> and post-accession<sup>88</sup> strategies. Most prominent among the pre-accession policies is the so-called 'Copenhagen criteria'. In 1993 the Copenhagen Economic Council established the rules of accession for a candidate country for the Union which include 'stability of institutions guaranteeing democracy.'<sup>89</sup> Yet as we shall see, this value occupies a somewhat subordinated role in the EU legal order, due to the long-standing 'democratic deficit' of the Community polity.

#### 4.1.6 Associative Human Rights

There are a number of aspects to the protection of human rights within the EU Treaty framework. Mostly prominent is of course are the rights identified in the Charter of Fundamental Rights, which as we have noted is given the 'same legal value' as the Treaties<sup>90</sup>. Closely associated with this is Article 6(2) of the TEU, which provides for

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*Institutional changes regarding democratic government in the EU*, (Florence: European University Institute, European Democracy Observatory (EUDO), Robert Schuman Centre for Advanced Studies, 2011).

<sup>84</sup> Article 11(4), TEU

<sup>85</sup> Articles 20(2), 24, 227 and 228, TFEU

<sup>86</sup> Preamble and Art. 14(3), CFR

<sup>87</sup> See for example Kristi Raik, 'From Conditionality to Convergence?: EU Enlargement as an Instrument of Democracy Promotion', in *Promoting Democratic Values in Enlarging Europe: The Changing Role of the Baltic States from Importers to Exporters*, ed. by Andres Kasekamp and Heiko Pääbo (Tartu: EuroCollege, University of Tartu, 2006), pp. 55-66.

<sup>88</sup> See for example Timofey Agarin, 'Russian Speaking Communities and Democratic Consolidation in the Post-Soviet Baltic Societies', in *Promoting Democratic Values in Enlarging Europe: The Changing Role of the Baltic States from Importers to Exporters*, ed. by Andres Kasekamp and Heiko Pääbo (Tartu: EuroCollege, University of Tartu, 2006), pp. 67-77.

<sup>89</sup> *Presidency Conclusions*, (Copenhagen, European Council, 1993), 7.A.iii

<sup>90</sup> Art. 6(1), TEU

the European Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Article 6(3) states these fundamental rights are ‘general principles of the Union’s law’, alongside the rights protection provided by the ‘constitutional traditions’ of Member States.

However note the following constraint described in Article 6(1) with regard to the application of the Charter of Fundamental Rights;

‘... The provisions of the Charter shall **not extend in any way the competences of the Union** as defined in the Treaties.’

The Union’s accession to the ECHR has similar restrictions:

‘Such accession (to the ECHR) shall not affect the Union's competences as defined in the Treaties.’<sup>91</sup>

The constrained approach is reiterated in Article 51(1) of the Charter:

‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with **due regard for the principle of subsidiarity** and to the Member States **only when they are implementing Union law** ... and respecting the **limits of the powers of the Union as conferred on it in the Treaties.**’

Thus the ambit of the Charter is limited according to the distinctive EU legal principle of subsidiarity and related limitations on EU competence. This is further underlined by Article 51(2):

‘The Charter **does not extend the field of application of Union law** beyond the powers of the Union or establish any new power or task for the Union ...’

Yet at the same time Article 52(3) of the Charter states with reference to those rights guaranteed by the European Convention;

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<sup>91</sup> Art. 6(2), TEU

‘... the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

The Charter thus requires that the standard of human rights as articulated by the Charter be at least as high as those upheld by the Convention. This aims to prevent the situation where a Member State is subjected to two different and possibly conflicting standards of human rights law, as well as ensuring any amendments to the Convention will ‘automatically’ become part of EU law.

Additional rights protection is provided by Article 151 of the TFEU which provides for some recognition for the rights articulated in the European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers. It could also be said that the adherence of the Treaties to the principles of international law also promotes fundamental rights protection within the Union. The prioritisation of human rights within the EU legal order by the Court of Justice will be discussed extensively below.

#### 4.1.7 Social Equality

Article 3(3) of the TEU states:

‘**The Union shall establish an internal market.** It ... shall combat social exclusion and discrimination, and shall promote **social justice** and protection, **equality** between women and men, solidarity between generations and protection of the rights of the child.’

In line with this Article 9 of the Treaty states:

‘In all its activities, the Union shall observe **the principle of the equality of its citizens**, who shall receive equal attention from its institutions, bodies, offices and agencies.’

The EU legal order thus has an underlying norm relating to elimination of discrimination on grounds such as sex, race and religion, but it should be noted that this normative value ultimately arises from the afore-mentioned *Common Market* norm.

#### 4.1.8 Equitability

Closely related, but distinct from, the social equality principle is that of economic *Equitability*. Other parts of Article 3(3) of the Treaty articulate this principle:

‘The Union shall establish an internal market. It shall work for ... **balanced** economic growth and price stability, a highly competitive **social market economy, aiming at full employment** ...’

Supporting this, the European Economic and Social Committee (EESC) Opinion on ‘The Social Dimension of the Internal Market’ argues that:

‘The social dimension is a core component of the **internal market** ... The internal market is an arena in which both the **social dimension** and other dimensions find their expression. To flourish, sustainable economic growth and jobs must be created which in turn generate tax revenues which are the basis for **social entitlements**.’<sup>92</sup>

Again we see a norm with a derivative relationship with the *Common Market* norm.

#### 4.1.9 Sustainable Development

Article 3(3) of the TEU also states the goal of ‘**sustainable development** ... a high level of protection and improvement of the quality of the environment’. ‘Sustainable development’ as well as ‘environmental protection’ is mentioned in the Preamble of the Treaty, but again this is understood in ‘the context of the internal market.’<sup>93</sup>

Additionally various environmental and sustainability goals are also promulgated in Article 21(2), which discusses the international relations aims of the Union.

#### 4.1.10 Transparent governance

Article 11 of the TEU states, with regard to the governance of the EU institutions:

‘The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all

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<sup>92</sup> OJ 2011 C 44/15, 1.1 & 1.5

<sup>93</sup> Preamble, TEU

areas of Union action. ... The institutions shall **maintain an open, transparent and regular dialogue** with representative associations and civil society ... **The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.**'

Articles 15 and 16 of the TEU also impose various requirements for consultation and open dialogues on EU institutions. Echoing this philosophy of openness through consultation, Article 2 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, which clarifies the implementation of the principle of subsidiarity by EU institutions, requires that the EU Commission 'consult widely' when proposing legislative acts, except in cases of 'exceptional urgency.'

The Treaties also uphold the goal of promoting good governance in the international system with Article 21(2) stating:

'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to ... promote an international system based on ... **good global governance.**'

From a conceptual viewpoint the norm of transparent and open governance is of course strongly inter-related to the normative value of democracy; this has even been empirically tested,<sup>94</sup> as well as being strongly derivative of the *rule of law* norm.

4.2 Where is the *Grundnorm*? The centrality of jurisprudence in the EU legal order

It is indeed undeniable that there are strong normative values within the EU Treaties and related documents. However to truly identify the Kelsenian *Grundnorm* we must also examine the jurisprudence of the Court of Justice of the European Union (CJEU), which as we shall see is also a 'primary' source of 'constitutional' law for the European Union, in *de facto* if not strict *de jure* terms.<sup>95</sup>

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<sup>94</sup> B. Peter Rosendorff, *Democracy and the Supply of Transparency*, (Los Angeles: University of Southern California, 2004)

<sup>95</sup> Roxana-Mariana Popescu, 'Features of the Unwritten Sources of EU Law', *Lex ET Scientia International Journal – Juridical Series*, 20.2 (2013), 99-108, p. 99

The centrality of the CJEU in the EU legal system began in the 1960s with the judgments of the ‘constitutional’ doctrines of direct effect<sup>96</sup> and supremacy<sup>97</sup>. Furthermore the Court has gone beyond the method of interpretation of most national constitutional courts via an emphasis of the *effet utile* principle. The *effet utile* principle (which can be translated into English as the *principle of effectiveness*) is a principle of judicial interpretation in international and European law, favouring the interpretation which best promotes Treaty objectives and in addition obliges Member States and their courts not to diminish the effectiveness of supranational law in their national legal orders.<sup>98</sup> Explicit and implicit employment of this principle by the Court has been deemed necessary due to the gaps within Community law, as well as its goal of dynamic integration. For example in the seminal *Van Duyn* case, concerned with the direct effect of directives, the Court ruled that;

‘...where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the **useful effect** of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.’<sup>99</sup>

Several other key cases directly or indirectly reference this principle including *Leberpfennig*, *Simmenthal II*, *Milchkontor*, *Foto-Frost*, *Francovich* and more recently *Viking*<sup>100</sup>.

