Anika Klafki (Hrsg.)

Patterns of Legitimacy

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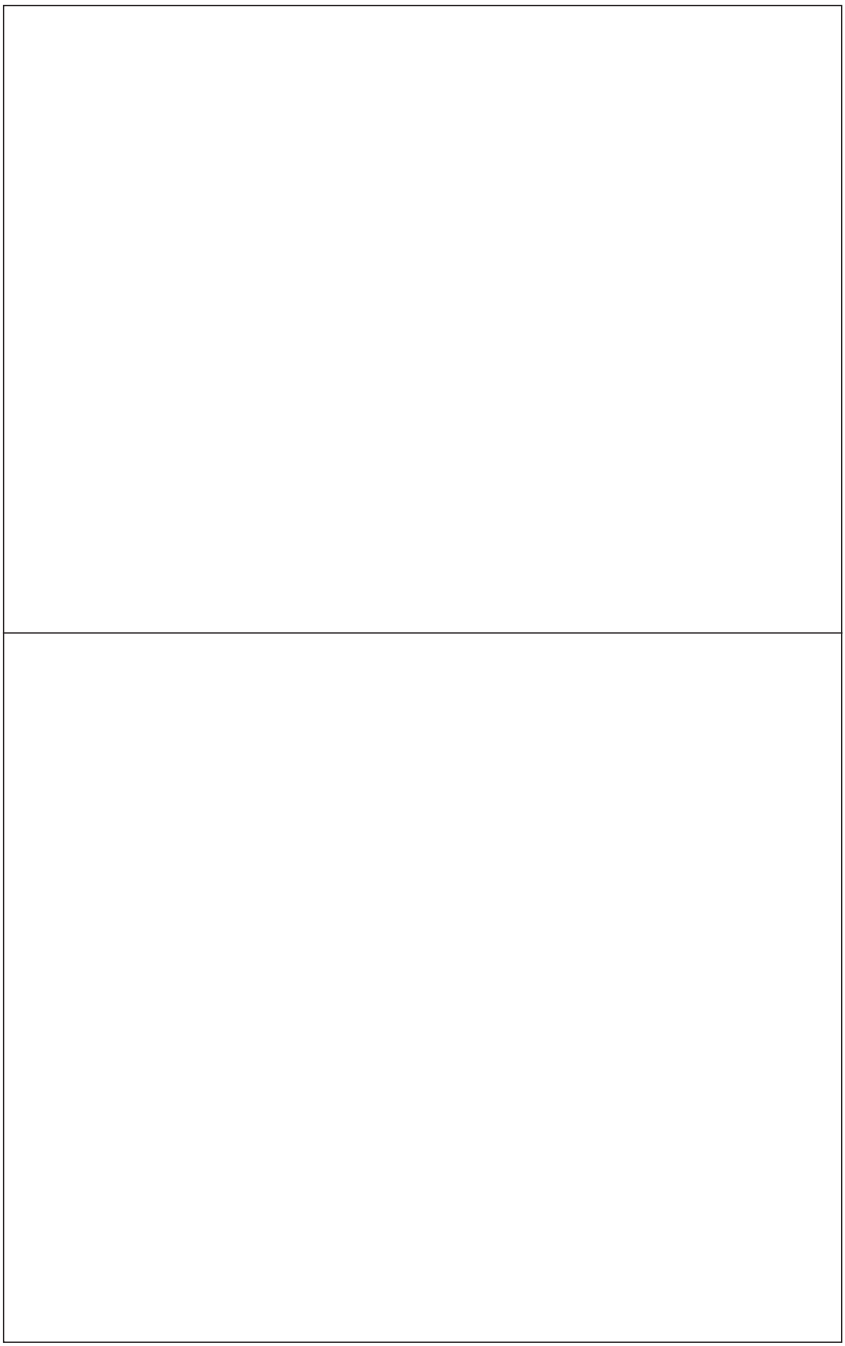

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Acknowledgments

Democracies worldwide currently face a legitimacy crisis. Despite the normative guarantee of democratic institutions, fair procedures and fundamental rights, approval ratings for politics are falling noticeably. This applies to the national level, as well as to the supranational level of the European Union and the international level. At the same time, populist and anti-liberal movements that question fundamental principles of legitimacy such as the rule of law or gender equality are on the rise – reason enough to take a closer look at the various patterns of legitimacy. The concept of legitimacy, which is ubiquitously used in the social sciences, offers interesting interdisciplinary perspectives, particularly for legal studies. This is why I organized the interdisciplinary conference 'Patterns of Legitimacy' in cooperation with the *German Chapter of the International Society of Public Law* at the University of Jena in June 2022. It is a pleasure to present the papers resulting from this conference.

I wish to express my gratitude to all conference speakers, namely, *Prof. Dr. Michaela Hailbronner*, *Prof. Dr. Anna-Bettina Kaiser*, *Prof. Dr. Markus Kotzur*, *Prof. Dr. Doris Mathilde Lucke*, *Prof. Dr. Christoph Möllers*, *Prof. Dr. Birgit Peters*, *Prof. Dr. Gesine Schwan*, *Prof. Dr. Alexander Somek* and *Prof. Dr. Michael Zürn* as well as the panel moderators *Prof. Dr. Till Patrik Holterhus, Dr. Stefan Martini* and *Prof. Dr. Tim Wihl*. I would also like to thank my team for their support in organising the event and editing this volume. Many thanks also go to *Dr. Brian Cooper*, who translated *Prof. Dr. Gesine Schwan's* think piece into English and proofread the other contributions. Finally, special thanks go to the *Daimler and Benz Foundation* for their generous financial support of the conference and the publication of this book.

Patterns of Legitimacy – An Introduction

Anika Klafki*

Legitimacy is a basic condition for any form of authority and thus a fundamental concept throughout the social sciences.[1] It describes citizens' acceptance and/or normative acceptability of the exercise of sovereign power.[2] As legitimacy is the basis and prerequisite of all state action, it should be the cornerstone of public law. Nevertheless, the concept of legitimacy receives relatively little attention in legal sciences. Instead, public-law scholars are primarily concerned with legitimation – which is traditionally constructed in a normative way, particularly via legal ties, hierarchies and rights of control.

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1 M Zelditch, 'Theories of Legitimacy' in JT Jost/B Major (eds.), *The Psychology of Legitimacy* (Cambridge University Press, 2001) 33 ff.; U Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt* (Mohr Siebeck, 2004) 151 ff.; C Johnson/TJ Dowd/C L Ridgeway, 'Legitimacy as a Social Process' (2006) 32 *Annual Review of Sociology* 53; T Herbst/S Zucca-Soest, 'Legitimität als Forschungsgegenstand' in T Herbst/S Zucca-Soest (eds.), *Legitimität des Staates* (Nomos, 2020) 11.

2 M Weber, *Economy and Society*, Vol. I (ed. by G Roth/C Wittich, University of California Press 1978) Chapter III, 212 ff.; F Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Universitätsverlag Konstanz, 1970), 21 ff.; VA Schmidt, *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in Eurozone* (Oxford University Press, 2022) 26.

I. Legitimacy Concepts

There are various understandings and patterns of legitimacy. In particular, a distinction must be drawn between normative and empirical understandings of legitimacy.[3] In political sciences, normative legitimacy is also referred to as prescriptive,[4] and empirical legitimacy as descriptive.[5] Legitimacy in the normative or prescriptive sense, on the one hand, describes the extent to which an authority is worthy of recognition and acceptance on the basis of its compliance with procedural and substantive principles such as transparency, accountability, equity, human rights and democratic legitimation.[6] Empirical/descriptive concepts of legitimacy, on the other hand, refer to the empirically measurable perceptions of those affected as to whether the authority of an institution is exercised in an appropriate manner.[7] In sociology, in particular, the terms "acceptance" and "legitimacy" are sometimes even used synonymously.[8] Naturally, normative and empirical legitimacy are interrelated, as the empirical inner basic acceptance of an authority is dependent on normative elements.[9]

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3 JHH Weiler, 'In the Face of Crisis – Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2013) 1 *Peking University Transnational Law Review* 292, 294 f.

4 M Zelditch, 'Theories of Legitimacy' in JT Jost/B Major (eds.), *The Psychology of Legitimacy* (Cambridge University Press, 2001) 33, 47; T Herbst/S Zucca-Soest, 'Legitimität als Forschungsgegenstand' in T Herbst/S Zucca-Soest (eds.), *Legitimität des Staates* (Nomos, 2020) 11, 12.

5 U Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt* (Mohr Siebeck, 2004) 151; T Herbst/S Zucca-Soest, 'Legitimität als Forschungsgegenstand' in T Herbst/S Zucca-Soest (eds.), *Legitimität des Staates* (Nomos, 2020) 11, 12.

6 M Zelditch, 'Theories of Legitimacy' in JT Jost/B Major (eds.), *The Psychology of Legitimacy* (Cambridge University Press, 2001) 33; J Habermas, 'Zur Legitimation durch Menschenrechte' in Habermas (ed.), *Die postnationale Konstellation und die Zukunft der Demokratie* (Suhrkamp, 1998) 170 ff.; S Bredt, *Die demokratische Legitimation unabhängiger Institutionen* (Mohr Siebeck, 2006) 40; N Petersen, 'Demokratie und Grundgesetz' (2010) 58 *Jahrbuch des öffentlichen Rechts der Gegenwart* 137, 142; B Peters, *Legitimation durch Öffentlichkeitsbeteiligung?* (Mohr Siebeck, 2020) 143 ff.

7 J Tallberg/M Zürn, 'The legitimacy and legitimation of international of international organizations: introduction and framework' (2019) 14 *The Review of International Organizations* 581, 583.

8 D Lucke, *Akzeptanz: Legitimität in der 'Abstimmungsgesellschaft'* (Springer, 1995) 75 ff., 401 ff.; D Lucke, 'Legitimation durch Akzeptanz' (1996) 17 *Zeitschrift für Rechtssoziologie* 221 ff.

9 For a political-science perspective, see M Zürn, *A Theory of Global Governance* (Oxford University Press, 2018) 62 ff. For a legal perspective, see U Schliesky, *Souveränität*

Furthermore, a distinction can be drawn between procedural and substantial legitimacy. Procedural legitimacy requires due processes, which in democratic systems involves rules that ensure formal legitimation that guarantees the sovereignty of the people. Substantial legitimation, in turn, refers to material concepts of justice and in liberal societies especially encompasses fundamental and human rights.[10]

The distinction between procedural and substantial legitimacy is also linked to the differentiation between input and output legitimacy introduced by *Fritz Scharpf*.[11] Input legitimacy refers to the notion that decisions by authorities are legitimate if they reflect the preferences and interests of those concerned, which can be promoted by democratic processes, such as elections, representation and public participation (government *by* the people). Output legitimacy, in turn, refers to the effectiveness and efficiency of an authority's action in addressing the needs of the citizenry and improving public welfare (government *for* the people). However, output legitimacy and substantial legitimacy are distinct. Especially in complex regulatory contexts, there is usually not only one substantially legitimate solution. Rather, output legitimacy relies on procedural rules that promote rationality. Furthermore, substantial legitimacy can be constructed purely normatively, whereas output legitimacy points to empirical findings.

II. Research Potential of Legitimacy for Legal Sciences

The potential of the concept of legitimacy in public law is only reluctantly recognized.[12] For the legal sciences, the empirical concept of legitimacy can only be operationalised to a limited extent, as system acceptance is difficult to measure, fluid, and relative in nature, whereas norms are dependent on

und Legitimität von Herrschaftsgewalt (Mohr Siebeck, 2004) 150 f., 162; B Peters, *Legitimation durch Öffentlichkeitsbeteiligung?* (Mohr Siebeck, 2020) 143.

10 J Habermas, in Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie* (Suhrkamp, 1998), 170, 173.

11 F Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Universitätsverlag Konstanz, 1970) 21 ff.; F Scharpf, Demokratic Legitimacy und Conditions of Regulartory Competition, in F Scharpf (ed.). Community and Autonomy (Campus Verlag, 2010) 173, 176.

12 M Ruffert, 'Comparative Perspectives of Administrative Legitimacy' in M Ruffert (ed.), *Legitimacy in European Administrative Law: Reform and Reconstruction* (Europa Law Publishing, 2011) 353 ff.

permanence and absolute validity.[13] Therefore, at first glance, the normative concept of legitimacy seems more promising in legal sciences.[14] A purely normative concept of legitimacy, however, can – from a positivist perspective – hardly be distinguished from the principle of legality.[15] Therefore, the far greater innovative potential lies in a combined understanding of legitimacy that comprises both normative and empirical elements. Of course, empirical legitimacy must not be traded off against legality. In particular, fundamental normative principles may not be eroded in favour of supposed output legitimacy.[16] However, openness to empirical findings can provide legal sciences with food for thought.

Declining acceptance with a form of governance can, for instance, reveal that the respective normative construction to ensure legitimacy needs reform in view of a changing social context.[17] Blind spots in the law – such as de facto power shifts and power imbalances – can thereby be revealed and made analysable for legal discourse. In this respect, a legal engagement with a legitimacy concept that is based on normative as well as empirical considerations opens up an innovative, interdisciplinary research field to current challenges for democracy. Unlike legitimation, legitimacy then not only refers to written norms and a normative set of formal rules of how things should be, but also directly involves social reality through the aspect of general acceptance by the people. Legitimacy is a fluid concept that is context-related and context-dependent.[18] It is a flexible concept that can be adapted to different constitutional settings at the national level as well as to organisations beyond the nation-state.[19] In addition, legitimacy can be

13 N Petersen 'Demokratie und Grundgesetz' (2010) 58 *Jahrbuch des öffentlichen Rechts der Gegenwart* 137, 143.

14 Cf. C Moellers, *The Three Branches* (Oxford University Press, 2013) 53.

15 F Müller, *Demokratie in der Defensive* (Duncker & Humblot, 2001) 61 f.; for a discussion, see M Hailbronner, in this volume. See also A Somek, 'Legalität heute: Variationen über ein Thema von Max Weber' (2008) 47 *Der Staat* 428, 430 ff.

16 Cf. A Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014), 222 ff.

17 Cf. J H H Weiler, 'In the Face of Crisis – Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2013) 1 *Peking University Transnational Law Review* 292, 294. See also the contribution of G Schwan, in this volume.

18 See, from a historical perspective, T Würtenberger, *Die Legitimität staatlicher Herrschaft* (Duncker & Humblot, 1973) 300.

19 See the contributions of M Kotzur and B Peters, in this volume.

built on the basis of various sources.[20] In particular, it can incorporate both procedural and material concepts of justice and is open to different forms of government as well as different understandings of democracy.[21] This makes it easier to compare different social systems using the concept of legitimacy rather than the formal concept of legitimation, which is linked to specific constitutional settings.[22]

III. Legitimacy and the Threat of Populism

The think piece by *Gesine Schwan* addresses current threats to democracy and traces them back to legitimacy problems of representative democracy. Modern democracies are facing a growing crisis of legitimacy, as citizens increasingly feel disconnected and disengaged from the political process. According to *Schwan*, this decline in trust is a result of several factors, including globalization, the rise of market-driven policies and the resurgence of right-wing extremism. These trends have led to the sense that democratic institutions are unresponsive to the needs of ordinary people and prioritize the interests of elites and corporations.

By empowering citizens and ensuring that their voices are heard, *Schwan* seeks to strengthen the bonds of democracy and safeguard its future in order to supplement representative legitimacy. She advocates the expansion of direct citizen participation in decision-making, particularly at the local level. This can be achieved through various mechanisms such as municipal development advisory councils, participatory budgeting initiatives, and neighbourhood assemblies. These mechanisms empower citizens to have a say in how their communities are governed, fostering a sense of ownership and engagement in the political process that generates trust in democratic institutions. In addition to direct citizen participation, *Schwan* sees multi-stakeholder involvement in decision-making as crucial to strengthen democratic legitimacy. Multi-stakeholder participation encourages diverse perspectives from various sectors of society, including civil society organ-

20 See, e.g., the three types of legitimacy of M Weber, *Economy and Society*, Vol. I (ed. by G Roth/C Wittich, University of California Press 1978) Chapter III, 215 ff.

21 M Ruffert, 'Comparative Perspectives of Administrative Legitimacy' in M Ruffert (ed.), *Legitimacy in European Administrative Law: Reform and Reconstruction* (Europa Law Publishing, 2011) 353, 356 ff.

22 M Ruffert, 'Comparative Perspectives of Administrative Legitimacy' in M Ruffert (ed.), *Legitimacy in European Administrative Law: Reform and Reconstruction* (Europa Law Publishing, 2011) 353.

isations, businesses and labour unions. By bringing together a wide range of voices, multi-stakeholder processes can promote transparency, accountability and a common-good orientation in governance.

IV. Legality as a Threat to Legitimacy? Vermeule's *Conception of the Administrative State*

Alexander Somek's contribution analyses the relationship between legitimacy, legality and rationality in the context of *Adrien Vermeule's* conception of the Administrative State**.** *Vermeule* is famous, amongst other things, for complementing the traditional US-American procedural concept of legitimacy with substantive elements related to the common good.

Vermeule argues that belief in legality, which is one of the types of legitimate rule identified by *Max Weber*, is not enough to ensure the legitimacy of administrative action. Instead, he emphasizes the importance of rationality, which in his view is the basis for the legitimacy of modern bureaucratic rule. *Vermeule's* work is based on the idea that legality and judicial review are legitimising factors, but can also create irrational obstacles to purposive bureaucratic action. Particularly with regard to legitimate second-order reasons such as legal certainty or administrative efficiency, *Vermeule* advocates a minimum judicial review of administrative authorities. *Somek* rightly points out how slippery this slope is, and that *Vermeule's* conception actually bases legitimacy of agencies on the basis of authority which – thought through to the end – may lead to autocracy.

V. Legitimacy of International and Supranational Organisations

Another pattern of the legitimacy discourse arises from discussions at the inter- and supranational level. *Markus Kotzur* explores legitimacy principles in global governance. Given the polycentric organisational structure of international law, as well as the fact that the international order is built not only by democracies, but also by other state forms, substantial concepts of legitimacy are only viable to a limited extent at the international level. Global administrative law focuses on developing a set of procedural standards that can be applied to a variety of governance regimes. It addresses the legitimacy of global governance by examining the procedural dimensions of decision-making processes such as transparency, participation and review.

It also draws on principles of domestic administrative law, such as rationality, proportionality and the rule of law, to ensure that global governance is fair, accountable and effective. *Kotzur* argues that global administrative law is more likely to be successful if it is based on a concept of 'contested legitimacy', which acknowledges that there is no single set of values that can be used to justify global governance. Instead, global administrative law must be based on a process of deliberation and negotiation among different stakeholders. This process of contestation shall ensure that international law is responsive to the needs and interests of diverse constituencies, thereby helping to develop a more legitimate and accountable global governance system.

Birgit Peters also follows this idea of legitimacy as an open and fluid concept in her analysis of the European Union's administrative law, although material values also form an important part of the legitimacy construct at the European level. *Peters* describes legitimacy as a process in which the sources of legitimacy are living principles. While debates on legitimacy have accompanied the European Union from the very beginning, *Peters* perceives today's discussions as less fundamental and more linked to specific problems, such as the refugee crisis or the current rule-of-law crisis. Meanwhile, the European Union's primary law is solidly based on the principle of dual democratic representation, participatory democracy, as well as the guarantee of fundamental rights, and may thus serve basic normative concepts of legitimacy. Furthermore, the transparency principle, public participation and cooperative administrative decision-making form cornerstones of the legitimacy concept in the European Union's administrative law. In addition, further legitimacy requirements – such as sustainability and access to justice – emerge sector-specifically, which *Peters* exemplifies with reference to state aid and environmental law.

