

**DEMOICRATIC AUTHORITY: NATURE
AND GROUND OF THE EU'S RIGHT TO
RULE**



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A Thesis submitted for the degree of
DPHIL IN LAW
Trinity Term 2021

Word Count: 99 237

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ABSTRACT

This thesis examines the nature and ground of the EU's legitimate authority. It provides an original account of the preferred moral standard to evaluate such authority and studies its effects on the practical reasoning of those subject to the EU's authority. The overarching objective of the thesis is to overcome court-centred discussions about conflicting claims to ultimate authority and *Kompetenz-Kompetenz*, and to initiate a debate on the more substantial and prior question of the moral grounds of the EU's authority. The thesis draws on the rich literature concerning the political authority of states and the emerging discussions on international authority. It shows that searching for the moral ground of the EU's authority can provide a fresh perspective on important legitimacy challenges in the EU, especially in relation to the authority of the Member States. This is not only theoretically important in that it highlights a previously neglected perspective on the EU's authority claim. Beyond that, a whole range of factors illustrate the practical relevance of this investigation: growing nationalism in the Member States, ever more opposition from national constitutional courts, and ultimately Brexit highlight the fact that the authority of the EU is under strain. The three parts of the thesis reflect the three main steps of the argument. Part I makes the case that the concept of political authority (both the study of the nature and of the legitimacy of authority) is applicable to political communities and organisations beyond the state. Part II focuses on the nature, scope and addressees of the EU's authority claim. It uses the notions of *institutions* and *membership* to understand the EU's authority claim and to relate it to national and international authority claims. The main goal is to gain analytical clarity about what kind of authority the EU claims that is in need of legitimation. Part III engages with the appropriate moral standard to ground and evaluate the EU's authority. It looks at both the EU institutions' vision as well as at various implicit and explicit academic models used to evaluate the legitimate authority of EU law. In the final two chapters, the thesis proposes an original account of *demoicratic authority*, which takes the EU's constitutional peoples as principal sources of the EU's authority and is based on the value of the EU's institutional set-up to allow the peoples to exercise joint self-determination beyond the state and thereby secure their autonomy as constitutional collectives.

ACKNOWLEDGEMENTS

First and foremost, I am deeply grateful to my supervisor Pavlos Eleftheriadis. He not only sparked my passion for the Philosophical Foundations of the EU during the MJur. Throughout the DPhil, he helped me to pursue my own ideas while preventing me from straying from the right course. Thank you, Pavlos, for your kindness, generosity and support at all times.

On the road to the DPhil, I relied on many more than I can name here to open doors for me and to encourage me to go through them. I am deeply grateful to Prof. Christoph Herrmann for invaluable mentorship and for guiding a naïve second-year law student towards a passion for EU law and academia. I thank Hans-Georg Kamann and Advocate General Juliane Kokott for invaluable work-experience and for generous references. Finally, I will forever be indebted to the late John Gardner, who opened the world of legal and political philosophy to me and whose teaching and encouragement gave me the confidence to pursue this doctorate.

The Oxford Law Faculty has provided the most stimulating environment I could have hoped for. I particularly thank Stephen Weatherill for supporting not only my project at all stages, but also the activities of the EU Law Discussion Group which I had the joy of co-convening. I am grateful to Nick Barber for very valuable input on my project. Beyond these formal means, I thank my colleagues and friends Ekati, Felix, Roderic, and Vassilios for many fruitful discussions (and coffees).

I would like to express my sincere gratitude to those who had so much faith in my project that they decided to fund it. In that regard, I thank the *Cusanuswerk* not only for financial support, but for the wonderful community I found there. I thank the Arts and Humanities Research Council Open-Oxford-Cambridge Doctoral Training Partnership for their support and for enriching my understanding of humanities more broadly. And I thank the *Studienstiftung* for allowing me to access their training opportunities and seminars.

One of Oxford's finest characteristics is the college system. I found a home, friends, and much more, first in Brasenose and then in St. Anne's. Those colleges offered great academic support, perfect conditions to write this thesis (thanks to the St. Anne's library team), ample opportunities to carry out my musical passions (thanks especially to Brasenose choir) and an education well beyond my narrow field of study (thanks to countless college lunches discussing, for example, quantum physics, the philosophy of language, and – yes – 'Brexit').

I not only fell in love with Oxford as a place. It is hard to express how blessed I am to have encountered so many friends who make my life better every day. Thank you to Crescente, Jan, Linus, Minas, and Virginia, for a great life in Cowley. Thank you to Harrison, Lukas, Tim, and William for friendships that are nourished through a shared passion for making

music, and much more beyond that. And a special thanks to those very dear friends who directly contributed to and significantly improved this thesis: thank you, Francesca and Jonas, for the ongoing and exciting exchange of ideas; thank you, Anne-Marie and Benni, for counsel and encouragement from the earliest stages of this adventure; thank you, Ryan, for taking on the tedious task of proofreading; thank you, Eddie, for your friendship and generosity throughout every stage of this; and – last but certainly not least – thank you, Amédée, for reading every word of this thesis and for making sure it is the best it can be.

It is hard work to support someone if you know what they are doing. I can't imagine how hard it is if you don't. The only reason a farmer's boy from Bavaria can end up submitting a DPhil at Oxford is with the unwavering support and love of family. I am thus grateful beyond measure to my parents Bernhard and Heidi, to my siblings Kathrin and Max, to my siblings-in-law Corinna and Tobi, and – most importantly – to my 3 ½ nephews (at the time of writing, the fourth is on his way), for grounding and supporting me despite the very different way in which I lead my life.

Josef Weinzierl, June 2021

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TABLE OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
BIS	Bank for International Settlements
BVerfG	Bundesverfassungsgericht (German Constitutional Court)
CFrEU	Charter of Fundamental Rights of the European Union
Council	Council of the European Union
COVID 19	Coronavirus Disease 2019
EAW	European Arrest Warrant
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
EFSF	European Financial Stability Facility
EP	European Parliament
ESM	European Stability Mechanism
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
IMF	International Monetary Fund
IO	International Organisation
IT	Information Technology
MEP	Member of the European Parliament

OECD	Organisation for Economic Co-operation and Development
PSPP	Public Sector Purchase Programme
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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INTRODUCTION

In 2021, it is simple enough to illustrate the importance of reflecting on the authority of EU law. For one, various national constitutional court judgments more or less openly question the authority of EU law and send shockwaves well beyond the narrow community of EU constitutional lawyers.¹ For another, controversial statements of national politicians show how the seemingly too intrusive authority claim of EU law enters the political arena. Already in 1988, former UK Prime Minister Margaret Thatcher opined that

(w)e have not successfully rolled back the frontiers of the state in Britain, only to see them re-imposed at a European level with a European super-state exercising a new dominance from Brussels.²

It is undeniable that some of this sentiment animated Brexit, ie the UK's ultimate departure from the EU in 2020. One of her successors, David Cameron, remarked in 2014 that 'Brussels has got too big, too bossy, too interfering'³. Only very recently, the Polish Prime Minister Mateusz Morawiecki petitioned the Polish Constitutional Tribunal, asking for a 'comprehensive settlement' of the conflict between the supremacy of EU law and national law in favour of the latter.

In light of this practical salience, I found it surprising how undertheorized many aspects of the EU's authority remain. I am, of course, not referring to the avalanche of

¹ One currently stands out: BVerfG, Judgment of 05 May 2020 - 2 BvR 859/15 (*Weiss*).

² Margaret Thatcher, 'Bruges Speech' (1988) <<https://www.brugesgroup.com/component/content/article/8-papers/808-bruges-revisited?Itemid=101>> accessed 4 May 2021.

³ 'Brussels Too Big and Too Bossy, Cameron Tells EU Leaders' *BBC News* (27 May 2014) <<https://www.bbc.com/news/uk-politics-27583545>> accessed 4 May 2021.

literature on the courts' conflicting claims to ultimate authority and their conceptualisation that fills entire libraries, but rather, to literature on the nature of the EU's authority claim and on the ground for its moral legitimacy, which is relatively scarce. These two distinct questions merit particular attention in light of the more general observation that political theory increasingly takes into account the emerging forms of governance and *loci* of authority above and beyond the state.⁴ The growing realisation of the breath and intrusiveness of EU law only raises the moral profile of these questions. Finally, the very issue of political authority – independent of the regulatory level under scrutiny – underscores the theoretical relevance of the present topic. As Raz rightly says, authority is 'one of the most controversial concepts'⁵ of political theory and thus merits our continuous attention.

The practical relevance of an inquiry into the nature and moral grounds of the EU's authority shouldn't be understated either. We will see at various stages of this thesis how the ECJ often labours in a theoretical vacuum when interpreting fundamental as well as novel instruments of EU law. An account of the ground and, importantly, limits of EU law's authority can help to guide and constrain the legitimate realm of interpretation. More generally, there is a widespread feeling – vividly illustrated by the above quotes – that the EU's 'authority is under stress'⁶. The reasons are familiar: the rise of populism and nationalism, ever more widespread scepticism about institutional cooperation beyond the

⁴ See only Joseph Raz, 'Why the State?' in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (CUP 2017) 160 et seq.

⁵ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd ed., OUP 2009) 3.

⁶ Joseph Weiler, 'The Authority of European Law: Do We Still Believe in It?' in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do we still believe in it?* (Springer 2019) 3.

state, or simply the growing realisation of the tremendous impact of the EU and its laws on our lives. It helps, so I argue, to take a step back and ask this deceptively simple question: what gives the EU the right to rule in the first place?

I. Objectives

This thesis has one overarching objective. It seeks to direct the attention of both academics and legal officials alike away from the sovereignty-related issues of ultimate decision-making and '*Kompetenz-Kompetenz*'. Let's instead focus on the moral ground for the EU's authority, ie how it legitimately binds whom and what, if anything, underpins the EU's right to rule. Part III will show how both institutions and academics often argue based on theoretical preconceptions they either don't spell out or don't appear to be aware of. This awareness is the first step to a conscientious and systematic understanding of ground and limits of the EU's authority.

In addition to this objective, the thesis argues for analytical clarity in relation to two issues that only rarely get the attention they deserve.

The first issue is the nature, scope, and addressees of the EU's authority claim in relation to state and international authority (Part II). Many avoid this crucial step in the argument. They either rely on neologisms that piggyback on the most well-known authority claim of sovereignty (European sovereignty etc.), or limit themselves to individual doctrines of the ECJ as object of inquiry (esp. primacy).

The second issue is, who is the main entity/agent on which we should place our

focus? It is clear that states bind their citizens qua individual humans, and still almost unanimously accepted that international law binds states and their (executive) officials. In the EU, both in theory and in practice, there are three distinctly identifiable entities that play a noticeable role as addressees and source of the EU's authority: Member States and their officials, EU citizens, and the EU peoples (*demoi*). My thesis does not study them in isolation, but provides an account of how they relate to each other in the EU's normative architecture.

II. Previous Work

Most of the writing on the EU's authority claim has so far focused exclusively on a distinct set of institutions: the ECJ and the national constitutional courts, the conflict between their claims to ultimate authority, and how best to conceptualise a system with such conflicting jurisprudential authority claims (monism, dualism, pluralism). This is not the focus of this thesis, which essentially regards the moral ground of the EU's authority, ie why EU law has authority in the first place. Although there is substantial literature on the broader legitimacy of the EU, normative accounts on the authority of EU law have so far been rare and mostly implicit.⁷

The growing scholarship on the authority of international law helped me identify the relevant questions. Many scholars in that field discuss the EU either as an example of

⁷ Although the thought-provoking essay Alexander Somek, *Individualism: An Essay on the Authority of the European Union* (OUP 2008). seems relevant, it is ultimately both a narrower (only relates to internal market legislation) and a broader (draws on philosophy and psychoanalysis) search for a hypothetical sociological counterfactual, namely the type of EU citizen that is envisaged by the EU's authority claim as reflected in the discussed legal texts.

international authority, or ask whether the EU needs to be distinguished from instances of international authority.⁸ It is not unsurprising to find that theories of authority inherit the difficulties from more traditional EU scholarship that has tended to grapple with the extent (if any) of the EU's emancipation of its international origins. This thesis takes up this challenge at various stages.

Many issues at the heart of this thesis are discussed in a recent collection of essays on the authority of EU law which I take as evidence that there is more need for a discussion of the nature and grounds of the EU's authority.⁹ Especially Part III has benefitted greatly from the work of Pavlos Eleftheriadis on authority and political obligation beyond the state,¹⁰ from Richard Bellamy's thought-provoking reflections the EU as a democracy,¹¹ and from the work of Martijn van den Brink on democratic authority specifically.¹²

III. Methodological Challenges

⁸ See only Başak Cali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (OUP 2015); Armin Von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 *European Journal Of International Law* 115; Mattias Kumm, 'The Rule of Law, Legitimate Authority and Constitutionalism' in Christoph Bezemek, Michael Portacs and Alexander Somek (eds), *Legal Positivism, Institutionalism and Globalisation: Vienna Lectures on Legal Philosophy, Volume 1* (Hart 2018).

⁹ Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019).

¹⁰ Pavlos Eleftheriadis, 'Citizenship and Obligation' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union law* (OUP 2012); Pavlos Eleftheriadis, *A Union of Peoples* (OUP 2020) ch 7.

¹¹ Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (CUP 2019).

¹² Martijn van den Brink, 'Justice, Legitimacy and the Authority of Legislation within the European Union' (2019) 82 *Modern Law Review* 293; Martijn van den Brink, 'The European Union's Democratic Legislature' *International Journal Of Constitutional Law* (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3594066> accessed 29 April 2021.

Especially in (early career) legal scholarship, questions of methodology are often shunned. This gets even more complicated in interdisciplinary approaches such as the present one. This thesis is a combination of political theory (beyond the state) and EU constitutional law, which requires an acute awareness of the appropriate methodology.

The three parts of this thesis use different methodological approaches. Part I prepares the theoretical ground of the thesis and thus constitutes a jurisprudential inquiry and theoretical classification of theories of authority in and beyond the state. Part II of the thesis and engages in a ‘constructive interpretation’ of material in EU constitutional law in order to end up with a clear account of the nature and scope of the EU’s authority claim.¹³ In relation to searching for the moral ground of the EU’s authority in Part III, I employ an ‘normative-inductive’ or rather ‘practice-dependent’ methodology.¹⁴ This means that I provide an independent normative evaluation of the EU’s practices, which – concurrently – stays close to the EU’s nature, mission and actions as a political community beyond the state. The appropriate normative evaluation of the EU’s authority is thus grounded in an interpretation of the role and purpose of the EU’s institutional set-up, and the relations they facilitate. One of the aims of my account of the EU’s authority is to be ‘action guiding’ in practice. The thesis ought to help addressees of EU law to understand the ground and limits of the EU’s moral authority, and how that impacts on the rightfulness of their actions.

¹³ On this methodology Neil Walker, ‘The Philosophy of European Union Law’ in Damian Chalmers and Anthony Arnall (eds), *the Oxford Handbook of European Union Law* (OUP 2015) 5.

¹⁴ See only Miriam Ronzoni, ‘The European Union as a Democracy: Really a Third Way?’ (2017) 16 *European Journal of Political Theory* 210, 215 et seq. who discusses Kalypso Nicolaïdis, ‘European Democracy and Its Crisis’ (2013) 51 *Journal of Common Market Studies* 351, 357; Andrea Sangiovanni, ‘Solidarity in the European Union’ (2013) 33 *Oxford Journal of Legal Studies* 213.

IV. Scope and Limits

The scope of this thesis might appear broad. It tries to advance political theory beyond the state in the field of political authority, and touches on various areas of EU constitutional law. I wish now to manage expectations and to explain the limits of this work.

Firstly, I won't provide an empirical account of the *de facto* authority of the EU, ie to what extent citizens and state officials actually believe that EU law as a whole or certain aspects of it are morally binding. I actively distinguish my normative inquiry from such a project in Chapter 2.

While I advance an argument how best to evaluate the EU's authority, I neither spell out the practical nor the institutional implications of this account in every detail. That not only relates to issues of institutional balance (Art. 13 (2) TEU). More broadly, an important issue for future research lies in the role of non-majoritarian institutions (first and foremost the ECJ and the Commission, but also the ECB or agencies) in an account of the legitimate authority of EU law. That is, what is the authority of individual EU institutions in relation to each other? While I engage with the authority of EU law as such, ie the product, and reflect on what the EU institutions think about EU law's authority basis (Chapter 6), I leave to one side the authority basis of the individual institutions themselves.

Finally, the present project in an important sense restricts itself to the 'internal' authority of the EU, ie how the EU's authority claim can be reconciled with the individual and collective autonomy of its subjects. There is no in-depth analysis of how the EU's authority relates to international law and third states – an issue that will gain only more

relevance in the future in light of the EU's ever growing contractual and factual relationships to global actors and third states in the EU's neighbourhood and beyond.¹⁵

V. A Brief Note on Structure

This thesis is organised in three parts which revolve around a distinction essential to theories of authority, namely between the conceptual nature of an authority claim on the one hand and the moral legitimacy of authority on the other. In short, '(u)nderstanding authority involves answers to two questions: what is authority and when is it legitimate?'.¹⁶

Part I reflects this distinction internally. Chapter 1 discusses the nature of authority. It analyses the nature of authority claims on different regulatory levels with the EU only entering the stage at the end of the chapter. Chapter 2, in contrast, not only discusses what legitimate authority entails and how it relates to political obligation, it also engages with various accounts evaluating the legitimacy of political authority on both the national and international level. Admittedly, Part I remains rather abstract and does not engage with the EU in detail. It is indeed legitimate for the reader to skip it and start *in medias res* with Part II. I am convinced that this theoretical groundwork is necessary, however, since many concepts in the literature on political authority are complex, controversial, and used rather carelessly. In a sense, Part I is the basement of my argumentative house. You might not notice it when observing the end-product, but without it the house would lack foundation.

¹⁵ For recent work in this area see Aravind Ganesh, *Rightful Relations with Distant Strangers: Kant, the EU, and the Wider World* (Hart 2021).

¹⁶ Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (OUP 2014) 19. See also Cali (n 8) 5.

The rest of the thesis mirrors this core distinction. Part II applies the issues discussed in Chapter 1 to the EU, and seeks to identify the nature, scope and addressees of the EU's authority claim. In other words, it asks what kind of authority the EU actually claims in order to gain analytical clarity on those claims in need of evaluation.

Part III then takes up the theoretical groundwork of Chapter 2 and engages with different attempts on how to evaluate the legitimate authority. It examines and criticises what institutions and academics have said about the grounds for the EU's authority, and ends with my own proposal on how best to understand the grounds and limits of the EU's right to rule.

VI. Conclusion

It can feel daunting to embark on such a project without having exhaustively considered all the big philosophical concepts necessarily connected to studying legitimate political authority (legitimacy, rights, democracy, justice etc.). However, this allows me to avoid getting lost in the maze of conceptual disagreements and important debates that are relevant, but not essential, to the study of the EU's authority. In other words, I intend to provide an entirely fresh account of an issue that comprises important questions of political theory, and that, in relation to the EU, hasn't yet received the attention it so justly deserves.

**PART I: ANALYSING AND EVALUATING AUTHORITY IN AND BEYOND THE
STATE**

CHAPTER 1: AUTHORITY CLAIMS IN EUROPE

I. Introduction

Evaluating the legitimate authority of the EU and its laws presupposes a firm grasp of the nature and scope of the EU's authority claim. That, in turn, requires an understanding of the nature of political authority. This chapter prepares the study of the EU's authority claim by zooming in from general observations about claims in the political arena, to the labels the EU's authority claim has attracted in the literature. On the way, it sheds light on the nature of practical and political authority, and introduces a taxonomy to compare authority claims on different regulatory level. Many issues will perhaps not get the attention they justly deserve, but the ensuing conceptualisation of the EU's authority claim in Part II requires such theoretical grounding, lest the argumentative house built on it can be knocked down all too easily.

II. Understanding the Importance of Claims

Many writers take it for granted that states, the EU, and various international organisations *claim* (sometimes conflicting) authority. In order to understand what that means, let me – at the outset – stress the broader relevance of claims in the political arena, the nucleus of which are an individual citizen's rights claims. According to Feinberg, 'it is claiming that gives rights their special moral significance'¹. Rights manifest the position of an individual

¹ Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press 2014) 151. For a rich discussion of various theories on the relation between claims and rights see Pavlos Eleftheriadis, *Legal Rights* (OUP 2008) 72 et seqq.

in relationship to political communities as well as to fellow citizens. Claims provide the overarching framework for understanding interrelationships and discourses in a polity. In essence, the political community is constituted as a platform for dealing with competing valid claims.² Darwall develops this idea, namely that citizens constitute a moral community and have valid claims on each other, into a fully-fledged account of political authority. For Darwall, authority necessarily relies on an accountability relationship between two agents based on second-personal-reasons, ie reasons stemming from the moral relationship between the two agents.³ Without setting out to defend or endorse his account, I take it to exemplify the importance of claims for understanding morally important questions in a political community.

The importance of claims has three crucial implications for political authority. First, political communities necessarily claim moral authority through their laws. The nature of legal systems entails that they claim to morally obligate the subjects of the community in question, which is why they use language of rights and obligations. In other words, ‘while not all governments have legitimate authority, all of them claim to have legitimate authority – this is one of the defining marks of governments’⁴. The idea that law (and thereby the political community producing it) necessarily claims moral authority is not undisputed, however. Since the bulk of the objections seem to pertain to the agency of law, this brings

² James Sheehan, ‘The Problem of Sovereignty in European History’ (2006) 111 *The American Historical Review* 1, 3.

³ Stephen Darwall, *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (OUP 2013) ch 10; Stephen Darwall, ‘Authority, Accountability, and Preemption’ (2011) 2 *Jurisprudence* 103.

⁴ Joseph Raz, ‘Why the State?’ in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (CUP 2017) 157; Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Rev ed, Clarendon 1995) ch 10.

me to the second implication, which is as follows.

The importance of claims for political authority is that legal officials make these claims on behalf of the law. Gardner makes a convincing case for understanding the personification of law and the relevance of legal officials' private opinions.⁵ He argues that voicing the authority claim of the law is constitutive of being a legal official, independent of their private belief about the truth of law's claims. Legal officials give agency to the law by making claims on law's behalf.⁶ Put differently, legal officials become mouth-pieces of law's moral claims. In light of the above, I would even go further: while legal officials utter claims on behalf of the law, the law ultimately expresses the claims the citizens have on each other as members of a people. In essence, legal officials through law administer claims citizens have on each other. What we mean by the shortcut that a political community like a state claims authority is that the legal officials administer law's authority claim on behalf of the members of the political community that authors these laws.

The third implication of the idea of authority *claims* is that authority claim can be false so that the law in question lacks moral authority. The claim-structure necessarily entails a 'logical space'⁷ for the claim's falsity. That is one of the recurring themes of this thesis. In other words, it is vital to distinguish between the claimed self-assertion that something constitutes a legitimate exercise of authority, and the separate inquiry whether

⁵ For such doubts see Ronald Dworkin, 'Thirty Years on (Book Review)' (2002) 115 *Harvard Law Review* 1655, 1665 et seqq; Kenneth Einar Himma, 'Law's Claim of Legitimate Authority' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (OUP 2001).

⁶ John Gardner, 'How Law Claims, What Law Claims' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 29–33.

⁷ *ibid* 34.

it is indeed objectively legitimate.⁸ Theories of authority evaluate the exercise of authority, they don't rubber-stamp it. Authority claims thus only show the 'self-image' of the respective states/polities/organisations.⁹

Understanding the importance of claims ultimately provides the relevant background for analysing the EU's authority claim and its moral significance in Part II. Analogous to a scenario in which individuals claim rights to secure their autonomy in a political space, political authority claims purport to manifest and ensure the authority of the polity in question, both internally and externally. Note that I don't claim that political communities and their institutions are *like* autonomous persons, but merely that their respective claims serve similar functions. The fundamental split between an individual's claim and a polity's claim kicks in at the stage of their moral justification. The authority of individual persons to claim rights is ultimately grounded in personhood itself, ie the moral standing as an autonomous agent.¹⁰ No one seriously questions a person's entitlement to claim rights. 'Who are you to claim a right?' sounds decidedly odd as a defence against another person's claim not to be harmed, for example. By contrast, no artificial social entity – like the state or the EU – is based on natural moral authority that would entitle them to claim a certain standing towards others. Quite the opposite. The interference of any political authority claim with the individual or collective autonomy of individual people is the moral puzzle theories of authority are trying to solve.

⁸ See by analogy Feinberg (n 1) 151 et seq.

⁹ Leslie Green, *The Authority of the State* (Clarendon 1988) ch 3.

¹⁰ Feinberg (n 1) 151.

III. Political Authority as Manifestation of Practical Authority

Political authority is practical authority. What characterises practical authorities is a normative power, exercised through offering *pro tanto* binding reasons for acting as the authoritative directive requires (1.). As such, practical authority is different from both counsel and coercion, and is necessarily relational, ie a normative power addressed to another agent in order to change their normative position (2.).

1. The Essence of Practical Authority: Binding Reasons to Act

As indicated, it is vital to distinguish between understanding what authority is (analytical) on the one hand, and the conditions under which the exercise of authority is justified on the other (normative).¹¹ This chapter tackles the first question, while the second is reserved for Chapter 2. In a sense, explaining the nature of political authority must always be a hopeless exercise, since ‘authority is a notion bound up with most, if not all, of the central questions of political philosophy’¹². Such humbling observations nonetheless support the case for analytical clarity in its use. Logically, the first question must be: what is authority? As *Flathman* noted: ‘The question of justifying authority can only arise if there is or at least could be authority to justify’¹³.

¹¹ See only Jeremy Waldron, *Law and Disagreement* (Clarendon 1999) 99.

¹² Richard B Friedman, ‘On the Concept of Authority in Political Philosophy’ in Richard E Flathman (ed), *Concepts in Social and Political Philosophy* (Macmillan 1973) 121. On the relationship between authority and analytical jurisprudence Liam Murphy, ‘The Normative Force of Law: Individuals and States’ in Leslie Green, John Gardner and Brian Leiter (eds), *Oxford Studies in Philosophy of Law. Volume 3* (OUP 2018).

¹³ Richard E Flathman, *The Practice of Political Authority: Authority and the Authoritative* (University of Chicago Press 1980) 182.

My first point is that political authority is practical authority. Whereas theoretical authorities give reasons for belief (such as experts), viz. they tell you what you ought to do, practical authorities give reasons for action.¹⁴ That is, they tell you what to do. Political authorities are one kind of practical authority. They tell you what to do.

I have no stake in the debate about the precise nature of the practical reasons involved in practical authority. The debate is whether they are content-independent or not, ie whether the binding force of the authoritative directive is at least partly influenced by its content, or exclusively by the fact that the authority says so.¹⁵ I will thus avoid the term content-independence altogether. What I take from this discussion is that the binding force of a practical authority's reasons cannot depend on the approval by every individual subjected to it. Otherwise it would be unable to fulfil its many functions. Crucially, due to fundamental and reasonable disagreements among citizens on the 'right' way to govern a society, any obligation to obey political authorities cannot be grounded in the merits of the law. For if political authority were contingent on the subject's assessment of the merits – of whether they think this is a 'good law' – the very anarchy it is supposed to remedy would re-enter via the back door.¹⁶

Similarly, my argument doesn't hinge on choosing between the two models concerning how exactly authoritative reasons bind (as second-order or weighty first-order

¹⁴ Darwall, 'Authority, Accountability, and Preemption' (n 3) 104 adds that practical authority also tells you to do it, ie to follow the binding directives in question. Andrei Marmor, 'The Dilemma of Authority' (2011) 2 *Jurisprudence* 121, 121.

¹⁵ For a recent overview of the discussion see only Laura Valentini, 'The Content-Independence of Political Obligation: What It Is and How to Test It' (2018) 24 *Legal Theory* 135.

¹⁶ Friedman (n 12) 141.

reasons), neither does the choice make a practical difference.¹⁷ What is important is that authoritative reasons offer *pro tanto* binding reasons for acting as the authoritative directive requires.¹⁸ I will simply refer to authoritative reasons as binding, instead of the *Razian* terminology, exclusionary reasons.

Summing up, practical (and thus also political) authority purports to establish binding reasons to act. Practical authority offers binding, particularly forceful reasons to do as the authority says on the ground that the authority says so – that is, independently of one’s own approval of the merits in the individual case. The next step is to distinguish practical authority from related phenomena.

2. Practical Authority as Relational Normative Power Between Counsel and Coercion

Authority is a means of social control. It is necessarily relational, since authority claims are addressed to someone. Such claims intend to change the normative position of the addressee. Let me briefly consider how authority sets itself apart from other means of social control, especially in the context of the political.

¹⁷ See on the one hand Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon 1979) 23; Joseph Raz, *The Morality of Freedom* (Clarendon 1986) 38. On the other DS Clarke, ‘Exclusionary Reasons’ (1977) 86 *Mind* 252; Flathman (n 13) 110 et seqq.

¹⁸ For a similar conclusion David Lefkowitz, ‘Legitimate Political Authority and the Duty of Those Subject to It: A Critique of Edmundson’ (2004) 23 *Law And Philosophy* 399, 419.

a. Not Counsel nor Coercion

For one, practical authority is different from counsel and advice, both of which are not uttered as binding, but as persuasive reasons.¹⁹ Authoritative reasons contain a distinct ‘surrender of judgment’-element. ‘Surrender of judgment’ presents the idea that an agent subject to an authoritative command must not act on the balance of their reasoning, even if it would lead to a different action.²⁰ The difference is that persuading someone requires convincing them of my reasons for or against a certain action, whereas authoritative directives prescribe to act as directed solely by virtue of having been prescribed by that practical authority. Law is the best example.

For another, the reason-giving element of authority distinguishes it from coercion, which does not appeal to reasons at all. What seems like an obvious point in relation to parental authority – hopefully the times have passed when smacking children was considered an exercise of authority – requires more explanation in the political realm. Especially social scientists have always emphasised coercion as means of a state to control or influence a large population and territory.²¹ Coercion is, however, conceptually alien to political authority. Indeed, the monopoly to use legitimate force represents but one tool in the toolbox of the state to uphold public order in practice. In other words, the state’s claim to legitimate political authority distinguishes it from a ‘band of robbers’, since – far from

¹⁹ Hannah Arendt, ‘What Is Authority?’ in Hannah Arendt (ed), *Between Past and Future* (The Viking Press 1961) 93; Thomas Hobbes, *Elementa philosophica de cive* (Apud Ludovicum Elzevirium 1647) ch 14.

²⁰ Flathman (n 13) 107. Friedman (n 12) 129.

²¹ For a classic take see Max Weber, ‘Politics as a Vocation’, *From Max Weber: Essays in Sociology* (Routledge 2009) 78. On that element see Green (n 9) 71–75.

constituting the source of the subject's compliance – empirically the whole point of the threat to use force is to reduce its actual application.²²

As Arendt reminded us, 'authority precludes the use of external means of coercion; where force is used, authority itself has failed'²³. The threat of coercion in that sense is anti-authoritarian, since it does not purport to bind the subjects in the same way as authorities to, that is, by way of *giving reasons* to act. Threats work, when – on the balance of reasons – an initially recalcitrant addressee decides they would be better off by conforming to the threat. Authority succeeds when the addressee acts on the authoritative directive in the first place.

The social scientists' preoccupation with coercion thus underpins the *de facto* authority of the state, viz. the ability to effectively secure widespread obedience by the subjects, to have one's authority acknowledged by the bulk of people.²⁴ And since states claim the authority to uphold public order by the monopoly of the legitimate use of force, coercive means play a role in securing said authority. The nexus between coercion and authority results from the state's specific 'job profile', rather than from the nature of authority. In Estlund's rather blunt words: 'Even without authority or legitimacy, of course, the state might yet have enormous power. But we are not investigating brute power as such,

²² Saint Augustine, *City of God: De Civitate Dei Contra Paganos* (Limovianet 2013) bk 4.

²³ Arendt (n 19) 92 et seq. Similarly Richard S Peters, 'Authority' in Richard E Flathman (ed), *Concepts in Social & Political Philosophy* (Macmillan 1973) 154.

²⁴ Joseph Raz, *Authority* (OUP 1990) 3; Raz, *The Authority of Law* (n 17) 9; Peters (n 23) 151–153. More on the relationship between *de facto* and *de jure* authority in Chapter 2, sec. II.

since brute power is not a moral thing'.²⁵ We gain a lot if both are kept distinct.²⁶

b. Relational Authority

The discussions so far regarding claims and reasons for action illustrate the inherently relational nature of practical authority. The respective authority claims are – by themselves – insufficient to establish their effectiveness, let alone their legitimacy. Like any practical authority, political authority depends on a certain normative stance on the part of its subjects in relation to the authoritative reasons, ie some form of compliance/approval/acceptance. Its relational character is part of authority's conceptual essence. An understanding of this tenet is vital for an analysis of the EU's authority claim on its subjects (the object of study in Part II), for which the proper reception of EU law by national institutions as well as citizens constitutes its very lifeline.

This leaves us with the following picture. Practical authority purports to give binding reasons to act for the addressees of its directives. It is addressed to another agent and hence inherently relational. The normative force of the reasons stems from their source and, unlike counsel, is not open to debate based on its merit. Authority excludes coercion as an anti-reason mode of social control, to which the state, however, has recourse once its authority is flouted.

Now that we have identified the main analytical features of political authority from

²⁵ David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008) 2.

²⁶ Raz, *Authority* (n 24) 15.

its classification as practical authority, let's move on to an analysis of political authority claims and their specific characteristics.

IV. The Specific Characteristics of Political Authority Claims

I propose a two-fold taxonomy for analysing political authority claims, namely *law and institutions*, and *membership/addressees*. This framework enables both an external distinction from other manifestations of practical authority (such as parents and employers), as well as an internal differentiation among manifestations of authority on different regulatory levels. Analysing these individual elements leads to analytical clarity about the nature, scope and force of authority claims on individual regulatory levels. That, in turn, allows tailoring the moral justification to the actual claim.

Both criteria derive from a wide reading of authority literature with the aim to distil the defining features of authority claims in the public realm. More intuitively, they simply spell out the idea of an authority claim according to the question ‘*how* does the political community in question seek to bind *whom*?’ I use the contribution of law/institutions (how?) and membership/addressees (whom?) to assess the EU’s position in today’s Europe of intertwined regulatory levels. I thereby seek to avoid the ‘endogeneity trap’, ie the fallacy of trying to understand the EU merely from the inside without awareness for the fundamental concepts informing the inquiry.²⁷ Whereas I briefly introduce each of the two elements here, Chapters 3-5 will engage with them in greater detail.

²⁷ For an excellent example and explanation of this methodology, see Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2008) ch 1.

1. Law and its Institutions

Political authority is inseparable from law and the institutional system administering it. Law is the instrument to exercise political authority, the channel through which a political community orders, shapes, and – in a sense – constitutes the society under its jurisdiction. It seems like a trivial point. But law and law-administering institutions provide the primary means for distinguishing political authority from other practical authorities, ie externally.²⁸ It shares the structural feature of practical authority to issue binding directives for addressees. While parents or teachers use direct communication with their children, however, political authorities use law. The institutional aspect of political authority means that authority is necessarily bound to holding a public office rather than to a natural person as such.²⁹ As we saw above, legal officials are ‘mouth-pieces’ of the law who claim authority on law’s behalf. In short, political authority is ‘institutionalized practical authority’³⁰.

Political obligation theory in general seems to be more sensitive to the institutional making and administering of law, compared to theories of authority.³¹ That is, it emphasises the law-making process and the legislature, rather than law as an end-product

²⁸ Green (n 9) 42 plausibly argues that institutions as such are unique to political authority. For a short overview of the internal relation between law and institutions Raz, ‘Why the State?’ (n 4) 142 et seqq.

²⁹ Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (OUP 2014) 28.

³⁰ Daniel Voelsen and Leon Valentin Schettler, ‘International Political Authority: On the Meaning and Scope of Justified Hierarchy in International Relations’ (2019) 33 *International Relations* 540, 545.

³¹ Various prominent accounts of state political authority do not rely on a specific role of institutions at all, for example consent-based explanations or Razian instrumentalism.

and the enforcement in courts. Both authority and obligation theorists nonetheless come together in the study of law-making and enforcing institutions and their legitimacy. As Raz has recently put it, '(l)egitimacy relates primarily to the normative force of institutional action'³². That applies to law-administering institutions beyond the state as well. One main characteristic of political authority hence results from its way of structuring, monitoring, and policing compliance in a polity by recourse to an institutionalized legal system.

The degree of institutional sophistication and the breath of jurisdiction moreover allows to compare the scope of different authority claims internally, ie on individual regulatory levels (the state and beyond). For example, states claim a comprehensive social ordering power intending to bind millions of subjects (comprehensiveness). States exclude other authorities in their substantive realm of action; hence, they claim a form of exclusive representation in order to fulfil their task (exclusiveness). And states claim to be the supreme authority of the land (supremacy). By contrast, this kind of comprehensiveness, exclusivity and supremacy/hierarchy is rather uncommon in international law, where numerous organisations usually operate in the same, functionally circumscribed area.³³ For example, the IMF, the World Bank, the BIS and others all regulate international finance in one way or the other. As we will see in Chapter 3, the EU sits uneasily between the two, in terms of exclusiveness (autonomy of EU law), comprehensiveness (difficult policing of principle of conferral), and supremacy (primacy of EU law).

³² Joseph Raz, 'The Democratic Deficit' (King's College London Dickson Poon School of Law, Legal Studies Research Paper Series) 2018–07 6.

³³ Allen Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 84.

What is more, the focus on institutions points to interesting distinctions between the authority claims of polities compared to individual institutions. Whenever one refers to the self-image of the state or the EU and their authority, that entails more than the self-image of one specific institution. As we will see in Chapter 6, for example, the individual EU institutions have quite a different view of the moral basis for the EU's authority. By contrast, many international institutions, eg the ICC or the ECtHR, claim authority in a comparatively limited way in that they represent individual institutions equipped with a specific mandate. Focusing on the institutional set-up thus informs us about the nature and scope of an authority claim.

Chapter 3 builds on this analytical foundation and studies how EU law-making and enforcement as well as the specific configuration of the EU's law-administering institutions and their relationship to their national counterparts are essential to understand the nature of the EU's authority claim.

2. Membership

The importance of law and law-administering institutions for political authority is almost self-explanatory in light of the above. I consider membership a second vital tenet of political authority claims.

First of all, membership allows to distinguish externally between political authority and other practical authorities with far-reaching normative systems, such as churches, trade unions, or even sports federations. While the latter may use law as well to exercise authority, they focus on their members as part of a special interest group like the faithful,

the workers, or the athletes. Political authority focusses on the members of its political community. All of them. The prime example are individual citizens on the state level. International organisations, by contrast, mostly view states as their primary subjects.³⁴ This shows how the notion of membership helps to distinguish authority claims on individual regulatory levels internally.

In addition, a focus on the notion of membership hints at a crucial purpose of the whole enterprise. What do I mean by this? Membership in a political community is impersonal. A typical authority relationship in the public sphere is relatively anonymous in that it cannot rely on strong associative ties between individuals, nor on them recognizing their role in and capacity to uphold the political order.³⁵ Political authorities – in contrast to teachers or parents – simply address a vast amount of addressees with no personal ties to the authority or to one another. In short, political authority cannot derive from a special *personal* relationship between authority and subject. Instead, the underlying scenario is the necessity for often millions of citizens to share a territorial and political space and to organize their society. This questions associative obligations-theories that extrapolate from the moral relationship between families and local communities to the moral obligation to obey the law between the citizens of a whole state.³⁶

Finally – as demonstrated earlier – practical authority is relational in the sense that

³⁴ See, e.g., *ibid* 85.: ‘chiefly, though not exclusively, states’.

³⁵ For a discussion, see Green (n 9) 148 et seq.

³⁶ See also Stephen Perry, ‘Associative Obligations and the Obligation to Obey the Law’ in Scott Hershovitz (ed), *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin* (OUP 2008) ch 8.

the authoritative directive has a source as well as an addressee. But surely this means that the addressee, ie the member of the political community, plays a role in gauging the nature and scope of the authority claim in question. Relational is, that is the point, a reflexive bond. These considerations make it easy to see how membership functions as primordial criterion for understanding the nature and scope of a political authority claim. Chapter 4 will put flesh on these bones.

We could summarise the useful features of my taxonomy in the following way:

	Means: Institutions/Law	Membership/Addressees
External Delimitation	<ul style="list-style-type: none"> - Other Practical Authorities (Parents, Teachers etc.) use Different Means - Political Authority is attached to an institutional role, not a personal relationship among human beings 	<ul style="list-style-type: none"> - Other Practical Authorities do not Address People in their Role as Members or Representatives of a Political Community (like Citizens or State Officials)
Internal Delimitation	<ul style="list-style-type: none"> - Different Regulatory Levels have Different Kinds of Institutions (eg Separation of Powers) - They also use Different Types of Law (Hard/Soft Law) and Enforcement Mechanisms 	<ul style="list-style-type: none"> - Polities and Organisations on Different Regulatory Levels Address Address Different Agents (Citizens, States, Peoples)

Figure 1: Delimiting Authority Claims

3. Interim Conclusion

So far, I have presented political authority as a distinct manifestation of practical authority, of providing binding reasons to act. I distinguished it from both coercion as well as from counsel. I then introduced a twofold analytical framework to differentiate authority in the political realm both from other practical authorities (externally) as well as internally on different regulatory levels. These criteria to evaluate authority claims are (i) the means and institutions to channel the authority claim, and (ii) the members or addressees of the claim. They will form the basis of the identification of the nature and scope of the EU's authority claim in Part II.

V. State Sovereignty and International Authority Claims: Two Ends of one Spectrum

Next, I want to provide a broad-brush comparison between a state's and international authority claims, in order to apply the above framework and, more importantly, in preparation for locating the EU in Europe's authority landscape.

1. State Sovereignty and Authority

State sovereignty captures the self-image of the state's authority claim. That conceptualisation avoids a range of terminological and conceptual confusions in debating the distinct authority claims of states and the EU in today's Europe, where claiming political authority is, alas, all too often equated with sovereignty.

a. Sovereignty Today: the State's Authority Claim

Sovereignty wanders like a ghost through any discipline occupied with the study of 'the political' (constitutional and international law, political theory, international relations etc.). As part of that, sovereignty has provided the analytical framework for discussions about the EU's authority claim for decades. Many theorists have tried to update/qualify/broaden the concept's reach in order to accommodate the EU's authority claim.³⁷ Although foundational ideas like sovereignty require clarity, this has led to ever murkier conceptual ground. Sovereignty's variegated use has caused despair amongst many, and provoked incessant calls for its final burial.³⁸ Its persistence as relevant concept for social actors and academics alike is one reason I second those who resist the claims to give up the study and use of sovereignty, however. Let me explain the others:

Recent scholarly contributions have unearthed a convincing framework of sovereignty and its continued relevance in today's world. I refer to the portrayal of sovereignty as the state's comprehensive authority claim over a distinct territory, accompanied by the practical effort to make good on that claim in reality, that is, for the claim to be effective.³⁹ This definition captures both core element of state sovereignty, ie the supreme authority to decide about the status and reach of any other authority in its

³⁷ For a comprehensive overview see Matej Avbelj, 'Theorizing Sovereignty and European Integration: Sovereignty and European Integration' (2014) 27 *Ratio Juris* 344.

³⁸ Stanley Benn, 'The Uses of "Sovereignty"' (1955) 3 *Political Studies* 109, 122. For a good summary of sovereignty-abandonists, Martin Loughlin, *The Idea of Public Law* (OUP 2004) 72.

³⁹ Wouter G Werner and Jaap H De Wilde, 'The Endurance of Sovereignty' (2001) 7 *European Journal of International Relations* 283, 287; Nicholas Barber, *The Principles of Constitutionalism* (OUP 2018) ch 2; Neil Walker, 'Sovereignty Frames and Sovereignty Claims' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law* (OUP 2012).

territory (internal sovereignty), and a right to non-interference from external authorities, mostly states (external sovereignty). The practical effectiveness of the claim secures that the state makes good on its claim in the sense that it holds and exercises a variety of vital sovereign rights (*de facto* authority). The claim to sovereign authority alone – as expounded in speech act theory – is intended to have illocutionary force, ie to influence and change the normative position of those to whom it is addressed.⁴⁰ In other words, the state claims a comprehensive right to rule and the power to enforce its rule in a given territory.

The claim structure I have already endorsed earlier helps again to elucidate a vital distinction, here between the abstract idea or claimed *status* of the sovereign state and the *exercise* of a variety of sovereign rights. As long as the state retains the ultimate authority to control the very delegation of sovereign rights by, for example, withdrawing from international arrangements, sovereignty as status and authority claim is left untouched.⁴¹ That notwithstanding, Malcolm poignantly summarises the tension between the possibility for the state to hand over the exercise of sovereign rights without consequences for sovereignty, and the need to retain vital sovereign functions itself in order to make a credible claim to sovereignty:

Each time we delegate the exercise of important areas of our authority to Europe, we do not lose sovereignty or become less sovereign; we merely

⁴⁰ John Searle, *Speech Acts: An Essay in the Philosophy of Language* (CUP 1969) ch 3; Werner and De Wilde (n 39) 298.

⁴¹ Werner and De Wilde (n 39) 303; Michel Troper, 'The Survival of Sovereignty' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (CUP 2010).

become more likely to lose our sovereignty.⁴²

In a nutshell, state sovereignty represents a state's self-image of its ultimate authority over a given territory. It implies a comprehensive claim to a right to rule and the accompanying effort to uphold the de facto effectiveness of the claim.

How is the conceptualisation of sovereignty as the state's comprehensive authority claim connected to the study of political authority?

b. Authority Claims: The Core of Sovereignty and Political Authority

The state's authority claim itself leaves open the moral basis of its legitimacy. Sovereignty theory doesn't inquire *why* the state has the right to rule, but rather, *who* has it: the state. It is about allocating decision-making powers, ie the scope and effectiveness of a state's authority (related to the (in)famous *Kompetenz-Kompetenz*). Why the state might legitimately claim and exercise such a right to rule in light of the autonomy of the individual citizen is a quite different question; it is the one theories of authority ask. In other words, sovereignty asks who has the authority, whereas the broader inquiry into political authority is interested in why and to what extent such authority is legitimate. Both inquiries address the same phenomenon (the authority claim of the state) from different angles:

⁴² Noel Malcolm, *Sense on Sovereignty* (Centre for Policy Studies 1991) 26 et seq.

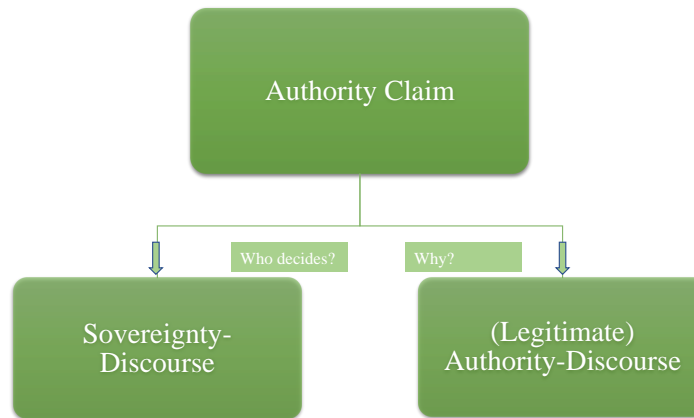


Figure 2: The Link between Sovereignty and Authority

Due to their distinct nature, the two inquiries may yield different results. Raz hit the mark recently when stating that ‘state sovereignty may well apply and prevent external intervention even when the governments of those states act beyond their legitimate authority’⁴³. He explicitly linked sovereignty back to the autonomy of the collective which needs to be protected externally against outside influence even if its decisions are mistaken. Note that the same is true internally. The state claims that all its laws are an expression of its legitimate authority. If an inquiry based on a chosen moral standard reveals that this claim is exaggerated (answering the *why*-question), however, it has no direct bearing on the question that it is still the state which should decide (answering the *who*-question).

This conceptual framework finds a structural equivalent in the EU. What unites the

⁴³ Raz, ‘Why the State?’ (n 4) 159.

separate inquiries into the decision-making powers of the EU (sovereignty-related) and the moral authority of the EU (political authority-related) is the EU's authority claim, which I will examine in Part II. There, the notions of law/institutions and membership will help us to gain analytical clarity about where the EU's authority claim departs from state sovereignty claims.

So much about the state. While state-centred discussions and terminology still dominate political theory, my EU-related inquiry can't stop there. Before turning to the special case of the EU, I wish to introduce the developments in theories of international authority to complement the introductory theoretical framework.

2. International 'Authority' Claims?

In recent decades, not only Europe is not the only place to witness a significant shake-up of the authority landscape through the emergence of a plethora of new trans- and international fora. Following suit, scholarly attention has shifted to instances of authority beyond the nation state. This section applies the above taxonomy to international authority claims. Before doing that, let me address an issue lingering in the shadows of the previous pages: is it appropriate to use the language of authority in relation to political communities and law-administering organisations beyond the state?

a. The Applicability of the Concept 'Authority' Beyond the State

Socrates might be responsible for the birth of inquiries into political authority when he declined the offer of his friend Crito to plot his escape from prison and imminent execution.

Socrates refused to flee, arguing that such an act would violate his moral duty to obey the law of Athens's polis, to which he consented by the way he had led his life.⁴⁴ Recalling this anecdote serves as a gentle historical reminder that political authority predates the advent of the post-Westphalian sovereign nation-state and is thus analytically independent of statehood. Some, nonetheless, want to reserve the language of (political) authority for the nation states.

The idea that only states claim authority has prominent advocates, such as Loughlin, Lindseth, and, implicitly, Majone.⁴⁵ I cannot do their accounts justice here, since they emerged in very different debates about constitutional theory and European integration. Let me thus focus on Loughlin's work as forceful advocate for not applying the concept of authority beyond the state. Loughlin has repeatedly argued for a distinction between the national, constitutional level as arena for sovereignty and political authority (*potestas*) on the one hand, and the international level characterised by governance-structures (*potentia*) on the other. *Potentia* refers to the empirically observable powers a government holds and its capacity to exert them, whereas *potestas* denotes the morally relevant political authority, ie the creation of a right to be obeyed.⁴⁶ On that view, the (sovereign) authority of a state protects the 'autonomy of the political'. That authority

⁴⁴ Plato, *Euthyphro. Apology. Crito. Phaedo*. (Christopher Emlyn-Jones and William Preddy trs, Harvard University Press 2017) 214 et seqq. For a discussion of several accounts of political authority in ancient Greece and Rome see Benjamin Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (OUP 2016) ch 4.

⁴⁵ Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010) Conclusion; Loughlin, *The Idea of Public Law* (n 38) ch 5; Giandomenico Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 *European Law Journal* 5.

⁴⁶ Martin Loughlin, 'Constitutional Pluralism: An Oxymoron?' (2014) 3 *Global Constitutionalism* 9, 11 et seq; Martin Loughlin, 'The Erosion of Sovereignty' (2016) 45 *Netherlands Journal of Legal Philosophy* 57, 70.

presupposes the ‘legal omnipotence’ of the state, viz. the state as ultimate source of authority which itself cannot be bound either by the legal obligations it creates or by the constitution.⁴⁷ Since the state ‘cannot be regarded as the subject of legal rights and duties’⁴⁸, it is easy to see how this framework precludes any conceptual space for genuine authority above the state, be it international or supranational. Although Loughlin acknowledges the substantial institutional and substantive impact of the EU on authority-structures in the Member States, for him, the impact remains quantitative and merely implies the presence of *potentia* without *potestas* at the EU level.⁴⁹ He denies any morally or legally relevant authority-relationship between supra-state institutions and individuals.⁵⁰ For Loughlin (and for similar reasons for Lindseth and Majone), in short, there is no *potestas* at the EU level; the EU does not claim nor exercise political authority.⁵¹

I am happy to agree with Loughlin that the state is the exclusive repository for *sovereign* authority. But I reject his idea of confining any authority in the public domain to the state. Whereas the emerging discussion of international authority does not address this issue directly (perhaps anxious that it might become the follow-up to the debate whether international law is law), a growing body of literature illustrates how the idea of authority

⁴⁷ Loughlin, ‘Constitutional Pluralism’ (n 46) 13 et seq; Loughlin, *The Idea of Public Law* (n 38) 86. Similarly, Raz, ‘Why the State?’ (n 4) 148 et seq.

⁴⁸ Loughlin, ‘Constitutional Pluralism’ (n 46) 13; Loughlin, *The Idea of Public Law* (n 38) 92 et seq.

⁴⁹ Loughlin, ‘The Erosion of Sovereignty’ (n 46) 73.

⁵⁰ Loughlin, *The Idea of Public Law* (n 38) 81 et seqq.

⁵¹ More recently, Majone seems to concede that the EU cannot be captured in his earlier narrow regulatory and efficiency-related terms alone Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (CUP 2014) ch 10. In the language of my chapter, he seems to admit that the EU claims authority that raises distinct legitimacy problems. See also Martijn van den Brink, ‘The European Union’s Democratic Legislature’ *International Journal Of Constitutional Law* (forthcoming) 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3594066> accessed 29 April 2021.

claims and duties on the part of the subjects of international law provides a helpful conceptual lens to ask morally important questions. Part II attempts to show that applying the concept of authority to the EU provides analytical clarity in relation to the evaluation of the legitimacy of the EU's exercise of public power by law. The taxonomy proposed above simultaneously allows to distinguish the EU's authority claim from manifestations of authority on other regulatory levels. In other words, denying the applicability of the concept of authority to a supranational polity – based on an idealisation of the state as legally uncontrollable juridical entity – has the undesirable effect of downplaying what is at stake in the EU as a matter of political legitimacy.

I will argue in Part II that the EU's claims can and should be conceptualised as authority claims in the sense explained in this chapter. As I see it, polities and organisations beyond the state that are not in the business of upholding public order or claiming the monopoly of legitimate force may still claim authority. Authority without an element of coercion, but still authority. Take it from Roughan:

The nature of authority does not change whether it is exercised by legal or political institutions, or whether it is located in local, national, transnational, or international communities. Wherever authority is located, it remains a normative power over subjects.⁵²

I agree. The nature of authority doesn't change, only the manifestation of authority claims on different levels. For example, only states, which claim ultimate authority over a given territory, need the capacity of legitimate coercion for their *de facto* authority to remain credible. Polities and organisations beyond the state simply fulfil a different

⁵² Roughan (n 29) 28.

function. The bottom line is this: sovereignty is not the only manifestation of a claim to political authority.

The crucial factor for the applicability of authority in the public domain then is not the claiming entity, ie the state. Arguing that political authority is exclusively authority exercised by the state would be to confuse historical evidence with theoretical necessity. It does not follow from the fact that states exercise political authority that *only* states claim political authority.⁵³ Since thinking about political authority predates the nation state by millennia, moreover, it is odd to deny the applicability of the concept of authority to manifestations other than the state. Indeed, theories of authority have always provided a conceptual tool that allows us to analyse important questions of the rightful exercise of political power over time.

Let us now take a closer look at the incipient scholarship on international authority and apply the above taxonomy.

b. Understanding International Authority

The following outline of scholarship on international authority illustrates that law and institutions, and membership/addressees seem good indicators to differentiate the nature, scope and force of the authority claims on different regulatory levels.

Various scholarly attempts approach the authority/legitimacy of international law

⁵³ In that direction Raz, 'Why the State?' (n 4) 161. Lefkowitz (n 18) 400 qualifies his political authority discussion as applying to a state 'or anything remotely like it'.

from a legalistic lens, ie with a view to the rather limited instances where international law binds the parties and subjects with ‘hard’ and enforceable law.⁵⁴ For instance, the ‘Heidelberg Project on International Public Authority’ studies the instantiations of authority in international law, broadly defined as unilateral capacity to determine and reduce the freedom of others.⁵⁵ Examples usually include the UN Security Council, the WTO and sometimes the ICC. One obvious consequence of this definitional approach is that it focuses on the international institutions that are closest to the authority exercised by states (binding and enforceable law).

Many others define international authority more broadly to accommodate various forms of governance beyond the state.⁵⁶ Krisch, for example, thinks of international authority as *postnational* or *liquid* authority. For him, authority on the global level involves the use of informal instead of formally binding means, the reliance on substantive rather than formal sources of authority, a diversity of actors instead of unitary authority, and finally a dynamic rather than stable nature of authority relations.⁵⁷ We learn from Krisch that international law relies on soft law, recommendations, best practices etc. Accordingly, whenever international law exercises authority in the statist understanding, ie through binding law, such as the WTO’s dispute settlement body or the ICC’s judgments, this is

⁵⁴ Samantha Besson, ‘The Authority of International Law: Lifting the State Veil’ (2009) 31 Sydney Law Review 343; Buchanan (n 33); John Tasioulas, ‘The Legitimacy of International Law’ in John Tasioulas and Samantha Besson (eds), *The Philosophy of International Law* (OUP 2010). Raz, ‘Why the State?’ (n 4) 152.

⁵⁵ Armin von Bogdandy, Philipp Dann and Matthias Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ (2008) 9 German Law Journal 1375.

⁵⁶ For a great overview see Voelsen and Schettler (n 30) 546 et seqq.

⁵⁷ Nico Krisch, ‘Authority, Solid and Liquid, in the Postnational Sphere’ in Maksymilian Del Mar and Roger Cotterrell (eds), *Authority in Transnational Legal Theory* (Elgar 2016).

the exceptional case. Çali's comprehensive study argues similarly that there is no unified international authority claim nor is there one distinct type of political obligation. In her view, international law imposes a variety of duties on national legal orders that make the authority of international law relative and fragmented.⁵⁸

This suggests that the binding force of authoritative directives varies on different regulatory levels and that these instances of governance beyond the state nonetheless fit under the general umbrella of authority in the public domain. International organisations simply seek to bind different actors with different means. In other words, the notable difference between authority at the state and on the international level not only plays out in the means of exercising authority (law vs. soft instruments), but also with regard to the other tenet identified above: membership/addressee. Whereas state authority comprehends citizens as natural subjects of its authority claim, international organisations almost exclusively exercise authority over states: 'International law does not command authority over individuals'⁵⁹. The variegated examples such as the Basel Committee's Banking Regulation Rules, the OECD's recommendations on Climate Change as well as the WTO Dispute Resolution bodies' judgments are all addressed to states only.⁶⁰ The very point of these emerging studies of international authority lies in acknowledging these forms of international law as authority despite their conceptual divergence from more traditional nation-state authority.

⁵⁸ Bařak Cali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (OUP 2015).

⁵⁹ *ibid* 75. For a different view, cf. Besson (n 54).

⁶⁰ For these and more examples, Krisch (n 57) introduction.

In short, international authority claims differ from political authority on the state level.⁶¹ They mostly depend on deference rather than compliance, address states instead of individual humans, and, as a consequence, questions regarding their legitimacy and capacity to trigger moral obligations will provoke different answers compared to grounding the legitimacy of state authority.⁶² They still raise their own variants of legitimacy questions, however. We should not try to make questions about rightful rule and moral impact of law beyond the state go away by confining the respective theoretical inquiries to the thick manifestations of concepts like political authority, legitimacy, and moral obligation in the nation state.

Before the chapter ends with a snapshot of ideas on the EU's authority claim in this framework, let me summarise how this chapter has, step by step, approached the heart of the issue, ie the EU's authority claim. The chapter proceeded like a looking glass, zooming in one step at a time. It started with the moral relevance of *claiming* in the political arena more generally. From there, it moved to discussing the nature of practical authority and of political authority as the manifestation of it that interests us here. It then proposed a taxonomy of studying authority claims on different levels, namely based on law/institutions, and membership/addressees. Finally, it applied this taxonomy by portraying state sovereignty as the state's particularly strong authority claim and compared it to the incipient scholarship on authority claims of international organisations. The gap to be closed in Part II is how the EU's authority claim fits in. One could visualize our journey

⁶¹ On the eternal tension between accommodating developments beyond the state and stretching the concept of authority see Voelsen and Schettler (n 30).

⁶² Cali (n 58) 13. But cf. Tasioulas (n 54) 100 et seqq.

so far in the following way:

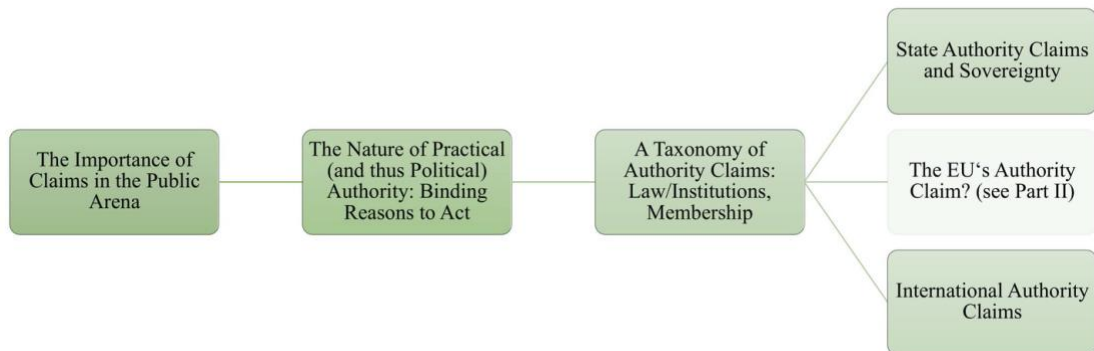


Figure 3: Authority Claims

This shows that the conceptual structure of an authority claim in the political realm will always be the same on each level, namely the claim to a legitimate normative power to bind the subjects and to trigger a certain kind of moral reason in the subject to act as directed. The nature scope and addressee of these claims vary on different levels, however, and we can use institutions/procedures and membership to describe these differences.

So how does the EU's authority claim feature in the relevant literature?

VI. The Many Labels of the EU's Authority Claim in the Literature

Up to this point, I have said almost nothing about my primary object of study, the EU. Instead, I looked at authority claims in the political realm more generally. These efforts seemed important both as foundation for assessing the EU's authority claim and to understand the moral stakes of political authority discourse more broadly. In the remainder of this chapter as well as in Part II, I will focus on the authority claim of the EU, viz. on

how the EU seeks to bind whom, in order to depart from there to a search for objective justification of this claim (Part III).

What I find most surprising about the literature on the EU's authority claim is its ambiguity. It seems very difficult to name the child. The EU's authority claim has received labels as diverse as, 'autonomy as a proxy for sovereignty'⁶³ 'sovereignty'⁶⁴ 'normative and political authority'⁶⁵ 'late sovereignty'⁶⁶ 'disguised claim to sovereignty'⁶⁷ 'European authority'⁶⁸, 'quasi-national authority'⁶⁹, 'supranational authority'⁷⁰ or simply 'authority of EU law'⁷¹. Whereas it is common ground to identify the authority claims of states as sovereignty, it seems there is no agreement on the nature of the EU's authority claim.

As states have historically held the monopoly of expressing political authority

⁶³ Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 208 et seq.

⁶⁴ Pierre Pescatore, *The Law of Integration* (Springer 1974) 29 et seqq.

⁶⁵ Miguel Poiares Maduro, 'How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union' in Joseph Weiler and Christopher Eisgruber (eds), *Altneuland: The EU Constitution in a Contextual Perspective* (Jean Monnet Working Paper 5/04) 3.

⁶⁶ Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart 2003).

⁶⁷ Jan Willem van Rossem, 'The Autonomy of EU Law: More Is Less?' in Ramses A Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence* (TMC Asser Press 2013) 13.

⁶⁸ Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP 2003) 32.

⁶⁹ Christina Eckes and Ramses Wessel, 'The European Union from an International Perspective Sovereignty, Statehood, and Special Treatment' in Takis Tridimas and Robert Schütze (eds), *The Oxford Principles of European Union Law - Volume 1: The European Union Legal Order* (OUP 2018) 89.

⁷⁰ Burkard Eberlein and Edgar Grande, 'Reconstituting Political Authority in Europe: Transnational Regulatory Networks and the Informalization of Governance in the European Union' in Edgar Grande and Louis Pauly (eds), *Complex Sovereignty: Reconstituting Political Authority in the Twenty-First Century* (University of Toronto Press 2017) 146.

⁷¹ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd edn, CUP 2014) ch 5.

claims proper, it is easy to see how the emerging authority claim of the EU led commentators to categorise it as sovereignty claim. But my argument so far has shown that sovereignty is best understood as authority claim of nation-states. I have also shown that the very concept of authority is conceptually open to accommodate organisations and political communities beyond the state. The benefit of a closer scrutiny of the EU's authority claim according to the above taxonomy is two-fold. The first is *analytical clarity*. A better understanding of the EU's authority claim helps to compare the (sometimes conflicting) authority claims of Member States, the EU and international law. Such a scrutiny simply helps to understand what we are dealing with. For instance, does the EU's authority claim lend credibility to the claim that the EU could 'absorb and replace' states?⁷² The second benefit is *normative salience*. The nature of the EU's authority claim informs us about its moral importance, ie which value it affects (individual autonomy? popular or state sovereignty?) and how intrusively it does so. In turn, the objective legitimacy of the EU's authority claim (Part III) will have to deviate from the rich literature on state and international authority to the extent that the EU's authority claim differs from both. Put differently, the legitimisation strategy needs to be mindful of the claim it seeks to evaluate.

This *normative* inquiry is of cardinal importance. The previous reflections already indicate how my project departs from the familiar discussions of the EU's authority claim in relation to decision-making competences. Much ink has been spilt on the allocation of ultimate decision-making power (*Kompetenz-Kompetenz*) in the EU, bending and twisting the concept of sovereignty in order to accommodate the primacy of EU law and the alleged

⁷² Raz, 'Why the State?' (n 4) 155.

ultimate authority of the EU.⁷³ There is, however, only scarce literature on the appropriate standard for evaluating and underpinning the EU's authority. The claim that this debate is important is not one shared by everyone. Eckes and Wessel have recently taken the opposite view in an urge to replace authority discussions with a focus on sovereignty:

Hence, discussing 'authority' offers a convenient way out of the dilemma of how to square the EU's self-conception as a (quasi-) sovereign entity, which is regularly recognised in practice (...) with the basic structures of international law, as well as the national law of the Member States.⁷⁴

This attack has some merit in criticising the literature for its lack of conceptual clarity and failure to engage with the nature of the EU's authority claim. Rarely is there a deeper inquiry into what the EU actually does in authority terms that goes beyond the above labels. And yet, I do not see how an authority lens 'does not capture the bottom-up or ascending legitimacy that lies as at the core of (popular) sovereignty'⁷⁵. The very purpose of theories of authority is to explain how authority can be legitimate in light of each citizen's autonomy and authorship over their lives, both individually and as a collective. To the contrary, it seems that loose talk of sovereignty leaves these fundamental moral questions aside by focusing on the allocation of decision-making powers alone.