In line with this, the role of the Court has continued to expand, leading to what has been described as a ‘constitutionalization’ of the European Union; the Court has increasingly influenced the substantive content of the Treaties, Community statutes and other sources

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<sup>96</sup> *Van Gend en Loos v Nederlandse Administratie de Berastingen* [1963] ECR 1

<sup>97</sup> *Costa v ENEL* [1964]

<sup>98</sup> Andreas Grimm, ‘Integration and the Context of Law: Why the European Court of Justice is not a Political Actor’, *Les Cahiers européens de Sciences*, Paper No. 03/2011 (2011)

<sup>99</sup> Case C-41/74, *Van Duyn v Home Office* [1975] Ch. 358 ECJ, at 9

<sup>100</sup> Case 9/70 *Leberpfennig*, [1970] ECR 825; Case C-106/77 *Simmenthal II* [1978] ECR 629; Case C-426/92 *Deutsche Milchkontor* [1994] ECR I-2757; Case 314/85 *Foto-Frost v Hauptzollamt Lubeck-Ost* [1987] ECR 4199; Joined Cases C-6/90 and 9/90 *Francovich v Italian Republic* [1995] ICR 722; Case C-438/05, *The Rosella or International Transport Workers Federation v Viking Line ABP* [2008] IRLR 143.



of law.<sup>101</sup> Thus the CJEU via the principle of effectiveness not only *interprets* but can be said to *create* EU law. The relative impact of the CJEU on Community law rivals that of the most powerful national constitutional courts.<sup>102</sup>

The Member States remain the ‘Herren der Verträge’ (Masters of the Treaties) while other organs of the EU polity such as the Council, the Commission and the European Parliament continue to possess considerable legislative and executive power. Yet to understand the ‘constitution’ of the European Union we must examine the Treaties *plus* the jurisprudence of the Court, even though this jurisprudence officially has ‘supplementary’ status. Similar to many national constitutional courts, the Court of Justice is not only ‘bouche de la loi’ (mouth of the law) but occupies a quasi-legislative and extremely critical role. As Kelsen commented;

‘...the Court is always a legislator ... it will always add something new.’<sup>103</sup>

But, as shall see, the Court has had to operate in a deeply uncertain environment.

#### 4.3 The uncertain condition of the European Union

The European Union is a truly unique type of politico-legal entity. It is commonly described as *sui generis* (of its own genre). It is ‘less than a state, but more than an international organization,’<sup>104</sup> although it possesses some characteristics of both. The institutional structure of the European Union has some resemblance to a modern state with, for example, both the Council of the European Union and the Commission having some characteristics of an executive branch and the directly elected European Parliament resembling a national legislature<sup>105</sup> while the CJEU acts much like a national constitutional court. Yet concluding that therefore the EU is therefore essentially a

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<sup>101</sup> Sweet, p.3

<sup>102</sup> A.S. Sweet, *The European Court of Justice and the Judicialization of EU Governance*. (New Haven: Yale Law School, Faculty Scholarship Series, 2010), Paper 70, p. 3

<sup>103</sup> Stefan Mayr, ‘Putting a Leash on the Court of Justice? Preconceptions in National Methodology v Effet Utile as a Meta-Rule’, *European Journal of Legal Studies*, 5.2 (2013), 8-21, p. 13

<sup>104</sup> Marek Hlavac, *Less than a State, More Than an International Organization: The Sui Generis Nature of the European Union* (Georgetown: Georgetown University, Georgetown Public Policy Institute, 2010), p. 2

<sup>105</sup> *Ibid.*, pp. 5-6

sovereign country is a somewhat misplaced focus on form over content. Specifically it ignores the fact that EU has very limited powers in those areas encompassing activities generally considered core to modern nation states such as taxation, fiscal policy, law enforcement and perhaps most importantly defence and security. Recall Max Weber's famous definition of a state as an entity with a monopoly on the legitimate use of force<sup>106</sup>; as the prior discussion of the CSDP illustrates the EU can in no way be said to possess this monopoly.

This restriction on the powers of the EU derives in legal terms from the Treaties themselves, which permits the Union act only in certain areas of competence.<sup>107</sup> Concomitant with this is the principle of subsidiarity provided for by TEU<sup>108</sup> which is defined by Mark Pollack as;

‘... the notion that the EU should govern as close as possible to the citizen ... (and only regulate) where necessary to ensure the completion of the internal market and/or other fundamental aims of the Treaties.’<sup>109</sup>

The *sui generis* nature of the European Union also means it possesses characteristics of both a federation and a confederation, existing somewhere between the two.<sup>110</sup> If it were a true federation the European Union could perhaps be considered somewhat analogous to a national state, however this is precluded by the ‘shared sovereignty’ of the EU polity between the institutions of the EU and the Member States, as well as the fact that the Member States remain sovereign agents under public international law.<sup>111</sup> In line with this, Article 4(1) of the TEU upholds the principle of conferral; that those

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<sup>106</sup> Hlavac, p. 8

<sup>107</sup> Art. 5(1), TEU

<sup>108</sup> Preamble, and Art.5, TEU

<sup>109</sup> Pollack, Mark, “Theorizing EU Policy-Making,” in *Policy-Making in the European Union* ed. by Helen Wallace, Mark Pollack and Alasdair Young, (Oxford : Oxford University Press, 2005), p. 30

<sup>110</sup> Gabriel Hazak, ‘The European Union – A Federation or a Confederation?’, *Baltic Journal of European Studies*, 2.1 (2012), 43-64

<sup>111</sup> Ramses Wessel, ‘Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?’, in *International Law as Law of the European Union*, ed. by Enrico Cannizzaro, Paolo Palchetti and Ramses Wessel (Leiden/Boston: Martinus Nijhoff Publishers, 2011)

competencies not imposed by Treaties remain with the Member States. Article 6(2) states with regard to the EU Member States that:

‘(The Union) shall respect their essential State functions ...’

EU Member States thus retain much of their sovereignty, although the interaction between Community and national law can be complex. Member State constitutional courts often adopt a dualist approach to the relationship between national and EU law. These courts do recognise the principle of supremacy, but this is due to State obligations under the general international law relating to treaties, rather than the ‘unique nature’ of the EU legal order itself.<sup>112</sup>

The *Solange II* case<sup>113</sup>, heard before the German Constitutional Court, illustrates this difficulty. The German court recognised the primacy of Community law in the protection of fundamental rights, but with the caveat that this primacy exists ‘so long as’ Community law continues to protect rights adequately in accordance with German Basic Law; this finding potentially contradicts the supremacy doctrine central to Community law. Similarly hesitation was displayed in the more recent (2013) *Melloni*<sup>114</sup> case heard before the Spanish Constitutional Court where the majority opinion resisted formally establishing EU fundamental rights law part of the Spanish constitutional canon.

The EU is therefore less than a state; yet long-standing Court of Justice jurisprudence gives Community law a unique status in the international legal order, suggesting it is more than an international organization. In the crucial case *Van Gend en Loos* the Court of Justice stated;

‘...the Community constitutes a **new legal order** of international law.’<sup>115</sup>

This was further underlined by *Costa*:

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<sup>112</sup> Kwiecień pp. 1487-88

<sup>113</sup> *Re Wuensche Handelsgesellschaft*, BVerfG decision of 22 October 1986 [1987] 3 CMLR 225,265 (*Solange II*)

<sup>114</sup> *Melloni*, STC 26/2014

<sup>115</sup> *Van Gend en Loos v Nederlandse Administratie de Berastingen* [1963] ECR 1, n.3

‘By contrast with ordinary international treaties, the EEC Treaty has created its **own legal system**.’<sup>116</sup>

According to the Court, the Treaties give the Community institutions power of a legislative and governmental nature that is independent of the Member States via the Member States ceding a portion of their sovereignty to a supranational Union.

In terms of public international law this is a remarkable development, as nation states have traditionally regarded as the ultimate actors or subjects. Some scholars consider the EU to be a ‘self-contained regime’, a distinct subsystem of international law, which makes rules that are not simply the conventional secondary rules of general public international law, but have their own character and effect.<sup>117</sup> Additionally, the Treaties also uphold the principle of loyalty, which imposes on Member States the obligation to assist each other, take appropriate measures to fulfil the obligations of the Treaty, and refrain from taking measures which could jeopardise Union objectives.<sup>118</sup> The substantial and binding nature of the obligations imposed on the Member States via this principle suggests that the EU is much more than an organization regulating an agreement between States. The highly innovative nature of the EU project in both legal and political terms means that even now, over sixty years after its formation, there is a great deal of uncertainty as to what the European Union is *for*; what values determines its governance and development.<sup>119</sup>

Benedict Anderson’s seminal work ‘Imagined Communities’ conceptualises a national community as a social construct; where people ‘imagine’ themselves to be part of a larger group, regardless of whether or not they have direct contact with the other group members.<sup>120</sup> The European Union does have the character of an ‘imagined community’,

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<sup>116</sup> *Costa v ENEL* [1964]

<sup>117</sup> Gerard Conway, ‘Breaches of EC Law and the International Responsibility of States’, *European Journal of International Law*, 13.3 (2002), 679-695 (p. 681)

<sup>118</sup> Art. 4(3), TEU

<sup>119</sup> Andrew Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’, *Oxford Journal of Legal Studies*, 29.3 (2009), 549-577, pp. 552-553

<sup>120</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, 2<sup>nd</sup> edn., (London: Verso, 1996)

although it has been noted that it has ‘big holes and shaky foundations’<sup>121</sup>, with a high level of instability as illustrated by the numerous political and economic crises of recent years. There is a strong on-going debate within the Union about what it means to be ‘European’; with a great deal of uncertainty as to what this encompasses. For example, could Turkey as an Islamic country truly be part of ‘Christian’ Europe? Or is even posing this question a racist rejection of the long-standing ‘European’ value of cosmopolitanism? Do ‘shared traditions’ such as democracy, parliamentary institutions, Judaeo-Christian ethics and the rule of law constitute an intrinsic part of the European identity? Or is the drive for European unity less normative and more pragmatic; based on the fear of war and outsiders?<sup>122</sup> The ‘imagined community’ of the EU has failed to achieve true clarity on these cultural questions. The decline in prominence of the *promotion of peace* normative value as Community law and European integration itself evolved also illustrates the on-going ‘identity crisis’ of the Community.