VI. Legitimacy in Times of Crisis

Finally, legitimacy discourses change in times of crisis. *Anna-Bettina Kaiser* discusses the impact of the COVID-19 pandemic on the separation-of-powers system in Germany. She specifically questions the narrative that the pandemic led to an 'executive unbound' in the sense of *Carl Schmitt*. Although she recognises that serious legitimacy problems occurred in the fight against the pandemic, and that more detailed legislation would have been desirable at times, she demonstrates that parliaments at federal and

state level were far from inactive during the pandemic. On the contrary, they took a stand and assumed responsibility in various ways. The courts did not fail either. Although the pandemic has clearly shown the limits of the principle of proportionality for the protection of fundamental rights in times of emergency, courts made very differentiated and balanced judgements on the measures to combat the pandemic, for example by invoking the principle of equality. Finally, *Kaiser* advocates strengthening the administration at the lowest levels in order to increase the general resilience and legitimacy of government action in times of crisis.

Michaela Hailbronner explores the role of output-legitimacy and effectiveness arguments in constitutional theory in times of crisis. She argues that, while a common view is that in modern democracies legitimacy is legality, there is a need to consider effectiveness arguments in public law. Hailbronner explores three distinct forms of effectiveness arguments – implied powers, arguments from failure and emergency arguments – and their relationship with legal changes. To this end, she embeds a historical perspective on legitimacy and shows how it has evolved over time, from being linked to the monarch's claim and commitment to public welfare to being connected to legality. Nevertheless, the dangers resulting from effectiveness arguments are recognised. *Hailbronner* suggests a middle path that acknowledges effectiveness as an important public-law value, especially in emergency situations, while upholding legality.

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Contemporary Challenges to Democracy and the Potential of Participatory Legitimacy

Gesine Schwan[*]

I. Introduction: Are Democracies on the Retreat?

The theme of today's conference is "Patterns of Legitimacy". It takes as its starting point "patterns" in the plural. This is important, because only such a plural can find answers to the question of the legitimation of democracy or democratic politics in our present day.

When my education in political science began in the 1960s, after the horrors of National Socialism and war, we lived in an atmosphere of hope and expectation that politics worldwide would develop, or at least *could* be developed, for the better, towards liberal democracies, freedom, the rule of law and human rights. This was all the more true after the fall of the Berlin Wall. What was troubling at the time, however, was the triumphalist tone of Fukuyama's "end of history". It was very far from any insight into the abysmal nature of history.

Since then, the trend of more and more states becoming democratic has reversed. Autocracies are on the rise and have overtaken democracies in number. The two are not always clearly distinguishable from one an-

* Prof. Dr. Gesine Schwan is president of the Berlin Governance Platform and former President of the Europa-Universität Viadrina Frankfurt (Oder). She also was a former candidate for the office of Federal President of the Federal Republic of Germany.

other either. This is because right-wing extremist cultural, social and political movements are emerging within democracies, under the protection of democratic constitutions, effectively eating away at the indispensable "underlining" of democracy, the so-called political culture, and leaving it riddled with holes. This is particularly dangerous because it happens imperceptibly at first and has long-term causes. Once recognized, these cannot be turned off overnight.

The causes of this transformation are so manifold that I cannot address them here. In general, we must probably recognize that, following Fritz Scharpf's distinction between input and output legitimation, the latter is lacking. Democratic politics is finding it increasingly difficult to identify solutions to the problems at hand that can be realized visibly and quickly enough and that satisfy enough people, i.e., that tend to be just – or at least not blatantly unjust. This is true, among other things, for climate change, for a so-called just transformation, for the fulfillment of the basic tasks of the welfare state and for domestic and transnational security.

Instead, the promise of democracy to provide the (relatively) best political system for all people to live their lives freely and with dignity remains a hollow one for more and more people. This manifests itself, for example in the global North, in lower voter turnout, which in turn leads into a negative circle because the wishes and interests of non-voters systemically count for less. This damages the subjective perception of the legitimacy of democracy, which it cannot do without. In the long run, the natural acceptance of decisions and laws thus dwindles if their content suits one, even though they have come about democratically. The consequences are: increasing violence; social and political instability; islands of anomie; but also the rise of autocratic systems. How can the legitimation of democratic politics be regained, especially in times of globalization?

II. Understanding Democracy and Legitimation

For the following deliberations, I would like to propose at least rudimentary definitions of the core concepts that will be discussed at this conference.

1. Democracy and Democratic Politics

I call democracies those political systems in which every person has an equal right to determine his or her own life and to have a say in his or her

political community. At the beginning of democracies and democratic politics therefore lie the equal right to self-determination, the equal freedom of all people and the equal human dignity decided therein.

As you can see, I believe that defining democracy and democratic politics solely in terms of formal procedures and institutions – elections, majority voting, constitutions, pluralism of parties and associations – is not sufficient without normative implications or "ties". Therefore, even if they are "technically" democratically designed, they all need appropriate "handling" by officials and social actors, so that they do not become perverted into the opposite.

What is needed, therefore, is a **corresponding, normatively profiled political culture**. It must safeguard democratic politics through values such as freedom, justice (fairness), solidarity and an orientation toward truth (which, to be sure, is never entirely attainable). Societies have to come to an understanding about these values again and again, because they are not an obvious basis for concrete decisions. My definition is based on the universalistic values of the Enlightenment. In any case, a mere voting mechanism is not sufficient to define democracy.

In the most powerful democracy in the West, we can observe how any understanding and just political solutions go to the dogs when part of the public refuses to accept the obvious. The fundamental difference here is between the many Republican office holders who verified and recognized the 2020 election results, on the one hand, and Donald Trump with his supporters, on the other, who continue to contradict without submitting to the obligation to substantiate their contradiction. They deny the difference between truth and lies and are quite powerful. Hannah Arendt discussed this problem using the example of Stalinist totalitarianism in her important texts on truth and lies in politics, and she showed that abandoning truth in fact deprives a society of its common ground, and thus also of its democracy.

At the same time, we see from this that destructive lies gain political power not only in Stalinist or autocratic systems, but also in democracies, even if they are institutionally democratic and organized under the rule of law. I will leave aside here the finer differences between the various types of liberal democracy.

2. Legitimacy and Legitimation

In its literal sense, legitimation is, first and foremost, a legal category in which the law – lex – plays a central, justifying role. In the political system of democracy, the legitimacy of the law depends on whether it has come about under the rule of law and on the basis of popular sovereignty. In terms of political science, however, this is only *one* aspect. For the structure of democratic institutions, it follows that legitimate political decisions, e.g., under the rule of law, must be legally derivable from elections and decisions by citizens. But this derivation does not guarantee that citizens can really experience co-determination, let alone self-determination, in a concrete way. The decision-making processes are already too complex and controversial in a municipality, let alone in a nation-state or even in transnational communities.

Even if the European Council's decisions are formally and legally legitimized via the heads of government, they deal with issues and are taken under conditions that were not up for debate at the time of the election. And these issues are not put up for discussion afterwards either, in accordance with the principle of representative democracy, because the elections for the federal government take place in the national framework and at best marginally address issues of European policy.

This is one example of the complexity of decision-making processes, as a result of which citizens often do not perceive democratic politics as legitimate, not only at domestic level, but even more so at transnational level. The crux of the matter is that legally derivable "objective" legitimacy is not enough for citizens to support a democracy. It must also be subjectively felt and recognized by the people – at least by a clear majority. This brings new aspects into play, e.g., social, economic, but also cultural and psychological aspects, which have an impact on the subjective perception of citizens.

Perhaps the dynamic concept of legitimation offers a bridge from objective to subjective legitimacy. This could happen if citizens can participate in political decisions – even if they only concern a section of democratic politics – in such an effective way that this radiates to their perception of the legitimacy of the system as a whole. I will come back to this. Because so far, that's a dream for the future. At present, we are primarily experiencing a process of progressive delegitimization of democracies and democratic politics.

This is the place to recall a long-established distinction in political science, namely: between consent to the political system as a whole (system

trust), on the one hand, and to individual political decisions, on the other. In democratic political systems, the supreme legitimation of individual self-determination cannot refer to individual decisions, which will always remain controversial in a pluralistic society, but can instead only refer to consent to the political system as a whole. This must be so strong that at least a large majority of citizens can accept being defeated in individual decisions without calling democracy as a whole into question.

The term applied to the realm of the democratic nation-state. System trust arose from the experience and expectation that citizens in this manageable framework would, after defeats in individual cases, nevertheless get their money's worth again in the long run. The question is whether it can be further developed under the conditions of globalization.

We can therefore note that legitimation has *an "objective" legal side* as a necessary, but not sufficient, condition, but it also needs *a "subjective" psychological side*. And it refers to *the political system as a whole*, on the one hand, as a necessary condition for the acceptance of *controversial individual decisions*, on the other. *Legitimizing self*-determination can only refer to the *overall system*. For *individual decisions*, it is a matter of **co**-determination in compromise with other citizens.

3. Democratic Politics under Conditions of Globalization

I distinguish between democratic politics and democracy because the term "democracy" is associated with politics within the framework of the nation-state, which is no longer true for many decisions in the age of advanced globalization. These are in part necessarily made transnationally. Legitimacy and legitimation must therefore today be conceived and practically justified beyond the borders of nation-states.

An important part of the delegitimization of democracies stems from the fact that globalization enables business enterprises in particular, which operate transnationally with important social, economic and cultural consequences for the national societies concerned, to evade national regulations. This is one of the reasons for the difficulties states have in meeting their citizens' expectations concerning their ability to solve problems. It is very difficult for national governments to join forces with transnational business because they have to take into account their national constituencies and the lobby groups (including business) behind them, which in turn influence national as well as transnational policy. Companies can also often choose

the legal system under which they operate internationally. In this context, their economic power gives them advantages.

There is a serious asymmetry here that works to the disadvantage of democratic politics. The long-standing goal of US Treasury Secretary Janet Yellen and the former German Finance Minister and current Chancellor Olaf Scholz to introduce a global minimum tax on corporations shows how difficult it is for nation-states and national governments to cooperate transnationally.

It is therefore obviously difficult to conceptualize, in a transparent and convincing way, the objective-legal or institutional legitimacy of democratic politics in a transnational framework, and to practise it accordingly. This applies all the more to the subjective perception of legitimacy. In the following, I would therefore like to concentrate on discussing *opportunities for a subjective perception of the legitimacy of democratic politics under the condition of unclear objective-institutional legitimation chains of transnational politics.*

III. Individual Freedom and Social Diversity in Representative Democracy

How can the promise of liberal democracy to citizens be kept under such conditions, to the effect that the political freedom to which everyone is entitled, the self-determination to which everyone is entitled, which also concerns their common affairs, is not extinguished by politics, but can be democratically realized? Is there any way to legitimize democratic politics, even if there is no uninterrupted personal, territorial and/or material link or even agreement between the individual citizens and the decision-makers?

In political philosophy, primarily European theorists since the 17th century, in particular *John Locke*, *Charles de Montesquieu* and *Jean-Jacques Rousseau*, have tried to provide answers to these questions under the term "social contract". They served to legitimize free political, i.e., democratic or, at that time, often republican rule. Even under the condition of the nation-state (i.e., not yet of globalization), the core question here is how a society that is in itself diverse can arrive at common answers without individual freedom suffering or even being suppressed.

All three authors advocate an orientation of political decisions toward the "common good". *Locke* and *Montesquieu* rely on the fact that the quite legitimate personal and particular interests are negotiated with each other

through compromises in such a way that no one has to give up his or her freedom. According to Montesquieu, mature and experienced politicians should be able to achieve this. Rousseau, on the other hand, radically demands that citizens renounce their particular interests. Instead, they should subordinate themselves to the "common will" ("volonté générale"), which, *Rousseau* claims, makes them truly free.

Neither of these basic ideas solves the problem that in pluralistic societies – with different interests and power potentials – individual freedom can empirically collide with the common good, all the more so with *Rousseau's* General Will ("volonté générale"), and that there is no "objective" or compelling standard for how they should be reconciled. How, then, can individual freedom be preserved in social diversity?

In the national framework, the model of representative democracy provides an answer to this. The potential gap between the citizens and the decision-makers, the individual issues and the territorial validity of the decision is theoretically closed here by the concept of representation. This is a notion of whose complexity many citizens are not always aware.

Most people understand this to mean a social correspondence between the citizens and the decision-makers, who are usually chosen by universal, free and secret ballot. A parliament is representative if it adequately "represents" all groups of society. In practice, however, there can be no such correspondence. This is because there is no generally binding division of society into social groups that should be "appropriately" represented in parliament: What percentage of women, men, young people, Catholics, Protestants, Jews, Muslims, city and country dwellers, migrants and "natives," people with different levels of schooling, married and single people, homosexuals, queer people, civil servants, employees and the self-employed should sit in the Bundestag? This list of possible categories mentioned is by no means exhaustive. And what if the composition of society changes?

The answer to this question can only be given pragmatically: If significant social groups, especially underprivileged groups (e.g., women, migrants, the unemployed) are excluded and others are disproportionately well-represented, the chance of a decision that is oriented towards public welfare is small; even if one considers that political interests or priorities can never be unambiguously inferred from social position.

Current efforts to improve the empirical social representativeness of our parliaments in order to strengthen legitimacy are therefore helpful and necessary. But they cannot solve the fundamental problem, especially not under the conditions of globalization, which ultimately increases to an

immense extent the social diversity of those potentially affected and the distance between individual choice and a collectively binding decision.

In the history of democratic theory, the term "representation" contains the further meaning that elected representatives can and should empathize not only with their direct constituents, but also with their socially differently situated compatriots, as indeed with all other citizens in general, and that they should strive, according to their conscience, for a "common good" that does justice to the various citizens affected by a decision.

Representation here does not mean social correspondence, but "realization" of the common good and justice in the conscience of the elected. This is why, according to Article 38 of the Basic Law (*Grundgesetz*), members of the Bundestag are expressly not bound by instructions and are obliged to act only in accordance with their conscience. Values such as the common good and justice thus become central elements of legitimation. Understood in this sense, legitimation is not dependent on an empirical chain of legitimation. Thus, empirical social interests and normative orientations coalesce in "representation" to form a complex understanding of legitimation both through the election and the subsequent legitimation chain, as well as through attention to justice and the common good. This is the theory.

At the beginning of my reflections, however, I pointed out that democratic practice makes more and more people dissatisfied and "eats away" at the legitimation of democracy.

IV. Legitimation through Orientation toward the Common Good and Participation as a Democratic Learning Process

Does a change in the output legitimation, which is obviously seriously lacking at the moment, offer a perspective to legitimize democratic politics through fairer solutions and to make it more credible again, even under the conditions of globalization, large distances and empirically weak legitimation chains? And how do we arrive at such fairer solutions?

For the "common good" in democracy is not something that simply falls from the sky. It can only result from the arguments and negotiation processes of the citizens. The legitimation of the "common good" must find its way through political freedom as citizen participation, and it cannot be "produced" autocratically or technocratically through a "good" solution.

The goal of political freedom through participation is not only to pursue one's own interests, but also to engage in dialogue with others and to work

toward a just community oriented toward the common good – one with which everyone can identify in principle. This distinguishes the *citoyen* from the *bourgeois*.

Not everyone becomes an altruist in the process. But direct participation in decision-making, which causes us to look beyond our private sphere, inevitably creates the insight that the well-being, cohesion and democratic stability of a community, a city, a region or a country requires skills and values that go beyond the assertion of one's own interests: e.g., putting oneself in the place of others, practising solidarity with them and precisely recognizing democratic political freedom as an equal right for all.

This is associated with a learning process that makes the logics of political action, including the many political disputes, more vivid: the ways and "tricks" that people use when they want to win; the indispensable ability to find support for one's own concerns and to form coalitions; the need to think long-term and to back down sometimes in order to make better progress on another occasion. Those who know this from experience on a small scale also understand "big" politics much better and can overcome the feeling of being overwhelmed by the complexity that alienates many citizens from politics today.

Political experience is important. Someone who is familiar with the political establishment judges differently than someone who has always been concerned only with his or her private well-being, without any broader responsibility. A viable legitimation of democracy only has a chance if a basic understanding and a "resonance" (Hartmut Rosa) can develop between voters and those who are elected, which explicitly includes competent criticism. In communication, one always needs a correspondence between senders and receivers.

We need to ask in what framework such a direct democracy can be implemented within the representative democracy (the latter specifically does *not* see itself as "direct"), enabling the complex practice of political freedom; in the process, it not only brings us the experience of being an effective citizen, but also leads us to rehearsing the values and basic cultural attitudes of successful political practice, acquiring in the process a deeper understanding of democracy and orientation toward the common good. This is necessary for subjectively perceived legitimacy.

V. Municipal Development Advisory Councils Strengthen the Legitimation of Democratic Politics in Globalization through System Trust

The place that provides such opportunities is the community. This is where the everyday life of citizens takes place; this is where they experience whether services of general interest succeed or fail – housing, work, healthcare, education, leisure activities, culture, infrastructures for energy, mobility, water, etc. Here, it is easy to see whether politicians are looking for solutions or merely looking for their own advancement; but it is also visible and identity-forming when something succeeds.

In line with the 17 Sustainable Development Goals adopted by the United Nations in 2015, squaring the circle of direct democratic participation in representative democracy can succeed if *municipalities* set up *"development advisory councils"*. In these, the basic orientation of the entire range of political decisions is on the agenda, which does not require specialists for individual issues. Elected and thus legitimized members of the municipal council, the mayor and the administration work together with non-elected members – business enterprises, citizens and organized civil society – to develop guidelines for the future development of their community.

The exchange of ideas and logics of action between these three stakeholder groups and their justifications leads to more transparency, trust and a convergence towards common goals and the common good. At the same time, democratic participation is significantly expanded.

The result of their joint deliberations must, of course, be legitimized by a final vote of the municipal council. However, there is much to suggest that the joint deliberation on the municipal future will then also suggest the implementation of the result, so that the direct-democratic participation of companies and civil society in a "municipal development advisory council" also becomes effective, even if not legally mandatory. *This is the psychological – not the logical or legal – squaring of the circle.*

Unlike referendums or thematically focused citizen councils or advisory boards, this allows non-elected citizens to participate continuously and effectively in negotiations on the entire field of local politics. The reach can be extended through local public-relations work and rotations, so that not only the "usual suspects" participate.

This improves political solutions (output legitimation), into which many more perspectives have found their way than if only members of parliament, mayors and administrations were making decisions for themselves, often with the help of consulting firms that cannot replace the expertise

of citizens, or under the influence of non-transparent lobby groups. At the same time, such municipal participation strengthens the sense of self-efficacy among many citizens, as well as their understanding of politics. As a result, they identify much more clearly with local democratic politics. Input legitimacy is expanded in many ways and strengthens output legitimacy. But what is a municipality in the context of global politics?

Already after the First World War, but even more so after World War II and with renewed impetus in 1989, far-reaching networks between municipalities and cities emerged across nation-states, but also across continents. Here, cross-border cooperation flourishes, especially with regard to the solution of global issues such as climate protection, scarcity of resources, migration, security in a broad sense and provision of public services. This cooperation does not converge vertically/hierarchically via states, regional associations, up to the UN. Rather, a network of cooperation spreads horizontally, with local nodes often better legitimized locally through elections than national governments. They are motivated by the desire to exchange knowledge and experience, to help each other and to find effective solutions suitable for everyday use.

VI. Multi-Stakeholder Trialogues Increase Output Legitimation

The improvement of output legitimation through the collaboration of actors with very different perspectives and the deliberative exchange of justifications that are as universally applicable as possible (Habermas: generalizable) can be realized not only at municipal level, but also at state or transnational level. So-called multi-stakeholder "trialogues" can serve to reach an understanding about our future challenges. In these, representatives of state politics and administration, business and organized civil society, with the help of science, argumentatively prepare a basic consensus for viable solutions by passing through "antagonistic" conflicts. This strengthens the basic trust in democratic politics (system trust) at all political levels, which is an essential element of subjective legitimation.