In order to lay the ground for assessing the benchmark and extent of the EU's legitimate authority, Part II outlines the EU's authority claim in the taxonomy of political authority presented above. There, I study the way EU law is made and enforced, viz. how its authoritative directives are channelled through national and supranational institutions

⁷³ For a good overview see Avbelj (n 37).

⁷⁴ Eckes and Wessel (n 69) 86.

⁷⁵ *ibid.*

(Chapter 3). I will explore the distinct categories of members of the EU (citizens, states, peoples), especially how they relate to each other and what that tells us about the addressees of the EU's authority claim (Chapter 4). This inquiry into the nature and scope of the EU's authority claim allows me to reconstruct what the EU does in authority terms and position it on the scale between state sovereignty and international authority (Chapter 5). Only afterwards can I shift the perspective from *who* decides (ie allocating decision-making powers) to *why* the EU should decide what it claims to have authority to decide.

To reiterate, I ultimately ask the question under what conditions the EU has the authority it claims and, conversely, whether its subjects have a moral duty to obey EU law (Part III). The discussion of the authority claim in Part II thus serves as a springboard. Before that, however, we turn to the flip side of the theoretical coin – namely, to what it means to have legitimate political authority.

CHAPTER 2: A PRIMER ON LEGITIMATE AUTHORITY IN AND BEYOND THE STATE

I. Introduction

Chapter 1 discussed the nature of authority claims, the moral problem they create in relation to the value of autonomy, as well as their manifestations on various regulatory levels. It became apparent that authority claims tell us how and to what extent polities/organisations seek to morally bind their subjects. The point of theories of authority, nonetheless, is to establish *objective* moral benchmarks for the exercise of authority. Legitimate authority, in other words, describes the extent to which the self-image of authorities corresponds to objective moral legitimacy standards, the extent to which their claims are actually true.

This chapter complements the preliminary theoretical groundwork for the present thesis. It introduces important discussions surrounding the quest for legitimate authority, especially the difference between social and moral legitimacy and the complex relationship between authority and duty/obligation. In addition, I sketch the available accounts of legitimate authority on both the national and international level and categorise them according to the moral value they rely on.

I'm afraid the search for the moral legitimacy of authority equals the 'hopeless exercise' I identified in Chapter 1 regarding the nature of authority, which necessitates a trade-off between depth and breadth. Mirroring Chapter 1, I aim to establish the extent to which important concepts of political theory can be brought to bear beyond the state. I will – once more – not apply any of the proposed moral benchmarks to the EU just yet, however.

That discussion is reserved for Part III and presupposes the theoretical groundwork of the first two parts of the thesis. EU-related examples will, of course, help me to illustrate the relevance of the discussions in this chapter for analysing the EU's authority.

I wish to begin by outlining the distinction between empirical and normative notions of authority, without which the thesis would likely suffer from considerable ambiguity.

II. Empirical and Normative Legitimacy

The disparate use of numerous notions of political theory (notably sovereignty (see Chapter 1)) makes it difficult to base an argument on them which cannot be swept aside by recourse to terminological disagreement ('I use the concept differently'). Cognitive science would call them 'suitcase-words', because we can pack them with such a variety of meanings.¹ Legitimacy (and, consequently, legitimate authority) seems to be one of them, since it is used in several discourses related to the acceptability of the exercise of public power.

The most important distinction in this regard is how moral philosophers and social scientists differ in their use of legitimacy and legitimate authority. While some writings are clear about this analytical distinction,² others are more ambiguous and fail to pin down the

¹ Marvin Minsky, *The Emotion Machine* (Simon & Schuster 2006) pt 4.

² See Claudia Sternberg, 'Political Legitimacy between Democracy and Effectiveness: Trade-Offs, Interdependencies, and Discursive Constructions by the EU Institutions' (2015) 7 615, 617–620; Achim Hurrelmann, 'Legitimacy and European Union Politics' in William Thompson (ed), *Oxford Research Encyclopedias: Politics* (OUP 2014).

notion of legitimacy under consideration.³ I cannot blame institutions like the Commission for blending the two debates into each other (more in Chapter 6). For political theory, however, conflating these conceptions ‘remains a vulgar error’⁴, since social and moral legitimacy differ in methodology, aim and moral substance.

1. Empirical and Normative Conceptions of Legitimacy

Social legitimacy – as coined by Max Weber –⁵ refers to the belief of the bulk of citizens regarding the acceptability of the political regime in place. Legitimacy here means observable acceptance, usefully termed ‘empirical legitimacy’⁶. It is about the extent of popular support for the concrete political system and thus system-specific. Legitimacy, in this context, ‘derives from people’s belief in legitimacy’⁷. This is what recent inquiries are after when they ask: ‘The Authority of EU Law: Do we still believe in it?’⁸ The notions of

³ Lina Papadopoulou, ‘“All Good Things Come in Threes”: From a Double to a Triple Democratic Legitimacy of the European Union’ in Lina Papadopoulou, Ingolf Pernice and Joseph Weiler (eds), *Legitimacy Issues of the European Union in the Face of Crisis* (Hart/Nomos 2017). See on that ambiguity Joseph Weiler, ‘Dialogical Epilogue’ in Lina Papadopoulou, Ingolf Pernice and Joseph Weiler (eds), *Legitimacy Issues of the European Union in the Face of Crisis* (Hart/Nomos 2017) 385. Another example is Giorgio Maganza, ‘Can the Authority of EU Law Be Taken for Granted? A Tale of Principles and Realities’ in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019) 46.

⁴ Nigel Simmonds, ‘Why People Obey the Law by Tom R. Tyler’ (1991) 50 *Cambridge Law Journal* 174, 174. In the international context see Allen Buchanan, ‘The Legitimacy of International Law’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 79.

⁵ Max Weber, ‘Politics as a Vocation’, *From Max Weber: Essays in Sociology* (Routledge 2009) 78 et seq. where he distinguishes between charismatic, traditional, and legal-rational legitimacy.

⁶ Dominika Biegoń, ‘Specifying the Arena of Possibilities: Post-structuralist Narrative Analysis and the European Commission’s Legitimation Strategies’ (2013) 51 *Journal of Common Market Studies* 194, 196. See also A John Simmons, ‘Justification and Legitimacy’ (1999) 109 *Ethics* 739, 748.

⁷ David Beetham, *The Legitimation of Power* (2nd ed., Palgrave Macmillan 2013) 8, who is extremely critical of Weber’s work, to whom he attributes that position.

⁸ Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019).

‘acceptance’ or ‘support’ in empirical legitimacy literature are admittedly relatively ambiguous, since they encompass a range of sociological and psychological factors and cover anything from bare toleration to active adoration.⁹ Since this thesis focuses on moral legitimacy, such ambiguity need not concern us any further. In relation to the EU, the 1990s produced a wave of social legitimacy literature on the potential (lack of) democratic legitimacy of the EU and how – according to popular belief – such input legitimacy relates to the previously dominant output legitimacy (more detail, again, in Chapter 6).¹⁰

How does normative (or moral) legitimacy differ? Normative legitimacy and authority is concerned with the appropriate moral justification of the legitimate exercise of public power. It entails a normative inquiry into the compatibility of legal directives with fundamental reasons, values, and principles, notably the overt tension between authority and autonomy.¹¹ In a nutshell, the moral limb of theories of authority provides a framework which allows for and explains a mismatch between our legal and our moral duties. It seeks to establish *universal* moral conditions to evaluate the legitimate exercise of governmental power. This conception of legitimacy, to make it clear, informs my project: reflecting on the appropriate normative standard to evaluate the rightfulness of the EU’s exercise of authority.

⁹ Michel Troper, ‘The Modern State and the Concept of Authority’ in Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory* (Elgar 2016) 76.

¹⁰ Michael Nentwich and Albert Weale, *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (Routledge 1998).

¹¹ On the latter, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon 1979) 3; Richard Dagger, *Playing Fair: Political Obligation and the Problems of Punishment* (OUP 2018) ch 2.

Remembering Rawls' distinction of concepts and conceptions,¹² it is helpful to understand social/empirical and normative/moral legitimacy as two different *conceptions* of the broader *concept* of legitimacy. Two major differences should suffice to illustrate the distinct perspective of both. I already hinted at a first difference among them, relating to the object under consideration. Theories of authority are characteristically abstract. They usually concern a form of organisation or political community *per se*, for example 'the modern state'. The arguments are supposed to apply *universally* to these forms of government/governance, eg to all modern states. Social (esp. political) scientists, by contrast, study the legitimacy of a *particular* political system in terms of what actual members of a discrete political community believe about its legitimacy. Their methodology and research interest frames the idea in context of a given society.¹³

The second major difference between normative and social legitimacy relates to the assessment of legitimacy, which may yield spectacularly different results. Think only of Weiler's drastic, yet helpful, example of the Nazi dictatorship.¹⁴ A sufficient part of the German population empirically accepted and even supported the regime; therefore, it proved relatively stable. In other words, the belief in the legitimacy of the regime (though perhaps achieved via indoctrination and fear) must necessarily have been widespread. A similar observation applies to past societies with wide-spread slavery practices. Notice that

¹² John Rawls, *A Theory of Justice* (OUP 1973) 5.

¹³ Note that this changes when you assess the legitimacy of an individual institution. The social and moral legitimacy of a particular institution, like the ECJ or the European Commission, are both necessarily tied to the concrete role, standing and actions of that institution.

¹⁴ Joseph Weiler, 'The Authority of European Law: Do We Still Believe in It?' in Wolfgang Heusel and Jean-Philippe Ragueade (eds), *The Authority of EU Law: Do we still believe in it?* (Springer 2019) 9.

such regimes in fact claimed legitimate authority in the sense explained in Chapter 1, even if that claim was based on despicable theories of slaves as objects or non-Arians as second-class humans.¹⁵ The point is that – despite their empirical legitimacy – no-one can seriously argue that such regimes yielded legitimate authority, ie that they ruled rightfully in keeping with any plausible moral standard. The legitimacy claims of such regimes were just false.

To sum up, socially legitimate authority and morally legitimate authority represent two separate inquiries. The former is about actual (subjective) behavioural support, the latter about (objective) justified reasons for such support.¹⁶ Those are two different ways of assessing the legitimacy of a political regimes which should be kept analytically distinct. Otherwise, oppressive and repugnant regimes count as morally legitimate as long as the bulk of citizens accepts them.¹⁷ Even so, both inquiries also influence each other:

2. The Link between Empirical Legitimacy and *De-Facto* Authority

A necessary precondition of *de jure*, ie morally legitimate authority is a sufficient degree of *de facto* authority. A *de facto* authority ‘claims to be legitimate or is believed to be so, and is effective in imposing its will on many over whom it claims authority’.¹⁸ It does not

¹⁵ Beetham (n 7) 30.

¹⁶ Similarly Allen Buchanan, ‘Institutional Legitimacy’ in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy*, vol 4 (OUP 2018) 69; Nicole Bolleyer and Christine Reh, ‘EU Legitimacy Revisited: The Normative Foundations of a Multilevel Polity’ (2012) 19 *Journal of European Public Policy* 472, 475; Andreas Follesdal, ‘The Legitimate Authority of International Courts and Its Limits’ in Patrick Capps and Henrik Palmer Olsen (eds), *Legal Authority beyond the State* (CUP 2018) 195 et seq.

¹⁷ Simmons, ‘Justification and Legitimacy’ (n 6) 749.

¹⁸ Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Rev ed, Clarendon 1995) 296.

necessarily have moral authority. In Chapter 1, we came across these two limbs when discussing the relationship between state sovereignty and coercion. Here, we focus on another aspect, namely social acceptance. The acceptance of the subjects guarantees the stability and effectiveness of a legal order.¹⁹ Social legitimacy is thus intrinsically related to *de facto* authority.

If political leadership only rarely succeeds in what its subjects expect it to do (eg to deliver policy outcomes), it tends to lose its authority and second-order compliance mechanisms like force need to kick in. Such resources are limited and costly to manage.²⁰ Conversely, the more popular support a government enjoys – viz. if an overwhelming majority believes government to be legitimate the more likely it is that it can govern smoothly, and non-compliance will presumably not be an endemic problem. Take the following example. If a state imposes a curfew on its entire territory because of a pandemic, it has to rely on the vast majority of citizens to stay at home voluntarily. The state simply lacks the police force to enforce it against large-scale non-compliance. This observation is ever more salient beyond the state, where lack of compliance cannot usually be sanctioned by force. If, for example, the national courts would not have followed some remarkable rulings of the ECJ in the early days of the integration, the EU legal order would look different today, and the lack of actual supranational enforcement means there is nothing the EU could have done (more detail in Chapter 3). Moral authority thus presupposes a

¹⁹ Fritz Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 *European Political Science Review* 173, 173; Beetham (n 7) 33.

²⁰ Beetham (n 7) 28.

good deal of *de facto* authority.

That stability and effectiveness social legitimacy brings about in addition constitutes an independent moral achievement in and of itself. Thereby, *de facto* authority ('legitimation') creates aspects of *de jure* authority ('legitimacy').²¹ In other words, overwhelming acceptance of the legitimacy of a concrete government *by itself* represents an aspect of its moral legitimacy. Note that this relationship is reflexive. Rawls has shown on the basis of moral psychology how more stable moral ideals are likely to muster more social support.²² *De facto* and *de jure* authority thereby become mutually reinforcing, since greater moral authority in turn contributes to more wide-spread social acceptance. Whereas a sufficient degree of social legitimacy is thus necessary but not sufficient for morally legitimate authority, its stability-enhancing effect contributes to morally legitimate authority.

These links between socially and morally legitimate authority describe one of the central dilemmas of nation states in the 21st century, who find it ever harder to shape their respective political community according to the wishes of their citizens. Both technological change and economic interdependence mean that crucial adjustment tools are beyond their control. This creates a social legitimacy deficit, since none of the parties you vote into government can change these external factors. As we shall see in Part III, these circumstances lie at the very heart of assessing the EU's legitimate authority as political

²¹ Joseph Raz, 'The Democratic Deficit' (King's College London Dickson Poon School of Law, Legal Studies Research Paper Series) 2018-07 18 et seq. On their interdependence Nicole Roughan, 'From Authority to Authorities: Bridging the Social/Normative Divide' in Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory* (Elgar 2016) 283 et seqq.

²² John Rawls, *A Theory of Justice* (Rev ed, Harvard University Press 1999) ch 69.

community beyond the state designed to remedy these deficits.

3. Interim Conclusion

The interrelation of both social and moral conceptions of legitimacy adds one more piece to the puzzle of understanding the relevant debate in relation to the EU’s authority. As will become clear when we look at the institutions self-images of the EU’s authority in Chapter 6, the standards EU institutions use to assess both the social legitimacy as well as the legitimate authority of the EU coincide or at least mutually inform each other. Social practice rarely distinguishes between these two conceptions of legitimacy. Political theory should. To illustrate, see the following table:

	Social Legitimacy/ <i>De Facto</i> Authority	Moral Legitimacy/ <i>De Jure</i> Authority
Decisive Criterion	Acceptance by the majority of subjects	Compliance with an independent moral benchmark
Object of Assessment	Concrete: The belief of individuals in a given political system	Universal: exercise of political power by a generic form of government
Method	Empirical Explanations	Normative Inquiry
Variability	Changes depend on individual beliefs	Changes depend on individual moral benchmark
Interdependence	Social legitimacy supports a political community’s <i>de facto</i> authority amongst its subjects and contributes to its <i>de jure</i> authority (stability, effectiveness, saving resources) as one of its preconditions	

Figure 4: Social and Moral Legitimacy

Once again, unless stated otherwise, the focus of this thesis is morally legitimate

authority, the search for a moral benchmark to test the legitimacy of the EU's exercise of authority by law; in short, the extent of the EU's *right* to rule. I focus on the legitimate authority of EU Law, which itself is a subset of the EU's broader moral legitimacy in the terms just described. Theories of legitimate authority exclusively focus on exercises of authority, ie giving binding reasons to act through law, and do not extend to all the EU's actions.²³ Rather than a broader justifiability of the EU's institutional framework, the present inquiry specifically seeks to explore the tension between authority claim and autonomy (both of which will be studied in Part II).

I now wish to turn to the discussion about the vexed relationship of legitimate authority and political obligation.

III. Authority and Duty

The distinction between authority and political obligation opens up the deepest jurisprudential questions about the nature and grounds of law.²⁴ Essentially, the distinction is about the consequence of legitimate authority for the practical reasoning of the subject.

1. From Legitimate Authority to Political Obligation

I side with the majority of theorists for whom legitimate authority triggers a *prima facie*

²³ More generally on the relationship between legitimacy and legitimate authority Daniel Voelsen and Leon Valentin Schettler, 'International Political Authority: On the Meaning and Scope of Justified Hierarchy in International Relations' (2019) 33 *International Relations* 540, 543.

²⁴ For a discussion Liam Murphy, 'The Normative Force of Law: Individuals and States' in Leslie Green, John Gardner and Brian Leiter (eds), *Oxford Studies in Philosophy of Law. Volume 3* (OUP 2018) 93 et seqq.

moral duty to obey the law. The right to rule correlates to the imposition of a moral duty; they constitute two sides of the same coin. Once the truth of the authority claim, ie its objective legitimacy, is established, the subject has a strong reason, a duty, to do what the authority requires.

This view alone takes the (normative) fact that political authorities make such claims to obedience seriously.²⁵ It is incompatible with the position that legitimate authority creates no duties, ie that political obligation is independent from authority.²⁶ Legitimate authority goes beyond the effects of good governance or the moral relationships we might have to political communities to which we are outsiders or mere residents. The right to rule brought about by morally legitimate authority affects our practical reasoning more profoundly.²⁷ You can operationalize this conceptual structure independently of your moral benchmark. In an example of an institution-centred account, Christiano argues: ‘If democracy has authority then it implies a duty of citizens to obey the democratic decisions because of their democratic provenance’²⁸. Legitimate authority is necessary and sufficient to create a moral duty. In Hohfeldian terms, legitimate authority claims in the public realm

²⁵ Edward Song, ‘Strong and Weak Legitimacy’ (2011) 27 *Southwest Philosophy Review* 167, 170 et seq.

²⁶ Endorsed by Rolf Sartorius, ‘Political Authority and Political Obligation’ (1981) 67 *Virginia Law Review* 3; Arthur Isak Applbaum, ‘Legitimacy without the Duty to Obey’ (2010) 38 *Philosophy & Public Affairs* 215; David Copp, ‘The Idea of a Legitimate State’ (1999) 28 *Philosophy & Public Affairs* 3; Christopher Wellman, ‘Toward a Liberal Theory of Political Obligation’ (2001) 111 *Ethics* 735.

²⁷ Joseph Raz, ‘Why the State?’ in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (CUP 2017) 156.

²⁸ Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (OUP 2008) ch 7.

correspond to a claim-right correlative to a duty to obey on the part of the addressee.²⁹

At this stage, a clarification is in order. Many writers seem to use the terms ‘obligation’ and ‘duty’ interchangeably. Since this is how it is commonly known, I will refer to the literature on political obligation as such. For reason of analytical clarity and coherence, however, I use the concept of a moral duty to obey the law in my project. In my view, the notion of duty is more apposite in institutional contexts, where it is incurred non-voluntarily.³⁰

To put it in a slogan, legitimate authority creates a right to rule and a corresponding *prima facie* moral duty to obey. I managed to sneak in an important qualifier: *prima facie* duties. Let me explain.

2. *Prima-Facie* Duties: Authority’s Internal and External Limits

Even in the study of political authority, there are some statements everyone can agree on. It seems universally accepted that authority at most triggers a *prima facie* duty to obey.³¹ Rightful, legitimate authority accordingly doesn’t establish an absolute duty. The duty to obey the law, whatever your moral benchmark for legitimacy, is defeasible and limited.

The *internal* limits and thresholds built into many accounts are technically not part

²⁹ Dagger (n 11) 82. For a Hohfeldian power-liability view see Stephen Perry, ‘Political Authority and Political Obligation’ in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law*, vol 2 (OUP 2013) 4, 34.

³⁰ RB Brandt, ‘The Concepts of Obligation and Duty’ (1964) 73 *Mind* 374, 392. Similarly Rawls (n 22) 98 et seq.

³¹ See only Murphy (n 24) 97.

of this discussion. Think only of the lack of consent for consent theories, or non-democratic procedures for democratic authority theorists. As Perry remarks when discussing political obligation, '(e)very minimally plausible theory sets out certain conditions under which such an obligation is said to arise'³². The violation of these conditions simply makes the exercise of authority illegitimate. Consequently, no *prima facie* duty to obey is created in the first place.

Compare that to *external* limits, for which we need the '*prima facie*'-qualifier (a synonym would be *pro tanto*). External limits kick in even if the exercise of authority is legitimate and thus creates moral duties on the part of the subjects. The reason is that independent prudential or moral considerations, aside from the law, can come into conflict with my political obligations. There are always other values from which strong moral obligations arise, such as love or friendship. And they may conflict with the law. For example, I might have promised a friend not to reveal compromising information, which the police asks me to divulge in the course of an investigation. Such external limits make it the case that even an existing moral obligation to obey the law may justifiably be set aside.³³

All of that still leaves the notion of duty itself relatively obscure. Let's turn to that next.

³² Stephen Perry, 'Associative Obligations and the Obligation to Obey the Law' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2008) 183.

³³ George Christie, 'On the Moral Obligation to Obey the Law' (1990) 6 *Duke Law Journal* 1311, 1312.

3. The Elusive Notion of Duty

What is the nature of the normative change legitimate political authority triggers in the addressee of its directives? It relates to the level of intrusiveness on the practical reasoning of the addressees. Here, I address both theoretical disagreements as well as how the notion of duty varies across regulatory levels.

Some claim that law requires you to *comply* with it, ie to do as law says for the reason that law says so.³⁴ In other words, you not only need to act as the law requires, but also because the law tells you to act thus, and for no other independent moral or rational consideration. This triggers the ‘paradox of just law’, illustrated perfectly by the prohibition of murder. Since one has powerful non-legal reasons to refrain from murder, it would be extremely odd to hold that I failed to comply with the legal duty not to murder if I refrained from murder based on independent moral reasons. The paradox is that the more just a law is based on its substance, the less one would comply with the law by acting on it.³⁵ Others, like Hershovitz, have shown a way out of the paradox by arguing that law is less intrusive and merely requires that one *conforms* with it. Conforming means to act as the law requires without necessarily basing that action on the legal directive.³⁶ What matters here are actions, not psychological dispositions.

³⁴ For an elaborate treatment and the relationship to Raz’ exclusionary reasons see Joseph Raz, *Practical Reason and Norms* (OUP 1999) 178 et seqq. For a discussion in relation to the notion ‘surrender of judgment’, see Richard E Flathman, *The Practice of Political Authority: Authority and the Authoritative* (University of Chicago Press 1980) 100 et seqq.

³⁵ For a discussion see Raz, *Ethics in the Public Domain* (n 18) ch 15.

³⁶ Scott Hershovitz, ‘The Authority of Law’ in Andrew Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012).

In my view, the law imposes different moral duties on us, and the most important aspect of any law's authority claim is that you act on it (conformity). In other words, I agree with Perry that 'for the most part, the law is indifferent to why one complies with the law so long as one does so'³⁷. I am thus sceptical about the viability of a single conceptual kind of duty imposed by the law, no matter in which area, by which entity and on whom. I find it intuitively appealing to argue that law originating on separate regulatory levels entails a variety of duties on a variety of addressees.

This intuition is confirmed by what theorists have said about the difference between domestic political obligation and the duty to obey international law. Based on a very specific concern for the rule of law in the US, Waldron argued that the state officials' duties stemming from international law differ from the duties individuals have towards state law. He grounds that argument in the different value of both agents. Human individuals have inherent moral value and dignity as persons, whereas states and other political communities are artificial institutional structures in the service of humans, so that their value is derivative. According to Waldron, someone's lawyer may legitimately seek to explore potential loopholes in the law, because that is in concordance with the ultimate underlying autonomy of the individual. States, by contrast, enjoy no such natural freedom and thus shouldn't seek to avoid the constraints of the law the precise purpose of which is to guarantee individual autonomy of humans.³⁸ International law accordingly claims a distinct binding force and imposes a different kind of duty that – at least in part – stems from the

³⁷ Perry (n 32) 184.

³⁸ Jeremy Waldron, 'The Rule of International Law' (2006) 30 *Harvard Journal of Law and Public Policy* 15, 19.

fact that it addresses states and not humans qua humans. I agree with this distinction that presupposes the different kinds of authority claims explained in Chapter 1. In her study of the authority of international law, Çali provides a conceptual argument to a similar effect. She refuses to import the above assumption of theories of state authority – namely, that the duty to obey the law on individuals is always of the same kind, to the international arena. Instead, Çali argues that international law imposes three different kind of duties on state officials: obedience (strong duties, no discretionary space) respect (weak, granting discretion to the states), or rebuttal (balancing with other legal duty to which the international duty might yield).³⁹ Similarly, Barnett and Finnemore conceive of the main duty induced by international authorities as one of ‘deference’.⁴⁰ The point these theorists correctly make is that political authority imposes different kinds of duties on individuals qua citizens than on individuals qua state officials.⁴¹ We might visualise the variety of factors that influence the nature of the normative change sought in the following way:

³⁹ Başak Cali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (OUP 2015) ch 2.

⁴⁰ Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004) 5, 29.

⁴¹ See also Murphy (n 24) 112 et seqq.

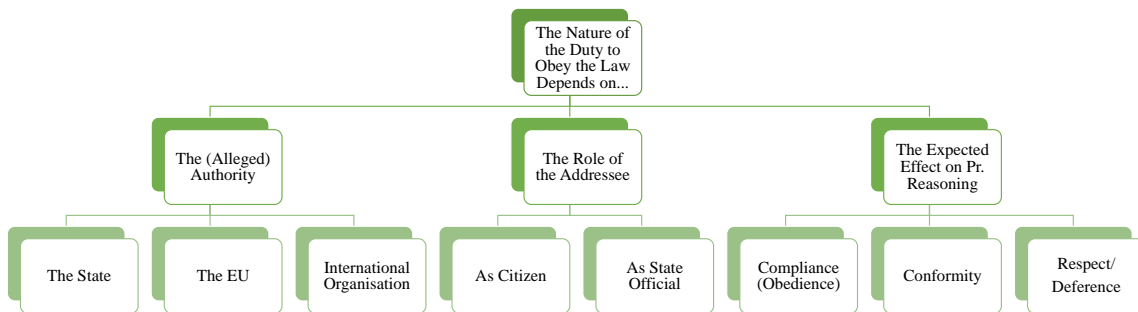


Figure 5: The Criteria that Determine the Nature of Political Obligation

4. Interim Conclusion

The main message of this section is that I concur with those who see a necessary connection between rightful, legitimate authority and the creation of moral duties on the subjects of said authority. After explaining my preference for *duty* instead of *obligation*, I showed that the moral duties authorities trigger are subject to external limits, such as countervailing independent moral duties, and therefore necessarily *prima facie*, defeasible. I went on to clarify that the character of the duty varies both in nature as well as on different regulatory levels and depending on the role of the addressee.

The remainder of this chapter is no attempt to discuss, apply and evaluate the moral standards discussed below to the EU. I will do that in Part III. Besides the illustration of the sheer (by no means exhaustive) variety of approaches, the introduction to the individual

moral benchmarks to reconcile autonomy and authority is an exercise of categorisation. I aim to show how individual accounts on both the national and the international level emphasise diverse moral characteristics, which they use to evaluate and explain the legitimacy of the exercise of public power. That is, the individual theories focus on such disparate factors as the normative powers of the individual, the relationship between different agents, institutional procedures, or constitutional values in public cooperation. Of course, the numerous bifurcations, developments and nuances in the literature make it impossible to even aim for comprehensiveness.⁴² But, in any case, that is not my goal. I want to give a sense of the available moral benchmarks as a basis for a reasoned argument which one (or the adaption of which one) is the best fit for a political community with the features of the EU.

IV. A Spotlight on Normative Standards to Evaluate Authority

The remainder of this chapter sketches the available legitimacy standards with a broad brush, only to get a sense of the nature of and differences between various accounts. For that reason, don't expect all of them to be taken up and discussed in relation to the EU in Part III, as some are merely there to illustrate the common moral value underlying a broader category of accounts. Let me start with the historically most prominent approach, both on the national as well as on the international level: consent.

⁴² See the entries on 'political authority', 'political obligation', and 'political legitimacy' in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy*. for surveys of the available accounts and the variegated use of the concept itself. Try also David Lefkowitz, 'The Duty to Obey the Law' (2006) 1 *Philosophy Compass* 571.

1. Focusing on the Agent: Consent

a. The Authority of the State and the Citizen's Consent

The predominant strategy for evaluating political authority after the emergence of states was the simple yet powerful idea of consent. The idea is that a state is legitimate in binding millions of subjects into a social order with coercion-backed laws to the extent the individual citizen consents.⁴³ The intuitive case for consent stems from its widespread use. After all, haven't societal arrangements throughout human history shown that humans can bind themselves through promises, contracts and vows, in other words, by consenting?⁴⁴ Consent protects autonomy (my decision), equality (adults relate to each other as equals, which only consent can change to a hierarchy of authority) and establishes an accountability relationship between authority and subject.⁴⁵ In essence, consent tells a story of the exclusive relationship between one individual and the political community's institutions.

Mainly due to the realization that individuals rarely consent actively to a statist arrangement, which would drastically limit the extent of states' legitimacy, some theorists resorted to qualifications such as hypothetical or *tacit consent*. Locke famously insisted that everyone who does not decide to escape the jurisdiction of a state and leave gives tacit

⁴³ Proponents of this *actual consent* view (though with notable differences) include Thomas Hobbes, *Leviathan* (Continuum 2005); Leslie Green, *The Authority of the State* (Clarendon 1988); Robert Nozick, *Anarchy, State and Utopia* (Basil Blackwell 1974).

⁴⁴ Green (n 43) 158.

⁴⁵ Thomas Christiano, 'The Legitimacy of International Institutions' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (1st edn, Routledge 2012) 383.

consent to its authority.⁴⁶ Consent theorists happily accept that this moral benchmark is high and that, consequently, most state governments and their laws are less legitimate than commonly thought.⁴⁷ For that reason, amongst others, consent-views for legitimising statist authority are neither dominant nor uncontested anymore.

b. State Consent and International Authority

Theories of international authority tell a similar story. The classic, only recently disputed view anchors the authority of international law firmly in the consent of the (state) parties to the respective international treaties.⁴⁸ This view is clearly related to the traditional understanding of state sovereignty as explained in the previous chapter. In a nutshell, because sovereign states can only incur obligations by actively consenting, their consent is the only available legitimacy source for international authority. Attempts to curtail sovereign states' room for manoeuvre by creating and enforcing binding legal norms independently of the everyday consent of the affected state are often considered hugely problematic.⁴⁹ State consent is the gold standard of legitimacy for sovereignty theorists as well as for hybrid theories, which qualify or complement the moral work done by state

⁴⁶ John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Ian Shapiro ed, Yale University Press 2003).

⁴⁷ Green (n 43) 165 et seq.

⁴⁸ For a discussion see Buchanan (n 4) 90 et seqq. For a recent nuanced defence Richard Collins, 'Consent, Obligation and the Legitimate Authority of International Law' in Patrick Capps and Henrik Palmer Olsen (eds), *Legal Authority Beyond the State* (CUP 2018).

⁴⁹ See only Martin Loughlin, *The Idea of Public Law* (OUP 2004). For a discussion focused on sovereignty and EU membership, Michel Troper, 'The Survival of Sovereignty' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in fragments: the past, present and future of a contested concept* (CUP 2010). From an international perspective Buchanan (n 4) 86 et seqq; John Tasioulas, 'The Legitimacy of International Law' in John Tasioulas and Samantha Besson (eds), *The Philosophy of International Law* (OUP 2010) 113 et seqq.

consent for international legitimate authority.⁵⁰

c. The Gist of Consent-Theories

This is not the place to discuss the merits and flaws of (national or international) consent theories.⁵¹ Instead, I want to highlight the moral focus of consent theories on the autonomy of the individual.

Any consent theory grounds the extent and limit of legitimate authority on the normative powers of the individual agent. The important moral work takes place exclusively between authority and subject and derives from the normative powers of the latter. Advocating for a consent strategy thus requires you to commit to two ideas. First, you have to ignore the horizontal relationships between different agents in political communities, since legitimising authority is exclusively a process between authority and individual addressee of the authority claim. That is no problem in national authority terms where the individual citizen is the main actor. It becomes more important in the international arena, however, where scholars have recently disputed the state-focus of international law.⁵² And I will explain later why this is particularly difficult with regard to the EU. For now, let us move on to the role of law-making in theories of authority.

⁵⁰ Such hybrid accounts are Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405; Christiano (n 45).

⁵¹ I shall address both in Chapter 7, sec. III.2.

⁵² Samantha Besson, 'The Authority of International Law: Lifting the State Veil' (2009) 31 *Sydney Law Review* 343, 363 et seqq. I will come back to that in Chapter 5, sec. III.2.

2. Focusing on Law-Making Procedures and their Institutions

An altogether different strand of literature looks at the machinery of law-production and at the value of law-administering institutions in order to reconcile autonomy and authority.

a. Law and Coordination

The notion of *coordination* has always been at the centre of institutional arrangements in political communities with millions of subjects.⁵³ Solving coordination problems is widely seen as a core value of public institutions, where coordination problems arise *en masse*. A coordination problem involves interrelated decisions of multiple people in the way that

each has to choose one from among several alternative actions, and in which the outcome of any person's action depends upon the action chosen by each of the others... The specific difference of co-ordination problems within this class is that in them the interests of the parties coincide.⁵⁴

Think only of the well-known example whether to drive on the left or right on the national level, on the extent of harmonisation of trade standards on the supranational level, or the appropriate reaction to climate change on the international level. Finnis provides a contemporary account of legitimising authority with recourse to the need for coordination as public/common good.⁵⁵ Since, for him, the only other alternative, unanimity, is both unreasonable and undesirable in mass society, we need political authority to achieve the

⁵³ *ibid* 352 et seqq. discusses the relationship between political obligation and coordination theory.

⁵⁴ Edna Ullmann-Margalit, *The Emergence of Norms* (Clarendon 1977) 78. Cited by John Finnis, *Natural Law and Natural Rights* (2nd ed., OUP 2011) 255.

⁵⁵ Finnis (n 54) ch 9. For an in-depth analysis and criticism see Leslie Green, 'Law, Co-Ordination and the Common Good' (1983) 3 *Oxford Journal of Legal Studies* 299.

common good of coordination. In that regard, the quality of a legal system, especially the virtues of the rule of law, make law the most suitable tool to achieve coordination.⁵⁶ Similarly, Garthoff argues that authority and obligation only arise for those laws which solve moral coordination problems, chiefly to concretise morally underdetermined obligations.⁵⁷

Various modern accounts of authority go beyond narrow coordination problems and take a broader perspective on the value of political institutions.

b. Natural Duties and Democratic Authority

Some neo-Kantian writers derive legitimate authority from ‘natural-duties’ of justice, viz. from the way in which the law-administering institutions of a sufficiently just state help us to relate to each other in a political community. They allow us to recognize each other’s dignity and moral worth by organising the political community through institutions that show equal respect to each individual.⁵⁸

In a sense, theorists of democratic authority put flesh on these bones. Christiano, Hershovitz, Lefkowitz, and Waldron all agree that legitimate political authority stems from the qualities of the law-making procedure in democratic states: from how democracies reach decisions. A democracy respects individual citizens – despite fundamental and

⁵⁶ John Finnis, ‘Law’s Authority and Social Theory’s Predicament’ in John Finnis (ed), *Philosophy of Law* (OUP 2011) 63 et seq.

⁵⁷ Jon Garthoff, ‘Legitimacy Is Not Authority’ (2010) 29 *Law and Philosophy* 669.

⁵⁸ Rawls (n 22) 92 et seqq. For a discussion, though not fully-fledged defence of such a model for international law see Patrick Capps, ‘The Evolution of Global Authority’ in Patrick Capps and Henrik Palmer Olsen (eds), *Legal Authority Beyond the State* (CUP 2018).

reasonable disagreement among them – by giving them an equal voice in deciding about the issues that affect the entire political community.⁵⁹ This view openly admits that the result of the legislative process may not be the *best* one, since there may not even be an on-balance better solution. The moral duty to obey arises instead from the unique capacity of law-making procedures to process the subjects' disparate views and thereby honour their autonomy and dignity.⁶⁰ The focus is on procedure, not substance. The equal opportunity to influence democratic procedures and institutions justifies requiring the *acceptance* of the outcome of the legislative machinery.

Estlund and Landemore focus on the qualities of legislative procedures as well. They don't focus on their moral achievement in light of wide-spread reasonable disagreement, however. Instead, they argue (setting important differences among them aside) that the legislative procedures in liberal democracies have distinct *epistemic qualities*, ie the means to come up with a 'good' solution, especially due to the diversity of views that they bring together.⁶¹ Estlund's 'epistemic proceduralism' and Landemore's 'democratic reason' in one way or the other base the authority of democratic laws on their propensity to come up with a good decision.

Notice how these accounts differ from the consent-based voluntarism we

⁵⁹ Jeremy Waldron, *Law and Disagreement* (Clarendon 1999) 99 et seqq; Christiano (n 28) ch 7. Similarly Wellman (n 26); David Lefkowitz, 'A Contractualist Defense of Democratic Authority' (2005) 18 *Ratio Juris* 346. Scott Hershovitz, 'Legitimacy, Democracy, and Razian Authority' (2003) 9 *Legal Theory* 201. As part of a wider philosophical framework see also Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity 1996) s 3.3.

⁶⁰ Hershovitz (n 59) 213 et seq.

⁶¹ David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008); Hélène Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton University Press 2013).

encountered above. While consent theories mean it, ie they derive the legitimating force from the voluntary act of consenting itself, process-centred theorists argue that people *ought to* consent based on the normative virtues of the institutions and procedures.⁶² The endemic use of majority procedures in democracies shows that actual consent by everyone is not needed.⁶³ In other words, consent does not do the normative work in process-centred theories. Instead, consent is the required consequence of the moral work done by law-administering institutions, which gives people a reason to consent.⁶⁴ Moreover, the focus is not on the individual's isolated relationship to the authority ('I bind myself'), but on the collective enterprise and its institutions ('We bind ourselves to each other').⁶⁵

c. The Value of Democratic Institutions on the International Plane

Various scholars have recently attempted to base the legitimate authority of international law on its democratic credentials.

Brunnée and Toope support the legitimacy of international law and the political obligation it creates for states on the basis of the value of interactional law-making on the international plane.⁶⁶ In their view, the law-making process itself grounds compliance since

⁶² Simmons, 'Justification and Legitimacy' (n 6) 261.

⁶³ Samantha Besson, 'State Consent and Disagreement in International Law-Making. Dissolving the Paradox' (2016) 29 289, 300.

⁶⁴ Jeremy Waldron, 'Theoretical Foundations of Liberalism' (1987) 37 *Philosophical Quarterly* 127, 144.

⁶⁵ Hershovitz (n 59) 210.

⁶⁶ Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010) ch 3.

it clearly expresses the commitment of the individual stakeholders to the common project.

Other accounts focus on democratic elements even more directly. For example, Peters (though for the most part as an aspirational project) argues for democratic legitimacy as appropriate benchmark for international law. She sees neither institutional (a global assembly is possible), nor social (preconditions for deliberation can be created), nor cultural (a demos is not needed) obstacles for global democracy and urges the relevant actors to facilitate it.⁶⁷ Relatedly, in Besson's view international authority at its core derives from a 'democratic coordination-based' argument. Her account can admittedly at best be described as hybrid: it combines elements of Razian instrumentalism, coordination, and leaves room for consent and other legitimation strategies. In an adaption of the above accounts on the national level, Besson nonetheless stresses international law's coordination-facilitating features which produce authoritative reasons as the best way to manage wide-spread reasonable disagreement among the international actors (provided that any procedures are sufficiently democratic).⁶⁸ She does not argue that international law and national law are equally or even similarly democratic.⁶⁹ And yet, her emphasis on widespread reasonable disagreement in international law-making allows her to rely on the normative weight of the democratic justifications discussed by the above political obligation theorists on the national level.

⁶⁷ Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009).

⁶⁸ Besson (n 63) 302. Similarly Mattias Kumm, 'Democratic Constitutionalism Encounters International Law: Terms of Engagement' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2007) 262.

⁶⁹ Besson (n 52) 368; Besson (n 63) 305 et seq.

d. The Authority of Just and Democratic Institutions

All of the accounts discussed in this section insist that law-making is the best process to regulate how millions should live side-by-side while respecting their equal dignity and thus rightly demand our compliance. Instead of centring on the individual moral position of citizens, these theories focus on the political community writ large. The writers explain, in different ways, why law is needed in the first place in bounded polities with impersonal relations between a mass crowd of individuals, and how law-making contributes to the procedure's legitimate authority. In a nutshell, authority here is generated through the value of the *production* of law, rather than the quality of law as *product*.

While the focus of these accounts on law-making procedures and institutions shows awareness for the issues caused by the relations between a multitude of subjects in a polity, other writers derive legitimate authority directly from these interpersonal relations:

3. Focusing on the Moral Relationship Among the Subjects

a. Fair Play: Of Benefits and Burdens

Fair-play accounts provide an interesting combination of justice and legitimacy. Theorists such as Dagger, Hart, and Klosko argue that legitimate political authority is based on fairness.⁷⁰ For them, it would be unfair towards the other stakeholders of the polity if some

⁷⁰ Dagger (n 11); George Klosko, *The Principle of Fairness and Political Obligation* (New edition, Rowman & Littlefield Publishers 2004); HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175.

only enjoyed the benefits a political community provides without sharing the burdens, such as committing to obeying the laws of the community. They would thereby violate the fair equality guaranteed by applying law to everyone, and disregard an important aspect of what it means to share a political community with others. According to Hart,

when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.⁷¹

The moral problem these theorists identify is cherry-picking and the harm this causes to the other members of the political community. The fear is not a sudden revolution, but the subtle and continuous erosion of the institutional scheme of cooperation if people decided for themselves which laws to obey. This risk is aggravated by the idea of law as a ‘seamless web’, viz. a legal system’s countless benefits and burdens that interrelate through a chain of validity.⁷² Cherry-picking in one area of law damages the integrity of the legal system as a whole.

In relation to the authority of international law, Franck uses fairness as overarching idea to assess, critique and improve the legitimacy of the international system.⁷³ Lefkowitz also proposes a fair-play model of international authority. In his view, states have a moral obligation to obey international law as flip-side of accepting the benefits of the

⁷¹ Hart (n 70) 185. For a concise summary of potential objections see, eg, Dimitry Kochenov, ‘EU Citizenship without Duties’ (2014) 20 *European Law Journal* 482, 495. For a response to objections try Richard Dagger, ‘Authority, Legitimacy, and the Obligation to Obey the Law’ (2018) 24 *Legal Theory* 77, 99 et seqq.

⁷² Finnis (n 56) 49 et seq.

⁷³ Thomas Franck, *Fairness in International Law and Institutions* (Clarendon 1995).

international order. That duty, however, is subject to two quite demanding conditions. The duty grounded in fairness obtains only (i) if they accepted the relevant legal regime (since that voluntariness condition respects their self-determination) and (ii) if they enjoy domestic legitimate authority in relation to their citizens (since without domestic legitimacy, states cannot bind their subjects at all).⁷⁴ Nonetheless, the notion underlying legitimate authority here is fairness, which emphasises the moral effect of one's actions on the other members of the community.

Other theorists focus even more directly on the moral relationships among citizens:

b. Obligations in a Moral and Political Community

Theorists in this camp argue that legitimate authority derives directly from the relationship we have to each other as citizens, as members of a bounded political community. On the one hand, Dworkin extrapolates from personal ties such as family and friendship, and reasons that our *associative obligations* in a political community suffice to trigger a *prima facie* moral duty to obey the law.⁷⁵ Membership in a political community per se here leads to political obligation. This is based on the idea that being a member of a political community with 'law that exhibits integrity' is intrinsically morally valuable and requires to follow the law.⁷⁶ Relatedly, I noted already in Chapter 1 that Darwall has argued for a *second-person standpoint* in grounding legitimate political authority. According to

⁷⁴ David Lefkowitz, 'The Principle of Fairness and States' Duty to Obey International Law' (2011) 24 *Canadian Journal of Law & Jurisprudence* 327.

⁷⁵ Ronald Dworkin, *Law's Empire* (Hart 1998) 206.

⁷⁶ Perry (n 32) 189.

Darwall, political authority results from the moral premise that people in a political community ‘share a common basic (second-personal) authority to make claims and demands of one another’⁷⁷ and thereby gain a right to hold each other accountable. Hence, we owe the duty to obey to the other members of the political and thus moral community.

In my opinion, the view closest to this argumentative structure on the international plane is cosmopolitanism. According to cosmopolitan thinkers, there should be no borders, and states immorally exclude non-citizens. These accounts – some explicitly built on Darwall’s second-person standpoint – focus on the moral relations among all humans worldwide.⁷⁸ They ground cosmopolitan legal and political authority in keeping with substantive standards (like human rights and the rule of law), which benefit and serve each individual on the globe. Hence, they also touch on the idea of global constitutionalism discussed below.

c. How We Relate to Each Other as Source of Authority

The accounts discussed in this section focus directly on the moral relationships between members of a cooperative enterprise. The horizontal relationship among members of a political community, rather than isolated autonomy or the value of institutions, does the moral work. While for some accounts (like fair play) this relationship forms only the indirect basis for their moral standard, others (like Darwall and Dworkin) explicitly use it

⁷⁷ Stephen Darwall, ‘Authority, Accountability, and Preemption’ (2011) 2 *Jurisprudence* 103, 105. In more detail, Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press 2006) ch 8 et seqq.

⁷⁸ Claudio Corradetti, ‘Judicial Cosmopolitan Authority’ (2016) 7 *Transnational Legal Theory* 29, 34 et seqq.

as source of political authority. In all these cases, we owe political obligation to the other members of the political community.

4. Instrumental Authority

The instrumental accounts in this section are very different from what we have just discussed.

a. Razian Instrumentalism: Authorities as Service Providers

Raz's instrumental account of legitimate authority has been highly influential for quite some time now. Besides his important work on the nature of authority discussed in Chapter 1, Raz provided a comprehensive account of the legitimacy of both theoretical and practical authority. His account is reason-based and instrumentalist. According to Raz' normal justification thesis, the

normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with the reasons which apply to him (other than the alleged authoritative directive) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.⁷⁹

In that sense, a doctor's advice and a legal directive are functionally similar. In both cases, the authority provides a service to the subject, helping them to do what they have reason to do anyway. Raz later introduced the 'independence condition' which restricts the

⁷⁹ Joseph Raz, *The Morality of Freedom* (Clarendon 1986) 53. See also Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003, 1014.

authority of law to instances where it is more important to decide correctly than to decide for oneself.⁸⁰ This results in piece-meal authority, the legitimacy of which is contingent on the individual's own expertise in the area under concern. The duty to obey the law is here first and foremost a rational one, which becomes moral if the underlying reasons are moral.⁸¹

In my endeavour to cluster attempts to ground legitimate authority, this is an odd case, because it doesn't treat law as special. Law only helps us comply with reasons which we have in the public domain, as much as math teachers tell us how to tackle algebra.

b. International Instrumentalism

Føllesdal applies Razian instrumentalism to the role of international courts.⁸² Murphy, by contrast, endorses an instrumental account to evaluate the authority of international law in its entirety. In Murphy's view, compliance with international law is morally mandatory because the limited enforcement of international law increases the destabilising effects of non-compliance and because it makes the world a better place.⁸³ Similarly, Tasioulas provides an elaborate instrumental account of international authority. He endorses Raz's service conception in order to 'normally justify' the authority of international law.⁸⁴ For him, international law has legitimate authority to the extent it makes its subjects better

⁸⁰ Raz, 'The Problem of Authority' (n 79).

⁸¹ Lefkowitz, 'The Duty to Obey the Law' (n 42) 593.

⁸² Føllesdal (n 16).

⁸³ Murphy (n 24) 118 et seqq.

⁸⁴ Tasioulas (n 49) 100 et seqq.

conform to independent reasons if they treat international law as authoritative. Those substantive reasons can, amongst others, be influenced by consent-, coordination-, or democracy-based consideration which, nonetheless, don't constitute independent factors. They instead contribute instrumentally to international law's authority under the normal justification thesis. For Tasioulas, the piece-meal nature of authority built into Razian instrumentalism reflects social reality in relation to actors (international law has varying authority on different states) and domains (international law's authority varies according to the underlying issues) as much as it reflects the normative value that states should be unbound by international law where they can foster global goods better individually.⁸⁵ This variety of writers illustrate the popularity of instrumental accounts across the board.

c. Interim Conclusion

The core focus of Raz's conception of authority is reasons and rationality. And the value it focuses on is outcome alone, ie to what extent the service-provider 'delivers' the help required.

A very different camp uses substantive standards as evaluative criteria for legitimate authority, especially for legal regimes beyond the state.

5. Substantive Standards: (Global) Constitutionalism

Substantive standards, for example constitutional values (equality, rule of law etc.) and

⁸⁵ *ibid* 103 et seqq.

fundamental rights, sometimes constitute implicit standards in the national accounts presented above, such as consent (who consents to public authority that violates human rights?), or coordination.⁸⁶ They never occupied a central role in theories of state authority, however, though Kumm – as we will see shortly – includes national authority in his account.

By contrast, international constitutionalism holds that the authority of international law is grounded on its conformity with and fostering of constitutional values, chiefly fundamental rights and the rule of law.⁸⁷ International constitutionalism is a wider field, conventionally subdivided in normative, functional and pluralist approaches and we will here focus on the normative limb alone.⁸⁸ The most prominent account of normative international constitutionalism is Kumm’s cosmopolitan constitutionalism. It grounds the authority of any public law (national, European, international) on ‘universal principles central to liberal democratic constitutionalism’ so that the order takes moral precedence which best adheres to these values.⁸⁹ For Kumm, the legitimate authority of law on any

⁸⁶ Finnis explicitly emphasises the rule of law as main reason for law as valuable tool of coordination. Finnis (n 56) 64.

⁸⁷ For an overview of manifestations, aims and critique of international constitutionalism, see Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009).

⁸⁸ By contrast, functional approaches to international constitutionalism analyse to what extent the allocation of (vertical and horizontal) authority is achieved by an international constitution, see Jeffrey L Dunoff and Joel P Trachtman, ‘A Functional Approach to International Constitutionalization’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009).

⁸⁹ Mattias Kumm, ‘Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism’ in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012); Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) 605. For a specific focus on fundamental rights in adjudicating the weight of legitimate

regulatory level is based on the same moral standard, notwithstanding the differences in their authority claims. It follows that resistance to international and supranational authority is justified if (and only if) those legal orders beyond the state do not meet structural legitimacy requirements such as endorsed by liberal constitutionalism. Buchanan, after refuting state consent-based accounts, advocates for a similar yet more concrete route to justify the legitimate authority of international law. For him, democratic procedures in a loose sense of ‘broad accountability’ in (necessary) combination with adhering to substantive fundamental rights protection grounds international authority and constitutes the criterion to evaluate its legitimacy.⁹⁰

These theorists emphasise the compliance with substantive standards of democratic constitutionalism as moral benchmark to evaluate legitimate authority. We will see in Part II how the EU has significantly helped the development of such accounts, first and foremost through Art. 2 TEU as prominent endorsement of such values (Chapters 3, 5).

So far, we have encountered a sophisticated (and often confusing) array of ways to reassure citizens that the exercise of political authority is (to varying extents) legitimate, ie compatible with individual or collective autonomy. But there is a rarely held view, which claims the extent of legitimate political authority is zero.

international authority, André Nollkaemper, ‘Rethinking the Supremacy of International Law’ (2010) 65 *Zeitschrift für öffentliches Recht* 65.

⁹⁰ Buchanan (n 4). See also Buchanan and Keohane (n 50).

6. Philosophical Anarchism

According to philosophical anarchism, the political authority exercised by the typical modern state violates individual autonomy and is thus illegitimate.⁹¹ For such anarchists, the state's far-reaching authority claim is incompatible with the fundamental premise of post-Enlightenment political theory, namely the (equal) autonomy of humans qua human beings. That individual autonomy in their view entails an obligation for everyone to take decisions themselves, rather than complacently following legal directives. Any restriction of that autonomy by binding laws is illegitimate. For anarchists, there is no political obligation: no duty to obey the law. Note, however, that this does not imply a call for overthrowing governments through revolution, but merely that there is no moral obligation to obey the law.⁹² It is philosophical, not political anarchism.

Philosophical anarchism – amongst others due to its radical consequences for the stability of states – is overwhelmingly considered an unattractive position for national authority. On the international level, the narrative changes, however. Especially international relational scholars view international law as playboard for state interests rather than binding authoritative rules.⁹³

⁹¹ Robert Paul Wolff, *In Defense Of Anarchism* ([new edition], Harper & Row 1976); Alan John Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1979).

⁹² A John Simmons, 'Philosophical Anarchism', *Justification and Legitimacy: Essays on Rights and Obligations* (CUP 2001); A John Simmons, 'Conclusions' in Christopher Wellman and A John Simmons (eds), *Is there a Duty to Obey the Law?* (CUP 2005).

⁹³ Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005); Eric A Posner, 'Do States Have a Moral Obligation to Obey International Law?' (2003) 55 *Stanford Law Review* 1901.

In relation to the underlying moral value, the key argumentative move of philosophical anarchists is to turn autonomy into a duty for every autonomous agent to maintain. On the national level, it is the individual autonomy of the citizen, which is supposedly illegitimately restricted by state's authority claims. On the international plane, it is the sovereignty of states which would be unduly constrained by binding international authority outside the control of the individual state. For both versions of philosophical anarchism, there can be no real authority over and above the respective agent. In short, no one may justifiably tell the citizen or the state what to do.

V. Conclusion

This chapter provided the second prelude to the engagement with the EU's authority. In preparing the EU for theories of authority, it complemented the previous chapter's focus on authority claims on different regulatory levels.

In light of the protean notion of legitimacy, I highlighted that I am interested in moral rather than social legitimacy. After that, it proved difficult to pin down both the relation between a political community's right to rule, and the subject's duty to obey, as well as the conceptual nature and content of any such possible duty on individual regulatory levels. As I see it, legitimate authority triggers a *prima facie* duty to obey of some sense in the subject, but that duty differs depending on the regulatory level and role of the addressee. Finally, the chapter provided its own perspective on the various theoretical accounts to evaluate political authority both on the national level and beyond. It classified them according to the relevant moral criterion underlying the normative force of their respective

argument. As a brief reminder, consult the following table:

Key Moral Value:	Authority of:	Individual Accounts:
Normative Power of Subject	National Law	- Citizen Consent
	International Law	- State Consent
Law-Making Procedures and Institutions	National Law	- Coordination - Natural Duties of Justice - Democratic Authority
	International Law	- International Law-Making and Reasonable Disagreement - (Aspirational) Democratic Authority
Relationship among Members of a Political and thus Moral Community	National Law	- Fair Play - Associative Obligations - Second-Person-Reasons
	International Law	- Fairness - Cosmopolitanism
Outcomes	National Law	- Instrumentalism
	International Law	- Instrumentalism
Substantive Values	Law on all Regulatory Levels	- Constitutionalism
Autonomy as a Duty	National Law	- Philosophical Anarchism
	International Law	- Anarchism with State Sovereignty as Basis

Figure 6: The Values Underpinning Theories of Authority

As this table illustrates, the structure of authority discourse traditionally anchored on the national level may be and is already transferred to discussions above and beyond the state. Doing so, of course, requires awareness of the differences among the respective regulatory levels, which I will explore in more detail in Part II with regard to my prime object of study: the EU.

In contrast to the flood of literature on the EU's authority claim related to sovereignty and *Kompetenz-Kompetenz* that we met at the end of the previous chapter, elaborate and – more importantly – explicit accounts on the legitimate authority of the EU are scarce. I intended this chapter to highlight the theoretical issues and practical accounts

that relate to the evaluation of legitimate authority, precisely in order to situate the EU in these debates in subsequent chapters.

The remainder of the thesis spells out the dualism between Chapters 1 and 2 in relation to the EU. Part II explores the scope, nature, and addressees of the EU's authority claim with the help of the taxonomy explained in Chapter 1 (law and institutions, membership). Its task is to pin down the EU's position on that scale, ie how it intends to bind, and whom its authority claim addresses. This is necessary before Part III discusses the moral basis of the EU's authority, since that inquiry presupposes a good grasp of the EU's authority claim, ie of what the EU actually does in authority terms.

PART II: THE AUTHORITY CLAIM OF THE EU

CHAPTER 3: IN THE ENGINE-ROOM OF EU LAW: THE MAKING AND - ENFORCEMENT OF EU LAW

I. Introduction

After the theoretical groundwork laid in Part I, let me now focus on the EU's place in theories of authority. Part II builds on the discussion on the manifestation of authority claims on different regulatory levels in Chapter 1. We first need to understand the nature and scope of authority the EU claims for itself (Part II) before we discuss the basis and extent of the EU's actual, legitimate authority (Part III). I have already indicated that many conceptual distinctions familiar from theories of state authority are helpful in analysing authority beyond the state. Whereas the content of the concepts may well vary on different regulatory level, the conceptual framework remains the same. For example, the nature and force of any duty to obey EU law may differ from the duty to obey national law. Nonetheless, we can still use the concept of duty to understand the normative effect of exercising authority beyond the state.

In this initial chapter of a twofold inquiry, I explore how a study of EU law-making and -enforcement enhances our understanding of the nature, scope, and normative architecture of the EU's authority claim. After a brief discussion of the broader relevance of law and institutions for political authority (II), I trace the substantial and institutional effects of EU law enforcement, ie the role of the *product* (III). Thereafter, I focus on the *process* of both primary and secondary law-making (IV), before concluding (V).

II. The Role of Law-Administering Institutions in Theories of Authority

Law is the core vehicle through which authority is exercised, the host that channels the authority claim to the subjects. Sociologically, there might be other person-centred factors which help the exercise of authority, such a leaders' charisma or the use of social media (like ex-US-President Trump's twitter account). They might contribute to *de facto* authority through generating popular acceptance. Yet, law alone – as normative tool to bind subjects and guide their actions – is the object of study in normative theories of authority. And that (*de jure*, legitimate authority) is my concern in this project.

As the *tour d'horizon* of both the nature and the possible justifications of political authority in Part I illustrated, law-administering institutions as well as their procedures have long played an important role in theories of authority: on the one hand, political obligation theorists since Kant have focused on the capacity and value of political institutions to organise the interdependence of a plethora of citizens in a bounded polity.¹ They emphasise the moral value of the law-making *process*. On the other, political authority theorists mostly focus on legally binding directives on the subjects and seek to inquire what gives the law-making and -enforcing institutions the right to rule. They emphasise law as the *product* and thus focus on courts and law-enforcement rather than legislatures. In what follows, I examine both perspectives (law-making and -enforcement),

¹ In my view, the EU is also a polity, in the sense of 'a politically organised society or community with its own institutions for making collectively binding decisions for a specified group of persons and/ or within a bounded territory', according to the definition in Rainer Bauböck, 'Multilevel Citizenship and Territorial Borders in the EU Polity' (IWE Working Paper, Austrian Academy of Sciences 2003) No. 37 1.

especially in light of the findings of Chapter 1, which showed that law and its institutions serve to distinguish political authority both externally (from other practical authorities) and internally (authority on different regulatory levels). The main task of this chapter is thus to gain a better understanding of the EU's authority claim by examining the authority-relevant features of administering EU law.

The focus on law and its institutions has one crucial advantage that is not often emphasised. It significantly constrains the scope of legitimate authority and makes it more transparent. Compare that to totalitarianism, where the public-private divide vanishes as the regime uses private citizens to monitor the behaviour of others. As Arendt observed, such a regime merges rulers and ruled into one mass.² The Stasi surveillance-methods in the German Democratic Republic – infiltrating every aspect of human life – constitute one recent historic example, while the encouragement of some governments during the COVID 19-pandemic for citizens to spy on and report their neighbours for violations of lockdown-measures provides a topical, yet very limited illustration of the general point. Arendt's study shows that leaving the exercise of public authority to institutions alone allows for human autonomy to be taken seriously in the first place, since totalitarian regimes aim to 'take possession of the man as a whole'.³ In short, law-administering institutions simultaneously facilitate and constrain the legitimate reach of political authority.

I now turn to explain how this plays out in the EU. I want to begin with the well-

² Hannah Arendt, *The Origins of Totalitarianism* (2nd edn, Meridian Books 1958) ch 10, esp. 323 et seqq.

³ *ibid* 336. For one of the earliest discussion of the value of institutions for different forms of government see Marcus Tullius Cicero, *De Re Publica; De Legibus* (Clinton Walker Keyes tr, Harvard University Press 2014) *De re publica* book 3.

tested waters of the ECJ's pro-active role in shaping the very architecture of the EU legal order. Though rather unorthodox, let me start with a focus on law-enforcement, before taking a closer look at law-making.

III. The Enforcement of EU Law

Let's first look at how EU law's authority claim is constituted by how it affects the national justice systems (1.) before examining how it shapes the character of EU institutions (2.). Any discussion of the EU's authority claim takes the doctrine of primacy as its natural starting point. Primacy is indeed a multi-dimensional notion which does the bulk of the work in facilitating the EU's substantive authority claim in relation to national legal systems. But it would be a mistake to focus on primacy alone. In what follows, I discern the individual facets of primacy and integrate them in a broader study of the role of supranational and national institutions.⁴

1. The Effect of EU law Enforcement on National Legal Orders

A crucial element of the EU's authority claim is how it relates to the legal orders of its Member States. Any account of the EU's authority needs to reflect on its multilevel/polycentric/(con-)federal (the list is long...) architecture. I want to start with what I call the 'primacy-as-sword' function (a), before moving on to the institutional implications (b), and to more recent value-based developments (c).

⁴ The distinction of individual applications of primacy in this chapter is based on a comprehensive survey of the curia.eu search results for 'primacy' in the ECJ case law.

a. The Sword: Primacy as Conflict-Resolution Doctrine

A main function of primacy is its use as a sword to resolve jurisdictional conflicts. Ever since the ECJ has introduced the doctrine of primacy of EU law over national law in *Costa*, any conflicting national law ought to give way to EU law.⁵ The conventional doctrine has ever since portrayed primacy as an absolute conflict-of-law rule according to which any norm of EU law takes precedence and, therefore, excludes the *application* of any conflicting national norm.⁶ Crucially, conflicting national law is set aside and inapplicable within the scope of EU law; it is not, however, invalid.⁷ Metaphorically speaking, the EU legal order represents the knight of the ‘fairyland duchy of Luxembourg’⁸, who uses primacy primarily as a sword to cut through conflicting national law.

The use of primacy as a sword has shaped debates about the nature of the EU legal order for a long time. Indeed, the sword-metaphor illustrates why primacy triggered the discussion as to whether the EU constitutes a sovereign polity.⁹ First, there is the issue of terminology. The term ‘primacy’ derives from the Latin origin *primas* (‘of the first rank’).

⁵ Case C-6/64 *Costa v ENEL* EU:C:1964:66.

⁶ Later cases include Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* EU:C:1978:49. See also Case C-198/01 *CIG* EU:C:2003:430, para 48; Case C-614/14 *Ognyanov* EU:C:2016:514. Monica Claes, ‘The Primacy of EU Law in European and National Law’ in Damian Chalmers and Anthony Arnall (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 182.

⁷ Most recently, however, in Case C-202/18 *Rimšēvičs v Latvia* EU:C:2019:139 the ECJ annulled a national decision.

⁸ Borrowed from Eric Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’ (1981) 75 *American Journal of International Law* 1.

⁹ See only Matej Avbelj, ‘Theorizing Sovereignty and European Integration: Sovereignty and European Integration’ (2014) 27 *Ratio Juris* 344.

Scholars equated the notion of primacy/precedence with ‘supremacy’.¹⁰ Translated literally, ‘sovereign’ derives from the Old French expression ‘soy-rain’ and the Latin origin ‘super’: in short, it means supreme.¹¹ Second, primacy reminded commentators of the issue of *Kompetenz-Kompetenz*, ie the arrogation of ultimate decision-making powers under a constitutional framework. The disapplication rather than invalidation of national law as effect of primacy questions the viability of this analogy, however. And so does the fact that giving effect to primacy is but a *pro tanto* obligation (it can be overridden by other considerations, such as *res judicata*). Primacy has thus less in common with sovereignty than a lot of the literature suggests.

While the focus of the EU’s authority literature on primacy as a sword is understandable, it ultimately reveals an impoverished conception of authority. Authority claims depend on institutions that facilitate the communication with the addressee. In that regard, the combination of primacy and the preliminary reference procedure redesigns EU law’s relationship to national institutions and especially courts. As we will see shortly, primacy operates as the grease that oils the wheel of judicial communication without which EU law could not be enforced.

¹⁰ I do not engage in the debate about the relationship between primacy and supremacy, for which cf. Matej Avbelj, ‘Supremacy or Primacy of EU Law—(Why) Does It Matter?’ (2011) 17 *European Law Journal* 744. The Court itself used the term supremacy merely once. For more reasons to avoid supremacy see Claes (n 6) 182 et seq.

¹¹ Oxford English Dictionary online, ‘Sovereignty’ <<http://www.oed.com/view/Entry/185343>> accessed 5 May 2021.

b. Keeping the Engine Running: EU law's Claim on National Institutions

It is essential to state at the outset that EU law primarily relies on national enforcement. The way EU law binds, integrates, and influences national law-administering institutions accordingly reveals crucial elements of its purported authority that goes well beyond the rare instances of conflicts studied above. At the heart of the transmission of EU law lies the preliminary reference mechanism (Art. 267 TFEU), the judicial rope binding the EU legal order to the national legal systems and vice versa. It is difficult to overestimate both the importance of this judicial cooperation mechanism and the number of contributions stressing this point.¹² According to the ECJ, it marks the 'keystone' of the judicial system and serves to 'ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties'¹³.

Art. 267 TFEU enables the ECJ to control and monopolise both the interpretation and the validity of EU law while harnessing national courts for this very task. Let's look at these two aspects in turn:

In *Foto-Frost*, the ECJ claimed the monopoly to adjudicate (with *erga omnes* effect) on the *validity* of EU law. National courts are not allowed to invalidate EU law since

¹² René Barents, 'EU Procedural Law and Effective Legal Protection' (2014) 51 *Common Market Law Review* 1437, 1455; Anthony Arnall, 'Judicial Dialogue in the European Union' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 118.

