

# 1 Introduction and overview – interpretation and the European Court of Justice

## Introduction

‘Judicial power is a brute fact of political life in the European Union’,<sup>1</sup> according to Stone Sweet, writing fifty years after the European Union (EU) as it is now<sup>2</sup> and the European Court of Justice (ECJ) came into being. The comment accurately captures the remarkable role played by the ECJ in the EU legal system. The ECJ has originated some of the key features of the constitutional structure of the EU without an explicit textual basis, including: direct effect of EU law in the Member States; the supremacy of EU law; a human rights jurisprudence; the system of State liability; and the general treaty-making powers of the Union in external relations. In addition, the ECJ has extended, beyond the explicit Treaty basis, Union competence through expansive readings of the common market principles of free movement and undistorted competition, as well as in several other areas, including sex equality and criminal law, while narrowly interpreting Treaty provisions preserving sovereignty to the Member States. The role of the ECJ has been the subject of relatively little critical commentary<sup>3</sup> when compared to the

<sup>1</sup> A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004), 9.

<sup>2</sup> The term ‘EU’ is generally used in the present work unless reference is made specifically to the First or Community Pillar in contrast with the other Pillars according to the pre-Treaty of Lisbon institutional arrangement. When referring to pre-EU (i.e. pre-Treaty of Maastricht 1992) cases, the term ‘EC’ or ‘Community’ is generally used.

<sup>3</sup> J. H. H. Weiler, ‘Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the arena of Political Integration’, *Journal of Common Market Studies*, 31(4) (1993), 417–46, 430–1; J. H. H. Weiler, ‘Rewriting *Van Gend en Loos*: Towards a Normative Theory of ECJ Hermeneutics’ in O. Wiklund (ed.), *Judicial Discretion in European Perspective* (The Hague: Kluwer, 2003), 151.

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common currency achieved by the ‘democratic deficit’ in the EU.<sup>4</sup> In particular, the methods of interpretation or reasoning of the Court have not been as extensively critiqued as might be expected for such an influential body<sup>5</sup> after a half-century of existence. This situation contrasts strikingly with the high profile and vigorous debate surrounding the role and approach to interpretation, for example, of the US Supreme Court. The debate on ‘government by the judiciary’<sup>6</sup> is a central feature of US constitutional and even political discourse.<sup>7</sup>

This work advances a thesis of the proper scope of legal interpretation by the ECJ in its role as a general and constitutional court<sup>8</sup> for the 27 Member States of the EU. It proposes a normative theory of interpretation for the Court and an alternative model of reasoning to its dominant method. In other words, it advances an argument about how the ECJ *should* generally engage in legal reasoning, not about how it does reason (which has already been well described in the literature).<sup>9</sup> What marks

<sup>4</sup> See P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials*, (4th edn, Oxford University Press, 2008), 133 n. 109, noting in particular J. H. H. Weiler, U. Haltern, F. Mayer, ‘European Democracy and its Critique’, in J. Hayward (ed.), *The Crisis of Representation in Europe* (London: Frank Cass, 1995), 32–3; A. Kaczorowska, *European Union Law* (2nd edn, London: Routledge, 2011), 231, noting that few seem to have cared that the ECJ has been pursuing a virtually political agenda of enhancing integration.

<sup>5</sup> For important recent discussion of the impact of the ECJ, see A. Stone Sweet, *The Judicial Construction of Europe*; K. Alter, *The Political Power of the European Court* (Oxford University Press, 2010).

<sup>6</sup> A phrase originated by L. B. Boudin, ‘Government by Judiciary’, *Political Science Quarterly*, 26(2) (1911), 238–270.

<sup>7</sup> More recently, see, e.g. J. N. Rakove (ed.), *Interpreting the Constitution* (Boston: Northeastern University Press, 1990); A. Bickel, *The Least Dangerous Branch of Government* (Indianapolis, IN: Bobbs Merrill Co., 1962); R. Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986); R. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990); A. Scalia, A. Gutmann (ed.), *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1998); K. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas, 1999); S. Breyer, *Active Liberty: Interpreting our Democratic Constitution* (New York: Alfred A. Knopf, 2005); R. Dworkin, *Justice in Robes* (Cambridge, MA: Harvard University Press, 2006). See also M. Rosenfeld, ‘Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court’, *International Journal of Constitutional Law*, 4(4) (2006), 618–51, 650–651, suggesting the ECJ has been ‘bolder’ than the US Supreme Court.