At international level, a number of initiatives have already achieved considerable successes in this regard, such as the Extractive Industries Transparency Initiative (EITI) and the Fisheries Transparency Initiative (FiTI), which create transparency in the payments made by international corporations to national governments. In the countries where resources are extracted, this creates the conditions for these countries to have a say in

shaping the extractive sector and determining how the financial proceeds are used.

Municipal democratic participation according to the principle of multi-stakeholder involvement thus not only leads to trust in local democratic politics, but also has a positive impact on how democratic politics is perceived overall: because transparency creates trust, and politics is better understood; and because self-efficacy is experienced, and democracy is therefore perceived as "responsive". Moreover, municipalities are today indispensable places for the realization of global-policy goals such as climate, migration, security and education. This prepares the ground for a more precise level of understanding, and also for the ability to criticize democratic politics (instead of only protesting). Last, but not least, it deprives right-wing extremism of its foundation.

Let us return to the initial distinction between the subjectively perceived legitimacy of the overall political system – for which the consent of *self*-determination is needed – and that of individual decisions – for which **co**-determination is required. The more effectively co-determination is organized at the various levels, in conjunction with more common-good orientation through multi-stakeholder participation, the greater is the increase in consent as self-determination for the overall system of democratic politics. Transnationally, political systems are necessarily different in individual aspects. However, they are all normatively characterized by the rule of law, pluralism and a **combination of self-determination and co-determination** on the part of the citizenry. The more effectively co-determination is organized in the representative political system, and the more it conforms to the system, the more reliably trust in democratic politics will grow at all levels. We therefore also have it in our hands when it comes to transnational politics.

VII. Conclusion

As I have already pointed out, the conference will deal today and tomorrow with patterns of legitimacy in the plural, with different patterns or forms of legitimation. At its origin, democratic politics must derive legally from acts of citizen self-determination – in the first place, through elections. This is **one** indispensable form of legitimation. However, the path from the election to the individual political decisions is often so complicated and convoluted, especially in times of economic and political globalization, that

citizens can no longer subjectively relate them to the original self-determination.

Moreover, in recent decades, the market-radical paradigm of tending to replace politics with the market has not only lost sight of the people, who no longer felt seen and whose legitimation no longer mattered. The corresponding neoliberal policies drastically increased the inequalities between people's life situations – socially, economically, politically and culturally. This breaks democracy's promise of equality and undermines the subjective perception of its legitimacy.

The proposal to establish "municipal development advisory councils" to expand direct political participation at local level – through which citizens can feel their self-efficacy and experience the democratic process as more comprehensible, and thus transparent – is capable of pushing back the process of delegitimization of democratic politics. When citizens can verify the effectiveness of their participation in their everyday lives and engage in a process of joint decision-making, the principle of democratic politics becomes more vivid and plausible. As a result, people experience a democracy that responds to their needs and that they can help shape. This creates a positive basic attitude in which they can embrace the political system as a whole. They regain confidence in the system – despite or because of the criticism in detail.

Multi-stakeholder participation in the municipal development advisory councils is a major help here. Due to the diversity of perspectives and logics of action, it creates transparency and develops a basic social consensus in preparation for the decision. It brings the business community into political responsibility and leads particular interests to consider opposing points of view in favour of a common-good orientation of politics. This increases the output legitimacy of politics, which is currently lacking in democratic politics, and strengthens trust in the system.

In this way, various "patterns" of legitimation interact: expansion of citizen participation, experience of self-efficacy, increase in transparency, diversity of perspectives and common-good orientation of the output, as well as control of democratic politics in the everyday world.

In this way, output legitimation can be increased, and trust in the system can be won anew, even in times of globalization, across the different levels and formats of representative democracy.

An Irrebuttable Presumption of Legitimacy? Vermeule on the Administrative State

Alexander Somek[*]

If law is the self-critique of practical reason,[1] then modern American administrative law is the self-critique of law. Admittedly, this seeming conditional is far from self-explanatory. On the contrary, most should find it rather perplexing. While the condition signifies a larger and unfinished project, the consequence summarizes, heedlessly perhaps, the core of what *Adrian Vermeule* takes to be the genius of American administrative law. He has undertaken to reconstruct its significance in a series of publications that have culminated in a book called *Law's Abnegation*.[2] Since the ending of the story disclosed in this work must have appeared a tad too bleak, *Vermeule* may have decided to add, aided and abetted by *Cass Sunstein*,

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1 See, more recently, A Somek, 'Das Recht als Kritik der praktischen Vernunft' (2022) 108 *Archiv für Rechts- und Sozialphilosophie* 5-19.

2 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016).

another slim volume that recasts the mindset of American administrative law from a slightly different angle, namely, *Lon Fuller's* "internal morality of law".[3] And yet, as if it had been necessary to complement this perspective from a constitutional point of view, *Vermeule* recently published another book that puts administrative law into a far broader perspective.[4]It is in this book that the *Thomist* conception of *determination* within a hierarchy of norms takes center stage.[5]

I. Legality and Rationality

There can be no doubt that "legitimacy" qua acceptability or *de facto* acceptance of one's rulers[6] or their policies is at the heart of *Vermeule's* agenda. This explains also why there is a tacit affinity to *Max Weber's* work. It is manifest, however, only to the extent to which *Vermeule* is suspicious of the irrational effects that legitimation "by means of legality" might engender.

According to *Weber*, the conviction that if requisite legal procedures have been observed the resulting arrangement is acceptable is one of several types of legitimate rule.[7] As an offspring of "legal rule", which is intimately tied up with modern bureaucracy, *Weber* calls this form of legitimacy the "belief in legality" (*Legalitätsglaube*).[8] This seemingly rather unsophisticated notion captures straightforwardly the fact that we are disposed to endorse as "right" what has been brought about in the legally ordained way. The important point is that we do not specify what it is exactly that we mean by "right". Is the matter *merely* legally accurate according to standards of positive law, or is it also morally correct? Interestingly, it does not even occur to us that we could ask this further question. What we mean by "right" oscillates, therefore, between "It accords with positive law" and "It is the way it ought to be".

3 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020); See L Fuller, *The Morality of Law* (Yale University Press, 1969).

4 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022).

5 *Ibid*, 9-10, 45-46; See J Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 284-289; J Finnis, '*Philosophy of Law:* Collected Essays IV' (Oxford University Press, 2011) 301-302.

6 See M Weber, *Economy and Society* (Harvard University Press, 2019) 115.

7 *Ibid*, 341-343, 347.

8 See M Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie*, 5th ed (Mohr, 1976) 19.

The existence of our "belief in legality" explains why even the most formal ideas concerning the rule of law have so much traction. It also gives rise to an important additional attitude, namely, the faith that we ordinarily rest on judicial review. For if what has been determined following relevant procedures is legitimate, ascertaining this legitimacy invariably seems to require some form of judicial oversight. After all, it is to judges to whom we usually entrust the task of reviewing a whole variety of legal processes. There is, hence, a transitive relation leading from the belief in legality to the belief in judicial review.

Implicitly, *Vermeule* concedes this point, for his whole critical analysis presupposes the premise that we do in fact regard judicial review of any variety of state action, at least in principle, as a legitimating factor. There are exceptions to this principle, such as the "political questions doctrine",[9] but they do not alter the fact that judicial control and trust in legality ordinarily come in tandem.

Vermeule is suspicious that our obsession with legality eclipses the truly legitimating factor that ought to be relevant. That factor is rationality, indeed, in the sense envisaged by *Weber* qua purposive rationality (*Zweckrationalität*).[10] This type of rationality is supposed to underpin modern bureaucratic rule and also to be exercised by legal means. Since modern democracies are interwoven with law, matters are tricky. The mere *belief* in the legitimating force of legality may *either* conceal actual bureaucratic irrationality *or* – and this is the alternative that is of greater interest to *Vermeule* – erect irrational obstacles to purposive bureaucratic action owing to an inability, on the part of judges, to appreciate the full complexity of the subject matter.

It should be noted that from *Vermeule's* perspective – from which he does not, however, address matters in exactly these terms – the two independent legitimating factors are not on the same footing. While "belief in legality" – *prima facie*, at any rate – confers merely *de facto* legitimacy on happenings or states of affair (something is taken to be legitimate without submitting such taking to further scrutiny), the rationality of bureaucratic action is a conspicuously normative standard. Decisions, plans, policies or projects that are rational *ought* to be considered legitimate—prima facie, at any rate.

9 See Goldwater v. Carter, 444 U.S. 996 (1979), in which the Court asserted that some acts, such as the unilateral nullification of an international agreement, concern the conduct of foreign affairs and are, hence, essentially political. As a consequence, they are not subject to judicial review.

10 See M Weber, *Economy and Society* (Harvard University Press, 2019) 102-103.

II. Three Consequences of this Asymmetry

Three consequences follow from this asymmetry.

First, any account of legitimacy needs to examine whether and how the *de facto* legitimacy of the belief in legality threatens to eclipse or overlay the factors underpinning warranted acceptability. This explains why *Vermeule* has already attempted in his earlier work to identify the "limits of reason" that the advocates of judicial review usually ignore.[11] It is not by accident, therefore, that rescuing the rationality of administrative action from the asphyxiating embrace of searching judicial solicitude has always been a major focus of his project.

Second, owing to the asymmetry in the relation between legality and rationality, the value of legality must be accounted for with an eye to how it contributes to rationality. Stated in *Kantian* terms, this means that legality is answerable to the court of reason. What is decisive here is that the rationality in question is not the full-blown reasonableness[12] of a constitutional system, but rather the rationality of administrative action.

To answer this question, *Vermeule* applies a marginalist calculus. What are the likely additional benefits to be reaped from an increase in legal control? What are the costs? The answer given by *Vermeule* is semantically playful and substantively shrewd.[13] The history of American administrative law teaches the lesson of "marginalization". The law realizes that it had better or best abdicate most of its authority. Hence, the application of the marginalist calculus yields the marginalization of law:

> "[…] [T]he implicit question is whether judicial review, at the margin, adds net value to the process of institutional decision-making that begins with agency decision-making. That marginalist logic, working itself pure, is the driving internal logic that pushes law toward ever-greater abnegation. Abnegation, from the internal point of view, gathers strength when lawyers and judges come to doubt whether law has very much to add to agency decision-making. In the extreme, they may even come to worry that law makes things worse, not better.

11 See A Vermeule, *Law and the Limits of Reason* (Oxford University Press, 2009).

12 See A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 13, 21, 212-213.

13 *Ibid*, 13, 21, 212-213.

> In economic terms, the marginal (technical sense) cost and benefits of additional layers of review have to be considered, and the shape of the resulting curves will determine exactly how marginal (in the colloquial sense) law will be in the administrative sense."[14]

Third, the adoption of judicial review is scarcely ever a question of either/or, but rather of investing judges with the power of a "more or less" searching inquiry. This is the core lesson to be learned from the evolution of the American administrative state.

The rise of the administrative state can be attributed, in general, to external and internal factors.[15]

Among the external factors, the complexity and exigency of problem-solving under conditions of greater social differentiation and acceleration figure prominently. In addition, if the sentiment is widely shared among members of society, so that they are affected by a growing number of risks or riveted with one spectacle of crisis after the other, the call for quick and flexible problem-solving will ever so often originate from – and resound favorably in – the public sphere. The quantitative growth of the administrative state is due to the prevalence of these factors.[16]

The internal factor, by contrast, concerns "law's voluntary abnegation".[17] It is manifest in a judicious retreat from a more searching inquiry of administrative decisions.

In what follows, I would like to summarize briefly the major strategies that, taken together, comprise this abnegation. Then, I would like to explain in which respect they amount to a self-critique of law from the perspective of reason or rationality. It is in this context that the distinction between first- and second-order reasons plays a major role, and we shall see how it can be articulated fully with an eye to the work of the late *Joseph Raz*. On this basis, we are going to explore the issue of delegation and *Vermeule's* account of the constitutionality of widespread practice. As we shall see, he

14 *Ibid*, 13, 210.

15 *Ibid*, 211.

16 *Vermeule* identifies three institutional developments. First, the ever-increasing delegation of matters by Congress to the executive and to independent agencies; second, increasing deference by courts; and third, the executive exploiting broad and vague delegations or vague constitutional powers in order to change policies without having to have statutory approval by Congress. He adds that the main response of constitutional law to these developments has been to "go get out of the way", *ibid*, 68.

17 *Ibid*, 211, 1, 34.

is offering a variation of the argument that appeals to the normative force of the factual. This is the chief strategy in his attempt to rebut claims that the modern administrative state is inconsistent with the US constitution (a claim that is advanced by a group of scholars and justices to whom *Sunstein* and *Vermeule* refer in a wholesale manner as "the new Coke").[18]

III. Unravelling the Original Compromise

According to *Vermeule*, the evolution of the modern administrative state is manifest in the creeping collapse of a settlement between rational administration and judicial control that was laid down in the *Crowell* case.[19] In fact, according to *Vermeule*, this case already made itself vulnerable to the marginal logic that would subsequently precipitate law's abnegation.[20]

At its core, the settlement posited that agency expertise was supposed to rein almost supreme over questions of facts, whereas courts should engage in *de novo* and independent review of the legal grounds of administrative actions.[21] A consequence of this settlement was that agencies would not have the power to determine, by interpretive means, their own jurisdiction or the facts supporting their jurisdictional claims.[22] This proscription affected not least the question of delegation, to which we are going to return below. The courts were also supposed to have a firm grip on procedural guarantees, not least because usually it is they who are watching over issues of due process.[23] Finally, courts were supposed to serve as sentinels of the rationality of administrative action, possibly in a manner even going beyond the standard of the rational-basis test relevant for legislation.[24]

18 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 19-37; For a highly informative and useful introduction to the controversies surrounding the American administrative state, see E Schmidt-Aßmann, *Das Verwaltungsrecht der Vereinigten Staaten von Amerika: Grundlagen und Grundzüge aus deutscher Sicht* (Nomos, 2021) 346-352.

19 Crowell v. Benson, 285 U.S. 22 (1932); A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 13, 24.

20 *Ibid*, 24, 34.

21 *Ibid*, 25-26.

22 *Ibid*, 26.

23 *Ibid*, 87.

24 *Ibid*, 131, 155, 157, 187.

The *State Farm*[25] case and what legal scholars made of it[26] stands for this contention.

Vermeule goes to great lengths to show that this settlement unraveled and that the courts had to cede ground on every part of the territory that they were supposed to control.[27]

First, a substantial surrender of the exclusive judicial power to expound the law is manifest in the evolution of the two most famous forms of judicial deference established in *Chevron*[28] and *Auer*.[29] To be sure, none of these forms of deference are unconditional. According to the *Chevron* analysis, the Court will only defer to agency interpretations of the authorizing statute if it is conceivable to attribute to Congress the intent that the Court do so ("step zero"), [30] if the language of the statute is ambiguous or otherwise not clear ("step one") and if the interpretation is reasonable ("step two").[31] Despite these conditions, the agencies enjoy wide discretion to construe statutory language in a manner they see fit,[32] not least because the Supreme Court usually imagines that any grant of rule-making or adjudicative au-

25 See Motor Vehicle Manufacturers Association v. State Farm, 463 U.S. 29 (1983). The holding of *State Farm* is ordinarily taken to be that the review of the reasons that connect the facts to policy choices ought to be more demanding than a mere rational-basis review. Courts are expected to take a "hard look" at the rationality of agency decisions or to ensure that at least the agencies themselves have taken a "hard look" at the relevant problems, A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 131. According to the Administrative Procedure Act (APA), the agencies must stay within the bounds of their statutorily delegated powers and have to supply "substantial evidence" or at least a reasoned evidentiary basis for their factual findings, offering reasons for their policy choices, *ibid*, 130. According to Vermeule, the Court exercises a far less stringent form of review. He dismisses "hard look review" as a misnomer, *ibid*, 131.

26 *Ibid*, 155.

27 *Ibid*, 216.

28 See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

29 See Auer v. Robbins, 519 U.S. 432 (1997) and Perez v. Mortgage Bankers Association, 125 S. Ct. 1999 (2015).

30 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 169, 202.

31 The question whether an agency's interpretation is reasonable must be distinguished from the other question whether the agency's decisional process was "arbitrary and capricious", *ibid*, 110.

32 Vermeule conceives of interpretation in a Kelsenian vain: "In the hard cases that tend to provoke litigation and reach appellate courts, agencies will usually have some discretion to choose among policies that fall within the range of reasonable interpretations." *Ibid*, 30, 201.

thority to an agency comes with the implied grant to absorb vagueness and ambiguity.[33] What is more, the Court permits agencies' interpretations to shift with changing administrations.[34]

According to *Vermeule's* reconstruction, *Chevron* deference reflects the concern that a judicial determination of statutory meaning would detract from the value of the administrative state, "[…] because judges lack any comparative insight into public values (*Chevron's* 'political accountability' rationale) and because judges often do not understand the consequences of interpreting statutes one way or another (*Chevron's* expertise rationale)".[35] Similarly, *Auer* deference requiring courts to defer to agencies' interpretations of their own rules is pertinent only if the interpretation is not clearly incorrect.[36] Nevertheless, *Auer* provides agencies with an incentive to stretch out the regulatory process over time, for they can adjust the meaning they attribute to their own regulations from one situation to the next. Since American administrative law leaves to agencies the choice between adopting a regulation or developing policies and general precepts on a case-by-case basis,[37] this should not be regarded as an irregularity. It is just the case that the agency has more flexibility regarding the timing of its regulation[38] and changing its interpretations under a new administration.[39]

However, the flexibility thus granted is counterbalanced by considerations of predictability, fair warning and the relevance of legitimate expec-

33 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 75, 135.

34 *Ibid*, 78-79.

35 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 212-213.

36 *Ibid*, 75; In addition, the interpretation must not be arbitrary and the earlier rule must "parrot" the statutory text, C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 75.

37 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 45-46, 53-55, 101; A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 163; Chenery II is the relevant authority here. Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194 (1947).

38 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 80-81, 84-85, rejecting the charge of "self-delegation".

39 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 79.

tations to which prior practice may have given rise.[40] An agency interpretation defeating reliance interests may be regarded as arbitrary and capricious.[41] *De facto* retroactivity may adversely affect reliance interests, but these interests must be put on the scale of balance and weighted against the benefits of flexibility and learning.[42] Hence, if for some reason *Auer* deference is inapplicable, the Court may still want to see "*Skidmore* deference" applied, which grants agency interpretations persuasive authority, if not even the power to control the issue.[43] Again, however, the major reason underpinning *Auer* deference is marginalist in the sense that it is skeptical that judicial constructions of the meaning of agency regulations add value to the administrative process given that agencies possess greater expertise and are subject to political accountability.[44]

Second, in *City of Arlington v. FCC*,[45] the Supreme Court determined that the *Chevron* framework should also be applied to agency interpretations of their own jurisdiction. It may at first glance appear revolting that agencies be granted authority to determine the scope of their own powers.[46] In this case, however, the Court, per *Justice Scalia*, rejected the exception that had been made originally for jurisdictional matters in the *Crowell* precedent. *Scalia* did so in terms that would have pleased *Hans Kelsen*. Any organic statute, *Scalia* states, sets out the condition under which the agency may and can exercise regulatory or adjudicatory authority. Since all these conditions are on an equal footing, it would not make any sense to single out a few of them and to call them "jurisdictional".[47] The *Chevron*

40 *Ibid,* 71-72, 85, 109, 130; See Kisor v. Wilkie, 139 S. Ct. 2400, 2417-18 (2019), cited in C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 159;

41 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 85; See Perez v. Mortgage Bankers Association 135 S. Ct. 1199 (2015).