This ‘identity crisis’ extends to other areas. The European Union was founded by the ‘Inner Six’ – France, West Germany, Italy, Belgium, the Netherlands and Luxembourg. These founding countries have a clearly defined geographical relationship. As of writing, the European Union now encompasses 28 Member States, with, as previously noted, Article 49 (TEU) opening the possibility of membership to ‘any European State.’ However Article 49 does not specify what countries are permitted the appellation ‘European State.’ Thus the spatial limits of the EU are undefined – it is unclear whether ‘Europe’ encompasses nations such as Turkey, Georgia, Armenia or even Russia and the countries of the south Mediterranean.<sup>123</sup>

This lack of clarity with regard to the legal, political, cultural and geographic character of the European Union ultimately culminates in philosophical uncertainty; exactly what fundamental values and beliefs underlie the European Union. Another ‘founding father’, Jean Monnet, the actual author of the Schuman Declaration, had a vision for a ‘people’s Europe’;

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<sup>121</sup> Kathleen McNamara, *The EU as an Imagined Community?*, (Boston MA: European Union Studies Association Meetings, 2011), p. 5

<sup>122</sup> Williams, ‘Taking Values Seriously’, p. 6

<sup>123</sup> Ibid.

‘...cooperation between the nations, important though it is, does not resolve anything. It is necessary to look for a **merger of interests** of the European peoples, and not simply to maintain a balance between their interests.’<sup>124</sup>

This ‘merger of interests’ seems concomitant with promulgated shared values existent at the heart of the EU legal order. Yet as we shall see this vision has only been partly achieved; economic union has achieved peace but not led to a unified, normatively-based, European identity.

#### 4.4 Uncertainty leading to paradox

This uncertainty of identity has created a paradox for the Court. In addition to establishing the doctrine of direct effect the *Van Gend en Loos*<sup>125</sup> case also held that the interpretation of the Treaty must be ‘uniform’ so that the ‘new legal order’ of the European Union could provide legal certainty for all those it affects.<sup>126</sup> This was not a particular innovation of the CJEU; it is generally considered that the principle of legal certainty is a key feature of the rule of law under most legal systems.<sup>127</sup> Legal certainty means that the adjudication of law must be predictable; that laws must have clarity, stability and intelligibility so that those affected by them can evaluate the approximate legal consequences of any actions they take.<sup>128</sup>

In addition to its commitment to legal certainty, the CJEU has been tasked with establishing order between actors with goals that are often in conflict; supranational institutions, Member State governments, ordinary citizens and other stakeholders. Legal certainty in the EU must be tempered by flexibility; not only must the effect of a law be predictable, but it must also be acceptable to the constituency it affects.<sup>129</sup> This means

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<sup>124</sup> Karine de Souza Silva, *Pedagogy of Peace: The Contribution of Jean Monnet to the Construction of the European Union*. (Miami: Miami European Union Centre, 2009), Jean Monnet / Robert Schuman Paper Series, 9.5

<sup>125</sup> *Van Gend en Loos v Nederlandse Administratie de Berastingen* [1963] ECR 1

<sup>126</sup> Williams, ‘Taking Values Seriously’, p. 8

<sup>127</sup> See for example *Democracy Rule of Law Report 2009*, (Gütersloh: Bertelsmann Stiftung, Sustainable Governance Indicators Project, 2009), pp. 2-13

<sup>128</sup> Elina Paunio, ‘Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order’, *German Law Journal*, 10.11 (2009), 1469-1493 (p. 1469)

<sup>129</sup> *Ibid.*

that the more powerful actors within the EU legal system may have a disproportionate influence on the law they choose to apply and enforce; therefore the system of law itself is influenced by notions of opportunity cost and even Machiavellian power calculations.<sup>130</sup> Thus here we see the appeal of the pluralist interpretation of EU law to many scholars.

In spite of the necessity of legal certainty, the interplay of power between the actors has led to hesitation by the Court in defining ‘common’ values. Uniform ethical points of reference are difficult to locate with the jurisprudence of the Court, beyond ‘vague allusions to a mythic heritage.’<sup>131</sup> In fact the notion of common European heritage strongly promulgated during the formation of the Council of Europe was deliberately avoided in the original EEC Treaty, and this reticence remains in the current Treaties.<sup>132</sup>

#### 4.5 Legal principles not ethical values

The outcome of this uncertainty and paradox is that the core norm of the legal philosophy of the EU as has been interpreted by the CJEU is founded on certain *functional legal principles*, rather than *deontological values*. By *functional legal principles*, it is meant those propositions from which rules might be derived; by *deontological values*, it is meant aspirational aims that are prudential or moral in character.<sup>133</sup>

Essentially, this means that the jurisprudence of the Court has a predominantly technical orientation. This is primarily due to historical reasons; the Court was established by the Treaty of Rome in 1957 without any values-based jurisprudential theories; rather it was simply required to ‘... ensure observance of law and justice in the interpretation and application of this Treaty.’<sup>134</sup> Thus for much of its existence the Court implemented a ‘new legal order’ without the guidance of any normative ‘fundamentals’. Those key cases where the Court seems to be constructing a ‘constitutional edifice’ for the EU

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<sup>130</sup> Williams, ‘Taking Values Seriously’, p. 9

<sup>131</sup> Williams, ‘Taking Values Seriously’, pp. 557-558

<sup>132</sup> Ibid., p. 558

<sup>133</sup> Ibid., pp. 11-12

<sup>134</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, Art.164

legal order almost always use constrained, functionally focussed language in their rulings, rather than an appeal to normative values. For example, the *Van Gend en Loos* case, which established the principle of direct effect and empowered the Court to interpret the Treaties in light of their ‘spirit’, had the cautious limitation that such interpretation be in line with the;

‘... objective of the EEC Treaty, which is to establish a common market.’<sup>135</sup>

Similarly in *Costa v. ENEL*, which established the supremacy doctrine, the Court ruled that in joining the Community;

‘...the Member States have limited their sovereign rights, **albeit within limited fields** ...’<sup>136</sup>

This approach was maintained in the much later *Les Verts* case:

‘The European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review a question of whether the measures adopted by them are in **conformity with the basic constitutional charter, the Treaty.**’<sup>137</sup>

Thus the appeal to the normative value of the rule of law is entirely understood in terms of ‘protecting’ the Treaty. A similar attitude is evidenced in the ‘*Chernobyl*’ case ruling:

‘By setting up a system for distributing powers among the different Community institutions, assigning each institution to its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community, **the Treaties have created an institutional balance.**’<sup>138</sup>

‘Institutional balance’ is upheld in the EU legal order not due to any rights-based separation of powers doctrine or similar normative goal, but solely because the aims of

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<sup>135</sup> *Van Gend en Loos v Nederlandse Administratie de Berastingen* [1963] ECR 1

<sup>136</sup> *Costa v ENEL* [1964] at Grounds

<sup>137</sup> *Les Verts* [1986] ECR 1357, at 23

<sup>138</sup> *EP v Council (Case C-70/88)* [1990] ECR I-2041 (‘*Chernobyl*’)



the Treaty require it. Likewise in *Francovich*, which established the principle of state liability, the wording of the ruling again focuses on the aims of the Treaty;

‘...rights arise not only where they are **expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes** in a clearly defined manner ...’<sup>139</sup>

Again the rights upheld by the Court in this are entirely dependent on the pre-eminent place of the Treaty in the EU legal system, rather than due to any underlying universal normative values.

More recently, the *Pringle*<sup>140</sup> case of 2012 dealt directly with the operation of the ‘constitutional’ Treaty document, the Charter of Fundamental Rights, specifically Article 47, which articulates the right to effective judicial protection.<sup>141</sup> *Pringle* concerned the establishment of the European Stability Mechanism Treaty by the euro-area countries outside the EU legal order, thus possibly breaching this right. The Court found that Member States could in fact conclude and ratify such a Treaty without breaching the Charter, reasoning that it can only interpret the Charter ‘within the limits’ of the powers defined within the Treaties.<sup>142</sup> This ruling followed similar reasoning in the near contemporaneous cases of *McB*<sup>143</sup> and *Dereci*<sup>144</sup>. Thus the innovations of Lisbon did not fundamentally change the constrained approach of the Court.

4.6 But what about Article 6(1) and the other normative values stated in the Treaty?

As noted, Article 6(1) of the TEU recognises the values of liberty, democracy, respect for fundamental rights and the rule of law, and we have identified a number of ethical norms derived from these values and other recitations in the Treaties. Yet it is argued above that such values occupy a subordinate place in the EU legal system normative hierarchy. This argument is confirmed by an examination of Court jurisprudence.

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<sup>139</sup> *Francovich v Italian Republic* [1995] ICR 722, at 21

<sup>140</sup> Case C-370/12, *Pringle*, 27 November 2012

<sup>141</sup> Art. 47, CFR

<sup>142</sup> *Pringle*, 179

<sup>143</sup> Case C-400/10, *PPU McB* [2010] ECR I-8965

<sup>144</sup> Case C-256/11, *Dereci and Others* [2011] ECR I-11315

Arguably the most prominent normative values in customary international law relate to the protection of human rights,<sup>145</sup> so it is perhaps apt that we examine the historic approach of the Court to this important area of law. The Court has been long hesitant to rule on human rights issues due to the relative silence of the pre-Lisbon Treaties. In the early cases of *Stork*<sup>146</sup> and *Ruhrkolen*<sup>147</sup> the Court found that the Treaties did not give the Court competence to adjudicate human rights issues, nor were these rights expressly or implicitly guaranteed in the Treaties.