<sup>8</sup> On the role of the ECJ as a constitutional court, see S. Weatherill, *Law and Integration in the European Union* (Oxford: Clarendon Press, 1995), 184–223, 254–261; Stone Sweet, *Judicial Construction of Europe*; Rosenfeld, ‘Comparing Constitutional Review’.

<sup>9</sup> For identification of how the ECJ engages in legal reasoning, see A. Bredimas, *Methods of Interpretation and Community Law* (Oxford: North-Holland, 1978); H. Rasmussen, *On Law and Policy of the European Court of Justice* (The Hague: Kluwer, 1986); M. P. Maduro, *We the Court: the European Court of Justice and the European Economic Constitution* (Oxford: Hart,

the ECJ out above all as a court is a tendency to meta-teleological or broad, system-level purposive interpretation aimed at enhancing integration, albeit that there are many variations across the case law.

The argument is that the normative model of reasoning proposed in this work would, compared to the institutional template of reasoning developed by the Court, better cohere with the two fundamental principles of political morality that are common to the marked moral and ethical pluralism of European society: democracy and the rule of law. Despite this critical perspective, the work is not meant to be a ‘thrashing exercise’, attacking the very legitimacy of the Court’s institutional role. Rather, it is that constitutional adjudication by the ECJ must be constrained by a principled, normative scheme of interpretation that can be related to the ideals of democracy and the rule of law, not that the ECJ should not function as a constitutional court. The theoretical basis of the work could be seen as based on a middle ground between a Dworkinian-style conception of a judge as a system builder and the authoritative interpreter of what law is and *should* be,<sup>10</sup> and the perspective of Waldron, at least in a human rights context, that constitutional interpretation cannot be meaningfully constrained so as to tie judges to a certain understanding of constitutional texts independent of their own political preferences, such that constitutional review should be abandoned.<sup>11</sup> The book thus seeks to offer an EU perspective on the ‘counter-majoritarian objection’.<sup>12</sup> This objection to constitutional review is particularly strong in the EU because interpretation by the ECJ of the Treaties is very difficult to reverse: it requires coordination by all the Member States. In that regard, the ECJ operates in an ‘unusually permissive environment’,<sup>13</sup> but much more so than an ordinary constitutional court. The focus is on interpretation of the Treaties, because of their constitutional nature, but the argument also applies to secondary EU law.

Even these brief comments throw up the question of the suitability of models and ideas developed in a national context for the EU. The EU is continually characterised as *sui generis* with an implication that it thus

1997); M. de S.-O.-L'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press, 2004).

<sup>10</sup> See recently, e.g. Dworkin, *Justice in Robes*.

<sup>11</sup> J. Waldron, *Law and Disagreement* (Oxford University Press, 1999); J. Waldron, ‘The Core of the Case Against Judicial Review’, *Yale Law Journal*, 115(6) (2006), 1346–1407.

<sup>12</sup> A phrase coined by Bickel, *The Least Dangerous Branch*, 16–17. See also J. H. Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980), esp. 4–8, 68.

<sup>13</sup> Stone Sweet, *Judicial Construction*, 25.

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calls forth an entirely new conception of political morality and design.<sup>14</sup> This approach can often act as a 'blocking move' in argument when objections to a particular constitutional feature of the EU are made on grounds that might similarly be made in a national system. The risk that this poses, though the approach is now a classic one in EU law especially for those who defend and advance the project of integration, is to render normative constraints on institutional and legal power (which is the core of the idea of Western constitutionalism<sup>15</sup>) in a national context seemingly inapplicable in the EU, but without adequately substituting for them. The EU is of course different, but to what extent, and what are the implications of that difference? The EU self-articulates as a democracy based on the rule of law and human rights, which brings it squarely into the province and tradition of the modern Western constitutional State in terms of the values it proclaims.<sup>16</sup> As Dann states:

... European constitutional scholarship should avoid stumbling into the trap of simple but ultimately empty *sui generis*-classifications, thereby exposing its 'classificatory impotence'. *Sui generis*-terms can act as middle stages for conceptual construction and can thus be functional ... They point out gaps and conceptual shortages. But filling those gaps – that is, conceptualizing and providing a term, or forming concepts – is a separate, subsequent matter.<sup>17</sup>

Chapter 4 argues that a tripartite separation of powers is a normatively attractive framework for the EU institutions. First, however, in Chapter 2, literature on the ECJ is surveyed in order to set the present work in context. In Chapter 3, a normative scheme of interpretation related to the rule of law and democracy is elaborated on as a model of reasoning for the ECJ; Chapter 4 thus cements this analysis by presenting the supporting institutional framework of a separation of powers.

<sup>14</sup> Shaw describes the *sui generis* characterisation as the 'paradigm analysis' amongst EU lawyers: J. Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic', *Oxford Journal of Legal Studies*, 16(2) (1996), 231–253, 245. See also, e.g. J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford: Clarendon Press, 1993), 34.

<sup>15</sup> G. Sartori, 'Constitutionalism: A Preliminary Discussion', *American Political Science Review*, 56(4) (1962), 853–864; G. Maddox, 'A Note on the Meaning of a Constitution', *American Political Science Review*, 76(4) (1982), 805–809.

<sup>16</sup> See the Preamble to the Treaty on European Union (TEU).

<sup>17</sup> P. Dann, 'Thoughts on a Methodology of European Constitutional Law', *German Law Journal*, 6(11) (2005), 1453–1474, 1469. As Shaw noted, this '*sui generis*' line of thinking tends to be self-sustaining: Shaw, 'European Union Legal Studies in Crisis?', 245. See also A. Vauchez, 'Embedded Law. Political Sociology of the European Community of Law: Elements of a Renewed Research Agenda', *EUI Working Paper 2007/23* (2007), 10 *et seq.*

Subsequent chapters then examine in more detail and apply to case law the interpretative scheme and framework set out in Chapter 3. Chapter 5 applies the normative scheme or hierarchy of interpretation elaborated in Chapter 3 to case studies from EU law. Chapter 6 examines the issue of levels of generality in the legal reasoning of the Court of Justice and relates this to objective originalist interpretation. Chapter 7 looks at another variation of originalist interpretation, namely, the use of evidence of the intention of the signatories of legal instruments in their judicial interpretation. The remainder of this chapter sets out the methodological framework and surveys some of the leading constitutional cases of the ECJ in order to offer an account of its central and fundamental role in the integration process and to explain the context of its legal reasoning.

## Methodological framework

### *The constitutional context and case selection*

The aim of the present work is not to offer a systematic account of ECJ interpretation across the range of substantive areas of its jurisdiction. The ECJ does not adopt a strongly ‘activist’ (i.e. strongly tending toward law creation rather than its identification) to the same extent in every area of its case law or even in the majority of its cases. The present work offers a normative framework as to *how the ECJ should engage* in interpretation of EU laws. Moreover, it is important to guard against an excessive differentiation of interpretative considerations relative to the substantive context or content of the law: the fundamental features of interpretation are universalisable, i.e. they are not sector-specific. The way in which a court approaches the identification of the rules and their application does not necessarily change according to the subject matter: otherwise, case law would be a wilderness of interpretative single instances, since it would be always possible to argue that a peculiarity of a case brought it into a category of its own. Such an approach would run counter to the core idea of the rule of law: of open, public rules, the meaning of which is shared in essentials by, and predictable to, all reasonable participants in the legal interpretative community.<sup>18</sup> Legal interpretation, as opposed to the content of the law, thus does not generally require a sector-specific process of initiation.

<sup>18</sup> See generally B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004).