42 *Ibid*, 82.

43 *Ibid*, 83-84; Understandably, Vermeule treats *Skidmore* deference with caution, for it suggests that there might be a best interpretation, *ibid*, 201.

44 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 79, 126.

45 City of Arlington v. FCC, 133 S. Ct. 1863 (2013).

46 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 35.

47 *Ibid*, 36, 112.

deference rule, hence, also applies to cases in which agencies appear to stretch the scope of their jurisdiction.[48]

Third, in *Mathews v. Eldrige*,[49] the Court developed a balancing test for the determination of the process that is due.[50] While there is obviously no consistent practice in the case law, *Vermeule* argues strongly that – in light of agency and more recent court practice[51] the three elements comprising the balancing test[52] ought to be used as a rule of decision by the agency and as mere standard of review by the court[53]. This means that the court would defer to the procedural determinations by the agency and merely control whether they were made arbitrarily and capriciously.[54]

Already in this context, the marginalist principle that *Vermeule* claims to be the driving force of the overall development seems to animate judicial retreat or abnegation. When confronted with the decision-making bodies established by agencies, the question must be raised, again, what additional benefit might be obtained from adding more full-blown judicial review.[55] *Vermeule* believes that, owing to the lesser familiarity by judges with the subject matters regulated, the overall balance may turn out to be negative rather than positive. Of course, one may object that, if agencies simultaneously investigate and adjudicate issues, they are made into judges in their own cause. Vermeule attempts to refute this objection by pointing out that constitutions "frequently make institutions the final arbiters of their own composition, compensation or power"[56].

Fourth, the rational-basis test based on the due-process clause is cast in the context of administrative law in the format of the "arbitrary and capricious test". It was introduced by the APA. Despite the "hard-look" approach developed in *State Farm,* is must not amount to something more stringent than the ordinary due-process standard. According to *Vermeule*, in the large majority of cases, the arbitrary and capricious standard laid down in the APA has been whittled down to a most deferential means of

48 *Ibid*, 110.
49 Mathews v. Eldridge, 424 U.S. 319 (1976).
50 Summarized in A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 92.
51 *Ibid*, 88.
52 *Ibid*,92.
53 *Ibid*, 103, 121.
54 *Ibid*, 88, 89.
55 *Ibid,* 115.
56 *Ibid*, 121.

control. Yet, this may be the point that *Vermeule* seems to have greatest difficulty in defending, which explains why he spends so much time on *State Farm* and its progeny.[57] However, he advocates thin rationality review. It boils down to asking whether there is a reason for agency action, and almost any reason may pass as sufficient.

IV. Uncertainty and Rationally Arbitrary Decisions

The upshot of the critique of our belief in legality comes to the fore in his explanation of what grounds thin rationality review.

Here is the core of *Vermeule's* case against more searching judicial inquiry:

> "Procedurally, judges sometimes demand reasons that cannot be given. Under conditions of genuine uncertainty, reasons run out and a relentless demand for further reason-giving becomes pathological. There is a category of agency decisions is [read: "in", A.S.] which it is *rational to be arbitrary*, in the sense that no first-order reason can be given for agency choice within a certain domain, yet some choice or other is inescapable, legally mandatory, or both."[58]

The idea is straightforward. From the APA's as well as the due-process clause's perspective, it is quite clear that legal acts – regardless of whether they are general or individual – must avail of a rational basis. Nothing must be done for no reason. Within the pursuit of their objective, they must do what is good (or even best), all things considered. Interferences with life, liberty or property can only be justified if the supporting reasons can be put on the table.

Yet, there are cases, *Vermeule* suggests, in which there ought to be some action, but no reason can be given for choosing one over the other. If courts were to ask for reasons in favor of acting in one way rather than another, agencies would end up in a situation in which they can only lose. If an act were struck down because it had been chosen for no good reason, the same could happen for acts based on the reverse choice, for they could not be based on a reason either.[59]

57 *Ibid*, 131, 155, 159-167.
58 *Ibid*, 129.
59 *Ibid*, 140.

The situations that *Vermeule* has in mind here are those of genuine uncertainty and ignorance.[60] Both are different from facing up to risks because, in principle, a probability of occurrence can be attached to the events addressed as "risks". Risks are calculable, uncertain events are not.[61] In the case of uncertainty, the possible outcome is known; in the case of ignorance, both the outcomes and the probabilities are indeterminate.[62] Uncertainty, in addition, can be of a second order. It can be uncertain whether an agency is confronted with a calculable risk or with an uncertainty.

Against this backdrop, *Vermeule* distinguishes three forms of uncertainty.[63] *Brute* uncertainty obtains if the facts relevant to the decision cannot be ascertained at a reasonable cost.[64] Also in this case, the problem can be compounded by the existence of second-order uncertainty[65] as to whether the benefits of further investments in fact-finding would exceed its costs.[66] *Strategic* uncertainty concerns the fact that interdependent choices create multiple equilibria;[67] and *model* uncertainty points to uncertainty as regards the proper analytical framework for assessing certain choices.[68]

Even if owing to the influence of these factors the substance of the matter is not amenable to a rational choice, there may nonetheless be a good reason on the part of an agency to make a choice, for example for the reason of creating legal certainty.[69] *Vermeule* therefore distinguishes between two different levels of reasons that are of relevance here:

60 *Ibid*, 126.
61 *Ibid*, 126, 152, 179; *Vermeule* observes that cases of genuine uncertainty are rare and that agencies work in order to transform uncertainty into risks. At the same time, agencies are always at the frontier of uncertainty, *ibid*, 153.
62 *Ibid*, 126, 132, 170-171.
63 *Ibid*, 133.
64 *Ibid*, 135-136.
65 *Ibid*, 149.
66 *Ibid*, 146, 152, 179-180 on "satisficing" as the consequence; See *ibid,* p. 21; *Vermeule* concludes: "One must decide to stop the explorations on an intuitive basis, i.e., without actually investigating whether further exploration would have yielded better results.", *ibid*, 147.
67 *Ibid*, 137-139.
68 In these contexts, *Vermeule* also dismisses the idea that agencies may be under an obligation to make cautious or "worst-case" assumptions, *ibid*, 133. It is not clear that under uncertainty the maximin (best worst case) or the maximax strategy (best-case payoff) ought to be chosen, *ibid*, 142. In his view, neither law nor canons of rationality require that agencies choose safe or cautious strategies, *ibid*, 143.
69 *Ibid*, 140.

> "By a first-order reason, I mean a reason that justifies the choice relative to other choices within the agency's feasible set. A second-order reason is a reason to make *some choice or other* within the feasible set, even if no first-order reason can be given."[70]

Vermeule goes on to explain that in situations of uncertainty agencies might often have "perfectly valid second-order reasons" even where first-order reasons are unavailable.[71] And from this he concludes that the decisions are then "necessarily and unavoidably arbitrary" in a first-order sense.[72]

Agencies, however, are permitted to make "rationally arbitrary decisions".[73] In order to elaborate what he means by this, he draws a handsome distinction between arbitrariness from the perspective of decision theory, on the one hand, and arbitrariness from the legal point of view, on the other.[74] He argues that it can often be the case that what is arbitrary from the decision-theoretical perspective does not appear to be arbitrary from a legal point of view. This concerns, in particular, decisions made under genuine uncertainty in which first-order reasons are insufficient to warrant one course of action over another. At the same time, there may be second-order reasons for making a choice, possibly if only in order to remove legal uncertainty (this is actually the reason that Vermeule mentions frequently). It is in these cases that the judicial demand for first-order reasons becomes pathological.[75] *Vermeule* then continues by expanding the picture of imperfectly reasoned first-order decisions by pointing to such second-order reasons as exigency (a speed-accuracy trade-off),[76] the preference for a sufficiently satisfactory result over the costly and uncertain search for an optimum ("satisficing")[77] or settling on an expected mean with greater or lesser variance.[78]

Vermeule states his conclusion in bold terms, namely that "under a robust range of conditions, *rational agencies may have good reason to decide*

70 *Ibid*, 135.
71 *Ibid*, 135.
72 *Ibid*, 126, 129, 133, 135.
73 *Ibid*, 149-151; A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 13, 46.
74 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 137, 149.
75 *Ibid*, 140, 153.
76 *Ibid*, 185-186.
77 *Ibid*, 179-183.
78 *Ibid*, 184-185.

in a manner that is inaccurate, nonrational, or arbitrary."[79] (*Vermeule's* emphasis).[80] Unsurprisingly, his preferred version of this rationality review is designed to recognize the "nonideal"[81] limits of time, information and resources that provide agencies with reasons to behave irrationally from a first-order perspective, at least as long as there are second-order reasons for doing so:

> "Such reasons may, for example, justify acting when taking some action or other is necessary or desirable, even when no particular action is sufficiently justified (a rationally arbitrary decision); justify a policy under a decision rule that can predictably be expected to misfire producing arbitrary results in some sets of cases (the mean-variance trade-off and the speed-accuracy trade-off); or justify a policy that seems acceptable, but might well be worse than other possible policies in the feasible set, for all anyone knows (satisficing). In all these cases, agencies rightly depart from the simplistic framework under which rationality requires choosing the best option within the known feasible set."[82]

The irrationality of legality is manifest in the lack of regard for the difference between the two levels of reasons. Courts invalidate decisions for want of first-order reasons where the lack thereof actually gives rise to valid second-order reasons.[83] The legalistic concern with legality gives rise to irrationality, or, in *Vermeule's* own parlance, to unreasonableness.[84] The administrative state underachieves its objectives owing to a false calibration

79 *Ibid*, 156.

80 *Ibid*, 215: „[…] [A]gencies have to make decisions whose content is intrinsically unjustifiable, in the sense that rationality does not dictate the decision, nor the opposite. In that sense, agencies must make decisions that are arbitrary. It does not follow, however, that the decisions are 'arbitrary and capricious' in a legal sense."

81 *Ibid*, 187.

82 *Ibid*, 187-188.

83 *Ibid*, 188.

84 *Ibid*, 188-189: „[...] [I]t is possible to decide reasonably, even when rationality has exhausted its force. For many large decisions at the individual level – where to go to college, what profession to pursue, whom to marry – rational choice is impotent or apposite, yet it is still possible to approach the decision more or less reasonably. Many of the decisions that agencies face have exactly this quality; the stakes are high, the consequences of the alternatives are shrouded in uncertainty, and this decision is either a one-time event, or at least will not be frequently repeated, so that no strong process of learning through trial and error is possible." He adds that the "arbitrary and capricious" standard should be best understood as a prohibition on unreasoned agency action.

of judicial review. It ignores the necessity of rationally arbitrary, or at the very least questionable, decisions.

V. What are Second-Order Reasons?

Thus understood, *Vermeule's* project is animated by the spirit of the enlightenment. It engages in a self-critique[85] of the reasons of law. It challenges a misguided faith in the beneficial effects of judicial review and rejects overreaching and overambitious interferences with agency action.

Deep down, however, the work is about legitimate authority. It is no coincidence that *Vermeule's* arguments have a familiar ring to students of *Joseph Raz's* work.[86]

Authority is legitimate if one has reason to follow the directives issued by authority because doing so makes one comply better with the reasons that apply to oneself than if one responded to these reasons directly. This is, roughly speaking, the gist of the so-called "service conception" of authority. Indeed, the concept of authority is based on "deference", for it involves "surrendering" one's own judgment.[87]

A simple example may explain what *Raz's* point is. In a pandemic, we all have reason to protect our health and to make sure that we do not constitute a health risk for others by spreading the disease. We are better able to act on these reasons by observing the policies adopted by government than by determining our conduct ourselves. First, governments draw on internationally shared medical and epidemiological expertise and, second, governments are able to coordinate our conduct in a manner that promises to make us jointly do what we are morally required to do. The existence of authority gives us a second-order reason not to rely on our own individual assessment of the situation.

In the relation between agencies and reviewing courts, the second-order reasons identified by *Vermeule* confer authority on agencies. They give courts reason *not* to examine the soundness of the first-order reasons of

85 See I Kant, *Critique of Pure Reason,* 2nd ed (Palgrave Macmillan, 2007).

86 See for example, J Raz, *The Authority of Law: Essays in Law and Morality* (Oxford Clarendon Press, 1979).

87 See J Raz, *The Morality of Freedom* (Oxford Clarendon Press, 1986) 42.

agency action, even if these reasons may have been inconclusive.[88] They are also not decisive. Decisive are the second-order reasons. Whether or not these reasons are relevant and applicable is essential to the authority of agency decisions.

One must be inclined, therefore, to conclude that any review of agency action, despite deference to first-order reasons, had better take a "hard look" at second-order reasons.[89] Why should the reasons governing the second order not also be just as amenable to judicial scrutiny as the first-order reasons, provided they are of relevance?

VI. The Elusiveness of the Distinction

Vermeule, however, presents second-order reasons as though they had to be more or less immune from judicial solicitude. This is puzzling and must invite further questions concerning the nature of reasons of a different order.

We have long come to recognize that every action is held to aim at some good.[90] Regardless of whether what agents take to be good is in fact good, it is obvious that any agent, in order to count for one, must rationally be concerned with something that they consider to be worth their while. This explains why there can be *prima facie* no reason to assume that judicial review is categorically ruled out on the ground that whatever agencies do is entirely haphazard and no longer rational action. Nevertheless, this matches exactly with how *Vermeule* invites us to look at first-order reasons if they are arbitrary. Hence, whatever the agency does would be no longer rational action if we conceived of it *merely* in light of the effort to arrive at, say, the technically most satisfactory solution of an environmental-protection

88 See A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 167: "[…] [A]gencies must act on reasons, where the set of admissible reasons includes second-order reasons to act inaccurately, nonrationally, or arbitrarily."

89 *Ibid*, 167.

90 Aristotle, *Nicomachean Ethics* (University of Chicago Press, 2011) p. 1 (1094a). Contemporary analytic philosophy calls this "the guise of the good". See JD Velleman, *The Possibility of Practical Reason*, 2nd ed (Maize Books, 2015) 73-99; J Raz, *From Normativity to Responsibility* (Oxford University Press, 2011) 59-84.

problem or the choice of the morally most defensible standard for barring "indecent" broadcasting.[91]

The question that must arise, though, is whether judicial review should be equally deferential towards second-order reasons. The answer must be straightforward. If the courts bracketed second-order reasons in the same manner in which they disregard first-order reasons, the judiciary would effectively abdicate all authority. The agencies would be entirely free to do what they want to do. Judicial review would become superfluous. Since this would be contrary to the intents of the system of judicial review, the judiciary must submit second-order reasons to *some* scrutiny.

From the perspective of *Weber's* purposive rationality, second-order reasons are not different from first-order reasons. They are merely directed at different objectives than the primary objectives of administrative action, such as attaining a high level of safety or environmental protection. Rather, they concern the expediency or the cost of such action. Possibly, they are also of an entirely political nature if they originate, for example, from the government's desire to demonstrate that it is taking control. In relation to first-order reasons, they *may* operate as exclusionary reasons, if they suggest that it is legitimate to ignore first-order reasons altogether. But they do not necessarily perform this function. On the contrary, it is imaginable that agencies base their action on a combination of first-order and second-order reasons, which is indeed the case if the agency finds that it can attain an objective in a satisfactory manner even if it does not invest more resources to determine which course of action would actually be best. It does not exclude the pertinent first-order reasons or treat them with indifference; it merely decides to close the book on the further exploration of such reasons. This indicates that *Vermeule* has mischaracterized the relation between first- and second-order reasons by suggesting that the second-order reason steps in "if no first-order reason can be given"[92]. Indeed, more often than not it will be the case the that first-order and the so-called "second-order" reason are part of the same set, and agencies use "second-order" reasons in order to determine which first-order reason is good enough. Second-order reasons, then, do not serve as exclusionary reasons, for other *conceivable* first-order reasons are not categorically considered irrelevant.

91 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 152.

92 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 135.

The distinction between first-order and second-order reasons collapses in these contexts, and it becomes unclear why the judiciary ought to abdicate all authority.

VII. Transitive Inconclusiveness

The answer that might be given to this question is that the judiciary ought to take its hands off all second-order reasons owing to a disabling transitive relation. Conceivably, first- and second-order reasons are so intrinsically interwoven with each other, and so inextricably combined, that deference towards first-order reasons invariably must translate into deference towards second-order reasons.

The inconclusiveness of first-order reasons is, indeed, often transitive in relation to reasons of the second order. This means, for example, that if it is unclear whether the agency is confronted with uncertainty rather than a risk, it is very likely to be equally unclear whether further cost-intensive research may reveal what the situation is really like. It is difficult to imagine, in particular, how a court is supposed to ascertain that an agency has erred about the unfeasibility of an inquiry in the existence of either uncertainty and risk and therefore failed to develop a strategy for managing an alleged *risk* when it acted on what it took to be *uncertainty*. Carrying out this type of review presupposes expertise that the judiciary usually does not possess. An agency may have had a resource-related reason not to explore the matter further and to take it for granted that this is a case of uncertainty concerning the existence of either uncertainty or risk. How should the court be able to review the agency's choice if the point of this choice is to have the agency deal with the lack of a guiding standard? The second-order reasons appear to be so composed that the unintelligibility of first-order reasons is preserved in them.

It is next to impossible to conceive how a court could assess the correctness of the second-order reason to engage in a particular mean-variance trade-off.[93] An agency may estimate that a policy could save roughly 2000 animals from contracting a contagious disease, but depending on further research the variance could lie between 200 or 1000 animals. There are good reasons to save as many animals as possible, but there are equally

93 *Ibid*, 184-185.

good reasons to economize on further research, in particular if its payoff is unknown, too. The second-order reasons grant the agency the authority to pick a solution with a wide variance. The accuracy of relying on that reason could only be reviewed by a court that had a standard available for balancing the unclear costs of further research against the likelihood of greater or lesser variance. Indeed, it is the very lack of such a standard that supposedly gives rise to second-order reasons in the first place. The second-order reason is subject only to a thin rationality review conceding that there is always "some reason" for agency action.[94] The one reason that is, however, definitely excluded is the pursuit of private rather than public purposes.[95] But will it ever be the case that for a justification of agency action nothing else will remain but the private gain of commissioners? This may be duly doubted.

The same observation can be made for the second-order reason of "satisficing",[96] which excludes a comparative policy evaluation. It occurs when an option is chosen that meets certain threshold conditions, regardless of whether there may be even better options hidden in the feasible set. There is a second-order reason to satisfice with something if the costs of information and research might be substantial. The problem is recursive, of course. It may be also uncertain what the costs of determining the size of the costs amount to. Suddenly, then, another second-order reason emerges, confirming the second-order reason for satisficing. The elusive second-order reason becomes self-validating.

Vermeule suggests that a "constrained optimizer" would "invest in gathering information just up to the point at which the (increasing) marginal costs of doing so equal the expected marginal benefits of information"[97]. While the satisficer stops as soon as the option is good enough, an optimizer moves forward unless there is reason to believe that the marginal benefit of information is not worth the cost. It is difficult to imagine how a court, which is not in the business of conducting or commissioning empirical research, could ever scrutinize a relevant assertion made by the agency. Courts cannot but give agencies the benefit of the doubt.

94 *Ibid*, 187.

95 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 150.

96 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 180.

97 *Ibid*, 181.

It is to be expected, thus, that the second-order reasons potentially anchoring in thin rationality review are possibly just as, or even more, elusive than the indeterminate first-order reasons. Yet, the elusiveness of the second-order reasons explains, indeed, why we are interested in the judicial review of first-order reasons concerning the optimal policy choice in the first place.