¹³ Case C-284/16 *Achmea* EU:C:2018:158, para 37. Earlier Opinion 2/13, *Accession to the ECHR* EU:C:2014:2454, para 174. For Stephen Weatherill, *Law and Values in the European Union* (OUP 2016) 155, this is promised too much.

this would have adverse effects on the uniformity of EU law, and on the unity of and legal certainty in the EU legal order.¹⁴ They may voice validity concerns, but such concerns trigger a duty to refer the question of validity to Luxembourg.¹⁵ The importance of this for the EU's authority claim is momentous, since this jurisprudence entails that national courts no longer have the authority to invalidate a significant share of the law of their land.

No less important is the monopoly of the ECJ regarding the authoritative *interpretation* of EU law. National courts routinely interpret EU law in their daily work, but the final and binding interpretation falls to the ECJ (Arts. 19 (1) TEU, 267 (1) TFEU). National courts may advance their own interpretation, which is then, however, subject to the ECJ's review. To grasp the effects of this, look at the possibility of Member States to transfer competences to international courts. In *Achmea*, the Court held that the autonomy of EU law not only applies to national courts *stricto sensu*, but also to courts set up as part of an investment treaty between Member States. Precisely because EU law forms part of the law of the land in the Member States and could thus be subject to the interpretation of the arbitration tribunal (which was prevented from referring questions under Art. 267 TFEU), this would constitute a threat to the autonomy of EU law.¹⁶ Rather ironically, the evolution of the legal order of a court stemming from a treaty among Member States (the

¹⁴ Case C-314/85 *Foto Frost* EU:C:1987:452, para 15. Note the important terminological difference. Whereas unity refers to a coherent legal order, uniformity requires sameness. For a discussion see Myrto Tsakatika, 'Claims to Legitimacy: The European Commission between Continuity and Change' (2005) 43 *Journal of Common Market Studies* 193, 206.

¹⁵ Which is why national courts form part of the complete system of remedies: Case C-384/16 P *European Union Copper Task Force* EU:C:2018:176, para 112.

¹⁶ *Achmea* (n 13) paras 55 et seqq. See earlier Opinion 2/15 *Accord de libre-échange avec Singapour* EU:C:2017:376, para 303. By contrast, the arbitration tribunal regime in CETA between the EU and Canada was held compatible with said autonomy specifically due to the lack of the power to interpret EU law, Opinion 1/17 *CETA* EU:C:2019:341, paras 106 et seqq.

ECJ) precludes the Member States from delegating disputes from their jurisdiction to another court stemming from a treaty among Member States (the arbitration tribunal). *Foto Frost* in essence established the monopoly of the ECJ to invalidate EU law whereas *Achmea* exemplified the Court's monopoly of the binding interpretation of any EU law.

An important consequence of this construction of the EU's authority claim is that Art. 267 TFEU allows EU law to rely on the more established and more legitimate national courts to enforce the supranational legal order.¹⁷ EU law violations thereby become matters for ordinary national courts, where individuals can invoke them as a result of the supranational (!) decision to accord direct effect to most of EU law (beginning with *van Gend en Loos*). This architecture transforms the judicial hierarchy within Member States by empowering ordinary courts (often at the expense of constitutional courts)¹⁸. In an important way, national courts operate as European courts¹⁹ or 'ordinary' courts within the European Union legal order'²⁰.

National courts are not only entrenched, familiar, and often reputable institutions for the public. The enforcement of EU law through national courts also opens up a whole arsenal of national remedies. Consider only the drastic example of ordering 'the coercive

¹⁷ Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP 2003) ch 6; Joseph Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 Yearbook of European Law 267, 301.

¹⁸ Michal Bobek, 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts' in Monica Claes and others (eds), *Constitutional conversations in Europe: actors, topics and procedures* (Intersentia 2012).

¹⁹ Case T-51/89 *Tetra Pak Rausing SA* EU:T:1990:4 para 42. See also Case C-234/17 *XC and Others* EU:C:2018:853, para 40. Comprehensively Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) Theme 1.

²⁰ Opinion 1/09 *Unified Patent System* EU:C:2011:123, para 80. Order of the President of the Court of First Instance in Case T-291/95 *Danielsson* EU:T:1995:219, para 77.

detention of office holders’ for ‘persistently refusing to comply’ with EU law obligations if national law provides an appropriate legal basis.²¹ Under these circumstances, national governments and other office-holders can’t simply pick and choose a form of *à la carte* compliance with EU law whenever it suits their interests (something not uncommon in international law)²². National executives are simply less likely to disobey their own courts in comparison to compliance with ‘foreign’ courts.²³ This shows that the involvement of national authorities and courts in EU law enforcement does not constitute a weak spot. The overwhelming lack of separate supranational enforcement mechanisms instead allows EU law to piggyback on the entrenched legitimacy of national institutions and allows it to ‘use’ national law’s enforcement tools. EU law thus harnesses national institutions to administer and enforce the binding legal norms created beyond the state.

The reliance on Art. 267 TFEU nonetheless also reveals the inherent fragility of that architecture. The EU legal order depends on preliminary references and on the application of ECJ verdicts by national courts. Only if the relevant cases reach the ECJ does the Court have some leeway in answering the question by, for instance, reformulating the question or by adjusting the level of precision of its guidance.²⁴ Indeed, the reasons for referral as well as the (potential lack of) compliance with the possibility/duty to refer cases

²¹ Case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114.

²² For examples of such ‘exceptionalism’ in international law see John Tasioulas, ‘The Legitimacy of International Law’ in John Tasioulas and Samantha Besson (eds), *The Philosophy of International Law* (OUP 2010) pt III.

²³ See also Joseph Weiler, ‘The Authority of European Law: Do We Still Believe in It?’ in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do we still believe in it?* (Springer 2019) 3.

²⁴ On the inherent weaknesses of Art. 267 see Julio Baquero Cruz, *What’s Left of the Law of Integration?: Decay and Resistance in European Union Law* (OUP 2018) 65 et seqq. Similarly Claes (n 6) 193.

to the ECJ are thorny issues in need of more empirical research.²⁵ That applies as well to the implementation of the ECJ judgments. We currently lack systematic knowledge about how national courts digest the ECJ's answer.²⁶ Weiler has summarised what this means for our purposes: 'When this axis, this communicative channel comes under stress, there is, too, a risk to the authority of European Law'²⁷. In addition to the 'vigilance of the individuals', it seems to be one of the most formidable tasks for the ECJ to secure the trust of national courts (in 27 Member States with diverse legal heritage) in order to ensure that national courts refer cases and implement ECJ rulings.²⁸ As we saw in Chapter 2, moral authority presupposes the presence of some degree of *de facto* authority. The EU is no exception.

Where does this leave us? The enforcement of EU law seems of a qualitatively different kind compared to the enforcement of international law. Regarding the latter, Murphy reminded us:

There is no further set of institutions that will enforce the law that applies to states themselves.(...) Though it is obvious, it is also often forgotten that there is no coercive apparatus that will enforce law against the government

²⁵ Such as Jasper Krommendijk, 'Why Do Lower Courts Refer in the Absence of a Legal Obligation? Irish Eagerness and Dutch Disinclination' (2019) 26 *Maastricht Journal of European and Comparative Law* 770; Tanja Börzel and others, 'Obstinate and Inefficient: Why Member States Do Not Comply With European Law' (2010) 43 *Comparative Political Studies* 1363; R Daniel Kelemen and Tommaso Pavone, 'The Political Geography of Legal Integration' (2018) 70 *World Politics* 358.

²⁶ Gráinne De Búrca, 'The Mutual Judicial Influence of National Courts and the European Court of Justice through the Preliminary Rulings Mechanism: Evidence from the United Kingdom' in Elizabeth Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (OUP 2020).

²⁷ Weiler (n 23) 4.

²⁸ Arnall (n 12) 119 et seqq. See also Jos Hoevenaars and Jasper Krommendijk, 'Black Box in Luxembourg: The Bewildering Experience of National Judges and Lawyers in the Context of the Preliminary Reference Procedure' (2021) 46 *European Law Review* 61.

itself.²⁹

He is right. International law is overwhelmingly enforced internationally and not in domestic institutions. The national enforcement of EU law under supranational supervision is a real game-changer in authority terms. It makes EU law not only more effective, but also more intrusive than international law. This structural feature is reinforced by the sheer breath and salience of the EU's competences. Any account of the EU's legitimate authority needs to bear in mind such differences.

c. Recent Developments: European Values and Institutional Design

A more recent line of case law makes Art. 267 TFEU the normative basis of an even more demanding authority claim on national judicial systems. The Court operationalises one of the crucial values enshrined prominently in Art. 2 TEU, the rule of law, to pronounce on the very design of national courts. In contrast to the variegated EU law obligations to alter national substantive law,³⁰ *Associação* constructs a duty to ensure a certain institutional design of the national judiciary itself: it imposes a duty on Member States to establish and retain an independent judiciary.³¹

Based on the conjunction of substantive values (Art. 2 TEU) and the crucial institutional pipeline of Art. 267 TFEU, the ECJ now claims the authority for EU law to

²⁹ Liam Murphy, 'The Normative Force of Law: Individuals and States' in Leslie Green, John Gardner and Brian Leiter (eds), *Oxford Studies in Philosophy of Law. Volume 3* (OUP 2018) 112.

³⁰ For a recent, exhaustive and concise list of EU legal concepts to achieve these alterations see Vlad Perju, 'On the (De-)Fragmentation of Statehood in Europe: Reflections on Ernst-Wolfgang Böckenförde's Work on European Integration' (2018) 19 *German Law Journal* 403, 412.

³¹ Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117.

require national courts to be institutionally in line with its interpretation of the rule of law (and presumably the other values in Art 2 TEU). This expansion of EU law's authority claim – from requiring substantive remedies to shaping the very institutional design of national institution – has already born fruits in the Area of Freedom Security and Justice, where public prosecutors who issue arrest warrants need to be independent as well,³² and where national courts refuse to execute EAWs based on an appraisal of the rule of law situation in the requesting Member State.³³

Since an independent court is a structural requirement, it affects the institution as a whole, thus (explicitly!)³⁴ ignoring the limits of the substantive scope of EU law. Follow-up case law, for example, confirms that EU law has a say in the appointment of national judges.³⁵ Metaphorically speaking, whereas the steps taken by the ECJ to secure the functioning of the Art. 267 TFEU mechanism served as oil in the gearbox of the institutional component of the EU's authority, the Court has now extended the EU's authority claim on the design of the very engine – ie the national court – itself.

In contrast to traditional international law, which leaves states free to organise their domestic justice system,³⁶ EU law mandates a clear separation of power and an

³² Joined Cases C-508/18 and C-82/19 PPU *OG v PI* EU:C:2019:456.

³³ Case C-216/18 PPU *Minister for Justice* EU:C:2018:586. For an example how national courts deal with these guidelines see only OLG Karlsruhe Order of 7th Jan 2019 Ausl 301 AR 95/18.

³⁴ *Associação* (n 31) para 29. Case C-896/19 *Repubblika* EU:C:2021:311, para 36. See Laurent Pech and Sébastien Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case' (2018) 55 *Common Market Law Review* 1827, s 5.1.

³⁵ *Repubblika* (n 34).

³⁶ Başak Cali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (OUP 2015) 89.

independent judiciary on the Member State level.

d. Interim Conclusion

Let's sum up the EU's authority claim on national law and its institutions. Primacy is the starting point of an investigation of the EU's authority claim. Its most widespread use as conflict of law resolution tool (as sword) shows that EU law renders conflicting national law inapplicable within the scope of EU law. Primacy thus understood does not, however, establish a sovereign-like hierarchy of norms. Beyond that, a further manifestation of primacy supports the uninhibited functioning of the preliminary reference procedure as primary channel to allow the ECJ to steer the enforcement of EU law in national legal systems. The thus generated division of labour represents an ingenious architecture, that has recently prompted the ECJ to influence the very design of those national – and simultaneously European – courts.

The special position of national courts in the enforcement of EU law uses them as established fora and yet makes for a rather fragile architecture. Above all, it distinguishes the EU's institutional architecture from both national and international authority. And these differences continue when we focus on the EU legal order itself.

2. The Integrity of the EU Legal Order

Let me show, next, that the EU claims a distinct hold over its own institutions (a) as well as over the validity and interpretation of its laws (b).

a. The Curious Bond between EU Law and EU Institutions

The way the ECJ has bound the EU institutions to the EU legal order in effect constrains the Member States' hold over these institutions in a peculiar way.

First, EU law binds EU institutions comprehensively as long as they act as EU institutions (see only Art. 52 (1) CFEU). So far so trivial. Beyond that, however, EU law claims the authority to unilaterally decide about the legal responsibility of its institutions when they operate *outside* EU law, viz. as part of another international organisation (IO), such as in the ESM. Their character as EU institutions and the accompanying need to preserve the nature of their powers under the EU Treaties prevents EU institutions from stripping themselves of their EU law obligations, even if they are currently at the disposal of another IO.³⁷ EU institutions are thus bound by EU law whenever they act. EU law binds them by virtue of their nature as EU institution.

EU law thereby constrains the ability of Member States to use EU institutions in other international organisations. This jurisprudence assimilates the applicable accountability regime structurally to the lending of state organs, where the determination of the legal responsibility is ultimately a decision for the home state to make. In both cases, the home legal order of the respective institution decides about the conditions under which it lends its organs to other subjects of international law. The EU legal order thus claims an

³⁷ Case C-8/15 P *Ledra Advertising* EU:C:2016:702, paras 56-60. This does not extend to informal fora like the Eurogroup, Cases C-105-109/15 *Mallis* EU:C:2016:702. For a discussion of the case law see Paul Craig, 'The Eurogroup, Power and Accountability' (2017) 23 *European Law Journal* 234.

equivalent hold over its institutions as states do over theirs, thereby protecting the integrity of its legal order. It follows, quite unusually, that the EU is fully liable under Art. 340 TFEU for the acts of its organs/institutions outside the EU legal order, especially for fundamental rights violations.³⁸

The important upshot for our purposes is that Member States cannot free EU institutions from their EU law obligations by making them available to other IOs. That distinguishes the EU's authority claim from any other IO, where Member States face no such restrictions when directing international organs.

Secondly, important early developments shaped the way EU law binds the Member States themselves to EU institutions. According to the ECJ, the 'new legal order' entails a duty for Member States to avail themselves of the Treaties' judicial system in order to solve their disputes concerning EU law. They 'shall not take the law into their own hands'³⁹. Unlike in international law (*tu quoque*-objection), Member States are accordingly not allowed to unilaterally suspend performance of EU Treaty obligations if another Member State fails to fulfil its obligations.⁴⁰ Read jointly with *Costa* – decided four months earlier – neither a Member State's own violation of EU obligations nor pointing to another Member State's failure to comply is a reason to escape the obligations under EU law. This

³⁸ *Ledra Advertising* (n 37). On ensuing questions of responsibility see Stefan Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005) 409.

³⁹ Case C-90-91/63 *Commission v Luxembourg and Belgium* EU:C:1964:80. This was confirmed in Case C-52/75 *Commission v Italy* EU:C:1976:29, para 11. See also Case C-142/80 *Essevi* EU:C:1981:121, para 8. Case C-146/89 *Commission v United Kingdom* EU:C:1991:246, para 41.

⁴⁰ William Phelan, 'What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime' (2012) 14 *International Studies Review* 367, 371–376.

rejection of a *quid-pro-quo* reciprocity later gave way to a normatively thick and comprehensive mutual-trust between the Member States, which is both precondition and result of deep transnational integration (more in Chapter 4).

In essence, the EU legal order claims full authority over its own institutions, while obliging the Member States to resolve any aspects within the scope of EU law by recourse to these EU institutions and their procedures. Before summing up, let's come back full circle, to the principle of primacy and its role as a shield.

b. Primacy as a Shield to Protect the Integrity of EU Law

I explained earlier how primacy functions as sword to set aside conflicting national law. To complement that, the metaphoric knight of EU law uses primacy as a shield to protect the integrity of EU law.

This function of primacy is the equivalent to the notion of 'autonomy' the Court uses in the EU's relation to international law. This idea of 'autonomy' conveys the claim that the EU legal order is self-referential, meaning that it excludes the possibility for international law to call into question the validity of or impose an external interpretation of EU law on the Union.⁴¹ According to the ECJ, it is part of 'the very nature of EU law, which (...) requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law'⁴². The validity and interpretation of

⁴¹ For example in relation to the WTO (Opinion 1/94 *WTO Accession* EU:C:1994:384), to the ECHR (*Opinion 2/13* (n 13)) and to Investment Treaties (*Achmea* (n 13); *Opinion 1/17* (n 16)).

⁴² *Opinion 2/13* (n 13) para 212.

EU law ought to be assessed exclusively against review standards internal to the EU legal order. For that reason, the very existence of a debate about whether the VCLT is applicable to the EU and its laws at all shows the emancipation of EU law from its international origins.⁴³

Translated to the EU's internal authority, this has become what I call primacy as a shield. EU law doesn't allow standards of national (even constitutional) law to dispute its validity. The ECJ held in *Internationale Handelsgesellschaft (IHG)*:

In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question.⁴⁴

In line with case-law of the very first days of the Community, the Court simply prevents national standards from questioning the validity of EU law.⁴⁵ The ECJ's attempt in *Melloni* to decide about the protection of fundamental rights in the European multi-level protection regime marks but one (undoubtedly controversial) manifestation of this idea.⁴⁶

⁴³ Against the application General Court, Case T-27/03 *SP v Commission* EU:T:2007:317 para 58. In Case C-621/18 *Wightman* EU:C:2018:999, para 70 the Court draws on the VCLT as supporting argument without addressing its relation to the EU legal order.

⁴⁴ Case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, para 3 (emphasis added). See also Case C-4/73-DEPE *Nold KG v Commission* EU:C:1974:51, para 13 for a cautious and early implicit developments of this case law. For even earlier traces see René Barents, *The Autonomy Of Community Law* (Wolters Kluwer Law & Business 2003) 241 et seq. For later applications Case C-273/15 *Ezernieki* EU:C:2016:364, para 53; Case C-201/15 *AGET Iraklis* EU:C:2016:972, paras 105 et seqq.

⁴⁵ Case C-36/59 *Präsident Ruhrkohlen-Verkaufsgesellschaft v High Authority* EU:C:1960:36. Implicitly also Case C-29/69 *Stauder v Stadt Ulm* EU:C:1969:57, para 7.

⁴⁶ Case C-399/11 *Melloni* EU:C:2013:107. For the opposite conclusion regarding aspects not covered by the Framework Decision, Case C-138/13 PPU *Jeremy F* EU:C:2013:358. See also Nicholas Tsagourias, 'Conceptualizing the Autonomy of the European Union' in Richard Collins and Nigel D White (eds), *International Organizations and the Idea of Autonomy* (Routledge 2011).

There, due to the full-harmonising nature of the Framework Decision on the EAW, national constitutional law was deemed inapplicable as a possible review standard in the first place.

EU law thus claims ‘autonomy...in respect both to the law of the Member States and to international law’⁴⁷. We can now see how the conflict-centred understanding of primacy has caused a widespread misconception: namely, that it constitutes a mere update of the well-known doctrine of primacy in international law.⁴⁸ According to Art. 27 VCLT, no state may invoke national law to justify a failure to comply with an international obligation. Admittedly, this aspect is part and parcel of primacy as a sword. As the ECJ held, ‘it is well established in case-law that a Member State may not plead provisions, practices, or circumstances existing in its internal legal system in order to justify a failure to comply with obligations arising under Community law.’⁴⁹ The shield-function of primacy, however, is altogether alien to the traditional logic of Art. 27 VCLT. And so is the use of primacy in EU law enforcement in national courts via Art. 267 TFEU we saw above, since Art. 27 VCLT creates no ‘new rights or duties for (...) citizens’⁵⁰.

This shield-function of primacy, in essence, imports a key function of external sovereignty theory into the realms of the EU’s internal normative authority: external

⁴⁷ *Wightman* (n 43) para 45. On the relationship between primacy and autonomy Alberto Miglio, ‘Differentiated Integration and the Principle of Loyalty’ (2018) 14 *European Constitutional Law Review* 475, 488.

⁴⁸ Derrick Wyatt, ‘New Legal Order, or Old?’ [1982] *European Law Review* 147; Ole Spiermann, ‘The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order’ (1999) 10 *European Journal of International Law* 763. Recently also Pavlos Eleftheriadis, *A Union of Peoples* (OUP 2020) 86 et seqq.

⁴⁹ Case C-290/94 *Commission v Greece* 1996:296 para 30.

⁵⁰ Eleftheriadis (n 48) 69.

independence understood as non-interference.⁵¹ The Court uses the functional logic of external sovereignty not only to demarcate the legal orders in the EU internally (no influence of national law on validity and interpretation of EU law). In addition, the idea of primacy as a shield claims independence from normative external determination (*Fremdbestimmung*) in order to exert its full influence in the legal orders from which it claims to be autonomous in the first place.⁵² This is a ‘self-contradictory’⁵³ paradox that the doctrine of autonomy does not face in relation to international law. What is more, primacy here once again departs from the concept of sovereignty and from federal regimes with divided sovereignty, where two institutionally *independent* regulatory levels with separate enforcement mechanisms interact.

c. Interim Conclusion

The relationship between the EU legal order and EU institutions shapes the EU’s authority claim. EU law seeks to bind EU institutions comprehensively and hold them accountable even when they act outside the EU legal order. Moreover, the integrity of the EU’s institutional architecture is tied to the scope of EU law: Member States are required to use EU remedies in case of a breach, rather than unilaterally suspending their obligations under EU law (no *tu quoque*-objection). What is more, the shield-function of primacy implies a distinct kind of normative self-determination, namely, that the interpretation and validity of EU law may only be based on criteria internal to EU law which, in turn, facilitates the

⁵¹ See only Bardo Fassbender, ‘Ch. 1 Purposes and Principles, Article 2 (1)’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012).

⁵² Kaarlo Tuori, *European Constitutionalism* (CUP 2017) 65.

⁵³ Eleftheriadis (n 48) 86.

entrenchment of EU law in national legal orders.

3. Taking Stock: The Architecture of EU Law Enforcement

The focus so far has been on the enforcement of EU law and its substantive and institutional implications on the national and the EU level.

Substantively, the concept of primacy entails two manifestations as complementary as a knight's sword and shield. On the one hand, primacy serves as a conflict-resolution tool when applicable national law conflicts with an EU law (sword). On the other, primacy protects an allegedly autonomous legal order, the validity of which ought solely to be determined by reference to intra-EU standards (shield).

An overview of the role of EU institutions showed that the ECJ tied them closely to the EU legal order. The core of the *institutional* manifestations of the EU's authority claim, however, lies in empowering actors outside the EU institutions – national courts – to enforce a legal order which remains under the oversight of the ECJ. As much as each EU citizen is called to enforce EU law (direct effect), the national courts hold each other accountable transnationally and horizontally and thus cloak EU law in the veil of their more robust and entrenched legitimacy credentials.

To what extent does this emerging picture distinguish the enforcement-related elements of the EU's authority claim from state and international authority? The distinguishing factors in relation to state authority seem obvious: the EU's overwhelming lack of its own enforcement institutions, the absence of any political power associated with

a state's monopoly of force, limited competences, and the absence of a state-like legal hierarchy of norms, since the primacy of EU law does not lead to the annulment of contrary national law. The differences to international authority are less obvious. In two crucial respects, however, EU law enforcement turns the traditional workings of international legal regimes upside down: status decisions and enforcement level.⁵⁴

Every state usually decides independently on the status of international law in its national legal system. By contrast, the ECJ decides on the status of EU law in national legal systems on the EU level (direct effect, primacy). The EU's authority claim thus encompasses the arrogation of decision-making powers that – under traditional international law – would be left to the national constitutional orders.⁵⁵ Some argue that these judgments about the status of EU law only become effective through the acceptance or application by national courts. Just like when faced with any other international law, it is the domestic court in this view which pulls the strings and ultimately decides about the effects of EU law.⁵⁶ This chapter shows that this seems implausible. It simply isn't up to the independent decision of a domestic court to decide how to receive EU law and which status to give it. They merely copy the ECJ's decision. The domestic acceptance, in other words, constitutes but the second, executing act of the decision reached at the EU level. Moreover, whereas there is no remedy in domestic proceedings against a judicial decision about the direct effect of a provision of international law, EU law foresees the preliminary

⁵⁴ Similarly Franz Mayer, 'Van Gend En Loos: The Foundation of a Community of Law' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU law* (Hart 2010) 18.

⁵⁵ Bruno De Witte, 'Direct Effect, Primacy, And the Nature of the Legal Order' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 327; Tuori (n 52) 61.

⁵⁶ Eleftheriadis (n 48) ch 4.

reference procedure in order to clarify such questions. And if a domestic court refuses to refer, it will happen in another Member State, triggering potential legal remedies against the first Member State (damages, state liability etc.).

The second difference to international authority relates to the enforcement level. International law is enforced on the international plain (eg by various dispute settlement mechanisms). EU law, by contrast, is primarily enforced in national courts with direct access for individuals. It is for this reason that one cannot compare EU law to promises that ought to be kept but may be broken, such as theoretical discourse about international treaties would have it.⁵⁷

In essence, the combination of these structural features, the sheer scope and detail of EU law, and the fact that every individual may police the state institutions' compliance with EU law, requires national constitutions to accommodate in an unprecedented way: qualitatively different and more intrusive than international law. In other words,

EU law is unique because it penetrates deeply into national legal orders and makes explicit, concrete, and disruptive demands that national law shall work in the service of EU law.⁵⁸

Perhaps a table helps to clarify.

⁵⁷ Michel Troper, 'The Survival of Sovereignty' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (CUP 2010).

⁵⁸ Weatherill (n 13) 178.

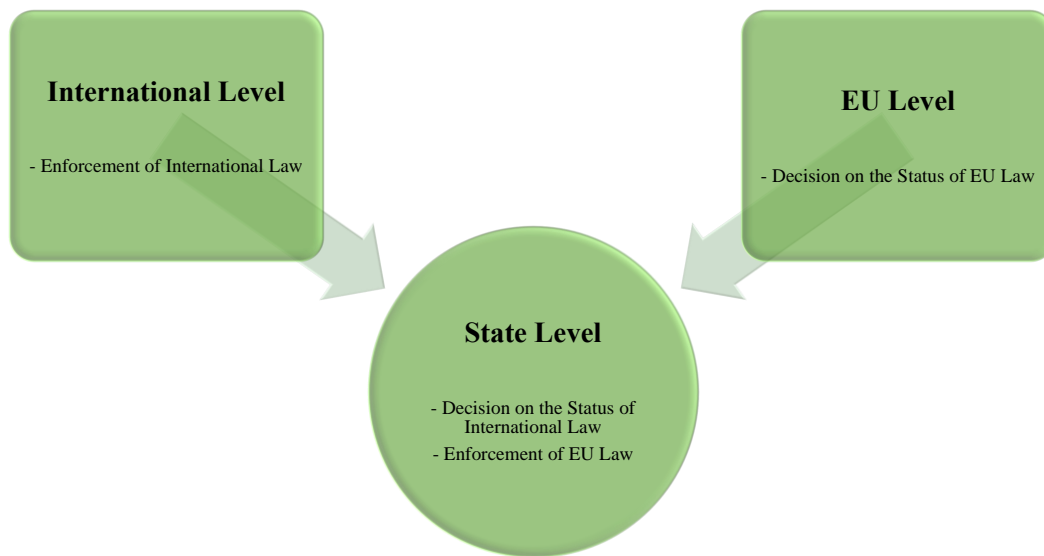


Figure 7: Status Decisions and Enforcement

Enough about EU law and its enforcement. But ending here would be to focus on the *product* at the expense of the *process*, ie the machinery of EU law-making. Let's turn to that now.

IV. Authority and Representation in EU Law-Making

Law-making procedures – simply put – reveal who has a say in the making of the binding rules of a political community. Applied to the EU, it puts the main stakeholders in the EU's governance framework into the spotlight. By doing that, the remainder of this chapter seeks to meet Waldron's criticism of contemporary legal philosophers, who seem 'intoxicated with courts and blinded to almost everything else'⁵⁹. We'll start with secondary law (1.)

⁵⁹ Jeremy Waldron, *Law and Disagreement* (Clarendon 1999) 9. See also Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016) ch 1.

before taking a closer look at primary law (2.).

1. Representation and Deliberation in EU Secondary Law-Making

Chapter 2 explained how various theorists have recently focused on authority-relevant features of law-making institutions. They hailed them (i) for facilitating necessary coordination, (ii) for guaranteeing citizens' equal value and peaceful coexistence on a territory despite their reasonable and insurmountable disagreement on public values, (iii) for epistemic qualities, and (iv) for securing fair play amongst those who benefit from the institutions' guarantees.⁶⁰

I sympathise with the underlying intuition of these writers that institutions are crucial for the analysis of the very nature of legitimacy authority, since the moral reasons underlying legitimate political authority are thus linked to the reasons for participating in the respective institutional practice in the first place.⁶¹ What are we to make of this at the EU level? These findings, I suggest, invite an analysis of the EU's law-making procedure, before committing to hasty parallels to the value of national legislative procedures.

EU secondary law is – in the standard case – created according to the ordinary legislative procedure of Arts. 289, 294 TFEU. The Commission (for now) retains the sole right of legislative initiative, while the Council, ie national ministers of the relevant department portfolio, and the EP dominate the ensuing deliberations. The configuration of

⁶⁰ See Chapter 2, sec. IV.2./3.

⁶¹ Andrei Marmor, 'The Dilemma of Authority' (2011) 2 *Jurisprudence* 121, 141.

these institutions provides various insights for our purposes.

a. Democratic Ideals and Supranational Realities in the Parliament

Consider first the EP's institutional design. Though one could spot many similarities to the workings of national parliaments, there is a fundamental difference in representation that alters the authority basis of the law produced by the institution. National democracies are based on the idea that people have an equal say in authoring the legal system which then claims authority over them. The crucial aspect is the *equal* opportunity of citizens to participate in law making, labelled as 'congruence-principle', 'all-affected-principle' or 'autonomy-principle'.⁶² Proponents of democratic authority capitalise on this very feature and portray the legislative procedure in democratic parliaments as the essence of democratic rule: the procedure needs to neither bury nor resolve the deep disagreement between the citizens. Instead, it gives each citizen *equal* weight to influence the outcome. Authority is generated through acceptance of the process, not result (See Chapter 2).

The EU's ordinary legislative procedure relates to this fundamental idea of national democratic theory in two ways. On the one hand, the EP aspires to realise democratic ideals (Arts. 10, 14 TEU) by giving a voice to the citizens in matters transcending statist boundaries. The underlying idea is to remedy the undemocratic *status quo ante*, where one

⁶² Robert Dahl, *After the Revolution?: Authority in a Good Society* (Revised edition, Yale University Press 1990) 49; David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity 1995) 145 et seqq. (using it as basis to advocate global democracy). Floris De Witte, 'Interdependence and Contestation in European Integration' (2018) 3 *European Papers* 475, 478. However, de Witte mostly focusses on the subject's capacity to change, rather than author these decisions, hence on *pouvoir constitué* rather than *constituant*. For an overview of the literature see Sarah Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State' (2012) 4 *International Theory* 39, 48 et seqq.

people makes decisions which may affect outsiders that don't have a say, thus violating the 'all-affected-principle'. Consider the well-known example of a nuclear facility or environmental emissions in a border area.⁶³ The supranational procedure overcomes such *negative externalities* by internalising the voice of all those affected on the supranational level. It thereby refines the traditional rule of thumb according to which 'those affected' is exclusively defined by membership in the bounded territory of the polity.⁶⁴ The availability of the supranational institutional framework simultaneously broadens and constrains the scope of action of national polities: it strengthens the influence over measures with effect beyond the state while subjecting the community to the resulting legal directives.⁶⁵ Crucially, the EU institutions not only allow the elected officials of Member States to have a say in law-making (though they do that in the Council), but also involve directly elected representatives of the EU citizens in the EP.

On the other hand, the ordinary law-making procedure evidently violates the congruence-principle. While the Council's involvement reflects the one-stakeholder one-vote principle for the state level, the EP neither by its electoral rules nor by its aggregated representation represents the individual EU citizens *equally*.⁶⁶ The degressively-proportional representation according to the population size of individual Member States

⁶³ Weatherill (n 13) 1 et seqq.

⁶⁴ De Witte (n 62) 481 et seqq; Miguel Poiars Maduro, 'Europe and the Constitution: What If This Is as Good as It Gets?' in Joseph Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 86.

⁶⁵ Anand Menon and Stephen Weatherill, 'Transnational Legitimacy in a Globalising World: How the European Union Rescues Its States' (2008) 31 *West European Politics* 397, 409.

⁶⁶ That seems to be a trade-off between equality as a fundamental right and as a governance mechanism: Koen Lenaerts, 'La Vie Après l'avis: Exploring the Principle of Mutual (yet Not Blind) Trust' (2017) 54 *Common Market Law Review* 807.

means that votes have different weights in different Member States. Not as a flaw in, but as a deliberate feature of the system. In fact, Art. 14 (3) TEU explicitly omits ‘equality’ as electoral principle for European elections. The directly elected EP thus represents the plurality of European peoples. That is, it represents the EU citizens as individually constituted in their respective statist polities, rather than as one collective *demos* of roughly 500 million citizens. In the words of the ECJ, the legislative participation of the EP

reflects a fundamental democratic principle that the *peoples* should take part in the exercise of power through the intermediary of a representative assembly.⁶⁷

Post-Lisbon case law confirms that the Treaty’s shift from portraying the EP as ‘representatives of the Union’s citizens’ (Art. 14 (2) TEU) instead of the ‘representatives of the peoples of the States brought together in the Community’ (Art. 189 EC) did not change the underlying constitutional focus on distinct European *demoi* in lieu of a meaningful European *demos*.⁶⁸

While such blatant departure from one of the very foundations of democratic rule causes foreseeable outrage, most of it can be assailed by reference to the fallacy of applying

⁶⁷ Case C-138/79 *Roquette v Council* EU:C:1980:249, para 33 (emphasis added). Later also Case C-300/89 *Commission v Council* EU:C:1991:244, para 20. See also Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (CUP 2019) 93, 129.

⁶⁸ Case C-263/14 *Parliament v Council* EU:C:2016:435, para 70; also Case C-130/10 *Parliament v Council* EU:C:2012:472, para 81, where the English ‘people’ either constitutes a mistranslation or entails the plural for a collective, as becomes clear from other language versions (FR: ‘les peuples’; IT: ‘i popoli’; SPA: ‘los pueblos’; GER: ‘Die Völker’). This is further reinforced by taking into account the Preamble and Art. 1 TEU (‘union of peoples’).

statist standards to a supranational polity.⁶⁹ This is not to say that one has to agree with Cheneval, for whom differentiated voting weight *among* Member States is harmless as long as the weight of a citizen's vote *within* a Member State remains equal.⁷⁰ The deliberate design of degressive representation in the EP simply differs in kind from the moral value of an equal vote for each member of one people on the state level.

In that regard, we of course do good to remember that bringing the EU closer to national democratic standards does not necessarily enhance its legitimacy.⁷¹ In particular, a purely majoritarian system that would allow 'foreigners' to decide about sensitive issues in other Member States would constitute a massive interference with domestic democracy on the Member State level.⁷² Imposing democratic standards suitable for a nation state on a non-state supranational community like the EU is moreover simply unnecessary, since the EU does not bind us in the same intrusive way our sovereign states do (both in relation to its fields of action as well as its regulator and its enforcement mechanisms). The EU does not require the same level of democratic legitimation. Again, we have to understand what the EU does in order to undertake a fitting normative assessment.

To sum up, the EU legislative procedure in the EP does not match the democratic

⁶⁹ See only Menon and Weatherill (n 65) 399 et seqq; R Daniel Kelemen, 'The "Democratic Deficits" of the US and the EU Compared' in Sacha Garben, Inge Govaere and Paul F Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart 2019) 51 et seqq.

⁷⁰ Francis Cheneval, *The Government Of The Peoples: On The Idea And Principles Of Multilateral Democracy* (Palgrave Macmillan 2011) 64.

⁷¹ Joseph Raz, 'The Democratic Deficit' (King's College London Dickson Poon School of Law, Legal Studies Research Paper Series) 2018–07 s 10.

⁷² Paul Craig, 'The EU, Democracy and Institutional Structure: Past, Present and Future' in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019) 322 et seq.

input legitimacy of the national level, which changes the normative force of the resulting laws. That is, if one thinks the institutional source of law is important for its moral pedigree. This distinction will be important in Part III where I assess the strength of procedural theories to legitimise the authority of the EU and its laws.

b. The Role of the Council

As far as I can see, so-called ‘second-chambers’ have as yet not made it into the institutional-procedural accounts of state political authority described in Chapter 2. That could be due to their secondary role in national law-making (although they are indispensable and powerful in many federal states like the US (Senate) or Germany (Bundesrat)). Alternatively, one could argue that institution-centred accounts include the legitimating function of the second-chambers implicitly. That is, members of second-chambers are also directly or indirectly elected representatives of the lower entities in federal states and thus constitute a reinforcing legitimacy element in the legislative process.

In EU secondary law-making, the Council does not hold the position of a ‘second chamber’ as traditionally understood on the state level. It is instead the primordial institution of the EU’s legislative process. Indeed, ‘(r)epresentation of state interests within a federal polity and within the EU are markedly different’.⁷³ The elaborate procedure in Art. 294 TFEU shows the centrality of the Council despite the important role of the EP regarding participation and veto rights. Therefrom results a greater emphasis on indirect

⁷³ *ibid* 321.

Member State-level legitimation in EU law-making – at least compared to federal states.

What do we learn from the Council composition and its voting rules? Beginning with MacCormick, some argue that the fact that national law determines the composition of this important institution of EU law-making (since the Council is made up of Member State ministers, it changes with every national election) proves the wholly-international, non-autonomous and non-constitutional nature of the EU.⁷⁴ I find that surprising. I have already mentioned second-chambers in federal states (German Bundesrat, US Senate), the composition of which is fully determined at the respective lower level with no influence whatsoever for the federal level. This shows that the rules on the composition of the Council conceptually do not even set the EU apart from federal states and thus hardly proof the EU's international architecture.

What about the ever-more widespread use of qualified majority voting in the Council? Decision-making in international organisations is mostly unanimous. That is due to the legitimacy-background; namely, the differentiation between the national and the international level. On the state level, many have emphasised the immorality of veto-powers for a single player in democratic regimes, enabling them to block even overwhelming majorities.⁷⁵ Unanimity requirements grant each participant immunity against being outvoted. In decision-making beyond the state, the story is different. There, unanimity secures that the national decisions cannot be overturned by a comparatively less

⁷⁴ Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999) 117. Recently also Eleftheriadis (n 48) 85.

⁷⁵ David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008) 17, 172; Thomas Christiano, 'A Democratic Theory of Territory and Some Puzzles about Global Democracy' (2006) 37 *Journal of Social Philosophy* 81, 103.

legitimate international decision. In short, the ‘consensual method better respects the political integrity of political societies’⁷⁶. Majority voting beyond the state has the potential to force states to be subjected to measures which they reject. Returning to the EU, qualified majority voting in the Council can deprive Member States from having their democratic national will implemented.⁷⁷ They will be bound by secondary law they have not consented to. Admittedly, Member States themselves have consented to give up unanimity in the Treaties. That is nonetheless not sufficient to legitimise the ensuing secondary law to which they do not consent (more in Chapter 7). The point is that non-consensual voting in the Council is a remarkable feature that sets EU law-making apart from international processes.

c. Interim Conclusion

Let me put these findings together. The supranational law-making procedure cannot reach the thick levels of input legitimacy of its national democratic counterpart. It does not give an equal voice and vote to each EU citizen and gives a prominent role to the Council as forum for indirect representation. Its capacity to extend input-legitimacy to the supranational level nonetheless challenges exclusively state-centred arguments for procedural, democracy-related legitimacy. Since the EU law-making procedure treats the Member States and their peoples as collectives equally (not the EU citizens as individuals), it can meet the criticism of inegalitarian structures and the rule of anarchy and power at

⁷⁶ Thomas Christiano, ‘Legitimacy and the International Trade Regime’ (2015) 52 San Diego Law Review 981, 994. In more detail Samantha Besson, ‘State Consent and Disagreement in International Law-Making. Dissolving the Paradox’ (2016) 29 289, s 5.1.

⁷⁷ Jelena von Achenbach, *Demokratische Gesetzgebung in der Europäischen Union: Theorie und Praxis der dualen Legitimationsstruktur europäischer Hoheitsgewalt* (Springer 2014) 444 et seq.

any level above the state.⁷⁸ While these features remedy legitimacy deficits known from the international level, they simultaneously constitute precarious ground when viewed in comparison to nation states. This is one of the roots for the perceived justificatory lacuna of the EU's supranational right to rule.

This concludes the overview of the architecture of and representation in EU secondary-law-making. Ultimately, however, the exercise of political authority grounds in and is thus constrained by the political community's constitutional foundations. For that reason, we need to complement this inquiry with a look at EU primary law-making.

2. Self-Determination and the Making of EU Primary Law

Self-determination embodies the authority of a collective to make its own decisions as a political community. The point of sovereignty is to allow a state to (self-)determine the affairs of the community on a distinct territory – superior to any internal authorities and free from external influence (Chapter 1). For example, when the Israeli Nationality Law of 2018 proclaims that ‘the exercise of the right to national self-determination in the State of Israel is unique to the Jewish People’⁷⁹, it excludes other peoples in Israel from shaping the polity, from self-determining their fate in this state.

But why start with a flashback to sovereignty? Because the EU lacks that kind of sovereign self-determination. It needs the Member State institutions and officials to rewrite

⁷⁸ For these challenges see Christiano (n 75) 91 et seqq.

⁷⁹ Basic Law: Israel as the Nation-State of the Jewish People, 19.07.2018 (7th Av, 5778).

the Treaties. We can read that in cold print in Art. 48 (esp. para. 4) TEU. The literature rightly points to the intergovernmental conference as evidence that the EU itself does neither author nor control its constitutional foundations.⁸⁰ The decisive phase of agreeing and ratifying amendments to the European Treaties is the business of the Member States' leaders and requires their 'common accord' as well as ratification in the Member States (Art. 48 (4) TEU). In contrast even to fairly devolved federal states (like the US, where constitutional amendment may lie wholly in the hands of a supermajority of the states, Art. 5 US-Constitution) the veto right of every Member State illustrates the voluntary nature of the European project and its anti-statist character. The conclusion that this proves the international character of the EU seems too hasty, however. Showing that the EU is not a state does not prove that it is an ordinary international organisation.

The Treaty-amendment procedure leaves room for the idea of focusing on the constitutional peoples of the EU as ultimate actors rather than on state organs and officials alone (like in traditional international law). That becomes apparent in both the convention that prepares the Treaty amendment and in the ratification process. Both EU institutions and representatives of national parliaments participate alongside national governments in the convention preparing the Member States' conference. That constitutes strong evidence of a qualitative difference to paradigmatically international processes.⁸¹ Even the most

⁸⁰ Pavlos Eleftheriadis, 'Federalism and Jurisdiction' in Elke Cloots, Geert De Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart 2012) 51. See Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd ed., Hart/Beck 2010) 35. He explains how Member State thus simulatenously stand inside and outside the binding force of primary law.

⁸¹ Lina Papadopoulou, "'All Good Things Come in Threes": From a Double to a Triple Democratic Legitimacy of the European Union' in Lina Papadopoulou, Ingolf Pernice and Joseph Weiler (eds), *Legitimacy Issues of the European Union in the Face of Crisis* (Hart/Nomos 2017) 83 et seqq.

sophisticated international organisations like the WTO require only the representatives of the Member States' executives to initiate and negotiate any amendments of the foundational documents.⁸² Larsen thus rightly calls the Lisbon Treaty 'an expression of the will of the peoples of the Member States'⁸³.

Besides, it does not follow from Art. 48 (4) TEU and its recourse to the ratification according to *national constitutional requirements* that the ratification process is the same as for other international treaties nor that the theoretical importance is similar. The special position EU law holds in many Member States constitutions (take only Art. 23 German *Grundgesetz*, Art. 23a-k Austrian Federal Constitutional Law, Art. 29 Constitution of Ireland, Art. 7 (6) Constitution of Portugal) emphasises the normative salience of the European project. Through their national constitutions, the peoples recognise it as distinct political community beyond the state.

In sum, the fundamental self-determination intrinsic to sovereignty is absent from the EU level, since that would require the existence of a European *self*, a united *demos*, which leaves no room for the coexistence of fully-fledged states under the EU's authority. This absence should not be mistaken for a weak spot, however. It illustrates instead a distinctly European model, the unique capacity of which is to provide a binding and effective normative arrangement on the supranational level. One may (very) crudely portray the differences among the regulatory levels in the following way:

⁸² See Arts. IV (1), X WTO-Agreements. More generally Koen Lenaerts and Marlies Desomer, 'New Models of Constitution-Making in Europe: The Quest for Legitimacy' (2002) 39 *Common Market Law Review* 1217, 1238 et seqq.

⁸³ Signe Larsen, *The Constitutional Theory of the Federation and the European Union* (OUP 2021) 29.

The making of the Highest Law

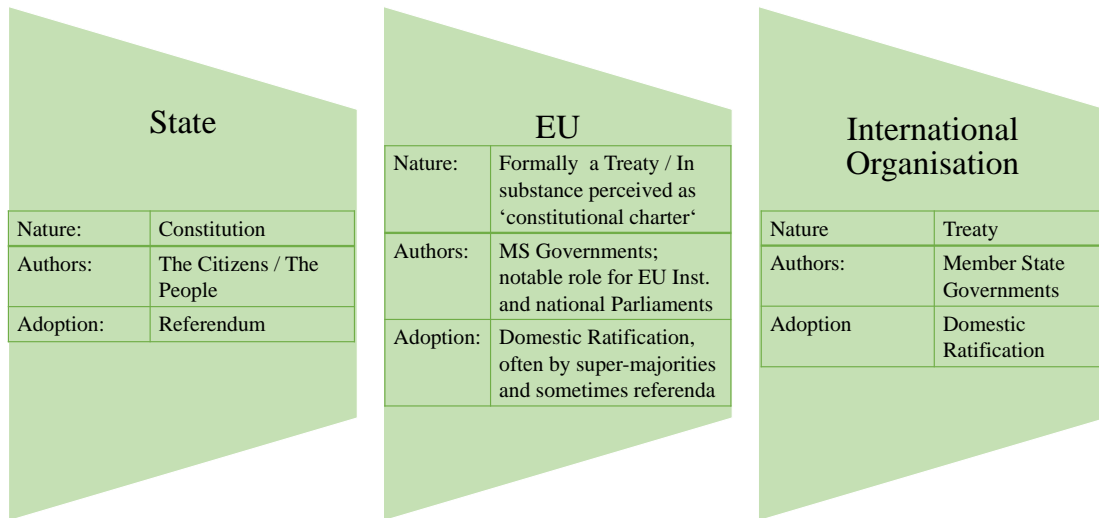


Figure 8: The Making of the Highest Law

3. Interim Conclusion

European primary law making is a long way away from a self-determined collective that regulates its own affairs and controls its constitutional foundations. The absence of sovereignty-like self-determination does not, however, prevent the evolution of a supranational political community that relies on national enforcement and the transnational integration of separate political communities on so many levels, be they legal, cultural, political or economic. What is more, it doesn't take away the insight that the ultimate concern of the European project goes beyond the traditional state-focus of international organisations and concerns the wellbeing of the peoples of Europe, as well as their capacity to solve cross-border problems, while also asserting their joint position in a globalised world.

The value of these EU law-making procedures nonetheless should not be underestimated simply because they don't match our national role-model. They seek to concretise the moral reasons that apply to the independent European peoples based on their factual interdependence through representation and deliberation.⁸⁴ EU law-making procedures, in other words, allow the EU peoples to regulate their joint affairs by subjecting themselves to a binding legal framework.

V. Conclusion

This chapter has fleshed out the idea that law, its institutions and procedures are vital to understand authority claims and their moral basis. To see what that implies for the EU, I examined the theoretical architecture of law-making and enforcement procedures in the EU. Both elements of the EU's authority claim will be central in assessing the extent of the EU's legitimate authority in Part III. If there is any broad conclusion to be drawn, it is that in many ways the EU's normative architecture curiously sits between familiar models of national on the one, and international architecture on the other.

Next, allow me to complement the evolving picture of the EU's authority claim by focusing on the notion of membership in the EU. The idea of membership seamlessly connects to this chapter if you think about what the institutions we have studied actually do. Mirroring their siblings in national legal orders, EU institutions perform a dual function in facilitating political authority. They limit the exercise of power by enforcing binding legal commitments beyond the state on the one hand, and they expand the possibility of

⁸⁴ See Marmor (n 61) 122. He explains the role of underdetermination in the value of institutions.

exercising power for the EU's members beyond their respective state borders on the other. These functions, which Isiksel aptly labels 'limitation and licence', blend into each other in her description of the EU institutions and laws as a 'commitment device'.⁸⁵ The EU members commit themselves to each other by erecting and joining the EU and more specifically by making EU law. The EU members are then held to their commitments by the enforcement of EU law, which acts as the commitment device. Not by accident, this dynamic mirrors the duality between authorisation and authority we encountered in Chapter 1.

The important question that follows from there is: Who makes the commitment? What does the notion of membership mean in relation to the EU's authority claim? The next chapter attempts to answer these questions.

⁸⁵ Turkuler Isiksel, 'Constitutionalism as Limitation and Licence' in Tom Ginsburg, Mark D Rosen and Georg Vanberg (eds), *Constitutions in Times of Financial Crisis* (CUP 2019) esp. 190.

CHAPTER 4: CITIZENS, STATES, PEOPLES: THE MYSTERY OF MEMBERSHIP IN THE EU

I. Introduction

Membership is a protean notion. We are all members of quite a few groups. Sometimes by birth, sometimes by choice. Examples include our family, the gym around the corner, or as employee of a company. More to the point, membership in distinct political groups (neighbourhoods, cities, regions, or states) defines and distinguishes human societies. In the EU, *citizens* of the Member States automatically acquire the status of EU citizens and thus become EU members in an interesting way. Moreover, the *Member States* figure as official members and original drivers of the EU. According to an (in-)famous phrase, they are the ‘Masters of the Treaties’. Finally, the Treaty’s prominent notion of a ‘union among the *peoples*’ (Art. 1 (2) TEU) invites a closer look at their role as members of the EU.

By analysing these individual agents in relation to each other, I attempt to further our understanding of the EU’s authority claim and architecture. Membership in a polity serves to identify those who are affected and thus should have a say in its running. Before reflecting on each of the above entities, let me very briefly explain how membership relates to political authority.

II. Membership and Authority

Chapter 1 proposed to include an analysis of membership to understand the authority claim of a given political community or organisation. As I explained there, that not only allows

us to identify those over whom authority is exercised in the first place (membership as such suffices to become subject to the authority). Moreover, the anonymous and impersonal ties among these subjects make membership a crucial element in understanding the normative architecture of a political community. In short, membership and the moral relationship among the members is a cornerstone of the very idea of political authority.

On the state level, citizenship represents the one impartial factor that distinguishes states from various other social groups.¹ The difference is that citizenship addresses us *qua* citizens, ie related to our status as members of the political community as such. More importantly still, citizenship expresses the fundamental idea that individual citizens form the bedrock of the political community, namely as authors and addressees of political rule. Citizenship is acquired automatically by birth and doesn't derive from free choice (although seeking to acquire another citizenship does). Citizenship also identifies rights and duties. While it usually grants legal (entry and exit rights), political (voting and agency), and social (abstract identity, concrete welfare benefits) rights,² it also makes citizens the main duty bearers of the state.

Membership is thus important because it defines discrete political communities by virtue of whom they include and exclude, and *thereby* creates the conditions for belonging.³ Such membership creates complications for authority and obligation theories, since any

¹ Harold Laski, *The Foundations of Sovereignty and Other Essays* (George Allen 1931) 26.

² For an influential deconstruction of the relationship between rights and citizenship see Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2008) ch 6. More succinctly Neil Walker, 'The Place of Territory in Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 555.

³ Jack Barbalet, *Citizenship: Rights, Struggle and Class Inequality* (Open University Press 1988) 1.

such theory needs to explain why individuals owe moral obligation of loyalty and law-abiding to that particular political community (the so-called *boundary* or *membership problem*)⁴. Further obstacles arise from the distinction between full members and mere residents. In the present context, we need to investigate the claim the EU holds over its members in order to test whether any explanation of its legitimate authority needs to answer to similar charges.

Membership constitutes a defining feature of political authority claims. While the EU is no exception, it replaces the classic bond between citizen and state on the national level with a web of membership notions affecting citizens, Member States, and their peoples. This chapter spells out the details of this web. Let's start with EU citizenship.

III. The Architecture of EU Citizenship

In the beginning, there was no EU citizenship. The ascent of the individual citizen and their role in the EU turned the usual sequence of political and judicial development on its head. The ECJ rushed ahead in 1963, proclaiming that the individual EU citizens are a distinct subject of the 'new legal order' in their own right (*van Gend*). It took a few decades for the political consensus to catch up, ie to witness the introduction of the EU citizenship provisions in the Treaty in 1992 (Art. 20 et seqq. TFEU). EU citizens today are 'members' of the EU in a theoretically interesting way that goes beyond law enforcement.⁵ This makes

⁴ Margaret Gilbert, *A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society* (Clarendon 2006); A John Simmons, *Boundaries of Authority* (OUP 2016) 60 et seq.

⁵ Similarly Paul Craig, 'EU Membership: Formal and Substantive Dimensions' 22 *Cambridge Yearbook of European Legal Studies* 1, 15.

EU citizenship unavoidably a prism for hopes and disillusiones related to the EU's development as a whole.⁶ Here, I am interested in how EU citizenship as membership helps to understand the EU's authority claim.

A good starting point for that inquiry is to ask how you become an EU citizen in the first place. EU citizenship is tied to Member State citizenship and parasitic on it. Art. 20 TFEU makes clear that 'Every person holding the nationality of a Member State shall be a citizen of the Union'. Despite repeated scholarly proposals to disassociate national and EU citizenship – thus enabling individuals to retain EU citizenship even in case of losing Member State citizenship –⁷ and understandable complaints of British citizens post Brexit, EU citizenship cannot exist independent from national citizenship. This parasitic nature is a matter of design: a feature, not a bug. Whereas there is no claim to acquire the status of citizenship against a state at the national level (in Arendtian terms, no 'right to have rights'),⁸ there is not even direct access to this status at the EU level.

You could argue that this parasitic nature is precisely why we should refrain from understanding the EU's notion of membership through citizenship to signify any more than political wishful thinking. But that would be a mistake. We have seen in Chapter 3 that the

⁶ See only Michelle Everson, 'A Very Cosmopolitan Citizenship: But Who Pays the Price?' in Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012).

⁷ Dora Kostakopoulou, 'The European Court of Justice, Member State Autonomy and European Citizenship: Conjunctions and Disjunctions' in Hans-W Micklitz and Bruno de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012); Liav Orgad and Jules Lepoutre, 'Should EU Citizenship Be Disentangled from Member State Nationality?' (EUI) 2019/24.

⁸ Chiara Rauceca, 'European Citizenship and the Right to Reside: "No One on the Outside Has a Right to Be Inside?"' (2016) 22 *European Law Journal* 470, 470.

EU's normative pull to dock onto, permeate, and reshape stronger national institutions is one of its core strengths. EU citizenship mirrors this strategy.⁹ As a status, it influences a threefold web of political bonds between polities and citizens: namely EU citizen-host state (1), EU citizen-home state (2), and EU citizen-EU (3).

1. Transnational Integration in Host Member States

EU citizenship has an inherently transnational focus. It aims to facilitate a common space for the peoples of Europe by integrating citizens in other Member States.¹⁰ The core benefits of EU citizenship derive from the allowed participation in other states' territories, job markets, or living conditions, rather than from the relationship to the EU polity vertically. This provides various insights for our purposes:

a. Horizontal Extension of Political Space

EU citizenship unfolds its greatest normative potential in the relationship to host states. It prevents host states from discriminating against EU citizens when they exercise free movement rights (*negative*). The host state is moreover *positively* required to treat EU citizens as equals, to enable them to integrate, though not unconditionally.¹¹ Put differently,

⁹ By contrast, cf. the thinner notions employed in other Regional Integration Organisations, Päivi Johanna Neuvonen, 'Transforming Membership? Citizenship, Identity and the Problem of Belonging in Regional Integration Organizations' (2019) 30 *European Journal of International Law* 229.

¹⁰ Päivi Johanna Neuvonen, *Equal Citizenship and Its Limits in EU Law: We the Burden?* (Hart 2016) 36.

¹¹ Loïc Azoulay, 'Transfiguring European Citizenship: From Member State Territory to Union Territory' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: the Role of Rights* (CUP 2017) 182 et seq.

genuine outsiders of a political community are entitled to claim rights similar to an insider for the purposes of their stay.¹² EU citizenship does not make EU citizens fully equal to citizens of the host states, but it significantly narrows the scope for justified differential treatment among them. This has important theoretical implications. Whilst states traditionally claim the right to unilaterally determine the conditions under which aliens (i) may enter into and (ii) continue to reside in their territory, or (iii) become members of their political community,¹³ the additional status of EU citizenship supranationalises and thereby redefines these questions.

The *external* dimension of EU citizenship law (Arts. 20 (2) c), 23 TFEU) reflects this transnational focus as well. The post-Lisbon clarifications surrounding diplomatic and consular protection of EU citizens abroad, first and foremost imply protection by other Member States' representations. They conceive the EU embassies to have a mere contributing function (cf. Art. 35 TEU) without original protective prerogatives.¹⁴ The EU does not protect its citizens abroad itself, but merely facilitates that the Member States look after each other's citizens qua EU citizens. Again, the familiar pattern: the EU uses national institutions to fulfil its functions, this time related to Art. 3 (5) TEU ('...the Union...shall contribute to the protection of its citizens'). Academic criticism of this architecture underplays the ingenuity of the EU's transnational governance toolbox that relies on

¹² Rauceu (n 8) 474, 488. The relationship between EU citizenship and the concept of equality is too complex to do it justice here. See only Neuvonen, *Equal Citizenship and Its Limits in EU Law* (n 10).

¹³ See Simmons (n 4) 215.

¹⁴ For the historical and constitutional implications cf. Alessandro Ianniello Saliceti, 'The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services' (2011) 17 *European Public Law* 91.

established and internationally recognised Member States embassies.¹⁵

EU citizenship, in a nutshell, facilitates transnational integration and extends the political space for EU citizens horizontally. It doesn't create a competing level of membership in another state. Instead, it establishes a membership status in a qualitatively distinct supranational polity, which facilitates access to and integration into the combined Member States of the EU. EU citizenship thus escapes the bilateral logic of dual citizenship.¹⁶ It is by definition less intrusive than dual citizenship, since its status as addition to national citizenship differs from the zero-sum game between competing states (with ensuing questions of military conscription, handing on citizenship etc). But what exactly is the role of EU citizens in the *host* Member State?

b. Citizens, Residents, and Discrimination

Some consider the inclusion of non-citizen residents in the purview of a state's authority as illegitimate, because they had no say in granting the relevant institutions the right to rule they claim.¹⁷ We do not have to settle this debate here, but this scepticism illustrates the importance of our focus on and combination of institutions and membership. It highlights the normative implications of a set of institutions' exercise of political authority over

¹⁵ But cf. Morten Rasmussen, 'Constructing the European Demos through External Action?' in Beatriz Pérez de las Heras (ed), *Democratic Legitimacy in the European Union and Global Governance: Building a European Demos* (Palgrave Macmillan 2017). Similarly Patrizia Vigni, 'The Protection of EU Citizens: The Perspective of International Law' in Joris Larik and Madalina Moraru (eds), *Ever-Closer in Brussels – Ever-Closer in the World? EUI Working Paper LAW 2011/10* 91. hopes that the EU convinces the international arena that 'it enjoys full jurisdiction over these individuals'.

¹⁶ Thus, the Standard Eurobarometer 2020 confirmed that 70 % of Europeans feel like an EU citizen. EU and national citizenship are sociologically and psychologically compatible.

¹⁷ Andrei Marmor, 'The Dilemma of Authority' (2011) 2 *Jurisprudence* 121, 133.

humans in a given territory for the extent of its right to rule.

The distinction between members and non-members receives a special meaning in an EU Member State. EU citizenship grants rights beyond one's home state. It actively blurs the distinction between insiders and outsiders in the Member States' communities by integrating transnationally mobile EU citizens in the host state while giving them a viable voice.¹⁸ Let's not forget that this framework creates a new category of discrimination between EU citizens and third-country immigrants in host Member States. To be sure, to label this status 'European Apartheid'¹⁹ demonstrates an outrageous belittling of the term's origin, the race-motivated withholding of any political agency from a large group of citizens in their home state. The structural point remains, however, that the EU introduces a qualitative distinction among the immigrants in host Member States. It singles out EU citizens and provides them with additional rights, benefits and protection. This represents the moral flip-side of the coin: namely, granting original EU citizenship rights exclusively to nationals of EU Member States.

To sum up, EU citizens have free movement rights *qua* EU citizens.²⁰ One important mark of EU membership stems from the continuation of my legal status despite

¹⁸ See Jussi Jaakkola, 'Enhancing Political Representation Through the European Economic Constitution? Regressive Politics of Democratic Inclusion' (2019) 15 *European Constitutional Law Review* 194, 215.

¹⁹ Étienne Balibar, *We, the People of Europe?: Reflections on Transnational Citizenship* (Princeton University Press 2004) 43.

²⁰ Julio Baquero Cruz, *What's Left of the Law of Integration?: Decay and Resistance in European Union Law* (OUP 2018) 97–101. On the oft criticised focus on the economically active see only Agustín José Menéndez, 'Which Citizenship? Whose Europe?—The Many Paradoxes of European Citizenship (Book Review)' (2014) 15 *German Law Journal* 907.

crossing national borders, from the very absence of normative change.²¹ Cross-border movement is often required to trigger EU citizenship rights in the first place.²² It is thus impossible to make sense of the nature of EU citizenship without this transnational dimension. That transnational dimension militates against proposals to decouple national citizenship from EU citizenship. A truncated version of EU citizenship without underlying national citizenship would dismantle the reciprocity underlying this transnational element.

The viable option of an exit right leads to interesting tensions in the relationship between citizens and their own state of nationality (home state).

2. The Influence of EU Citizenship on the Home State-Citizen Nexus

Apart from its transnational drive, EU citizenship influences the individual citizen's ties to their home state. EU law's interference in this relationship is particularly delicate since the almost intimate relationship between a state and its own citizens represents the linchpin of sovereignty. That notwithstanding, the ECJ consistently holds that withdrawing national citizenship must have due regard to EU law. More generally, the EU's structural incentive to make exit a viable option for citizens shakes up the authority relationship between home states and their citizens.

It seems a truism that the decision as to who becomes and remains a member of the national polity lies in the hands of each Member State. Since the *Rottmann*-judgment,

²¹ Azoulay (n 11) 184 et seq; Rauceau (n 8) 473. This challenges the classic authority of a state to determine who crosses their borders. On the latter Simmons (n 4) 215 et seq.

²² Simmons (n 4) ch 9 shows how this inverts the traditional logic of international law.

however, any national citizenship revocation decision needs to take into account that EU citizenship has independent value, thereby prioritising EU law over any international law requirements.²³ That does not exclude the revocation, but it makes it harder to demonstrate the proportionality of such a decision. Alongside the implications of free movement we discussed above, this illustrates a second important area in which Member States are normatively constrained and lose control over the configuration of membership in their own political community. Interestingly, it is easier to justify national citizenship revocation (and a subsequent automatic loss of EU citizenship) if the individual in question holds dual nationality and, therefore, would not be endangered to become stateless.²⁴ EU citizenship may thus protect EU citizens from becoming stateless – from losing their national citizenship. This supports Azoulai’s claim that

statelessness is not easily compatible with the standards of a decent European life. In practice, it means that the Union citizens should be defined not only as parts of home and host societies; they may also represent themselves as being part of Europe as a whole.²⁵

The Court thereby challenges international law’s paradigm, according to which the prerogative of a state to grant and withdraw national citizenship protects one’s belonging to a distinct political community, and emphasises mutual integration in a joint European project.²⁶ Note that none of this entails that EU law claims a hold over the *acquisition* of

²³ Case C-135/08 *Rottmann* EU:C:2010:104, paras 45 et seqq. See also Case C-179/98 *Mesbah* EU:C:1999:549, para 29. Case C-369/90 *Micheletti* EU:C:1992:295. Case C-192/99 *Kaur* EU:C:2001:106.

²⁴ Case C-221/17 *Tjebbes* EU:C:2019:189.

²⁵ Azoulai (n 11) 199. But cf Dimitry Kochenov, ‘The Tjebbes Fail’ (2019) 4 *European Papers* 319. for a fierce critique, which – in my view – should really be targeted at Dutch nationality law.

²⁶ Sara Iglesias Sánchez, ‘A Citizenship Right to Stay: The Right Not to Move in a Union Based on Free Movement’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights*

nationality. EU citizenship rights kick in only after gaining national citizenship of a Member State: there is no right to have rights in EU citizenship.²⁷

This picture brings us back to one of the main findings of Chapter 3: EU law gains normative force from turning constructively derivative notions and procedures (enforcement of EU law in national institutions, the rule of law and judicial independence (Art. 2 TEU)) into constraints on the primary national concepts, once they are triggered. In the present case, EU citizenship still derives from the stronger (national) citizenship status, but it gains normative force from shaping this very status itself. Once again, the parasitic nature of the EU's notion allows it to influence the primary national status. The claims EU law makes on this entrenched national concepts changes the authority landscape in Europe. Fundamental national choices are reshaped by their EU derivatives in the interest of a minimum European standard, reflected and guaranteed by membership in the EU.

EU citizenship law claims to have a say where it is supposed to be powerless, ie in the citizen-home Member State relationship.²⁸ The salient domain and theoretical novelty of such intrusion triggers the quest for the legitimate basis of claiming the authority to interfere in the relationship between Member States and their citizens – an issue that will be at the heart of Part III.

(CUP 2017) 386, 388. On the relationship to the Zambrano case law see Case C-165/14 *Rendón Marín* EU:C:2016:75, Opinion of AG Szpunar, paras 111 et seqq.

²⁷ *Kaur* (n 23). See Daniel Sarmiento, 'EU Competence and the Attribution of Nationality in Member States' [2019] Investment Migration Working Papers, for a discussion of options and limits of EU law to intervene there.

²⁸ Pavlos Eleftheriadis, 'The Content of European Citizenship' (2014) 15 German Law Journal 777.

EU citizenship exerts a broader influence on the relationship between Member States and their citizens by providing a viable exit option. As I explain in detail elsewhere, free movement creates exit rights.²⁹ EU citizenship fundamentally redesigns the exit-option for citizens of the Member States. The EU claims the authority to make the exit right a viable option for EU citizens, since it offers them the entire EU territory. This creates competition among the states to keep their citizens ‘happy’. The buzz word for this competition in the EU is the *free movement* we studied above in relation to EU citizenship’s transnational component.