As we know, the scope of EU law has expanded considerably, particularly with the establishment of the doctrines of supremacy and direct effect. In the 1969 case of *Stauder* human rights were recognised by the Court for the first time, however the basis for this recognition was in the;

‘... unwritten Community law, derived from the general principles of law in force in the Member States.’<sup>148</sup>

The Court was thus both protective of the fairly new doctrine of supremacy, as well as being mindful of the potential threat this doctrine faced from the constitutional courts of the Member States. The primary focus of the ruling was not the protection of human rights *per se*; rather it was protection of the supremacy doctrine via a minor display of deference to the national law of the Member States.<sup>149</sup>

The *Nold* case of 1974 finally saw the Court find inspiration in the European Convention on Human Rights (ECHR). The fundamental rights regime the Court established by *Nold* and subsequently *Internationale Handelsgesellschaft* had a distinctive character; yet once again the broad theme is the limitation imposed by the functional nature of the Community legal system. In both these cases, and many subsequent ones, the Court submitted the claimant to analysis comprised of three stages;

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<sup>145</sup> Anthony D'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms', *Georgia Journal of International and Comparative Law*, 1995 (2010), Northwestern Public Law Research Paper No. 10-56

<sup>146</sup> See *Stork v High Authority* Case 1/58 [1958-9] ECR 17, 27

<sup>147</sup> Williams, 'Taking Values Seriously', p. 16

<sup>148</sup> See *Stauder v City of Ulm* Case 29/69 [1969] ECR 419, 422.

<sup>149</sup> Williams, 'Taking Values Seriously', pp. 16-17

- Firstly, whether the disputed measure had a legitimate purpose.
- Secondly, whether the measure was necessary to achieve this legitimate purpose.
- Thirdly, whether the burden imposed by the measure was ‘disproportionate’.

The Court thus balanced fundamental rights protection with the policy goals of the Community; recognition of these rights had a restricted scope due to the established Community principle of proportionality.<sup>150</sup> The AG Opinion in *Internationale Handelsgesellschaft* stated:

‘...concerning the internal legality of the disputed measures are linked to one and the same problem, namely whether or not these measures comply with a principle of ‘proportionality’ ... obligations which are strictly necessary for those purposes attained.’<sup>151</sup>

In these early cases the Court thus had a dualist approach to both human rights and the general applicability of international law. One scholar has commented that the ‘proportionality test’ has ‘nothing specifically law-like.’<sup>152</sup> Instead such a test evaluates whether a particular policy is ‘good’ in terms of the achievement of Community goals. Needless to say, such an approach could hardly be described as motivated by *deontological values*. Instead proportionality gives lawyers a ‘framework to engage in policy analysis in a way that is neither guided nor restrained by regulatory authority.’<sup>153</sup>

Subsequent cases followed this principle. The *Omega* case did superficially uphold the right to human dignity, but its application beyond the specific circumstances of the matter adjudicated was limited, and also rights protection was yet again subordinated to the Community law principle of proportionality.<sup>154</sup> The *Schmidberger* case similarly seemed to uphold the rights to freedom of expression and association, but also

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<sup>150</sup> Mattias Kumm, ‘Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm’, in *The Past and Future of EU Law: The Classics of EU Law: Revisited on the 50th Anniversary of Rome*, ed. by M. Maduro and L. Azoulay (Oxford: Hart Publishing, 2009), p. 5

<sup>151</sup> See Opinion of Mr. Duthellet de Lamothye, Case 11/70, p. 1146.

<sup>152</sup> Kumm, p. 7

<sup>153</sup> Ibid.

<sup>154</sup> Kumm, p.18

‘weighed’ these fundamental rights against the common market principle of free movement of goods. The Court commented that their actions should be:

‘... **proportionate** in light of the legitimate object pursued, namely, in the present case, the protection of fundamental rights.’<sup>155</sup>

This conceptualisation of proportionality by the Court of Justice contrasted strongly with the approach of the Strasbourg Court.<sup>156</sup> In the jurisprudence of the Strasbourg Court, the ‘proportionality test’ is applied when the Court seeks to determine whether a restriction applied on the European Convention in accordance with the ‘margin of appreciation’ doctrine is reasonable. In *Handyside*<sup>157</sup>, the Court applied the following four question test when a restriction on a fundamental right is being considered:

- Is there a pressing social need for some restriction of the Convention?
- If so, does the particular restriction correspond to this need?
- If so, is it a proportionate response to that need?
- In any case, are the reasons presented by the authorities, relevant and sufficient?

Note any restrictions on rights protection is balanced, not by a concept of limited competence of the Court, but by the ‘reasonableness’ of the restriction itself, with a particular deference to ‘social need’. Thus the approach of European Court of Human Rights is primarily *deontological* not *functional*.

A similar deontological approach by the Strasbourg Court can be seen in the *Matthews* case of 18 February 1999, which concerned a violation of Article 3 of Protocol No. 1 of the Convention (‘Right to Free Election’) by a Community Act. The Strasbourg Court held that High Contracting Parties were responsible for infringements even if they transfer competencies to an international organization such as the Community.<sup>158</sup> The willingness of the Strasbourg Court to participate in the EU legal order if the upholding

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<sup>155</sup> Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659, 81.

<sup>156</sup> See G. Letsas, ‘Strasbourg’s Interpretative Ethic: Lessons for the International Lawyer’, *The European Journal of International Law*, 21.3 (2010), 509-541 for an overview of the approach of the Strasbourg Court.

<sup>157</sup> *Handyside v. the United Kingdom* App. No. 5493/72 (ECtHR 7 December 1976)

<sup>158</sup> *Matthews v. United Kingdom*, App. No. 24833/94 (ECtHR 18 February 1999)

of deontological protection required it was further developed by the ECtHR in the subsequent *Bosphorus* case, which also illustrated an interaction between the Strasbourg and Luxembourg courts.<sup>159</sup>

The *Bosphorus* case concerned the Turkish airline Bosphorus Hava Yollari Turizim ('Bosphorus'). The Bosphorus company leased and registered two aircraft owned by the Federal Republic of Yugoslavia (FRY); one of these aircraft, while having maintenance performed in Ireland, was impounded by the Irish government on the basis of the Council Regulation 990/93/EC<sup>160</sup> in line with United Nations sanctions against Yugoslavia. Bosphorus disputed the action before the Irish High Court, arguing that the company's fundamental right to property had been infringed. The Irish High Court held that the Community Regulation did not even apply in this case as Bosphorus was not held or controlled by a Yugoslavian person or undertaking. The Irish government appealed, and the Irish Supreme Court requested a preliminary ruling from the Court of Justice.<sup>161</sup>

The Court of Justice preliminary ruling stated the following with regard to the disputed EC Regulation:

'As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the ... (action if performed) by an undertaking based in or operating from the Federal Republic of Yugoslavia, **cannot be regarded as inappropriate or disproportionate.**'<sup>162</sup>

According to the Court, the disputed Regulation did not infringe on any right; it passed the 'proportionality' test.

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<sup>159</sup> *Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98 (ECtHR 30 June 2005)

<sup>160</sup> Kathrin Kuhnert, 'Bosphorus – Double standards in European human rights protection?', *Utrecht Law Review*, 2.2 (2006), 177-189, pp. 177-78

<sup>161</sup> *Ibid.*, p. 2

<sup>162</sup> Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS* [1996] ECR I-3953 at 26

The Irish Supreme Court allowed the appeal of the Irish government on the basis of the Court opinion. In response, Bosphorus brought the case before the ECtHR, arguing that the Irish authorities had infringed Article 1 of Protocol No 1 or the European Convention on Human Rights, the right to have property respected.<sup>163</sup>

This case gave the Strasbourg Court the opportunity to identify and clarify its role with regard to how it would review Community actions. The decision of Court<sup>164</sup> had a number of aspects. Firstly, the Strasbourg Court ruled that the nature of the complaint fulfilled the ECtHR jurisdiction prerequisites of *ratione loci*, *personae* and *materiae*. The Court found that Bosphorus fell within the ‘jurisdiction’ of Council of Europe member Ireland, and therefore the company was protected by the rights and freedoms provided by the Convention.<sup>165</sup>

The Court then examined the applicant’s claim that the company’s right to have property respected had been infringed by the Irish authorities. With regard to the EC Regulation, the Court noted that no Member State of the European Union could lawfully depart from its provisions; the Irish government was correct in considering itself obligated to impound the aircraft. The Strasbourg Court concurred with the preliminary ruling of the EU Court, as well as ruling that the actions of the Irish government passed the ‘proportionality’ test.<sup>166</sup>

Following this point, the judgement becomes more directly relevant to the interaction between two human rights regimes of the EU and the Convention. Having established that the action of the Irish authorities were appropriate in terms of their obligations arising from their membership in the European Union, the Court examined whether the obligation-fulfilling actions themselves could be ‘presumed’ to be compliant with the ECHR system, rather than exhibiting ‘manifest deficiency.’ The Court found that, at the

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<sup>163</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11), ETS No. 155, 4 November 1950

<sup>164</sup> *Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98 (ECtHR 30 June 2005)

<sup>165</sup> Frank Schorkopf, ‘The European Court of Human Rights’ Judgment in the Case of *Bosphorus Hava Yollari Turizm v. Ireland*’, *German Law Journal*, 6.9 (2005), 1255-1264, p. 1261

<sup>166</sup> *Ibid.*, p. 8

present time, the regime for the protection of fundamental rights provided by the EC was ‘equivalent’ to that provided by the Convention.<sup>167</sup>

Judge Ress issued a separate opinion. He concurred with the majority judgement, but noted that the concept of the presumption of ECHR compliance by international organizations might be unnecessary and even dangerous when Convention signatory States transfer their sovereignty to an international organization such as the EU. In other words, the presumption of compliance should not limit the ambit of the Strasbourg Court to assess violations of the Convention on a case-by-case basis.<sup>168</sup>

Thus the ECtHR displays much less caution in limiting its jurisdiction if the protection of deontological values requires it. It should also be noted that the accession of the European Union to the Convention is likely to further embolden the approach of the Strasbourg Court to this values protection when it interacts with the Union legal order, and thus we may well see the ECtHR move beyond the *Bosphorus* principle, perhaps even to a position of ‘supremacy’ over the EU Court.<sup>169</sup>

This new ‘supremacy’ seems to be reflected in the explicit recognition of the binding character of ECtHR case law in the Charter.<sup>170</sup> The Preamble of the Charter states:

‘This Charter reaffirms ... the rights as they result, in particular, from ... **the European Convention for the Protection of Human Rights and Fundamental Freedoms** ... and the case-law of the Court of Justice of the European Union and of **the European Court of Human Rights**.’