VIII. Epiphanies of Sovereignty

Vermeule appears to believe that the reasons relevant at the second-order level are altogether different from the reasons governing the choice of the best policy. This is of great consequence for the plenitude of authority that agencies are supposed to possess.

Taking as an example, for the sake of simplicity, the adoption of a standard for "indecent broadcasting", there are two ways of approaching the issue. The first would actually examine the matter from a *Dworkinian* perspective and view agencies as well as courts as charged with the task of having to arrive at the most plausible conception of what is to be understood by "indecency".[98] The second would actually claim that the relevant political choice is the agency's to make. If the latter is the idea underpinning the hands-off approach advocated by *Vermeule*, then it is based upon a certain view of what is rationally reviewable by courts. And it appears that *Vermeule* is ready to exclude a whole variety of reasons from the domain of second-order reasons that it would be adequate for the judiciary to consider. Reasons that make a choice economical, for example, are of this kind, and *Vermeule* is ready to grant agencies much space to decide whether further research is feasible in order to explore whether choosing the best policy option might even be in the cards. I take it, therefore, that *Vermeule* envisages something amounting to another domain of "political questions" with which the judiciary is not supposed to meddle.

Upon closer examination, however, it turns out that the seemingly neat distinction needs to be viewed as merely one side of another distinction whose other side consists of the considerations relevant for shifting from the first-order to the second-order level in the first place. In order to avoid compounding the matter with another set of second-order reasons, one

98 See R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978).

could say that second-order reasons are applied self-reflectively, that is, on the basis of some idea when it is appropriate to base decision-making on them rather than on first-order reasons. Regardless of what type of a question this is, if we allow the agency to answer it itself, following *Vermeule*, we grant it jurisdiction to exempt itself from judicial scrutiny. Since the agency thus also determines its own jurisdiction, we catch a glimpse of sovereignty here, for sovereign is that body which determines its own jurisdiction.[99] The authority of the decision-making body cuts itself loose from the reasons to grant it such authority from the perspective of those who are subject to it.

The situation is not identical with, but nonetheless parallel to, the condition under which authority becomes authoritarian.[100] This is the case if the reasons for accepting authority no longer persuade the subordinates, who are nonetheless told that they would be persuaded if they possessed adequate insight. The defense for considering them obligated is that the elect bearers of authority are in the know. The subordinates are told that obedience is good for the obedient, even if they have no clue why. This situation is not identical with thin rationality, to be sure, for in the case of deference those wielding authority do not have any first-order reasons for acting one way or another either. Since the reviewability of second-order reasons remains, as we have seen in the previous sections, at least an open question, if it is not entirely foreclosed, those who decide have authority for no reason other than the complexity of determining whether they really deserve to possess it. Their authority is based on an *irrebuttable presumption of authority*. This is very much like the authority endorsed by professing authoritarians. It is not by accident, possibly, that *Vermeule* confronts us with claims, such as:

> "[…][P]ublic authority is both natural and legitimate – rather than intrinsically suspect, as one might infer from certain stands of the liberal tradition."[101]

The abdication of law makes room for *faith* in agency action.

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99 See D Grimm, *Souveränität: Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin University Press, 2009).

100 See A Somek 'Delegation and Authority: Authoritarian Liberalism Today' (2015) 21 *European Law Journal* 340-360.

101 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 7.

IX. Delegation Awakens the Leviathan

The abdication of law is thus followed by the *Kantian* step to make room for faith.[102]

Faith is already anticipated in the way in which *Vermeule* addresses the issue of delegation. His views emerge in reply to the common charge that the administrative state acts in excess of the powers that have been delegated to it. This is the charge that *Vermeule* replies to in discussing the work of *Hamburger* and *Lawson*[103] who allege that administrative law unconstitutionally rests on subdelegating from Congress to agencies the legislative power that was originally delegated from the people to Congress.[104] This cannot be right: *delegata potestas non potest delegari*.

This critical view of the administrative state seems to be premised on the idea that delegation involves – putting the matter in the language of European Union law – a "conferral" or, cast in classical legal language, a *traditio*, a handover of legal power from one institution to another. Such a handover must in principle not happen; and if it happens, it must contain its own revocation. Such a revocation is manifest in the tight leash along which the delegate ("delegatee" – obviously used in contemporary legal English, even though a rather peculiar coinage in view of the availability of "delegate") is tied to the plans and intentions of the delegator. What the delegate may then permissibly do is to "fill in the details" (this is how *Justice Gorsuch* is not approaching the issue)[105]. The delegate is doing something on behalf of the delegator that the latter is too lazy to do or cannot do owing to a heavy load of other responsibilities.[106]

But one can conceive of delegation without a transfer. Possibly "commissioning", regardless of what it may mean precisely, provides the adequate concept for this understanding. The delegators assign certain tasks that they cannot accomplish themselves. It is essential that the tasks be carried out by *someone else*. The delegates can be given only a rough idea of what the delegators desire, for the simple reason that the delegators themselves only

102 See I Kant, *Critique of Pure Reason,* 2nd ed (Palgrave Macmillan, 2007).

103 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 36-37.

104 *Ibid*, 51.

105 See C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 120.

106 This reflects, arguably, a part of my relation to my assistants. They are doing things for me that I could possibly do even more quickly myself. However, I need to delegate matters in order to cope with the rest of my workload.

have a rough idea of what it is that they want. They need the delegates to flesh out their inchoate ideas.

American administrative law has long considered delegations appropriate so long as the delegating statute supplies an "intelligible principle" that guides the exercise of delegated discretion.[107] Since the 1950s, the Supreme Court permitted such principles to be highly general, such as "what is requisite for the protection of health and safety"[108]. This seemingly loose attitude towards constraints, however, seems to match the idea that delegation is akin to "commissioning". When Congress delegates a task to an agency, it *exercises*, but does not thereby *transfer,* legislative power.[109] The agencies, consequently, adopt executive, and not legislative, acts.[110]

What is possibly even more striking, however, is that according to *Vermeule's* view, the executive branch never exercises legislative power, but *always only* executive power, even if it were to transcend the bounds of delegation (by definition it could never validly exercise legislative power). It cannot do anything but exercise executive power. Remarkably, however, the power avails of splendid plenitude, for it contains within itself the three functions of the separation of powers:

> "When agencies create 'legislative rules', they are acting within the bounds of statutory grants of authority, adding specification to statutory policy choices – a core executive task. When they 'adjudicate', they are adding specification to the statutes by elaborating their application to particular factual circumstances – a core executive task. In either case, in the theory of American administrative law, agencies are not exercising legislative or judicial powers, and there simply is no fusion of powers going on in the first place."[111]

In a manner somewhat reminiscent of conceptual jurisprudence, *Vermeule* draws a line between "branches" and "functions". The powers remain se-

107 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 51.

108 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 120.

109 *Ibid*, 122.

110 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 51; This is the view explicitly adopted by the Court in the City of Arlington case, City of Arlington v. FCC, 133 S. Ct. 1863, 1873 n. 4 (2013), cited *ibid*, 52.

111 *Ibid*, 77.

parate even if the executive branch contains within itself legislative and adjudicative functions.[112]

From that angle, the act of delegation can be cast in a different light. Far from amounting to a conferral or a *traditio*, it *permits* the executive branch to exercise powers that it already has. In a sense, it *unleashes* the Leviathan that is initially cabined into constitutional bounds.

The fact that this branch is always and already legislative, executive and adjudicative does not, however, warrant the conclusion that within agencies the functions must be kept distinct in a manner that matches how the constitution has separated the three major branches. On the contrary, the administrative state does not have to replicate within itself the constitutional system of the separation of powers:

> "Law has decided to allow the combination of lawmaking, law-interpreting, and adjudicative functions in the same hands, where there are good reasons to do so – reasons evaluated by the classical constitutional institutions themselves, in the exercise of their constitutional powers. Law's abnegation is generated from within.
> […]
> Not every subordinate institution within the system must have the same internal structure as the Constitution itself."[113]

There is no problem if the prosecuting agency first legislates and then adjudicates a specific issue.[114] Agencies may permissibly wear three different hats vis-à-vis citizens. This makes good sense given that administrative law is supposed to serve as a countervailing force in relation to socially powerful private actors, such as corporations.[115] Even though there may be a risk of the abuse of agency power if an investigating commissioner can cast a vote in the adjudicating body, the risk of abuse needs to be balanced against the at least equally important risk that the administrative state could be disabled from executing its task to protect the interests of citizens.[116]

112 *Ibid*, 63.
113 *Ibid*, 86.
114 *Ibid*, 63.
115 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 30.
116 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 64-65.

Vermeule concludes that there are good reasons to unchain, at least partly and cautiously, the unmitigated Leviathan (aka the "deep state").[117] He thereby cunningly reduces constitutional constraints to a level at which they become rather trivial:

> "[…] [A]gencies must act based on reasons."[118]

Law and Leviathan completes the task of downplaying the legal checks on the administrative state by reading the existing Court's jurisprudence as though it lent expression to the principles of *Fuller's* internal morality of law.[119] Indeed, the book positions itself shrewdly in the middle between political liberalism and the consummation of law's abdication. It appears like political liberalism, for it claims that most scholarship in administrative law could converge on their view, albeit based on different premises.[120] I am in no position to check whether this is indeed the case. At the same time, *Sunstein* and *Vermeule* point out repeatedly that *Fuller's* framework does a better job of explaining the guiding ethos of contemporary administrative law, as interpreted by the Supreme Court:

> "[…] [A]dministrative law has converged on the principles of law's morality as *surrogate safeguards*. These safeguards help protect many of the values and concerns articulated by critics about violations of the rule of law, excessive administrative discretion, arbitrariness, and the erosion of judicial power. The surrogate safeguards capture the workings of contemporary administrative law at its most appealing, and they also have critical power for the future."[121]

The principles of the morality of administrative law are intrinsic to law. Attempts to derive them from positive law are bound to remain somewhat bogus.

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117 One is reminded, of course, of Hobbes's idea of the "sleeping sovereign". See R Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press, 2015).

118 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 187.

119 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 8; They concede that it might be difficult to derive the principles from the text of the APA, *ibid*, 9, 95-103.

120 *Ibid,* 10.

121 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 9, 11-12.

X. The Constitution Interpreting the Constitution

There is an ultimate argument proffered by *Vermeule* in support of "law's abnegation". He himself, however, appears to struggle a bit with articulating it clearly.

The argument is made in reply to the objection that the concentration of powers in the administrative state is not faithful to the constitution's original design. The reply to this objection that we find most frequently articulated in *Law's Abnegation*[122] is not terribly convincing – at any rate, it is not at first glance. Repeatedly, *Vermeule* points out that the administrative state has historically emerged from the cooperative interaction between and among the three branches of government:

> "It is very odd for theorists to complain about combinations of functions in agencies, and to urge a return to separated functions, when the combination of functions was itself an arrangement created by the operation of classical institutions with separated powers. Whatever arguments support the separation of powers necessarily support the institutions that the separated powers, after due deliberation, decided to create."[123]

This not terribly convincing argument appears to proceed as follows: Assuming that the interaction among branches is conducive to reasonable deliberations, at least as long as the separation of powers is sustained, the institutions and legislative delegations constituting the administrative state are the descendants of the original constitutional design. In order to underscore this point, *Vermeule* adds that, even if the administrative state were all of a sudden eliminated, root and branch, it would invariably have to reappear.[124] This argument is functionalist in its orientation. It raises the question whether, assuming that the administrative state is a many-headed hydra devoid of a constitutional base, we would not have to bite the bullet and take it for granted that the original constitutional design has remained powerless in the face of the necessities arising in a complex society. That observation may be entirely correct from a sociological point of view, but

122 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 54-55, 69, 72-73, 79, 86, 218.

123 *Ibid*, 84, 72-73; C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020) 217-218.

124 A Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016) 54.

it does nothing to assuage the objection concerning the lawfulness of the administrative state.

The major argument, by contrast, is not functionalist, but also far from clear. It is to be feared that, even if we attributed to it a clear meaning, it might, if presented in a certain way, still beg the question.

Vermeule's argument comes in two different versions. This first presents the creation of the administrative state as a constitutional abnegation of constitutional authority. Here is the gist of it:

> "[…] [The] institutions acting in their classically separated ways, together decided to create institutions that did not follow the pattern of the creating institutions themselves. They made creatures *not* in their own image. Thus the Constitution superseded itself from within, in a gigantic act of self-abnegation."[125]

For the argument to be normatively sound, it must view the operation of the separated powers acting jointly as invested with the legal power to alter the arrangement of functions that the constitution originally anticipated the institutions of the executive branch to exhibit. The constitution would make *itself* vulnerable to being altered in its operation.

There is, however, a slightly different, second version of the argument in *Vermeule's* text:

> "The classical Constitution of separated power, cooperating in joint lawmaking across all three branches, *itself* gave rise to the administrative state."[126]

There is no talk of constitutional self-abdication; rather, in this case, the question is which institution possesses the ultimate authority of constitutional interpretation. Could it be the Supreme Court invoking some mystical "original design" against the understandings developed by other branches of government, or is such authority invested in the three powers acting in concert? It is clear how *Vermeule* answers this question:

> "If political legitimacy is not to be found in this long-sustained and judicially-approved joint action of Congress and the President, the premier democratically elected and democratically legitimate bodies in our system, then legitimacy resides nowhere in that system […]."

125 *Ibid*, 42-43.
126 *Ibid*, 46.

Modifying the argument a bit, and pushing the emphasis on political legitimacy somewhat to the background, one could say that the credentials of an interpretation of the constitution could never be higher than those of an interpretation that taps judicial expertise, garners the support of a *de facto* popularly elected chief executive and has backing from the deliberations of the democratically elected legislature.

In its first version, the argument begs the question, for it suggests that whatever the three branches venture to bring about severally and jointly automatically bears the imprint of constitutional authority because none of them has exercised any resistance against the other. This view must take the original constitution to embrace a self-denying ("abnegating") ordinance according to which the three branches of government have unlimited power to amend the constitution, a view that is obviously not supported by the text of this constitution.

In its second version, the argument possesses far greater merit. Defending it in the terms proposed by *Vermeule*, however, would require reopening the debate over judicial supremacy, which is another can of worms.[127] I surmise, however, that the argument could possibly be salvaged if it were recast in slightly different form. Actually, one merely needs to consult *Vermeule's* earlier work on constitutional interpretation[128] to see how the modified argument might work.

The meaning that is ascribed to constitutional provisions is "systemic". This means that participants in the system arrive at interpretations by paying heed to how these are regarded by other political players. If one is surrounded by originalists, it would be pointless to appeal to the "living constitution". For strategic reasons, the argument that one would really like to make with an eye to "evolving" meanings has to be recast as a reference to some, possibly rather obscure, "true" original meaning. Likewise, even originalists must respect limits at which non-originalist would regard them as nuts.[129] Simply put, a constitutional argument is good for A if she has reason to believe that B would find it acceptable according to either A's or B's terms. Should B not accept it, A could possibly challenge B for having misunderstood or misapplied her own (or A's) principles.

127 See LD Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004).

128 See A Vermeule, *The System of the Constitution* (Oxford University Press, 2011).

129 See A Scalia, 'Originalism: The Lesser Evil' (1989) 57 *Cincinnati Law Review* 849-865.

Meanings can be settled within a constitutional system only if the mutual anticipations of acceptability converge. This means, however, that meanings depend decisively on the interpretive views of those who are *relevant* to constitutional discourse. The constitution can mean only what the political players active within the framework of the constitution ascribe as its meaning to it.[130] The constitutionally relevant game of interpretation is constituted by the constitution itself. The constitutional system has no time for solitary constitutional constructions arrived at from outside the constitutional system. For appeals to external meanings to matter, they must be made from the inside. Thus, the system of the constitution itself gives rise to its interpretation. All strategies that appeal to purportedly stable or timeless constitutional meanings must be funneled into the constitutional system. Consequently, their relevance to the constitution becomes dependent on the political constellation of forces made possible by the constitution.

Possibly, the point becomes clearer when one considers the career of originalism. It took several judicial appointments, in addition to *Justice Scalia*, to elevate it to the level of a dominating interpretive doctrine. Whether or not originalism is *constitutionally* regarded as an acceptable method of interpretation depends on the composition of the court.

It is against this background that *Vermeule* can claim that the actual constitution has accepted the administrative state. It settles the issue.

XI. Determinatio

Vermeule's most recent book offers the key to unlocking the connection between deference and the specific contribution made by the delegate.

Above all, *Vermeule* explains, somewhat perplexingly, that deference is the favorite tool of the "classical lawyer" (which is *Vermeule's* slightly generic term for jurists hailing from the Thomist tradition). Substantively, it stands for a "rebuttable presumption of authority"[131]. We have seen that in the context of the highly complex issues addressed by the administrative state there is nothing left to rebut. The authority of agency action becomes

130 For a further elaboration of these points, see A Somek, 'Real Constitutional Law: A Revised Madisonian Perspective' in: C Bezemek/M Potacs/A Somek (eds.), *Vienna Lectures on Legal Philosophy,* vol. 2 (Hart Publishing, 2020) 161-183.

131 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 46.

irrebuttable. For that reason, as we have seen (see V. above), it is a strange sibling of authoritarian rule.

But *Vermeule* now also claims that deference flows from determination.[132] This is consistent with according primacy to reason. From within the *Thomistic* framework that he has now added to his theoretical edifice, the regulating or adjudicating authority is to be given precedence over judicial second-guessing of regulatory choices, at least so long as the authority has engaged in a good-faith effort to arrive at a reasonable determination of the "intelligible principle". Such a *determinatio* may legitimately reflect the influence of context-specific, path-dependent and local factors and cannot be uniform for all places.[133] Indeed, a *determinatio* would be wrong if it even attempted to pursue this aim, for according to *Thomist* principles the human law is a particularly *human* contribution made in the broader context of natural law, at any rate when we are talking about *determinatio* in the second form envisaged by *Aquinas*.

The story is straightforward.

In *Aquinas*' hierarchical view of the law, natural law (*ius naturale*) represents that part of the law governing God's creation (*lex aeterna*) that is amenable to human insight and that is to be further determined by human or positive laws (*lex humana sive positiva*). The relevant determinations can take on two different forms.[134]

First, they can amount to deductions. The example provided by *Aquinas* is that the prohibition of murder can be deduced from the harm principle. It is merely a further specification that draws out its meaning. The determinations of the first kind stay within the perimeter of natural law. They can be recorded in written laws, but this does not alter their nature, which is to belong to the realm of natural law.

Second, *determinatio* can also involve and require a decisively original contribution to be made by the law-giver if such a contribution is indispensable to realizing a general precept of natural law. This does not indicate that there is a defect of natural law that needs to be repaired by virtue of human intervention. Neither natural law nor positive law are in any respect deficient. It is just the case that the former requires the latter to be put into practice and the latter depends on the former so that it can serve the right aim. The example used by *Aquinas* to elucidate the idea is that of an

132 *Ibid*, 152.
133 *Ibid*, 45.
134 *Ibid*, 44-45.

architect being commissioned (see V. above) to build a house for his or her clients.[135] Of course, the architect has to fill in all kinds of blanks so that the project can be set on the tracks. But there is no deficiency on the part of the clients if they approach the architect with only a rough idea of what they want, just as there is nothing wrong with the architect drawing out rough ideas much more concretely, possibly by adding to the building one or another more or less arbitrary ornamental detail.