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In any study of legal reasoning and of the case law of a particular court, a preliminary issue is the justification of case selection. The latter in legal ‘science’ often proceeds on the basis of shared assumptions, without being explicitly articulated, and there is always a risk that it is open to a charge of selectivity. To a large extent, this charge can be met on qualitative grounds: if generalisations can be made about methods of reasoning across a range of important, constitutional decisions, the resulting conclusions are as generalisable as any study can be without claiming to be a comprehensive description of every aspect and every case of a given court’s legal reasoning. This is the approach implicitly adopted in Bengoetxea’s *The Legal Reasoning of the European Court of Justice*, where he acknowledges not providing the account of substantive law found in other general works on EU doctrine.<sup>19</sup>

Lasser’s important work *Comparative Judicial Deliberations* has been criticised by some for not justifying case selection in its study of the French *Cour de Cassation*, although these criticisms seem to be made as to the comparative method, rather than with respect to legal reasoning.<sup>20</sup> One review suggests the comparatist must ‘go deeply into [the debates within a particular legal system] and try to understand the other legal system on its own terms’,<sup>21</sup> suggesting this as a ‘jurisprudential approach to comparative law’.<sup>22</sup> The universalisable character of legal reasoning would cast doubt on this at least in so far as it applies to legal reasoning. Most legal theorists claim to offer general accounts of law in a way that is not specific to any jurisdiction. In the present work,

<sup>19</sup> Bengoetxea, *Legal Reasoning*, 3.

<sup>20</sup> F. Bruinsma, ‘A Socio-Legal Analysis of the Legitimacy of Highest Courts’ in N. Huls, M. Adams and J. Bomhoff (eds.), *The Legitimacy of Highest Courts’ Rulings: Judicial Deliberations and Beyond* (The Hague: T. M. C. Asser, 2009), 64, comments ‘Lasser is unforgivably silent about his empirical methodology ...’. See also J. Komárek, ‘Questioning Judicial Deliberations’, *Oxford Journal of Legal Studies*, 29(4) (2009), 805–826, 821.

<sup>21</sup> Komárek, ‘Questioning Judicial Deliberations’, 826.

<sup>22</sup> *Ibid.*, citing W. Ewald, ‘The Jurisprudential Approach to Comparative Law: A Field Guide to “Rats”’, *American Journal of Comparative Law*, 46(4) (1998), 701–707, to the effect that understanding a foreign legal system requires immersion in its concepts or a ‘conceptual jurisprudence’. For Ewald, this touches on deep issues in the philosophy of history and of social science: *ibid.*, 706–707. Ewald acknowledges the risk of conceptual relativism that this approach entails (*ibid.*). It appears, however, to be primarily directed at the process of law formation, and not at legal reasoning. In response to Ewald, the reasons for the development of a particular legal system in particular ways will of course be entwined with a jurisdiction’s political and intellectual history, but the result of law-making must be understandable by ordinary citizens according to everyday, conventional criteria.

literature from other contexts and jurisdictions is cited in so far as it helps understanding of the conceptual (i.e. non-empirical) character of legal reasoning. To put the point in a practical way, almost all legal systems require obedience of people within their jurisdiction and do not make exceptions on the basis that visiting foreigners have not been able to immerse themselves in the practice and *mentalité* of the local legal interpretative community. Understanding the law is for the most part subject to publicly accessible conventions of understanding, a point developed further in Chapter 3.

One defender of the Court, Judge David Edward, explicitly based his rejection of criticism by Sir Patrick Neill of the ECJ, that the Court was forwarding integration by its own élite sense of mission, on the observation that the cases that tend to attract the ire of critics are very small in number and only represent a fraction of the Court's case law.<sup>23</sup> This is, however, arguably misdirected, because underlying it essentially is the presupposition that case law ought to be evaluated in quantitative terms. Yet law, and the study of case law, is quintessentially a qualitative matter. What matters is the importance of the legal sources and the nature of reasoning contained in them. For example, the number of cases needed to establish the essential constitutional features of the EU was not large relative to the overall body of ECJ cases. However, their effect as *de facto* precedents meant that their significance far transcended the small number of cases involved: the principles identified in them apply generally throughout the EU legal system. If one includes in the quantitative calculation all the cases that in turn explicitly or implicitly relied on the doctrines established in the leading judgments criticised by Sir Patrick Neill, virtually every ECJ judgment could be included within the category of 'activist' decisions.