To complement our inquiry, let’s look at the relationship that is rarely put in the spotlight when reflecting on membership and EU citizenship: that between the EU citizens and the EU as a political community.

3. The EU Citizen’s Political Status in the EU

Chapter 3 has already explained an important element of the EU citizen’s membership in the EU, namely as agents to enforce EU law. The doctrine of direct effect allows them to enforce EU law in their national courts and thus equips them with a crucial position in the EU’s normative architecture. In the words of Paul Craig, ‘Van Gend en Loos was of seminal importance for the conception of EU membership that it articulated, and we lose sight of this at our peril’³⁰. I recalled above how this legal role predated any meaningful political element to the membership of EU citizens in the EU. Nowadays, however, EU

²⁹ Josef Weinzierl, ‘Territoriality beyond the State: The EU’s Territorial Claims and the Search for Their Legitimacy’ 22(4) German Law Journal (forthcoming).

³⁰ Craig (n 5) 17.

citizenship grants direct political rights against the EU, most importantly to vote in and stand as a candidate for the EP, (Art. 22 (2) TFEU).³¹ This political dimension does not constitute a meaningful equivalent to the full political status one enjoys in one's home state, of course. Citizenship is evidently in the same basket as many traditional notions of political theory that the EU fills with new meaning.

Most importantly in our context, the obligations we have *qua* EU citizen are considerably lighter than those you face as national citizen in relation to your state. There is a theoretical explanation for this. The moral obligation for individuals to escape the state of nature by replacing might with right under a set of public institutions in a state is stronger and more intrusive than its equivalent for states and its peoples to form a supranational community of right. Why? Because the former is *existential* for human co-existence, whereas the latter constitutes the *supplementary* pursuit of an 'unattainable goal', in order to institutionalise and benefit from cooperation amongst a collective of peoples.³² In more practical terms, upholding public order in a distinct territory forms part of the very definition of a state (*Staatsgewalt*) and comes with intrusive obligations for example in criminal law, tax law and beyond. It would be absurd to suppose a similarly intense relationship between the EU citizen and the EU as a polity.³³ That does not mean that EU citizens don't play a role in appreciating the EU's normative architecture. Only if the EU maintains a relationship with EU citizens allowing for their identification with and interest

³¹ These rights alone suffice to trigger the scope of EU law, despite the fact that EP elections are still organised nationally Case C-650/13 *Delvigne* EU:C:2015:648.

³² B Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (CUP 2010) 201 et seqq.

³³ Similarly Gareth Davies, 'How Citizenship Divides: The New Legal Class of Transnational Europeans' (2020) 4 *European Papers* 675, 678.

in European integration could the legitimacy of its authority claim be based on any model related to the EU citizen, their autonomy or their wellbeing.³⁴ In short, EU law has to have a purpose and role in the political relationships they have among each other.

In that context, it needs restatement that EU citizenship is not devoid of the notion of duty, so central to any theory of authority (Chapter 2). Arguments to the contrary employ both an untenable ‘cosmopolitan teleology’, as well as a too hasty extrapolation of national citizenship standards to EU citizenship.³⁵ The present discussion shows that neither is appropriate. EU citizenship does not express a form of exclusive vertical belonging to a supranational polity. It instead recognises and embraces transnational differences and targets mutual integration of ‘the other’ citizen as members of different peoples.³⁶ EU citizens not only have explicit legal duties in all the scenarios where EU law is applicable horizontally – in their roles as employers, service-providers, students, or just citizens. EU law also requires a minimum duty to integrate on the part of the migrant citizen who exercises free movement rights.³⁷ Moreover, from a moral perspective, it is unconvincing to argue that Art. 20 (2) TFEU’s notion of duty is empty for the reason that the Treaty does not stipulate an obligation to obey the law.³⁸ Such moral obligations do not constitute legal obligations enumerated in constitutional documents. Whereas there is disagreement as to

³⁴ Gráinne De Búrca, ‘The Quest for Legitimacy in the European Union’ (1996) 59 *Modern Law Review* 349, 361.

³⁵ Richard Bellamy, ‘A Duty-Free Europe? What’s Wrong with Kochenov’s Account of EU Citizenship Rights’ (2015) 21 *European Law Journal* 558.

³⁶ Päivi Johanna Neuvonen, ‘Retrieving the “subject” of European Integration’ (2019) 25 *European Law Journal* 6, 18.

³⁷ Loïc Azoulay, ‘The (Mis)Construction of the European Individual Two Essays on Union Citizenship Law’ *Law* 2014/14 11 et seqq; Neuvonen, *Equal Citizenship and Its Limits in EU Law* (n 10) ch 2.

³⁸ But see Dimitry Kochenov, ‘EU Citizenship without Duties’ (2014) 20 *European Law Journal* 482, 485.

whether all legal duties are moral duties, it is plain that not all moral duties are legal duties. The correct moral standard and extent of an individual's duty to obey EU law is a moral inquiry, and not a matter of positive law.

4. Interim Conclusion

Despite fragmentation and incremental change, EU citizenship increasingly contributes to the development of a European space of social and territorial cohesion, and the reduction of discrimination. It does so by enabling integration in host states, by influencing the status as nationals of their home state, and by expressing the idiosyncratic authority claim of the EU over individuals as members of the EU polity. At the same time, EU citizenship as a status is almost invisible in the direct link between the EU polity and the individual citizen. This appears as conceptual inversion of the national model, where *rights and duties* flow from the *status* of citizenship. By contrast, the status as an EU citizen usually comes second to the various rights attached to it.

The combination of this implies a significant loss of the Member States' ability to control the composition of their societies.³⁹ It also prompts us to rethink political authority in a web of transnational and supranational rights and obligations. Despite scholarly laments, however, I argue that the relative weakness of the direct link between the EU and its citizens should not be seen as a major flaw – an example of a *fake* citizenship. Instead, it seems to be just the point of EU citizenship that it exerts its strongest influence in the asymmetrical relationship between EU immigrant and host Member State. It thereby

³⁹ Azoulay (n 11) 197 et seq.

matches the transformed territorial rule the EU creates, ie to open up the fragmented national spaces in Europe to one another.

A visual illustration might help to grasp the disruptive potential of EU citizenship:

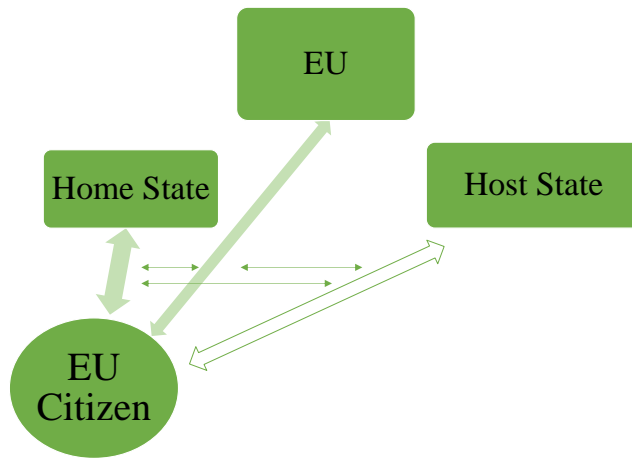


Figure 9: The EU Citizen's Normative Relationships

While EU citizenship thus mainly plays out transnationally, the link between the EU citizen and the host state is the only contingent one (transparent arrow). In other words, it is optional and needs activation through movement. By contrast, the home state link (thick vertical arrow) is necessary to gain EU citizenship in the first place, and the status in the EU polity is parasitic yet automatic (thin diagonal arrow). All of these individual bonds between the EU citizen and the political communities interact and often create tensions (horizontal green arrows). A direct relationship between the EU and 'its' citizens thus not necessarily enhances the legitimacy and authority of the European project. To the

contrary, the EU's authority claim seemingly creates a legitimacy problem by cutting into the state-citizen nexus and by granting rights to the citizen in question without necessarily providing a justificatory compensation beyond rights-individualism on the supranational level.⁴⁰ Only an analysis of these elements of the EU's authority claim allows us to answer the question of the EU's legitimate authority in its proper context.

But perhaps I have been putting the cart before the horse when discussing EU citizenship before focusing on those who formally join the club: the individual Member States. Let me do that now.

IV. The Membership of the Member States

Discussions of international authority – as briefly discussed in Part I – focus mainly on states as members of international organisations. In what follows, I discuss how the EU's authority claim has transformed the Member States' relationship to each other and to the EU.

1. Voluntariness and the Value of Popular Sovereignty

An analysis of how the EU changes authority structures among its Member States will enable us to understand the parallels between individual autonomy and collective autonomy or state sovereignty. In that regard, the processes of entering and exiting the EU

⁴⁰ Joseph Weiler, 'Van Gend En Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 25 *European Journal Of International Law* 83, 94, 99; Neuvonen, *Equal Citizenship and Its Limits in EU Law* (n 10) 38.

are quite telling. Occasional sweeping and equally untenable voices had claimed in the past that the Member States would have no legal right to ‘secession’ from the EU.⁴¹ That was before the introduction of Art. 50 TEU clarified in theory that they do. In practice, Brexit has helped to settle many controversial issues surrounding the exit of an EU Member State. Most importantly, the *Wightman* judgment strengthened the Member States’ unilateral right to invoke Art. 50 TEU and leave.⁴² Beyond that, the ECJ had a lot to say about the membership status of EU Member States as such.

I want to bracket these considerations for now and first take a closer look into the machinery of EU accession. According to Art. 49 (2) TEU, the conditions of EU membership are negotiated between the applicant Member State and the current Member States. Not with the EU (though under Commission supervision). The enlargement process is essentially under the control of Member State institutions.⁴³ Notwithstanding the consent requirement of the EP, the EU itself essentially neither controls individual accession negotiations nor its results (potential opt-outs etc.).⁴⁴ Think only of the current enlargement discussions regarding North-Macedonia and Albania. The veto of a single Member State (France) sufficed to stop the process for some time. In brief, the Member States can

⁴¹ See for example Raymond Friel, ‘Secession From the European Union: Checking Out of the Proverbial “Cockroach Motel”’ (2003) 27 *Fordham International Law Journal* 590, 627. An abundance of (German) literature on this question can be found at Stephan Breitenmoser, ‘Die Europäische Union Zwischen Völkerrecht Und Staatsrecht’ [1995] *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 951, n 123.

⁴² Case C-621/18 *Wightman* EU:C:2018:999.

⁴³ Comprehensively Christophe Hillion, ‘EU Enlargement’ in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU law* (2nd ed., OUP 2011).

⁴⁴ Rebecca Adler-Nissen, ‘Opting Out of an Ever Closer Union: The Integration Doxa and the Management of Sovereignty’ (2011) 34 *West European Politics* 1092. She explains how opt-outs in practice support rather than threaten the authority of the integration process.

themselves configure any membership conditions. The bottom line is that the EU has no direct and unmediated control over its members, neither regarding Member States nor EU citizens (as we saw above).

On the flipside, EU withdrawal according to Art. 50 TEU seems similarly sobering. Why? Because it expresses an unequivocal supranational clarification of the continuing sovereign character of the EU's Member States, the unilateral 'sovereign choice' of which alone determines whether to remain a member of the club.⁴⁵ At the same time, the EU itself cannot force a Member State to leave the EU against its will.⁴⁶

What are the implications of this for the EU's authority claim? First, the EU's lack of control over EU membership takes away part of the moral baggage that can come with the authority claims of (especially federal) states. The voluntary character of the EU as a negotiation among equal European states and peoples avoids the morally problematic elements of denying membership to keen outsiders on the one hand, and of preventing withdrawal/secession on the other.⁴⁷ Second, we have seen above that consent – though having lost some momentum – expresses the underlying value of autonomy and becomes operational in discussions of exit rights. Art. 50 TEU protects the sovereignty of individual states – the functional equivalent to individual autonomy – as the normative basis for exit

⁴⁵ *Wightman* (n 42) para 50.

⁴⁶ Insightful Pekka Pohjankoski, 'Expulsion of a Member State from the European Union: Ultimate Remedy?' in Koen Lenaerts and others (eds), *An Ever-Changing Union?: Perspectives on the Future of EU Law in Honour of Allan Rosas* (Bloomsbury Publishing 2019). See also Deutscher Bundestag, Wissenschaftlicher Dienst, 'Sachstand: Zur Anwendung Der Wiener Vertragsrechtskonvention Auf Das EU-Primärrecht 21. November 2018, WD 2 - 3000 - 166/18' 8 et seq.

⁴⁷ On the former in relation to state citizenship see Simmons (n 4) 218.

rights on the supranational level. Membership, in short, represents the individual choice of a national people at a given time. EU membership is, of course, not voluntary for individual EU citizens born into an EU Member State. But the individual EU citizen is not the main duty-bearer nor subject of the European project. EU membership is voluntary for a people and managed through its state institutions.

You might argue that the exit right for states in Art. 50 TEU merely mark the EU as a classic international organisation. I think that would be premature, however. That exit right on the supranational level does not, in my opinion, protect state sovereignty for its own sake. Sovereignty instead represents and protects the self-determination of the national people(s) as a collective to organise its political affairs autonomously, thus pointing at the human collective behind the institutional state entity. It is no accident that state sovereignty and popular sovereignty use the same concept to express what surely are two sides of the same coin – ie the autonomy of a collective to self-determine its political affairs. In other words, state institutions are always the trustee of the people they govern.⁴⁸ And the EU not only affects these state institutions as trustees, but concerns popular sovereignty itself – ie how the constitutional peoples of the EU reconcile each other's independence with their factual interdependence. Let me explain.

Art. 50 TEU ultimately protects the autonomy of the European peoples as self-constituted human collectives. It reveals a *qualitative* difference to exit rights in international organisations. Look at the procedural contours of Art. 50 TEU. For example,

⁴⁸ Alexander Hamilton and others, *The Federalist Papers* (OUP 2008) No. 46; Samantha Besson, 'State Consent and Disagreement in International Law-Making. Dissolving the Paradox' (2016) 29 289, s 5.

the necessary consent of the EP to any withdrawal agreement (Art. 50 (2) TEU) shows the involvement of the remaining peoples of Europe, especially in order to protect citizens rights. In contrast to the accession process, the EP even has a say concerning the substantive terms of the agreement in the withdrawal process. Similarly, Art. 50 (1) TEU's reference to domestic 'constitutional requirements' illustrates the familiar coupling of supranational and national institutions to administer EU law (Chapter 3) through which EU law touches on the constitutional foundations of the Member States. Recall only the United Kingdom Supreme Court's *Miller* judgments and their considerable impact on the separation of powers in the UK in the wake of Brexit, or the EU General Court's *Shindler* ruling on adjudicating the compliance with these constitutional requirements via Art. 267 TFEU as a flipside.⁴⁹ Even politically, Brexit was ultimately not about UK state sovereignty, nor about the autonomy of the individual. Brexit was about the autonomy of the British people to determine their fate independently of supranational authority. Whenever sovereignty figured into the debate as proxy for 'liberation' from EU rule, it ultimately meant popular self-determination. Brexit reminds the Member States that membership in the EU is ultimately about the choices the peoples of Europe make about how to govern themselves.⁵⁰

This shows that the EU turns the familiar picture from the state level upside down. There, exit rights focus on the main duty-bearer and addressee of state authority – namely the autonomous individual human being. The core addressee of legal and moral duties in

⁴⁹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61. *Cherry and others v Advocate General for Scotland* [2019] UKSC 41. Case T-458/17 *Shindler et al* EU:T:2018:838 para 74.

⁵⁰ Succinctly Vernon Bogdanor, 'Europe and the Sovereignty of the People' (2016) 87 *The Political Quarterly* 348.

the EU's normative architecture, by contrast, are *national peoples as self-determining collectives*.⁵¹ As a collective, they retain a formal right to leave the EU, to secede. To focus on an individual's exit rights in a discussion of the EU's authority would be beside the point. The common ground between exit rights for individuals in a state and for peoples in the EU remains that it cannot remedy any unjust authority regime, nor is it easily exercised as a matter of *realpolitik* (think only of smaller, less powerful states in the centre of Europe).

To conclude, the EU does not directly control the entry and exit of its members, both at citizen and state level. EU membership remains voluntary from the perspective of a collective (state or people), but usually involves a fundamental decision for the shape and fate for the people constituted in a (future or soon former) Member State.

Beyond those insights from accession and withdrawal, EU membership has more profound daily repercussions for the normative relations among the Member State institutions and their officials:

2. Mutual Trust and Equality

This section shows how the Member States' membership in the EU differs from membership in other international organisations. It examines how the EU's authority claim reinterprets and enriches central notions of international law, such as *pacta sunt servanda*

⁵¹ The Preamble of the TFEU confirms that by 'calling upon the other peoples of Europe' and not the other states, to join the EU. Similarly, the Preamble of the CFEU starts with 'The peoples of Europe'.

and the sovereign equality of states.

a. From *Pacta Sunt Servanda* to Mutual Trust

Pacta sunt servanda is one of the first principles in the legal relations between states. It ‘is the bedrock of the customary international law of treaties and, according to some authorities, the very foundation of international law’⁵². The legal and moral bonds between EU Member States go well beyond that, however. They are fundamentally informed by *mutual trust*. That principle requires from ‘each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law’⁵³. What is the difference between the two?

In the course of European integration, mutual trust became an ever more prominent catchphrase for the EU-facilitated relations among the Member States institutions and their officials. Mutual trust made its first rather innocent appearance in *Opinion 1/75* on competence delimitation, where the Court opined that allowing Member States to take different positions towards third states in areas covered by the then Community’s competence would ‘call into question the mutual trust within the Community’.⁵⁴ Despite the overwhelming focus of contemporary literature on its repercussions in the AFSJ, it underpins a whole range of areas; in:

⁵² Jonathan Law (ed), *A Dictionary of Law* (9th edn, OUP 2018) ‘pacta sunt servanda’.

⁵³ *Opinion 2/13 Accession to the ECHR* EU:C:2014:2454, para 191.

⁵⁴ *Opinion 1/75 OECD Understanding* EU:C:1975:145, p. 1364.

- internal market law to complement mutual recognition of product standards⁵⁵
- the European Asylum law system to presume Charter-compliance in relation to the treatment of asylum seekers⁵⁶
- the AFSJ in relation to rule of law standards⁵⁷
- the recognition and enforcement of foreign civil law judgments⁵⁸

The role of mutual trust as normative substratum of such a variety of institutional mechanisms, where Member State authorities/courts accept foreign goods, diplomas, arrest warrants, judgments etc., makes mutual trust and the presumption of legality underpinning it a cornerstone of the relationships among EU Member State institutions. Regarding its normative foundations, the Court – in line with the general shift in post-Lisbon jurisprudence from more effectiveness-driven to substantive normative justifications – has based mutual trust on the respect for the values in Art. 2 TEU:

EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected.⁵⁹

⁵⁵ Case C-11/95 *Commission v Belgium* EU:C:1996:316, para 88; Case C-110/01 *Tennah-Durez* EU:C:2003:357, para 30.

⁵⁶ Case C-63/15 *Ghezelbash* EU:C:2016:409, para 55; Case C-297/17 *Ibrahim* EU:C:2019:219, paras 82 et seqq.

⁵⁷ Case C-399/11 *Melloni* EU:C:2013:107; Case C-571/17 *Ardic* EU:C:2017:1026, para 90; Case C-404/15 *Aranyosi* EU:C:2016:198, para 78.

⁵⁸ Case C-386/17 *Liberato* EU:C:2019:24, paras 40 ff; Case C-325/18 *C.E. and N.E.* EU:C:2018:739, paras 90 et seqq., as well as in the relevant secondary legislation)

⁵⁹ Case C-284/16 *Achmea* EU:C:2018:158, para 34; *Opinion 2/13* (n 53) para 168; similarly Case C-551/18 *PPU IK* EU:C:2018:991.

The interesting feature of this structure for our purposes is that mutual trust supports the authority of legal solutions adopted by EU institutions. In that regard, it is worth mentioning the sibling notion of mutual trust: *sincere cooperation*. Horizontal mutual trust justifies the vertical element of sincere cooperation (Art. 4 (3) TEU), since both reflect the principles and rules binding the national polities to the EU and to one another.⁶⁰ Sincere cooperation denotes a rich concept of vertical loyalty among EU and Member States. Similarly to the above story about mutual trust and *pacta sunt servanda*, sincere cooperation is more demanding and normatively richer than its counterpart in international law: the good faith performance of Treaty obligations.⁶¹

Mutual trust supports EU law enforcement according to the following logic: the need to ensure mutual trust creates a duty for the Member States to obey EU law, which was, after all, made by the EU institutions for that very purpose (to make and enforce binding commitments among them). Only EU law, in short, can establish and guarantee mutual trust. Therefore, national courts may police their fellow Member States' compliance with EU law transnationally because it ultimately expresses a commitment made to each other. Mutual trust departs radically from *pacta sunt servanda* as it seeks to justify supranational justiciability and enforcement rather than purely horizontal cooperation. Almost as a logical consequence of this, Opinion 1/17 claims that

⁶⁰ *Achmea* (n 59) paras 34, 58. *Wightman* (n 42) para 45. For its first application to the external context in Opinion 1/17 *CETA* EU:C:2019:341, para 109, 128. For how these seminal concepts relate to *pacta sunt servanda* see Bruno De Witte, 'Direct Effect, Primacy, And the Nature of the Legal Order' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 361.

⁶¹ Lucia Serena Rossi, 'The Principle of Equality Among Member States of the European Union' in Lucia Serena Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 26.

Member States are, *in any area that is subject to EU law*, required to have due regard to the principle of mutual trust. That principle obliges each of those States to consider, other than in exceptional circumstances, that all the other Member States comply with EU law.⁶²

Far from constituting specific jargon for sensitive matters of criminal justice collaboration, the ECJ has made mutual trust one of the central notions to describe the bonds between EU Member States. It has become a general principle of EU law destined to remedy the lack of coercion among the Member States with trust-based institutionalisation of compliance.⁶³ The enforcement of EU Law in Member States (direct effect, Art. 267 TFEU), by other Member States (transnationally) and on the EU level (Art. 258 et seq.) takes the voluntary commitment undertaken in the Treaties seriously; it transforms nation states to Member States.⁶⁴

The bottom line is that mutual trust represents the qualitative normative difference to mere technical cooperation as traditional characteristic of international relations; it denotes trust, the ‘firm belief in the reliability...of someone’.⁶⁵ As a result, the more demanding normative notion of mutual trust among the EU Member States replaces the international idea of *pacta sunt servanda*. Moreover, the rich notion of sincere cooperation replaces the good faith performance of Treaty obligations in international law. Mutual trust, in essence, represents the umbrella term for the far-reaching transnational integration and

⁶² *Opinion 1/17* (n 60) para 128 (emphasis added).

⁶³ See Luc Von Danwitz, ‘Der Grundsatz des gegenseitigen Vertrauens zwischen den Mitgliedstaaten der EU. Eine wertebasierte Garantie der Einheit und Wirksamkeit des Unionsrechts’ (2020) 55 *Europarecht* 61, 72 et seqq.

⁶⁴ Christopher Bickerton, *European Integration: From Nation-States To Member States* (OUP 2012) ch 2.

⁶⁵ Oxford English Dictionary online, ‘Trust’ <<https://.ox.ac.uk:2446/view/Entry/207004?>> accessed 5 May 2021. Similarly Sacha Prechal, ‘Mutual Trust before the Court of Justice of the European Union’ (2017) 2 *European Papers* 75, 91 et seq.

interaction of state officials under the EU legal framework.⁶⁶

We witness a similar development in relation to the notion of equality, where EU membership reconceptualises the traditional sovereign equality of states in important ways.

b. The Two Dimensions of Member State Equality

The ‘sovereign equality of states’ is a central idea in international law guaranteeing (in theory) that each state remains the ultimate authority in its own territory and respects the same authority of its peers over theirs. Not unlike the transition from *pacta sunt servanda* to mutual trust, the EU enriches the notion of sovereign equality and thereby gives it a new meaning.

The international paradigm of sovereign equality is evidently still present in the background of the EU’s architecture. Important manifestations we have already evaluated are the accession procedure (Art. 49 TEU), the idea of the Member States as ‘Masters of the Treaties’, or unanimity rules and the ensuing veto power.

The equality of Member States expressed in 4 (2) TEU has a very different theoretical meaning, however. Art. 4 (2) TEU reads: ‘The Union shall respect the equality of Member States before the Treaties...’. The wording already indicates that this notion is to be understood as equality among the subjects of an authority (*Hoheitsgewalt*).⁶⁷ The

⁶⁶ Valsamis Mitsilegas, ‘Trust’ (2020) 21 German Law Journal 69.

⁶⁷ Claus Dieter Classen, ‘Die Gleichheit Der Mitgliedstaaten Und Ihre Ausformungen Im Unionsrecht’ [2020] Europarecht 255, 257 et seq.

addressee of the duty to treat equally here is the EU. The clause creates a legal obligation for the EU to treat its Member States equally in both the making and the enforcement of EU law.⁶⁸ In that regard, the law-making architecture is designed to accommodate and balance the equality of both the Member States and their peoples.⁶⁹ On the flipside, when the Member States act jointly and make EU law, they exercise public authority on the territory of other Member States.⁷⁰ In that sense, Art. 4 (2) enshrines the guarantee that they remain equals through the equal making and enforcement of EU law. This ‘equality before EU law’ was introduced precisely to counter the fears and strengthen the position of smaller Member States who had lost their veto rights to qualified majority voting.⁷¹ In an important sense, the equality of Member State accordingly goes far beyond the international idea of sovereign equality.⁷² Member States are not only sovereign actors designing the EU’s normative architecture, but also equal subjects of EU law.

c. Interim Conclusion

The EU Membership of Member States differs significantly from their membership in traditional international organisations, especially when viewed from the lens of political authority. Both *pacta sunt servanda* and the sovereign equality of states are merely the starting points of a morally richer notion of membership. Mutual trust and the equality of

⁶⁸ ibid 264 et seqq; Rossi (n 61) 15 et seqq.

⁶⁹ Rossi (n 61) 15.

⁷⁰ Classen (n 67) 263.

⁷¹ Andreas Haratsch, ‘Die Gleichheit der Mitgliedstaaten in den Institutionen und Entscheidungsverfahren der Europäischen Union – der rechtliche Rahmen’ (2020) 55 *Europarecht* 471, 472.

⁷² Koen Lenaerts, ‘La Vie Après l’avis: Exploring the Principle of Mutual (yet Not Blind) Trust’ (2017) 54 *Common Market Law Review* 809.

Member States describe a better integrated and more demanding notion of membership that makes them (equal) subjects and addressees of the EU legal order. This normative landscape serves as precondition for solidarity among Member States, which – as Chapter 7 will show – plays an ever more important role in the appreciation of the EU’s authority.

The remainder of the chapter explains the foundational role for the peoples of Europe as ultimate members/addressees of the EU’s political authority. Whereas reflections on the theoretical standing of Member States institutions and citizens is not uncommon in EU constitutional theory, the notion of ‘people’ is usually confined to the *no-demos* discussions in democratic theory. We can’t fully understand the EU’s authority claim without reflections on the membership of the ‘peoples’, however.

V. The Case for the Peoples as Original Members

The first order of business is to clarify the notion of ‘people’. In political theory, people or *demos* represents a constitutional rather than an ethnographical, identity-related term.⁷³ A tentative definition of such a constitutional people is a ‘group of human individuals engaged in generally binding collective action through common institutional practices’⁷⁴. This can only be a starting point, however, otherwise we don’t know whether residency or emotional connection suffices to belong to a constitutional people. Both are insufficient in my view. A constitutional people – as I understand it in this thesis – describes a collective

⁷³ See only Samantha Besson, ‘Deliberative Demoi-Cracy in the European Union: Towards the Deterritorialization of Democracy’ in Samantha Besson, José Luis Martí and Verena Seiler (eds), *Deliberative Democracy and its Discontents* (Ashgate 2006) 189.

⁷⁴ Francis Cheneval, *The Government Of The Peoples: On The Idea And Principles Of Multilateral Democracy* (Palgrave Macmillan 2011) 57.

that exercises its self-determination by constituting and thereafter being constituted by a bounded political community: a state.⁷⁵ This co-constitution between state and people derives from the fact that a constitutional people is identified as the sum of the state-citizens, which presupposes the existence of a state that offers such citizenship. Even in federal states, there will thus be only one constitutional people as defined by citizenship of the federal level (British, Belgian, German etc). Nonetheless, the people is theoretically prior, it is the principal that uses state institutions as agents to exercise and facilitate its self-determination.

European integration has profound consequences for this popular self-determination since it enables them to jointly legitimise a demos- and border-transcending set of institutions for binding decision-making beyond the state.⁷⁶ Apart from liberating the concept of people from discussions about ethnic identity and nationalism, this clarification serves to distinguish the EU's authority claim from pluri-national states, ie states with several ethnical *demos*, for example Russia and the UK.⁷⁷ Whereas multi-people states still claim to unite those ethnical peoples as one constitutional people under a sovereign umbrella ('The British people' instead of 'The English, Scottish, Welsh, and Northern Irish peoples combined'), the EU builds on the individual peoples as constituted by their statist polities separately. EU membership is not the end of self-determination at the national

⁷⁵ For an examination of the interrelationship between people and *demos* see Eva-Maria Tieke, *Das Subjekt Demokratischer Legitimation in Der Europäischen Union* (Tectum 2016) 268 et seqq.

⁷⁶ James Bohman, 'From Demos to Demoi: Democracy across Borders' (2005) 18 *Ratio Juris* 293, 300, 306.

⁷⁷ The Russian Constitution starts with 'We, the multinational peoples of the Russian Federation'. See also Stephen Tierney, "'We the Peoples": Constituent Power and Constitutionalism in Plurinational States' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2007).

level, but rather increases the scope for self-determination by creating trans- and supranational bonds between peoples.⁷⁸

That doesn't fully settle the use of peoples as a useful entity in understanding the EU's normative architecture, however. Eijsbouts has recently cautioned against the use of the concept, based on the vague and protean use of 'peoples' in primary law, as well as the fear of a populist, nationalist backlash.⁷⁹ One can hardly blame him in light of the new-right's occupation of the notion as well as the recent ethnic reclaiming of the notion *Volk* in the wake of the Brexit referendum and the migration challenge. Nonetheless, his criticism is surprising. Many academic voices in EU constitutional theory view attempts to liberate the EU's setup from an exclusively international focus on its Member States with healthy anti-federalist scepticism, rather than as evidence of a renationalising backlash.

In my view, the focus on peoples rather than states helps to understand the deeper and more intrusive impact on the EU on collective self-determination and, as a result, provides a helpful element in the EU's normative architecture. Even if we – *arguendo* – subscribe to Eijsbouts's interpretation of the various notions of peoples in the Treaties,⁸⁰ I doubt that a disparate use of the notion 'people' in primary law necessarily erases the EU constitutional peoples from a foundational role in the theory of the EU. Textual varieties do not undermine the idea that the EU ultimately addresses the constitutional peoples of

⁷⁸ Similarly Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd ed., Hart/Beck 2010) 49.

⁷⁹ Tom Eijsbouts, 'People and Peoples in EU Law: To Debunk the No-Demos Myth' in Lina Papadopoulou, Ingolf Pernice and Joseph Weiler (eds), *Legitimacy Issues of the European Union in the Face of Crisis* (Hart/Nomos 2017).

⁸⁰ Did the original notions of 'peoples of Europe' in the EEC-Treaty of 1957 really include the Swiss and other peoples on Europe's land-mass? See *ibid* 119.

Europe, which decide to open up their national spaces to each other and to integrate in a transnational and supranational institutional framework.

Focusing on constitutional peoples should neither lead to conceptual confusion, nor to a nationalistic turn. In fact, as Weiler has shown, even if we bring in ‘the peoples’ as separate agents, the ethnical and cultural differences in the EU remain salient. A persistent challenge of this ‘union of peoples’ remains to integrate foreigners without consuming their identity and making them the same, which he calls ‘community of others’ or ‘constitutional tolerance’.⁸¹ After all, Eijsbouts himself seems to accept the no-demos thesis as the lack of a sense of belonging on the part of the EU citizens that would justify the imposition of majority decisions on a minority.⁸² In other words, I think it is essential to understand the role of the peoples in the EU’s normative architecture.

We wouldn’t need the peoples as independent entity in an appraisal of the EU’s normative architecture if citizens and Member State officials alone sufficed to grasp the authority relations. That is not the case, however.

Think only of the widespread use of national referenda in major treaty revisions as well as in the decisions to join the or withdraw from the EU. This illustrates that EU membership is a decision affecting the core of a national people’s self-determination.⁸³ I

⁸¹ Joseph Weiler, ‘In Defence of the Status Quo: Europe’s Constitutional Sonderweg’ in Joseph Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 18 et seq.

⁸² Joseph Weiler, ‘Dialogical Epilogue’ in Lina Papadopoulou, Ingolf Pernice and Joseph Weiler (eds), *Legitimacy Issues of the European Union in the Face of Crisis* (Hart/Nomos 2017) 399 et seq.

⁸³ For example, nine out of ten accession candidates of the EU’s 2004 enlargement round held referenda (not Cyprus). Referenda are also part of the debate on the UK’s and Denmark’s permanent opt-outs from the eurozone, see Adler-Nissen (n 44) 101 et seq. France even requires referenda for the accession of other Member States, see Hillion (n 43) 208 et seq.

don't claim that the EU legally requires these referenda as part of its authority claim. Instead, the fact that the peoples individually enshrine referenda requirements in their national constitutions reflects the salience of EU membership from their perspective. These referenda are a reaction to and acknowledgment of the EU's authority claim. Outside of the EU context, compulsory referenda for external affairs are extremely rare.⁸⁴ EU membership subjects a people to binding supranational authority structures, and conjoins it with the other EU peoples into a political community beyond the state that affects their self-determination. In that regard, the direct involvement of the constitutional peoples via referenda reveals the profound impact of the EU on popular self-determination, which an exclusive focus on state sovereignty and state officials would be unable to grasp.

In addition, various EU peoples have amended their home constitution to accommodate EU integration and thereby rewritten the very document and narrative that constitutes them as a constitutional people in the first place. They thereby recognise the importance and transformative impact of EU integration for their own identity. Not only does the EU regulate or affect a vast array of substantive areas, some of them crucial for self-determination. What is more, the EU harnesses state institutions to make and enforce EU law in a powerful normative architecture (Chapter 3). Such developments illustrate that EU membership changes the relationship between citizens and their own state institutions. The decision to govern jointly affects the way each people is governed independently.

Constitutional courts use the notion of people as well to conceptualise the

⁸⁴ Notably, Ireland would require a referendum to join NATO. See Ireland Department of Foreign Affairs, *Challenges and Opportunities Abroad: White Paper on Foreign Policy* (Stationery Office 1996) para 36.

qualitatively different force of the EU's authority claim. For one, the BVerfG derives its review mechanisms from the idea that the German people have limited the possibility for European integration in the German constitution, so that the state officials cannot consent to everything favoured by current majority.⁸⁵ For another, recall the UK Supreme Court's *Miller* judgments. In both *Miller* cases, the government argued that EU affairs are external, international affairs, and, as a result, fall under the 'Royal Prerogative' of conducting foreign affairs, which belongs to the government. The Supreme Court disagreed and implicitly affirmed that the EU makes a qualitative difference to domestic constitutional law and, consequently, is very different from international arrangements. For that reason, Parliament as main forum for the representation of the national people needed to be involved in significant affairs like triggering the exit from the EU according to Art. 50 TEU.⁸⁶

Lastly, since the Lisbon reforms, national parliaments play a role in EU law-making – though so far only a negative one, via the card-procedure to police compliance with subsidiarity. More generally, Chapter 3 has shown that the EP is best understood as representation of the joint but separate EU peoples as collectives. The point of this combined evidence is that the EU's normative architecture foresees a role for and affects the constitutional peoples of its Member States directly.

These actions, measures, and initiatives allow me to argue that the constitutional peoples of the EU claim an independent role in the EU's authority architecture that

⁸⁵ See only BVerfG, Judgment of 05 May 2020 - 2 BvR 859/15 (*Weiss*), para 101.

⁸⁶ *Miller* (n 49); *Cherry* (n 49).

distinguishes the EU from other organisations beyond the state. Beyond the above instances where the EU peoples act as such – ie in their capacity as peoples – I argue that they are always ultimately affected by EU law, even if and when they act in their capacity as Member State officials or citizens. A focus on the peoples and their self-determination makes the EU’s authority claim intelligible. This is the crucial importance of membership for discussion of political authority. Who is ultimately affected by the political community’s authority claim?

VI. Conclusion

This chapter sought to explain the fundamental role of membership in the EU’s authority claim. Membership unites a group and distinguishes it from others, which is never morally inert. I first traced the familiar dichotomy between Member States and individual citizens, and how they relate to each other and to the EU. We can neither disassociate the individual EU citizen’s status in the EU polity from the fundamental importance of Member States, nor would it be possible to surgically separate the membership of the Member States from considerations related to the rights and interests of EU citizens.

A spotlight on the European peoples completed the inquiry. In a nutshell, the EU empowers individual citizens but constrains/binds them collectively, namely as a collective people. A focus on the national *demoi* in EU theory explains or at least orders the mutual interrelationship of rights and duties for both state officials and citizens. Remember our present concern, the nexus between membership (on the national level citizenship) and political authority. Membership in a polity serves to identify those who are affected and

thus should contribute to shaping the polity in question, who should have a say. The elegant conceptualisation of membership on the EU level is to view the European peoples as foundational members, whence originate duties for state officials and citizens alike. We will see in the next chapter how to use these insights to make the EU's authority claim intelligible.

By zooming in on the individual entities that play a role in the EU's architecture, this chapter not only contributes to understanding the EU's authority claim, it also attempts to conceptualise how Member State officials, EU citizens and EU peoples relate to each other in and through the EU's polity. Far too often, alas, they are merely juxtaposed or studied in isolation. Such a perspective loses sight of the idea that it is their relation to one another that makes a normative difference in the construction of the EU as a polity. To reiterate a few findings, recall that the essence of EU citizenship can only be explained in the citizens' interaction with home and host states, rather than with the EU alone. On another front, the EU law-making architecture is a trade-off between the equality of Member States and the equality of citizens, in order to facilitate the equality of peoples at a deeper level. This range of actors also allows for an unequal distribution of rights and duties. Because EU law mostly obligates the collective as such (EU peoples), citizens qua citizens gain more rights than duties through EU membership. Moreover, Member State relations are the catalyst for the moral relations of peoples when we, for example, counterbalance free movement with extradition of criminals, the internal freedom with external borders. Mutual trust is established and institutionalised among the member state officials precisely to facilitate the joint government of their peoples.

We can illustrate the findings of this chapter in the following way:⁸⁷

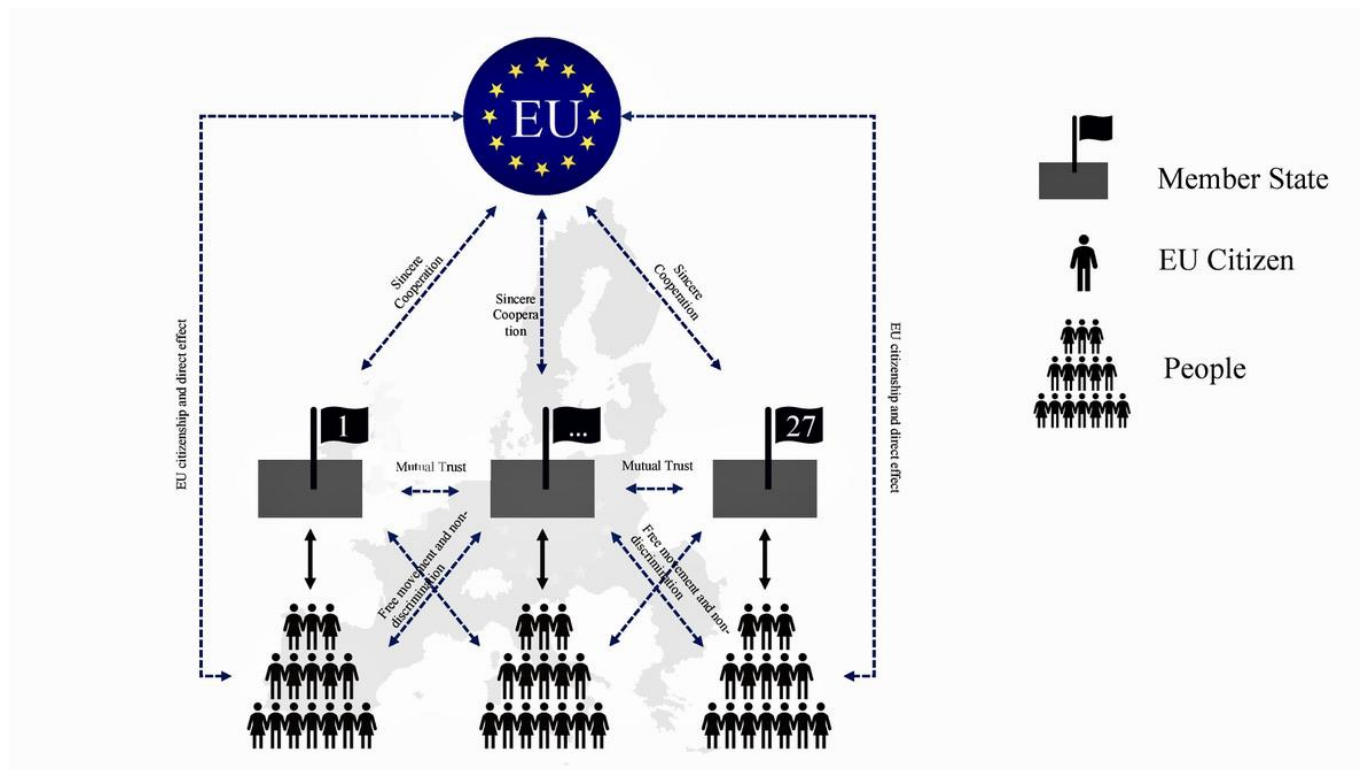


Figure 10: The Legal Manifestations of the EU's Authority Claim

The figure shows the complex web of legal duties and authority relations in the EU's governance structure, annotated with a few of the notions studied in this chapter. The EU exercises political authority through creating and maintaining these individual relationships. Its character is thus far from a bilateral, top-down arrangement between polity and collective of citizens: well-known from the state level. In its place, we find a complex interplay of meaningful vertical, horizontal and diagonal political relationships

⁸⁷ For a similar reflection on many of these relations see Pavlos Eleftheriadis, 'The Idea of a European Constitution' (2007) 27 Oxford Journal of Legal Studies 1.

among the EU and its citizens, Member States and peoples.

This concludes our two-step attempt to unravel the meaning of law/institutions and membership as part of the EU's authority claim. The result is a better understanding of what exactly the EU claims in relation to place, power, and peoples. Barber is obviously right to posit that 'the European Union clearly possesses a territory, a membership, and a set of institutions'⁸⁸. But it took us two chapters to establish to what extent these familiar notions are filled with new meaning in the supranational context: to allow as to comprehend them independently of their statist siblings.⁸⁹

With that in mind, let's move on to restate the EU's authority claim and position it in the spectrum of statist and international authority.

⁸⁸ Nicholas Barber, *The Constitutional State* (OUP 2010) 175.

⁸⁹ For more detail on the territorial aspect, see Weinzierl (n 29).

CHAPTER 5: SYNOPSIS: AN AUTHORITY CLAIM OVER PEOPLES

I. Introduction

The preceding chapters have sought to understand the nature, scope, and addressees of the EU's authority claim. To do so, I have used the comparative notions (i) means/institutions and (ii) membership. The next step will be to use these insights to position the EU's authority claim in the range between national and international authority.¹ First, I argue that the EU neither claims sovereignty nor sovereign authority (II.). Second, I submit that the EU's claim should not be seen as part of international law's authority claims (III.). Instead, in my constructive interpretation, the EU ultimately addresses and binds the peoples of Europe (IV.). The EU, in short, claims authority over constitutional peoples.

II. Why The EU Does Not Claim Sovereign Authority

Sovereignty has served as *the* analytical lens of any political (primarily the state's) authority claim since the late Middle Ages. As the list at the end of Chapter 1 shows, various theorists – quite understandably – argue that some form of sovereignty best describes the EU's authority claim. Nonetheless, it is conceptually flawed to argue that the EU claims sovereign authority.

Before expanding on the reasons for this categorical rejection, I want to pause for a moment to focus on the last point. The EU does not *claim* sovereign authority. It literally

¹ I share the approach of Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2008) 3, namely that 'we cannot understand the x (...) by confining our study to the characteristics of the x'.

does not. No European institution *claims* that the European Union is sovereign in the sense of articulating such a strong authority claim. And whenever individual national and EU leaders claim ‘European sovereignty’ outside institutional processes, they use the notion either in an aspirational sense or in a political and informal sense.² In fact, they use it exclusively in relation to the wider world externally – carefully avoiding the profound effects a sovereign EU would have on the realm of authority of Member States.³ The same is true for the very few and very recent appearances of EU sovereignty in institutional documents.⁴ European sovereignty is thus a figure of speech, rather than a speech act.⁵ That means Walker betrays his own analysis of sovereignty as a claim, as a speech act, when he posits that the EU claims ‘late sovereignty’.⁶ Speech act theory tells us that words matter – ie that sovereignty is destined to convey a certain normative ideal entrenched in the tradition of political theory. Searle describes this as an ‘illocutionary act’, intending to

² Antoine Bailleux, ‘The Two Faces of European Sovereignty’ (2020) 2020 5 European Papers 303, 305. See eg Donald Tusk, ‘Keynote Speech’ (Opening Ceremony of the 2019/2020 Academic Year at the College of Europe, Bruges, 13 November 2019) <<https://www.consilium.europa.eu/en/press/press-releases/2019/11/13/keynote-speech-by-president-donald-tusk-at-the-opening-ceremony-of-the-2019-2020-academic-year-at-the-college-of-europe>> accessed 5 May 2021.: ‘sovereign Europe’. Angela Merkel, ‘Speech’ (Deutscher Arbeitgebertag 2019, Berlin, 12 November 2019) <<https://www.bundestkanzlerin.de/bkin-de/aktuelles/rede-von-bundestkanzlerin-merkel-zur-teilnahme-am-deutschen-arbeitgeber-tag-2019-am-12-november-2019-in-berlin-1691076>> accessed 5 May 2021.: digital sovereignty. Emmanuel Macron, ‘Initiative Pour l’Europe’ (Sorbonne, Paris, 26 September 2017) <<http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/>> accessed 5 May 2021.: ‘une Europe souveraine’.

³ See Thomas Verellen, ‘European Sovereignty Now? A Reflection on What It Means to Speak of “European Sovereignty”’ (2020) 5 European Papers 307, 316 et seq.

⁴ See, eg, Commission, Communication, Secure 5G deployment in the EU: Implementing the EU toolbox, 29.1.2020 (COM(2020) 50). European Council, Presidency Conclusions, Brussels, 2.10.2020, Nos. 6, 7.

⁵ Ségolène Barbou Des Places, ‘Taking the Language of “European Sovereignty” Seriously’ (2020) 5 European Papers 287, 292.

⁶ Neil Walker, ‘Late Sovereignty in the European Union’ in Neil Walker (ed), *Sovereignty in Transition* (Hart 2003) 19 et seqq.

achieve a change in the normative position of the addressee by the very speech act itself.⁷ In other words, part and parcel of what it means to have sovereign status as a polity is to claim sovereignty in the first place. The EU does not do that.

What are the other reasons against the use of sovereignty in relation to the EU's authority claim?

1. Authority and Political Power

One of the crucial points of contact between authority and sovereignty theory is political power. By political power, I mean the actual capacity of political institutions to enforce and impose compliance with the given laws (mainly through police and military). For two reasons, the EU's authority claim lacks an intricate relation to political power.

To start with, the state's monopoly of the legitimate use of force and its accompanying effective capacity to uphold the authority over its territory is built into the very concept of sovereignty. Both internally and externally, the state has the factual means to uphold its authority claim – ie to enforce compliance through, if need be, coercion. It disciplines recalcitrant citizens on the inside (using mainly the police) and holds off threats from external actors (using mainly the military). In other words, since states claim and aim to uphold public order, the effective operation of the monopoly of the legitimate use of force must be seen as part of their *de facto* authority, without which there can be no *legitimate* authority. Otherwise, the state wouldn't 'do its job' and would thus lose the

⁷ John Searle, *Speech Acts: An Essay in the Philosophy of Language* (CUP 1969) ch 2.

approval of the citizens.

The EU can't back up its authority claim with the threat to enforce its laws by the use of force. But it also doesn't claim the monopoly of legitimate force.⁸ It entirely lacks any element of political sovereignty.⁹ As we saw in Chapter 1, political power is intrinsically related to sovereignty, but political power is not a necessary element of authority claims as such. The EU's enforcement portfolio admittedly includes sanctions, such as the execution of its laws in national courts, as well as remedies for a failure to do so,¹⁰ financial sanctions (eg the imposition of fines in competition law, but see also Art. 260 TFEU), or even the loss of voting rights (Art. 7 (3) TEU). Since the purpose and mandate of the EU is not to maintain public order however (see Art. 72 TFEU), there is simply no need for a police unit to enforce the body of EU law 'on the street', ie outside law-administering authorities like courts and administrations. The *judicial* enforcement of the EU's legal norms suffices. The same is true externally: there is no EU army and the EU's normative architecture doesn't require one.¹¹ The lack of coercion should thus not be portrayed as deficiency of the EU. Without this basis in and link to political power, we

⁸ See only Erik Oddvar Eriksen, *The Normativity of the European Union* (Palgrave Macmillan 2014) 95. This obvious fact is often downplayed in authority related EU-US comparisons. Cf. only Robert Schütze, *European Constitutional Law* (2nd edn, CUP 2016) ch 2.

⁹ But cf. Gunnar Beck, 'The EU Constitution, Sovereignty and the Problem of Primacy' in Nicholas Barber, Maria Cahill and Richard Ekins (eds), *The Rise and Fall of the European Constitution* (Hart 2019) 158. He describes EU ultra-vires acts as manifestations of political sovereignty in a (Carl) Schmittian sense.

¹⁰ Consider also the recent establishment of European Public Prosecutors, to protect the EU's financial interests by prosecuting in national courts.

¹¹ Though it would, in my view, be compatible with an army that pays attention to the EU's theoretical *Gestalt*. See Josef Weinzierl, 'An Army of Peoples? A Democratic Perspective on a Future European Army' *European Papers* (forthcoming).

shouldn't express any jurisdictional or legal autonomy in terms of sovereignty.¹² In essence, the authority of the EU hinges on the respect for and efficacy of its 'community of law' alone.¹³ This crucial insight also applies in relation to the wider world. There, Bradford has recently described the 'Brussels-effect' – ie how the EU's regulatory standard have a global pull-effect and often demand compliance from third-states and private operators.¹⁴ In short, the EU's authority claim lacks any meaningful connection to political power, an intrinsic element of sovereignty.

The EU's institutional framework downplays another deep-seated element of sovereign authority, which becomes ever more prominent in institution-centred justifications of political authority on the state level. I refer to an open political debate about values, policies, and the fundamental coordinates of the respective society underlying the democratic state and its decision-making procedures. The EU differs in two important ways. First, in contrast to the state's *a priori* unconstrained competence to regulate any substantive area, the EU's competences are limited. The conceptual point is that the EU's debates about regulatory actions are constrained by the scope of EU law. Secondly, the 'integration through law'-paradigm in EU law tips the scale further away from politics (production) towards law (product). In Chapter 3, I explained in great detail the crucial differences between the law-making processes on the national and the supranational level.

¹² But see Christina Eckes, 'EU Autonomy: Jurisdictional Sovereignty by a Different Name?' (2020) 5 *European Papers* 319.

¹³ Neil Walker, 'The Place of European Law' in Gráinne De Búrca and Joseph Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012) 96; Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd ed., Hart/Beck 2010) 30.

¹⁴ Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020).

The EU is over-constitutionalised and under-politicised at a foundational level. The limited scope of EU law in combination with court-driven constitutionalisation of economically biased Treaties as well as individual rights to challenge national policy choices reached in the political arena bear ample proof. The substantial reconfiguration of political and legal elements changes the nature of the EU's authority claim.

Summing up, sovereignty combines the legal and the political in a special and highly balanced way. In contrast, the EU's authority claim lacks (for it does not need) the underlying political power associated with the monopoly of force as core element of sovereignty. The EU Treaties, moreover, do not allow for a substantively unconstrained political debate. These features in the configuration of law and politics mark a qualitative difference between the nature of sovereign state authority and EU authority.

Let's turn to the different conceptions of hierarchy between the EU and sovereign states next.

2. Of Distinct Hierarchies

Inquiries into the EU's authority claim rarely go beyond primacy, the ECJ's 'new legal order' dogma, and the relation to sovereignty. Here we see a similar trend to conceptualise primacy in terms of sovereignty. Only very recently, Verellen argued: 'In the EU, then, primacy can plausibly be reformulated as a weak claim to internal sovereignty'¹⁵. Let me

¹⁵ Thomas Verellen (n 3) 313. See also the discussion in See for example the discussion in Nicholas Barber, *The Constitutional State* (OUP 2010) ch 10; Nicholas Barber, *The Principles of Constitutionalism* (OUP 2018) 48.

briefly reiterate why I argued in Chapter 3 (Sections III.1.a., III.2.b.) that this is a misconception. I agree that primacy implies a demanding authority claim over the legal systems of the Member States. Besides the familiar conflict-model (sword), primacy encompasses both an autonomy-driven (shield), as well as an institutional component. Primacy, in essence, serves to protect the normative integrity of the EU legal order. Indeed, primacy serves as a *functional* equivalent to the *legal* component of sovereignty by representing the EU's version of how the legal orders interrelate.¹⁶ That does not, however, mean that the EU claims sovereignty – the same way that my riding a bicycle while my friend uses a Vespa to get to work does not mean we are using the *same* vehicle. The fact that the two tools fulfil similar functions does not make them identical. Limited functional equivalence does not necessarily imply the applicability of the same concept.¹⁷

Most importantly, sovereignty entails a hierarchy of norms that includes the capacity of higher norms to *invalidate* lower norms. By contrast, the primacy of EU law does not create such a hierarchy, since conflicting national law is (merely) declared inapplicable *in the scope of EU law*. For that reason, terminology like ‘legal monism’ is misguided, since it suggests such an unqualified top-down hierarchy on the EU level.¹⁸ Well beyond the important principle of conferral (Art. 5 TEU), no element of the EU's

¹⁶ I assume this is what Anne Peters, ‘Membership in the Global Constitutional Community’ in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 208 et seq. means in the external realm by ‘autonomy as a proxy for sovereignty’.

¹⁷ Similarly Christoph Möllers, ‘Pouvoir Constituant-Constitution-Constitutionalisation’ in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd ed., Hart/Beck 2010) 180.

¹⁸ In more detail Pavlos Eleftheriadis, *A Union of Peoples* (OUP 2020) ch 4. But see Mattias Kumm, ‘Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism’ in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 43 ff.

authority claim can be understood without the serious engagement and sometimes critical input from national institutions. The implication for our purposes is that EU law does not claim to be supreme in the sense of a sovereign hierarchy of norms.¹⁹

It is then mistaken to suggest that ‘the Union does claim to be the supreme authority within its territory’²⁰. The above qualifier *in the scope of EU law* makes plain that EU law does not constitute the highest law of the land in the EU territory. In contrast to national constitutions, EU law does not claim the right to determine or even extend to every single regulatory aspect that appears under God’s European sun. EU law has limits.²¹ The European Union has limits. True, hard red lines for the outer limits of the scope of EU law quickly fade when examined in their practical environment of functional competences, and the wide reach especially of negative integration. The recent feud between the ECJ and the BVerfG about policing the ECB’s competences provides an almost unnecessarily contentious example.²² The theoretical point remains, however: EU law has tangible limits and – unlike states – does not claim universal authority in its territory.²³ In essence, primacy represents a (limited) functional equivalent – but, crucially, a conceptual *aliud* to the legal component of sovereignty.

¹⁹ See also Julio Baquero Cruz, *What’s Left of the Law of Integration?: Decay and Resistance in European Union Law* (OUP 2018) 45. But cf. Walker (n 6) 21.

²⁰ Barber, *The Constitutional State* (n 15) 179.

²¹ Similarly Turkuler Isiksel, ‘Constitutionalism as Limitation and Licence’ in Tom Ginsburg, Mark D Rosen and Georg Vanberg (eds), *Constitutions in Times of Financial Crisis* (CUP 2019) 19 et seq. See also recent developments in the case law on purely internal situations, the very existence of which proves my point. Case C-497/12 *Gullotta* EU:C:2015:168, Opinion of AG Wahl, paras 30 et seqq.

²² On the one hand Case C-493/17 *Weiss* EU:C:2018:1000. On the other BVerfG, Judgment of 05 May 2020 - 2 BvR 859/15 (*Weiss*).

²³ Kaarlo Tuori, *European Constitutionalism* (CUP 2017) 319.

3. Membership and Territory beyond the State

The in-depth analysis of the preceding chapters served to discourage the temptation to conclude that because the EU has citizenship and its law claims primacy, *therefore* its authority claims can be likened to national sovereignty claims. That is the crux of the EU. Precisely because various notions for conceptualising the EU piggyback on and imitate their national counterparts (see introduction to Chapter 3), their usage invites confusion. The concepts sound familiar, but their content often is not.

There is no need to repeat the various findings related to the specific character of the EU's territorial and membership-related notions. Two reflections may suffice. First, we saw that EU membership for citizens does not amount to an exclusive political relationship that grants essential rights in and against the supranational polity itself, and imposes heavy burdens on the subject. The EU does not constrain individual autonomy as such. Instead, it mostly grants rights against other states and against your home state. Second, remember the discussion about *secession* – the prevention of which constitutes one paradigmatic manifestation of the territory- and membership-related aspects of state sovereignty.²⁴ Things could not be more different in the EU. As explained in Chapter 4, any Member State has an absolute and unconditional right to leave the EU according to Art. 50 TEU, which corroborates their sovereign status. The EU's lack of control over its members (and

²⁴ For a famous judicial treatment see Canadian Supreme Court, Reference re Secession of Quebec, [1998] 2 SCR 217, 1998 CanLII 793. For a philosophical study see David Lefkowitz, 'On the Foundation of Rights to Political Self-Determination: Secession, Nonintervention, and Democratic Governance' (2008) 39 Journal of Social Philosophy 492.

consequently over its territory) excludes the attribution of sovereignty.²⁵ While leaving the EU is never easy – the messy business of Brexit testifies to that – the conceptual point remains: it is possible.

So, the EU doesn't claim sovereign authority. A final step is missing, however. Students of EU federalism are aware that the remarkable development of the EU revived the old idea of divided sovereignty.²⁶ I want to conclude by offering my scepticism about describing the EU's authority claim in terms of divided sovereignty.

4. Some Doubts about Divided Sovereignty

What does divided sovereignty mean? Unsurprisingly, this notion proves almost as elusive as sovereignty itself.²⁷ As a lowest common denominator, divided sovereignty must allow each composite entity of a federal polity to claim and exercise (!) ultimate authority within its sphere of competences. Political theorists are overwhelmingly sceptical about the very possibility of divided sovereignty, because ultimate authority denotes a sense of hierarchy that only leaves room for one sovereign on a given territory.²⁸ I share this scepticism, since

²⁵ But cf. Jean-Victor Louis, *The Community Legal Order* (2nd ed, EC Official Publications 1993) 14.

²⁶ John Temple-Lang, 'Chapter VII - The Draft Treaty Establishing the European Union and the Member States: Ireland' in Roland Bieber, Jean-Paul Jacqué and Joseph Weiler (eds), *An Ever Closer Union: A Critical Analysis of the Draft Treaty Establishing the European Union* (Office for Official Publications of the European Communities; European University Institute 1985) 247.: 'Sovereignty is a bundle of powers, and so it is divisible. In the Community it is divided between the MS and the Community itself.'

²⁷ For an overview see Daniela Obradovic, 'Community Law and the Doctrine of Divisible Sovereignty' (1993) 20 *Legal Issues of Economic Integration* 1.

²⁸ For a summary of the arguments see Stefan Oeter, 'Federalism and Democracy' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd ed, Hart/Beck 2009) 63 et seqq.

the framework of this thesis understands sovereignty as the state's comprehensive claim to ultimate authority over a given territory and the accompanying powers and efforts to make good on that claim (Chapter 1, Section V.1.a.).

Even if – for the sake of argument – one accepts the general possibility of divided sovereignty, the EU's idiosyncratic normative architecture escapes its conceptual realm.²⁹ First, consider speech act theory (already consulted above), where many have pointed out that not even the ECJ claimed divided sovereignty between the Member States and the EU.³⁰ The Court in *van Gend* and *Costa* declared a 'limitation of sovereign rights' or a 'limitation of sovereignty', as well as a 'transfer of powers', but not a 'transfer of sovereignty' to the then Community. The terminological difference is important and often ignored.³¹ But the Court thereby implicitly acknowledges that not even the far reaching 'new legal order' amounts to a divided sovereignty claim.

Second, the concept of divided sovereignty – as its earliest defender Waitz explained in relation to the 19th century German *Reich* – limits the *scope* but not the *content* of each level's sovereignty.³² It requires a true *Bundesstaat* – ie that neither of the regulatory levels, which supposedly divide sovereignty between them, can depend on the institutions or even funding of the other level; and that – ultimately – the citizen stands in the same relationship to each divided sovereign. As the preceding chapters show, none of

²⁹ Similarly, though for different reasons Obradovic (n 27) 10–14, 17; Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press 2015) ch 5.

³⁰ See only Jan Willem van Rossem, 'The Autonomy of EU Law: More Is Less?' in Ramses Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence* (TMC Asser Press 2013) n 59.

³¹ For example Louis (n 25) 11 et seqq; Obradovic (n 27) 7; Grimm (n 29) 113.

³² Georg Waitz, 'Das Wesen Des Bundesstaats', *Grundzüge der Politik* (Homann 1862) 166 et seqq.

this applies to the EU, whose capacity to rely on national institutions to enforce its law, combined with the absence of the use of force to do so itself define its authority claim. And so does the qualitatively different relationship a citizen has to their home state on the one hand, and to the EU on the other.

Again, the theoretical leap from observing institutional expressions of a composite architecture of political authority in a non-unitary polity, to concluding that it *therefore* constitutes an instance of divided sovereignty is a leap too far. I thus find it hard to understand why Schütze insists on positioning the EU in the tradition of divided sovereignty, since that only undermines his admirable attempt to take the specific federalism of the EU out of its historical straitjacket of sovereignty.³³ The EU's authority claim, in my view, is no manifestation of divided sovereignty.

5. Interim Conclusion

To portray the EU's authority claim in terms of sovereignty has no explanatory value. It either misrepresents the content of the EU's authority claim, or the concept of (divided) sovereignty beyond recognition.³⁴ Put differently, such attempts suffer from the mimetic bias to seek at the supranational level what it seems to take away from the national level.³⁵

³³ Schütze (n 8) 73.

³⁴ Similarly Antoine Bailleur (n 2) 303 et seq. For a recent example of the latter see Matej Avbelj, 'A Sovereign Europe as a Future of Sovereignty' (2020) 5 *European Papers* 299. See, generally, for an urge to avoid these fallacies in political theory, Joseph Lacey, 'Conceptually Mapping the European Union: A Demoi-Cratic Analysis' (2016) 38 *Journal of European Integration* 61, 62.

³⁵ For an identical conclusion regarding the no-demos thesis Francis Cheneval and Kalypso Nicolaidis, 'The Social Construction of Democracy in the European Union' (2017) 16 *European Journal of Political Theory* 235, 238.

It follows that the helpful analysis of sovereignty as a communicative framework for statist political authority is not distorted if we accept that the EU's supranational authority claim participates in this representation and communication, while it cannot and should not be subsumed under the conceptual heading of sovereignty. It helps analytical clarity a great deal to disassociate sovereignty from authority claims on other regulatory levels.

Let me move on to explain what distinguishes the EU's authority claim from international authority.

III. Why the EU does not Claim International Authority

Recently, the solidification of international law urged scholars to question the assumption that political relationships above the state level represent a system of anarchy.³⁶ As Part I shows throughout, more and more literature studies international law from the perspective of political authority. Do I make things more complicated than they actually are? Does the EU not simply constitute an – albeit sophisticated – international organisation, which situates its authority comfortably in the international realm? My aim from the outset was to depart from what the EU claims and does in practice, rather than from familiar labels such as international/constitutional/(con-)federal in interpreting the EU's authority claim. And the conceptual lens I chose to study authority claims enables me to point to important differences between international authority claims and what the EU claims.

³⁶ David A Lake, 'Rightful Rules: Authority, Order, and the Foundations of Global Governance' (2010) 54 *International Studies Quarterly* 587, 587.

1. On Mandates and Means of Authority

EU law and international law differ in the degree of exclusiveness of their mandate. International law is creatively fractured. It consists of a plethora of individual organisations which often overlap in their mandate. Take the well-known example of international trade, where the WTO, the OECD, and many regional and bilateral trade agreements plough through the field side by side. For that reason, Sand rightly doubts whether international law as a whole is capable of being justified by recourse to one single normative standard.³⁷ Compare that to the ‘autonomy of EU law’, which defines EU law as a self-sufficient normative framework, excluding unilateral alterations by other legal regimes, be they national or international (Chapter 3). Neither Member States nor other international organisations may legitimately act within the scope of EU law. Since we already saw above how the notion *scope of EU law* confirms the limited, non-sovereign character of the EU’s architecture, we see now that it actually helps to distinguish the EU’s authority claim from both state sovereignty and international authority.

The polity-formation via membership contributes moreover to a non-fragmented, coherent political community. The complex web of citizen, state, and people as ‘members’ distinguishes the EU from international organisations (Chapter 4). There is no such political community in any meaningful sense in an international organisation. In addition, the difference between being inside and outside the EU is striking. As I explain in more detail elsewhere, it has a huge normative impact that leads to a distinct understanding of

³⁷ Inger-Johanne Sand, ‘Varieties of Authority in International Law’ in Patrick Capps and Henrik Palmer Olsen (eds), *Legal Authority Beyond the State* (CUP 2018) 169.

territoriality.³⁸ One fundamental difference between international organisations and the EU is that the latter has a place, and differentiates between insiders and outsiders. This highlights a qualitative difference in the political bonds among the members of the EU that will play an important role in searching for the normative basis of the EU's authority in Part III.