It is this *determinatio* in the second sense that is at stake in the context of delegation. *Vermeule* actually underscores that, whereas the legislature is ideally merely determining natural law, administrative agencies actually have to serve two "clients": the statutory framework and the principles of the morality of administrative law, which is to be considered part of natural law.[136]

In an almost moving eulogy for a long-gone period of American constitutional history, *Vermeule* exemplifies how the relation of *determinatio* and deference works. In the period after the civil war preceding the infamous *Lochner*[137] case, it was understood that state legislatures may, as an outgrowth of their police power, adopt legislation for the sake of protecting health, safety and morals (and more specific public purposes).[138] The Supreme Court merely examined whether the purpose pursued by legislation stayed within the remit of this power and whether the legislative means chosen to pursue them were rationally related to this purpose. This rationality test was quite deferential, for all that was required was to examine whether the legislature had reasonably found such a relation to exist.[139] The reviewing court thereby left sufficient leeway to the legislature to fulfil its function to serve the common good. This is deference's ultimate point.

135 *Ibid*.

136 *Ibid*, 151-153; Vermeule is entirely correct in pointing out that from a historical perspective natural law was not only considered to be a trump card in the event of positive law appearing to be particularly awful, *ibid*, 44. On the contrary, natural law was taken to be complementary to positive law, overlapping with its principles in large parts and providing a resource for amendment. See R Helmholz, *Natural Law in Courts: A History of Legal Theory in Practice* (Harvard University Press, 2015) 37, 46-53, 73-75.

137 See Lochner v. New York, 198 U.S. 45 (1905).

138 See A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 62, 67.

139 *Ibid*, 65.

Vermeule speaks with great modesty about the scope of reasonableness:

> "In the nature of things there is no metric or algorithm for determining the boundaries of the reasonable, but a hallmark of maturity is the realisation that the absence of such a metric is hardly a decisive objection."[140]

Even if one or another arbitrary determination of the law is made, the regulating authority does not, as we have seen, leave the remit of reasonableness.[141]

XII. Political Theology

Vermeule has recently rediscovered and rejuvenated natural law theorizing, not only with reference to, and modest reverence for, Fuller in the context of administrative law,[142] but also at a more general level[143]. He claims that viewing law in the context of principles of natural justice has been integral to the "classical tradition in American law".[144] While his views have not remained uncontested,[145] what is commendable about his intervention is that he corrects the caricature into which natural law has been turned under the dominance of legal positivism.[146] Natural law, properly understood, is not merely the ultimate authority for answering questions of legal validity in a knock-down manner. Rather, it provides a structure of arguments that regards certain principles, such as *inclinationes naturales*,[147] relevant to answering normative questions without suggesting that it is easy or even

140 *Ibid*, 70.
141 *Ibid,* 46.
142 C Sunstein/A Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020).
143 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022).
144 *Ibid*, 54-56.
145 See WH Pryor, 'Against Living Common Goodism' (2022) 23 *Federalist Society Review* 23-40.
146 For a very nuanced discussion that actually emphasizes that natural law, as it is imagined in the context of the modern controversy with legal positivism, presents natural law in truncated form, see B Bix, 'Natural Law Theory' in D Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory,* 2nd ed (Wiley-Blackwell, 2010) 211, 219.
147 Examples for such natural inclinations are the drive for self-preservation or the desire to procreate. See C Shields/R Pasnau, *The Philosophy of Aquinas, 2nd ed* (Oxford University Press, 2016) 275.

always possible to arrive at a single right answer.[148] One may even conclude, on the basis of a natural-law argument, that positive law is not correct, but one may nonetheless abstain from denying it legal validity, for example for the reason that doing so might upset order and public peace.[149]

There is nothing to be said, in principle, against rejuvenating natural-law theory. On the contrary, it is perfectly sound[150] so long as this suggests that the pursuit of legal arguments remains embedded in a structure of practical reasoning that recognizes the relevance of morally significant ideas.[151] One may even want to modify *Aquinas'* distinction between *lex naturalis* and *lex humana sive positiva* to suggest that when we reason within the structure of natural law we may at times find, as is often said, that reasonable people can disagree and that the choice inherent in adopting positive law is necessary in order to settle the issues that are bound to remain unsettled based on principles of natural justice alone.

Given that natural-law arguments have to be employed with circumspection and caution, even if one endorses a natural-law perspective, it is all the more surprising that *Vermeule* is quick at identifying mistaken Supreme Court decisions. Among his chief exhibits are Obergefell v. Hodges,[152] clearing the path for same-sex marriage, and Ashcroft v. Free Speech coalition, protecting on First Amendment grounds simulated child pornography enacted by adult actors.[153] It is sad that he thereby confirms a widespread prejudice about Roman Catholics,[154] namely that they are always obsessed

148 For an excellent account, see *ibid*, 282-283.

149 See B Bix, 'Natural Law Theory' in D Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory,* 2nd ed (Wiley-Blackwell, 2010) 214-215.

150 It is so, in particular, considering the enormous wrenching of concepts that legal positivists have engaged in to accommodate practical reasoning in law by developing an "inclusive" version of legal positivism. See R Dworkin, 'Thirty Years on' (2002) 115 *Harvard Law Review* 1655-1687 (reviewing J. Coleman's *The Practice of Principle*).

151 See the approving references to *Dworkin* A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 144-145.

152 See Obergefell v. Hodges, 576 U.S. 644 (2015).

153 See Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

154 This is not the place to explore the impact that Vermeule's conversion to Catholicism has had on his thinking. It is, however, possibly more obvious in his contributions to blogs and online journals than in his most recent monograph. See, in particular, his contributions to https://iusetiustitium.com <02/2024> and his much-debated article 'Beyond Originalism' in *The Atlantic*, https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ <02/2024>. For a critical voice, see James Chappel, 'Nudging Towards Theocracy: Adrian Vermeule's

with questions concerning sexuality.[155] One would have been really interested in reading *Vermeule's* views on Bush v. Gore,[156] which in 2000 effectively settled the Presidential election in favor of George W. Bush, or Citizens United v. FEC,[157] which opened the gate to massive corporate funding of electoral campaigns. Both decisions had an adverse impact on American democracy in comparison to which an issue like same-sex marriage, if it is at all still worth debating, pales in significance. Since *Vermeule* believes that there is never a real conflict between rights and the common good and that no right ever extends beyond the contribution that the pursuit of an individual interest can make to it,[158] his silence suggests that, in his view, stopping the ballot count and permitting the untrammeled influence of money on the electoral process are conducive to the common good.

That a political and constitutional theory which is taking its cue from *Aquinas* is not the natural ally of progressives should of course not come as a surprise. What is astounding, nonetheless, is the view of authority with which his most recent book concludes. *Vermeule* offers an approving summary of *some* of *Johannes Messner's* views of subsidiarity.[159] *Messner*, in his major tome on natural law, derives the principle of subsidiarity from the common good. If the common good is the most fundamental principle of the social order, and if the decentralization of authority, albeit subject to exceptions, is the best means to achieve it, then the principle of subsidiarity is a consequence of this basic norm.[160] The principle of subsidiarity,

War on Liberalism' in *Dissent*, https://www.dissentmagazine.org/article/nudging-towards-theocracy <02/2024>. See also Angelo Golia, 'A Road to Redemption? Reflections on *Law and Leviathan*' (2022), no. 4 MPIL Research Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4041976# <02/2024>; rs, 'His ideas profoundly split US conservatives. He is just getting started' *Financial Times*, 14 October 2022, https://www.ft.com/content/5c615d7d-3b1a-47a2-86ab-34c7db363fe4 <02/2024>.

155 For a striking example, see RP George, 'What Sex Can Be: Self-Alienation, Illusion or One-Flesh Union' in RP George (ed.), *In Defense of Natural Law* (Oxford University Press, 1999) 161-183.

156 See Bush v. Gore, 531 U.S. 98 (2000).

157 See Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

158 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022) 24, 167.

159 I think it is fair to say that *Messner* was one of the most important proponents of *Thomist* natural-law theory in the second half of the twentieth century. See J Messner, *Das Naturrecht: Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik*, 8th ed (Duncker & Humblot, 2018) 294-298.

160 *Ibid*, 295.

according to *Messner*, empowers those who are capable of contributing to the common good to do their bit, but it also limits the powers thus conferred on pursuing this objective. Subsidiarity is both enabling and constraining.[161] *Messner* adds that human flourishing, which is an integral part of the common good, requires that people enjoy their liberty to pursue their existential aims by their own lights. The common good would hence not be attained if people lacked autonomy and individual responsibility.[162] Since the principle of subsidiarity is designed to allocate responsibilities, in particular in the relation of the higher and the lower level of social organization, it is a principle of law. Competence on the ground of one's particular responsibility for the common good is the basis of rights.[163]

The subsidiarity principle is thus generative of a very broadly defined constitutional order, possibly of the legal order as a whole. What matters is that *Messner* begins with order, not with disorder, even though he must concede that in exceptional cases the central authority may have to intervene, if it becomes clear that the subordinate institutions or persons are incapable of delivering their contribution to the common good.[164]

Vermeule deconstructs subsidiarity by putting the supplementary principle first.[165] He turns *Messner's* focus on its head by putting *Messner's* discussion of the exceptional situation of disorder first.[166] The concept of subsidiarity, *Vermeule* explains, is derivative of the Latin *subsidium*, namely, the reserve army that is supposed to step in only if the regularly deployed troops are unable to cope with the situation.[167] The focus on the legal order that is generated by the subsidiarity principle disappears, for the order is seen to exist only for as long as the central authority is convinced of the usefulness of its existence. *Vermeule* thus reconceives order from the perspective of the exceptional situation, that is, the situation in which the chief authority believes to have reason to step in in order to protect the common weal. *Bruce P. Frohnen* sums up the consequence – quite pointedly, one must say – as follows:

161 *Ibid*, 295.
162 *Ibid*, 296.
163 *Ibid*, 298.
164 *Ibid*, 301.
165 In the sense envisaged by *Jacques Derrida*, See J Derrida, *Of Grammatology* (Johns Hopkins University Press, 1997) 141-165.
166 A Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022)157.
167 *Ibid*, 156.

> "This 'constitutionalism' is rooted in the demand that subjects show 'respect for the authority of rule and rulers'. Note, not respect for law, tradition, of even in this context, God, but for the powerful, their positions, and their dictates."[168]

All constitutional and other legal constraints are in place at the pleasure of the executive branch. We can conclude that *Vermeule's* thinking has not altered all too dramatically since the publication of *The Executive Unbound*.[169]

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168 BP Frohnen, 'Common Good Constitutionalism and the Problem of Administrative Absolutism' (2022) 27 *The Catholic Social Science Review* 81, 88.

169 EA Posner/A Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010).

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Legitimacy Principles in Global Administrative Law

Markus Kotzur[*]

I. Framing a Global Legal Space

Let us begin the present considerations with a terminological differentiation, which admittedly also has conceptual consequences. Global Administrative Law (in capitals),[1] originating from a multinational research project based at New York University, conceives global administrative law (in small letters) as an answer to the question about the legitimacy of global governance; the latter thus refers to the rules and principles that the former "identifies as normatively governing global administration".[2] Global

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1 B Kingsbury 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.

2 MS Kuo, 'Law-Space Nexus, Global Governance, and Global Administrative Law' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 328 (328, 329); B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 1: "Global administrative law can be understood as comprising the legal rules, principles, and institutional norms applicable to processes of `administration´ undertaken in ways that implicate more than purely intra-State structures of legal and political authority."

constitutionalism[3] – an admittedly "contested and fuzzy" concept[4] – and the small-letter variant "global administrative law",[5] defined as "the body of law or law-like principles and mechanisms governing the procedural dimensions of an increasingly important global, or at least transnational, 'administration'",[6] are, as different as they might be conceptually,[7] still built on common ground and share common preconditions. Both face a global legal space in which state and non-state actors alike exercise formerly state-bound (and in fact *exclusively* state-bound) power and which has been brought about by globalization[8] – an even more fuzzy and emphatically contested concept than constitutionalism. Notwithstanding all its ambiguities and shades of grey, globalization would be utterly misconceived if, in its essence, seen as a political ideology, a normative construct or a regulatory revolution purposefully disempowering the traditional nation-state in favour of transnational global elites. Globalization describes, first and foremost, a complexity of real-world phenomena caused by dramatic and

3 A Atilgan, *Global Constitutionalism. A Socio-Legal Perspective* (Springer, 2018); A. Tschentscher/H Krieger, 'Verfassung im Völkerrecht' (2016) 75 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 407 and 439 (each providing extensive further reference); K Möller, *Formwandel der Verfassung. Die Postdemokratische Verfasstheit des Transnationalen* (transcript, 2015); T Kleinlein, *Konstitutionalisierung im Völkerrecht* (Springer, 2012).

4 C Möllers, 'Constitutional Foundations of Global Administrative Law' in Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107.

5 B Kingsbury et al., 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15; CD Classen/G Biaggini, 'Die Entwicklung des Internationalen Verwaltungsrechts als Aufgabe der Rechtswissenschaft' (2008) 67 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 365 and 413; N Krisch, 'Global Administrative Law and the Constitutional Ambition' in P Dobner/M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010), 245; M Savino, 'What if Global Administrative Law is a Normative Project?' (2015) 13 *International Journal of Constitutional Law* 492.

6 B Kingsbury, 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 526, 527.

7 *Ibid*, 527: "Unlike other accounts, particularly those tracing a `constitutionalization´ of the world, GAL does not seek to make sense of the entire complex of legal orders and their relation to one another. Rather, it is oriented towards the frayed edges of various orders, the cornucopia of new institutional forms that are springing up and not easily classified within existing categories (…)."

8 The literature is abundant; here are just two samples with a democracy-related ambition: D Rodrik, *Das Globalisierungs-Paradox. Die Demokratie und die Zukunft der Weltwirtschaft* (C.H. Beck, 2011) 416; A v. Bogdandy, 'Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme' (2003) 63 *ZaöRV* 853.

dramatically ongoing technological progress – the World Wide Web and the growing importance of Artificial Intelligence (AI) being perhaps the most striking examples – and by a dramatic increase of non-geographically limited risks, climate change and, again, AI being the potentially most striking threats.[9] These phenomena, in themselves intertwined, have blurred the boundaries between legal regimes and require – as did all fundamental changes throughout human history – legal responses to guarantee effective governance in and for this more or less "brave new world".[10]

Since all exercise of power – which comes along with any form of governance – needs to be legitimized, organized, limited and controlled,[11] advocates of global constitutionalism try to translate these classical constitutional functions into a transnational narrative and to develop a transnational legal architecture of some constitutional quality, knowing that a global constitution "stricto sensu" would be utterly unrealistic.[12] They address, with a constitutional mindset, the very foundations of the international order. Protagonists of global administrative law are, a bit less foundational in their ambit, "animated (…) by the view that much of global governance (particularly global regulatory governance) can usually be analyzed as administration."[13] Both the global constitutional and the global administrative law concept have to deal with the fact that the powers they aim to constitutionalize (or at least to tame) and the processes they seek to regulate are no longer neatly separated into public, private, local, regional, national or transnational spheres, but are intertwined in manifold ways. The

9 See also R Howse, 'The globalization debate – A mid-decade Perspective' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 515, contrasting globalization with the origins of the anti-globalisation debate.

10 Hoping that Aldous Huxley´s 1932 "Brave new World" dystopia will not become its decisive feature.

11 All forms of uncontrolled discretions, as benevolent the actors at the beginning may be, necessarily amount to administrative tyranny at the end of the day; see MS Kuo, 'Law-Space Nexus, Global Governance, and Global Administrative Law' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019), 328 (329).

12 B Kingsbury et al., 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.

13 B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *EJIL* 23, 24, 25; even more outspoken are B Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016), 526, 528: "GAL is distinct in its renunciation of any comprehensive vision of order, and any *a priori* normative foundation."

global legal space, whether conceived as constitutional or administrative space, is composed by a multiplicity of different actors (sometimes themselves hybrid) and different regulatory layers including states, international organisations, transnational networks, domestic as well as international administrations, NGOs, transnational enterprises, informal institutional arrangements, inter-institutional relations, hard law, soft law, gentlemen´s agreements, best practices, self-commitments and others.[14]

This structural heterogeneity is crucial in the search of "administrative sovereignty"[15] and all the more decisive for answering the legitimacy question in a multipolar setting, causing an ongoing diversification of rule-making subjects/rule-enforcing actors.[16] It would be an obvious shortcoming to address only the legitimacy of what each single subject/actor does in its own right, in its own capacity, and corresponding to its own constituency. What needs to be legitimized is their hybrid interplay[17] and interaction causing transboundary legal effects and having repercussions on domestic legal/administrative orders. Thus, a simple transposition of legitimacy modes from the national to the global legal space would be doomed to under-complex failure. Limited and careful analogies, however, might very

14 Different types of global regulatory regimes are identified by S Battini, 'The proliferation of global regulatory regimes' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 45, 53; moreover K Jayasuriya, 'Globalization, Law and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance` (1999) 6 *Indian Journal of Global Legal Studies* 425. With particular reference to inter-institutional relations, see B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 54.

15 K Muth, 'The Potential and Limits of Administrative Sovereignty' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 59, 60: administrative authority being "an assertation of control over recognizable administrative mechanisms of government separate from the comprehensive operation of a nation."

16 G Skogstad, 'Global Public Policy and the Constitution of Political Authority' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 23: "The first proposition is that transnational political actors require a legitimate basis for their exercise of political, including regulatory, authority". Furthermore S Cassese et al., 'Towards Multipolar Administrative Law: A Theoretical Perspective' (2014) 12 *International Journal of Constitutional Law* 354.

17 L Casini, 'The Expansion of the Material Scope of Global Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 25, 31, holding that "norms produced within global regulatory regimes tend to appear extremely *hybridized*" (italicization in the original).

well be helpful, since global governance itself is in many regards a form of regulatory administration shaped by administrative law instruments stemming from national legal orders (such as the law of participation, the law of transparency, principles of proportionality and accountability, judicial control of administrative functions etc.).[18] Global administrative and domestic law share another baseline principle: the overall accountability and responsibility of regulatory bodies.[19] Consequently, global administrative law also focuses on the protection of human rights and the promotion of democratic ideals.[20] In turn, it formulates global standards that have to be implemented and enforced by national administrations.[21] Global norms thus "reshape the administrative state",[22] whereas "ideas from domestic administrative law can help us to solve accountability problems in global governance."[23]

II. Identifying Legitimacy Principles Relevant for the Global Legal Space – Three Preliminary Questions

Keeping these unquestionable interdependencies and potential analogies in mind, legitimacy principles in global administrative law might be related to the classic distinction between input and output legitimacy; to procedural and substantive legitimacy; to the constitutional triad of human rights, democracy and the rule of law; and last, but not least, to the identification of public goods on the global scale.[24] Obviously, the democratic

18 M Kotzur, 'Art.: World Law' in H Anheier/M Juergensmeyer (eds), *Encyclopedia of Global Studies* (Sage Publications, 2012).

19 See R Keohane, 'Global Governance and Democratic Accountability' in D Held/M Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Blackwell Publishers, 2003); the accountability mechanisms themselves might be competing, see N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 262.

20 M Kotzur, 'Art.: World Law' in H Anheier/M Juergensmeyer (eds), *Encyclopedia of Global Studies* (Sage Publications, 2012).

21 M Kotzur, 'Art.: World Law' in H Anheier/M Juergensmeyer (eds), *Encyclopedia of Global Studies* (2012). Furthermore, L Casini, 'The Expansion of the Material Scope of Global Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016), 25, 27 on the effects of globalization.