Thus in interpreting the Charter, it seems that the CJEU would now be bound by the decisions of the ECtHR, although there is some debate about this, given that there is no

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<sup>167</sup> Schorkopf, p.8

<sup>168</sup> Ibid., p.9

<sup>169</sup> Tobias Lock, ‘Beyond Bosphorus: The European Court of Human Rights’ Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights’, *Human Rights Law Review*, 10.3 (2010), 529-545

<sup>170</sup> Tobias Lock, ‘The ECJ and the ECtHR: The Future Relationship between the Two European Courts’, *The Law and Practice of International Courts and Tribunals*, 8 (2009), 375-398, p. 383

explicit articulation of this new ‘Court hierarchy’ within the Charter or the EU Treaties<sup>171</sup>, although the eventual accession of the EU to the ECHR may resolve this.

The act of accession would seem to have several important impacts. Firstly and most obviously, the human rights protection afforded to EU citizens would be significantly improved. Post-accession, it would be possible to complain about alleged rights abuses by the EU institutions themselves as well as Member States implementing EU law. Secondly, the accession will minimise the risk of divergences for the jurisprudence of the EU Court and the Strasbourg Court in relation to human rights law; the implementation of the Charter might encourage the CJEU to ‘go it alone’ given the rights protection provided by the Charter is distinct, albeit closely related.<sup>172</sup>

There is some debate as to whether the imminent accession will jeopardise the autonomy and distinctiveness of the EU legal system.<sup>173</sup> Post-accession, the Strasbourg Court will end the ‘hermeneutic monopoly’ the Court of Justice possesses over the interpretation of EU law in accordance with Article 19 (TEU). Prior to accession, while the CJEU might use Strasbourg jurisprudence or national law to reach a decision, it remains the ultimate arbiter of the Treaties<sup>174</sup>. Paul Craig comments;

‘The ECtHR will be sensitive to the imperatives of the EU, and will not lightly conclude that the interpretation accorded by the EU courts to Convention rights was mistaken. This does not alter the fact that ... the ECtHR will exercise external control over EU acts to ensure that they comply with the Convention, in the same way as for any other contracting party.’<sup>175</sup>

This is of course a major change to the EU legal system. In a recent hearing with regard to the validity of the Draft Agreement on the Accession of the EU to the ECHR<sup>176</sup> the

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<sup>171</sup> See the various arguments against this in Lock, ‘Future Relationship’, pp.10-13.

<sup>172</sup> Martin Kuijer, ‘The Accession of the European Union to the ECHR: A Gift for the ECHR’s 60th Anniversary or an Unwelcome Intruder at the Party?’, *Amsterdam Law Forum*, 3.4 (2011), 17-32

<sup>173</sup> Paul Craig, ‘EU Accession to the ECHR: Competence, Procedure and Substance’, *Fordham International Law Journal*, 36 (2013), 1114-1150, pp. 1142-48

<sup>174</sup> Craig, pp. 1145-46

<sup>175</sup> Craig, p. 1146

<sup>176</sup> Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, June 10, 2014, Strasbourg



Commission commented that it perceived no structural issue with this new situation; the Strasbourg Court will have primacy, but only in a limited capacity, as a specialized court for human rights.<sup>177</sup> Yet this comment may seem to minimise the staunch attitude the Strasbourg Court takes to the protection of rights,<sup>178</sup> and seems to anticipate a continuation of a constrained approach to rights protection within the EU Treaty framework.

Indeed, recent human rights cases heard solely by the Court of Justice continue to locate the basis of the protection of human rights in legal doctrines and principles specific to Community law, leading to a functional rather than deontological approach. A particular apt example is the recent *Kadi*<sup>179</sup> case, which is worth examining in some depth as the Court directly states where it believes ‘very foundations’ of the EU legal order currently exist.

#### 4.7 The *Kadi* case: Functional basis of the EU law *Grundnorm* confirmed

Yasin al-Qadi (Kadi) was identified by the UN Security Council as a possible associate of the Al-Qaeda terrorist group. Under Chapter VII of the UN Charter the Security Council is permitted to adopt resolutions to ‘maintain or restore international peace and security’. Article 25 of the UN Charter obligates UN members to ‘accept and carry out’ these resolutions. With these Articles as its legal basis, the UN Security Council therefore ‘blacklisted’ al-Qadi, taking various sanctions against him including freezing of his financial assets.<sup>180</sup>

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<sup>177</sup> Stian Oby Johansen, ‘Some thoughts on the ECJ hearing on the Draft EU-ECHR Accession Agreement (Part 2 of 2)’, Pluricourts Blog, <<http://blogg.uio.no/jus/smr/multirights/content/some-thoughts-on-the-ecj-hearing-on-the-draft-eu-echr-accession-agreement-part-2-of-2>> [accessed 27 September 2014]

<sup>178</sup> See Jose Martín y Pérez De Nanclares, *The accession of the European Union to the ECHR: More than just a legal issue*. (Madrid: Complutense University of Madrid, Institute of European Law and Regional Integration, 2013), Working Paper 15/2013 and Julia Laffranque, ‘Who has the last word on the protection of Human Rights in Europe?’, *Juridica International*, XIX (2012), 117-134.

<sup>179</sup> Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649

<sup>180</sup> Alisa Shekhtman, ‘Kadi v. Commission: A Case Study of the Development of a Rights-Based Jurisprudence for the European Court of Justice’, *Claremont-UC Undergraduate Research Conference on the European Union*, 2011.9 (2011), p. 90

The then Second Pillar of the European Union, the Common Foreign and Security Policy, permitted the Council of the European Union to create a ‘Common Position’ on foreign affairs binding on Member States (but not individuals). After the terrorist attacks on September 11, 2001 this Common Position encompassed agreement to implement various anti-terrorism resolutions enacted by the UN Security Council, including various sanctions on identified associates of Al-Qaeda, the Taliban or Osama bin Laden. In addition to the Common Position, in 2002 the Council of the European Union adopted Regulation (EC) 467/2001 (which was subsequently replaced by Community Regulation (EC) 881/2002) transposing the ‘accept and carry out’ requirement of Article 25 of the UN Charter in EU law. In line with the UN measure, al-Qadi was one of the sanctioned individuals listed in the EC Regulation.<sup>181</sup>

Mr al-Qadi disputed the Regulation before the General Court (GC). The GC initially refused to review the transposed Regulation as this would essentially entail reviewing the UN Security Council measure. On appeal, the Court of Justice instead evaluated the lawfulness of the Community regulation itself in light of the protection of fundamental rights, with the Court stating:

**‘Fundamental rights form an integral part** of the general principles of law whose observance the Court ensures ... Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community.’<sup>182</sup>

Yet in spite of noting that the protection of fundamental rights is an ‘integral part’ of the EU legal order, the Court made the following constraining comments:

**‘The Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the Treaty, ... An international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the**

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<sup>181</sup> Shekhtman, p. 90

<sup>182</sup> Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649 at 5

**Community legal system**, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it ... jurisdiction that forms part of **the very foundations of the Community**.<sup>183</sup>

The ‘very foundation’ of the EU legal order is thus located in the ‘constitution’ provided by the Treaty itself. This was further reiterated by the ruling of the Court in relation to the validity of Community Regulation (EC) 881/2002:

‘Implementing such measures through the use of a Community instrument does not go beyond the **general framework created by the provisions of the EC Treaty** as a whole, because by their very nature they offer a **link to the operation of the common market** ...’<sup>184</sup>

This approach of the CJEU was noted by the French government in its submission as a third party intervener in *Nada v Switzerland*<sup>185</sup>, a case heard before the ECtHR which shared many similarities with *Kadi*. The French government commented that in *Kadi* the Court of Justice ‘had relied on the **constitutional nature of the EC Treaty** for its review’<sup>186</sup> of the Regulation i.e. not an appeal to universal deontological values.

Thus the *Kadi* case echoed the earlier cases in confirming the *functional* nature of the *Grundnorm* of the EU legal order, with the over-riding ‘normative’ principle being the upholding of the operation of the single market via the constitutional framework provided by the Treaties.

#### 4.8 Other normative values – present but not central

The Court has taken a similar approach to the other normative values present in the Treaties. For example, the ‘right to liberty’ is generally related to the ‘four freedoms’ of the single market in the jurisprudence of the Court;<sup>187</sup> once again the norm is concerned

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<sup>183</sup> *Kadi* at 4

<sup>184</sup> *Kadi* at 3

<sup>185</sup> *Nada v. Switzerland*, App. No. 10593/08 (ECtHR 12 September 2012)

<sup>186</sup> *Nada* at 110

<sup>187</sup> Williams, ‘Taking Values Seriously’, pp. 567-568

with economic aims rather than deontological values. With regard to the closely related value of democracy, the Court's approach has been described as 'vaguely desperate'<sup>188</sup>.