Recall, finally, the means to exercise authority discussed in Chapter 1. The exercise of political authority through binding and enforceable law remains, in international law, the exception to the rule. Most of the rules on the international level are soft-law, such as commitments and standards, and international law's compliance mechanisms are often legally non-binding.³⁹ Even some of the most sophisticated international legal authorities, like the WTO, do not have an independent standing judiciary and must have recourse to exclusively international enforcement mechanisms.⁴⁰ Importantly for theories of authority, international law does not impose the same or even a similar type of duty on those it addresses (in my view, states). The discussion in Chapter 2 showed that the moral duties international law imposes on state officials come in various forms, such as obedience, respect, deference and rebuttal – all of which differ conceptually from a citizen's political obligation.⁴¹

³⁸ Josef Weinzierl, 'Territoriality beyond the State: The EU's Territorial Claims and the Search for Their Legitimacy' 22(4) *German Law Journal* (forthcoming).

³⁹ See in more detail Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010) 108 et seqq.

⁴⁰ Those who do, such as the ICJ or the ICC, depend on the actual and continuous consent of the concerned Member State. For a discussion of the authority of the WTO cf. Lake (n 36) 602 et seqq.

⁴¹ Similarly Andreas Follesdal, 'The Legitimate Authority of International Courts and Its Limits' in Patrick Capps and Henrik Palmer Olsen (eds), *Legal Authority beyond the State* (CUP 2018) 192.

In contrast to these variegated institutions, the authority of the EU is not only based on law but also exercised and enforced through law. The EU's authority claim marks a qualitative and quantitative difference, even to instances where international institutions emancipate themselves from their original mandate and claim a certain authority over its founders.⁴² As explained in Chapter 3, this results from the combination of the following features: (i) the enforcement of EU law on the national level by national (!) courts, (ii) the supranationalisation of decision-making powers traditionally left to states (the status of EU law and its invocability), and (iii) the breath and scope of EU law.

In addition to these characteristics, EU law presents itself as a 'seamless-web' invocable by individuals in national courts so that EU law imposes a different kind of duty compared to international law. The EU puts national legal orders in the service of EU law as it expects them to adapt, not only the handling of entrenched legal concepts – such as limitation periods and remedies for breach of contract – but also their individual legal cultures as a whole and, indeed, their constitutions.⁴³ Any legal and moral duties stemming from these features relate to the EU in its entirety. The EU accordingly maintains a coherent and complete set of law-administering institutions, rather than a narrow, functional, and non-exclusive mandate on the international plane. These elements corroborate the qualitative difference in scope and force between the authority claims of international

⁴² Mikael Madsen, 'Bolstering Authority by Enhancing Communication : How Checks and Balances and Feedback Loops Can Strengthen the Authority of the European Court of Human Rights' in Joana Mendes and Ingo Venzke (eds), *Who Should do What in European and International Law?* (Hart 2018).

⁴³ Eriksen (n 8) 90 et seqq. But cf. Eleftheriadis (n 18) 80: 'There is nothing strange in the process of adjusting domestic law in order to accommodate international obligations. (...). The same problem arises in the European Union'.

organisations and the EU.

These reflections explain why I reject Tasioulas' argument according to which the fact that international law is law means that it enjoys the same legitimacy as national law (since any law claims the same authority by virtue of its nature, by virtue of being law).⁴⁴ I accept the premise that international law is law, but not the conclusion. The reason I distinguish between the authority claim of the state, of international law, and of the EU is not only analytical clarity. Authority is, both etymologically (from the Latin origin *auctoritas*: 'author'), and in terms of its legitimacy inseparable from its respective author and institutional legal system. Political authority is concerned with the status of the respective legal regime in its entirety, which – *pace* Tasioulas – is not 'invariable'. Otherwise the *Codex Juris Canonici* (the law of the Catholic Church), or any national sports federation's statutes *qua* law, would enjoy the same status and legitimate authority as any national criminal law code: because they are law. The idea that law *qua* law necessarily claims the same authority/legitimacy would moreover leave no room for the conflicting authority claims in Europe since the claims on both levels are based on law. No-one argues that the mutually incompatible claims of the ECJ on the one hand, and the national constitutional courts on the other, rely on identical legitimation strategies because they are law-based. I consider it one of the core maxims of this thesis that just as the nature of authority claimed and exercised differs on various levels, so does the appropriate standard for its normative legitimacy.

⁴⁴ John Tasioulas, 'The Legitimacy of International Law' in John Tasioulas and Samantha Besson (eds), *The Philosophy of International Law* (OUP 2010) pt I.

Recent scholarly emphasis on the relational character of authority – ie its expression of a distinct normative relationship between authority and subject, reveals yet another distinguishing factor between the EU’s and international authority claim: the main addressee.

2. Identifying the Addressee

A crucial part of understanding authority claims on different regulatory levels is identifying their main addressee. There is no doubt that the overwhelming majority of international law scholarship as well as the practice of international law works under the background assumption that international law is law among (‘inter’) nations (‘national’) – ie among states.⁴⁵ While I agree that international law addresses and obligates states, this view is not accepted by everyone.

Besson’s rich account of international authority urges us to ‘lift the state veil’ and realise that individual citizens are self-standing subjects of international law. In her view, individuals constitute the ultimate reference points for duties on states who would merely represent these individuals. In my understanding, her argument is that (i) a service conception of authority presupposes a valuable autonomy of the agent whom the authority claim addresses, (ii) this autonomy is unique to human individuals and not applicable to state sovereignty/autonomy, and (iii) it follows that international law ultimately binds state officials as proxy subjects of their autonomous citizens, not as self-standing subjects of

⁴⁵ See only Thomas Christiano, ‘The Legitimacy of International Institutions’ in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (1st edn, Routledge 2012) 380.

international law.⁴⁶

I find it difficult to accept any of the steps of this argument. As will become clearer in Chapter 7, despite Raz's impressive intellectual achievement of providing a universal account of theoretical and practical authority, the service conception is most vulnerable when explaining authority in the public realm.⁴⁷ That renders it a problematic candidate to assess international authority in the first place. While I agree that individual autonomy is conceptually as well as morally distinct from state sovereignty, the moral intuition underlying this distinction reinforces the point that authority over individuals cannot be explained by the same structure as authority over states. It seems to overshoot the mark to posit that the state's autonomy has no independent, even instrumental value and needs thus to be erased from the equation and give way to the individual citizen. Finally, I cannot see how – as a general rule – international law binds states only as proxy subjects. For example, international tribunals do not usually grant legal standing to individuals, but only solve disputes between states, because – in general – they do not exercise authority over individuals. I believe that Besson's example of the duty to prevent genocide is not representative for international law and its authority claim, but constitutes an exception.⁴⁸ Finally, I have difficulty in understanding how the mere transposition of international law into domestic law, as well as the fact that contributions to international organisations bind

⁴⁶ Samantha Besson, 'The Authority of International Law: Lifting the State Veil' (2009) 31 *Sydney Law Review* 343, 364. More concisely also in Samantha Besson, 'Sovereignty, International Law and Democracy' (2011) 22 *European Journal of International Law* 373.

⁴⁷ Especially because it has nothing to say on the role and value of institutions. See Andrei Marmor, 'The Dilemma of Authority' (2011) 2 *Jurisprudence* 121, 133.

⁴⁸ See only, relatedly, James Bacchus, 'A Few Thoughts on Legitimacy, Democracy, and the WTO' (2004) 7 *Journal of International Economic Law* 667, 669.

resources affect ‘the balance of a citizen’s reasoning’.⁴⁹ In other words, it seems to have little basis in social reality to legitimise a duty of individuals to obey international law, if international law for the most part does not obligate individuals.⁵⁰ International law obligates states. The few cases where it imposes direct duties on individuals cannot be the benchmarks for its authority.

Since this chapter is not about providing a self-standing account of international authority, let this suffice to indicate my scepticism about giving up the traditional focus of international law on states as agents distinct from the represented citizens. It would, nonetheless, be a mistake to think of this as an infant disease – a flaw that has to be overcome. The authority of international law differs from national (and in my view the EU’s) authority because it serves a different function, addresses different problems, and contributes to the international society in a valuable and distinct way.

The remainder of this chapter identifies the constitutional peoples as the addressees of the EU’s authority claim and integrates this argument into a constructive interpretation of this claim. Before that, let me summarise.

3. Interim Conclusion

In its central case, international law’s primary subjects are states, not individual humans. It is organised in a fragmented web of international organisations with purely functional,

⁴⁹ But cf. Besson (n 46) 364.

⁵⁰ Başak Cali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (OUP 2015) 44 et seq. explains why political philosophers tend to focus on individual autonomy in discussions of international law.

often overlapping mandates. Moreover, international organisations overwhelmingly do not use enforceable legal norms, but resort to soft law and persuasion rather than authority. I am not saying there are no exceptions, only that these cannot underwrite an account of the legitimate authority of international law.

The EU, in contrast, addresses both states and citizens directly, and it does so with binding laws that are enforced in a curious mix of national and supranational institutional cooperation. Notions of membership and territoriality construct an inside-outside distinction mostly irrelevant in international organisations. Finally, the autonomy of its legal system claims a normative self-determination towards both national and international law that is alien to international law. The EU's authority claim, in sum, differs qualitatively from international law. In short, 'International Law can neither explain nor legitimate the reality of Community life'⁵¹.

I have so far outlined in some detail what the EU does in authority terms, and have distinguished it from sovereignty and international authority. In the remainder of this chapter, I will provide my constructive interpretation of the EU's authority claim as 'Authority claim over peoples'. I will also offer an explanation of the relationship between peoples, citizens, and state officials in the EU's normative architecture, and explain whom the EU's authority claim addresses: the constitutional peoples of Europe.

Before doing that, this seems a good place to remember the sceptics of Chapter 1,

⁵¹ Joseph Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration* (CUP 1999) 336.

according to whom the nature of the constitutional state makes authority beyond the state a theoretical impossibility. According to writers from Loughlin to Majone, sovereignty and political authority are both confined to the national level, while the EU constitutes a form of non-authority related joint government. For them, the EU and international law in general lack the capacity for political authority. Consequently, the constitutional state remains the sole repository of authority in the public domain.

The inquiry over the last chapters suggests that these views are mistaken. I agree with Wilkinson that they misrepresent the normative reality by downplaying the transformations brought about by and in the EU.⁵² I have the evidence of the previous chapters to show what the EU demands from its members, and how that amounts to a distinct authority claim. To deny that, you would not only have to portray the institutional arrangements in the EU as mere quantitative – not qualitative – difference to international law (re Chapter 3), and reject that the concept of membership has any meaning apart from the relationship between the EU and the Member State institutions (re Chapter 4). It would also require you to downplay the transformational effect of autonomy, primacy, and direct effect as structural principles of how EU law relates to other legal regimes, as well as to argue that the scope and breath of EU law don't alter the nature of the EU's authority claim.

The language of authority is appropriate because the authority exercised through EU law involves the claim to moral rightfulness. This claim demands a form of political

⁵² Michael Wilkinson, 'Constitutional Pluralism: Chronicle of a Death Foretold?' (2017) 23 *European Law Journal* 213, 222 et seq.

obligation – ie moral duty to obey, on the part of the various addressees.⁵³ By avoiding the language of authority, we would ignore the questions this raises for the legitimate authority of the EU. We could do that, but I think we shouldn't.

IV. An Authority Claim over Peoples

Long gone is the overall rather short period when the relationship between state and citizen constituted the only meaningful political bond. Of course, on the national level, we are still subject to the state's authority as an individual citizen and, simultaneously, as member of the respective national people.

In addition to ever-expanding international law, however, the emerging picture in present-day Europe represents a complex matrix of vertical, horizontal, and diagonal relations among a variety of actors (recall the figure in Chapter 4). The EU does not address individuals as unmediated members of the EU polity, because there is no single European demos (in the sense explained in Chapter 4).⁵⁴ Instead, the EU's supranational authority claim essentially hovers between national and international authority.⁵⁵ In my view, the best way to construct the EU's authority claim is in relation to the peoples of Europe as ultimate addressees. They remain distinct, but open up their communities to accept European standards of legality instead of their idiosyncratic national ones, they mutually recognise each other's policy choices and together form part of this supranational and

⁵³ Similarly Eriksen (n 8) 87. More in Chapter 8, sec. IV.

⁵⁴ And there most likely never will be. Christoph Möllers, 'Constitutional State of the European Union' in Robert Schütze (ed), *Globalisation and Governance: International Problems, European Solutions* (CUP 2018) 245 et seq.

⁵⁵ Similarly Walker (n 13) 60.

transnational institutional framework. Put differently, the supranational authority claim is the result of the commitment of the peoples of the EU to collaborate at the EU level. The EU claims a right to rule over the peoples of Europe as such, as well as in their more day-to-day manifestations and roles as citizens and Member State institutions/officials.

We will only be able to fully grasp this dual role of the peoples as source and subjects of the EU's authority at the end of Chapter 8. In what follows here, I use the findings of Part II to explain the role of the European peoples as ultimate addressees of the EU's authority. It starts by focusing on the underlying value that the EU's authority claim affects.

1. The EU's Authority Claim and Popular Self-Determination

Claims are relational. Authority implies a claim right directed at addressees whose autonomy it affects by changing their normative situation (Chapter 1). It is essential, therefore, to identify the correct subject/addressee, which underscores the central notion of membership in a political community once more.⁵⁶

Individual autonomy has hitherto constituted the starting point of any political authority discussion, simply because theories of authority focused exclusively on the state.⁵⁷ 'Individual autonomy' means the equal moral value of every human being,

⁵⁶ The *pouvoir constitué* is usually coextensive with the citizenry, Francis Cheneval, *The Government Of The Peoples: On The Idea And Principles Of Multilateral Democracy* (Palgrave Macmillan 2011) 76 et seq.

⁵⁷ See only Robert Paul Wolff, 'The Conflict between Authority and Autonomy' in Joseph Raz (ed), *Authority* (Blackwell 1990) 25 et seqq.

expressed by the capacity to be free and accept responsibility for one's actions.⁵⁸ In that context, theories of authority attempt to evaluate the compatibility of individual autonomy with the state's authority.

Notice how state sovereignty seems to play an equivalent role as foundational value of theories of international authority. State sovereignty almost seems an end in itself, comparable to individual autonomy. Sovereign states, however, cannot have any moral value which is entirely independent of the human beings they represent and whose wellbeing and security is in their hands.⁵⁹ In a sense, sovereignty occupies a hinge function between national and international authority. It represents the autonomy of the state in relation to international law at the same time as it represents the state's authority claim over its citizens. That is no paradox, but the manifestation of the idea that the state claims independence from external authority and interference *in order to* be the sole actor to exercise internal authority over its citizens and be responsible for them. As I argued above, that is not to say that states cannot have moral value at all, or that the value of sovereign self-determination is inept to influence political authority discussions. That would be to throw out the baby with the bathwater. But the value of state sovereignty is derivative and thus morally less weighty than individual autonomy, which matches our moral intuition of the different quality of national and international authority.

Chapter 4 suggested that distilling the ultimate addressee of the EU's authority

⁵⁸ *ibid* 26.

⁵⁹ In more detail Carmen E Pavel, 'The International Rule of Law' (2020) 23 *Critical Review of International Social and Political Philosophy* 332.

claim is rather complicated. Because of the role of Member State institutions and EU citizens in the EU's governance, individual autonomy as well as state sovereignty are potential values which the EU's authority claim affects. Instead of viewing the duality of subjects (state institutions/officials and citizens) as separate addressees, I argue that the EU ultimately addresses the *peoples of Europe* as underlying entities. Properly understood, the EU constrains the self-determination of the constitutional peoples of Europe, which has distinct (but secondary) effects on individual autonomy and state sovereignty. Conversely, what should be protected from illegitimate EU interference is not state sovereignty per se, but the constitutional space and the collective freedom of a constitutional people to organise themselves. The peoples are entitled to self-rule by virtue of setting up the state as the institutional refugium to self-determine their affairs in the first place. How is this different from focusing on individual autonomy and state sovereignty?

An exclusive focus on the individual citizen and their autonomy misrepresents the normative and social reality in the EU. This view is not uncommon, however. For example, von Bogdandy argues that '(i)t is theoretically more convincing to conceive only the individuals, which are national as well as Union citizens, as the sole subjects of legitimacy'⁶⁰. Similarly, Somek's search for the hypothetical EU citizen who is envisaged by and would consent to the EU's authority presupposes that the EU's authority claim addresses the citizen and their individual autonomy in the first place.⁶¹ Admittedly, *van Gend* made the fact that EU law imposes rights and duties on EU citizens clear very early on. EU citizenship also involves legal and moral duties, as we saw in Chapter 4. But these

⁶⁰ But cf. Bogdandy (n 13) 43 et seqq., 49.

⁶¹ Alexander Somek, *Individualism: An Essay on the Authority of the European Union* (OUP 2008).

duties only distinguish the EU from a vast array of international law. In fact, EU law purports to vindicate the very shortcomings scholars have identified to deny any authority to international law, viz. the lack of influence of individuals in international law-making as well as the lack of enforcement.⁶² Whereas on the national level one is usually subject to the state's authority as an individual citizen, this is not the case in the EU. The derivative nature of EU citizenship and its mostly transnational effects for integrating into host states testifies to that. A state, for example, tells you not to build a house without permission, to pay income tax, or not to trespass on someone else's property. All of that affects your autonomy as a citizen. The EU, by contrast, tells you not to discriminate against other EU citizens or regulates the terms of doing business. The EAW illustrates this regulatory effect. EU law here 'merely' facilitates the conditions of surrendering EU citizens to another Member State. It has nothing to do with the criminal law procedure and the substance of any crime. The latter is still regulated by the Member States as part of their authority claim that stands in tension with individual autonomy. EU law, by contrast, mostly addresses individuals as a member of their people that is collectively constrained by these rules (notice how we teach EU law. We speak about Italian traders, Belgian companies, Polish families, because the interrelationship of these individuals as members of different peoples matters). Hence, proclaiming the European courts' judgments 'in the name of the Citizens of the European Union'⁶³ would pretend a single source of authority that neither reflects social reality nor the normative architecture of the current EU. The EU imposes duties on

⁶² Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005) 193 et seqq. For a critical discussion of their work see Cali (n 50) 42 et seqq.

⁶³ Stephan Wernicke, 'Au Nom de Qui? The European Court of Justice between Member States, Civil Society and Union Citizens' (2007) 13 *European Law Journal* 380, 407.

EU citizens as representatives and members of the collective people.

Conversely, an exclusive focus on state sovereignty as value affected by the EU's authority would be insufficient. The EU of course imposes most duties on Member State institutions and their officials. EU membership entails many primary and secondary (remedial) duties for Member States in relation to the enforcement of EU law and the required adaptations to national law.⁶⁴ But a focus on state sovereignty cannot account for the duties on EU citizens discussed above. While the continued existence of states is a precondition for the continuation of the EU as it stands, EU membership transforms state institutions by integrating them in supranational governance structures which ensure the national implementation and trans- as well as supranational policing of EU law. EU law curtails states' unilateral choices by withdrawing certain pivotal decisions about the effect of 'foreign' law from their authority as well as obliging them to justify their way of governing their territory (eg derogations from fundamental freedoms). At its core, the EU is designed to bind its Member States by subjecting them to binding rules in relation to each other and by giving them a common (not always single) voice in international relations. To do so, the EU goes beyond constraining state sovereignty alone and involves citizens and peoples more directly.

Both Member States institutions and EU citizens are thus subject to a supranational authority in a bounded political community.⁶⁵ We can only understand these combined

⁶⁴ Paul Craig, 'EU Membership: Formal and Substantive Dimensions' 22 *Cambridge Yearbook of European Legal Studies* 1, 6 et seqq.

⁶⁵ Which, in turn, 'strong cosmopolitanists' – who see in the EU but a regional extension of morally questionable borders at the state level – criticise. Cf. Menno R Kamminga, 'Cosmopolitan Europe? Cosmopolitan Justice against EU-Centredness' (2017) 10 *Ethics & Global Politics* 1.

effects on individual autonomy and state sovereignty by focusing on self-determined peoples at the core of the EU's authority regime. The EU is neither a community of states nor of citizens alone, but a community of constitutional peoples. As we saw in Chapter 4, they act themselves whenever the very roots of EU integration are affected, viz. its core architecture, composition and future.

It follows that the value affected by the EU's authority claim is ultimately the autonomy or self-determination of the individual peoples. This impact on popular self-determination manifests itself legally through powers (eg to determine their own powers, join and exit organisations beyond the state etc.) and corresponding immunities not to have these powers removed against their will.⁶⁶ As shown in Chapter 4, the distinct provisions on EU membership in national constitutions reflects EU law's impact on self-determination as well. Far beyond explicit adaptations of constitutional law, however, the EU's authority claim affects how the national peoples constitute and govern themselves as a result of their mutual integration in the EU.⁶⁷ Morally, the value of popular sovereignty manifests itself in a collective right to non-domination, which I will explain in Chapter 8. Popular sovereignty as a right to non-domination allows for binding laws and an institutional framework beyond the state precisely in order to protect collective autonomy in an interdependent world. For present purposes, the important take away is that the EU addresses both citizens and state institutions/officials, as well as their respective autonomy

⁶⁶ Francis Cheneval, 'Democratic Self-Government in the European Union's Polycentric System: Theoretical Remarks' in Josephine van Zeben and Ana Bobić (eds), *Polycentricity in the European Union* (CUP 2019) 54 et seqq.

⁶⁷ Similarly Signe Larsen, *The Constitutional Theory of the Federation and the European Union* (OUP 2021) 21 et seq.

and sovereignty only on a secondary level – namely as members and representatives/agents of constitutional peoples.

To summarise, only state authority relates directly to an individual citizen. The core tension that interests theories of state authority exists between individual autonomy and state law – ie the collective decisions of the people. By contrast, the EU claims authority as a direct relation to a constitutional people as a collective. Here, the core tension exists between collective autonomy (popular sovereignty) of one people and collective decisions of several peoples on the EU level. That manifests a different *conception* of authority, which nonetheless fits within the *concept* of authority. Let me put the distinction in a chart, illustrating the individual regulatory levels and the main agents and values these respective authority claims affect.

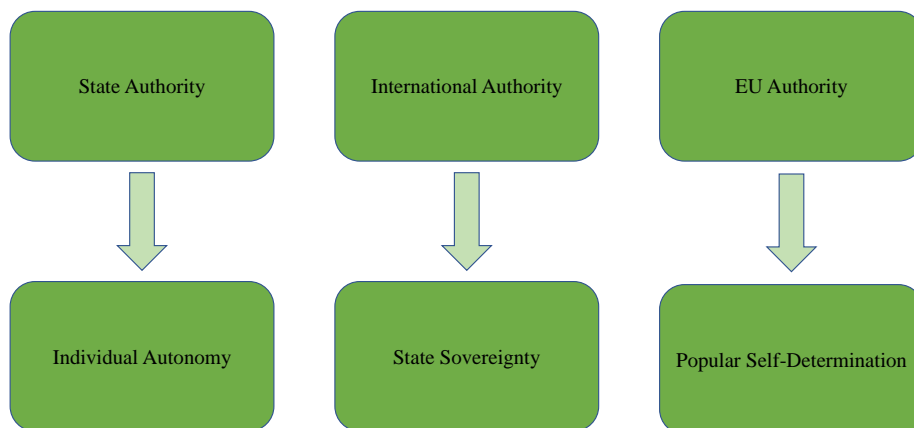


Figure 11: Authority and Autonomy on Different Regulatory Levels

2. Why the Peoples

It follows from the above that the EU's constitutional peoples as constituted in Member States are the ultimate addressee of the EU's authority claim. To sharpen my argument, let me clarify what distinguishes the focus on peoples from the focus on (Member) States and state sovereignty.

To begin with, the focus on peoples enables to explain the involvement of the EU citizen that we have seen in Chapter 4 in the EU's normative architecture. As Papadopoulou notes:

European citizens are referred to as a source of EU legitimacy neither as an integrated European people nor as individuals, but rather as citizens organized in peoples⁶⁸

Indeed, each individual people remains constituted in and as separate states, which through their institutions play a vital role in the EU's governance. But the focus on peoples enlarges the theoretical toolbox for the idea that the peoples jointly author a supranational arrangement that is conceptually distinct, but not independent from the states they each make up separately.⁶⁹ I don't understand the EU as a union derivative of *states* with no direct normative relationship to the constitutional peoples and their citizens. Instead, the EU complements states, which are themselves but an instrument for the self-determination

⁶⁸ Lina Papadopoulou, "All Good Things Come in Threes": From a Double to a Triple Democratic Legitimacy of the European Union' in Lina Papadopoulou, Ingolf Pernice and Joseph Weiler (eds), *Legitimacy Issues of the European Union in the Face of Crisis* (Hart/Nomos 2017) 87.

⁶⁹ Cheneval and Nicolaidis (n 35) 236 et seq. Cheneval (n 56) 58.

of an individual people.

Next, the focus on peoples reflects that the EU affects self-determination at a deeper level and is more demanding compared to international organisations. On the one hand, the focus on peoples takes into account that the EU impacts on the agency and autonomy of citizens at all compared to international organisations. On the other, Member State-centred, international approaches to the EU put the people in the back seat. As *pouvoir constitué* of the Member State, the demos then plays no active role. Legitimation from Member States' executive representatives alone would be sufficient. By contrast, emphasising 'the people' as *pouvoir constituant*, as authors of their political community, conceptualises the state as secondary: as agent of the self-determined people. An independent role for the European peoples makes intelligible how they normatively underpin the EU polity. A more direct involvement of the peoples allows the EU in principle to exercise authority that differs qualitatively from other international organisations. This is very important in reflecting on the moral basis for the EU's authority in Part III.

This ultimate focus on the separate constitutional peoples as addressees of the EU's authority claim results from a constructive interpretation of the EU's authority claim based on the findings of the last two chapters in relation to the EU's normative architecture. The focus on peoples and the comparison with states and international organisations puts the people in the driver's seat. It thereby (re-)conceptualises how the individual entities (citizens, state officials, peoples) relate to each other in a theoretically coherent framework. In other words, the well-rehearsed duality between states and citizens as distinct subjects of the EU only makes sense when seen as joint proxies for the underpinning constituting

entities: the individual European peoples.⁷⁰ A constitutional people manifests itself in social and political reality mainly as citizens and state officials. But those individual legal obligations of the Member States and EU citizens reflect a commitment of their underlying constitutional people. While the respective obligations of citizens and state officials to obey the law might differ in moral force, they still emanate from the participation of their people in the EU as a political community.

There will of course be tensions between the interests of Member States and EU citizens. Not only in virtue of the vertical configuration of individual rights and duties between the national and the supranational level,⁷¹ but also in relation to the powers of citizen and state representatives in different EU institutions. The 2019 EP election and the ensuing search for the highest representatives of the EU demonstrated some of these horizontal tensions, to say the least. Nonetheless, the emerging discourse between the groups in the EP and the European Council ever more openly reflected the balancing of interests between political families, regional representation, and individual Member States.⁷² The same is true for the inter-institutional deliberations about the economic package to combat the COVID 19-crisis. Such a discourse reflects the competition between the interests of an independent *demos* (national leaders in the European Council) and

⁷⁰ Similarly Case C-105/03 *Pupino* EU:C:2004:712, Opinion of AG Kokott, para 26. For a discussion of the theoretical interrelationship of both see Jelena Von Achenbach, 'Verfassungswandel durch Selbstorganisation: Trilogie im europäischen Gesetzgebungsverfahren' (2016) 55 *Der Staat* 1, 416.

⁷¹ Nicole Bolleyer and Christine Reh, 'EU Legitimacy Revisited: The Normative Foundations of a Multilevel Polity' (2012) 19 *Journal of European Public Policy* 472, 479.

⁷² See Mark Dawson, 'The Lost Spitzenkandidaten and the Future of European Democracy' (2019) 26 *Maastricht Journal of European and Comparative Law* 731.

interdependent *demoi* (MEPs), which forms part and parcel of the EU's very architecture.⁷³

Note that I am not dismissive of states as such. They continue to be the primary repositories of authority in today's world, while in the best case allowing individuals to flourish and exercise their autonomy. I also recognise the primary role of state institutions, especially the executive branch, in making and enforcing EU law (Chapter 3) or in acceding to or seceding from the EU (Chapter 4). My theoretical claim remains, however, that the Member States as such (and their sovereignty) are not the ultimate addressees of the EU's authority claim. Instead, I argue that the EU affects popular self-determination and the collectives of constitutional peoples themselves that ultimately put their state institutions in the service of a political community beyond the state. The peoples are the principals; the state institutions are the agent.

Roughly, statist authority addresses individual citizens and international authority obligates states. The EU's authority claim addresses both Member States and their citizens as agents of the peoples of Europe. It ultimately seeks to obligate constitutional peoples. The constitutional peoples underwrite two types of political communities: their states (each on their own), and the EU (jointly, but not as one). It is true that, ultimately, the EU Treaties constitute an 'agreement between the *peoples* of Europe'.⁷⁴ The EU's authority framework as constructed here takes the heritage of the Treaty of Rome's Preamble (now enshrined in Art. 1 TEU) seriously. After all, does it not proclaim the creation of a 'union among the

⁷³ Similarly Eriksen (n 8) 92 et seq.

⁷⁴ Case C-415/05 P *Al Barakaat International Foundation (Kadi)*, Opinion of AG Maduro, EU:C:2008:30, para 21.

peoples of Europe’?

While this ought to suffice to characterise the peoples as addressees of the EU’s authority claim, Chapter 8 will provide more detail on the flipside: namely, the peoples as source and authors of EU law’s normative authority.

V. Conclusion

Part II made the case that the EU claims genuine and remarkably intrusive political authority. In the course of Part II, I came out as a centrist in two important ways. Firstly, with regard to the classification of the EU’s authority claim. The EU’s authority claim shouldn’t be conceptualised as (even divided) sovereign authority. At the same time, I argued that the nature of the EU’s authority claim differs from international authority claims. Secondly, with regard to the conceptual possibility of a political community beyond the state. I do not share the revolutionary hopes of cosmopolitans who see the EU as one of the main drivers for the beginning of the end of boundaries and sovereignty.⁷⁵ Neither, however, do I wish to join the exclusively state-focused theorists, who perceive any disruption of the existential bond between a state and its people to constitute a retreat to the Middle Ages or a brake-down of stability and normativity.⁷⁶

Situated between those extreme positions, I see enough evidence that the EU claims

⁷⁵ Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009). Think also of Mac Cormick’s virginity metaphor, Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999) 126.

⁷⁶ See only Grimm (n 29) ch 5.

authority over and seeks to bind the peoples of Europe. It thereby complements their individual organisation (*Verfasstheit*) in separate sovereign states and transcends international authority and its exclusive focus on states as addressees. Whereas, methodologically, others start from preconceptions and fully-fledged theories about the nature and relationship between national and international law, I analysed the EU's authority claim by dissecting the EU's manifestation of core concepts of political authority: institutional procedures/laws, and membership. This allowed me to avoid taking a stance on many disputed concepts (such as constitutionalism, federation, confederation), which I see as an advantage.⁷⁷

The focus on peoples best reflects social reality (ie what the EU does in authority terms) as well as the normative ambition of the European project. The EU requires the peoples to open up their respective national spaces and experience a loss of control over their territory. It mandates to prioritise their EU law obligations over national obligations in order to respect their commitments on the supranational level. And it facilitates their integration into a common European space that will be policed both trans- and supranationally. The EU is ultimately grounded on the idea that the various European peoples constrain each other by setting up supranational institutions. In short, the 'union of the peoples of Europe' replaces the statist 'We, the people'.

So what comes next? What distinguishes Part II from Part III? To answer that, recall the claim-structure of Chapter 1 that provides conceptual clarity in two crucial respects that

⁷⁷ See for a concise overview of these debates Barber, *The Constitutional State* (n 15) ch 10. For a literature review Lacey (n 34) 65.

both stem from the capacity of claims to be right or wrong.

First, think about the distinction between the nature of the authority claim (what kind of authority does the EU claim over whom?, Part II) and the actual authority (why and to what extent does the EU have legitimate authority, Part III). Here, we first need to understand the claim in order to say something useful about its legitimacy – ie whether the claim is true or false. The scope of the authority claim can be false in the sense that it is too far reaching as evaluated in light of the appropriate normative basis. Put differently, because a polity claims authority of a certain scope and force does not mean it legitimately has this authority. Part III searches for this normative basis to evaluate the EU's claims.

Second, this claim structure helps to distinguish between the claimed basis for the EU's authority and its actual, normatively preferable basis. 'Wrong' is here understood in the sense that the claimed basis for the authority is wrong. For example, I will argue that consent is the wrong basis to evaluate the EU's authority so that those institutions and academics who support it are wrong. This observation will shape the remainder of Part III in various ways. First, I analyse what the EU institutions view as the basis of the EU's authority (Chapter 6). Second, I evaluate the viability of these institutional proposals in light of the relevant literature on the basis for the EU's authority (Chapter 7). And third, I try to rectify the shortcomings of these accounts by proposing my own account of the appropriate normative basis of the EU's authority (Chapter 8). Thus, not only can the scope of the authority claim be 'wrong', but also the EU institutions' view of the normative basis to evaluate the EU's authority.

**PART III: EVALUATING AND GROUNDING THE EU'S LEGITIMATE
AUTHORITY**

CHAPTER 6: INSTITUTIONAL REFLECTIONS ON THE EU'S AUTHORITY

I. Introduction

In essence, this chapter occupies a hinge function between Parts II and III. Whereas Part II brought the contours of the EU's authority claim to light – ie its nature, scope and addressees – the present chapter introduces the search for the moral basis of that authority, the core theme of the remainder of this thesis. Part III, in other words, is about evaluating on what basis and to what extent the EU's authority claim is (morally) true.

The present chapter focuses on social-institutional reality. That is, it investigates how the EU Treaties and Institutions themselves construct the moral basis for the EU's right to rule. Since the EU often asserts its position and, in particular, the authority of its law in relation to its Member States (as well as their citizens) and international law, statements to that effect are not uncommon. Methodologically, we are looking for traces of theories of authority in social reality. In Chapter 2, I categorised a number of authority models – both on the state level and beyond – based on the moral value they build on. The distinct focus of consent theories, the values of institutions and law-making procedures, fair play and associative obligations theories, instrumental accounts, and, finally, substantive values as basis for normative authority showed us the wide range of possible perspectives. Part of the present inquiry is whether the Treaties and institutions rely on any of these standard approaches, even if inadvertently.

One of Part II's main discussions centred around the appropriate agent or source of the EU's authority claim. While theories of state authority focus on the individual citizen

and international authority theory on states, the EU's governance framework engages Member State officials, EU citizens and the constitutional peoples themselves. This chapter then scrutinises each institution's view in relation to two distinct elements. First, it seeks to uncover the substantive moral standard (or moral benchmark, or normative standard) they use to evaluate the EU's authority in the respective institutional statements. Second, it asks who – in their view – underwrites the EU's authority, ie which entity is viewed as the source of the EU's authority. Note the limited scope. This chapter is a forensic exercise aiming to understand how the Treaties and institutions ground the EU's authority. The assessment of how viable and convincing their views are is reserved for the next chapter.

At the outset, let me stress the important distinction between the EU's authority on the one hand, and the authority of individual institutions (the Commission, the ECJ etc.) on the other. These are two distinct subject matters. My project is exclusively concerned with the former: the authority of the EU and its laws. This chapter does not inquire into the authority of individual EU institutions.¹ Instead, I look at how individual EU institutions and the Treaties themselves reflect on the authority of the EU and of EU law as a whole.

There is one more caveat. We will find that many institutions use a broader notion of legitimacy. Whereas Chapter 2 distinguished between moral legitimacy (normative compliance with an independent moral benchmark) and social legitimacy (empirical acceptance by the subjects), some institutions often use moral and social

¹ A project others have set out to pursue. See Martijn van den Brink, 'Justice, Legitimacy and the Authority of Legislation within the European Union' (2019) 82 *Modern Law Review* 293. Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP 2014) ch 3, esp. at 147; Vivien A Schmidt, *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (OUP 2020) chs 5–8.

legitimacy/authority interchangeably. In short, institutional practice is messier than theoretical literature. This requires appropriate caution when imputing legitimacy standards to these institutions. Nonetheless, Chapter 2 showed that the two legitimacy debates are intrinsically connected. First, both relate to the broader question of rightful rule. Second, social legitimacy supports a political community's *de facto* authority and contributes to its *de jure* authority (stability and effectiveness). Accordingly, if an institution uses the same moral standard consistently, that gives us *prima facie* reason to believe that this standard informs both the empirical and normative component of legitimacy, even if political theory rightly distinguishes them.

Let's kick off the discussion with the EU Treaties.

II. Traces of Authority in the Treaties

Quite predictably, the Treaties reveal their conception of the ground for the EU's authority in the Preamble. Though it might come as a surprise to some, there are noticeable differences between the two foundational Treaties.

1. The TFEU Preamble: Nucleus of a Union of Peoples

The TFEU Preamble reproduces the Preamble of the founding Treaty of the then EEC, namely the 1957 Rome Treaty. The Preamble's most conspicuous aspect is the early focus on peoples, as well as states, suggesting that the Treaty and its drafters even then imagined the authority of the EEC to go beyond the one of traditional international organisations. The Preamble refer to peoples as distinct from states no less than four times, most

prominently by invoking the ‘ever closer union among the peoples of Europe’ at the outset.² The Treaty thereby emphasises that the integration project is about the interdependence of those self-determining collective entities and their prosperity in post-war Europe.

In substance, the Preamble mentions instrumental benefits (economic and social progress), but the emphasis is clearly on the value of institutional cooperation among the participants. For example, the Preamble intends the recognition of the EU as an instrument for joint action of the Member States to eliminate barriers or remove obstacles between them (also expressed in Arts. 1, 2 EEC-Treaty). More to the point, cooperative notions like ‘common action’ and ‘concerted action’, ‘pooling resources’ pervade the Preamble. This institutional-cooperative basis for moral authority has both intrinsic and instrumental value.

Transnational cooperation of states-peoples intrinsically advances peace and stability.³ This is especially true in an institutional regime such as the EU’s, which from the outset went beyond any traditional international set-up.⁴ Binding institutional cooperation by its very nature fulfils an ordering function that has been a core value of political communities for millennia. The mere existence of the institutional architecture makes future especially military conflicts among the participating peoples less likely.

² Even the Preamble of the 1951 Treaty establishing the European Coal and Steel Community refers to the hope for it to be a ‘basis for a broader and deeper community among peoples’.

³ Claudia Sternberg, ‘Political Legitimacy between Democracy and Effectiveness: Trade-Offs, Interdependencies, and Discursive Constructions by the EU Institutions’ (2015) 7 *European Political Science Review* 615, 626.

⁴ For a list of the remarkable institutional novelties, see Julio Baquero Cruz, *What’s Left of the Law of Integration?: Decay and Resistance in European Union Law* (OUP 2018) 13.

Simultaneously, such cooperation is *instrumental* for achieving – as Art. 3 TEU reminds us today – the Union’s aim to ‘promote peace (...) and the well-being of its peoples’.⁵ In a nutshell, an institutional arrangement that fosters peace can also be used to promote peace. This broader emphasis on peace and well-being questions portrayals of the then EEC as yet another international organisation with economic goals. Admittedly, the means to achieve these aims were economic. Nonetheless, economic integration between European states only years after World War II was deeply political. Not only because economic integration is inherently political,⁶ but because economic means were used to achieve political ends. The Member States supranationalised crucial defence-related industries in the European Coal and Steel Community, and sought to establish an internal market through the EEC.

The idea of promoting peace and institutionalised political relations among states through primarily economic means did not just pop up instantaneously. Ever since Kant’s theoretical groundwork for portraying commercial interdependence as main driver of a ‘cosmopolitan constitution’, the use of economic means to further political ends presented itself as an option for academics and political leaders alike.⁷ Due to the instrumental value

⁵ The Monnet-Plan and the Schuman- Declaration stressed this aspect early on. See *ibid* chapter 2., called ‘Law after Auschwitz’. Claudia Sternberg, ‘Public Opinion in the EU Institutions’ *Discourses on EU Legitimacy from the Beginnings of Integration to Today* (2016) 54 *Politique Européenne* 23.

⁶ Turkuler Isiksel, ‘The Dream of a Commercial Peace’ in Luuk van Middelaar, Philippe van Parijs and Herman van Rompuy (eds), *After the Storm: How to Save Democracy in Europe* (Lannoo 2015); Jussi Jaakkola, ‘Enhancing Political Representation Through the European Economic Constitution? Regressive Politics of Democratic Inclusion’ (2019) 15 *European Constitutional Law Review* 194.

⁷ Immanuel Kant, ‘Toward Perpetual Peace’ in Pauline Kleingeld (ed), David Colclasure (tr), *Toward Perpetual Peace and other Writings on Politics, Peace, and History* (Yale University Press 2006) 67 et seqq. See for a very insightful recent discussion Turkuler Isiksel, ‘Cosmopolitanism and International Economic Institutions’ (2020) 82 *Journal of Politics* 211.

of cooperation in economic areas to achieve broader political aims, economic integration is thus intrinsically connected to political legitimacy.

To sum up, the 1957 EEC Treaty – confirmed by various treaty revisions over the past decades to end up as TFEU treaty – envisages the authority of the EU as focusing on the European peoples as ultimate reference entity. Yet, Member States play a noticeable role in the TFEU Preamble’s vision of the EU’s authority as well. In terms of substantive normative basis, the Treaty Preamble derives the EU’s authority from mutual cooperation and integration through a sophisticated set of institutions that – both inherently and instrumentally – seek to guarantee peace and prosperity. This echoes the various contractarian accounts discussed in Chapter 2 which derive the authority of law from the way political institutions facilitate the cooperation and interdependence of the participants and thereby create and express a certain moral bond between them.

2. The TEU Preamble: Enriching Values

Is there any reason to think that the TEU, which marks the creation of the EU as a consequence of the 1992 Maastricht Treaty, differs from the TFEU’s vision of the EU’s authority? At first glance, the answer is no. Various paragraphs of the TEU Preamble in its Maastricht-form confirm the TFEU’s focus on institutional cooperation as decisive value of the EU. They emphasise a new stage in EU integration, ending the division of the European continent, enhancing the democratic and efficient functioning of the institutions, and economic progress. In addition, the current post-Lisbon Preamble puts a visible emphasis on substantive values, which the Treaty of Lisbon added to the Preamble as well

as to the Treaty text itself (Arts. 2 and 6 et seqq. TEU).⁸ Three distinct paragraphs engage with the ‘cultural, religious and humanist inheritance of Europe’, emphasise the ‘attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’ and mention social rights separately. This indicates a shift in the Treaty-makers’ perspective from contractarian notions and their often instrumental benefits towards substantive values. We will see below that various EU institutions reacted to this new prominence of values in the TEU and adjusted their conception of the EU’s authority accordingly.

Regarding the relevant agents, an apparent hierarchy of states over peoples in the TEU Preamble gives the impression that the underlying rationale is integration and cooperation between states and not primarily peoples. For example, Art. 1 (1) TEU prioritises the EU as a vehicle of the ‘High Contracting Parties’ over the ‘ever closer union among peoples’ which, incidentally, moved to the end of the Preamble. Similarly, the Lisbon-amendments to central treaty provisions such as Arts. 3 (6), 4, 5 TEU confirm the renewed sensitivity for the derivative nature of the EU and the respect for the integrity of the Member States and their competences. The Preamble – like the TFEU’s – nonetheless mentions the European peoples four times. Moreover, the introduction of EU citizenship broadens the perspective well beyond Member States as main actors. In light of these findings and the ever more salient new competences of the EU (chiefly the common currency), there is no indication that the creation of the EU in 1992 marked an ‘international turn’. Nonetheless, the focus on Member States is noteworthy in comparison to the TFEU-

⁸ Earlier, the Treaty of Nice had already added social rights to the Preamble.

preamble, where the peoples take precedence.

To sum up, the TEU Preamble is ambiguous when it comes to the relevant agent(s) as source of the EU's authority. Member States, peoples, and citizens play a distinct role and interact in grounding the EU's authority. There are two key differences to the TFEU. First, the citizens play no part in the original EEC-Treaty Preamble and its successors. Second, whereas Member States seem to be secondary to the EU peoples in the TFEU Preamble, the TEU puts three agents (Peoples, Member States, EU citizens) on roughly an equal level. Regarding the substantive moral standard to evaluate legitimate authority, the continuity of the TFEU's cooperative elements (integration through functioning institutions and achieving common projects) is enriched with substantive elements – ie the values enshrined in Art. 2 TEU.

This shows that both Treaties in one way or another translate the central idea of political obligation theories: namely, the value of institutional procedures in facilitating a political community of equals to the supranational level. They pick up ideas from bare cooperation to morally richer reciprocal institutional integration to underpin the moral authority of the EU and its laws.

Let us move on to consider the ECJ's vision as the institution that played a vital part in upholding the authority of EU law over the past decades. But on what basis?

III. The Court: From Effective Contracts to Institutional Integrity

Although historians often twitch at the sight of counterfactuals, it is almost certain that the

‘Authority claim over Peoples’ described in Part II would not exist but for the audacity of the ECJ. Its central role in interpreting and shaping the EU legal order inevitably prompted various pronouncements on the source of the EU’s legitimate authority.

1. Effective Integration and a Role for the Citizen

The story of the Court’s vision of the EU’s authority begins, no surprise, with *van Gend*.⁹ In *van Gend*, the ECJ derives the distinct authority of EU law from the idea that the Treaties structurally and institutionally transcend purely inter-state relations. It takes the mentioning of the peoples in the Preamble, the precursor of the EP, and the preliminary reference procedure to herald a qualitatively new form of public institutional arrangement with a noticeable role for individuals.¹⁰ Ever since, the calibration of a network of individuals and states through institutions underpinned the ECJ’s reasoning.

Overall, *van Gend* revealed more about the relevant subjects of the EU’s authority than about its substantive moral justification. That is not only due to the doctrinal question at hand: namely, the direct effect of primary law in national courts. More theoretically, in order to support the ‘new legal order’ the Court sought to boost the role of the individual citizen in that legal order (‘...Treaty is more than an agreement which merely creates mutual obligations between the contracting states’, ‘...institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens’, ‘...the nationals

⁹ Case C-26/62 *Van Gend en Loos* EU:C:1963:1.

¹⁰ For an analysis of the broader implications see Franz Mayer, ‘Van Gend En Loos: The Foundation of a Community of Law’ in Miguel Poiars Maduro and Loïc Azoulai (eds), *The Past and Future of EU law* (Hart 2010).

of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the EP and the Economic and Social Committee’, ‘... the task assigned to the Court of Justice under Article 177 (...) confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals’). The substantive moral basis for the EU’s authority in the eyes of the ECJ was added in *Costa*¹¹.

Costa provided two main arguments to support EU law’s authority, one instrumental and one contractarian, whereby the combination of both generates a distinct normative force.¹² The instrumental argument comes to fore in the ever since central idea of *effet utile*, according to which a Member State’s unilateral deviation from EU law would call into question the pursuit of the Treaties’ objectives.¹³ *Effet utile* expresses the idea that EU law is there to be implemented and enforced to its fullest extent. As will become clearer in Chapter 7, this cannot serve as self-standing argument for EU law’s authority, since the EU’s multilevel system is characterised by the interaction of EU law and national law. Unsurprisingly, each of the legal orders ‘wants’ to be fully effective.

The Court’s combination of this instrumental argument with a contractarian angle adds force to the argument, however. The ECJ simply reminds the Member States that they have created the Community ‘on a basis of reciprocity’ so that Community law, if open to

¹¹ Case C-6/64 *Costa v ENEL* EU:C:1964:66.

¹² See also Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (7th edn, OUP 2020) 316. They identify four core arguments (contractarian, functional, egalitarian, analytical).

¹³ *Costa* (n 11). Confirmed in Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* EU:C:1978:49, paras 17 et seqq. More recently Case C-378/17 *Garda Síochána* EU:C:2018:979, para 36.

unilateral deviations, would lose its binding force and thus its character as, well, *Community Law*. A potentially varying force of EU law would moreover lead to ‘discrimination’ of (EU) law-abiding Member States. The Court thus reminds the Member States of their obligations towards each other.

These broadly contractarian arguments resonate in fair-play accounts of authority: you bind yourself by agreeing to the Treaty or by acceding to the Union. Not keeping the bargain by unilaterally deviating from EU law would unfairly discriminate others.¹⁴ This explains the subsequent coupling of primacy and uniformity in the case law.¹⁵ The Court not only assumes that Member States want to abide by EU law at all times. It uses this assumption to help the enforcement of EU law by empowering EU citizens and the institutions of other Member States (Chapter 3).

To sum up, the early ECJ shifted the emphasis from Member States to individual citizens when discussing the relevant source of the EU’s authority. In substance, a contractarian notion, combining fair play (uniform and binding application) and instrumental efficacy (*effet utile*), underwrites the ECJ’s vision in this phase.

2. After Lisbon: The ECJ’s Restatement of EU Law’s Authority

The evolution from the EC to the EU in its post-Lisbon shape happened in the same two

¹⁴ For an explicit endorsement of fair play see Case C-39/72 *Commission v Italy* EU:C:1973:13, paras 24, 25. There is, however, a noticeable consent-flavour in these statements.

¹⁵ For example Case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, para 3. Case C-369/96 *Arblade* EU:C:1999:575, para 31. Case C-316/05 *Nokia* EU:C:2006:789, para 43.

decades in which IT progressed from the first ‘notebook style’¹⁶ laptop to the mass-distribution of smartphones (1989-2009). It seems only a slight overstatement to label both as quantum leaps in their respective sectors. The EU ‘upgrade’ in the Treaty of Maastricht; ever more salient competences; the major treaty revisions around the new millennium; an enlargement by 15 new Member States; a failed Constitutional Treaty; and a binding Fundamental Rights Charter barely left a stone unturned. The impact of this development on the Court’s self-image of the EU’s authority is discernible in *Kadi* but received its canonical formulation in *Opinion 2/13*. There, the Court recalled the institutional structure and special characteristics of EU law (esp. primacy, direct effect), before proclaiming:

These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe.’¹⁷

The Court later ties this rationale to the pursuit of the EU’s objectives (Art. 3 TEU) by declaring the ‘implementation of the process of integration’ to be the ‘*raison d’être* of the EU itself’.¹⁸ Not unlike the TFEU preamble, the Court grounds the EU’s authority in the intrinsic and instrumental value of EU institutions for the cooperation among states/peoples. The second argument for the authority of EU law builds on this and complements the contractarian notion with substantive values:

This legal structure is based on the fundamental premiss that each Member

¹⁶ Mary Bellis, ‘The History of Laptop Computers’ thoughtco (4.10.2019) <<https://www.thoughtco.com/history-of-laptop-computers-4066247>>.

¹⁷ *Opinion 2/13, Accession to the ECHR* EU:C:2014:2454, para 167.

¹⁸ *Opinion 2/13* (n 17) para 172. See also Case C-621/18 *Wightman* EU:C:2018:999.

State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore, that the law of the EU that implements them will be respected.¹⁹

In the early period, the value of law-administering institutions was covered by the emphasis on equality and fair play as well as the instrumental value of EU law. Here, the Court not only emphasises the value of the EU's institutions and ties it to normatively rich concepts such as mutual trust. Moreover, the Court uses the Art. 2 TEU-values to corroborate EU law's authority with moral/constitutional substance. While the focus in *Kadi* and *Opinion 2/13* is on *fundamental rights*, the Court would later broaden its use of the arsenal of values in Art. 2 TEU. It used *liberty* and *democracy* to reconcile the voluntary nature of the EU with the obligations involved in its membership.²⁰ The *rule of law* then served as conceptual basis to discipline Member States' attempts to curtail independent judiciaries in the interest of moving towards an – in Hungarian Prime Minister Orbán's words – 'illiberal state'.²¹ In sum, the ECJ more and more ties the integrity of the Treaties' institutional system to the values enshrined in Art. 2 TEU.

The third step in the Court's reasoning is to link this institutional architecture and normative foundation firmly to the enforcement of EU law.²² In the eyes of the Court, the enforcement of EU law represents not just a matter of output-related technical effectiveness of a single market, but rather the value-based interaction of self-governing collectives,

¹⁹ *Opinion 2/13* (n 17) para 168.

²⁰ *Wightman* (n 18) para 62.

²¹ See Chapter 3, sec. III.1.c. Confirmed by Case C-619/18 *Commission v Poland* EU:C:2019:615, paras 42 et seqq.

²² *Opinion 2/13* (n 17) paras 170, 173.

which participate in this supranational community. The Court's self-understanding of the EU's authority shifted from technical notions – such as effectiveness and uniformity – to an emphasis on the value of institutions and procedures cloaked with thoroughly normative concepts that have ever since formed the bedrock of its jurisprudence.

Regarding the relevant agent, we meet the tripartite structure of citizens, peoples and Member States, which has informed ECJ jurisprudence since the 1960s. In terms of theoretical architecture, the ECJ interestingly derives the *hierarchical* authority of the EU from the *horizontal* relationships among these constituent entities. This finds a parallel in theories of state authority, where many accounts derive their normative force from the state as institutional facilitator of how the individual citizens relate to each other (eg associative obligations, coordination, fair play theories; see Chapter 2). The underlying idea is in both cases that the political communities' institutions and laws gain their moral value from how they facilitate and concretise the mutual moral relationships among the members.

3. Interim Conclusion

To this day, the Court doesn't employ a 'clean' – ie one single coherent – theory about the moral backbone of the authority of EU law. The overarching focus, nonetheless, is on the value of EU institutions to facilitate cooperation. In that regard, law-enforcing institutions (courts) have always taken a more prominent role than law-making institutions. Even the early contractarian arguments remain abstract, and the court rarely appreciates the value of EU-law-making openly. This emphasis on the value of law-enforcement is alien to theories of national authority, but understandable beyond the state, where this very enforcement is

often far from given. In addition to its institution-focus, the ECJ has used instrumental arguments (*effet utile*) in the past, and increasingly relies on substantive values (Art. 2 TEU) to corroborate EU law's authority. Yet, neither serves as stand-alone basis for the EU's authority. They have always been secondary to institutional-procedural elements.

Note, finally, that the ECJ's own position in the EU's architecture as guarantor for EU law's coherence and effectiveness most likely plays a part in its reasoning as well. For the Court thereby puts its own role as institutional guardian of EU law and its enforcement in the spotlight. Such a connection between an institution's function in the EU's governance and its view of the ground of the EU's authority is evident in various institutions under consideration here. One of them is our next candidate: the Commission.

IV. The Commission: Delivering Benefits Between Social and Moral Legitimacy

As we turn to the Commission's viewpoint, recall the words of caution in the introduction. It is rather difficult to discern the Commission's view, especially in the early days. For one, there is a substantial risk of selection bias in light of the breadth and diversity of Commission publications.²³ For another, the Commission's discourse is one of legitimacy, not of authority. Of course, the two are intrinsically linked, but the present focus is on legitimacy as normative standard for authoritative, rightful rule. A great share of the Commission's views and significant parts of the relevant literature undoubtedly relate to the empirical conception of legitimacy explained in Chapter 2, ie mustering public support

²³ Similarly Sternberg (n 3) 618 et seq.

for political rule.²⁴ Rare mentions of the concept of authority as well as overwhelming evidence of a specific focus on a single legitimation strategy nonetheless allow for the tentative conclusion that the Commission – unaware of the theoretical distinction between social and moral authority – would readily view that standard as moral standards for rightful rule as well.

The Commission’s benchmark to assess the EU’s legitimate authority has always been output-centred. Already the earliest Commission pronouncements on justifying the then EEC’s *right to exist* more than its *right to rule* focused on economic prosperity as primordial means to improve the living conditions in the Member States. Unlike the EEC-Treaty Preamble, the Commission seems to confine the instrumental value of the EU to economic goals narrowly understood.²⁵ In other words, the legitimacy of the integration project is based on its instrumental capacity to deliver (economic) benefits. According to the early Commission, the EEC and its Common Market were about ‘the *effects* and the expected *results* of the process of integration along with the *benefits* from that general economic expansion’²⁶.

As the White Paper on the Single Market of 1985 shows, the Commission’s

²⁴ For one example Dominika Biegoń, ‘Specifying the Arena of Possibilities: Post-structuralist Narrative Analysis and the European Commission’s Legitimation Strategies’ (2013) 51 *Journal of Common Market Studies* 194.

²⁵ Commission, Seventh General Report on the Activities of the Community (1 April 1963 – 31 March 1964) p. 21-22. Commission, Tenth General Report on the Activities of the Community (1 April 1966 – 31 March 1967) p. 30. Commission, Third General Report on the Activities of the Community (1 April 1959 – 31 March 1960) p. 25-26 states the temporal priority of the economic over the political. See also Commission, Fourth General Report on the Activities of the Community (16 May 1960 – 30 April 1961) p. 18. Sternberg (n 3) 627.

²⁶ Commission, Fourth Report (n 25) p. 11. Emphasis added.

perspective remained unchanged for quite some time. The Commission reflects on the achievements of a common customs tariff with ‘pride’ and, so it informs us, the ‘benefits to an integrated Community economy of the large, expanding and flexible market are so great that they should not be denied to its citizens because of difficulties faced by individual Member States’.²⁷ The legitimacy of the EU and its law, which facilitates these benefits, is thus based on its instrumental capacity to deliver a single market. The contrast to the – albeit tentative – normative language of the Rome Treaty’s Preamble is striking.

In the early 2000s, the Commission opted to confirm its instrumental justification for the European project, while tying it to the expectations of the individual stakeholders. It singled out policy areas in which ‘people expect the Union to lead’ and demanded ‘more effective and relevant policies’ to enhance the legitimacy of the EU.²⁸ So citizens expect the delivery of results. For that reason, reflections on the past achievements of the EU are dominated by listing ‘results which would not have been possible by individual Member States acting on their own’. Even democracy and the rule of law seem only relevant to the extent they contributed to achieving results.²⁹ This strategy often amounts to mere window-dressing, however, since it imputes these wishes to the European citizens without

²⁷ Commission, *Completing the Internal Market: White Paper from the Commission to the European Council*, 28-29.6.1985 (COM/85/0310) No. 15. This seems to be in line with public choice models of the EU’s legitimacy. For a discussion see Gráinne De Búrca, ‘The Quest for Legitimacy in the European Union’ (1996) 59 *Modern Law Review* 349, 353 et seq.

²⁸ Commission, *European Governance – A White Paper*, 12.10.2001 (2001/C 287/01), Executive Summary. See also Commission, *White Paper on a European Communication Policy*, 1.2.2006 (COM (2006) 35) p. 2: ‘Citizens expect Europe to offer them prosperity, solidarity and security in the face of globalization’. Myrto Tsakatika, ‘Claims to Legitimacy: The European Commission between Continuity and Change’ (2005) 43 *Journal of Common Market Studies* 193, 204, 207. For an overview of the fierce academic criticism of the 2001 White Paper see *ibid* 195.

²⁹ Commission, *European Governance* (n 28) p. 5, 8. This hasn’t changed. See Commission, *Communication, Further Strengthening the Rule of Law Within the Union: State of Play and Possible Next Steps*, 3.4.2019 (COM(2019)163) p. 2.

consulting them. In other words, the Commission's agenda was to tell the people that they really wanted output legitimacy – ie to change the citizen's expectations rather than its own benchmark for legitimacy and authority.³⁰ The longing for more popular support clearly appeals to the social aspect of legitimacy – ie its ability to attract support by the populace.³¹ Whereas the Commission's efforts thus do not thus seek to establish a moral benchmark for the exercise of rightful rule, the overwhelming focus on instrumental outcomes leaves no doubt about its broader vision of how to evaluate the authority and legitimacy of the EU.

In 2017, after the tectonic changes in the EU's shape mentioned earlier, the Commission reminded everyone of its fundamental yardstick for the legitimacy of EU integration, displaying its fondness for pathos:

The images of battles in trenches and fields in Verdun, or of a continent separated by the Iron Curtain and the Berlin Wall, have been replaced by a Union standing out as a beacon of peace and stability.³²

Instead of the earlier focus on market and economy, the ulterior motives are now (and always have been?) directly political: namely peace and stability. Interestingly, in tandem with the Treaties and the ECJ's recent judicial pronouncements, the Commission also embraced the ever more prominent values of Art. 2 TEU:

³⁰ Sternberg (n 5) 34 et seqq; Tsakatika (n 28) 210. On this relationship Anna Davidson, 'Through Thick and Thin: "European Identification" for a Justified and Legitimate European Union' (2008) 4 *Journal of Contemporary European Research* 32.

³¹ De Búrca (n 27) 351.

³² Commission, White Paper on the Future of Europe: Reflections and Scenarios for the EU 27 by 2025, 1.3.2017 (COM(2017) 2025) p. 2. Baquero Cruz (n 4) 22 agrees and argues that the 'possibility of war (...) should be the basis for the value we must give to the law of integration'.

Even if the attachment to peace is not one that all of today's Europeans can relate to in the same way as their parents or grandparents, these core values continue to bind us together.³³

But make no mistake. The instrumentalist output-related justification is still alive and kicking. The emphasis is on serving ulterior interests, determined by the Member States as ultimate constituent actors, in line with the familiar earlier image. Headlines like 'Strengthening the Rule of Law: A Priority for an Effective Functioning of the Union' vividly illustrate that.³⁴ In the eyes of the Commission, the authority of EU law is intrinsically related to its capacity to deliver the benefits of the EU to its stakeholders. The added value of, for example, the single market, does 'not materialise if Member States do not apply or implement single market rules, or if the rules are undermined by other barriers'.³⁵ Driving this analogy with law as service for consumers to the extreme, the Commission thinks it has to do everything so that the '*end-users* of EU law...can fully enjoy their rights'³⁶.

In my view, the Commission's perspective on the EU's authority should be understood as an instrumental account of authority. Although the notions output-legitimacy and instrumental accounts of authority are used in different contexts, their justification strategy is structurally equivalent. That is, they focus on ulterior ends that justify the

³³ Commission, Future of Europe (n 32) p. 2. See also Commission, Report on the Operation of the TEU, 10.5.1995 (SEC(95) 731) p. 3.

³⁴ Commission, Communication, 2020 Rule of Law Report: The Rule of Law Situation in the European Union, 30.9.2020 (COM(2020) 580) p. 2.

³⁵ Commission, Monitoring the application of European Union law, 2017 Annual Report. See also Commission, Monitoring the application of European Union law, 2018 Annual Report, Foreword. Commission, Communication, EU Law: Better results through better application, 19.1.2017 (2017/C 18/02) p. 1. Commission, Communication, Strengthening the rule of law within the Union: A blueprint for action, 17.7.2019 (COM(2019) 343) p. 1: 'The European project relies on permanent respect of the rule of law in all Member States. It is a prerequisite for the effective application of EU law' or the 'effective delivery of its policies'.

³⁶ Commission, EU Law: Better Results (n 35) p. 12.

practice under concern. I think the substantive outputs envisaged by the Commission – especially delivering economic prosperity – is one example of an instrumentalist account of the authority of EU law, in the sense that the latter is conducive to achieving these economic ends. Hence, I don't wish to suggest that output legitimacy is identical to instrumental authority; instead, I suggest that output-centred legitimacy strategies can be translated into one particular kind of instrumental justifications for authority. In short, the Commission's view of the EU's authority is instrumental, since it is based on the capacity of EU law to serve more or less clearly defined ends: to deliver benefits to the Europeans and especially the Member States.³⁷

Notice the stark contrast between this vision, and the one of the Treaties and ECJ we have studied before. While the latter overwhelmingly focus on the moral value of institutions and procedures in administering a political community, the Commission emphasises outputs and benefits. For the Commission, the way laws are made and enforced is irrelevant as long as the result can be delivered. Finally, the Commission's clear focus on Member States as primary agents also departs from the Treaties' and ECJ's eclectic combination of peoples, states and citizens.

Similarly to the ECJ, the Commission's normative vision acutely reflects its position in the EU's architecture. The Commission itself is *instrumental* in promoting, guarding and enforcing EU law (for example, through its legislative initiative monopoly, the infringement procedure, or its pivotal role in Competition Law and Policy). As the

³⁷ See only recently Commission, White Paper On Artificial Intelligence: A European approach to excellence and trust, 19.2.2020 (COM(2020) 65) p. 2.

quasi-executive of the EU, moreover, outcomes will always be more important to the Commission than to other institutions. There is thus a direct correlation between the institution's own role in administering EU law, and its view of the normative basis of EU law's legitimacy.

Next, the EP enters the stage with a very different appraisal of the basis for the EU's authority which is, nonetheless, similarly related to its own role and standing.

V. The EP: Input-Legitimacy First³⁸

The institutional standing and self-confidence of the EP have both grown significantly since its humble beginnings, which the ECJ used in *van Gend* to support EU law's authority. At the same time, the EP's vision of the EU's authority remained more or less unchanged. It has consistently offered an intrinsically democratic-institutional account that centres on the value of institutional arrangements to solve transnational coordination problems and disagreements. According to the EP, only the universal free election of the EP can provide the authority to face the 'contingencies, divergences and particularities of the moment'³⁹. This 'new political authority'⁴⁰, therefore, is rooted in the authorisation by the peoples.⁴¹ European integration – so the EP argues – is so fundamental, so intrusive,

³⁸ The findings of this section are based on a comprehensive survey of the EP's Reports and Resolutions. They constitute a constructive interpretation of the statements related to legitimate authority.

³⁹ My translation from European Parliamentary Assembly, 'Rapport fait au nom la commission des affaires politiques et des questions institutionnelles sur l'élection de l'Assemblée parlementaire européenne au suffrage universel direct', 30.04.1960, p. 16.

⁴⁰ Leo Tindemans, Report to the European Council, 27.12.1975, BEC Supplement 1/76, p. 29.

⁴¹ But cf. Sternberg (n 3) 630 for more references but the opposite conclusion. She argues this is intrinsically connected to output legitimacy by helping the European Communities to 'do their job

and so important, that it has to involve the voices of citizens as subjects, rather than objects of the law.⁴² The focus is on input, not output. While that must have sounded optimistic and aspirational in 1960, the EP has ever since repeated the argument that the European project is about the links among the peoples of Europe.⁴³ In contrast to the Court's focus on enforcement, the EP emphasises law-making. It thus echoes the democratic authority accounts presented in Chapter 2, according to which the authority of law is due to the respect for law-making procedures and their moral achievement of reaching binding solutions, despite the reasonably diverging views of the subjects.

The EP has more recently enriched its notion of the EU's authority. In line with the general post-Lisbon emphasis on values encountered throughout this Chapter, the EP opined, rather boldly, that the values enshrined in Art. 2 TEU made up one of the original drivers of European integration as a whole.⁴⁴ Similarly, the emphasis on values represents one of the key normative underpinnings of the EP's resolutions on the current rule of law problems in Eastern European Member States,⁴⁵ as well as in its appraisal of the EU's

well'. If that were correct, however, there would be no conceptual space for any purely input-centred account of legitimate authority.