22 D Barak-Erez and O Perez, 'Whose Administrative Law is it Anyway?` (2013) 46 *Cornell International Law Journal* 456.

23 N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 248.

24 L Casini, 'The Expansion of the Material Scope of Global Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016), 25, 29.

feature is the least likely one to find (close) resemblance on the global plane. International human rights and an international rule of law can be seen as more appropriate, nevertheless contested, candidates.[25] Spelled out more specifically, (sub-)categories such as transparency, (procedural) participation, mechanisms for consultation and effective review, reasoned decision-making processes, accountability, responsiveness, rationality, legality and quite a few more principles have the potential to become founding principles for global administrative regulation[26] or, in a more encompassing sense, a global polity.[27] There is no shortage of theoretical approaches on constituting transnational political authority, in particular participatory models (the right to exercise voice for all actors affected by the decisions) and delegated-authority models (accountability to those who delegated the authority).[28]

1. However, before delving deeper into the issue of building transnational public authority on legitimate grounds, we need to clarify the question of who both the subjects and objects (targets, addressees) of this authority (and thus also of global administrative law) are. It goes without saying that global administrative law first studies and then attempts to theoretically frame very distinct processes of administration within the realm of global governance. The institutional settings that are scrutinized range from formal (bilateral and often multilateral) treaty-based ones through

25 C Möllers, 'Constitutional Foundations of Global Administrative Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107 f., distinguishes a rights-based legalistic approach (107), an alternative approach referring to "technocratic criteria to substitute or at least complement constitutional norms for the rise of the global executive" and global administrative law concerned with the "internationalization and globalization of administrative law". Furthermore, see B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 32.

26 B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *EJIL* 23, 25; as far as global regulatory regimes and their proliferation are concerned, see S Battini, 'The proliferation of global regulatory regimes' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016), 45. Furthermore, S Krasner, *International Regimes* (Cornell University Press, 1983).

27 S Cassese, *The Global Polity* (Global Law Press, 2012); I Volkmer, 'The Transnationalization of Public Spheres and Global Policy' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 240 ff.

28 G Skogstad, 'Global Public Policy and the Constitution of Political Authority' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 23, 26 f.

less formal regulatory networks, to hybrid and finally wholly private transnational actors, often even established under national private law.[29] The proliferation of global regimes targets states (i.e., sovereignty concerns) and individuals (i.e., human-rights concerns) as well. States and individuals, therefore, are the subjects and the objects of the same legal system. Or, expressed more pointedly: "Global regimes have assumed the power to impose legal rules upon individuals and national administrations as their members, without requiring prior state authorization."[30] The legitimacy question arises in both dimensions submitting states, on the one hand, and individuals, on the other, to transnational (public) authority.

2. The second preliminary question is that of publicness within the global public space.[31] Without being able to do this in detail here, publicness (or publicity) has to be contextualized with the classic notion of "res publica", meaning public affairs and the good governance thereof by the relevant public.[32] Within the nation-state, the relevant public can be more easily identified as a well-ordered and free political community under a "good constitution", which is characterized by the long-established attributes liberal, democratic, responsible and responsive. The "public" dimension of a "good" constitution depends to a very important extent on a connection of responsiveness and accountability between those who govern and those who are governed. Without minimizing the relevance of input legitimacy, the rule-makers and norm-enforcers should be aware of and *respond to* the ideas, needs, concerns, anxieties, hopes and fears of every actor subjected to their power.[33] Responsiveness and responsibility

29 B Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 526, 529.

30 M Macchia, 'The Rule of Law and Transparency in the Global Space' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 261.

31 B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *EJIL* 23 (31) names the following general principles of public law as constitutive for publicness: the principle of legality, the principle of rationality, the principle of proportionality, the rule of law, and human rights.

32 K Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland (C.H. Beck, 1999) para. 120K; Nowrot, Das Republikprinzip in der Rechtsordnungsgemeinschaft (Mohr-Siebeck, 2014) 292.

33 The reference to Abraham Lincoln´s famous "Gettysburg Address" A Lincoln/D Fehrenbacher Speeches and Writings 1859-1865: Speeches, Letters, and Miscellaneous Writings, Presidential Messages and Proclamations, (Liberty of America, 1989) 536 is

are not only semantic twins; they represent the two sides of one and the same medal in the tradition of "res publica", "salus publica" and "public freedom".[34] Regarding global administrative law and the global space within which it is built, *B. Kingsbury* has translated these complexities into the following formula: "By publicness is meant the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the whole society as such."[35] It consequently is necessary "to connect the law-making process with a political procedure. Needed are therefore enforceable rules for this political process to maintain its legitimacy by legalizing the political system".[36]

3. The quest for global administrative law´s publicness can either be conceived as a "top-down" or a "bottom-up" process. In the prior variant, global administrative law might be related to a cosmopolitan constituency; in the latter variant, it could be construed as the interplay of diverse state or non-state actors involved in its creation. Let us briefly look at the cosmopolitan "top-down" approach. Whereas constitutional theory uses the "common good" as a regulative idea to build a political community on the common interests of the people, various public international law theories try to conceptualize the global legal order as transcending the particular interests of sovereign states and serving the common interests of humankind as such. Humanity is their public; humanity´s publicness lies at the very heart of building global legal regimes. Scholars such as *P. C. Jessup*, *C. W. Jenks* and *W. G. Friedmann* idealistically relied on humankind orientation when describing the transformation of public international law from a system merely organizing the

not completely unintentional: "government of the people, by the people, and for the people".

34 In that sense, the interpretation of a "republic" by P Häberle, *Verfassungslehre als Kulturwissenschaft* (Duncker & Humblot, 2nd edn, 1998) 1000; furthermore, P Häberle/M Kotzur, *Europäische Verfassungslehre* (Nomos, 8th edn, 2016) para. 324. A classic is, of course, J Bodin, *Six Livres de la République* (Du Puys, 1577).

35 B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *EJIL* 23, 31; I Volkmer, 'The Transnationalization of Public Spheres and Global Policy' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University press, 2019) 240 (241); J Habermas, *Strukturwandel der Öffentlichkeit* (Suhrkamp, 1962); J Habermas, *Die postnationale Konstellation* (Suhrkamp, 2001).

36 C Möllers, 'Constitutional Foundations of Global Administrative Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107, 110.

coexistence of sovereign states to a system facilitating the cooperation of States and also non-State actors.[37] The "bonum commune humanitatis" (*F. Suárez*)[38] was also an underlying idea(l) when the "common heritage of mankind" had been developed. Recently, the "bonum commune", the "common heritage of mankind" and the "global commons" have been, amongst others, used as means to observe and as argumentative tools to conceptualize a no longer exclusively state-bound international legal order.[39] Global administrative law, however, mistrusts all attempts to base global administration on substantive grounds. Its approach can rather be characterized as bottom-up, assuming a "massive volume, polycentricity, and obscurity of the interactions", which constitute a global administration and involve a "blurring of national and international, and public and private, dimensions."[40]

37 W Jenks, *The Common Law of Mankind* (Stevens and Sons Limited, 1958) 19 et passim; P Häberle, 'Nationales Verfassungsrecht, Regionale "Staatenverbünde" und das Völkerrecht als Universales Menschheitsrecht: Konvergenzen und Divergenzen' in Gaitanides (ed), *Festschrift für Manfred Zuleeg zum siebzigsten Geburtstag* (Nomos, 2005) 80.

38 As early as the 18th century, E. de Vattel had framed his "humankind-focused" concept of a "société des nations". Even before that, F. Suárez (1548-1617), a famous representative of the Spanish School, had placed an emphasis on the "bonum commune humanitatis". Humanity itself or, expressed in classical Latin terms, the "societas humana" was one cornerstone of rationalistic natural justice – later on, and with a less Eurocentric starting point, this translated into texts of national constitutions as well as international treaties. The same is true for the Ciceronian notions of "res publica" and "salus publica". Along with these developments came the – in a broader sense – republican premise that justice requires all laws to serve the common good, which is to say the common good not only of national or regional political communities, but of all mankind.

39 S Paquerot, Le Statut des Ressources Vitales en Droit International – Essai sur le Concept de Patrimoine Commun de l'humanité (Bruylant, 2002); K Baslar, The Concept of the Common Heritage of Mankind in International Law (Brill, 1998); W Stocker, Das Prinzip des Common Heritage of Mankind als Ausdruck des Staatengemeinschaftsinteresses im Völkerrecht (Schulthess Juristische Medien, 1992); B Blanc, El Patrimonio Común de la Humanidad – Hacia un Régimen Jurídico Internacional para Su Gestión (Bosch, 1992).

40 B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011), para. 1 and 2.

III. Legitimacy Principles Identified

An early framing of global administrative law had, as *B. Kingsbury*, *M. Donaldson* and *R. Vallejo* put it, "provisionally `bracket(ed) the question of democracy´ as too ambitious an ideal for global administration".[41] The approach´s founding fathers, among them B. Kingsbury, even emphasize that global administrative law was neither pursuing any "comprehensive vison of order" nor endorsing "any a priori normative foundation", but being driven by another normative concern, namely, bridging "description and prescription".[42] It intends to reframe "the narratives of justification" – i.e., legitimization – "attributed to global decision-making".[43] This reframing is anything but trivial. Given an obvious lack of shared values and common standards, the framework to be developed cannot simply rely on democratic input legitimacy and can hardly claim a direct output legitimacy by strengthening an international rule of law[44] or advancing human rights.[45] Where the substance of norms remains contested,[46] a "fundamental and durable contestation over the right constituency of global governance" pre-

41 B Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 526.

42 B Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 526, 528.

43 Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016), 526 (528); furthermore, see S Ranganathan, 'The Value of Narratives: The India USA Nuclear Deal in Terms of Fragmentation, Pluralism, Constitutionalization, and Global Administrative Law' (2013) 6 *Erasmus Law Review* 16.

44 A Watts, 'The International Rule of Law' (1993) 36 *German Yearbook of International Law* 15; D Thürer, 'Internationales "Rule of Law" – Innerstaatliche Demokratie' (1995) 5 *Swiss Review of International and European Law* 455; I Brownlie, *The Rule of Law in International Affairs. International Law at the Fiftieth Anniversary of the United Nations* (1998); Chesterman, 'Rule of Law' in *Max Planck Encyclopedia of International Law* (Springer Netherlands, 2007); M Wittiger, 'Das Rechtsstaatsprinzip – vom Nationalen Verfassungsprinzip zum Rechtsprinzip der Europäischen und der Internationalen Gemeinschaft?' (2009) 57 *Jahrbuch des öffentlichen Rechts der Gegenwart* 427.

45 For further reference, see KH Ladeur, 'The Emergence of Global Administrative Law and Transnational Regulation' (2012) 3 *Transnational Legal Theory* 243.

46 See A Wiener, *A Theory of Contestation* (Springer, 2014).

vails;[47] processes and procedural structures, as well as less demanding, but effect-oriented, input and output mechanisms, might open an alternative avenue.[48] Moreover, the shortcomings of real-world governance should not make regulative ideals obsolete. On the contrary, global administrative law can become a dispatcher of both these ideals and of infrastructural incentives for the exercise of power via administrations on the national as well as on the international plane.[49]

1. According to what has just been said, a *Kantian* "humankind orientation", even though it lies in the aforementioned tradition of international-law thinking,[50] might not be the obvious candidate to start reflections on what kind of legitimizing principles global administrative law can rely on. It may nevertheless not be forgotten that the human being – though not necessarily, at least not exclusively, conceived of as an individual holder of rights following Western legal thought[51] – is the *ultimate aim* of *all law* and of *any legal order*. This holds true for global administrative law, too: The human person has to be seen as its very center.[52] Where a "single overarching authority", let alone a democratic grounding in the classical sense, is missing and normative rules do not emanate from a single sovereign,[53] the indispensable "power of legitimacy"[54] might stem from a focus on the needs and threats of

47 N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 248.

48 B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011), para. 3: "(…), global administrative law principles and mechanisms primarily address process values rather than substantial values (…), which are extremely difficult to ground as generally-accepted bases for most global administrative structures".

49 C Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *EJIL* 187.

50 W Jenks, *The Common Law of Mankind* (Stevens and Sons Limited, 1958) 19 et passim; P Häberle, 'Nationales Verfassungsrecht, Regionale "Staatenverbünde" und das Völkerrecht als Universales Menschheitsrecht: Konvergenzen und Divergenzen' in Gaitanides (ed), *Festschrift für Manfred Zuleeg zum siebzigsten Geburtstag* (Nomos, 2005) 80.

51 In this context, some even fear a human-rights expansionalism; see U Baxi, 'Too Many, or Too Few, Human Rights?' (2001) 1 *Human Rights Law Review* 1.

52 In that sense, see P Allott, 'Reconstituting Humanity – New International Law' (1992) 3 *EJIL* 219; P Allott, *Eunomia – New Order for a New World* (Oxford University Press, 1990).

53 J Klabbers, *International Law* (Cambridge University Press, 2013) 9.

54 T Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990).

the human being and humanity[55] as such (as, e.g., expressed by *F. D. Roosevelt's* famous "Four Freedoms Speech" of 7 January 1941).[56] Since the *unbound* "global village" or "contemporary global condominium"[57] – describing manifold worldwide interdependencies in fields such as Artificial Intelligence, technology in general, economy, ecology, security, climate protection, trade policies (WTO), banking supervision, fighting corruption, fighting terrorism, migration policies, competition policies, food-safety standards etc. – forces us to challenge categories of traditional *state-bound* legal thinking, we are in urgent need of (unorthodox) conceptual alternatives. Even though global administrative law, in the absence of universal agreement on moral values, seeks to avoid any content-based conception of law, it must not lose sight of its ultimate addressees. It consequently needs some kind of sensitivity to humankind in its attempt to reconceptualize governance, instead of government-related legal thinking. The legitimacy of global administrative law as an emerging form of transnational law, albeit "implemented and developed by sub- and non-state administrative institutions, often with little or no involvement of political branches of governments",[58] must be measured against its human rights-adequacy.

2. It has already been mentioned several times that global administrative law cannot be democratically grounded in the way democratic input

55 E Benvenisti, 'Sovereigns as Trustees of Humanity' (2012) 107 *AJIL*, 295; A Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *EJIL* 513, 535.

56 "In the future world, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression – everywhere in the world. The second is freedom of every person to worship God in his own way – everywhere in the world. The third is freedom from want – which, translated into world terms, means economic understandings, which will secure to every nation a healthy peacetime life for its inhabitants – everywhere in the world. The fourth is freedom from fear, which, translated into world terms, means a worldwide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour – everywhere in the world." For the citation see L Kühnhardt, *Die Universalität der Menschenrechte* (Bundeszentrale für Politische Bildung, 1987) 112; furthermore H Lauterpacht, *An International Bill of the Rights of Man* (Oxford University Press, 1945) 6, 84.

57 E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2012) 107 *AJIL* 295 (298).

58 A Golia, 'Judicial Review, Foreign Relations and Global Administrative Law. The Administrative Function of Courts in Foreign Relations' (2020) no. 2020-20 *MPIL Research Paper Series* 7.

legitimacy is traditionally conceived.[59] Global governance regimes, no matter how institutionally consolidated they may be, hardly provide sufficient opportunities for individuals to participate directly or indirectly in political decision-making or law-making processes through their elected representatives;[60] at best, NGOs or comparable actors could be seen as somehow representing a global civil society.[61] Output-oriented legitimacy is a different story. It highlights the substantive quality of decisions to "effectively promote the common welfare of the constituency in question".[62] Just one example: International control of environmental issues might be preferred to the national alternative because it is more likely to limit "negative externalities".[63] However, this promotion of common welfare or the common good ("bonum commune") not only has to do with the aims it pursues (freedom, security, peace, political stability, a functioning economy, an intact environment, social subsistence, welfare, fair distribution of life chances on a global scale[64] etc.). It also has to do with the openness and intelligibility concerning the modes of promotion – i.e., transparency (requiring that all decisions of administrative bodies be made publicly accessible within due time) and reason-giving (the ways and reasons why and how a certain decision has been reached needs to be explained), both of which are key features of "democratic" governance.[65] The addressee of a decision needs to understand the rationale behind the (often) discretionary line of argumentation and should fur-

59 J Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547, 551: "The ways and means of international norm setting and law making, the modes in which international law "commands", are so varied, sometimes even radically so, that any attempt to bring them into the laboratory of democracy as if belonging to a monolithic species called "international law" will result in a reductionist and impoverished understanding of international law, of democracy and of the actual and potential relationship between the two."

60 M Strebel et al., 'The Importance of Input and Output Legitimacy in Democratic Governance' (2019) 58 *European Journal of Political Research* 488, 489.

61 For further reference regarding a "cosmopolitan constituency", see N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 255.

62 F Scharpf, *Governing in Europe: Effective and democratic?* (Oxford University Press, 1999) 6.

63 N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 255.

64 A Denhard, *Dimensionen Staatlichen Handelns* (Mohr-Siebeck, 1996) 119.

65 I Opdebeek/S de Somer, 'Duty to Give Reasons in the European Legal Area. A Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative Law' (2016) *RAP* 97.

thermore be informed about the processes in the course of which the decision has been reached. It has long become a commonplace: The more complex the multi-level form of (global) governance is, the more complex the infrastructure of sufficient accountability, controllability, and comprehensibility becomes. Moments of input and output legitimacy must be combined; direct and indirect forms of participation and control are intertwined. Transparency[66] and control, as well as procedural justice and fair processes of low-threshold participation, constitute a legitimacy amalgam.[67] Above all, decisions must be justified in a transparent and comprehensible manner.[68]

3. Another democracy-related element that global administrative law can rely on is cooperation and dialogue in the sense of "bottom-up" deliberative democracy.[69] Some restrictions and adjustments obviously have to be made. Not "We, the people" are involved in discourse, at least not primarily, but the different decision-making and governing actors who have already been described above. Their deliberations, exchange of views, openness for mutual learning from best practices, readiness for comparative interaction etc. will nevertheless improve the quality of the outcome. An all-too-idealistic view of open and all-inclusive deliberation would, however, be misleading. The preconditions of such an ideal deliberative forum could, facing global inequality, hindrances

66 B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 28.

67 M Nettesheim, 'Demokratisierung der Europäischen Union und Europäisierung der Demokratietheorie – Wechselwirkungen bei der Herausbildung eines europäischen Demokratieprinzips' in H Bauer et al. (eds), *Demokratie in Europa* (Mohr-Siebeck, 2005) 143, 144, 176; B Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, 1984).

68 See also the second paragraph of Article 296 of the TFEU, stating that "legal acts shall state the reasons on which they were based and shall refer to any proposals, initiatives, recommendations, requests or opinion required by the Treaties".

69 B Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in A Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 526, 535. As to the notion of deliberative democracy as such, see J Cohen, 'Deliberative Democracy and Democratic Legitimacy' in A Hamlin/P Pettit (eds), *The Good Polity* (Wiley-Blackwell, 1989), 17; M Warren, 'Deliberative Democracy' in A Carter/G Stokes (eds), *Democratic Theory Today. Challenges for the 21st Century (*Polity, 2002), 173; J Fishkin, *Democracy and Deliberation* (Yale University Press, 1991); C Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993).

to participation,[70] power gaps etc., never be met. Viewed through a more realistic and practice-oriented (and thus, to some extent, also broader) lens, however, global administrative law can foster in global administration "an interlinked web of deliberative arenas",[71] being concerned with discussing standards. These standards, again, are related to "transparency, participation, reason-giving, review and reconsideration" and, in particular, "accountability of decision-makers".[72] To make that argument very clear: Legitimacy can, to some extent at least, also be reached by debating legitimacy standards. Mutual consultations not only help administrative actors to better manage conflicting interests and to coordinate overlapping interests more prudently, but also to give voice to the stakeholders concerned. Using, among others, the Aarhus Convention as an illustrative example, E. Benvenisti explains that domestic democratic processes also need to be enhanced for this purpose: "in the case of the Aarhus Convention on access to domestic environmental decision-making and to give voice to stakeholders that are sometimes ignored by state organs at the domestic level (e.g. the tribunals instituted in the areas of human rights, trade, and investment, or the World Bank Inspection Panel)".[73]

4. Unlike the principle of democracy, the nomocratic principle is not bound to supposedly ontological quantities such as "the people" or "the state", but is linked solely to the existence of institutionalized power[74] and thus faces fewer obstacles in its application to state-unbound exercise of power. Even though the *rule of law* implies a rules-based form of governance, it must not be mistaken for a rule by law.[75] Simply setting legal standards and ensuring their execution through a bureaucracy does

70 See B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 28.

71 B Kingsbury et al., 'Global Administrative Law and Deliberative Democracy' in Orford et al. (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 526, 536.