It might be objected here that in order to know what cases are important, one must first become familiar with the whole mass of case law. However, this kind of familiarity, apart from being impractical for a single study, is already achieved by the accumulated doctrine and commentary in academic literature, which will have as a collective exercise determined what cases are more important than others

<sup>23</sup> D. Edward, 'Judicial Activism – Myth or Reality', in A. Campbell and M. Voyatzki (eds.), *Legal Reasoning and Judicial Interpretation of European Law: Essays in Honour of Lord Mackenzie Stuart* (Hampshire: Trenton Publishing, 1996) referring to Sir Patrick Neill's *The European Court of Justice: A Case Study in Judicial Activism* (London: European Policy Forum, 1995), 30.



and what cases constitute the ‘canon’ within a legal discipline or sub-discipline, including through mutual criticism and self-correction. This ‘constitutional canon’ is likely to be a much smaller body of case law than the total numerical mass.

This process of the identification of a canon is not unique to law; it applies across many disciplines, literature being a good example. It might be objected to a study of Shakespeare (1564–1616 AD) that it randomly focuses on one of the many writers active in the sixteenth and seventeenth centuries and fails to establish his supposed pre-eminence. However, the body of critical work in English literature will have already established this canonical status to a degree that makes it unnecessary for a new researcher in the field to re-establish that *ab initio*. Similarly in EU law,<sup>24</sup> there exists a well-established canon of cases, e.g. of constitutional character, that are widely and frequently cited because of their substantive significance and precedential effect. Perhaps the most obvious examples of the canon of ECJ case law are those cases that established the constitutional character of the EU, through the doctrines of supremacy, direct effect, parallelism and pre-emption in external relations, fundamental rights, State liability, and the extension of the free movement principles to encompass non-discriminatory obstacles to market access.<sup>25</sup> That these cases are of constitutional character reflects a qualitative criterion of case selection, i.e. the importance of the subject matter that is regulated.

By ‘constitutional’, this work means the same as that term has generally meant in Western legal history: of or relating to the general structuring or ordering of government or of the State, or relating to, in a general way, the relationship between the individual and a government.<sup>26</sup> The ECJ does act as a constitutional court, in fact though not in name.<sup>27</sup> The ECJ itself has described the Treaty as a ‘constitutional

<sup>24</sup> On the idea of a legal canon and a comparison with a literary canon, see P. Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Oxford: Blackwell, 1986), 75; F. Cownie, A. Bradney, M. Burton, *English Legal System in Context* (Oxford: Blackwell, 2007), 102–104.

<sup>25</sup> These and other ‘constitutionalising’ cases of the ECJ are surveyed at the end of Chapter 1.

<sup>26</sup> See generally G. Sartori, ‘Constitutionalism’; Maddox, ‘A Note on the Meaning of a Constitution’.

<sup>27</sup> S. R. Weatherill, ‘Activism and Restraint in the European Court of Justice’, in P. Capps, M. Evans and S. Konstadinidis (eds.), *Asserting Jurisdiction: International and European Legal Perspectives* (Oxford: Hart, 2003); Stone Sweet, *Judicial Construction*; Rosenfeld, ‘Comparing Constitutional Review’, 620–623.



charter'.<sup>28</sup> Many of the matters dealt with in the case law of the ECJ fall within what is conventionally taken as 'constitutional' including: the scope of the 'economic' and other rights enjoyed by citizens of the Union, human rights more generally, the delineation of Member State competence relative to that of the Union, and the Court's embryonic jurisdiction in criminal law. Moreover, because of the doctrine of supremacy, EU law and the interpretation of it by the ECJ takes precedence over all national law, including national constitutional law (at least from the perspective of the ECJ).<sup>29</sup> The choice of cases relates primarily to constitutional matters in the EU.<sup>30</sup> The focus is on the judgments of the Court of Justice itself, rather than on opinions of the Advocate General. Opinions of the latter are relatively infrequently referred to in ECJ judgments, and their influence is difficult to measure,<sup>31</sup> although they are referred to in the present work where they help illustrate an alternative perspective or point of criticism of the ECJ's own reasoning and where space permits.

### *The universalisability of legal reasoning*

A considerable amount of the literature referred to in this work is from the US and written in the context of the US Constitution or has been written generally on legal reasoning without specific reference to the EU. This raises the question of the transferability of such literature to the EU context, given that, after all, the EU has a number of distinctive features that render it unlike other polities. However, irrespective of constitutional design, the task of interpretation shares certain common features across legal systems: it is the act of attributing meaning to legal

<sup>28</sup> Case 294/83, *Parti Écologiste 'Les Verts' v. European Parliament* [1986] ECR 1339, para 23.