⁴² European Parliamentary Assembly, 'Rapport' (n 39) 17.

⁴³ For example, EP, Resolution on the European Parliament's guidelines for a draft constitution for the European Union, 11.7.1990 (O.J. 1990, C 231/91) No. 1. EP, Resolution on the 60th anniversary of the end of the Second World War in Europe on 8 May 1945, 12.5.2005, Nos. 6, 8.

⁴⁴ EP, Resolution on the situation of fundamental rights in the European Union of 8.9.2015 (2014/2254(INI)) No. A.

⁴⁵ EP, Resolution on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary, 16.1.2020 (2020/2513(RSP)) No. A-B. EP, Resolution on the rule of law in Romania, 13.11.2018 (2018/2844(RSP)) No. A-C. EP, Resolution on the situation in Hungary, 17.5.2017 (2017/2656(RSP)) No. A-B.

relations to external partners.⁴⁶ We should not, however, conceptualise this focus on the EU's values as a self-standing, sufficient justification for the EU's authority. Instead, they operate as supplementary force and are often combined with democratic elements,⁴⁷ or the founding ideas of peace and prosperity.⁴⁸

In relation to the relevant agent, the EP early-on emphasised input-based features by invoking the peoples' (by which it means citizens) contribution to the 'European building'⁴⁹. This is hardly surprising since it is in the EP's self-interest to bolster its own institutional role as the main forum of representation for the EU citizens. Nonetheless, the EP offers no unified account of the relationship between citizens, states and peoples in the EU's theoretical architecture. Especially due to its substantive emphasis on citizen representation, the persistent role for Member State cooperation as element of justification for the EU's authority is astonishing.⁵⁰

Summing up, while the EP leaves room for Member States and peoples as distinct entities, the focus on EU citizens as agents in the EU's governance framework distinguishes the EP from many other institutions. Regarding the normative standard based on which it evaluates the EU's authority, the EP consistently focuses on the democratic

⁴⁶ EP, Resolution on the state of EU-US relations, 12.9.2018 (2017/2271(INI)). Also EP, Resolution on EU-NATO Relations, 13.6.2018 (2017/2276(INI)) No. A. EP, Resolution on the role of the EU in promoting a broader Transatlantic Partnership, 13.6.2013 (2012/2287(INI)) No. B.

⁴⁷ See for an earlier combination with democratic elements EP, Resolution on the Declaration of Fundamental Rights and Freedoms 12.4.1989 (O.J. 1989, C 120/51). EP, Resolution on guidelines for a draft Constitution of the European Union, 11.7.1990 (O.J. 1990, C 231/91), Nos 1-14.

⁴⁸ See EP, Resolution on the 60th anniversary (n 43).

⁴⁹ Textes relatifs à l'Assemblée parlementaire européenne au suffrage universel direct, 2.6.1960, p. 834.

⁵⁰ See only EP, Resolution on the mutual defence clause (Article 42(7) TEU), 2.11.2016 (2015/3034(RSP)) No. C.

value of the EU as supranational forum in which the European peoples author the decisions which subsequently affect them through elected representatives. It increasingly complements this democratic idea(1) with substantive standards (Art. 2 TEU).

VI. The European Council: International Instrumentalism⁵¹

The European Council⁵² has continuously raised its profile in the EU's institutional architecture. Unlike the EP case, however, Treaty reforms (like its first formal recognition as consequence of the Lisbon reforms) cannot sufficiently explain this development. Much is instead due to the European Council's formal and informal reinterpretation of its own role in the past decades, especially since the crisis-ridden times of 2008.⁵³ The Treaty description of its role to 'define the general political directions' (Art. 15 (1) TEU) is today a glaring understatement. Chiefly due to its non-legislative role, it proves difficult to decipher the European Council's views of the EU's authority. And yet, the various turning points in European integration provided ample opportunity for it to reflect, albeit implicitly,

⁵¹ The findings of this section are based on a comprehensive survey and constructive interpretation of the European Council Resolutions.

⁵² Because of the distinct 'division of labour' between the European Council and the Council of the EU, there will be no separate discussion of the latter. Not only does their composition of members of the national executives makes a convergence of views between them very likely. Moreover, there is no single Council of the EU. There are various subject-specific Council composed of the national ministers of the portfolio in question, who meet to legislate or draw up conclusions on specific policies (eg climate change, inclusive labour markets, animal welfare etc.) rather than on theoretical and more universal questions of the EU's nature. For a brief overview of the relation between European Council and Council of the EU, see Federico Fabbrini, 'The Relation Between the European Council and the Council: Institutional Arguments in Favour of an EU Senate' (2016) 22 European Public Law 489.

⁵³ See only Puetter (n 1) ch 3. In the early days, it was a very informal meeting. For example, in European Council, Presidency Conclusions, London, 29/30.6.1977, the European Council professionalised and institutionalised its own meetings for the first time. The European Council's increasing role came mostly at the expense of the Commission. See Anchrit Wille, *The Normalization of the European Commission: Politics and Bureaucracy in the EU Executive* (OUP 2013) 207 et seq.

on the moral basis for the EU's right to rule.

1. Legitimacy through Economic Output

Early statements in European Council Conclusions emphasise the EU's instrumental capacity to achieve the economic goals identified in the Treaty. When reflecting on the 25th anniversary of signing the Rome Treaty, the only element the European Council recalls is 'the importance of the contribution made by the European Community over a quarter of a century to the achievement of the objectives of economic and social progress in the member countries'⁵⁴. Regarding the decisive actor, the focus is clearly on the Member States and their task to design the then Communities in a way that it is 'capable of meeting the challenges with which Europe is confronted today'⁵⁵.

The European Council subsequently linked the economic prosperity and stability in Europe to the citizen's legitimate expectations.⁵⁶ Similar to the Commission's statements, however, this shouldn't be understood as a shift in perspective towards more input-focused legitimation strategies. The terminological shift instead constitutes little more than a PR measure to give output-legitimacy an allure of deriving from the populace.⁵⁷ The point is that instrumental output continues to serve as normative standard

⁵⁴ European Council, Presidency Conclusions, Brussels, 29/30.3.1982, No. 1. For as early as 1955 see the founding Member States' Messina Declaration of 2.6.1955.

⁵⁵ European Council, Presidency Conclusions, Lisbon, 27.6.1992, p. 2.

⁵⁶ European Council, Presidency Conclusions, Cannes, 26/27.6.1995, Introduction. European Council, Presidency Conclusions, Corfu, 24/25.6.1994, Introduction. European Council, Presidency Conclusions Brussels, 15/16.6.2006, Nos. 4, 38. The EU ought to be at the 'service of its citizens', see European Council, Presidency Conclusions, Brussels, 17/18.6.2004, no. 5. ...or to the 'benefit of the Union's citizens', see European Council, Presidency Conclusions, Brussels, 8/9.3.2007, p. 1.

⁵⁷ Sternberg (n 5) 35 et seqq. See for example European Council Laeken-Declaration on the Future of the European Union, Annex I to European Council, Presidency Conclusions, Laeken,

to evaluate the EU's legitimacy, independently of their role in the beliefs of EU citizens.

2. From Enlargement to Strategic Autonomy: The More, the Merrier?

Substantial political developments in the early 1990s – such as the downfall of the Soviet Empire, and the German reunification – prompted the European Council to update its view of the EU's authority, in search for the basis of a more 'political' community. Already in 1990, it emphasised the common European values (later enshrined in Art. 2 TEU), thus intending to invite the ex-Soviet states to join the EU.⁵⁸ Since the European Council's discussions of the EU's authority are often linked to a push for enlargement, it is illuminating to briefly reflect on the relation between authority and size.

The European Council often associates size and number of Member States with greater authority, especially internationally. For example, in 2006, it opined that enlargement

has helped to overcome the division of Europe and contributed to peace and stability throughout the continent. It has inspired reforms and has consolidated common principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law as well as the market economy. The wider internal market and economic cooperation have increased prosperity and competitiveness, enabling the enlarged Union to respond better to the challenges of globalisation. Enlargement has also enhanced the EU's weight in the world and made it a stronger international partner.⁵⁹

14/15.12.2001, p. 20, stating that the European Council's vision of the EU 'admirably matches citizens wishes'.

⁵⁸ European Council, Presidency Conclusions, Dublin, 28.4.1990, Nos. 1 and 3.

⁵⁹ European Council, Presidency Conclusions, Brussels, 14/15.12.2006, No. 5. For earlier examples, see European Council, Presidency Conclusions, Helsinki, 10/11.12.1999, No 3. European Council,

Perhaps this reflects a common assumption in international relations, according to which ‘right follows might’, ie that population and economic size corresponds to the polity’s geopolitical influence.⁶⁰ That, incidentally, is also present in the EU’s internal discourse in relation to different-sized Member States: for example, the preeminent role of France and Germany as drivers of integration or the permanent guarantee of an Advocate General position for the big Member States. In any event, empirical evidence suggests that enlargement does indeed contribute to more compliance with EU law.⁶¹ An influential recent study on the ‘Brussels-Effect’ confirms this relation between size and authority. It suggests that the EU’s global *regulatory* authority derives its normative force, among others, from the sheer scale of assembling and regulating 27 individual national political communities.⁶² Politically, the recent tensions between Europe and the Trump Administration illustrate the advantage of debates on equal footing between the two, which seem impossible to achieve for individual Member States. These considerations play a concrete role for our object of study – the moral authority of EU law – as well. The weight of any associational or contractarian justification, ie one based on the horizontal institutional integration of the participants, increases in relation to the authority of individual Member States with a growing number of EU members, since the nominal weight of each individual entity shrinks. In short, the greater the number of Member States

Presidency Conclusions, Nice, 7-10.12.2000, No. 4. The Commission seems to agree, see Commission, Third General Report (n 25) p. 11.

⁶⁰ See only Federico Fabbrini, ‘States’ Equality v States’ Power: The Euro-Crisis, Inter-State Relations and the Paradox of Domination’ (2015) 17 Cambridge Yearbook of European Legal Studies 3, 6.

⁶¹ Tanja Börzel and Ulrich Sedelmeier, ‘Larger and More Law Abiding? The Impact of Enlargement on Compliance in the European Union’ (2017) 24 Journal Of European Public Policy 197.

⁶² Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020).

and EU citizens, the more normative weight for EU law passed by all of them.

At the dawn of a new millennium, the European Council kindly summarised its view of the EU's authority in the Tampere Conclusions. It portrays a dual source for the EU's legitimacy, combining *instrumental economic goals* and *substantive values*. According to the European Council, EU integration is based on a 'shared commitment to freedom based on human rights, democratic institutions and the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union'⁶³.

The European Council's most recent take still sees the legitimacy of the EU in its capacity as vehicle to tackle contemporary challenges. In substance, a sound economic system, curiously connected to values, forms the heart of the European Council's view of the *raison d'être* of the EU.⁶⁴ This is evident in the reflections on the challenges for the EU as autonomous and strategic player. The considerable development of the Area of Freedom, Security and Justice since Tampere, combined with permanently looming terrorism threats and the questioning of the post-war transatlantic defence alliance, prompts the European Council more and more to view the EU as instrumental to protect EU citizens and their freedom as a whole:

The common values underpinning our democratic and societal models are the foundation of European freedom, security and prosperity. The rule of law, with its crucial role in all our democracies, is a key guarantor that these

⁶³ European Council, Presidency Conclusions, Tampere, 15/16.10.1999, No. 1. Similarly, European Council, Presidency Conclusions, Brussels, 25/26.3.2004, Nos. 6-8. See also European Council, Presidency Conclusions, Brussels European Council, 10/11.12.2008, No. 1. European Council, Presidency Conclusions, Brussels, 11.12.2020, No. 1.

⁶⁴ See only European Council, Conclusions, Brussels, 2.10.2020, Nos. 7, 9.

values are well protected; it must be fully respected by all Member States and the EU.⁶⁵

The common values are not portrayed as ends in themselves. And neither is European integration. Instead, it serves the ultimate aim of maximising the impact of the Member States in the world. As so often in Europe's history, the common identity on the inside is nurtured by a perceived external threat, or at least significant changes in the external environment.⁶⁶ For example, the call for the EU to become digitally or technologically 'sovereign'⁶⁷ links political theory to a modern version of threat (cyber warfare, powerful digital companies).

One could, of course, question whether the combination of instrumental benefits and substantive values as main reasons for the EU's authority match with political reality or whether they can coexist without friction. According to widespread academic criticism, the emphasis on common values and the wellbeing of the citizens have been sacrificed on the altar of economic viability in the course of the financial crisis.⁶⁸ There, the European Council resorted to mechanisms outside the EU legal order (EFSF, ESM etc.), where democratic and legal accountability, to put it mildly, are scarce. Whilst this is no place to assess the implications of these crisis mechanisms (wait for Chapter 8), it shows how the

⁶⁵ European Council, Guidelines following the United Kingdom's Notification under Article 50 TEU, 29.4.2017. See also Informal Meeting of Heads of State or Government, Sibiu Declaration, 9.5.2019.

⁶⁶ See, in more detail, Josef Weinzierl, 'Territoriality beyond the State: The EU's Territorial Claims and the Search for Their Legitimacy' 22(4) German Law Journal (forthcoming).

⁶⁷ European Council, Conclusions, Brussels, 2.10.2020, Nos. 6, 7.

⁶⁸ In European Council, Presidency Conclusions, Brussels, 19/20.3.2009, p. 1, the European Council still had an eye on EU citizens, when declaring: 'By acting together, the EU can put its financial sector on a sound footing, get credit flowing to the real economy and protect its citizens from the worst impacts of the crisis'. Compare that to European Council, Presidency Conclusions, Brussels, 17.6.2010, and European Council, Presidency Conclusions, Brussels, 14/15.3.2013.

European Council prioritised economic and financial stability over institutional legitimacy and substantive accountability.

This short digression illustrates that employing a broader arsenal of normative standards increases the risk that they clash with each other. This is additional evidence that social reality is simply messier than academic models. In any case, the discrepancy between political theory and institutional reality contributes to the theoretical debate whether political theory ought to give up unitary models of legitimacy to stay closer to social reality, despite the risk of conflict among these standards.⁶⁹ Alternatively, it could be precisely the task of political theory to provide a ‘clean’ analytical framework as ideal standard for institutions and their social reality. As I will explain in Chapter 8, the truth lies in between. Whereas theories of political authority ought to provide a unitary ideal guideline for evaluating the rightful exercise of public power, this is compatible with non-monistic – viz. various parallel – assessment vehicles internal in a single standard (such as elements of input, output, throughput).⁷⁰

3. Interim Conclusion

In line with other institutions, the European Council does not offer a unified moral benchmark for evaluating the authority of the EU. This is not a criticism. Apart from the fact that institutions are not obliged to adhere to academic models, the European Council

⁶⁹ Some already do. Raz calls his account ‘normal’ justification thesis precisely to allow for other normative standards to play a role as well.

⁷⁰ For a discussion in relation to democratic authority on the national level, see Thomas Christiano, ‘The Authority of Democracy’ (2004) 12 *Journal of Political Philosophy* 266.

is a political body involved in the general governance of the EU. Its conclusions reflect the political environment of the day as much as the compromise between the leaders of multiple sovereign states.

Nonetheless, two things can be discerned. First, the European Council almost exclusively relies on the Member States as relevant agents and reference points for the legitimate authority of the EU. Neither peoples nor citizens play a vital role in legitimising the EU's authority. Citizens are mostly used in proclamations to enhance and proclaim the social legitimacy of the EU. Second, the overall trend for offering a substantive moral benchmark is and always has been instrumental. The European Council judges the EU's authority by way of the advantages it has for the Member States. Though those are primarily economic, the more visible geopolitical standing of 27 states united in a supranational political community plays an ever-greater role in recent years (evidenced by the leaders' own use of sovereignty and autonomy for the EU). The common values of Art. 2 TEU figure in many, especially recent Council Conclusions. Yet, they never assumed a self-standing legitimising function. In other words, the European Council employs an *international-instrumentalist* justification strategy. Similarly to the Commission, the EU's right to rule is justified because it provides the service for these Member States of increasing their individual economic well-being as well as their voice internationally while adhering to common values.⁷¹

With that, let us finally address the perspective of actors that, while not EU institutions in the narrow sense of Art. 13 TEU, have influenced the debate of EU law's

⁷¹ This is deliberately phrased in terms of Raz's service conception.

authority for decades: national constitutional courts.

VII. National Constitutional Courts: Popular Consent

It should have become apparent by now that this thesis is not about the intensely-debated theoretical disagreement between the ECJ and the national constitutional courts. It leaves the (sovereignty-related) question of ultimate decision-making authority mostly to one side and studies the EU's authority claim with regard to the right moral standard to evaluate its legitimacy. National constitutional courts nonetheless have a say in debating the moral basis for the EU's authority. This is not only due to the EU's unique institutional architecture, where the law-administering institutions of its Member States play a vital role in enforcing EU law. National constitutional courts are 'EU institutions' in at least two important ways. For one, as 'European Courts' (Chapter 3) they are vital parts of the EU's legal architecture and pronounce on the theoretical implications of EU membership for their own constitutional arrangement. For another, they have historically been the main actors in reconciling the EU's emerging authority claim with their respective constitutions for which they act as ultimate guardians.

National constitutional courts overwhelmingly base the authority of the EU and its laws on the consent of their constitutional people, since they treat certain core guarantees in their national constitutions as expressions of popular sovereignty. As one of their most prominent representatives, the BVerfG argues that the

democratic legitimation by the people of public authority exercised in Germany belongs to the essential contents of the principle of the sovereignty of the people and thus forms part of the Basic Law's constitutional identity".

(...). It follows that the Basic Law does not authorise German state organs to transfer sovereign powers to the European Union in such a way that the European Union were authorised, in the independent exercise of its powers, to create new competences for itself.⁷²

Put differently, the legitimisation strategy of ‘the people’s consent’ is derived from the national constitution, which enshrines the possibilities for as well as the limits to integration beyond the state. The constitution and, more precisely, the will and consent of the *pouvoir constituant* informs the national constitutional court’s authority basis.

The constitutional courts focus on the self-determining people instead of Member States as relevant constituent entity.⁷³ This shift has important theoretical implications. Firstly, it distinguishes their approach from the classic state-consent justification in international law, which downplays any theoretical impact of international arrangements on individuals or their fate as a collective people. The focus on peoples constitutes a bottom-up acknowledgement of the qualitative difference in EU law’s intrusion into the national constitutional arena. Secondly, the focus on their people allows constitutional courts to impose limits on EU integration, *even if* Member State officials would consent to them.⁷⁴ In order for there to be sufficient space left on the national level to allow a people to self-determine its affairs in a proper democracy, various salient competences can’t be transferred to the EU, and the national parliament’s scope of action itself must not be

⁷² BVerfG, Judgment of 05 May 2020 - 2 BvR 859/15 (*Weiss*), para 101.

⁷³ Similarly Eva-Maria Tieke, *Das Subjekt Demokratischer Legitimation in Der Europäischen Union* (Tectum 2016) 303 et seqq.

⁷⁴ For an overview of the evolving disagreement between the ECJ and national constitutional courts see Andrew Oppenheimer, *The Relationship between European Community law and National law: the Cases* (CUP 1993, 2003) Vol. 1&2. Instructive also Bruno De Witte, ‘Direct Effect, Primacy, And the Nature of the Legal Order’ in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011).

substantially eroded.⁷⁵ It follows that the attempt to transfer non-transferable competences (elements of national constitutional identity) violates the constitution. In other words, the state institutions cannot validly transfer certain competences to the EU because the *demos* as constituted power (*pouvoir constitué*) is constitutionally obliged to retain them at the national level.⁷⁶ Other national constitutional courts operate with similar *controlimiti*, so that national popular self-determination sets absolute limits to EU integration and consequently to the legitimate exercise of public power by the EU.⁷⁷

The viability of the constitutional courts' theoretical edifice is not under consideration here (wait for Chapters 7 and 8). The take-away for our purposes is the exclusively derivative nature of the EU's authority in that picture. It seems like a supranational adaption of the historically quite popular benchmark for political authority on the national level, ie the notion of normatively meaningful *consent* of individual citizens (Chapter 2). Actual constitutional authorisation by the people entails the necessary consent from which the EU's moral authority and its limits derive. Even more important is that the national constitutional courts' notion of legitimate authority focusses exclusively on a

⁷⁵ BVerfGE 142, 123 (*Gauweiler*), paras 115 et seqq. BVerfGE 123, 267 (*Lisbon*), para 249 contains a list.

⁷⁶ Only the constituent power can do that. See, also for other examples, Michel Troper, 'The Modern State and the Concept of Authority' in Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory* (Elgar 2016) 89.

⁷⁷ For example, Spanish Constitutional Court, judgment 26/2014 of 13 February 2016, Melloni, sec. II.3. refers to the 'sovereignty of the Spanish people' as ultimate reference entity. Moreover, the Italian Constitutional Court since the 1970s has derived its 'controlimiti-doctrine' from Art. 11 Italian Constitution, which speaks of the 'limitations of sovereignty' Italy agrees to. See only Italian Constitutional Court, *Frontini v Minister delle Finanze* [1974] 2 CMLR 372. For a similar approach of the French Constitutional Court and insights on other Member States, see De Witte (n 74) 354 et seqq. The Polish Constitutional Court, K32/09, 24 November 2010 confirmed this view by relying mainly on the consent of the nation to bind Poland to the EU (the word *consent* appears no less than 58 times in the judgment).

single unit. It relies on each national constitution and each people individually, with no concern for how they interrelate as a European political or moral community. The BVerfG's limits on the EU's legitimate authority derive from the German Constitution, the Czech Constitutional Court's limits from the Czech Constitution, the Spanish Constitutional Court's limits from the Spanish Constitution, and so on. Put differently, in contrast to referring to a 'union of peoples', the constitutional courts focus on their individual constitutional people alone. And yet, the national constitutional courts remarkably perceive the national people – instead of Member States – as ultimate constituent entity of the EU polity. Their argumentative edifice rests on the normative requirement that, ultimately, the national people needs to author any public rule exercised over that people.

To sum up, the constitutional discourse in national supreme courts is unambiguous. The EU's authority is anchored in – and simultaneously limited by – the consent of each individual people as expressed in the respective constitutions.

VIII. Conclusion: Theoretical Purity vs. Institutional Reality

The following summary shows that the institutions hold divergent views in relation to the moral standard for and relevant actor concerning the EU's authority. In that, at least, they imitate their academic counterparts. A striking difference between the two perspectives, however, is that academics strive for uniform and coherent accounts, whereas the institutions are happy to take leaves out of various books:

	Substantive Moral Standard	Relevant Agent
Treaties I: TFEU	Overall focus on the (intrinsic and instrumental) value of binding institutional cooperation to achieve peace and prosperity among the EU peoples	European peoples as joint entities; prominent subsidiary role for Member States
Treaties II: TEU	Combination of cooperative (integration through functioning institutions) and substantive values (Art. 2 TEU)	Ambiguous. Noticeable focus on Member States
ECJ	Developed over time. Post-Lisbon: Institutional elements (the integrity of and respect for supranational law-making and enforcement procedures) firmly conjoined with substantive values (Art. 2 TEU)	No explicit account. Important roles for citizens, states and EU peoples, mostly focusing on their respective relation to each other
Commission	Emphasis on instrumental value of delivering various outcomes	Ambiguous, mainly Member States
European Parliament	Emphasis on democratic elements (value of EU institutions to enable European cooperation by allowing input of all Europeans). Subsidiary role for substantive values (Art. 2 TEU)	Not entirely clear, but noticeable focus on role of EU citizens
European Council	Mainly instrumental: EU law's capacity to deliver outputs through coordination among stakeholders. Subsidiary role on substantive values (Art. 2 TEU). Focus on enlargement as tool to increase EU's authority	Member States
National Constitutional Courts	Consent of national people, each individually	Constitutional Peoples

Figure 12: Institutional Visions of the EU's Authority

This cautious summary depicts institutional reality. Neither is any given institution's perspective necessarily internally coherent, nor are the different views of individual institutions compatible with each other. Due to looming threat of selection bias and the often murky blend of social and moral legitimacy, I had to proceed with appropriate caution when imputing these views to the institutions. Note in that context also the variegated use of notions such as 'people', which might mean self-determined national

demoi to some, the citizens or an individual citizen to others, or even constitute a synonym for states (see also Chapter 4). The following conclusions are thus only tentative.

Seeing theories of authority applied in practice results in a rather convoluted picture. Many individual considerations are at play, sometimes capable of being traced back to well-known authority literature, sometimes idiosyncratically derived from the specifics of the EU polity. This theoretical patchwork rug illustrates how different conceptions of the EU's authority inform institutional practices. The same applies to the disagreement about the underlying agent. That is, whom does the EU ultimately concern and who is the source of its authority? Its Member States? EU citizens? The European peoples? All of them together? In one way or another, the moral standards focus on a mix of constituent entities, thereby reflecting the lack of a European *demos*, the composite architecture of the EU, and the still unresolved question of the EU's constitutional nature. While the absence of any discussion seems to suggest that the institutions don't disagree about the nature and scope of the EU's authority claim in the sense of Chapter 5, they all disagree on the moral basis and relevant agent underlying the legitimate authority of EU law. This chapter shows clearly that there is no such thing as 'the EU's view of its authority basis'. Each institution has formulated its own, often dynamic and changing conception. Deciphering this polyphony of institutional conceptions on the right moral standard and agent for grounding the EU's authority constitutes the first lesson of this chapter.

The second lesson stems from the interesting links between the institutional position and the institutions view of the EU's authority. To a varying degree, the conceptions of any of the institutions studied in this chapter mirror the standing of these

institutions in the EU's architecture. Recall only the EP's focus on the peoples' input or the Commission's emphasis of economic benefits. There seems to be a reflexive relationship between institutional standing and authority conception.

The third lesson emerges from connecting the dots, from discovering interesting alliances and frictions among the Treaties and institutions studied above. For example, the substantive convergence between the European Council and the Commission's instrumental accounts might be due to the 'executive spirit' in both institutions, ie that both have executive responsibilities at the national and EU level respectively. Yet, the reasoning of both institutions differs sharply. While the Heads of States and Governments in the European Council intend to justify the added value of the European project to their home constituents, the Commission's instrumental outlook can be traced back to its crucial role in delivering and monitoring the EU's policies. Furthermore, there is a palpable tension between the European Council's rather lax attitude towards regulatory fragmentation as a result of enlargement on the one hand, and the Court's and Commission's usual emphasis on institutional unity, coherence, and integrity on the other. This reflects the political character of the European Council as opposed to the Court's and Commission's overall more legalistic nature. Finally, the vision of each institution either consisted in a patchwork of different moral ideas from the outset, or changed over time to adjust to internal or external developments. The exception is national constitutional courts. They have consistently relied on the people's consent to underwrite the EU's legal and moral authority. This can be explained by the fact that they are not EU institutions in the narrow sense (Art. 13 TEU), but first and foremost national institutions. They originate from outside the EU. Consequently, whenever the EU evolved, either through Treaty

amendments or a shifting geopolitical environment, this didn't affect national constitutional courts directly. They simply continued to rely on their home constitutions.

At the end of this chapter, I can only hope that the juxtaposition of the institutions' views on the EU's authority and the models in political theory that underpin them, fulfilled the hinge-function between Parts II and III I promised above. Whereas both parts feed from the theoretical groundwork in Part I, Part II explored the nature, scope and addressees of the EU's authority claim and where it ought to be located on the range between national and international authority. Chapter 6 led us to the core question of the remaining chapters, namely to identify the correct moral standard to evaluate the EU's legitimate authority. It showed that the Treaties and institutions disagree about both the moral basis for the EU's authority and about the underlying agent and source. The rich collection we encountered here serves as neat background for the ensuing analysis of each model's cogency.

In Chapter 7, I complement this institutional reality by turning to academic accounts of the EU's authority. That is, I portray implicit and explicit models of the appropriate moral baseline for the EU's authority in the literature, link them to the view of the above institutions, and assess their theoretical soundness. This marks the penultimate step before I propose my own view of how to evaluate the grounds and limits of the EU's right to rule, or – in other words – of how to assess the truth of the EU's authority claim.

CHAPTER 7: POTENTIAL AND LIMITS OF CURRENT MODELS ON THE EU'S AUTHORITY

I. Introduction

Let me start by retracing the previous steps of the argument: I first laid out the conceptual framework for applying theories of authority to political communities and organisations beyond the state (Part I). I then set out to portray the EU's authority claim, viz. how it seeks to bind whom. By focusing on the notions of institutions and membership, this resulted in a constructive interpretation of an 'Authority claim over Peoples' (Part II). The preceding Chapter launched Part III by looking at how the Treaties and institutions themselves reflect on the moral ground of the EU's legitimate authority. In what follows, I put these institutional perspectives in their theoretical context and evaluate the viability of existing – implicit or explicit – accounts of the EU's authority.

At the outset, however, let me reflect on the appropriate agent: on who is the source of the EU's authority, since this aspect affects each of the substantive accounts that follow.

II. Identifying the Source of the EU's Authority

In Chapter 5, I argued that the EU barely affects the individual autonomy of an EU citizen qua individual human, especially when compared to states and their monopoly of force. The EU's authority thus cannot be based on ideas such as EU citizen consent or maintaining a fair distribution of benefits and burdens between them as individual agents, since that would be at odds with what the EU actually does in authority terms.

Part II also attempted to show that an exclusive focus on states and their officials fails to appreciate the distinct normative architecture of the EU. In other words, Member States are not the appropriate source of the political authority of the EU. Yet, some authors insist on the Member States as primary and exclusive source for the EU's authority:

Whatever authority the EU claims (...) must be rooted in a grant made to it by the Member States, as the principal site of recognized political authority in Europe. And, provided this is maintained, the Member States come to the rescue of the EU by supplying it with the political legitimacy to act which on its own it lacks.¹

I disagree. I think that ultimately the constitutional peoples themselves as self-determining collectives underpin the EU's moral authority. Precisely because of ever-growing inter-, trans- and supranational developments, political theory ought to acknowledge that peoples may entrust political agency to non-state polities. While the peoples in social reality act mostly as state officials and citizens, they intervene themselves to take important decisions, eg through referenda, through amending their constitutions, or through their representatives in the EP. The profound effect of the EU's institutional structure on the European peoples, their ways of life, and their economic and political choices cannot be based on states as main agents in my view. As explained in Part II, a constitutional people is conceptually prior to state institutions, which derive their legitimacy from popular (constitutional) authorisation and express and implement the will of a self-determined collective. While it is true that the Member States are the principal sites of political authority, this does not apply to areas beyond their legitimate jurisdiction,

¹ Stephen Weatherill, *Law and Values in the European Union* (OUP 2016) 9; Anand Menon and Stephen Weatherill, 'Transnational Legitimacy in a Globalising World: How the European Union Rescues Its States' (2008) 31 *West European Politics* 397, 398.

however. In many ways, the EU does for the European peoples what their states can't. Since the EU's tasks thus escape the legitimate authority of the individual state, it is hard to see how states could act as the main repository for legitimate authority in precisely those areas. As Craig remarked long ago in relation to the widespread use of terminology such as democracy and legitimacy, it 'bears testimony to the acceptance by the major players that the Community requires a form of legitimation which can no longer be found purely in the traditional language of state agreement and state control.'² In short, we ought to focus on the constitutional peoples themselves as source of the EU's political authority.

Focusing on peoples rather than states illustrates how the EU enables the peoples to deliberate and resolve tensions between the two levels (state and EU), via which they exercise their self-determination.³ The point is that states lack the normative power to bind their peoples in the way the EU purports to do, because the EU affects the self-determination of the European peoples from which the states themselves originate.⁴ In the EU's architecture, state institutions do not 'own' their citizens in the sense that they alone could represent their interests and political agency. Think of the current developments in some Member States, where authoritarian governments face more or less strong pro-European opposition: not through their institutions, but via their own civil society. Such movements would have no voice in the debate about the EU's legitimate authority if we

² Paul Craig, 'Democracy and Rule-making Within the EC: An Empirical and Normative Assessment' (1997) 3 *European Law Journal* 105, 112 et seq.

³ Nicole Bolleyer and Christine Reh, 'EU Legitimacy Revisited: The Normative Foundations of a Multilevel Polity' (2012) 19 *Journal of European Public Policy* 472, 479.

⁴ One reason why state consent fails as appropriate framework. See Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal Of International Law* 596, 610.

focused on state institutions and officials alone. Neither would their national judges, who intend to apply EU law faithfully, or the MEPs, who derive their mandate directly from their national people as well. There are consequently both analytical and normative advantages to focusing on the constitutional peoples.

To sum up, we should view the EU's constitutional peoples as ultimate agents and source of the EU's authority. Chapter 8 builds on this insight more fully. For now, however, let's focus on the literature on the moral grounds for the EU's authority.

III. Taking Stock: The Obscure Debate on the Moral Basis of the EU's Authority

The remainder of this chapter engages with different accounts on the correct moral standard to evaluate the EU's authority. I call the debate obscure because it is hard to find fully-fledged accounts of the moral authority of EU law. One aim of the following pages is to uncover the normative assumptions behind these contributions in the literature. To start, we focus on a value that has informed theories of authority for centuries: consent.

1. The Role of Consent in the EU's Authority Architecture

Consent used to be the panacea of authority issues on the state level (Chapter 2). Based on an intuition derived from private relations (think of promises or contracts), my state may legitimately obligate me if and to the extent to which I have signed up for that scheme. The ingenuity of consent-theory is that I bind myself voluntarily. The source of authority is the individual citizen's normative powers, which enable them to overcome the core difficulty

of reconciling individual autonomy with sovereign authority.

Once it fell out of fashion on the state level, however, consent theories found another host: the international arena. To this day, most international lawyers intuitively subscribe to the view that the authority of international law and its institutions is based on state consent. That is why Çali calls it the ‘standard account’.⁵ That view alone seems to honour and reflect sovereignty and *pacta sunt servanda* as fundamental ideas of the international order. But now to the EU.

a. Primary Law-Making as Plausible Starting Point

In light of this success story of consent, it is unsurprising to find traces of consent-based accounts in reflections on the EU’s authority. After all, aren’t the Member States the ‘Masters of the Treaties’, who fully control the constitutional basis of the EU? Even the ECJ itself said so not long ago when dismissing AG Sharpston’s appeal against the decision of the Representatives of the Member State Governments to replace her early.⁶ MacCormick supports this view when he invokes *pacta sunt servanda* as the normative consequence of state consent in the search for the legitimacy of EU law.⁷ One of the strongest counterarguments to consent theories on the national level, namely the empirical

⁵ Başak Cali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (OUP 2015).

⁶ Case C-424/20 P(R) *Sharpston* EU:C:2020:705, para 17: ‘Thus, the Member States – as masters of the Treaties – have reserved to themselves, collectively, the adoption of certain acts’. In the literature, see also Dieter Grimm, ‘Sovereignty in the European Union’ in Johan Van der Walt and Jeffrey Ellsworth (eds), *Constitutional Sovereignty and Social Solidarity in Europe* (Nomos 2015).

⁷ Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999) ch 9.

absence of actual consent,⁸ thus can't be brought to bear against consent-based accounts of the EU's authority. Member State consent is ubiquitous at the level of the EU's constitutional foundation. Not only does actual Member State consent as part of every Treaty amendment provide updated consent to the EU's exercise of authority. What is more, accession involves the consent not only of the acceding state, but of all the current Member States (Chapter 4).

There is thus – prima facie – a good case for a consent-based justification of the EU's authority. I am nonetheless sceptical about the viability of consent as correct standard to evaluate the EU's authority. Let me introduce my scepticism by quoting Çali's great questions:

If European Union law aims to integrate 28 states more deeply, does this mean its authority should be understood in ways that match the normative intentions of its creators? Are European Union member states under a more profound duty to respect the authority of European Union law? Does European Union law have authority on grounds other than the binding nature of the treaty? In other words, does it attract obedience for reasons beyond the standard account?⁹

While you will find my answers to all of these questions in the present and the next chapter, my answer to the last question is: Yes, it does. The standard account of state consent doesn't do the trick in the EU. Let me explain why.

⁸ David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008) 9.

⁹ Çali (n 5) 35.

b. The Normative Limits of Member State Consent

The following reasons suggest that consent is unsuited to ground the EU's authority.

First, let's reflect on the notion of voluntariness that lies at the heart of consent-theory.¹⁰ From a theoretical perspective, consent's emphasis on voluntariness is itself morally questionable, since it prioritises voluntary obligations over involuntary ones without a good reason, especially in the public realm.¹¹ Even if we grant the importance of voluntariness however, the picture in the EU is murky. Formally, EU membership is voluntary for the European states and their peoples (Arts. 49 et seq. TEU). As stated above, that makes consent a good candidate to underpin the EU's authority. This formal observation nonetheless obscures that – in substance – the EU in many ways resembles a non-voluntary scheme. For the individual citizen the EU is non-voluntary, since it takes the collective decision of a majority of one's people to enter and exit the EU. More importantly still, on a collective level Brexit provides many years of evidence of Green's point about the substantive costliness of exit (Chapter 4). These reflections raise doubts about the theoretically meaningful voluntariness of EU membership. The point is that consent falsely suggests that it is easy to revoke consent at any time. The breadth and depth of the EU's authority claim explained in Part II simply make it impossible to foresee the future avenue of EU integration and just how the individual peoples will be affected by the mutual opening up of their territories. In other words, it is implausible to assume that

¹⁰ On the relationship between voluntariness and consent Andrei Marmor, 'An Institutional Conception of Authority' (2011) 39 *Philosophy & Public Affairs* 238, 250.

¹¹ Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of Harvard University Press 2011) 318 et seq.

consent at a given time legitimises the daily workings and future developments of a political community like the EU.¹²

The second reason for doubting a primary role of consent is closely related. Many have pointed to the widespread overestimation of the moral work consent can do in underpinning political authority more generally. The doubts result mainly from the idea that the reasons for consent are actually more important than the consenting act itself, and that consent is in itself insufficient to establish political legitimacy, given that one can consent to morally atrocious regimes.¹³ Applied to the EU, this shows that consent as basis for the EU's authority is normatively unattractive, as it puts unwarranted emphasis on the exit right of states and their peoples. Consent is unable to establish tangible substantial limits on the EU's authority beyond legality (ie conformity with the Treaties) as long as they remain members. In a nutshell, one would have to accept any EU law in accordance with primary law as legitimate as long as one doesn't leave. A consent-focus has the counterintuitive implication that the EU can legitimately increase the burden on the collective autonomy of its peoples as long as they remain in the EU. In that sense, exit rights only pretend that there is an easy moral way out.

Third, the in-built focus of consent theories on a single agent raises challenging

¹² More generally Christian Volk, 'The Problem of Sovereignty in Globalized Times' [2019] *Law, Culture and the Humanities* 1, 10. For a parallel critique in international authority theory Cali (n 5) 100.

¹³ Joseph Raz, 'Government by Consent', *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Rev ed, Clarendon 1995); Jeremy Waldron, 'Theoretical Foundations of Liberalism' (1987) 37 *Philosophical Quarterly* 127, 136–140; Scott Hershovitz, 'Legitimacy, Democracy, and Razian Authority' (2003) 9 *Legal Theory* 201, 215; Thomas Christiano, 'The Legitimacy of International Institutions' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (1st edn, Routledge 2012) 385.

questions in the EU context. Many theorists criticise the failure of individual consent to account for interactive concerns, especially the cooperative enterprise a political community necessarily is.¹⁴ This failure is all the more present in a multilevel polity like the EU. The exclusive fixation of consent on one individual source of authority (for example a citizen's consent on the state level or state consent on the international level) belies the various horizontal, diagonal and vertical authority elements that underly the EU's authority architecture and its various actors. So whose consent matters? Consent is simply unable to accommodate the nature of the EU as a collective enterprise of peoples acting mainly through state institutions and citizens. The focus on one individual entity obscures that the *raison d'être* of the EU is based on a plural, on the horizontal political, economic, and historical links between the peoples of Europe and their states. How they relate to each other has to play a role in grounding the authority of EU law, and individual consent leaves no room for that.

Beyond these structural features, basing the EU's authority on consent (most obviously Member State consent) has various normative consequences I am reluctant to accept. For example, national constitutions would necessarily have primacy over EU law. That holds true even if they consented to the primacy of EU law, since that consent would ultimately derive from and be determined by their national constitutions. What is more, Member States would be allowed to derogate from EU law based on their interpretations of their constitutions, which alone form the basis and thus also the limit of state consent.

¹⁴ Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (OUP 2008) ch 7; Samantha Besson, 'State Consent and Disagreement in International Law-Making. Dissolving the Paradox' (2016) 29 *Leiden Journal of International Law* 289, 291; Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (OUP 2014) 33.

Remember that the survey of the institution's vision of the EU's authority (Chapter 6) showed that national constitutional courts are the only institutions which openly argue for consent-based authority. Even in their conceptualisation, however, consent is not a 'super-value' that gives the EU unlimited authority in the sense consent theory suggests. Quite the contrary. Consent has absolute substantive limits, chiefly among them national constitutional identity. There are sectors so central to statehood and national democracy that they may not be transferred to the EU. In other words, their transfer to the EU would be illegitimate, quite apart from the presence of a consenting act by state officials. This shows, first, that consent alone can't do the moral work expected from it and, second, that the necessary focus of consent on one individual entity would render the binding force of EU legal acts up for grabs.

Relatedly, there is an issue concerning international agreements by Member States outside but in the periphery of EU competences. On a consent view, such international action (like the ESM) would not undermine the authority of EU law, because it is then exclusively up to the Member States to choose and voluntarily sign up to the forum for their cooperation. This is no novel conclusion. Theories of international authority have already identified state consent's lack of concern for democratic national institutions and changing majorities over time.¹⁵ Procedures, accountability and substantive guarantees simply don't matter in a consent-based account. Each Member State – as represented by its current government – individually would constitute the ultimate source of authority of the EU, thus shutting out any normatively interesting horizontal moral relationship between

¹⁵ Cali (n 5) 47, 100.

the European peoples, civil societies and individuals. Consent's utter disregard for the value of political institutions and the moral reasons for setting up political communities in the first place makes it an unattractive benchmark for legitimate authority.

To sum up, consent is the wrong moral standard to underpin the authority of EU law. For one, the notion of voluntariness fails to grasp the deeper normative architecture of the EU. For another, various structural features (focus on exit rights and each agent individually), as well as unattractive normative consequences (no concern for the EU's multilevel architecture and accountability mechanisms), and the lack of endorsement by the Treaties or EU institutions, suggest that we ought to look elsewhere for a viable basis of the EU's authority.

Before moving on, let me 'de-radicalise' my claim. I don't suggest that consent is irrelevant for the present discussion. I have tried to show previously that the more consent an authority enjoys, the more effective the governance (Chapter 2). Consent is a crucial ingredient of *social* legitimacy, of a political regime's *de facto* acceptance by the bulk of its subjects. That, however, only impacts on a ruler's moral authority to the extent that it makes it more stable. It creates an 'extra reason' to obey and expresses 'confidence' in the abilities of the government of the day.¹⁶ In short, consent of the bulk of subjects is necessary for the *de facto* authority of a government, but can only function as supporting consideration for moral legitimacy. That is the real importance of Member States' renewed

¹⁶ Joseph Raz, *The Morality of Freedom* (Clarendon 1986) 88 et seqq; Raz, 'Government by Consent' (n 13) 367; Liam Murphy, 'The Normative Force of Law: Individuals and States' in Leslie Green, John Gardner and Brian Leiter (eds), *Oxford Studies in Philosophy of Law. Volume 3* (OUP 2018) 120. See also Besson (n 14) 300 in relation to international law.

consent at moments of treaty amendment.¹⁷ Their consent denotes trust and establishes accountability. Conversely, the negative referenda in France and in the Netherlands, which killed the Constitutional Treaty in 2005, constituted remarkable illustrations of the widespread lack of trust in how the EU was run. But it does not follow that consent should be considered the moral basis for the EU's authority.

Let us move on to an idea which we encountered in various institutional accounts in Chapter 6: namely, instrumental authority.

2. Beyond Instrumentalism Beyond the State

Instrumental accounts ground the authority of law in its ability to help us to achieve ulterior, often moral ends. They focus on the quality of the outcome for the agent subjected to authority. Let's look at their potential to ground the EU's authority next.

a. Traces of Instrumental Authority in the EU

In essence, any account which focuses exclusively on outputs can, in fact, be characterised as instrumental. I refer to the belief that the EU is legitimate to the extent it delivers (mostly economic) outputs which improve the lives of Europeans.

In authority literature, Raz's service conception continues to have remarkable influence as paradigmatic account of instrumental authority (Chapter 2). According to Raz,

¹⁷ See Erik Oddvar Eriksen, *The Normativity of the European Union* (Palgrave Macmillan 2014) 91 for a fuller appreciation of the value of authorization in the EU's architecture.

authority is normally justified (Normal Justification Thesis) if and to the extent its directives help the agent to conform to reasons which apply to them independently (Service Conception). Therefore, it would be better if we treated these directives as authoritative. Even Raz himself has recently expanded his view beyond the state. In his view, states as well as super-state organisations (he mentions the UN and the EU) ‘are justified by the results, by the quality of their character and life’¹⁸.

But the family of instrumental accounts is much broader than Raz’s service conception. Broader instrumental visions have dominated how social scientists and political theorists understand and interpret the EU. In Chapter 6, for example, I argued that the Commission and the European Council focus on the benefits and output the EU brings for its participants (mostly the Member States) in their discussions of the EU’s legitimacy, and I translated that into an instrumental account of authority. Relatedly, various early theories about the broader rationale for EU integration, especially neo-functionalist and liberal intergovernmental approaches, focused exclusively on outcomes, especially economic prosperity and efficiency.¹⁹ Today, Scharpf seems to be the most ardent defender of the view that the EU should be legitimised in terms of output alone.²⁰ He has consistently maintained that the EU lacks the preconditions for input-legitimacy and warned that the EU’s output-legitimacy ought to be aware of its impact on input-legitimacy on the national

¹⁸ Joseph Raz, ‘The Democratic Deficit’ (King’s College London Dickson Poon School of Law, Legal Studies Research Paper Series) 2018–07 10.

¹⁹ Paul Craig, ‘Integration, Democracy, and Legitimacy’ in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU law* (2nd ed., OUP 2011) 16 et seqq.

²⁰ See only his seminal work Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999). More recently Fritz Scharpf, ‘Legitimacy in the Multilevel European Polity’ (2009) 1 *European Political Science Review* 173, 178.

level. In my view, output legitimacy as understood in this literature can be translated into one subcategory of instrumental authority that focuses directly on substantive ends.

The institutional developments after the 2008 Financial Crisis led scholars more recently to note critically that, if anything, the EU's authority can currently be justified with reference to economic prosperity and shared benefits alone, rather than, say, input legitimacy.²¹ Notably, Isiksel has characterized the EU's normative architecture as 'functional constitutionalism'. This idea belongs to the family of instrumental accounts, since functionalism ought to 'convey the EU's purposive mode of legitimation'²². The EU's legitimate authority, in her view, is grounded on the effective delivery of goods, especially an economic union. That means 'its legitimacy depends on the successful realization of these substantive objectives; that is to say, its basis of legitimacy is functionalist (...)'²³. Especially because the goal of an economic union is entrenched in primary law and thereby removed from easy amendment, the EU's authority depends on the 'desirability and successful realization of these aims'.²⁴

Instead of making an argument for the attractiveness for such a normative vision,

²¹ Michael Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union' (2013) 14 *German Law Journal* 527, 548; Turkuler Isiksel, 'Constitutionalism as Limitation and Licence' in Tom Ginsburg, Mark D Rosen and Georg Vanberg (eds), *Constitutions in Times of Financial Crisis* (CUP 2019) 195. See also Anna Davidson, 'Through Thick and Thin: "European Identification" for a Justified and Legitimate European Union' (2008) 4 *Journal of Contemporary European Research* 32, 36.

²² Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (OUP 2016) 72 et seq., 45.

²³ Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (OUP 2016) 78. See also Signe Larsen, *The Constitutional Theory of the Federation and the European Union* (OUP 2021) 97 et seq.

²⁴ *ibid* 220.

Isiksel interprets the EU's normative architecture. That, according to her, simply is the EU's nature: a constitutional arrangement beyond the state that bases its right to rule on delivering an economic union to its Member States and their citizens. In short, the EU relies on *finalité économique* rather than *finalité politique*.²⁵

This *tour d'horizon* illustrates that instrumental arguments have always figured prominently in assessing the EU's social and moral authority. Especially Isiksel's interpretation of the EU illustrates that instrumental visions pervade contemporary writing on the EU's authority without even the need for a proper normative defence. It seems so obvious. Should we thus assess the legitimacy of the EU's authority claim based on its instrumental value? I don't think so. In addition to issues inherent to instrumental accounts of authority, their application to the EU raises further doubts.

b. The Case Against Instrumental Authority

The important yardstick of instrumental theories of authority is to what extent law helps the members of a political community to achieve certain ends. Such an instrumental structure is inadequate, however, to ground authority, which I will illustrate with EU-related examples.

Firstly, I take issue with the way in which instrumental accounts cloud the underlying moral issues by shifting the focus from morality to prudential reasons and rationality (Chapter 2). That feature in itself makes instrumental theories an odd case for

²⁵ *ibid* 18.

justifying authority, since the underlying problem of authority is moral: namely, how to reconcile binding laws with individual or collective autonomy. That, of course, can easily be remedied by only counting moral reasons as enablers of instrumental authority – ie by narrowing down the category of reasons that underpin instrumental authority. There is no such easy remedy for the next point, however.

I suggest that instrumental benefits of rule following itself can't ground legitimate authority, let alone political obligation. Rule following for its own sake is morally empty, especially in a multilevel system in which individual legal orders compete. Let me explain what I am after with a well-known doctrine of EU law: *effet utile*. *Effet utile* means that the effectiveness of EU law as such is an argument for its normative force. An interpretation which leads to a 'better' implementation of EU law is preferable, because it helps EU law to be effective.²⁶ And yet, the limits of such a doctrine are obvious in the EU legal order, which integrates 27 national legal systems. Unsurprisingly, national constitutional orders want to be effective as well. *Effet utile* cannot explain why (a hypothetically conflicting) national law should not be effective. Its normative force is necessarily constrained to intra-systemic arguments, which serve the rule of law of a given legal system.²⁷

This weakness of *effet utile* in theoretical terms corresponds to criticism of Raz's service conception. As others have pointed out, the idea that it would be better for my

²⁶ See, prominently, Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* EU:C:1978:49, para 18. For a comprehensive survey of the case law Urška Šadl, 'The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU' (2015) 8 EJLS 18.

²⁷ Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd ed., Hart/Beck 2010) 29 et seqq.

compliance with the reasons that apply to me independently to treat law as authoritative, does not establish that law is, in fact, authoritative.²⁸ It seems as if instrumental accounts miss the point of the moral problem authority poses by failing to translate a rational advantage into moral authority. In short, it remains unexplained how a rational ‘would be good’ turns into a moral ‘ought to’. The example of the EU as a multi-level order with competing legal systems illustrates this defect powerfully.

Secondly, instrumental accounts – similar to consent theories – by definition focus on a single agent, such as the citizen in the state-context, or the state in the international context. They exclude considerations outside each individual agent and evaluate instrumental benefits for each agent individually so that law’s authority varies from one agent to another. Whereas the agent in question seems a good starting point for approaching the autonomy-authority relationship, it is ultimately too narrow. Indeed, there is something odd about this quid-pro-quo, rather transactional architecture. I provide binding solutions, you obey. Vice versa (in an EU example): I pay a share of the EU budget, so what do I get out of this? The upshot would be that EU law’s moral authority varies among Germans, Italians, and Latvians, depending on how they benefit, let’s say, economically from the EU. As Cruz put it:

The temptation is that of conceiving the Union as a game in which all the states should win all the time and in all sub-games, never losing or conceding anything, engaging in cooperation only when there is something to win, and trying to reduce costs and maintain or recover as much

²⁸ Andrei Marmor, ‘The Dilemma of Authority’ (2011) 2 *Jurisprudence* 121, 125 et seq; Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press 2006) chs 8, 9. For a nuanced discussion of this aspect of the normal justification thesis see Stephen Perry, ‘Political Authority and Political Obligation’ in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law*, vol 2 (OUP 2013) s V.

autonomy as possible for the rest, rolling back the policies which entail any sort of solidarity. This conception would deeply transform and undermine the Union.²⁹

The point is that for instrumental theories of authority, the intrinsic value of institutional processes that allow us to cooperate and regulate our affairs together is simply irrelevant.³⁰ They are individualistic and thus inherently inept to evaluate the legitimacy of institutions that apply to a multitude of agents.³¹

Applied to the EU, they neglect the significance of the institutions and the legitimacy input generated by their processes for the authority of EU law. Since law is the key and not rarely the only instrument to administer political authority, however, it seems counterintuitive to ignore its moral features. That would mean to neglect why we set up political communities on the communal, regional, or state level and beyond in the first place. Various authority theorists have rightly emphasised that, in relation to political authority, there are intrinsic and instrumental reasons to conclude that the value of an institutional procedure is conceptually prior to the ‘right’ outcome. In Hershovitz’ words, ‘making decisions together can be more important than getting them right’³². In short, it matters for law’s authority how laws are made.

Thirdly, this ‘institutional blindness’ of instrumental accounts is exacerbated by a

²⁹ Julio Baquero Cruz, *What’s Left of the Law of Integration?: Decay and Resistance in European Union Law* (OUP 2018) 128.

³⁰ Marmor (n 28) 133.

³¹ Allen Buchanan, ‘Institutional Legitimacy’ in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy*, vol 4 (OUP 2018) 70–73.

³² Hershovitz (n 13) 218. Similarly Pavlos Eleftheriadis, ‘Citizenship and Obligation’ in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union law* (OUP 2012) 177.

questionable assumption in the very architecture of instrumental authority. Instrumental models have to assume that there is a specific outcome that is desirable for every participant. In other words, legitimate instrumental authority depends on the subject's acceptance that a problem is indeed solved substantively by the authoritative directive. But that is surely disputable. To let Christiano speak, the 'trouble with instrumental justifications, however, is that there is serious disagreement on what the best outcomes are supposed to be'³³. Voting and institutional deliberation are there to decide on the ends the community should pursue, as well as on the prioritisation of various ends and on the means to achieve them.³⁴ I believe, for example, it is fair to assume that there is no consensus about the right outcome in any of the areas of the EU's competence. To name a few, how should EU citizenship be reconciled with national welfare states? To what extent should EU subsidies be tied to keeping with Art. 2 TEU-values? How should the EU asylum system be redesigned? In fact, there is not even agreement on which competences the EU ought to have in the first place (think only of an EU army or a competence to raise direct taxes).

A view of the EU as an instrument for Member States to produce outputs actively undermines the legitimate authority of EU law in three distinct ways. First, making the authority of law contingent on achieving outputs constitutes shaky ground.³⁵ The benefits of the promised economic union appear straightforward, but it has been clear for quite some

³³ Thomas Christiano, 'A Democratic Theory of Territory and Some Puzzles about Global Democracy' (2006) 37 *Journal of Social Philosophy* 81, 102.

³⁴ Jeremy Waldron, *Law and Disagreement* (Clarendon 1999) 243.

³⁵ See only Joseph Weiler, 'The Authority of European Law: Do We Still Believe in It?' in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019) 6 on material promises as precarious basis.

time that they do not materialise equally in all Member States.³⁶ Second, instrumental authority downplays the political and contested nature of the EU's actions. Of course, one could turn the openness to various outputs into a virtue and emphasise the attractiveness of instrumentalism because it encompasses a wide range of considerations. As we have seen in Chapter 6, the institutions which emphasise instrumental considerations cover aspects from effectiveness (ECJ), peace and stability (European Council), and economic prosperity (Commission). Each of these benefits, however, presupposes unanimity on their desirability, and entails that failure to produce these outcomes would damage the *de jure* authority of EU law. And third, the prioritisation of instrumentalist output-legitimacy downgrades intrinsic goods of a constitutional system with self-government and fundamental rights chiefly among them. As I mentioned in Chapter 6, the European Council's instrumentalist mindset during the Euro-crisis led to a normatively questionable precedence of economic gains over input and accountability.

For these reasons, I do not think instrumental accounts ought to serve as appropriate standard to evaluate the EU's authority. Their prudential focus clouds the underlying moral problem of political authority. Their exclusive emphasis on the individual subject is too narrow and cannot account for the value of political institutions as fora for millions of subjects. And their inherent assumption that there is an uncontested outcome or benefit appear hugely problematic, especially in a multi-level polity like the EU.

Outcomes are of course important in a governance framework. They are important in relation to *de facto* authority, where it always matters whether a polity/institution

³⁶ Stephen Weatherill, *Cases and Materials on EU Law* (12th edition., OUP 2016) 361.

actually delivers results on issues of importance for the populace.³⁷ Additionally, instrumental theories can explain why the EU might be *justified* – ie why it makes sense to have it, especially from the perspectives of the involved states. The factual interdependence of European states makes it the case that if we didn't have the EU, we would have to invent a similar entity tomorrow.³⁸ But that merely justifies the EU's existence. It doesn't give its laws moral authority.³⁹ Outcomes, in other words, cannot serve as successful standards for the EU's legitimate authority, ie its capacity to legally and morally bind also those who disagree with the outcome. Every outcome is contested and its legitimate pursuit dependant on a prior choice of the constituent units.

Let us, next, move to very different accounts of the EU's authority, namely: political obligation theorists in general and democratic authority theorists in particular, who prioritise institutional input and procedures over the quality of any output.

3. Political Obligation and Democratic Institutions

When analysing the value of institutions for the EU's authority, it is essential to draw an important distinction between EU institutions (where non-primary EU law is made), and national institutions (which overwhelmingly enforce EU law). Let me discuss them in turn.

³⁷ See recently Nadja König and Ludger Schuknecht, 'The Role of Government and Trust in the Market Economy' in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019).

³⁸ Similarly Weatherill (n 1) 415.

³⁹ A must read on the distinction between justification and legitimacy A John Simmons, 'Justification and Legitimacy' (1999) 109 *Ethics* 739.

a. Democratic Authority on the EU Level?

As you may recall from Chapter 2, ever more theorists argue that law-making institutions and their procedures command our respect (which translates into a moral obligation to obey their laws). They ground this respect in the moral achievement of political institutions to give individual citizens equal influence and voice in the production of laws despite pervasive and reasonable disagreement among them on how to govern their society. This applies to the neo-Kantian political obligation theories in the wake of Rawls and Waldron, but especially to democratic authority accounts – variations of which also stress the epistemic benefits of democratic institutions (the idea that democratic procedures tend to lead to the ‘right’ outcome).

Can we translate these ideas to the discussion of the authority of EU law? The widespread obsession with the ‘democratic deficit’ – though implicitly acknowledging the importance of democracy as a standard to evaluate the EU’s rightful rule – invites scepticism. As we saw in Chapter 6, however, the EP focusses on the input legitimacy provided by a directly elected Parliament in the supranational architecture. In the literature, Eriksen recently argued that the normativity of EU law should be assessed based on its compliance with democratic standards. For him, the EU realises democratic ideals as a ‘regional cosmopolitan polity’. He lists the ‘milestones of EU democratisation, among them the direct election of the EP, EU citizenship, the Charter of Fundamental Rights or the citizens’ initiative.’⁴⁰ Eriksen explicitly distinguishes EU democracy from democracy’s

⁴⁰ Eriksen (n 17) 48.

manifestation on the state level, and argues that the fusion of constitutional orders (constitutional pluralism), state-less government (no monopoly of force; instead, the normative ideal of constitutional democracy under separation of powers), parliamentary interweaving (the combination of EP and national parliament) and a layered public sphere (deliberation and contestation within and outside of EU institutions) justify to evaluate the EU on the basis of democracy.⁴¹

I think this is mistaken. For a start, any viable version of democratic authority can certainly not be translated into international society and international organisations.⁴² But to the extent that democracy ought to manifest the values championed by democratic authority theorists, it also fails as basis for the EU's legitimate authority. The key reasons for democratic authority theories on the national level simply don't apply to the EU.

For one, democratic authority focusses on the democratic essence of national parliamentary procedures, which treat every individual *equally*. They secure individual autonomy by giving everyone an equal chance to influence how the territory and polity in question is governed. As I explained in Chapter 3, however, the EU is not a democracy in this essential sense. The EP doesn't represent a united *demos* of equal citizens, nor are EU citizens given an equal voice and voting opportunity in EP elections (instead, degressive

⁴¹ *ibid* 90 et seqq.

⁴² The international order lacks the institutional means to deal equally with deep disagreement, as well as the relevance for people's lives and the societal preconditions to establish democratic arrangements. See Thomas Christiano, 'Democratic Legitimacy and International Institutions' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) s 9; Richard Collins, 'Consent, Obligation and the Legitimate Authority of International Law' in Patrick Capps and Henrik Palmer Olsen (eds), *Legal Authority Beyond the State* (CUP 2018) 221. But cf. Mattias Kumm, 'Democratic Constitutionalism Encounters International Law: Terms of Engagement' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2007) 262.

representation). Eriksen interprets the principle of autonomy as constitutive element of democracy too widely when he defines it as ‘those affected by laws should also be authorized to make them’⁴³. This definition lacks the crucial element that underpins democracy as moral standard for rightful rule on the national level: namely, the *equal* respect of citizens through formal decision-making procedures. Equal influence and representation alone secures their individual autonomy. Eriksen may be right about the presence of some other elements of democracy in the EU’s architecture. But those, such as ‘transparency, participation, representativeness, and accountability’⁴⁴ can’t compensate for the absence of equal respect, which makes democratic laws authoritative. The latter is intrinsically connected to the moral relationship among the citizens in a democracy.

For another, the EP neither occupies the crucial position its national equivalents enjoy (note only that it has no right of legislative initiative) nor are its policy choices substantively unconstrained (due to the EU’s limited competences and the broader economic vision entrenched in primary law).⁴⁵ In particular, the epistemic value of democratic procedures of the EU’s institutional procedures is qualitatively different from what its defenders on the national level have in mind.

Democratic authority in its various manifestations thus relies on the specific

⁴³ Eriksen (n 17) 17, 62.

⁴⁴ Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) 273. The presence of these values in EU governance is disputed in Weiler (n 35) 13 et seqq.

⁴⁵ See also Paul Craig, ‘The EU, Democracy and Institutional Structure: Past, Present and Future’ in Wolfgang Heusel and Jean-Philippe Ragueade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019) 321.

properties of democratic nation states. It presupposes the existence of a democracy which the EU simply isn't. As I will show in Chapter 8, the idea of 'democracy' provides a more promising conceptual framework for translating democratic ideals beyond the state. But what if we focus on national institutions?

b. Is the Sum Greater than its Parts?

National institutions are crucial for EU-law making and enforcement in several ways. The Council of the EU is composed of national ministers and, as a result, profits indirectly from their democratic credentials. National parliaments play a role as EU law-administering institutions when transposing Directives or as main actors of the Early-Warning Mechanism to ensure compliance with subsidiarity. Chapter 3 fleshed out in detail the pivotal role national courts and administrative authorities play in the enforcement of EU law. We cannot simply upscale the strong input-related arguments made above to legitimize EU law, however. The role of national institutions in making and enforcing EU law is just too different from their respective roles in relation to national law. In short, the EU law-making does not profit from the democratic authority of national institutions. But what does Weatherill mean then in the passage quoted above, according to which the Member States supply 'the EU...with the political legitimacy to act which on its own it lacks'?

Recently, Eleftheriadis has put forward an argument that puts flesh on the bones of this idea. He argues that international obligations are part and parcel of the state's authority, thereby endowing them with the same moral force. In that framework, the concept of

authority has no independent meaning beyond the state, because international legal obligations are internalised in the statist framework.⁴⁶ They are incorporated in the state's authority. For our purposes, the moral duty to obey EU law is just the same in kind and force as the duty to obey national law, since both emanate from the moral imperative to realise a set of just institutions to facilitate how we relate to each other as individuals on different political levels. That obviates the need to search for distinct legitimation strategies.⁴⁷ EU law is, so to speak, cloaked with national law's legitimacy credentials since national institutions call the shots when incorporating and enforcing EU law. National institutions apply EU law in the same way as national law, so the distinct origin in supranational institutions does not matter. Eleftheriadis writes: 'In a way, all EU obligations are now equally domestic obligations'⁴⁸.

In his view, we do not owe political obligation to the EU or its institutions. Instead, we owe the 'duty of jurisdiction' to our home state or to any state of residence (host state), that is the respect for their moral achievement in setting up just institutions.⁴⁹ Indeed, we cannot owe political obligation to the EU directly, because it does not constitute such a moral achievement.⁵⁰ Our status as EU citizens does not change our moral position towards the EU in the sense that third country nationals owe the same duties to the respective host

⁴⁶ Pavlos Eleftheriadis, 'Federalism and Jurisdiction' in Elke Cloots, Geert De Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart 2012) 62; Pavlos Eleftheriadis, *A Union of Peoples* (OUP 2020) 193.

⁴⁷ Eleftheriadis, 'Citizenship and Obligation' (n 32) 169, 182 et seq.

⁴⁸ Eleftheriadis, 'Federalism and Jurisdiction' (n 46) 62.

⁴⁹ Eleftheriadis, 'Citizenship and Obligation' (n 32) 169, 178, 186 et seqq.

⁵⁰ *ibid* 181.

states.⁵¹ In sum, Eleftheriadis' view is that the sum is not greater than its parts. The EU doesn't create its own forum for legitimate authority, but docks onto and enriches the national notions of authority political obligation. This original and sophisticated model squares the circle by enabling EU law to profit from the legitimate authority of national law in a constitutional state of public right.

Nonetheless, I take issue with both the theoretical structure underpinning Eleftheriadis' argument and with its normative implications. To begin with, the present thesis is built on the idea that sources of law matter for an appraisal of its legitimacy. This is no place to fully defend this claim. Let me just say the following. Chapter 1 distinguished between authority claims on different regulatory levels. In my view, such a distinction is conducive to analytical clarity and normatively desirable. One of the dangers I noticed, for example, in relation to the contemporary sovereignty discourse is the lack of differentiation between the underlying institutional structures on different regulatory levels, which leads to the unwarranted application of state-bound concepts to supranational institutions. Besides, attention to sources reflects social reality. Judges and other law-administering officials differentiate between the moral value and effect of national on the one hand, and supra- or international law on the other. In short, there is a moral intuition that sources matter. Eleftheriadis implicitly acknowledges that, since his dualism is built on a distinction between national law and international law, their respective institutions and the different moral achievements they embody.