It might be expected that the rule of law would have a more central basis in CJEU jurisprudence, given the Court's often bold and arguably 'activist' reading of its mandate to safeguard the Treaties.<sup>189</sup> But again this recognition of this right by the Court has only been in areas of uncontested exclusive competence, with the Court perhaps sensitive to accusations of surreptitious federalism.<sup>190</sup> For example, in *Van Schijndel* the Court commented that Community law does not require national courts to;

'...abandon the passive role assigned to them in civil proceedings by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of [Community law] bases his claim.'<sup>191</sup>

Again we see the Court take a constrained, rather than values-based, approach, this time influenced by wariness in overstepping its competence in interacting with the legal order of a Member State.

Similarly in cases including *Kapferer*<sup>192</sup>, *Kühne*<sup>193</sup> and *Köbler*<sup>194</sup> the Court ruled that *res judicata* ('a matter already judged') applied not only to the judicial review, but also to the rulings of national courts.<sup>195</sup> This is in spite of rulings on both national<sup>196</sup> and supranational<sup>197</sup> level which held that this doctrine is not inviolable, as well as the views of some legal scholars that the doctrine itself is highly problematic, and often at odds

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<sup>188</sup> Williams, 'Taking Values Seriously', p. 20

<sup>189</sup> See for example Henri de Waele and Anna van der Leuten, 'Judicial Activism in the European Court of Justice – The Case of LGBT Rights', *Michigan State Journal of International Law*, 19.3 (2011), 639-666.

<sup>190</sup> See Pech.

<sup>191</sup> Joined Cases C-430–31/93, *Van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten*, [1995] ECR I-4705 at 22

<sup>192</sup> Case C-234/04, *Kapferer v. Schlank & Schick GmbH* [2006] ECR I-2585 at 20–21

<sup>193</sup> Case C-453/00, *Kühne v. Productschap voor Pluimvee en Eieren* [2004] ECR I-837 at 23 and 28

<sup>194</sup> Case C-224/01, *Köbler v. Austria* [2003] ECR I-10 at 38–39

<sup>195</sup> Koen Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice', *Fordham International Law Journal*, 33.5 (2011), 1338-1387, p. 1384

<sup>196</sup> See Case C-119/05, *Opinion of Advocate General Geelhoed, Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA* [2007] ECR I-6199 at 37

<sup>197</sup> See *S.A. Dangeville v. France*, App. No. 36677/97 (ECtHR 16 April 2002) at 71.

with legality.<sup>198</sup> The Court once again held a position that was arguably overly protective of the competences of the national courts at the expense of the upholding of the rule of law.<sup>199</sup>

A similar approach can be seen in subsequent cases heard by the Court. For example, in the *Eldafaji* case of 2009 the Court was extremely careful to identify a distinction between the ‘protection from harm’ right provided for by an Article of a Council Directive and that of Article 3 of the ECHR. Thus the Court was able to primarily analyse the ambit of the right in terms of Treaty competence.<sup>200</sup>

Likewise in the *Bressol*<sup>201</sup> case of 2010, although the Court upheld the right to education expressed in Article 13 of the UN International Covenant on Economic, Social and Cultural Rights, Andrew Williams comments with regard to the ruling;

‘... the right only gains form through its relationship with EU Treaty concerns (fundamentally market freedoms) ... (it) seems to enhance the conditionality of the Court’s approach to human rights in general.’<sup>202</sup>

Similarly in the 2011 case *Brustle v. Greenpeace*<sup>203</sup>, concerned with the CJEU definition of an ‘embryo’, the Court intrinsically favoured the ‘fundamental freedoms’ of the Single Market over fundamental rights.<sup>204</sup> Another 2011 case, *Zambrano*<sup>205</sup>, concerned with EU citizenship, saw the Court ‘vacillate’ between the upholding of the

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<sup>198</sup> See for example Yuval Sinai, ‘Reconsidering Res Judicata: A Comparative Perspective’, *Duke Journal of Comparative and International Law*, 21 (2011), 353-400, p. 354.

<sup>199</sup> Xavier Groussot and Timo Minssen, ‘Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality’, *European Constitutional Law Review*, 3 (2007), 385-417, pp. 390-393

<sup>200</sup> Case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921

<sup>201</sup> Case C-73/08, *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française*, Judgment of the Court (Grand Chamber) of 13 April 2010

<sup>202</sup> Williams, ‘Human Rights and the European Court of Justice’, p. 41

<sup>203</sup> Case C-34, *Brustle v Greenpeace* [2011] ECR I-09821

<sup>204</sup> Daniel Augenstein and Bert van Roermund, ‘Lisbon vs. Lisbon: Fundamental Rights and Fundamental Freedoms’, *German Law Journal*, 14.10 (2013), 1909-1916, p. 3

<sup>205</sup> Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)* [2011] ECR I-01177

fundamental right to family life and the ‘freedom’ associated with the common market, with the protection of the latter seeming to dominate the Court’s reasoning.<sup>206</sup>

#### 4.9 The *Grundnorm* of the European Union legal order

Our analysis leads us to a reasonably decisive identification of the *Grundnorm* or central underlying norm of the EU legal order. The prior discussion illustrates that the jurisprudence of the Court has consistently subordinated any recognition of ethical values to a functional interpretation of the scope of the Treaties. This seems to be primarily due to the often contentious environment created by the various national and institutional actors in the EU framework. Andrew Williams somewhat provocatively comments that the Court has established the concept of ‘indeterminacy’ as a core principle of the EU legal framework.<sup>207</sup>

This thesis therefore answers the first research question as follows:

**“The Kelsenian *Grundnorm* of the European Union law is the establishment and maintenance of the European Common Market, the scope of which is defined and governed by the Treaties.”**

Any ethical values existing within the EU legal system are essentially peripheral to this central norm. Thus the legal order of the European Union thus has a *functional* or *technical* basis rather than basis of *deontological values*.

The functional nature of the *Grundnorm* as it exists in the current legal order may be something of a disappointment to the founders of the project; recall, for example, Walter Hallstein who saw the primary goal of European integration as the promotion of peace via gradualist federalism rather than economic expansion. The original European Coal and Steel Community (ECSC) had the specific aim of making another Franco-German war impossible; it is reasonable to say this goal has been achieved and perhaps even forgotten by the current EU polity. As the integration project has developed, the

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<sup>206</sup> Ibid., p. 5. See also Andrew Williams, ‘Human Rights and the European Court of Justice: Past and present tendencies’, (Warwick: School of Law, University of Warwick, 2011), Legal Studies Research Paper No. 2011-06

<sup>207</sup> Williams, ‘Taking Values Seriously’, p. 21

central normative focus of Community law has shifted from the *promotion of peace*, to the economic advantages associated with the on-going implementation of the *Common Market*. In other words, in the current EU legal order the *Common Market* has become *an end in itself, rather than a means to an end*.

Implementation of deontological values within the jurisprudence of the Court has been strictly constrained, with a continual reference to the highly restricted competence of Community law in the rulings of the Court, an attitude that has continued in the post-Lisbon environment. As a result, the upholding of values with a predominantly ethical basis such as human rights and democracy has been limited in scope, or only permitted in so far as they do not threaten the underlying *Grundnorm*.

## 5. Ethical assessment of European Union law

### 5.1 Can functional law still be ethical?

We have established that the legal philosophy of the European Union has a predominantly functional basis, with the Kelsenian *Grundnorm* relating primarily to the establishment and maintenance of a common European market. Yet this should not in of itself be considered as an argument that the European Union legal order is totally indifferent to ethical norms. The World Trade Organization (WTO), for example, is generally considered a primarily functional legal system<sup>208</sup> but still has normative aims within its areas of competence such as assistance to developing countries, even though these norms are subordinate to the central norm.<sup>209</sup> So it should be noted that a predominantly functional *Grundnorm* is not necessarily an unethical *Grundnorm*.

### 5.2 Application of ethical theories to the *Grundnorm* of European Union law

So finally we can answer the second and perhaps most important research question posed by this thesis – can the *Grundnorm* of European Union law be considered ethical and thus by extension is the European Union truly a normative institution? Ultimately a somewhat nuanced answer must be given – it is, as might be expected, dependent upon the selection of the theory of ethics with which the *Grundnorm* of European Union law is evaluated.

Under the ethical framework provided by Kantians, the *Grundnorm* of the legal system of the European Union cannot be considered a primarily ethical. Recall that Kantian ethics take a *deontological* approach; the standards for the rightness or wrongness of an action are independent of the outcome, whether good or bad. The *Grundnorm* of the EU legal order is functional – the primary aim of EU law is to uphold the European Common Market. The EU legal system is thus intrinsically *teleological* – it is focused

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<sup>208</sup> David Palmetier, 'The WTO as a Legal System', *Fordham International Law Journal*, 24.1 (2000), 444-480

<sup>209</sup> Clara Brandi, *Development, International Organizations and Fairness as Justice: Normative Perspectives on the WTO*, (Annual Bank Conference on Developmental Economics, 2008)



on economically-oriented ends rather than being foundationally constructed with reference to universal underlying deontological values.