<sup>29</sup> See Case 6/64, *Costa v. ENEL* [1964] ECR 585; Case 106/77, *Simmenthal Spa v. Italian Minister for Finance* [1978] ECR 629. However, the absolute claims of the ECJ in this regard have been strongly contested, most notably by the German Federal Constitutional Court: *Internationale Handelsgesellschaft*, BVerfGE 37, 271, [1974] 2 CMLR 540; *Wünsche Handelsgesellschaft*, BVerfGE 73, 339; [1987] 3 CMLR 225; *Brunner v. European Treaty*, BVerfGE 89, 155; [1994] 1 CMLR 57; *Lisbon Treaty Case*, BVerfG, 2 BvE 2/08, judgment of 30 June 2009.

<sup>30</sup> See E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law*, 75(1) (1981), 1–27, discussing cases relating to direct effect, supremacy, human rights and Community competence.

<sup>31</sup> N. Burrows and R. Greaves, *The Advocate General and EC Law* (Oxford University Press, 2007), 7–8. See, however, C. J. Carrubba, M. Gabel, C. Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice', *American Political Science Review*, 102(4) (2008), 435–452, 449, suggesting that, statistically, opinions of the AG '[have] a systematic positive influence on ECJ decisions'.

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texts. Legal reasoning is regarded by many scholars as necessarily having a universal character to justify the general normative claim to obedience that it makes:

... In other words, there is no special case of European legal reasoning, nor anything particularly European about the way the ECJ proceeds to justify its decisions. Rather, any general theory of legal reasoning ... could account for the ECJ's decision-making. Obviously certain rearrangements would need to be made in order to adjust the general theory to the different idiosyncratic elements of the European legal system.<sup>32</sup>

This context of a shared interpretative framework is especially important in a continent-wide entity such as the EU, encompassing different jurisdictions and free movement of what are hoped to be law-abiding citizens between them. Uniform application of EU law, a principle

<sup>32</sup> J. Bengoetxea, N. MacCormick, L. M. Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice', in G. de Búrca and J. H. H. Weiler (eds.), *The European Court of Justice* (Oxford University Press, 2001), 48. Similarly in the context of the ECJ, see J. H. H. Weiler, 'The Court of Justice on Trial', *Common Market Law Review*, 24 (1987), 555–589, 568. On the universal character of legal reasoning in general, see e.g. N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), 97–99, 123–124; A. Peczenik, 'Moral and Ontological Justification of Legal Reasoning', *Law and Philosophy*, 4(2) (1985), 289–309, 293–298; R. Dworkin, 'Hart's Postscript and the Character of Legal Philosophy', *Oxford Journal of Legal Studies*, 24(1) (2004), 1–37, 36; and see generally, Z. Bankowski and J. MacLean (eds.), *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2007). On constitutional interpretation, Goldsworthy observes: 'Interpretation everywhere is guided by similar considerations': J. Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2007), 5. Different accounts of universalisation or universalisability are possible, depending on how 'thick' their explanations of normativity. As developed further in Chapter 3, the present work supposes universalisation within a shared hermeneutic framework between all legal participants in the legal system, which can be described as a thin or formal account. For discussion of MacCormick's formal conception of universalisation compared to a more substantive account (based on discourse theory), see G. Pavlakos, 'Two Concepts of Universalisation', in Bankowski and MacLean (eds.), *The Universal and the Particular*. Dworkin seems to acknowledge this universalisable aspect of legal reasoning, although he seems unclear to what extent law has a local character: 'For just as we can explore the general concept of democracy by developing an attractive abstract conception of that concept, so we can also aim at a conception of legality of similar abstraction, and then attempt to see what follows, by way of concrete propositions of law, more locally' and goes on to deny the criticism directed at this theory that it simply seeks to explain US practice by noting that '... In fact, my account aims at very great generality, and how far it succeeds in that aim can only be assessed by a much more painstaking exercise in comparative legal interpretation than these critics have undertaken': Dworkin, 'Hart's Postscript', 36. Nonetheless, Dworkin himself appears not to have published any comparative studies and does not cite such comparative studies in his work.