Moreover, Eleftheriadis' 'progressive internationalism' is unable to accommodate

⁵¹ *ibid* 187.

the EU's authority claim as outlined in Part II. For him, EU citizenship for example is not citizenship at all.⁵² More importantly, his dualism turns the institutional aspect of the EU's authority claim upside down. For it rejects the idea that EU law, when compared to international law, entails a qualitative difference in nature and effectiveness by using national institutions to give effect to EU law in the way described in Chapter 3.⁵³ Eleftheriadis' model has to deny what the EU actually does in terms of political authority. Perhaps not altogether surprising in light of the previous chapters, I take issue with the qualification of the EU as an international organisation that belongs to the domain of international law. Under his progressive internationalism, there can only be two types of public institutional arrangements: the constitutional state, where we owe duties of citizenship to each other; and the worldwide moral community, which owes natural duties of justice/civility to each other.⁵⁴ *Tertium non datur*. Yet, I insist (quite apart from the breath and salience of the EU's competences) that EU law seeks to bind the European peoples in a qualitatively distinct way (Chapter 5). In plain speak, consider the difference between the US's (temporary) withdrawal from the WHO in 2020, and the UK's withdrawal from the EU. The effect on the autonomy and self-determination of a constitutional people varies significantly and qualitatively.

I also take issue with the idea that the duty to obey EU law has the same content and moral force as the duty to obey national law. I have argued that the moral obligations EU law claims to impose on us are of a different kind compared to national law. In

⁵² Eleftheriadis, *A Union of Peoples* (n 46) 192.

⁵³ See the discussion *ibid* 158 et seqq.

⁵⁴ See, for example, Eleftheriadis, 'Federalism and Jurisdiction' (n 46) 63.

particular, EU law in the standard case obligates us as collectives, and constrains our ability to self-determine our affairs as constitutional peoples. Take the example of the Dublin III-Regulation Eleftheriadis discusses, which makes the state of first entry into the EU responsible for migrants.⁵⁵ For him, the moral position of a Third Country National is comparable to the one of EU citizens in host Member States, since both are bound by the ‘duty of jurisdiction’ to any just state other than their home state. In other words, the moral duties imposed by the EU are none other than those one stemming from the international system as a whole. But EU law does not bind us as individual autonomous agents (in contrast to states), but addresses the constitutional peoples as distinct collectives. I understand the core moral duty involved in this element of the Dublin III Regulation to be on the peoples of the state of first-entry. The challenges arising from this system for the Greek and Italian peoples is the appropriate moral lens to judge the legitimacy of the Dublin III Regulation, as public discourse confirms. As a result, EU political obligation, viz. the ground and nature of the moral duty to obey EU law, is conceptually different from national political obligation.

Equating EU and national political obligation also faces practical problems. It fails to grasp the reality of conflicts between the authority of national law and that of EU law, which only recently detonated in the BVerfG’s Weiss-judgment.⁵⁶ Eleftheriadis’ framework provides us with no tool to compare and evaluate each legal obligation’s legitimacy foundation, nor does it offer an argument how to solve any conflicts in practice.

⁵⁵ Eleftheriadis, ‘Citizenship and Obligation’ (n 32) 160.

⁵⁶ BVerfG, Judgment of 05 May 2020 - 2 BvR 859/15 (*Weiss*).

If the moral obligation to obey EU law and national law have the same moral force, the citizen or institution lacks any guidance on how to deal with such conflicts. This constitutes a central weakness of Eleftheriadis' highly original account.

Consequently, we can neither apply democratic authority arguments to the EU institutions themselves, nor can we rely on the legitimacy of democratic national institutions to ground EU law's authority. Perhaps substantive constitutional values can help. As I discussed in Chapter 6, the Treaties and most of the EU institutions have integrated the values of Art. 2 TEU when reflecting on the legitimate authority of the EU. The question becomes, which role can these values play in grounding said authority?

4. The Recent Popularity of Values

In 2009, the Lisbon Treaty introduced Art. 2 TEU. It made the discourse on values that had commenced with the Charter of Fundamental Rights official:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

This is a substantive commitment at the symbolically charged outset of the TEU. Waluchow calls these values the 'positive morality' of the EU and thereby implicitly confirms their suitability as moral standard to evaluate the legitimate authority of EU law.⁵⁷

⁵⁷ Wil Waluchow, 'Constitutionalism in the European Union: Pipe Dream or Possibility?' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 204 et seq.

Whereas this codification is a significant step in itself, it was impossible to anticipate the important role values would play in the practice of EU law. That applies not only to the EU institutions' extensive recourse to them (Chapter 6). In addition, the rule of law problems in various Member States triggered the first use of the Art. 7 TEU-procedure, as well as the ECJ's complementing jurisprudence (based on Arts. 19 TEU, 267 TFEU (see Chapter 3)). This practical use of values prompts us to look at value-based account of EU law's authority next.

a. Cosmopolitan Constitutionalism: On the Basis of Values

Before EU institutions integrated Art. 2 TEU in their defence of EU law's authority, Kumm developed a distinctly value-based model for evaluating political authority. His *cosmopolitan constitutionalism* holds that the authority of law on any regulatory level hinges on keeping with the values at the heart of liberal constitutions.⁵⁸ For example, he portrays the ECJ's seminal *Kadi* case and its defence of fundamental rights protection against non-reviewable international acts as instance of this idea. Kumm recently restated the idea of constitutionalism as foundation for the legitimate authority of law with particular attention to the *rule of law*, which he then connects with *democracy* and

⁵⁸ Mattias Kumm, 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012); Mattias Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly so Called' (2006) 54 *American Journal Of Comparative Law* 505, 523. For a similar account see Sascha Garben, 'The Principle of Legality and the EU's Legitimacy as a Constitutional Democracy: A Research Agenda' in Sacha Garben, Inge Govaere and Paul Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart 2019).

fundamental rights protection to form the ‘trinitarian formula of constitutionalist faith’⁵⁹.

In his view, a

legal and political system that effectively institutionalises the rule of law is one that fulfils the conditions that need to be fulfilled for law to actually have the authority it claims to have. The content of the rule of law thus becomes a function of the normative grounds that justify its claim to authority.⁶⁰

On that view, the values of Art. 2 TEU seem like an attractive intuitive basis for the legitimate authority of EU law. For the following reasons, I am nonetheless reluctant to accord a primary role to these values in grounding EU law’s authority.

b. Evasive Values

I think the wide-spread use and popularity of the values listed in Art. 2 TEU should invite suspicion. And I think the reason for that suspicion is that the popularity points to their inherent ambiguity. Values like democracy or the rule of law are broad churches. They can be institutionalised and put into action in multiple ways.⁶¹ Beyond that, the question how the values relate to each other only adds complexity to the issue.⁶² There will always be

⁵⁹ Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law’ (2013) 20 *Indiana Journal of Global Legal Studies* 605, 609.

⁶⁰ Mattias Kumm, ‘The Rule of Law, Legitimate Authority and Constitutionalism’ in Christoph Bezemek, Michael Portacs and Alexander Somek (eds), *Legal Positivism, Institutionalism and Globalisation: Vienna Lectures on Legal Philosophy, Volume 1* (Hart 2018) 117.

⁶¹ Christoph Möllers, ‘Constitutional State of the European Union’ in Robert Schütze (ed), *Globalisation and Governance: International Problems, European Solutions* (CUP 2018) 263; Loïc Azoulay, ‘The Madness of Europe, Being Attached to It’ (2020) 21 *German Law Journal* 100, 101; Waluchow (n 57) 196.

⁶² Ernst-Wolfgang Böckenförde, ‘Critique of the Value-Based Grounding of Law [1990]’ in Mirjam Künkler and Tine Stein (eds), *Constitutional and Political Theory: Selected Writings* (OUP 2017) 229.

reasonable disagreements about what it entails to comply with these values – often a crucial part of judicial review. Making these values *operational*, in other words, constitutes a choice. A choice that highlights the importance of who makes the choice. In light of the conceptual breadth of these values, critics plausibly fear that recourse to values becomes an ideological tool rather than an evaluative standard; an ‘exercise in legitimization of the EU’s own policy preferences, which merely helps advance the institutional agenda’.⁶³ In short, abstract recourse to such broad values constitutes precarious ground for underwriting the EU’s authority.

Even if one could settle the interpretive question, there is a more fundamental problem in relation to the EU’s composite/multilevel/polycentric polity. National constitutional orders are not only a competing forum for implementing these values; in fact, they constitute their natural habitat. Most of the values mentioned in Art. 2 TEU were developed in the context of the post-Westphalian nation state (notable exception: democracy), as the second sentence implicitly confirms.⁶⁴ Admittedly, there is a lot to be said for the view that the EU is based on a *conception* of the rule of law within the realm of the broader *concept* of the rule of law. But that does not help us to settle issues related to the authority of EU law in comparison to national law. As Bolleyer/Reh put it: ‘In contrast to its member states, the EU therefore not only needs to balance values; it first

⁶³ Azoulai (n 61) 101.

⁶⁴ For this reason Christian Volk, ‘Why Global Constitutionalism Does Not Live up to Its Promises’ (2012) 4 Goettingen Journal of International Law 551, 564 et seq. criticizes global constitutionalism’s use of concepts which were designed for the nation state.

needs to decide who should carry which value at what level'⁶⁵.

Think about the primacy debate. If the authority of EU law hinges on the respect for the EU's conception of values, how could it ever take precedence over national law that complies with national conceptions of, let's say, the rule of law? Kumm himself seems to encounter that problem when discussing democracy as one of the three core elements of the 'constitutionalist rule of law'. By requiring a democratic process based on, inter alia, the *equal* right to vote for law to be legitimate,⁶⁶ he implicitly rules out that the EU has legitimate authority, simply because the EP is not elected by an equal vote of each EU citizen (see above). Perju powerfully outlined this predicament when discussing the legacy of Böckenförde:

the inevitability of conflicting interpretations of values between states and the EU creates difficult challenges. How a political community chooses to interpret abstract values (...) is an indispensable dimension of its self-government. While abstract values might seem common, the specifics of their meaning are so central that the process of interpretation must itself remain within the realm of political self-determination.⁶⁷

I agree. The competing fora for value-protection are the real challenge for cases like *Melloni* or *IHG*. The real issue in *Melloni* is not whether the Framework Regulation for the EAW complies with the fundamental right to effective legal protection. It is whether the Spanish or European interpretation of the fundamental right to effective legal protection informs the case. The normative core is thus related to the character of the underlying

⁶⁵ Bolleyer and Reh (n 3) 473.

⁶⁶ Kumm, 'The Rule of Law, Legitimate Authority and Constitutionalism' (n 60) 124.

⁶⁷ Vlad Perju, 'On the (De-)Fragmentation of Statehood in Europe: Reflections on Ernst-Wolfgang Böckenförde's Work on European Integration' (2018) 19 German Law Journal 403, 425.

political community. This relates back to the above point about the abstract and broad nature of such values. Whereas the values as such on both levels are not at odds with each other, their interpretation and institutional manifestation in each political community trigger the potential for conflict.⁶⁸ If Spanish fundamental rights are an expression of Spanish self-determination, however, what stands behind Art. 2 TEU and the Charter? In my view (which I explain in detail in Chapter 8) their democratic pedigree, namely the moral force of the joint commitment of all European peoples to protect these values, is key.

Abstract reliance on Art. 2 TEU to ground the legitimate authority of EU law hence fails when applied to the interaction with national constitutional systems. Either there is no normative guidance for dealing with conflicts, given that both legal orders are judged against the same ‘republican principles’ and each manifestation is most likely compatible with the master-value.⁶⁹ Or we are bound to conclude that national constitutional law always trumps EU law, because national constitutions embody the – one could say – ‘original’ normatively richer version of these values. What is more, the EU’s current handling of the rule of law challenges in Eastern Europe illustrates that the Treaty (esp. Arts. 7 et seq. TEU) is by design ill-equipped to enforce these values in practice. There is a sizeable gap between the normative claims and the institutional reservoir to make good on these claims. The Treaty-makers seem to have guarded themselves against ‘normative

⁶⁸ See in relation to human rights Samantha Besson, ‘European Human Rights Pluralism’ in Miguel Poiares Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational law: Rethinking European Law and Legal Thinking* (CUP 2014) 187.

⁶⁹ Waluchow (n 57) 210–212. Kumm, ‘Beyond Golf Clubs and the Judicialization of Politics’ (n 58) 528 merely states: ‘What that means when there is a conflict between national constitutions and European law is one of the central task for European constitutional scholars to reflect upon’.

backtalk' from the EU about the fundamental values of their constitutional systems.⁷⁰

Simultaneously, grounding the authority of EU law in keeping with the values of Art. 2 TEU encounters problems at the opposite end. Not only is there a palpable danger that EU law would have no viable authority compared to national laws and their 'thick' value background. Quite paradoxically, a value basis alone could simultaneously make the authority of EU law formally limitless. Why? Besides the fact that these values are inherently 'broad churches', there would be no test for the limits of said authority independent of compliance with these values. As I emphasised in Chapter 2, a core feature of value-based accounts is their exclusive reliance on substance rather than procedure. Recall only the *Associação* jurisprudence as salient example of a broad value-based reach of EU law in tension with the principle of conferral.⁷¹ The ECJ held that the EU's conception of the rule of law, combined with the obligation on Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' (Art. 19 TEU) shapes the very design of national courts and requires them to be independent (Chapter 3). Requiring courts to be independent is admittedly a core requirement under any plausible conception of the rule of law. But the formal point remains: since the very design of national courts is at stake, this requirement necessarily applies to cases outside the scope of EU law.⁷² It is wholly unsurprising that claimants in

⁷⁰ Isiksel, *Europe's Functional Constitution* (n 22) 223; Turkuler Isiksel, 'Democracy-Eroding Multilateralism' in Michele Battini and Nadia Urbinati (eds), *The Future of Democracy* (Feltrinelli forthcoming) 224; Jan Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 5 *European Papers* 255.

⁷¹ Similarly Frank Schorkopf, 'Europäischer Konstitutionalismus Oder Die Normative Behauptung Des „European Way of Life“ Potenziale Der Neueren Werterechtsprechung Des EuGH' [2019] *Neue Juristische Wochenschrift* 3418, 3422.

⁷² Armin Von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15

the wake of this development exploit alleged violations of Art. 2 TEU to bring a case under the scope of EU law. Recently, for example, Slovenia brought a territorial dispute with Croatia to the ECJ, arguing that Croatia violated the terms of its accession to the EU and thus violated the rule of law. Slovenia submitted (unsuccessfully) that this sufficed to bring the border dispute in the scope of EU law.⁷³

I don't necessarily disagree with the outcome of *Assoçiação*. Once again, who could object to keeping with the values enshrined in Art. 2 TEU? There are nonetheless good philosophical arguments against the teleological idea of values as merely 'things to be promoted'. We often have intrinsically good reasons to promote values (like friendship and democracy) that are quite independent of the benefit the realisation of these values brings to the participants.⁷⁴ That is why I don't understand accounts based on constitutional values as instrumental accounts. What is more, the unqualified promotion of values in judicial and legal practice can raise its own questions of legitimacy, particularly in relation to the proper delimitation of competence. The preceding discussion of *Assoçiação* illustrates that. Members of the Court, who defend such lines of jurisprudence,⁷⁵ seem to underestimate that the opposite of a good action is often a well-meant action. That is to say, bold judicial attempts to safeguard a certain value 'for the greater good' could damage

European Constitutional Law Review 391, 395. See also Möllers (n 61) 264. for a similar argument in relation to the Digital Rights Ireland case.

⁷³ See Case C-457/18 *Slovenia v Croatia* EU:C:2020:65.

⁷⁴ See, at length, Thomas Scanlon, *What We Owe to Each Other* (Belknap Press of Harvard University Press 1998) ch 2.

⁷⁵ In relation to the present example see only Koen Lenaerts, 'New Horizons for the Rule of Law Within the EU' (2020) 21 *German Law Journal* 29, 32 et seq. In relation to the Zambrano case law see Marek Safjan and Dominik Düsterhaus, 'The EU Citizens' Right to Have Rights and the Courts' Duty to Protect It' in Koen Lenaerts and others (eds), *An Ever-Changing Union?: Perspectives on the Future of EU Law in Honour of Allan Rosas* (Bloomsbury Publishing 2019) 203.

the broader legitimacy of the political community by impacting on other important safeguards, such as the principle of conferral.⁷⁶

To sum up, I caution against the idea of grounding the authority of the EU and its laws exclusively in substantive values (such as articulated in Art. 2 TEU). First, their interpretive openness provides a rather shaky evaluation basis for authority in general. Second, relying on values seems a particularly unhelpful way to position the authority of the EU in relation to the authority of the Member States. Third, the lack of procedures and formal background conditions makes it hard to draw any limits to the reach of EU law, once compliance with these values is established. A value basis thus lacks an essential element of legitimacy: namely, to properly limit the exercise of authority.

None of this is to argue that values should play no role in assessing the authority of EU law. The key, however, is that they can only hold a secondary, supportive function in the architecture of political authority. An account which supports the authority of the EU on the basis of state consent might refer to the values because the Masters of the Treaties in the Lisbon revision incorporated them explicitly in Art. 2 TEU. Similarly, constitutional values can be part of instrumental theories of authority, to the extent they help the constituent entities to realise attractive moral goods.⁷⁷

⁷⁶ Von Bogdandy and Spieker (n 72) 421 et seqq. are aware of these problems and try to build in internal limits.

⁷⁷ For a description of conceptions of justice as instrumental value see Martijn van den Brink, 'Justice, Legitimacy and the Authority of Legislation within the European Union' (2019) 82 *Modern Law Review* 293.

To conclude our *tour d'horizon*, let's take a look at fair play theories.

5. Benefits and Burdens: Fair Play Beyond the State

It's only fair to obey the rules of the game (such as the laws of the political community) if you benefit from the advantages they confer. The intrinsic connection between benefits and burdens as integral part of a cooperative enterprise describes the essence of fair play accounts (Chapter 2). The underlying moral issue is free-riding and, ultimately, unfair behaviour towards the other participants of the cooperative scheme.

Intuitively, free-riding is a problem for a cooperative scheme because of its effect on the moral standing and psychological motivation of the other participants. In a political community, that makes law-abiding a primary candidate for an obligation we have to each other. The last three words are important. In contrast to instrumental accounts discussed previously, benefits here does not relate to 'what do I get out of this'? Benefits relate to ordering the interdependence of all the members of a political community. Fair-play theory highlights why the individual participants set up the scheme in the first place, namely, due to the need for millions of individuals to organise their interdependent lives on the same territory. That seems good starting point for any political theory.

Potential benefits of the EU are easily identifiable. A regulatory level-playing field, cross-border mobility, economic prosperity, a stronger voice in the world, etc. But has anyone translated this into a fair-play theory of the EU's legitimate authority? After all, the strongest objection to fair-play accounts on the national level does not apply to the EU. There, Nozick argues that bestowing (unasked) benefits on someone and demand

subsequent payment is objectionable.⁷⁸ This argument rests on the assumption that there was no prior voluntary act of submission to the authority. As we saw in theory (Chapter 4) and in practice (Brexit), however, the EU is formally a voluntary organisations for the addressees of its authority claim, the European peoples. Hence, there is a prior agreement. The benefits of the cooperative scheme EU are not imposed upon them.⁷⁹

As I show below, there are both academic and judicial traces of fair-play accounts. They rely on two possible bases of fair-play theories for EU law's authority, equality and solidarity. In fact, the ECJ gave early credibility to both of these models when arguing:

In permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community *brings into question the equality of Member States before Community law* and creates discriminations at the expense of their nationals.

This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order.⁸⁰

As explained in Chapter 6, the ECJ never employed a single 'clean' account of the EU's authority, which allowed it here to borrow from fair-play theories. Let me address both variations of fair-play accounts in turn.

⁷⁸ Robert Nozick, *Anarchy, State and Utopia* (Basil Blackwell 1974) 93 et seq.

⁷⁹ But cf. Dimitry Kochenov, 'EU Citizenship without Duties' (2014) 20 *European Law Journal* 482, 495. For a discussion and rebuttal of various less sweeping objections see Richard Dagger, *Playing Fair: Political Obligation and the Problems of Punishment* (OUP 2018) ch 5.

⁸⁰ Case C-39/72 *Commission v Italy* EU:C:1973:13, paras 24, 25 (emphasis added).

a. The Demanding Argument of Fairness Grounded in Equality

Fabbrini's argument for unconditional primacy of EU law contains an implicit fair-play account of EU law's authority. His argument that national constitutional courts ought to give up their review mechanisms is based on equality (see Art. 4 (2) TEU).⁸¹ Fabbrini's claim that ultra-vires and other locks constitute cherry-picking is, in essence, an accusation of free-riding on the common scheme set up in the EU. The simple idea – which echoes the ECJ's arguments in *Costa* –⁸² is that the equality of the participants in a cooperative scheme can only be secured by a common authority. As soon as the addressees of binding directives decide themselves when to comply, the cooperative scheme – especially the careful balance between benefits and burdens – is jeopardised, and with it the equal dignity of its participants. This view emphasises the reciprocity of rights and obligations among the members of the EU.

While I welcome the change in perspective from a bilateral lens (EU-Member State) to the multilateral effects of supremacy in relation to 27 Member States, Fabbrini's conclusions seem too strong to hold.

⁸¹ Federico Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) 16 *German Law Journal* 1003. Similarly Ingolf Pernice, 'Costa v ENEL and Simmenthal: Primacy of European Law' in Miguel Poiares Maduro and Loïc Azoulay (eds), *The Past and Future of EU Law* (Hart 2010) 49.

⁸² See only Case C-6/64 *Costa v ENEL* EU:C:1964:66: '(...) make it impossible for the States (...) to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. (...) The executive force of Community law cannot vary from one State to another (...) without (...) giving rise to the discrimination prohibited by Article 7'. Therefore, pace Justin Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment' (2020) 21 *German Law Journal* 1032, equality as a rationale for EU law's primacy and authority has noticeable roots in the case law.

In substance, Fabbrini argues for equality of outcome.⁸³ By definition, there is then no noticeable internal or external limit to EU law's legitimate authority. For one, any rule of EU law is authoritative simply by virtue of its existence as EU law. Lawful EU law is legitimate EU law. For another, there is no space for countervailing national constitutional reservations ever, because the original sin would be to disregard common rules in favour of unilateral rules. Any deviation is prohibited as *unfair*. In essence, such a standard of legitimate authority provides no real test for the moral right to bind the authority's subjects. Instead, it rubber-stamps whatever is decided on the EU level and keeps with EU primary law.

Fabbrini's exclusive focus on equality furthermore loses sight of the fact that those Member States themselves are political communities that secure the equality of their citizens, that they guarantee the citizens' democratic self-determination.⁸⁴ A fundamental element of fair play theory requires a moral assessment of the character of the polity, however; that is, whether it is indeed a cooperative scheme worthy of respect.⁸⁵ Fabbrini overlooks that this is necessarily a comparative exercise in the EU: both the EU and the Member State polities are such cooperative schemes worthy of respect.

Consider then AG Sharpston's recent version of a fair play account that shifts the

⁸³ Similarly Koen Lenaerts, 'No Member State Is More Equal than Others: The Primacy of EU Law and the Principle of the Equality of the Member States before the Treaties' (*Verfassungsblog*, 8 October 2020) <<https://verfassungsblog.de/no-member-state-is-more-equal-than-others/>>. accessed 14.5.2021.

⁸⁴ For similar reasons, Lefkowitz built the condition of internal rightful authority into his account of international authority based on fair play (see Chapter 2, sec. IV.3.a).

⁸⁵ Dagger (n 79) 102.

underlying value from equality to solidarity.

b. Fairness and Solidarity: A Promising Start

AG Sharpston writes with her characteristic passion:

Solidarity is the lifeblood of the European project. Through their participation in that project and their citizenship of European Union, *Member States and their nationals have obligations as well as benefits, duties as well as rights. Sharing in the European ‘demos’ is not a matter of looking through the Treaties and the secondary legislation to see what one can claim. It also requires one to shoulder collective responsibilities and (yes) burdens to further the common good.*

Respecting the ‘rules of the club’ and playing one’s proper part in solidarity with fellow Europeans cannot be based on a penny-pinching cost-benefit analysis along the lines (familiar, alas, from Brexiteer rhetoric) of ‘what precisely does the EU cost me per week and what exactly do I personally get out of it?’ Such self-centredness is a betrayal of the founding fathers’ vision for a peaceful and prosperous continent. *It is the antithesis of being a loyal Member State and being worthy, as an individual, of shared European citizenship.* If the European project is to prosper and go forward, we must all do better than that.⁸⁶

Notice how the underlying value of fairness here is not equality, but solidarity. An obvious advantage of grounding a fair-play account in solidarity is that solidarity has various firm roots in EU law. It is not only enshrined in important provisions of primary

⁸⁶ Case C-715/17 *Commission v Poland*, Opinion of AG Sharpston, EU:C:2019:917, paras 253 et seq. (emphasis added). For a similar view Baquero Cruz (n 29) 92, 128.

law.⁸⁷ You can also trace it throughout the history of EU jurisprudence.⁸⁸ In addition, the shift from outcome equality to solidarity is crucial, because solidarity is more flexible and focusses on the moral interrelation among the participants.

And yet, I take issue with the fact that this solidarity-based fair play model swaps the underlying value. Instead of the autonomy of the individual (in statist authority discussion) or of a collective (in supra- and international discussions), the underlying moral issue suddenly becomes a notion deeply connected to justice: fairness.⁸⁹ Nozick's intriguing counterexample of the radio station set up voluntarily by your neighbours who then assign you to run it one day a year proves the point. It illustrates that considerations of autonomy are superseded by conceptions of justice.⁹⁰ In fair play accounts, obeying the law is based on 'giving everyone what is due to them', rather than securing the very agency and autonomy of the participating stakeholders.

I doubt that considerations of justice should inform accounts of the EU's

⁸⁷ The most important ones are TEU Preamble: 'Desiring to deepen the solidarity between their peoples'; Art. 2 TEU 'These values are common to the Member States in a society in which (...) solidarity (...) prevail'; Art. 3 TEU: '...shall promote solidarity between generations; (...) shall promote (...) solidarity among Member States; (...) contribute to (...) solidarity and mutual respect among peoples'; Preamble TFEU: 'Intending to confirm the solidarity which binds Europe and the overseas countries'; Art. 67 (2) TFEU: '...shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States'. For a summary and analysis see Lucia Serena Rossi, 'The Principle of Equality Among Member States of the European Union' in Lucia Serena Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 37.

⁸⁸ Case C-6 and 11/69 *Commission v France* EU:C:1969:68, paras 14-17. Case C-44/14 *Spain v Parliament and Council* EU:C:2015:320, Opinion of AG Wahl, para 35. See also the discussion in AG Sharpston's opinion (n 89) at paras 246 et seqq.

⁸⁹ See only Dagger (n 79) 105.

⁹⁰ For only one attempt to separate fairness as legitimacy from fairness as justice Thomas Franck, *Fairness in International Law and Institutions* (Clarendon 1995) 7 et seqq.

authority.⁹¹ This is not only due to the observation that justice is not even mentioned in the founding values of Art. 2 TEU. Since theories of authority are based on the tension between autonomy and binding authoritative directives, justice seems to deflect from the fundamental tension between authority and autonomy that we are trying to solve. More importantly, there will always be reasonable disagreement about what constitutes a just outcome or what fairness requires in each case. In this important sense legitimacy is prior to justice.⁹² I thus find it problematic how fair play theories shift the underlying moral value from autonomy to justice and fairness. I noted in Chapter 1 that the problem of authority is intertwined with many of the big questions of political philosophy. Discussions of fairness and solidarity in the EU should be kept distinct from questions of authority and political obligation, however, lest we lose sight of the quite separate underlying moral issues.⁹³ An unfair and thus unjust outcome is often the *effect* of someone flouting the law, but it should not serve as the *moral basis* of political obligation.

The way EU law employs the concept of solidarity supports this argument. Most of the solidarity-jurisprudence Sharpston discusses does not use solidarity as basis for the legitimate authority of EU law, but as the emanation of distributive justice. And so does the Treaty. In fact, solidarity is often invoked where binding EU law is weak or absent. Take only Art. 222 TFEU, according to which ‘The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the

⁹¹ Similarly Danny Nicol, ‘Can Justice Dethrone Democracy in the European Union? A Reply to Jürgen Neyer’ (2012) 50 *Journal of Common Market Studies* 508.

⁹² Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (CUP 2019) ch 2; van den Brink (n 77) 295 et seqq; Nicol (n 91) 515 et seqq.

⁹³ Similarly Eleftheriadis, *A Union of Peoples* (n 46) chs 8 and 9.

victim of a natural or man-made disaster’. Similarly, Arts. 67 and 80 TFEU mandate that the policies in the Area of Freedom, Security and Justice (esp. asylum, immigration and external border control) ‘shall be governed by the principle of solidarity’. The Court has also suggested that the Solidarity Chapter of the Charter is not directly applicable horizontally – ie not enforceable among individuals.⁹⁴ This leads me to conclude that the repeated invocation of solidarity in EU law does not envision it as legitimacy basis for EU law, but as principle which ought to govern the broader relations between the participants – especially in areas where binding legal obligations are scarce.⁹⁵

Overall, I think it is mistaken to argue that democracy (broadly understood) is inept to ground the EU’s legitimacy and that we thus have to move to justice.⁹⁶ In Chapter 8, I attempt to modify the promising moral background of fair play theories in order to accommodate the above deficiencies.

IV. Conclusion: Anarchy?

In this chapter, I have examined various moral standards that more or less explicitly evaluate the moral basis of EU law’s authority. In doing so, I argued that none is entirely convincing, either in itself or in their respective application for the EU. The straightforward conclusion would be to join the ranks of philosophical anarchists, such as Kochenov,⁹⁷ and

⁹⁴ Case C-176/12 *Association de médiation sociale* EU:C:2014:2, para 49.

⁹⁵ For an analysis of the role of solidarity among the members of the EU see Andrea Sangiovanni, ‘Solidarity in the European Union’ (2013) 33 *Oxford Journal of Legal Studies* 213.

⁹⁶ But cf. Jürgen Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (OUP 2012).

⁹⁷ Kochenov (n 79). For different reasons also Martin Loughlin, *The Idea of Public Law* (OUP 2004) ch 6.

argue that the EU's exercise of authority is illegitimate. It would follow that EU law does not bind us morally, but violates our (individual and/or collective) autonomy.

This is not the road I want to go down, however. Instead, I aim to show in the final chapter how the most promising moral standards for legitimate authority on the domestic level – those that focus on the value of institutions for a political community and the moral relationship of the individuals living in it – can be adjusted to a supranational political community. We saw in Chapter 6 how the Treaties themselves emphasise the importance of law-administering institutions for creating and supporting a political community that respects the value and rights of its participants. This emphasis constitutes the starting point for my account of 'democratic authority'.

CHAPTER 8: DEMOCRATIC AUTHORITY I: THE THEORY

I. Introduction

Recall the previous steps of my argument. Starting with a categorisation of the crucial concepts in theories of authority, I emphasised the vital distinction between authority claims and their objective moral legitimacy, and I suggested that the concept of authority is applicable beyond the state (Part I). Part II aimed at understanding the nature, scope, and addressees of the EU's authority claim. I defended the view that the EU ultimately claims authority over the EU's constitutional peoples. Part III kicked off the search for the moral basis of the EU's authority by illustrating the EU Treaties' and institutions' views on the matter (Chapter 6). In a penultimate step, I examined and ultimately dismissed various implicit and explicit accounts of the EU's authority (Chapter 7).

Here, I defend an alternative basis of EU law's moral authority that I call 'democratic authority'. To do that, I will start by outlining the idea of democracy (II.) before focusing on the heart of the chapter, namely, extracting the values that underpin law in a democracy and give it moral authority (III.). The chapter then develops these insights to study the relationship between democratic authority and political obligation (IV.), before concluding with a view to the limits of democratic authority (V.).

II. What is Democracy and why do we need it?

Understanding democratic authority presupposes an understanding of democracy. Over the next pages, I provide a necessarily short overview of the analytical features of

demoicratic theory (What is demoicracy?). In the course of this overview, I outline the reasons why democracy is a normatively attractive framework to understand the value of the EU as a political community beyond the state (Why do we need it?). This is not a fully-fledged defence of the idea of demoicracy, but an introduction that highlights why I endorse it. In short, this section is not part of my argument, but the basis of it.

Democracy is not a typo. The idea of demoicracy is an attempt to capture the EU as ‘democracy beyond the state’ without giving the fatal impression that it mimics the features of a nation-state democracy. Take demoicracy literally: it specifies the relevant agent(s) underlying the political community, namely the *demoi* in the plural. And it informs about the core value of the ‘cracy’/*kratos*, namely to allow the peoples to ‘govern together but not as one’¹. Although democracy is a relatively recent phenomenon in democratic theory, individual ‘demoicrats’ have already offered various competing visions.² To depart from a common understanding of the idea, let me borrow from Nicolaïdis:

European democracy is a Union of peoples, understood both as states and as citizens, who govern together but not as one. It represents a third way against two alternatives which both equate democracy with a single demos:...the EU is neither a Union of democratic states as ‘sovereigntists’ would have it, nor a Union-as-a democratic state to be as ‘federalists’ would have it.³

Endorsing the no-*demos* thesis marks the most important feature of democracy in

¹ Kalypso Nicolaïdis, ‘European Democracy and Its Crisis’ (2013) 51 *Journal of Common Market Studies* 351, 351 et seq.

² For an overview see Miriam Ronzoni, ‘The European Union as a Democracy: Really a Third Way?’ (2017) 16 *European Journal of Political Theory* 210, 217.

³ Kalypso Nicolaïdis, ‘The Idea of European Democracy’ in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 254.

comparison to other attempts at democracy beyond the state. Others suggest that a European *demos* already exists.⁴ But that would strip the very idea of a constitutional *demos* of any political-theoretical weight. Clearly, ‘the exercise of power by the Union can hardly be interpreted as the will or self-governance of a democratic sovereign’⁵. If living on the territory of the EU sufficed to form a *demos*, it would have no more meaning than calling the inhabitants of Paris or Bavaria a *demos*. Of course, it is disputed just how much social and cultural convergence a *demos* requires (as in a common language, culture or media landscape).⁶ We can leave that to the side here, however, since one decisive argument for the absence of a constitutional *demos* in the EU is that currently Europeans neither would nor should accept the decisions of a simple majority.⁷ Furthermore, the Treaties (i) avoid the term ‘people’, (ii) refer to the European ‘peoples’ an impressive nine times in their two Preambles, and (iii) acknowledge the peoples’ separate histories and cultures (Art. 167 (2) TFEU). In the EU we have today, these features make it impossible to base the existence of a European *demos* on either political reality or constitutional endorsement.

But what is the source of the EU’s authority if not a *demos*? For demoicrats, the constitutional peoples of the EU Member States ground the EU’s theoretical architecture. As Lenaerts put it in relation to Arts. 9 et seqq. TEU, the ‘idea of demoicracy is

⁴ Cf. Stefan Oeter, ‘Federalism and Democracy’ in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd ed, Hart/Beck 2009) 67; Samantha Besson, ‘Deliberative Demoi-Cracy in the European Union: Towards the Deterritorialization of Democracy’ in Samantha Besson, José Luis Martí and Verena Seiler (eds), *Deliberative Democracy and its Discontents* (Ashgate 2006).

⁵ Armin von Bogdandy, ‘Founding Principles’ in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd ed., Hart/Beck 2010) 25.

⁶ For a detailed discussion see Eva-Maria Tieke, *Das Subjekt Demokratischer Legitimation in Der Europäischen Union* (Tectum 2016) 270 et seqq.

⁷ Nicolaïdis (n 1) 356.

incorporated into the constitutional fabric of the EU'⁸. Through the EU, the European peoples exercise their self-determination jointly to address issues transcending statist boundaries in an elaborate institutional framework. In that sense, democracy expresses the theoretical link between each people's independence and their reciprocal interdependence.

This has a profound effect on self-determination and the role of states in the EU. Due to the participation of each people in the EU's decision making and enforcement, popular self-determination increases beyond statist borders. Eleftheriadis protests against such an extension of self-determination on the basis that there can only be one constitutional scheme in a given territory, lest law's function to guide action and coordinate the behaviour of a multitude of individuals would be threatened.⁹ His view underestimates that similar issues arise beyond the state, however. It neglects that joint self-determination on the EU level compensates for the decreasing importance of independent national self-determination for peoples constituted in states.¹⁰ Thus understood, both the EU and the Member States derive their authority from the persons they serve. They realise the self-determination of these peoples in separate ways: a state facilitates the self-determination of (usually) one independent people, whereas the EU helps these distinct peoples to exercise their self-determination jointly in affairs that affect all of them. The EU constitutes

⁸ Koen Lenaerts, 'Democracy, Constitutional Pluralism and The Court of Justice of the European Union' in Luuk van Middelaar, Philippe van Parijs and Herman van Rompuy (eds), *After the Storm: How to Save Democracy in Europe* (Lannoo 2015) 129.

⁹ See Pavlos Eleftheriadis, 'Federalism and Jurisdiction' in Elke Cloots, Geert De Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart 2012) 61; Pavlos Eleftheriadis, 'Citizenship and Obligation' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union law* (OUP 2012) 166 et seq., 175.

¹⁰ Daniel Innerarity, *Democracy in Europe: A Political Philosophy of the EU* (Palgrave Macmillan 2018) 256. See also Armin Von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law' (2004) 15 *European Journal of International Law* 885.

a political community without a *demos*, an ‘‘us’ made up of others’¹¹. Demoicracy, in a nutshell, breaks up the exclusive relationship between people and state, and adds another layer of political community.

Understanding the EU as instrument for the joint self-determination of several peoples explains why national institutions act as EU-institutions when administering EU law (Chapter 3). Both national and supranational institutions then exist to allow a constitutional people to govern itself. While national institutions primarily serve an *independent demos*, they at the same time serve the *interdependent demoi*, together with supranational institutions and under their direction.

The EU accordingly enables the European peoples to realise democratic ideals beyond the state by giving them a say in decisions that subsequently affect them. In my view, this is not (only) important because it makes the states more democratic, though it does do that.¹² Indeed, ‘acting through the EU the sum of State powers is expanded so it becomes greater than its parts’¹³. What makes the EU ultimately greater than the sum of its state parts is that it provides a complementary demo(i)cratic forum with intrinsic value for the peoples of Europe. It is complementary to the national processes since both realise democratic ideals (authoring the laws that claim authority over you) in their respective jurisdictions. This complementary nature has a negative and a positive dimension:

¹¹ Innerarity (n 10) 165, 246 wfr.

¹² See only Athanasios Psygkas, *From the Democratic Deficit to a Democratic Surplus: Constructing Administrative Democracy in Europe* (OUP 2017) from an administrative law perspective.

¹³ Stephen Weatherill, *Law and Values in the European Union* (OUP 2016) 396.

The negative dimension implies outlawing, or at least managing negative externalities. Such externalities arise when unilateral state decisions have negative effects and impose costs on neighbouring states and their peoples (classic example: emissions).¹⁴ The problem is that '(d)emocracies barely have instruments to assure that "outside" identities and interests are taken into account in their decision-making processes'¹⁵. The EU remedies this deficit. The positive dimension stems from including all those affected in supranational decision-making procedures. In both these dimensions, the EU thus remedies the wide-spread democratic deficit of imposing decisions on outsiders of the nation state without giving them a say. This is how demoicracy in my view answers the challenge of safeguarding self-determination as the normative nucleus of democracy in an interdependent Europe.¹⁶ Put differently, it realigns *polity* and *policy* where the latter affects more than one national political community.¹⁷

That is where the version of demoicracy I endorse clashes with state-focused accounts of the EU's legitimacy and authority.¹⁸ I don't think it goes far enough to claim that the EU manages the interdependence of states. Not that it doesn't do that – it does. But the UN does that as well. The EU as a political community, by contrast, affects the constitutional peoples on a deeper level. As I tried to show in Part II, not only do individual citizens matter in the EU's governance architecture, aside from state institutions. The

¹⁴ Innerarity (n 10) 239.

¹⁵ *ibid* 242.

¹⁶ For more detail of this challenge see *ibid* ch 10.

¹⁷ *ibid* 247. On the relationship between policy and politics in the EU see only Vivien A Schmidt, 'Politicization in the EU: Between National Politics and EU Political Dynamics' (2019) 26 *Journal Of European Public Policy* 1018.

¹⁸ Such as Weatherill (n 13); Pavlos Eleftheriadis, *A Union of Peoples* (OUP 2020).

voluntary participation of a people in the EU also transforms the political *Gestalt* of the relationship of each *demos* to ‘their’ state by adding another political community on top. The ‘democratic interdependence’ of its Member-peoples characterises the EU in the sense that their capacity to affect each other’s national democracy creates mutual obligations.¹⁹ These institutionalised obligations cannot and should not be theoretically captured and legitimised by mere consent (Chapter 8). They manifest a moral *commitment* to one another – ultimately based on their factual and normative interdependence – that is legally enforceable in their own institutions and on their territories.²⁰

One important implication of the theoretical disagreement between state-centred and peoples-centred accounts is that it influences to whom we owe the duties related to membership in the EU as a political community. While state-centred accounts need to conclude that we owe them to our home state, or the state of residence, I will argue below that we owe them to the other European peoples as joint members of the supranational political community. In other words, focusing on peoples instead of states shifts the emphasis from enlightened self-interest of states to recognising mutual obligations of the peoples as authors and subjects of political institutions both in and beyond the state.²¹

This is how we can illustrate the authority relationships in a democratic framework:

¹⁹ Ronzoni (n 2) 217.

²⁰ Turkuler Isiksel, ‘Constitutionalism as Limitation and Licence’ in Tom Ginsburg, Mark D Rosen and Georg Vanberg (eds), *Constitutions in Times of Financial Crisis* (CUP 2019) 191.

²¹ Ronzoni (n 2) 217.

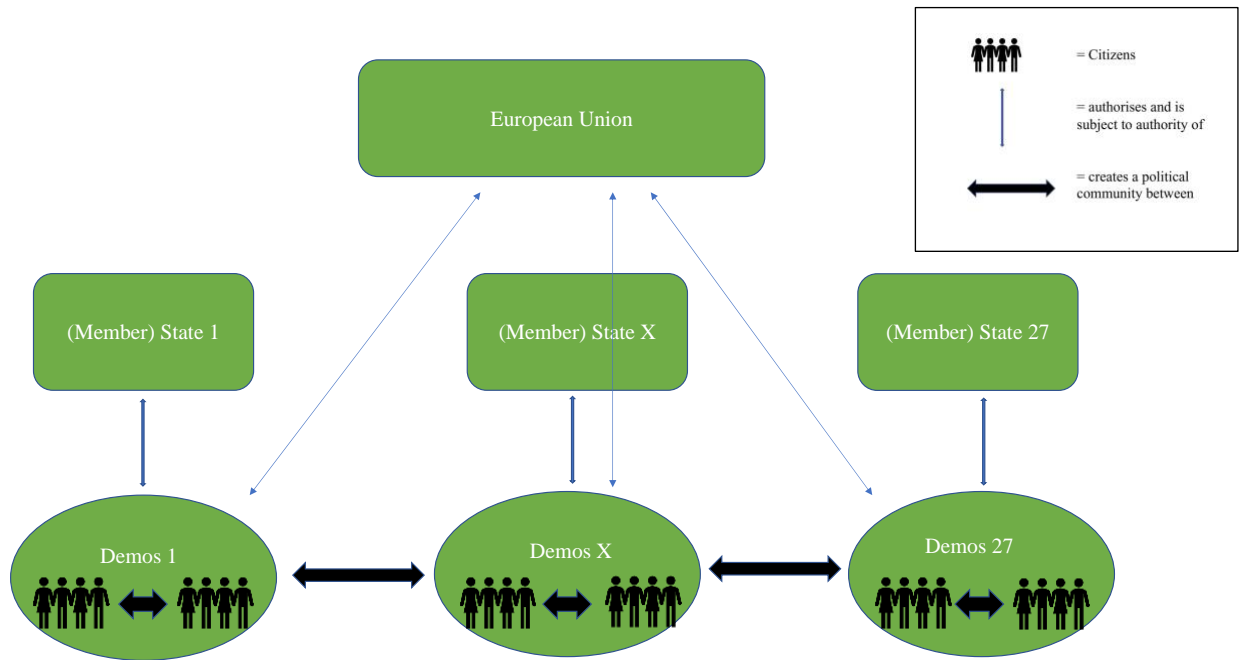


Figure 13: Authority Relations in a Democratic Framework

The blue arrows illustrate the nexus between authorisation and authority. Their distinct thickness indicates the thicker bond on the national level. The bold horizontal arrows indicate the core moral bonds of the respective political community – ie among citizens in a state, and among peoples in the EU.

The focus on peoples – who act themselves (amending domestic constitutions, referenda), as well as through state officials and as EU citizens – thus listens to the voice of national minorities and viewpoints outside national institutions. Look at the ongoing dismantling of the rule of law in Poland and Hungary. In my view, international, state-centred theories of the EU lack the tools to conceptualise the threat this poses to the legitimate authority of the EU. Because they can only conceptualise it as a problem internally to Poland, either in the sense that the state institutions do not fulfil the duties of justice they owe to the Polish people, or because Poland consented to the EU Treaties

including Art. 2 TEU. If we construct the EU as a political community of peoples, however, the Polish citizens (and especially those in the current minority) have moral claims against the other Europeans based on the duty to uphold the institutional machinery and substantive values set up at the European level.

Conversely, the (institutionalised) interdependence of the Member States implies that violations of the EU's core values by one Member State affect the other EU Member States and peoples in a way they should not be forced to tolerate.²² Recall the discussions in Part II and especially Chapter 4. The mutual trust between the Member States points to a deeper political community that comes to light when national institutions collaborate transnationally to give effect to EU law, eg by handling claims of EU citizens from other Member States or by enforcing EAWs. Fumbling with the integrity of these national law-administering institutions strikes at the very heart of these mechanisms and thus becomes a concern for the entire EU. It jeopardises the reciprocity underlying the transnational institutional collaboration. In a nutshell, a democratic lens shifts the focus to the individual constitutional peoples and their law-administering institutions as a whole, not just as represented and constituted by the current executive representatives, or the current majority.

To sum up, democracy is a democratic theory for political communities beyond the state. It answers the question how constitutional peoples can realise democratic ideals jointly in areas beyond the reach and capacity of their individual states. Note that the notion

²² Pauliine Koskelo, 'Current Threats to the Rule of Law in the EU: The Foundation on Which the Authority of EU Law Rests' in Wolfgang Heusel and Jean-Philippe Ragueade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019) 302.

of democracy is open to various institutional variations, something it has in common with state democracy. On the one hand, one may thus criticise the EU democracy for not being democratic enough.²³ On the other, making the EU more democratic in the conventional - ie national – sense may do more harm than good.²⁴

For that reason, grounding the legitimate authority of EU law on democracy presupposes a clear understanding of the authority-relevant features and values of a democratic law-administering system. In other words, the next and indeed crucial argumentative step is to flesh out which features of the EU’s democratic law-administering system provide normative reasons for the authority of EU law. The next section thus provides an argument that moves from ‘What is democracy and why do we need it?’ to ‘What gives democratic law moral authority?’

III. Democratic Authority Explained

The democratic authority of EU law is based on the manifestation of three core values that ought to characterise law-making and -enforcement among the EU peoples: deliberation, non-domination, and equality (1.). Their interplay creates the essence of democratic authority (2).

²³ Thorsten Hüller, ‘Out of Time? The Democratic Limits of EU Democracy’ (2016) 23 *Journal of European Public Policy* 1407.

²⁴ See only Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (CUP 2019) ch 4; Dieter Grimm, *The Constitution of European Democracy* (OUP 2017).

1. The Values Rooting Democratic Authority

The values of deliberation, non-domination, and equality constitute the moral reasons for the binding force of EU law. Each of them contributes a valuable part, but it is ultimately how they interrelate and enrich each other that expresses the normative reasons for democratic authority, for a binding law-administering process among peoples.

a. The Right Result Where There Is No Best Result: Deliberation

One of the most welcome achievements of institution-centred and especially democracy-based theories of national authority is that they highlight the ‘circumstances of politics’²⁵. This felicitous phrase refers to translating policy choices into binding law in a society of millions of individuals with widespread reasonable disagreement on, well, everything.²⁶ That, in combination with the acceptance of the democratic axiom that you, the reader, like everyone else around you ought to have a say over the laws that subsequently affect you, creates the problem whether those who disagree with the policy and thus the law’s substance still accept it as authoritative and legitimate. Democratic procedures, which give every citizen an equal vote and thereby the opportunity to influence and be represented, are the single most successful solution to this problem. Pointedly, ‘(l)aw in a democracy does not merely tell us what we may and may not do – though it does that; law is how we decide

²⁵ Jeremy Waldron, *Law and Disagreement* (Clarendon 1999) 101. See also Chapter 2, sec. IV.2.

²⁶ I understand reasonable here in the same way as Laura Valentini, ‘Justice, Disagreement and Democracy’ (2013) 43 *British Journal of Political Science* 177, 184, ie disagreements that are ‘broadly consistent with the liberal commitment to equal respect, and not based on empirical falsehoods’.

what we may and may not do'²⁷.

That might be true for state democracies. But I had to conclude earlier that we cannot use this value for the EU's law-making procedures because they lack these democratic qualities of nation states (Chapter 7). That does not mean that we can't translate the reasoning behind this democratic idea to the EU understood as a democracy, however. After all, the EU provides procedural means to solve collective action problems and to govern a large political community despite widespread disagreement among the peoples of Europe. The EU handles the relations

between prosperous and less prosperous countries, north and south, centre and periphery, old countries and newcomers, big and small states, conservative and progressive political forces, and different views about the future of integration.²⁸

A significant part of what makes the EU valuable is that it allows these peoples to determine their joint fate for themselves in a legitimate way. As explained in Chapter 3, the EU provides an institutional framework where they can come together and agree on binding solutions for any issue that transcends the legitimate jurisdiction of the democratic processes in their states. The EU is about the choices of the peoples *per se*.²⁹ Their institutional participation and deliberation is vital for grasping the authority of EU law as it secures the peoples' autonomy in the first place. It is hard to argue, for example, that EU

²⁷ Scott Hershovitz, 'Legitimacy, Democracy, and Razian Authority' (2003) 9 *Legal Theory* 201, 210.

²⁸ Julio Baquero Cruz, *What's Left of the Law of Integration?: Decay and Resistance in European Union Law* (OUP 2018) 93.

²⁹ Francis Cheneval, 'Democratic Self-Government in the European Union's Polycentric System: Theoretical Remarks' in Josephine van Zeben and Ana Bobić (eds), *Polycentricity in the European Union* (CUP 2019) 68. Wolfgang Heusel, 'Legitimität Und Finalität Des Europäischen Projekts' in Wolfgang Heusel and Jean-Philippe Ragueade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019) 343 et seqq.

law unduly constrains the scope of action for Member States in the many areas that escape the legitimate reach of unilateral state action because they affect outsiders who, as a consequence, wouldn't have a say in the laws that affect them.³⁰ Since one people neither ought to impose its own rules on others, nor should be forced to accept the rules of another, it would be wrong to think that EU law on this matter constitutes an illegitimate intrusion into autonomy. By giving them a say in how to govern together, the EU respects their autonomy as self-governing peoples.

But precisely how does the value of deliberation give moral force to law, especially in the EU? Law-making institutions and procedures in a demo(i)cratic polity enable the members of a political community to come up with binding law while respecting the equal dignity of each participant. The real magic happens when deliberation translates diverse preferences and reasonable disagreement into binding law for the entire community. Rather than merely aggregating preferences through counting votes, deliberation transforms preferences into binding rules via collective and informed decision-making.³¹ As Cheneval puts it

Justification and deliberation have to be appropriated by the peoples in binding decisions. (...) Since deliberation remains vague and of uncertain consequence without its subjective appropriation in democratic decision-making procedures, the benefits of deliberation will remain very limited without a formal institutional framework linking the dêmoi as distinct

³⁰ Franz Mayer, 'Verfassung Im Nationalstaat: Von Der Gesamtordnung Zur Europäischen Teilordnung?' (2016) 75 VVDStRL 7, 39. For a similar thought regarding international authority Başak Cali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (OUP 2015) 102.

³¹ Besson (n 4) 186.

démoi.³²

This is the moral value of deliberation in law-making procedures. Now to the EU. The fact that deliberation in the Council and EP leads to binding law that both individuals and state institutions can enforce judicially is very important. It marks the qualitative difference to international arrangements. EU law thereby becomes the institutional expression of the EU peoples' mutual commitment to each other. In essence, through their representative officials in these EU institutions the peoples deliberate, make law, and jointly exercise public authority in each other's territory: an astonishing anomaly in an international world of sovereign equals.³³

For deliberation to reach its full moral potential, it requires the participation of the appropriate agents.³⁴ That is the upshot of the 'all-affected principle' discussed in Chapter 3. Deliberation only unfolds its authority-generating value if the deliberative process includes those affected by the subsequent decision. And that's where the EU comes in regarding the issues that transcend state borders in Europe. In the face of actual interdependence, it is clear that '(s)ociety is not sufficiently self-determined when it is only nationally self-determined'³⁵. The EU remedies a true democratic deficit on the national level, which results from one people 'conditioning' another without the latter's input, and

³² Francis Cheneval, *The Government Of The Peoples: On The Idea And Principles Of Multilateral Democracy* (Palgrave Macmillan 2011) 85.

³³ Similarly Claus Dieter Classen, 'Die Gleichheit Der Mitgliedstaaten Und Ihre Ausformungen Im Unionsrecht' [2020] *Europarecht* 255, 262 et seq.

³⁴ I am not referring to non-governmental actors. But cf. Francis Cheneval and Frank Schimmelfennig, 'The Case for Democracy in the European Union' (2013) 51 *Journal of Common Market Studies* 334, 339 et seq.

³⁵ Innerarity (n 10) 251.

opens up much needed democratic potential.³⁶

The go-to mechanism to involve those affected is the making of primary and secondary law. As discussed in Chapter 3, both mechanisms allow for a variety of representation channels for the peoples of Europe, secondary law-making more robustly so than primary law-making. These procedures enable EU law to reflect the ‘right’ solution from the perspective of the deliberating EU peoples, even if it might not constitute the ‘best’ solution.³⁷

I don’t want to suggest that EU law has no epistemic value, however. That is, I don’t argue that EU law-making is ill-equipped to produce ‘good’ solutions, where ‘good’ refers to empirical accuracy, desirability and moral correctness.³⁸ Besides representation and diversity in EU law making itself, let’s not forget the less formalised elements of these institutional mechanisms, which are as important for grounding the epistemic value of EU law-making. Oftentimes, ideas or policies emerge in different Member States who thus act as drivers and role-models for EU legislation. Take only the regulation of automotive emissions in Germany or of antibiotics in animal feed in Sweden and Denmark, all of which set the EU on a path for higher quality regulations, due to the experience in individual Member States.³⁹ The peoples channel their diverse regulatory experiences into the EU

³⁶ *ibid.*

³⁷ Diana Wallis, ‘A View from Parliament’ in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019) explicitly relies on Waldron’s democratic authority in order to conceptualise the value of the EP legislative machinery.

³⁸ Hélène Landemore and Scott Page, ‘Deliberation and Disagreement: Problem Solving, Prediction, and Positive Dissensus’ (2015) 14 *Politics Philosophy & Economics* 229, 230.

³⁹ Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020) 10.

law-making process and thus increase the epistemic value of EU law. Conversely, this process enriches national law-making as well. Legislative proposals on the national level profit from the exchange on the European level as an exercise in hands-on comparative law. Especially in complex and contentious sectors, law-makers often glance at other Member States and the scheme that is in place there. New national legislation as a consequence benefits from the exchange among law-makers in Europe. Thus, while we focus on the legitimising function of deliberation for EU law-making, the EU's deliberative democracy enables and facilitates deliberation on many levels (national, European, transnational).⁴⁰

Admittedly, the substantial constraints for deliberation stemming from primary law limit the value of deliberation in EU secondary-law making. The EU's limited competences and the hierarchy between primary and secondary law reinforced by the Court's constitutionalising jurisprudence of first and foremost economic law in the Treaties make an open debate among policy options impossible. The epistemic value of EU law is thus weaker than in state democracies.⁴¹ But that follows from the very architecture of the EU as a political community beyond the state with limited competences. The fact remains that there is distinct epistemic value to the contributions of the representatives of 27 peoples, even if they are substantively constrained. In short, the democratically chosen 'right' solution often has epistemic value that makes a 'good' solution more likely. The difference

⁴⁰ Besson (n 4) 199 et seqq.

⁴¹ For the epistemic value of democratic laws in states see David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008); Hélène Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton University Press 2013).

to state democracies ‘is one of degree, not of kind’⁴².

But we shouldn’t only focus on deliberation among the peoples alone. Interestingly, the nature of the EU’s institutional framework enables one single people (the French, the Czech, the Latvians) to voice and deliberate internal struggles between its more domestic-focused and its more European agents and institutions. Here we can see a democracy of democracies at work. EU institutions allow to debate contradictory desires that would remain below the surface of institutional deliberation did the EU not exist. We have seen an example of that in Chapter 5, where I discussed the debate between the EP and the European Council regarding the next Commission President after the 2019 election. Remember, however, that both MEPs and Heads of State can be traced back to the representation of the EU peoples. In fact, a MEP is first and foremost an elected domestic official who runs on an EU program. This MEP’s proposals may conflict with the government of his own state – also elected by the same people. Both these institutional agents are distinctly ‘EU’ in that they represent their people in different EU fora (the EP vs. the Councils), but they derive their authority from a particular people that thereby may voice contradictory demands in relation to how it wants to be governed. An important value of the EU institutions is to allow for these variegated representation channels and deliberations in a binding institutional framework. Thereby, the EU’s architecture mitigates the risk of persistent minorities to a considerable extent.⁴³

⁴² Paul Craig, ‘The EU, Democracy and Institutional Structure: Past, Present and Future’ in Wolfgang Heusel and Jean-Philippe Ragueade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019) 323.

⁴³ Less optimistic Bellamy (n 24) 112 et seqq.

This moral value of inter- and intra-*demos* deliberation in making binding EU law is complemented by the value of republican non-domination that pervades both EU law-making and its enforcement.

b. Republican Non-Domination Beyond the State

Non-domination is a prominent value of democratic thought and can be harnessed to support the democratic authority of EU law. Indeed, van den Brink calls it the ‘paramount democratic value’⁴⁴. For example, Bellamy’s recent defence of democracy understands the EU as republican association of states that secures mutual non-domination among the EU peoples. In this framework, power imbalance (instead of balance), dependency (instead of reciprocity), and/or personal rule (instead of interdependence) create ‘circumstances of domination’. These elements need to be erased so that ‘laws are under the equal influence and control of those subject to them’.⁴⁵

Traced back to the origins of republican non-domination in the work of Pettit, domination threatens autonomy – the underlying value of theories of authority – because someone else can arbitrarily interfere in my life or impose duties arbitrarily, ie without taking into account my interests.⁴⁶ In the language of Chapter 1, they can make an illegitimate claim on how I lead my life. Translated to the EU level, a national people may

⁴⁴ Martijn van den Brink, ‘The European Union’s Democratic Legislature’ *International Journal Of Constitutional Law* (forthcoming) 14
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3594066> accessed 29 April 2021.

⁴⁵ Bellamy (n 24) 61 et seqq.

⁴⁶ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon 1997) 52; James Bohman, ‘Nondomination and Transnational Democracy’ in Cécile Laborde and John Maynor (eds), *Republicanism and Political Theory* (Blackwell 2008) 197 et seq.

impose unilateral decisions on others or depriving them of sufficient breathing space in their national popular self-determination. The EU's institutional architecture has an inherent capacity to guard against such domination among its peoples.⁴⁷ This applies to both EU law-making and its enforcement.

Let's start with EU law-making. The antidote to domination in law-making is to give each member the capacity to influence the decisions that claim authority over you. This removes any risk of arbitrariness because the deliberative process itself consist of channelling the interests of those affected into binding decisions.⁴⁸ It is a core feature of the EU's normative architecture to do just that: to give its peoples roughly equal normative influence in the EU's governance through a balance of influence of their representatives in various EU institutions, especially the Councils and the EP. The EU peoples bind each other through enforceable EU law and thereby constrain their inherent capacity to arbitrarily interfere with each other's' democracies.⁴⁹

Naturally, there will be disagreement about the means to achieve non-domination, ie which precise institution should have a say in democratic law-making. For Bellamy, democracy is basically the sum of the national democracies and, therefore, national parliaments should take centre stage and provide the main bodies for legitimizing the EU and for making EU law.⁵⁰ I disagree. In my view the focus on national parliaments stems

⁴⁷ Nicolaïdis (n 3) 264 et seqq.

⁴⁸ Pettit (n 46) 35 et seqq; Charles Larmore, 'Liberal and Republican Conceptions of Freedom' (2003) 6 *Critical Review of International Social and Political Philosophy* 96, 114.

⁴⁹ Ronzoni (n 2) 226.

⁵⁰ See only Bellamy (n 24) 65.

from his lack of distinction between states and *demoi* as separate entities, which prevents him from fully grasping the normative potential of democracy as legitimisation strategy on the supranational level. His very sophisticated republican intergovernmentalism sees the EU as union of sovereign states and thus as truly international, so that he focusses too much on state representatives as relevant actors.⁵¹ As I see it, Bellamy thereby underplays the importance of the peoples' input in the legislative machinery on the supranational level and the binding enforcement of EU law for securing the very autonomy of the national peoples he seeks to protect.⁵²

Aside from that, even the current limited involvement of national parliaments in EU law-making as guardians of subsidiarity has revealed many problems. More national parliament involvement jeopardises the precarious vertical and horizontal institutional balance in the EU. It would overburden the capacity of national parliaments and thereby even weaken national democratic rule, while national parliaments by definition pursue national rather than European interests.⁵³ More importantly, an even greater role for national parliaments neglects that we have the EP as directly elected – democratic – parliament with extensive legislative and budgetary powers.⁵⁴ Why would we want the

⁵¹ See only *ibid* 97.

⁵² For a similar criticism Robert Schütze, 'Models of Democracy: Some Preliminary Thoughts' (2020) *Law 2020 EU Working Papers* 33 et seq; Ronzoni (n 2) 224 et seq.

⁵³ For a good summary of the criticism see European Parliamentary Research Service, *In-Depth Analysis: Subsidiarity – Mechanisms for Monitoring Compliance*, July 2018 — PE 625.124, Sec 3.1.

⁵⁴ See only Cristina Fasone, Daniele Gallo and Jan Wouters, 'Re-Connecting Authority and Democratic Legitimacy in the EU: Introductory Remarks' (2020) 5 *European Papers* 175, 179.

national parliaments to do the EP's job, especially if they don't even want to do it?⁵⁵

In my view, you cannot secure non-domination by harnessing national parliaments for the task.⁵⁶ While they can and actually do contribute to the deliberative value of EU law-making through contestation via the card procedure, they are inept to mitigate domination. The EU can only secure non-domination among the peoples of Europe if they use EU institutions to deal with those matters that affect them together. The EU provides a forum for the peoples of Europe to exercise their self-government jointly regarding issues that transcend the legitimate reach of their states and their democratic capacities. It does so through morally valuable deliberation that takes into account the preferences and perspectives of the representatives of 27 peoples (see above). Such inter-peoples deliberation that secures non-domination is impossible in national parliaments.

Enforcement is not merely the other side of the coin of law-making. It occupies a vital role in the EU's conception of non-domination. In general, only equal enforcement of the jointly agreed EU law ensures that these rules apply and thus exclude domination by one people. This is especially important in the EU simply because enforcement of law that originates beyond the state through actual legal remedies and the involvement of national institutions and especially citizens is rare.

When viewed from this perspective, the value of non-domination actually

⁵⁵ Adam Cygan, 'From Deparliamentarisation to a Parliamentary Renaissance? National Parliaments in the EU Polity' in Sacha Garben, Inge Govaere and Paul Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart 2019) 293 concludes that 'they lack the appetite to engage more actively in EU policy-making'.

⁵⁶ Similarly van den Brink (n 44) 19.

legitimises the Court's structural principles of primacy and direct effect. While it is unfortunate that the ECJ, when engaging with the authority of EU law, hardly ever emphasises the production side of EU law, it is right to emphasise the enforcement of the product (Chapter 6). From the perspective of non-domination, democratic law in fact provides an argument for enforcing EU law under the guidance of the ECJ. How so?

Courts balance the short term interest in political and legislative fora with the long term interest of the political community, especially as expressed in the constitution or its equivalent.⁵⁷ The ECJ in particular offers binding legal pronouncements that channel the legal commitments of a ca. 450 million citizens large political community through the constraints of legal reasoning of an independent Court. Its doctrines of direct effect and primacy make the commitment of the peoples and their representatives more credible.⁵⁸ Enforcement ensures that the moral achievement which EU law represents is put into practice in the EU territory and thus secures democratic authority. Primacy and direct effect ensure the even and effective enforcement of EU law vertically, ie in the Member State courts and authorities. They serve as crucial drivers of non-domination among the peoples. Whereas primacy is more relevant for the equality of peoples under EU law, think of direct effect as handing each EU citizen a tool to challenge transnational domination, ie the imposition of unjustified burdens on EU citizens by host states.⁵⁹

We saw in Chapter 3 that the ingenious normative architecture of the EU leaves

⁵⁷ Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton University Press 2011) 163.

⁵⁸ Craig (n 42) 328.

⁵⁹ Similarly Bohman (n 46) 209.

most of EU law enforcement to national legal orders, and especially courts. It allows individuals and state institutions (transnationally) to invoke and enforce EU law in domestic institutions. This constitutes the single most important factor why the EU can legitimately claim to secure non-domination among EU peoples, in contrast to international law, where enforcement happens on the international stage. This preeminent role for national law-administering institutions in the enforcement of EU law makes sense from a democratic perspective and especially in light of the value of non-domination. For one, it illustrates the horizontal nature of the EU, where the peoples mobilise their own institutions in the administering, not only of their state, but of their joint political community beyond the state. Through that commitment, national institutions, as Chapter 3 showed, become European institutions. For another, it allows EU law to permeate a great array of different legal cultures while national institutions remain in charge. Here, the EU's motto 'United in Diversity' is practiced every day.

Despite any disagreements with other democrats, such as in relation to the division of labour between the EP and national parliaments, the main point for our present discussion lies in acknowledging the capacity of the EU to guarantee non-domination among the EU peoples and thereby securing their viable self-government. In analogy to the state level, where citizens can only secure their autonomy in a state of right, the EU peoples remain autonomous despite their EU membership. Their full autonomy as individual peoples is guaranteed precisely because they bind themselves to the supranational authority and thereby mitigate the risk of domination. In light of externalities and actual interdependence, this institutional cooperation alone allows them to realise the 'republican

ideal of not living at the mercy of another's will'⁶⁰.