The teleological nature of the EU legal order might however be more congenial to a utilitarian ethicist. The utilitarian might admit that the *Grundnorm* of European Union law is indeed the maintenance of a capitalistic market in Europe, with more normatively based goals such as the promotion of democracy and human rights subsidiary to this central principle. However a utilitarian might note that the European common market has had the *consequences* of achieving goals in line with the ‘Greatest Happiness’ of the greatest number of people. Achievements such as peace in Europe for over sixty years, promotion of democratic ideals in former Communist bloc countries, increasing prevalence of the rule of law and human rights in the EU Member States and so on would be indicative of the *consequentialist* normative orientation of the European Union. In line with this, Mark Dawson and Elise Muir argue that fundamental rights protection can ‘thrive’ on the back of the economic drives of the Common Market.<sup>210</sup> The Millian ethicist might also note that the economic benefits of the internal market itself leads to more ‘happiness’ for both citizens of the European Union and associated countries through the greater prosperity delivered via free trade. The utilitarian might also be impressed by the fact that the ‘internal market’, as envisioned by the Treaties, also encompasses a ‘social market economy’. The ‘social market economy’ encompasses the goals of full employment, social progress, environmental protection, advances in science and technology, the prevention of social exclusion and discrimination, social protection and justice, gender equality, improving generational relations and protecting the rights of children.<sup>211</sup> Also noteworthy is that the norms of *social equality*, *equitability* and *sustainable development* have a close relationship with the Common Market norm within the Treaties as discussed above.

In conclusion, to describe the European Union as ‘Kantian’, contrasting it with the ‘Hobbesian’ United States and other powers *cannot* be justified if the *Grundnorm*

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<sup>210</sup> Mark Dawson and Elise Muir, ‘Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law’, *German Law Journal*, 14.10 (2013), 1959-1980

<sup>211</sup> Art.3(3), TEU

theory of Kelsen is given any credence. The consequentialist nature of the *Grundnorm* of EU law suggests that the ethical core of the European Union may have more in common with the USA than has been traditionally perceived. Both powers do seem to operate under the principle of the ‘end justifying the means’, albeit that they often achieve their goals via different policies.

The answer to the second research question is summarised as follows:

**“The *Kelsenian Grundnorm* of the European Union legal system is *consequentially ethical* but is not *primarily* governed by *deontological values*.”**

## 6. Suggestions for a new legal philosophy for the European Union

### 6.1 The consequentialist problem

The ‘Millian’ nature of the *Grundnorm* of the legal philosophy of the EU immediately raises a larger question about the value of consequentialist ethics. Elizabeth Anscombe, although a leading developer and proponent of the consequential ethical theories, noted that:

‘It is a necessary feature of consequentialism that it is a shallow philosophy. For there are always borderline cases in ethics ... (Other ethical theories) will deal with a borderline case by considering whether doing such-and-such in such-and-such circumstances is, say, murder, or an act of injustice; and accordingly you decide it is or it isn’t, you judge it to be a thing to do or not ... The consequentialist has no footing on which to say “this would be permissible, this not”; because by [their] own hypothesis, it is the consequences that are to decide.’<sup>212</sup>

It is the opinion of this thesis that a legal system without *deontological values* at its very core cannot in the longer term achieve truly ethical outcomes. Although we have used the positivist toolbox, including Kelsenianism, to analyse the EU legal order, the natural law concept that law, for it to be valid, must provide a set of standards in accordance with universal ethical norms, must be still highly persuasive to anyone interested in ethics. As theologian, philosopher and proto-natural law theorist Augustine of Hippo is said to have opined:

‘In the absence of justice, what is sovereignty but organised robbery?’

The upholding of ‘indivisible, universal values’ in the Preamble of the Charter of Fundamental Rights seems to recognise this intrinsic maxim.

In line with this, Katrin Nyman-Metcalf has commented with regard to the articulation of normative values in the EU Treaties:

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<sup>212</sup> Elizabeth Anscombe, ‘Modern moral philosophy’, *Philosophy: the Journal of the Royal Institute of Philosophy*, 33 (1958), 1-19

‘By underlining principles like liberty, democracy, human rights and the rule of law and furthermore spelling out that these principles are shared among Member States, it is apparent that there is to be a **community of values** (in the European Union). This, more than the geographical limitation to European States, sets out who can aspire to become an EU Member.’<sup>213</sup>

It is suggested that the redefining the EU legal system *Grundnorm* to a more deontological basis may be the best way to achieve this ‘community of values’. But which of these values should be emphasised above all?

## 6.2 How to create a community of values

Much of the discussion in prior sections could be viewed as an implicit criticism of the historically constrained approach of the CJEU jurisprudence to the protection of ethical values, leading ultimately to a functionally-based *Grundnorm* of the EU legal order. However we must recall that the Court has had to contend with the uncertain goals and nature of the Community polity itself as it has evolved. These goals seem closely related to the issue of what the European Union actually is – is it primarily an economic vehicle, a prospective Federal State or something else entirely? Recall that founders of project such as Hallstein envisioned the ultimate goal of European integration as the complete prevention of another Franco-German war, with the creation of a European common market merely a means to that end. Now that this end has been largely achieved what is next for the European Union? The lack of deontological basis for the *Grundnorm* of the EU legal philosophy ultimately arises from this identity crisis.

The obvious ‘Kantian’ / values-based solution to this identity crisis is to enable the citizenry of the European Union to democratically decide what the goals of the Community ultimately are – revisiting Monnet’s concept of the ‘merger of interests’ created by a ‘people’s Europe’. Furthermore, it is generally accepted that democracy has

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<sup>213</sup> Katrin Nyman-Metcalf, ‘Common Values as a Basis for Integration: Is there an End to Europe? The Baltic States as a Bridge between Europe and Beyond’, in *Promoting Democratic Values in Enlarging Europe: The Changing Role of the Baltic States from Importers to Exporters*, ed. by Andres Kasekamp and Heiko Pääbo (Tartu: EuroCollege, University of Tartu, 2006), pp. 110-120 (p.113)

an ‘interdependent’ relationship with human rights,<sup>214</sup> and as discussed extensively above the constrained approach of the Court of Justice to this area of law is a major contributor to the subordinate role of deontological values within the EU legal order. Julia Laffranque has commented:

‘Human rights cannot be defended and promoted only by legal instruments and their enforcement mechanisms ... it is essential that the basic rights are understood and upheld by everyone ... If we are afraid to speak openly of the concerns weighing on Europe, we will create a psychological barrier between the decision makers and everyone else that will be difficult to overcome. **The people, who should be the bearers of supreme power**, will no longer understand what role they have to play in this entire process. Professor Andreas Vosskuhle, President of the Federal Constitutional Court of Germany, has rightly begun to speak about a crisis of trust in Europe.’<sup>215</sup>

Thus it seems that democratic values, with the closely aligned norms of human rights and the rule of law, should be articulated above all within a future *Grundnorm* of the EU legal order, in order to address this ‘crisis of trust’. Yet there are major issues with the eminence of the value of democracy in the current iteration of the Treaties.

### 6.3 The Democratic Deficit of the European Union

In spite of the various recitations upholding democratic values in the Treaties previously discussed, there is much evidence to support the view that the Union lacks democratic legitimacy, a ‘democratic deficit’. Firstly there is the argument that that European integration has led to an increase in executive power with corresponding decrease in national parliamentary power via the supremacy of EU law. Secondly the European Commission, essentially the executive power of the Union, is not directly elected, nor does it conduct its activities with a high level of transparency. Thirdly, it could be said

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<sup>214</sup> Anne Gallagher, ‘The United Nations, Democracy and Human Rights’ in *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers*, ed. by S. Skare, I. Burkey and H. Mork, (Oslo: Norwegian Centre for Human Rights, University of Oslo), p. 1

<sup>215</sup> Julia Laffranque, ‘Estonia’s Trump in Europe – Protection of human rights’, in *Estonian Foreign Policy Yearbook 2013*, ed. by K. Kasekamp and L. Malksoo (Tallinn: Estonian Foreign Policy Institute, 2014), 125-140, p. 129

that the powers of the directly elected European Parliament do not sufficiently balance those of the other institutions, especially the Commission. Fourthly, European Parliament elections, as they are currently conducted, are not truly ‘European’ as they are treated by the parliamentary parties and the media essentially as mid-term national elections, meaning that the general public are not really voting on Union issues, but rather on national issues.<sup>216</sup>

Andreas Follesdal and Simon Hix comment with regard to the structure of the EU polity:

‘... there is no electoral contest about the political leadership at the European level or the basic direction of the EU policy agenda.’<sup>217</sup>

Additionally it has been noted that the *sui generis* nature of the European Union does not lend itself well to the separation of powers doctrine<sup>218</sup> – which is generally considered a key feature of a parliamentary democracy.<sup>219</sup> Until the Single European Act (SEA)<sup>220</sup> of 1986, the role of the European Parliament was at most consultative. The adoption of the *co-decision procedure*, now called the *ordinary legislative procedure*,<sup>221</sup> did grant the European Parliament equal footing with the Council; the Lisbon Treaty also increased the legislative areas where the ordinary legislative procedure can be employed. However the current Treaty framework still retains the *special legislative procedure* for some areas. Under the *special legislative procedure* the European Parliament continues to only have a consultative role, with the Council of the European Union acting as the sole legislator.<sup>222</sup> The Treaties give no ‘ranking’ to law created under either the *ordinary legislative procedure* or the *special legislative procedure* – in

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<sup>216</sup> Andreas Follesdal and Simon Hix, ‘Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’, *European Governance Papers (EUROGOV)*, No. C-05-02 (2005)

<sup>217</sup> *Ibid.*, p.18

<sup>218</sup> See for example Robert Schutz, *Sharpening the Separation of Powers through a Hierarchy of Norms? Reflections on the Draft Constitutional Treaty’s regime for legislative and executive law making*, (Florence: European University Institute, 2005), Working Paper 2005/W/1, p.7.