Equality completes the value-trio that underpins democratic authority. Because equality is such a broad and elusive value, we need to study closely just how it manifests itself in administering EU law.

c. The Equality of Peoples

Through their participation in and commitment to the EU, the EU peoples recognise each other as equal partners in a joint political community. The law-administering institutions, both law-making and enforcement, facilitate this equality through the deliberation and non-domination just described.

This is a good place to come back to the importance of EU law-making procedures. In his democratic account of republican intergovernmentalism, Bellamy gives priority to national democratic processes. The role of EU institutions in his view is merely to mediate between these peoples to protect the national democratic process through shared control of the *demos*. EU institutions have no intrinsic value to secure fairness and equality among the EU peoples because their actors neither represent nor are accountable to the EU peoples in a meaningful way.⁶¹ The best way to remedy any democratic deficit is to involve national parliaments and parties in EU law-making.⁶² I do not accept this conclusion. EU institutions alone allow these peoples to come together as equals and decide about the legal obligations

⁶⁰ Larmore (n 48) 110.

⁶¹ Bellamy (n 24) 113 et seqq.

⁶² *ibid* 4, esp. 128 et seqq.

that apply to them. Domestic institutions, by contrast, are wholly ineffective in guaranteeing equality with outsiders, as they represent the interests of one people alone. The value of a democracy mainly feeds from the workings of supranational institutions, without which the deliberation among equals studied above would be impossible.

A pervasive theme of this thesis was to identify the appropriate entity that serves as both the addressee of the EU's authority claim and as source of its moral authority. The present discussion shows why this is necessary. The novel element in the EU's authority claim is that it affects the constitutional peoples themselves. It puts national institutions and territories in the service of the supranational community with transformative effect on how the individual *demoi* govern themselves. It changes both levels of government, within and beyond the state. As Ronzoni explains:

Democracy advocates the equality of European peoples at the EU level, as distinct from both the equality of European citizens and the equality of member states. The aim of the EU is not merely to foster the problem-solving capacity of its member states, but the democratic capacity of its peoples.⁶³

What needs legitimation is the idea that EU law disrupts the tested ways of national rule in the service of others, of outsiders. Democracy offers this legitimation (within limits, see below) by focusing on the very same peoples as source of the EU's authority. Democracy shows that equality among the peoples is only achieved if they relate to each other as equals in institutional fora for law-production and enforcement. Only the binding institutionalisation of their reciprocal duties grounds their full equality. For that reason,

⁶³ Ronzoni (n 2) 218.

neither states and their officials, nor citizens are treated as full political equals.

There is no doubt that equality of Member States is a bedrock principle of the EU which finds both legal and institutional (composition of Councils) expression in the EU's 'constitutional compromise'⁶⁴. Nonetheless, equality among Member States in the EU does not remain a relatively light international notion of equal state sovereignty, the main purpose of which is not to interfere in each other's business. Though this notion of equality does not disappear completely, as the moments of Treaty revision and various unanimity requirements show, Art. 4 (2) TEU is better understood as the equality of subjects of an authority claim (see Chapter 4). In the daily workings of the EU then, Member States are equal as subjects of the EU's authority, which, so I argue, is legitimate because they are a secondary actor compared to the underlying people that commits to the EU. This also underpins the morally rich notion of mutual trust among Member State officials (Chapter 4), which establishes a presumption of compliance as subjects of EU law based on – ultimately – the values carved out in this section.

EU citizens are *legal* equals as well. Non-discrimination underpins EU citizenship (Art. 18 TFEU) and 'reflects a fundamental moral norm: to treat the other as oneself and, beyond that, to transcend the distinction between oneself and the other'⁶⁵. Similarly, consider the mainly transnational impetus of EU citizenship explained in Chapter 4. Since each *demos* remains constituted in a state, only transnationally enforceable EU law can

⁶⁴ Federico Fabbrini, 'States' Equality v States' Power: The Euro-Crisis, Inter-State Relations and the Paradox of Domination' (2015) 17 Cambridge Yearbook of European Legal Studies 3, 9.

⁶⁵ Baquero Cruz (n 28) 89.

guarantee the recognition of other EU citizens as legal co-equals. But in the absence of an EU-wide *demos*, EU citizens are not *political* equals. The degressive proportionality in voting for the EU parliament illustrates that (Chapter 3). Demoicracy accommodates that and puts the ultimate focus on the equality of *demosi* as collective instead of on citizens as individuals. Rather counterintuitively, a political community without a *demos* may legitimately resist treating each citizen as political equals.⁶⁶

This demoicratic perspective thus connects to the EU's authority claim on peoples as carved out in Part II. There, I concluded that the EU's authority claim is ultimately not concerned with the individual citizen and their autonomy qua human being, but rather with the collective autonomy of the people of which they form a part. Demoicratic authority emphasises that the making and enforcement of EU law has legitimate authority because it guarantees the equality of the EU's constitutional peoples through giving them an equal say in EU law making, and enforcing EU law in the national institutions across the EU's territory. The legitimacy basis changes significantly compared to the national level, however, where it is based on a natural duty to treat other human beings with equal dignity qua humans.⁶⁷ Instead, the EU seeks to protect each people's moral achievement of realising democratic self-determination within their respective Member States. Demoicratic authority then needs to be reconciled with the autonomy of the peoples to self-determine their affairs.

⁶⁶ van den Brink (n 44) 16.

⁶⁷ See only Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (OUP 2008) chs 1, 2.

These reflections explain why the authority of EU law is not about equality of outcome, and why I cautioned in Chapter 7 against fair-play accounts which are ultimately rooted in ideas of justice and equality of outcome. Both fair play and democratic authority argue that solidarity among EU peoples is not about charity. It is about reflecting on our self-interest in relation to the ‘others’ with whom we form the EU as a political community.⁶⁸ In other words, the ‘democratic ideal is to treat the *demos* as equal political subjects’⁶⁹. Like fair-play theories, democratic authority focuses on why the participants set up the political community in the first place. Unlike them, however, for democratic authority political/moral legitimacy is prior to justice, because of widespread disagreement about what justice requires, and the fact that justice underdetermines what system of rules we ought to adopt.⁷⁰ Democratic authority emphasises the moral value of EU institutions and procedures that enable the European peoples to decide jointly how to regulate their interactions. For democratic authority, it is the institutional realisation of the idea that ‘they are in this together’ on an equal level, instead of any concrete benefits, that gives EU law its moral force. In short, it is about procedural equality.

Democratic authority moreover rectifies the problem that equality-centred fair-play accounts insufficiently respect the crucial value affected by the EU’s authority, because they can’t identify limits and prioritise any EU law over any national law (Chapter 7). In my view, none of the values rooting EU law’s authority demand that. Equal representation in the deliberations about making EU law does not guarantee prevailing on

⁶⁸ Innerarity (n 10) 201.

⁶⁹ van den Brink (n 44) 15.

⁷⁰ See only Christiano (n 67) 237 et seq; Eleftheriadis, *A Union of Peoples* (n 18) 36.

the outcome. It is about procedural equality. Similarly, non-domination can be realised without equality of outcome. The daily practice of differentiated integration and inbuilt diversity in EU law shows that. On a conceptual level, here is a viable role for the review mechanisms of national constitutional courts, which – when applied properly (more in Chapter 9) – are a vital instrument to protect the very autonomy of the peoples the EU interferes with. In these cases, there is no equality of outcome (since that particular EU law is then unenforceable in that Member State), but the EU’s authority framework is still respected. In other words, because the application of EU law in, let’s say, *ultra vires* cases would be an exercise of domination and an illegitimate interference with the autonomy of the people, the use of the review mechanism is justified.

The procedural equality of peoples that contributes to EU law’s democratic authority is thus a combination of aggregate representation, equal chance of influencing EU law through deliberation, and uniform enforcement throughout the EU’s territory.

2. The Essence of EU Law’s Authority

The values of deliberation, non-domination, and equality of peoples underpin the moral force of EU law and together form the essence of democratic authority. Their reflexive relationship is the key to evaluate the democratic authority of EU law.

Take deliberation and equality. The way in which EU institutions treat the EU peoples and their state and citizen representatives as equals has a direct bearing on the deliberative quality of the process. The institutional compromise in relation to aggregation and representation in the Council and the EP provides a legitimate setting for morally

valuable deliberation because the interests, preferences, and (legal) traditions get a seat at the table that reflects their equal standing. The moral force of deliberation, in other words, stems precisely from the capacity of the law-making process to treat the members as equals without guaranteeing that their views ultimately prevail in terms of policy outcome. This illustrates again why national institutions, especially parliaments, shouldn't play a decisive role in EU law-making. Deliberation among equals only occurs through the participation of representatives of the various *demos* on the EU level, rather than within one *demos*.

Equality and non-domination also stand in a reflexive relationship.⁷¹ For one, enforcing EU law supports a fair scheme of cooperation that guarantees equality in the first place.⁷² The non-domination that the EU's particular law-enforcement architecture brings about thus makes the equality of the peoples a legal reality. For another, the equality of the peoples in the EU's institutional architecture is a precondition for securing non-domination among them. Only if we face each other as equal peoples can EU law guarantee our respective autonomy. The reason is that the horizontal moral relationship among the peoples led to the creation of the EU in the first place. It is only possible to remove the risk of domination in the sense of a capacity for arbitrary interference if the constituent units, the EU peoples, can be assured that they enjoy equal status in administering EU law.⁷³

The values of deliberation and non-domination mirror this intricate, reflexive

⁷¹ For a convincing account of the compatibility of republican non-domination and equality as embodied in democratic ideals see Nadia Urbinati, 'Competing for Liberty: The Republican Critique of Democracy' (2012) 106 *American Political Science Review* 607.

⁷² Neil Walker, 'The Place of European Law' in Gráinne De Búrca and Joseph Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012) 89.

⁷³ For an explanation of this Rawlsian idea on the individual level see Larmore (n 48) 111.

connection. On the one hand, non-domination creates the conditions for unconstrained deliberation in the first place.⁷⁴ Only if each people can formulate their freely chosen vision of how to govern Europe without being dominated by others, will the exchange of reasons and force of rational argument that grounds the value of deliberation and allows to contest arbitrary interference effectively unfold its greatest moral value.⁷⁵ On the other hand, deliberation is a crucial component of non-domination. Deliberation among those affected by subsequent laws removes the risk of arbitrariness and thus the risk of domination. As I argued above, deliberation is the best way to take into account the interests of those affected and be guided by them.⁷⁶

In a nutshell, EU law has legitimate authority because (and to the extent to which) its law-making and enforcement institutions treat the EU peoples as equals and secure non-domination among them by allowing them to act together and to translate their disagreements about issues that transcend the legitimate jurisdiction of their states into binding law through deliberation. As a result, participation in the EU protects the autonomous self-determination of the EU peoples in the first place. For democratic authority reconciles the theoretical tension between authority and autonomy in its manifestation in the EU: namely, the tension between the EU's authority claim and the popular self-determination of the EU peoples. EU law that has democratic authority does not violate the collective autonomy of any of the EU peoples but secures it. In that sense,

⁷⁴ Bellamy (n 24) 62.

⁷⁵ See generally Pettit (n 46) 185 et seqq.

⁷⁶ Charles Larmore, 'Liberal and Republican Conceptions of Freedom' (2003) 6 *Critical Review of International Social and Political Philosophy* 96, 114; Deirdre Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy* (Kluwer Law International 1997) 53–55.

democracy is about freedom.⁷⁷ The EU gives its peoples a say in the issues that affect them jointly and prevents illegitimate interference by neighbouring peoples. Let me visualise what I have said in the last paragraphs:

The Values of Democratic Authority

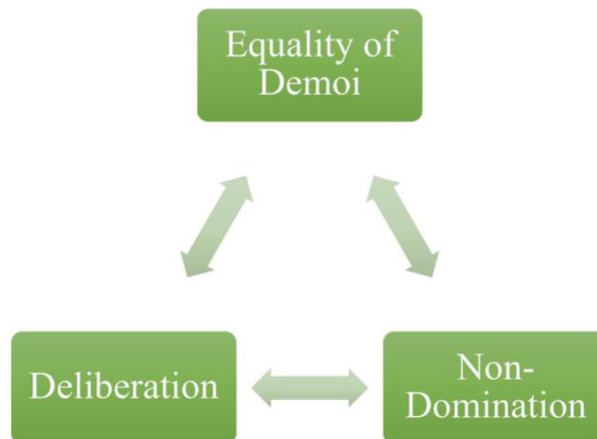


Figure 14: The Values of Democratic Authority

There is no apparent hierarchy among these values. Deliberation will be a more dominant component of some pieces of EU law (especially secondary law made through the ordinary legislative procedure), non-domination of others (for example, ECJ judgments on fundamental freedoms), and equality of others again (laws that require unanimity). It follows that the moral authority of EU law is gradual, depending on the extent of its compliance with these values.

In sum, the concept of democracy helps to carve out the crucial values underpinning the authority of EU law (deliberation, non-domination, equality) because it

⁷⁷ Adapted from Urbinati (n 71) 609: ‘Democracy is about freedom’.

directs our attention to two important elements. First, it conceives of the EU's constitutional *demoi*/peoples as important actors in the EU's normative architecture. Second, it emphasises the crucial role and value of the EU's law-making and enforcement institutions (*kratos*) in administering the claims the EU peoples have against each other. The EU's demoicratic institutional architecture (more precisely, the values explained above) constitutes the appropriate benchmark to evaluate the legitimate authority of EU law. That is the essence of demoicratic authority.

Note that I am not pulling anything new out of the hat. Institutional support comes mainly from the Treaties and the Court. As I showed in Chapter 6, both the ECJ and the Treaties seem to support the idea that the peoples' input into EU law-making constitutes a primary reason for the authority of EU law. Specifically, the Rome Treaty of 1957 has emphasised the value of cooperation among the peoples from the beginning, which is also present in the 1992 TEU. The Court has put flesh to the bones by emphasising the value of EU institutions and the binding law they produce and enforce in facilitating the cooperation of the EU peoples from the outset.

Next, let me consider next what demoicratic authority has to say about political obligation in the EU.

IV. EU Political Obligation

In Chapter 2, I discussed the conceptual relationship between legitimate authority and political obligation, and sided with those who argue that legitimate authority triggers a *prima facie* duty to obey the law. Here theories of authority have a significant impact on

social practice, because it identifies whether (dis-)obeying the law is *prima facie* morally right or wrong. When dealing with political authority beyond the state, the question of political obligation has several layers. We have to ask who has a duty to obey EU law (1.), what that duty requires (2.) and to whom we owe it (3.).

1. Who has a Duty to Obey EU Law?

Membership is usually a good indicator of whom a political community obligates or, at least, claims to obligate (Chapter 4). Take only the example of states, where the citizenry makes up the members of the political community. There, individual citizens qua citizens are the addressees of political obligation. On the international level, by contrast, states are the primary members of the international community and, as a result, addressees of the main international legal and moral duties.

In my constructive interpretation of the EU's authority claim in Chapter 5, I argued that EU law ultimately addresses and seeks to bind the constitutional peoples of the EU, which – in political and social reality – mainly act in their dual manifestation as citizens and state officials (only rarely do they act directly as peoples). It follows from the argument of democratic authority that EU law imposes political obligation on the constitutional peoples. In other words, EU citizens do not have a duty to obey EU law qua individual EU citizens, but as member of a *demos* which participates in the EU as a collective jointly with other equal collectives. Similarly, any ensuing duty to obey EU law for Member State officials flows from their representing a self-determined people which committed to EU integration and remains its ultimate legitimacy source. The EU affects Member States and

their citizens on a theoretically deeper level compared to other legal arrangements beyond the states, and national constitutions recognise this. But just how exactly does political obligation materialise in the EU?

2. Different Agents – Different Duties

In Chapter 2, I portrayed the individual manifestations of *international* duties to obey (especially Çali's obedience, respect, and rebuttal) and voiced my suspicion about a single nature of duty for *national* political obligation (where the main disagreement is between compliance and conformity). Independent of the viability of one single account for the nature of political obligation on these levels, the fact that both citizens and state institutions play a role in the EU's daily governance makes it very unlikely that the same can be argued in the EU. We have to be open to the idea that EU law imposes different kinds of duties on different agents. Whereas ground and reference point remain the same (democratic authority), the duties vary in nature and consequences.

Barber suggests, nonetheless, that the EU only has authority if the addressees of EU duties do what the EU wants because the EU says so.⁷⁸ Obeying EU law based on the incorporation of EU law in one's home constitutional framework cannot do the trick, since that would mean that, ultimately, the addressees obey their home state rather than the EU. Barber thus requires strong compliance. I am reluctant to accept this, however. Why should we require compliance instead of conformity for law beyond the state, if it is already dubious as a standard for national legal duties, not least because of the problem of just

⁷⁸ Nicholas Barber, *The Constitutional State* (OUP 2010) 180.

laws? The comparatively weaker authority claims of legal regimes beyond the state (no coercion, individual autonomy less affected) make it unlikely that they require compliance in the strong sense entertained nationally. More importantly, since political authority is practical authority, it is counterintuitive to rely on internal psychological differences among agents rather than their manifestation in practice. Practical authority tells you what to do, and what matters most, accordingly, is what you do. Finally, the present argument is still a moral rather than empirical one. Empirical evidence of officials and individuals who obey EU law because the EU says so (which one would undoubtedly find) is thus not very important. Instead, my aim is to uncover moral reasons why they ought to obey EU law. My point is that the nature of political obligation – ie the precise moral character and weight of the duty to obey EU law – will vary among different kinds of agents and does not require compliance (acting on it *because* the EU says so).

Part II showed that EU law imposes quantitatively and qualitatively more demanding duties on Member State institutions than on individual EU citizen. Mirroring that, Member State representation is more pronounced in the EU's institutional framework compared to citizen representation.⁷⁹ In terms of enforcement, duties on Member State officials even correspond to rights of EU citizens. Direct effect, for example, allows EU citizens to enforce the duties incumbent on Member State institutions; they act as 'custodians of the obligations member states owe to one another'⁸⁰. But what does this

⁷⁹ Craig (n 42) 321.

⁸⁰ Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (OUP 2016) 61.

mean for political obligation of EU citizens whenever EU law imposed duties on them?

The normative architecture just described shouldn't prompt us to throw out the baby with the bathwater and declare that EU citizenship is without duties.⁸¹ Instead, the core duty of EU citizens flowing from EU law's democratic authority is *respect*. They ought to respect EU law as a consequence of the fact that they are not affected in their individual autonomy, but as part of a people that committed to EU membership. EU citizens ought to respect EU law and take it as *prima facie* reason to rightly determine how this specific issue is to be regulated. This duty of respect ultimately flows from the idea that EU law itself expresses the respect among the citizens of the peoples that come together in the EU.⁸² In a nutshell, EU citizens ought to respect EU law because they thereby uphold the respect EU law embodies towards all EU citizens. The upshot is that EU citizens cannot legitimately try to dodge EU law if their collective people is constrained by it, since their individual autonomy is not affected as ultimate value. For example, if an employer seeks to dodge EU anti-discrimination rules by not hiring other EU citizens despite their valid credentials, they fail to respect EU law.

What is the implication for any moral duty to obey EU law for Member State officials? The fact that EU law imposes considerably more duties on Member State institutions than on individual citizens is mainly a result of the ingenious way in which EU law 'employs' them to administer and enforce EU law (Chapter 3). EU law doesn't affect

⁸¹ But cf. Dimitry Kochenov, 'EU Citizenship without Duties' (2014) 20 *European Law Journal* 482.

⁸² For Larmore (n 48) 115 et seqq. this idea of respect underlies republican non-domination as a whole. See also Valentini (n 26) 193.

Member State institutions in the same way as national constitutional law or international law do. While the former creates the legal relationship between states and citizens, ie binds states to their home people, the latter affects states more lightly and rarely imposes duties enforceable outside the international level.

Instead, EU law imposes enforceable legal duties on them that morally require *conformity* – ie acting on them. Democratic authority underpins this duty of conformity. Democratic authority requires any state official to take into account the value of EU law as giving effect to a valuable scheme of cooperation among the EU peoples and to conform to it. In most cases, this duty – of which sincere cooperation Art. 4 (3) is the most prominent codification – requires national officials to apply and enforce EU law as well as they can. In those rare cases, when weighing whether to obey EU or national law in case of a conflict, it will be a decision between effectuating the national law an autonomous people has given itself, or the supranational law of the joint peoples. This framework balances the collective autonomy of a people with the authority exercised in the EU jointly with other peoples.

Beyond these rare conflict cases, the representatives' duty to conform with EU law implies a duty to justify and explain decisions on the EU level to their people in order to gain and maintain support.⁸³ This is a clear case where reflecting on the EU's authority and the ensuing obligations helps to evaluate and pin down the moral wrongness of national leaders' frequent attempts to 'blame Brussels' and divert responsibility.

⁸³ On this dual duty of Member State leaders see Albert Weale, 'Citizenship in Europe and the Logic of Two-Level Political Contracts' (2014) 15 German Law Journal 867, 871 et seqq.

3. To Whom do We Owe the Duty to Obey EU Law?

Theories of state authority assume that we owe political obligation to the state and not to our fellow citizens.⁸⁴ Although literature on extending political obligation beyond the state is rare, when the issue has been addressed it is stated as obvious that one owes the duty to obey EU law to one's own fellow citizens or 'polis'.⁸⁵ If, however, the authority of EU law is based on the moral value of the EU's democratic institutional architecture, as I argue it is: Europeans and their representatives owe the duty to obey EU law to each other as members of distinct but interrelated peoples. In other words, those wronged by the failure to comply with EU law are the other Europeans who – as part of a constitutional people – have committed to the EU as a political community beyond the state.

This duty is part of the broader moral 'responsibilities that peoples owe one another'⁸⁶ in a democracy. In other words, EU political obligation expresses the EU law-related element of the otherwise underdetermined moral obligations among the EU peoples (others are, eg, solidarity and transnational justice)⁸⁷. Democratic authority thus extrapolates from both the institutional and interpersonal accounts for state authority explained in Chapter 2. These theorists ground political obligation on the moral relationship among the citizens of the state. Similarly, democratic institutions facilitate the interaction of EU peoples and, as a result, gain their moral value directly from how these

⁸⁴ See only Stephen Perry, 'Associative Obligations and the Obligation to Obey the Law' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2008) 191.

⁸⁵ Eleftheriadis, 'Citizenship and Obligation' (n 9) 163.

⁸⁶ Nicolaïdis (n 1) 356.

⁸⁷ See only Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 *Oxford Journal of Legal Studies* 213, 229.

peoples relate to each other through these institutions.⁸⁸ By not respecting or not conforming to EU law, I disrespect the moral worth of the community as a whole and ultimately harm the other peoples that have committed to the EU. Remember one of the main findings of Chapter 1: namely, that peoples make claims on each other in a political community. Depending on the nature of the political community in question, this will involve different claims by different individuals/collectives. In the EU, constitutional peoples make claims on each other, as a moral consequence of which they are reciprocally bound by the institutional regime they choose to manage these claims in.

So far, I have outlined the idea of democracy and how its underlying values give moral force to EU law. Democratic authority thus understood gives rise to a *prima facie* duty to obey the law, though in different manifestations for different actors in the EU. If democratic authority wants to be an evaluative standard to distinguish rightful rule from illegitimate power – rather than a tool to rubber-stamp EU law, and thereby turn legitimacy into mere legality – it needs to incorporate limits. Democratic authority provides a conceptual framework to identify such internal and external limits. Let me turn to those.

V. The Limits of Democratic Authority

Authority ought to acknowledge limits. Not only because it has to respect the intrinsic good of autonomy it interferes with, but because limits are a necessary element of legitimate rule. It follows that theoretical accounts of authority should have operable limits as well,

⁸⁸ Joseph Weiler, 'A Constitution for Europe? Some Hard Choices' (2002) 40 *Journal of Common Market Studies* 563, 548; Innerarity (n 10) 249.

and I criticised those that don't (Chapter 7). It is thus an asset of democratic authority that the democratic authority of national law imposes *external* limits (1), while democratic authority shares the *internal* limits of institution-centred, procedural accounts (2).

1. Democratic Self-Government as External Limit

Defining the boundaries of a political community's authority is ever more important in today's interdependent world, both horizontally among the states and vertically in relation to other regulatory levels.⁸⁹ In the EU, the most important boundary 'dispute' occurs between the legitimate reach of EU law vs. the legitimate reach of national law. In other words, the democratic authority of Member State law serves as external limit to the democratic authority of EU law. That is of course overly simplistic. And yet, this idea redirects our attention to the tension between the EU's authority claim and the self-determination/autonomy of the EU peoples (Chapter 5). The EU's authority hinges on respecting the value of national self-determination while containing it in a binding legal framework beyond the state. But what does that mean? It is fundamentally about

the idea that, when peoples are constituted as *demoi*, i.e., when they give themselves democratic institutions, then they are owed respect as collectives by other actors (...) and, in particular, its democratic decisions are. (...) respecting it also means respecting the individuals which form it – hence respecting it does not mean making a choice between the freedom of collective agents and that of individuals.⁹⁰

Ronzoni highlights that EU citizens constitute the agents that deserve respect as

⁸⁹ For the former, see A John Simmons, *Boundaries of Authority* (OUP 2016). For the latter see Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (OUP 2014).

⁹⁰ Ronzoni (n 2) 218.

members of a constitutional *demos* of a Member State. Respecting their self-determination qua *demos* in their respective state and, consequently, their right to regulate their own affairs, implies respecting each and every one of them individually. Bellamy deserves much credit for fleshing out this particular perspective in democratic theory: namely, to reflect on the appropriate relationship between the two regulatory levels in a democracy, ie the EU level and the national democracies composing it.⁹¹

This focus on the respect for national democracies allows the integration of the locks/review mechanisms of national constitutional courts in the theoretical framework of democratic authority predominantly as external control. These locks constitute external limits to the authority of EU law that are ultimately based on the democratic authority of national law. The national constitutional courts act as guardians of national self-determination as spelled out in the respective national constitutions. Recall that the obligation to obey (EU) law is a *prima facie* obligation that can be overridden by other moral obligations (Chapter 2). In some cases, national democratic self-determination may turn out to produce such an overriding consideration. That not only applies to refusing the application of EU law in their own state vis-à-vis the EU (vertically). The case law according to which the far-reaching idea of mutual trust has limits (*Aranyosi*) implies that the conception of national self-determination embodied in a Member State constitution can lead to a refusal to apply an EU Arrest Warrant because of deficiencies in another Member State horizontally.

Yet, popular sovereignty- and democracy-related arguments cannot be made too

⁹¹ Bellamy (n 24) esp. ch 3.

easily against the other peoples of Europe. The fact that each Member State is a democracy limits the objections one of them can make against the others. As van Middelaar recalls from the financial crisis negotiations in the Eurozone,

Greece was not a single democracy fighting the world of high finance and international organisations (...), but a single democracy that found itself opposed by eighteen other democracies.⁹²

Hence, the democratic authority of national law does not give EU citizens and state officials a blank check to overturn EU law. That would go against the moral weight of the duty to obey EU law that all the EU peoples committed to. The conceptual point remains, however, that national democratic self-determination sets an external jurisdictional limit to the EU's authority. In other words, the respect for national constitutional identity and diversity not only figures as a legal limit on the EU's action (Art. 4 (2) TEU), but also as an outer moral limit to the legitimacy of its rule.⁹³ This rather crude framework by no means entails that EU law cannot legitimately touch, shape or harness national legal systems for its purposes. The function as an external limit does not ring-fence national law from EU law influence. Instead, democratic self-determination on the national level needs to be balanced with its jurisdictional limits that provide the legitimate scope of action for EU law.

⁹² Luuk van Middelaar, 'Europe and the Return of Politics' in Luuk van Middelaar, Philippe van Parijs and Herman van Rompuy (eds), *After the Storm: How to Save Democracy in Europe* (Lannoo 2015) 213 et seq. See also Christoph Möllers, 'Constitutional State of the European Union' in Robert Schütze (ed), *Globalisation and Governance: International Problems, European Solutions* (CUP 2018) 257.

⁹³ See only Myrto Tsakatika, 'Claims to Legitimacy: The European Commission between Continuity and Change' (2005) 43 *Journal of Common Market Studies* 193, 205; Joseph Raz, 'The Future of State Sovereignty' in Wojciech Sadurski, Michael Sevel and Kevin Walton (eds), *Legitimacy: the State and Beyond* (OUP 2019) 80 et seq.

2. The Internal Limits of (mainly) Procedural Authority

One of the key values underpinning the democratic authority of EU law is the procedural legitimacy stemming from the deliberation among equals in the institutional procedures leading to the adoption and enforcement of EU law. While deliberation – unlike in democratic authority accounts – does not do all the moral work, procedural limits also apply to democratic authority. According to Christiano, ‘the limits to democratic authority are internal limits in the sense that the limits are grounded in the very same principles as democracy is grounded in’.⁹⁴ The values which give law authority, simultaneously constitute boundaries of its legitimate authority. The same applies, by analogy, to democratic authority and its emphasis on procedural deliberation.

But what are the limits of procedural accounts, such as democratic decision-making? For one, the violation of the values identified above as underpinning EU law’s authority serves as internal limit in the sense explained in Chapter 2: namely, that their violation renders EU law illegitimate from the outset. The standards that make EU law legitimate would simply not be met if EU law itself would foster domination, for example. For another, an important limit of democratic authority is the absence of substantial safeguards. Various scholars have pointed out how democratic decision-making procedures can be used to produce vile results. ‘A democracy of evil people will be evil, even if democratic’⁹⁵. The same is true for the EU’s democracy. Though that sounds harsh,

⁹⁴ Thomas Christiano, ‘A Democratic Theory of Territory and Some Puzzles about Global Democracy’ (2006) 37 *Journal of Social Philosophy* 81, 90.

⁹⁵ Joseph Weiler, ‘The European Circumstance and the Politics of Meaning: Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4)’ (2020) 21 *German Law Journal* 96, 96. See earlier Joseph Weiler, ‘Federalism without Constitutionalism: Europe’s Sonderweg’ in Kalypso Nicolaïdis and Robert

I have no intention to downplay the risks associated with conceiving of the EU as a democracy. To the contrary, Part II illustrated just how transformational the EU's authority claim is, which makes a discussion of its potential dangers all the more pressing.

Democratic authority presents an open flank based on the lack of substantive protection against 'vile' results. While the force of the values of Art. 2 TEU is ever more ailing in practice, it shows how the election of authoritarian populists to EU institutions and Member State governments could at some point mean that they are in charge of a democracy whose institutions and laws deeply affect the European peoples in their everyday life. In an important sense, the authority of EU law as democratic right to rule depends on the continued existence of its Member States as democratic states. Only then will the governments and parliamentarians truly represent their citizens.⁹⁶ The *demos* needs to continue to govern on the national level for the *demos* to be able to govern on the supranational level, so to speak. In a nutshell, the lack of substantive safeguards in the primary values underpinning democratic authority is an internal limit to this legitimacy standard.

This unappealing result can somehow be mitigated by the interaction of internal and external limit. As discussed above, the external limit of democratic authority is the democratic authority of national law. This in turn, leads to a limited window of review-mechanisms by national constitutional courts, which thereby may legitimately avoid

Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 66.

⁹⁶ van den Brink (n 44) 19. See also R Daniel Kelemen, 'The "Democratic Deficits" of the US and the EU Compared' in Sacha Garben, Inge Govaere and Paul F Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart 2019).

domination by EU law, and simultaneously put external pressure on EU law to make good on its claim to legitimate authority.

VI. Conclusion

Three pillars underpin the democratic authority of EU law: deliberation, non-domination, and equality of peoples. These values explain why the law-making and -enforcement machinery itself equips EU law with moral force. EU law allows the peoples to exercise joint self-determination over the issues that affect them in relation to each other.

The question ‘Does the EU have the authority it claims for itself?’ thus received two answers in this chapter. First, the EU has the authority it claims to the extent that the nature and scope of its claim (explained in Part II) match with democratic authority and the values underpinning it. This can be evaluated for each piece of EU law separately. Secondly, EU law’s authority is not based on the various moral values many EU institutions claim it is (Chapter 6). Most of the EU institutions and academics who have (mostly implicitly) endorsed a vision of the moral baseline underlying the authority of EU law (see Chapters 6, 7) got it wrong. But that does not mean – pace philosophical anarchists – that EU law has no authority. Here, I attempted to outline a more convincing view of the EU’s authority, which helps to evaluate EU law’s moral force: democratic authority.

EU law within the limits of democratic authority, as explained here, protects the self-determination of the EU peoples. We come back full circle to the basics discussed in Chapter 1 in two important ways. First, as I recalled there, authority derives from *auctoritas*: from authorship. The account I have provided here is simple in that it builds on

this etymological and conceptual connection: the law of the European Union gains its moral force from allowing the European peoples to decide about their joint fate together: to author their coexistence as a political community beyond the state. Second, I emphasised the importance of claims for moral and political relationship more broadly. Demoicratic authority expresses that EU law is one important way in which the EU peoples make and concretise otherwise under-determined claims they have on each other.

In a final step, let me illustrate the fresh perspective and practical value of demoicratic authority as a conceptual framework by putting it into practice.

CHAPTER 9: DEMOCRATIC AUTHORITY II: THE PRACTICE

I. Introduction

The primary perspective of this thesis is a theoretical one. It seeks to contribute to a theoretical understanding of the EU and intends to raise awareness of serious moral questions in relation to the legitimate exercise of its authority. I can nonetheless best illustrate the value of democratic authority as evaluative tool by shedding some light on its practical implications. After all, discussions of political authority are always necessarily practical: they are action-guiding and seek to inform the practical reasoning of both the officials of law-administering institutions, and the affected citizens.

Each of the following debates illustrates how democratic authority helps to conceptualise and understand pressing issues of EU constitutional law. The emphasis is on ‘illustrates’. Space precludes taking up all the challenges identified in previous chapters (for example the discrimination between EU citizens and third country nationals). This chapter showcases a selection and thus seeks to show how democratic authority provides an attractive framework to conceptualise any of these practical issues.

II. Disagreement and Judicial Review

The deliberative value of EU law-making – how it translates the preferences of 27 diverse peoples into binding legal rules – is one of the constitutive values of democratic authority. Let me show how today’s ever more politicised EU relates to democratic deliberation and how democratic authority weighs in on the proper realm of judicial review.

Nothing is left of the ‘permissive consensus’ of the early days of the Community. Today, Member States, EU citizens, transnational organisations, academics, and even national constitutional courts question the policy choices of Brussels. While some might say ‘Blessed be the good old times!’, democratic authority suggests that the continued politicisation of EU law- and policy-making increases the authority of EU law. In a nutshell, the more controversial the underlying policy-debate, the more authority the resulting EU law has. Sternberg is right:

If there is one key lesson, it is that any claims about the EU’s legitimacy, in order to be plausible, have to openly acknowledge the essentially controversial nature of EU politics.¹

Calls for the EU to embrace differences not only among its local roots and diverse legal cultures, but – more fundamentally – in respect to the substance of political decisions on the supranational level are always welcome.² Those differences also influence the authority of EU law: they help to realise that ‘making decisions together can be more important than getting them right’³. Look, only recently, at the cumbersome negotiations of the appropriate economic response to the COVID 19-crisis in combination with the new Multinational Financial Framework or the intense public scrutiny of the EU’s vaccination strategy. Not only were they a powerful instance of a European public where the EU peoples engaged with each other in joint deliberation, both via media outlets and in EU

¹ Claudia Sternberg, ‘Public Opinion in the EU Institutions’ Discourses on EU Legitimacy from the Beginnings of Integration to Today’ (2016) 54 *Politique Européenne* 24, 46.

² See for example Michèle Finck and Floris de Witte, ‘The Challenge of Challenges’ (2020) 21 *German Law Journal* 1. More generally Gareth Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2015) 21 *European Law Journal* 2; Floris De Witte, ‘Interdependence and Contestation in European Integration’ (2018) 3 *European Papers* 475.

³ Scott Hershovitz, ‘Legitimacy, Democracy, and Razian Authority’ (2003) 9 *Legal Theory* 201, 218 in relation to national law making.

institutional fora, and where they held their leaders and representatives accountable for their decisions. These negotiations and debates also laid bare that the interests of various peoples align ideologically rather than nationally, which enabled institutional and societal deliberations about the appropriate European response to the crisis. We witnessed a similarly intense politicisation and deliberation when the EU adopted prominent recent secondary law, such as the General Data Protection Regulation and the Copyright Directive.⁴ EU law in its post-Lisbon shape reflects a ‘binding dissensus’⁵ which – due to that very nature – constitutes a great moral achievement.

The effect of this politicisation on EU law’s democratic authority has direct consequences for judicial review. Arnall scrutinises EU law against the democratic features of a majoritarian national democracy and – hardly surprising – finds no counter-majoritarian difficulty that would prevent intense judicial review of EU law. The simple reason is that the EU does not constitute a majoritarian state-like democracy that warrants protection of the democratically adopted laws.⁶ He thus accepts a greater role for judicial review against ‘non-democratic’ EU law. Democratic authority tells a different story. The moral value of EU law lies in channelling the reasonable disagreements of 27 peoples into binding and enforceable law through institutional deliberation. Judicial review on the EU

⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

⁵ Luuk van Middelaar, ‘Europe and the Return of Politics’ in Luuk van Middelaar, Philippe van Parijs and Herman van Rompuy (eds), *After the Storm: How to Save Democracy in Europe* (Lannoo 2015) 244.

⁶ Anthony Arnall, ‘Judicial Review in the European Union’ in Anthony Arnall and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015).

level has to respect this moral achievement as part of a supranational conception of separation of powers called institutional balance (Art. 13 (2) TEU).⁷

What position does the court take in this debate? On the one hand, the ECJ seems ever more reluctant to interfere with the policy choices and assessments made by the EU legislator.⁸ The Court recognises the greater authority of intensely-debated secondary law, such as the Framework Decision on the EAW or the Citizenship Directive. With regard to the EAW, the ECJ in *Melloni* argued that the Framework Decision ‘reflects the consensus reached by all the Member States’ and, as a result, should not be compromised by unilateral national alterations.⁹ With regard to the Citizenship Directive, the Court is increasingly reluctant to use primary law to deviate from secondary law, holding that the ‘principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression’ in the Directive¹⁰. In contrast, the ECJ is willing to grant more leeway in areas that ‘had not been harmonised by the EU legislature’¹¹.

On the other hand, van den Brink gathered powerful evidence from a range of policy sectors (eg citizenship, social security coordination, flight compensation) where the Court undermines the choices of the EU legislature.¹² The court does that (i) by

⁷ See, in far more detail Martijn van den Brink, ‘The European Union’s Democratic Legislature’ *International Journal Of Constitutional Law* (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3594066> accessed 29 April 2021.

⁸ See only Jacob Öberg, ‘The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes’ (2017) 13 *European Constitutional Law Review* 248, esp at 254.

⁹ Case C-399/11 *Melloni* EU:C:2013:107, para 62. Recently confirmed in Case C-416/20 PPU *Generalstaatsanwaltschaft Hamburg* EU:C:2020:1042.

¹⁰ Case C-333/13 *Dano* EU:C:2014:2358, para 61.

¹¹ Case C-42/17 *M.A.S. und M.B.* EU:C:2017:936, para 44.

¹² van den Brink (n 7) 22 et seqq.

constitutionalising primary law and thus obliging legislative choices to conform with the Court's interpretation of primary law,¹³ (ii) by interpreting legislation contrary to the drafters' intention,¹⁴ or (iii) by purposive reasoning in light of the Treaties more generally.¹⁵

I agree with van den Brink that the democratic authority of EU law militates against these judicial intrusions into the EU legislator's policy choices. Note that the Court's intrusion into these substantive choices is very different from the Court's structural principles, especially primacy and direct effect. These principles – as explained in Chapter 8 – serve precisely to enforce the democratic authority of EU law *vertically*, ie in national court's and institutions and thereby ensure non-domination and equality.

The moral force of EU law accordingly increases if the legislative process results in a binding compromise, despite deep yet reasonable disagreements within and among the EU peoples. In short, 'more politics' strengthens law's authority. And the Court ought to respect that. But that is not the main point. The main point is that it is fatal to portray political differences and conflicting visions among the Member States and their citizens as a threat to the very existence of the EU. Quite to the contrary. Instead of lamenting that this leads to an 'unprecedented climate of decay' in which 'the very idea of integration is shattered to its bones'¹⁶, we should acknowledge that the nature, level, and future of EU

¹³ Van den Brink lists the Merger Regulation, the Patients Mobility Directive, the Service Directive, and the Citizenship Directive.

¹⁴ Joined Cases C-402/07 and C-432/07 *Sturgeon and others* EU:C:2009:716.

¹⁵ Van den Brinck lists the access to benefits cases, such as Case C-209/03 *Bidar* EU:C:2005:169; Case C-413/99 *Baumbast* EU:C:2002:493.

¹⁶ Julio Baquero Cruz, *What's Left of the Law of Integration?: Decay and Resistance in European Union Law* (OUP 2018) 170. Similarly Giorgio Maganza, 'Can the Authority of EU Law Be Taken

integration has indeed always been controversial. The argument of democratic authority suggests that embracing the contestation among the EU peoples in the production of binding EU law makes that very law more legitimate.

III. A Guide to Navigate Conflicts

Democratic authority provides a fresh perspective on the pervasive discussion about how the authority of EU law relates to the authority of national law (who would have thought that possible). Potential conflicts arise from the different perspectives of the ECJ on the one hand, and national constitutional courts on the other, in relation to the ultimate decision-making authority in Europe. Whereas the ECJ claims for itself the authority to decide about the status, validity, and applicability of EU law throughout the EU territory ('autonomy'), national constitutional courts reserve the right to check the compatibility of EU law against fundamental principles of their constitutions.¹⁷

Many scholars have attempted to conceptualise these incommensurable claims or proposed a pragmatic solution for when they clash in practice under the headings of monism, dualism, or pluralism. The focus of their work is on the sovereignty-related question of who decides and how to decide when push comes to shove (ultimate decision making, *Kompetenz-Kompetenz*). My angle is different. It compares the moral reasons for

for Granted? A Tale of Principles and Realities' in Wolfgang Heusel and Jean-Philippe Ragueade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019) 46.

¹⁷ For an insightful summary see Monica Claes, 'The Primacy of EU Law in European and National Law' in Damian Chalmers and Anthony Arnall (eds), *The Oxford Handbook of European Union Law* (OUP 2015). For the most recent example see Portuguese Constitutional Court, judgment 422/2020 from 15.7.2020.

the authority of each legal order and seeks to extract a normative guide to solve potential conflicts in each given case. In other words, I intend to propose a standard for evaluating the relative weight of the authority claims of EU law and national law by recourse to the very reasons that make both authoritative.¹⁸

Member States and the EU, so I argue, serve the EU peoples as complementary fora for different tasks, each with their own genuine moral authority. Such an understanding goes against two intellectually rather lazy trends in opposite camps. While some designate the nation state as reactionary ethnic escape-room and the EU as promised land of the future, others portray the EU as unaccountable technocracy and the nation state as sole repository for normatively acceptable political rule. The key to a more balanced approach for evaluating the authoritative force of laws from both orders in relation to each other, lies in a focus on the collective agents that underpin them.

A good reason for the authority of democratically enacted national law in the Member States stems from the moral achievement of institutionally resolving reasonable disputes among the members of the polity while treating each citizen equally (Chapter 2). EU law is consequently illegitimate if it impinges on what is properly left to the national democratic process. From the perspective of the EU's legitimate authority, Weatherill is right: 'An EU which is imposed on the peoples of Europe contains the seeds of its own destruction'¹⁹. In terms of this chapter, a democracy wrongs its *demos* if it curtails their

¹⁸ For a call to develop such perspectives Roger Cotterrell, 'Transnational Legal Authority: A Socio-Legal Perspective' in Maksymilian Del Mar and Roger Cotterrell (eds), *Authority in Transnational Legal Theory: Theorising Across Disciplines* (Elgar 2016) 256.

¹⁹ Stephen Weatherill, *Law and Values in the European Union* (OUP 2016) 418.

independent space for self-determination. The inbuilt-idea of democracy is respect for the continued existence and viability of its members as independent collectives. Only when EU law does not impose illegitimate constraints on national democracies by interfering in areas which are neither part of regulating the interdependence of the peoples, nor necessarily and rightly affected by EU integration, does it rule legitimately. Of course this leaves great interpretive leeway for individual cases in practice. Nonetheless, this theoretical framework helps to rationalise EU case law that stays away from how to regulate abortion²⁰ or non-cross-border insurance contracts for breast implants.²¹ Thus understood, democratic authority provides a conceptual framework to explain why centralisation as such, which neglects diversity and focuses entirely on uniformity, ultimately harms the authority of EU law.²²

But that is not a one-way street. The legitimacy of national democratic procedures and the ensuing law, conversely, is jeopardised whenever national law impinges on areas which ought to be dealt with beyond the state. Member State democratic legitimacy has jurisdictional limits.²³ A crucial part of my argument is that the EU operates as necessary complement to national democratic procedures, and helps where national democratic authority fails. In my view, the EU provides an alternative and complementary forum with its own institutions and procedures to legitimately address and resolve issues in relation to

²⁰ Case C-159/90 *Grogan* EU:C:1991:378.

²¹ Case C-581/18 *TÜV Rheinland* EU:C:2020:453.

²² Similarly Stephen Tierney, “‘We the Peoples’: Constituent Power and Constitutionalism in Plurinational States’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2007) 244 et seq.

²³ Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) 296.

which unilateral state measures would cause harm to outsiders (by not including them in decision-making processes that result in laws that affect them). Again, only the EU institutions can ensure and facilitate meaningful deliberation, non-domination, and ultimately the equality of the EU peoples.

Which guidance follows from that for conflicts between EU and national law? So far, Isiksel rightly states that most would frame the comparison of their moral bases as one ‘between alternate sources of constitutional authority, namely democratic rule on the one hand, and effective government on the other’²⁴. Let me explain why that should change.

Best to start with examples. Think of the scenario underlying *Melloni*. As is well known, the ECJ interpreted Art. 53 CFEU so as to preclude the application of national fundamental rights to harmonised secondary law. The Court’s unfortunate language of ‘primacy, unity and effectiveness’²⁵, may usefully be re-interpreted as a democratic argument. The Court simply holds that the idiosyncratic Spanish understanding of the right to fair trial must not prevail over the exhaustive conditions that result from the EU legislative procedure in the Framework Decision. Of course it is troubling that the Court did not explicitly assess the compliance of the Framework Decision with EU fundamental rights. It nevertheless remains the case that – assuming such compliance – opening up the Framework Decision to the control of each national constitution gives rise to unilateral dominance of the others by imposing one’s own fundamental standard on other peoples,

²⁴ Turkuler Isiksel, *Europe’s Functional Constitution: A Theory of Constitutionalism Beyond the State* (OUP 2016) 50 et seq.

²⁵ *Melloni* (n 9) para 60.

especially the one issuing the EAW. This illustrates how the underlying values of democratic authority (deliberation, popular equality, non-domination) sometimes stand in tension with each other, since the EAW Framework Decision is a Council Decision without EP involvement and thus without the full deliberation that underpins democratic authority. As discussed in Chapter 8, the authority of EU law is gradual, and each piece of EU law reflects a different level of compliance with its underlying values and thus a different level of binding force. In the case of *Melloni*, the Court was right to hold that a national fundamental rights scrutiny would jeopardise the integrity of that particular piece of legislation that secures equality and non-domination.

But the Court doesn't always get it right. Recall that we are trying to get normative guidance for potential conflicts from the variants of collective self-determination underlying both political communities. In *Rimšēvičs*, the ECJ used the institutional entanglement of the ECB and national central banks not to merely *disapply* a national administrative decision to oust the Latvian central bank governor. No, the ECJ felt it could legitimately *annul* the national decision itself. According to the Court, the 'less marked distinction' between the legal orders in that area and the 'hybrid status of national central bank governors within the European System of Central Banks' allows EU law to interfere in such a way.²⁶ As I explain elsewhere, the Court thereby illegitimately intruded into the proper sphere of national self-determination. For self-determination entails that a people creates laws through its national institutions, which can, as a consequence, only be

²⁶ Case C-202/18 *Rimšēvičs v Latvia* EU:C:2019:139, paras 69, 70.

legitimately invalidated by these institutions.²⁷ That much was respected by the EU's authority claim, which hitherto restricted itself to *disapply* conflicting national law and thereby respected the different chains of validity.²⁸ From the perspective of democratic authority, the failure of the judgment that annuls a national decision consists in encroaching upon the natural prerogative of a people to invalidate their own laws according to their own constitutional standards as a crucial expression of how they want to govern themselves. A law a people has given itself in a democratic process (and any decision based on such a law) can only be invalidated by the procedure that this people's constitution provides for.

In both cases (*Melloni* and *Rimšēvičs*), the issue is not only about enforcement and domination. The crucial question becomes whether the democratic solution on the national level or the democratic agreement on the EU level should prevail. The comparison of the underlying agents reveals the moral weight of each decision. The conceptual lens of democratic and democratic authority enables at least approximative normative guidance on how to resolve potential conflicts. It simply means that deference to national democratic self-government on the part of the EU is not a one-way street, despite the absence of Democratic (Capital) institutional procedures on the EU level.²⁹ By contrast, the consent framework that underpins the national constitutional courts' reasoning (see Chapter 7) does not allow these courts to take into account the integrity of the EU's institutional framework

²⁷ Josef Weinzierl, 'Der EuGH erklärt erstmalig nationales Recht für ungültig – Anmerkung zum Urteil des EuGH v. 26.2.2019, Rs. C-202/18 (*Rimšēvičs*)' (2019) 54 *Europarecht* 434.

²⁸ See only Case T-192/16 *NF v European Council* EU:T:2017:128, para 44. See also Chapter 3 sec. III.1.

²⁹ But see Vlad Perju, 'On the (De-)Fragmentation of Statehood in Europe: Reflections on Ernst-Wolfgang Böckenförde's Work on European Integration' (2018) 19 *German Law Journal* 403, 425 et seqq.

as self-standing source of legitimate law among peoples.

This shows that the jurisdictional dimension and moral basis of each legal system provides guidance on how to approach conflict cases. The decisive question, in the case of a conflict, becomes whether the binding norms *one people* has given itself should prevail or the European norms generated through the collaboration of the *joint peoples* of Europe.

Next, democratic authority – as a tool to evaluate the extent of the EU’s rightful rule – helps to bring to light various threats to the authority of EU law.

IV. Threats to Democratic Authority

1. Undermining EU Law through International Arrangements

Democratic authority has a clear position on Member States’ recourse to international legal mechanisms outside the EU legal order, such as witnessed as a reaction to the financial crisis (EFSF, ESM etc.).³⁰ Such mechanisms (especially in the neighbourhood of the EU’s competences) constitute a threat to the authority of EU law. They essentially circumvent the inherent democratic and especially deliberative quality of the EU’s institutional machinery, as well as EU law’s substantive legal safeguards that distinguish the EU as a political community from international law.

³⁰ For other examples, see the concessions agreement with UK Prime Minister Cameron on the free movement of workers. Rightly very critical of both developments Joseph Weiler, ‘The Authority of European Law: Do We Still Believe in It?’ in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019) 4.

For one, the flight to international law leads to executive dominance and de-parliamentarisation. Garben makes a forceful case for the *illegality* of those mechanisms outside the EU legal order based on the commitment to democracy enshrined in Art. 10 TEU and the principle of sincere cooperation.³¹ In my view, these legal arguments can be translated into political theory. Such mechanisms are *illegitimate*. They lack institutional integrity and bypass the supranational forum which is the institutional manifestation of the relations of the EU peoples with each other.³² For another, the outsourcing of EU-related issues to international organisations greatly increases the risk for domination by more powerful Member States, which the EU's institutional architecture is designed to prevent.³³ This is due to the lack of legal safeguards for smaller states and the idea that political might plays an important role in international organisations. International outsourcing thereby also jeopardises the equal political standing of the EU's demoi.³⁴ This lack of respect for the values identified above threatens the authority of EU law as a whole. The ECJ admittedly mitigated some of the 'damage' when it held that EU institutions were bound by their EU law duties even when acting outside EU law.³⁵ Nonetheless, ex post legal accountability cannot replace ex ante political legitimacy, since that upsets the intricate interrelation among the values underlying EU law's authority as identified above.

³¹ Sacha Garben, 'The Constitutional (Im)Balance between "the Market" and "the Social" in the European Union' (2017) 13 *European Constitutional Law Review* 23, 55 et seqq. The Court usually disagrees. See only Case C-370/12 *Pringle* EU:C:2012:756. Case T-192/16 *NF v European Council* EU:T:2017:128.

³² Similarly in relation to the EU-Turkey deal Valsamis Mitsilegas, 'Trust' (2020) 21 *German Law Journal* 69, 71 et seq.

³³ Federico Fabbrini, 'States' Equality v States' Power: The Euro-Crisis, Inter-State Relations and the Paradox of Domination' (2015) 17 *Cambridge Yearbook of European Legal Studies* 3, 25.

³⁴ van den Brink (n 7) 17.

³⁵ See Case C-8/15-P *Ledra Advertising* EU:C:2016:701 and the discussion in Chapter 3, sec. III.2.a.

Some don't share these concerns, however, and emphasise the national democratic legitimacy of institutions like the ESM – ie their accountability to national ministers and parliaments.³⁶ Nonetheless, this remote accountability cannot alleviate executive dominance and de-parliamentarisation. Moreover, such international bodies might even harm national democracy itself by disrespecting the budgetary autonomy of national parliaments. Budgetary discretion all but vanishes under these mechanisms.³⁷ Finally, even if we assume domestic democratic legitimacy, such democratic legitimacy in one state is unable to accommodate the possibility of domination among democracies.

The threat of inter-se agreements among Member States to the authority of EU law increases with their substantive proximity to EU competences. However attractive it might be for national governments to escape the constraints of the EU's institutional architecture, they are there for a reason. The EU binds the EU peoples to one another and allows each of them to influence the obligations they intend to impose on each other. In essence, escaping EU procedures replaces 'integration through law' with 'integration through power'.³⁸ Or, as Stubb expressed it in a more casual tweet:

If you want more integration you should not do it by rejecting others or undermin(in)g common rules and institutions. Or I guess you can do it, but be honest about your intentions. The EU is a political Union that uses

³⁶ Christoph Möllers, 'Constitutional State of the European Union' in Robert Schütze (ed), *Globalisation and Governance: International Problems, European Solutions* (CUP 2018) 256 et seq.

³⁷ Isiksel (n 24) 225; Christian Joerges, 'How Is a Closer Union Conceivable under Conditions of Ever More Socio-economic and Political Diversity? Constitutionalising Europe's Unitas in Pluralitate' (2018) 24 *European Law Journal* 257, 263 et seq.

³⁸ Weatherill (n 19) 411. See also Erik Oddvar Eriksen, *The Normativity of the European Union* (Palgrave Macmillan 2014) 115, 118.

economic instruments. Both need to be respected.³⁹

Only those who perceive the EU as international forum with no *qualitative* difference to other international organisations are thus unable to identify a legitimacy problem here.⁴⁰ But if you view the EU as a political community in which the European peoples relate to each other as institutionally guaranteed equals, few developments constitute a bigger threat to the EU's authority than the international reactions to the financial crisis. Such international outsourcing neglects the deliberative value of EU law-making, creates the potential for domination, and cannot secure the peoples' equality. This shows that a discussion of the ground for EU law's moral force is vital to call out and prevent such harmful practices and their functionalist logic.

But we shouldn't put all the blame on the European Council. The Court has most recently contributed to international 'outsourcing' by refusing to review the legality of acts in the heart of the EU's political and institutional architecture. It held that the 'common accord' that concludes the selection process of members of the ECJ according to Art. 253 TFEU does not constitute an act of EU institutions under Art. 263 TFEU and is thus beyond judicial review.⁴¹ Similarly, the Court held that the Eurogroup does not qualify as EU 'institution' for the purposes of Art. 340 TFEU. Its decisions thus can't give rise to non-contractual liability.⁴² It seems that the efforts involved in deeming such acts legal – despite their neglect for the EU's institutional architecture and accountability regime – have

³⁹ Alexander Stubb, 'Tweet at 12.56 Pm' *Twitter* (19 April 2020) <<https://twitter.com/alexstubb?lang=de>> accessed 5 May 2021.

⁴⁰ See, for example, Pavlos Eleftheriadis, *A Union of Peoples* (OUP 2020) chs 8, 9.

⁴¹ Case C-424/20 *Sharpston* EU:C:2020:705

⁴² Case C-597/18 P *Council v Chrysostomides & Co* EU:C:2020:1028.

convinced the Court that it is better to deny jurisdiction in the first place. And yet, this non-justiciability jurisprudence threatens the authority of EU law. It showcases a flawed focus on Member State consent as legitimacy basis and breaks up the careful calibration between political and legal accountability.

The idea is that the lack of legitimate alternatives usually strengthens the case for the legitimacy of the current institutional set up.⁴³ The finding that international organisations provide no more or equally legitimate alternative to the EU's institutional arrangement thus corroborates the EU's legitimacy. This section consequently not only argues for avoiding any future escape to international law. Following the Schengen example, it also creates a normative incentive to push for the integration of international bodies in the orbit of the EU's competences into the EU's governance architecture.

2. (Systemic) Non-Compliance

It seems self-evident that flouting legal obligations threatens the authority of any given legal system. There are good reasons, however, not to accept this without qualification. Mostly in response to fair play theories many argue that not every violation of legal duties immediately shakes up the entire legal order.⁴⁴ Most of them, like jaywalking, are simply too irrelevant to have any impact on the stability of the system. On the domestic level, only

⁴³ NP Adams, 'Legitimacy and Institutional Purpose' (2020) 23 *Critical Review of International Social and Political Philosophy* 292, 301.

⁴⁴ See only MBE Smith, 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82 *Yale Law Journal* 950, 956 et seqq. Liam Murphy, 'The Normative Force of Law: Individuals and States' in Leslie Green, John Gardner and Brian Leiter (eds), *Oxford Studies in Philosophy of Law. Volume 3* (OUP 2018) 107 et seqq.

systemic threats may undercut the *de facto* authority of law. Similar arguments are made on the international level. Due to the difficult enforcement of international law, the notion of compliance of course is broader. Many portray the attempts of delinquent states to justify violations of international law as well as the political consequences of such violations as evidence rather than subversion of international law's compliance pull.⁴⁵ But what is the situation in relation to EU law?

The BVerfG's recent Weiss-judgment provides a timely and illuminating case-study. The BVerfG held the ECB's bond buying program PSPP as well as the ECJ decision affirming it to be *ultra vires* for lack of attention to the disproportionate effects of the program on the national competence for economic policy.⁴⁶ The German Court thereby imposes its own idiosyncratic understanding of proportionality on EU law and assesses the ECB's actions in the name of the German people.⁴⁷ The BVerfG, so to speak, takes the law in its own hands. This judgment has various effects on the present discussion.

The judgment constitutes a threat to the moral authority of EU law. The reason is not that the ultra-vires review exists. Instead, the problem is that the BVerfG seeks to dominate the other EU peoples in the name of the German people. It imposes a unilateral

⁴⁵ For an example of the former see Erika Leonaite and Dainius Zalimas, 'The Annexation of Crimea and Attempts to Justify It in the Context of International Law' (2016) 14 Lithuanian Annual Strategic Review 11. For an example of the latter, remember only the reactions when the British Secretary of State for Northern Ireland told the British Parliament on 8.9.2020 that the Internal Market Bill would 'break the law in a very specific and limited way'.

⁴⁶ BVerfG, Judgment of 05 May 2020 - 2 BvR 859/15 (*Weiss*), paras 123 et seqq, 167 et seqq.

⁴⁷ See only Franz Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's Ultra Vires Decision of May 5, 2020' 21 German Law Journal 1116, 1123 et seq. I See also BVerfGE 142, 123 (*Gauweiler*), dissenting opinions of Judges Lübke-Wolff and Gerhardt, para 18.

decision by one people on all the others and thereby wants to make the ECB more German. This is especially harmful since – unlike in other ultra vires rulings out there –⁴⁸ the ruling directly affects the running and governance of an EU institution rather than, for example, the effects of a specific EU law in a Member State. By requiring the ECB to safeguard the interests of the German saver, and by asking the ECJ to do proportionality the German way, the BVerfG tells the EU what to do and thereby ultimately threatens the democratic equality of the EU peoples. Hence, the judgment directly harms the values identified as underpinning EU law’s moral force.

Moreover, the Weiss-judgment threatens the *de facto* authority of EU law, its acceptance in practice by representatives and institutions of the other EU peoples. Especially some Eastern European governments, who currently try to dodge their core EU law obligations, were overjoyed and took the judgment to imply that they could legitimately ignore ECJ decisions they dislike.⁴⁹ The reason why such dynamics gain moral significance for the EU’s authority stems from a combination of factors. Firstly, EU law is mostly enforced de-centrally through national institutions. The almost complete lack of its own enforcement institutions means that EU law fully depends on the attitude and willingness of national institutions, especially courts and administrative authorities, to apply EU law (Chapters 3, 5). Secondly, this enforcement architecture highlights the fragility of the legal order, since the combination of supranational and transnational

⁴⁸ Danish Constitutional Court, 15/20146.12.2016, Dansk Industri (DI) acting for Ajos. Czech Constitutional Court, Pl. US 5/12 31.1.2012, Landtova.

⁴⁹ Zosia Wanat and Lili Bayer, ‘EU Top Court’s Authority Challenged by Poland and Hungary’ *politico* <<https://www.politico.eu/article/ecj-authority-challenged-by-poland-and-hungary/>> accessed 5 May 2021.

institutional cooperation links enforcement in one Member State to all the others. As explained earlier, the EU is only normatively viable if the individual *demoi* can trust each other with such fundamental decisions like handing over their nationals for criminal prosecution (EAW). In short, national enforcement itself makes it the case that EU law violations by national law-administering institutions gain systemic relevance.⁵⁰

Apart from the innumerable constitutional, legal, political and economic questions this judgment raises, the Weiss-judgment shows that a national parliament is the wrong forum for holding a supranational central bank accountable. In a cheeky twist of events, the German MEP Sven Simon tried to resolve the impasse. He asked the ECB (which is accountable to the EP (Art. 284 TFEU)) for clarification and intended to fulfil the BVerfG's order on behalf of the German parliament.⁵¹ In fact, national parliamentarians accept the division of labour between two directly elected parliaments: one responsible for an independent *demoi*, one for the interdependent *demoi*. These practical questions support the argument in Chapter 8 regarding the unique capacity of EU institutions to facilitate the interdependence of the participating peoples.

None of this is to argue that national courts and authorities should not critically engage with the practice of EU institutions and insist on their constitutional fundamentals. But it is imperative to administer these reservations without jeopardising the legitimate

⁵⁰ Similarly Peter-Christian Müller-Graff, 'Die Wirtschafts- Und Währungsunion Als Herausforderung Der Autorität Des Unionsrechts' in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe In It?* (Springer 2019) 209.

⁵¹ To which ECB President Lagarde responded. Christine Lagarde, 'To MEP Sven Simon' (29 June 2020) <https://www.ecb.europa.eu/pub/pdf/other/ecb.mepletter200629_Simon~ece6ead766.en.pdf> accessed 5 May 2021.

authority of EU law and its underlying values. National constitutional courts do not have to give up (all of) their review mechanisms, but the present argument urges them to reconsider the normative basis and practical application of these reviews in light of EU law's democratic authority. The bottom line is this: a robust understanding of democratic authority suggests that external safeguards based on national constitutions are only legitimate to the extent that they do not threaten the values underpinning EU Law's authority.

An incipient form of systemic non-compliance emerges in Poland, where the government continues to ignore ECJ judgments. Since those judgments result from infringement proceedings according to Arts. 258, 259 TFEU, there is no national court to hold the government accountable. The very recent example of refusing to follow an ECJ interim relief order to cease lignite extraction shows that reality always surpasses textbooks when it comes to examples.⁵² The coalmine is situated on Polish territory, but right at the border to the Czech Republic and Germany. The extraction activity seems to violate EU environmental law and, chiefly, has a devastating effect on groundwater in the Czech Republic. In other words, Poland arbitrarily interferes, ie dominates the neighbouring peoples. It harms them without giving them a say in regulating such activities. The refusal of the Polish government to follow the ECJ order, in short, threatens the moral authority of EU law because it undermines EU law's ability to secure non-domination.

But national institutions are not the only ones in the spotlight. Whenever EU

⁵² Case C-121/21 *Czech Republic v Poland* EU:C:2021:420, Order of the Vice President. In more detail Maximilian Steinbeiß, 'Borders' (*Verfassungsblog*, 28 May 2021) <<https://verfassungsblog.de/borders/>> accessed 31 May 2021.

institutions enforce EU law unequally, they endanger the authority of EU law. For example, the Commission should not be more lenient with one Member State than with another (remember former Commission President Juncker telling the public that France may dodge the budget rules ‘because it is France’)⁵³. EU institutions cannot be seen to favour individual peoples and states.⁵⁴ Democratic authority means, at its core, that the EU peoples have a guarantee through the EU law-making and-enforcement architecture that they engage and deliberate with each other as equals. Unjustified uneven application of EU law disregards their equality and their right to non-domination. Simultaneously, it suggests that big and powerful Member States can get away with law-breaking, thereby cementing the fact that they are already more likely to break EU law.⁵⁵ Note that this does not contradict the above argument for embracing diversity and political opposition within EU law making. For EU law that embraces diversity and gives leeway to Member States (such as Directives and other secondary law with margins of appreciation) can and should still be enforced equally. In other words, the unequal application of EU law ought to derive from an inbuilt recognition of diversity, not from an uneven application.

V. Conclusion

This brief analysis of various practical questions of EU constitutional law illustrates the attractiveness and useful nature of democratic authority as a conceptual lens to evaluate

⁵³ See also Claus Dieter Classen, ‘Die Gleichheit Der Mitgliedstaaten Und Ihre Ausformungen Im Unionsrecht’ [2020] *Europarecht* 255, 267 et seq.

⁵⁴ Similarly Baquero Cruz (n 16) 200; Müller-Graff (n 50) 210.

⁵⁵ Tanja Börzel and others, ‘Obstinate and Inefficient: Why Member States Do Not Comply With European Law’ (2010) 43 *Comparative Political Studies* 1363.

the EU law's authority. It was, however, only one of my aims to make a convincing case for democratic authority.

My most important aim in this thesis was to initiate a debate about the grounds for the moral authority of EU law in the first place. For too long, it has been overshadowed by the court-centred focus on sovereignty-related ultimate authority. The narrow focus on rare conflict-cases has hitherto obscured the broader moral issues the EU's authority claim raises for the autonomy and self-determination of the EU peoples. If I have succeeded in initiating that debate about the moral ground of the EU's authority, I will have achieved more than I could have hoped for.

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