<sup>219</sup> David Samuels, ‘Separation of Powers’, in *The Oxford Handbook of Comparative Politics*, ed. by Carles Boix and Susan Stokes, (Oxford: Oxford University Press, 2007), pp. 703-726 (p. 703)

<sup>220</sup> Single European Act, 1987 OJ L 169/1

<sup>221</sup> Art. 294, TFEU

<sup>222</sup> Art. 289(2), TFEU

other words law originating via the (arguably) ‘less democratic’ *special legislative procedure* has the same value as law originating from the *ordinary legislative procedure*.<sup>223</sup>

The Lisbon Treaty innovation of the European Citizens’ Initiative (ECI)<sup>224</sup>, although it could be said to encourage a civil society within the Union, does little to correct the democratic deficit either. An ECI referendum is non-binding and additionally:

‘The problem with referendums ... is that they only allow voters to express their views about isolated fundamental constitutional issues and not on the specific policy content within a particular constitutional status quo. Referendums are hence ineffective mechanisms for promoting day-to-day competition, contestation among policy platforms, articulation and opposition in the EU policy process.’<sup>225</sup>

Even the Copenhagen criteria imposed on potential future members of the EU has been criticised as ‘ineffective’ and ‘vague’. Non-compliant candidate countries that do not fully comply with criteria do not generally suffer meaningful sanctions.<sup>226</sup> Furthermore, the lack of democratic legitimacy possessed by the Union institutions ironically suggests that the EU itself would not meet the criteria it imposes on Member State candidates.<sup>227</sup> As Julia Laffranque comments:

‘If the European Union places great demands on the Member States, it is in no position to neglect examining whether and how the EU institutions themselves adhere to the European fundamental values.’<sup>228</sup>

Ultimately the source of the identity crisis of the European Union must be located in this ‘democratic deficit’. Recall the frequent hesitation of the Court of Justice whenever there is a potential conflict between Community law and Member State sovereignty;

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<sup>223</sup> Schutz, pp.7-8

<sup>224</sup> Article 11(4), TEU

<sup>225</sup> Follesdal and Hix, p. 19

<sup>226</sup> Paulina Rezler, ‘The Copenhagen Criteria: Are they helping or hurting the European Union?’, *Touro International Law Review*, 14.2 (2011), 390-410 (p.391)

<sup>227</sup> Cesare Pinelli, *Protecting the Fundamentals: Article 7 of the Treaty on the European Union and Beyond*, (Brussels: Foundation for European Progressive Studies (FEPS) Jurist Network, 2012)

<sup>228</sup> J. Laffranque, ‘Estonia’s Trump in Europe’, p. 128

thus leading to a restrained approach to rights protection by the Court as well as a level of indeterminacy in many other areas. Implementation of fuller democracy within the EU polity via a refocusing of the EU law *Grundnorm* would surely help to resolve this uncertainty, and thus give the Court a clearer guidance as to what the EU is truly *for*, and hence what type of legal order it should construct. Such a view would seem to be supported by none other than Pope Francis, who in a recent speech to the Council of Europe noted:

‘Today Europe is multipolar in its relationships and its intentions; it is impossible to imagine or to build Europe without fully taking into account this multipolar reality ... In Europe’s present political situation, merely internal dialogue between the organizations (whether political, religious or cultural) to which one belongs, ends up being unproductive. Our times demand the ability to break out of the structures which “contain” our identity and to encounter others, for the sake of making that identity more solid and fruitful in the **fraternal exchange of transversality**.’<sup>229</sup>

Implementation of democracy and its closely associated norms at the heart of the EU legal system would contribute to the creation of a more clarified yet ‘transversal’ European identity, and thus in turn lead to a truly deontological ‘community of values’ within the Union.

#### 6.4 The ideal *Grundnorm* of the European Union

Flowing from the above discussion, the answer to the third research question, with regard to the ideal future *Grundnorm* of European Union law, is as follows:

**“The ideal *Grundnorm* of a future European Union legal order should be deontologically-based, with a primary emphasis on democracy and the closely associated values of human rights and the rule of law, with the goal of creating a community of values in Europe.”**

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<sup>229</sup> Francis, ‘Pope Francis’s speech to the Council of Europe in full’, Catholic Herald, November 25 2014, <http://www.catholicherald.co.uk/news/2014/11/25/pope-franciss-speech-to-the-council-of-europe-in-full/> [accessed November 25 2014]



Again, to quote a recent speech of influential ethicist Pope Francis, this time to the European Parliament:

‘The true strength of our democracies – understood as expressions of the political will of the people – must not be allowed to collapse under the pressure of multinational interests which are not universal ... **Awareness of one’s own identity** is also necessary for entering into a positive dialogue with the States which have asked to become part of the Union in the future ... the time has come to work together in building a Europe which revolves not around the economy, but ... around **inalienable values**.’<sup>230</sup>

In practical terms achieving the ambitious goal of this new *Grundnorm* will be extremely difficult, and will require as a minimum extensive revision of the Treaties, with a particular focus on making the EU institutions more accountable and democratic. However, resolution of the identity crisis of the European Union could be expected to lead not only to stronger protection and promotion of intrinsic rights within the EU legal order itself, but also a greater engagement in the European integration project with the approximately 500 million citizens of the Union – perhaps even justifying the claim that the European Union is truly a normative power.

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<sup>230</sup> Francis, ‘Pope Francis: Address to European Parliament - full text’, Vatican Radio, November 25 2014, <http://www.news.va/en/news/pope-francis-address-to-european-parliament> [accessed November 25 2014]

## 7. Conclusion

In summation, this thesis has attempted to identify the underlying normative structure of European Union law using the theories of Hans Kelsen. While the Treaties do contain many normative statements, the jurisprudence of the European Court of Justice supports the view that the central norm or *Grundnorm* of European Union law is the establishment and maintenance of the European Common Market. This centrality of this norm does permit many consequentially ethical benefits, although it cannot be said to have a primarily *deontological* emphasis, rather it has a *functional* or technical basis. The Court constructed this functional *Grundnorm* due to the challenge posed by the indeterminacy of the goals of the Community polity which primarily arise from the long-standing democratic deficit, which remains in spite of the reforms of the Lisbon Treaty. Thus it is suggested that a future *Grundnorm* for European Union law emphasise democracy with concomitant values of human rights and the rule of law, in order to achieve a true community of values in Europe.

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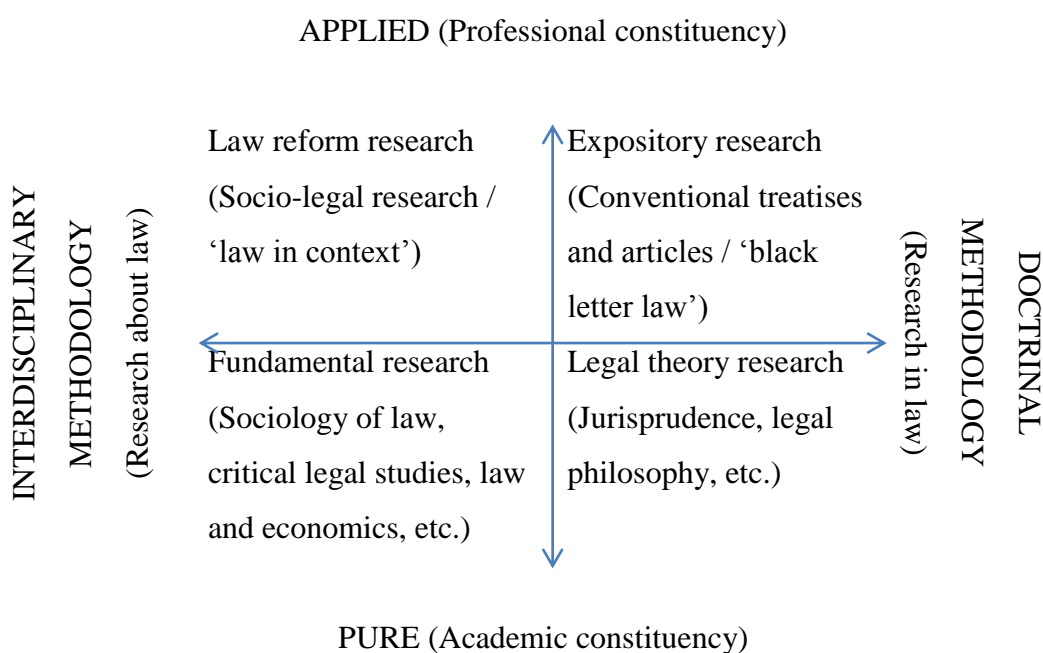
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**General notes on the nature of legal research**

The various approaches to legal research can be organised into the following matrix:<sup>231</sup>



The thesis, with its focus on legal philosophy, will definitely sit within the bottom right quadrant; doctrinal methodology with an academic constituency. Legal doctrinal research usually takes the form of asking the question ‘what is the law?’ in particular contexts, in order to discover and develop legal doctrines. This type of research contrasts with research in the natural sciences, which attempts to identify the causal relationship between variables in order to explain natural phenomena. Thus doctrinal

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<sup>231</sup> Harry Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law*, (Ottawa: Information Division, Social Sciences and Humanities Research Council of Ottawa, 1983), pp.63-71

research almost always has a qualitative rather than quantitative epistemological emphasis.<sup>232</sup>

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<sup>232</sup> Paul Chynoweth, 'Legal research' in *Advanced Research Methods in the Built Environment*, ed. by A. Knight and L. Ruddock (Hoboken: Wiley-Blackwell, 2008)

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