72 *Ibid*, 536.

73 E Benvenisti, 'The Future of Sovereignty: The Nation State in the Global Space' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 483, 489.

74 A v. Arnauld, 'Rechtsstaat' in O Depenheuer/C Grabenwarter (eds), *Verfassungstheorie* (Mohr-Siebeck, 2010) § 21, para. 13, para. 58 ff.

75 See T Ginsburg/T Moustafa, *Rule by Law. The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008).

not live up to the much higher expectations of a true rule of law regime.[76] It is the effective control of administrative agencies and of the discretionary power they exercise, which lies at the very "heart of the rule of law".[77] The "law" in the rule of law not only serves as an *instrument of rule*, but forms, more importantly, the standard of *legitimation for rule*. The institutional threshold for such a rule-of-law model is – besides self-control mechanisms embedded in administrative procedures – the independent judicial review of the legality of administrative action guaranteeing the peaceful and law-based/rule-based settlement of disputes caused by administrative measures.[78] Only those actors who can be sure of the enforceability of their rights, and who can therefore trust law-making as well as law-executing and law-enforcing authorities, will be willing to submit themselves to "sovereign" power – be it exercised in the traditional state-bound way or detached from the state in various forms of global governance. Legal remedies and dispute-settlement mechanisms are, in other words, the decisive prerequisites for legitimizing government as well as governance. That notion brings us back to the procedural dimension of global administrative law's legitimacy. Global regulatory regimes, global institutions and international organization have been increasingly concerned with developing procedures most of which are "similar to models adopted at the domestic level"[79] – from access to documents to "audiatur et altera pars", and from mechanisms of administrative self-control to due process-bound review bodies.

76 C Möllers, 'Constitutional Foundations of Global Administrative Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107, 113.

77 MS Kuo, 'Law-Space Nexus, Global Governance, and Global Administrative Law' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 328, 329.

78 MS Kuo, 'Law-Space Nexus, Global Governance, and Global Administrative Law' in D Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 328, 329, with further reference to A Harel, *Why Law Matters* (Oxford University Press, 2014). *Möllers*, however, calls for a realistic perspective: "The idea that any action performed by international administrative units can be reviewed independently appears to be dramatic and unrealistic, but it is clear that such a guarantee would contribute not only to the internal legitimacy of an organization that can plausibly claim to adhere to its own rules, but also to its external legitimacy, in that it would be open to impartial control."

79 L Casini, 'The Expansion of the Material Scope of Global Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 25, 38; N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 248.

5. Among the manifold components shaping the rule-of-law principle, rationality (besides their democratic facet, reason-giving or reasoned decisions also have a nomocratic facet)[80] and proportionality play a crucial role for global administrative law processes. To some extent, the rule of law can be equated to a rule of reason, calling for knowledge-based governance and highlighting the relevance of (scientific) expertise,[81] obviously without simply endorsing an expertocracy.[82] Weighing approaches and proportionality tests give specific responses to the different (legal) interests determining a certain decision. Global administrative law actors might be inspired by the rather categorical way in which the US Supreme Court has developed three "tiers" or levels of scrutiny: strict scrutiny, intermediate scrutiny and the rational-basis review.[83] European Courts and administration tend to apply a more flexibly structured proportionality approach that seems to be even more suitable for administrative processes within the global space. They look for the legitimate purpose of the action taken, and they ask whether it is suitable for reaching the purpose, whether the impairment is minimal and whether proportionality "stricto sensu" (weighing all interests involved) is given.[84] It goes without saying that administrative actors need sufficient flexibility to calibrate the intensity of their review.[85]
6. Many further rule-of-law-based legitimacy criteria for administrative decision-making beyond the state could be mentioned, and each of them would call for a theory-sensitive in-depth analysis. For the paper at hand, some keywords will have to suffice. One of the most existential experi-

80 See B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 41 ff.

81 C Möllers, 'Constitutional Foundations of Global Administrative Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107.

82 E Erikson, The Accountability of Expertise. Making the Un-elected Safe for Democracy (Routledge, 2022).

83 A Stone, 'The Limits of Constitutional Text and Structure' (1999) 23 *Melbourne University Law Review* 668.

84 G Huscroft et al., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014); V Jackson, 'Constitutional Law in the Age of Proportionality' (2014) 124 *Yale Law Journal* 3094; A Barak, *Proportionality - Constitutional Rights and Their Limitations* (Cambridge University Press, 2013); J Bomhoff, *Balancing Constitutional Rights. The Origins and Meanings of Postwar Legal Discourse* (Cambridge University Press, 2013); M Klatt/M Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2012).

85 R Dixon, 'Calibrated Proportionality' (2020) 48 *Federal Law Review* 92.

ences of injustice is being at the mercy of arbitrariness. It arises wherever rule does not have to legitimize itself, knows no boundaries and eludes all control.[86] The prohibition of such arbitrariness is closely related to the principles of equality, accountability and impartiality. Avoiding arbitrariness would not be possible without sufficiently effective control. The latter requires a certain degree of power-sharing between the different responsible actors. In other words: What mixed actors do need, in order to be legitimized in their interaction, is power-sharing between different rulers. In the tradition of Montesquieu, the separation-of-powers model might serve as a useful blueprint.[87]

7. Finally, some method-related aspects of legitimacy must be paid attention to. Administrative precedents can help to build foreseeability, continuity, stability and thus a degree of legal certainty in global administrative processes.[88] Law comparison can provide some source of legitimacy, too. It is important to note that a comparative approach is anything but an unreflected copy-paste from foreign samples. On the contrary, it is all about gaining *own* knowledge by "thinking" or "comparing" out of the box. In that sense, comparison can be described as both a *knowledge-creating technique* and a *knowledge-oriented discovery process* that aims at unfolding the embeddedness of administrative decision-making processes in their national, transnational, international and global multi-perspectivity.[89] The *telos* that *Ernst Rabel* classically postulated for comparative law is decisive: "The name of its goal is simply: knowledge."[90] Comparison enables informed decision-making processes. Last, but not least, and itself related to comparative insights, contestation instead of an only alleged consensus can strengthen the legitimacy of decisions and compromises reached. *Ch. Möllers* makes it quite clear that "the future of international law lies in contestation and not in consensus".[91] Since

86 In general, see J Schapp, *Freiheit, Moral und Recht* (Mohr-Siebeck, 2nd edn., 2017).

87 C Möllers, The Three Branches. A Comparative Model of Separation of Powers (Oxford University Press, 2013).

88 See N Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008).

89 On the multi-perspective nature of jurisprudence, see O Lepsius, 'Themes of a Theory of Jurisprudence' in M Jestaed/O Lepsius (eds), *Rechtswissenschaftstheorie* (Mohr-Siebeck, 2008) 1 (10).

90 E Rabel, 'Aufgabe und Notwendigkeit der Rechtsvergleichung' in HG Leser (ed), E Rabel/H Ernst, *Gesammelte Aufsätze, vol. III* (Mohr-Siebeck, 1967) 1.

91 C Möllers, 'Constitutional Foundations of Global Administrative Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107, 117, refer-

the "democratic merit of consensus" at the transnational, international or global level "would depend on the coherent democratic legitimacy of all participating states", which obviously is not given, "the merit of politics must be sought through other features: the generation of alternatives in a decision-making process, or the possibility to openly challenge and revise decisions. Especially for the administrative level, political legitimacy may then be created by transparent conflicts between different regulatory regimes."[92] Contestation paves the way to solutions that ultimately might be commonly agreed on.[93] The theoretical-conceptual proximity to the aforementioned principles of transparency and rationality (reason-giving) is obvious.

IV. Instead of a Conclusion: An Ongoing Quest for Legitimacy

Global administrative law, existing "within the context of a larger system of public and constitutional law",[94] and hence "inter-public law",[95] describes itself as less ambitious than constitutionalist approaches to global governance.[96] It aims to establish a legitimacy framework for global governance which is not based on axiological assumptions or whichever notion of global democracy,[97] but primarily on procedural standards (which leave room for deliberation and cooperation as well as contestation). Divergent

ring to N Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 *AJIL* 1.

92 Again C Möllers, 'Constitutional Foundations of Global Administrative Law' in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016) 107, 117; more generally, see I Ley, *Opposition im Völkerrecht* (Springer, 2015). Concerning the high relevance of political alternatives, see P Häberle, 'Demokratische Verfassungstheorie im Lichte des Möglichkeitsdenkens' (1977) 102 *Archiv des öffentlichen Rechts* 27 ff.

93 A Wiener, *A Theory of Contestation* (Springer, 2014).

94 B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 57.

95 B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *EJIL* 23, 55.

96 See C Krisch, 'Global Administrative Law and the Constitutional Ambition' in P Dobner/M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010) 245.

97 A Golia, 'Judicial Review, Foreign Relations and Global Administrative Law. The Administrative Function of Courts in Foreign Relations' (2020) no. 2020-20 *MPIL Research Paper Series* 8.

regulatory purposes that will never result in a "perfect", but "contested", mutually challenged and continuously-to-be-renegotiated balance need to be reconciled.[98] If global administrative law wants to give "the answer to the question about the legitimacy of global governance", as stated above,[99] it can only do so if conceived as an open process and ongoing procedure-driven quest for a global "bonum commune" that is in itself contested.[100] This quest, for sure, is worthwhile.

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98 N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *EJIL* 247, 266.

99 MS Kuo, 'Law-Space Nexus, Global Governance, and Global Administrative Law' in A Stone/K Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (Oxford University Press, 2019) 328.

100 B Kingsbury/M Donaldson, 'Global Administrative Law' in *Max Planck Encyclopedia of Public International Law* (April 2011) para. 12, emphazise the "contested nature of public interests".

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Legitimacy Principles in the Administrative Law Network of the EU

Birgit Peters[*]

I. Introduction

If confronted with questions about the legitimacy of EU law – and EU administrative law in particular –, one is tempted to ask: Is the Union still facing legitimacy problems? Historically, the Union had several severe legitimacy crises; most notably in the 1960s, 70s and 90s. They continued into the turn of the millennium, when the European Constitutional Treaty failed. Consequently, the Commission sought alternative ways of legitimation in its White Paper on European Governance, which focused on European citizenship and citizen rights, and their inclusion into the EU Treaties.[1] With the adoption of the Lisbon Treaty, European representative and participatory democracy got its home in Arts. 9-11 Treaty of the

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1 Commission of the European Communities, 'European Governance – A White Paper', 12 December 2001, COM (2001) 428 final.

European Union (TEU). Nowadays it is firmly established that the Union is built on the principle of dual democratic representation.[2] Hence, at least from the perspective of primary law, the EU has adopted conceptualizations designed to overcome some of the legitimacy charges of its past. This view seems to be shared by the academic literature on legitimacy in the EU. Research on the EU's legitimacy crises plummeted around 2009, when the Lisbon Treaty was adopted, and shortly thereafter.[3]

This does not mean that the Union has managed to ensure her actions are received as legitimate by the member states and European citizens. In fact, the current and ongoing crises in the European Union may easily be perceived as legitimacy crises. What else, if not the lack of acceptance of the EU and its institutions, would have led the British to renounce the European acquis in 2012? And let us remember the lack of acceptance by heads of state and state institutions in the so-called Visegrád states, which

2 Art. 10 paras. 1 and 2 TEU.

3 GA Caldeira/JL Gibson, 'Democracy and Legitimacy in the European Union: The Court of Justice and Its Constituents' (1997) 49 *International Social Science Journal* 209; R Caranta, 'Democracy, Legitimacy and Accountability - is there a Common European Theoretical Framework?' in M Ruffert (ed.), *Legitimacy in European Administrative Law* (Europa Law Publishing, 2011) 175; P Craig, 'Legitimacy in Administrative Law: European Union' in M Ruffert (ed.), *Legitimacy in European Administrative Law* (Europa Law Publishing, 2011) 197; A Føllesdal, 'Democracy, Legitimacy and Majority Rule in the European Union' in A Weale/M Nentwich (eds.), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (Routledge, 1998) 34, 35; B Kohler-Koch/B Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield Publishers, 2007); C Marxsen, 'Participatory Democracy in Europe Article 11 TEU and the Legitimacy of the European Union' in F Fabbrini/E Hirsch Ballin/H Somsen (eds.), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing, 2015) 151; A Moravcsik, 'Reassessing Legitimacy in the European Union' (2002) 40 *Journal of Common Market Studies* 603; J Newig/O Fritsch, 'More Input – Better Output: Does Citizen Involvement Improve Environmental Governance?' in I Blühdorn (ed.), *In Search of Legitimacy: Policy Making in Europe and the Challenge of Societal Complexity* (B. Budrich, 2009) 205; FW Scharpf, 'Democratic Legitimacy under Conditions of Regulatory Competition. Why Europe Differs from the United States' in K Nicolaidis/R Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001) 355; FW Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 *European Political Science Review* 173; FW Scharpf, 'Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis' in K Armingeon (ed.), *Staatstätigkeiten, Parteien und Demokratie: Festschrift für Manfred G. Schmidt* (Springer VS, 2013) 567; J Thomassen, *The Legitimacy of the European Union after Enlargement* (Oxford University Press, 2009).

caused the rule of law crisis of the EU. Further, cannot the EU's financial crises, the reactions to the COVID-19 pandemic, in particular policies and agreements on vaccines, and the refugee crises of 2015 and 2022 be captured as incidences questioning the legitimacy of the Union?

Interestingly, this is not how those crises are looked at today. Academic literature as well as policy practice do not view these current crises as legitimacy crises of the Union *lato sensu*. Rather, discussions appear to have moved toward specialized topics and issues. Now, there is talk of the rule of law crisis,[4] the legitimacy of EU criminal law,[5] EU asylum policy and the refugee crisis of 2015,[6] European economic governance and EU environmental law,[7] the Euro crisis etc.[8] Concomitantly, more specific solutions are discussed for the areas of EU law, which allegedly lack legitimacy, such as the rule of law,[9] solidarity in EU migration law[10] and sustainability in EU

4 A Jakab/L Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 *German Law Journal* 936; M Smith, 'Staring into the abyss: A crisis of the rule of law in the EU' (2019) 25 *European Law Journal* 561 ff.

5 J Öberg, 'EU Criminal Law, Democratic Legitimacy and Judicial Review of Union Criminal Law Legislation in the Wake of the Lisbon Treaty' (2011) 16 *Tilburg Law Review* 60; K Nuotio, 'A legitimacy-based approach to EU criminal law: Maybe we are getting there, after all' (2020) 11 *New Journal of European Criminal Law* 20.

6 Y-D Kang, 'Refugee crisis in Europe: Determinants of asylum seeking in European countries from 2008-2014' (2021) 43 *Journal of European Integration* 33; S Angeloni/FM Spano, 'Asylum Seekers in Europe: Issues and Solutions' (2018) 19 *Journal of International Migration and Integration* 473.

7 G Barrett, 'European economic governance: deficient in democratic legitimacy?' (2018) 40 *Journal of European Integration* 249 ff.; R Csehi/DF Schulz, 'The EU's New Economic Governance Framework and Budgetary Decision-Making in the Member States: Boon or Bane for Throughput Legitimacy?' (2022) 60 *Journal of Common Market Studies* 118 ff.; N Craik/T Koivurova, 'Subsidiary Decision Making under the Espoo Convention: Legal Status and Legitimacy' (2011) 20 *Review of European Community & International Environmental Law* 258.

8 P Kratochvíl/Z Sychra, 'The end of democracy in the EU? The Eurozone crisis and the EU's democratic deficit' (2019) 41 *Journal of European Integration* 169; VA Schmidt, *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press, 2020); M Markakis, 'Differentiated Integration and Disintegration in the EU: Brexit, the Eurozone Crisis, and Other Troubles' (2020) 23 *Journal of International Economic Law* 489.

9 J Öberg, 'EU Criminal Law, Democratic Legitimacy and Judicial Review of Union Criminal Law Legislation in the Wake of the Lisbon Treaty' (2011) 16 *Tilburg Law Review* 60; K Nuotio, 'A legitimacy-based approach to EU criminal law: Maybe we are getting there, after all' (2020) 11 *New Journal of European Criminal Law* 20.

10 E Karageorgiou/G Noll, 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4 *Jus Cogens* 131; L Marin/S Penasa/G Romeo, 'Migration Crises and

environmental law.[11] Hence, most of the Union's current legitimacy issues become manifest in specialized and sectoral areas of EU law. Accordingly, the critique of the 'legitimacy of the EU', which dominated EU legal writing all the way up until the 2000s, has diversified into a critique of specific legitimacy principles and/or the Union's core values, such as sustainability, the rule of law and solidarity.

This late, compartmentalized method of thinking about legitimacy in EU law corresponds to how the Union of today is perceived by its citizenry. Both Union critics, such as *Dieter Grimm*,[12] and its proponents, such as *Armin von Bogdandy*,[13] convincingly argue that the initial motives underlying the Union's creation, i.e., integration and harmonization, do not resonate any more with today's citizenry.[14] Likewise, questions like 'what is the Union' and 'what is it *for*' are no longer on the popular agenda. Since the coming into force of the Treaty of Luxembourg, generations of Union citizens have grown up with the benefits of the internal market and free movement in the Schengen area. They neither experienced the Second World War that led to the Union and its creation, nor have they been brought up with the gradual realization of the Union as a common, European peace project built on core values such as the rule of law, democracy and solidarity.[15] Today, the status of the Union is settled. As

the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity' (2020) 22 *European Journal of Migration and Law* 1; J Bast, 'Solidarität im europäischen Einwanderungs- und Asylrecht (Solidarity in European Immigration and Asylum Law)' in M Knodt/A Tews (eds.), *Solidarität in der EU* (Nomos, 2014) 143.

11 DR Bell, 'Sustainability through democratization? The Aarhus Convention and the future of environmental decision making in Europe' in J Barry/B Baxter/R Dunphy (eds.), *Europe, Globalization and Sustainable Development* (Routledge, 2004) 94; U Collier, 'Sustainability, Subsidiarity and Deregulation: New Directions in EU Environmental Policy' (1997) 6 *Environmental Politics* 1; S Marsden/ J De Mulder, 'Strategic Environmental Assessment and Sustainability in Europe – How Bright is the Future?' (2005) 14 *Review of European Commmunity and Environmental Law* 50.

12 D Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie,* 3rd edn (C.H. Beck, 2016).

13 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022).

14 D Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie,* 3rd edn (C.H. Beck, 2016) 29; A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022).

15 D Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie,* 3rd edn (C.H. Beck, 2016) 30.

Grimm stated: In today's Europe, "peace is no longer an achievement, it has become reality".[16] It is the common view that the Union of today is that of a 'Verbund', a Union of national states,[17] or a network endeavour. In either construction, states and their administrations retain their national sovereignty and identity, and do not succumb to the idea of a United States of Europe or a federal administration.[18] At the same time, there is a recent rise of populist parties.[19] Some states resort to populist policies.[20] Hence, not only agreement on core values like the rule of law or public participation dissipates. Consensus on common policies, like environmental protection and sustainability, also crumbles.[21] Whereas debate about the overall character of the EU has muted, common values and legitimations for the Union are – again – being renegotiated, debated and developed.[22]

Now, if this is the status quo on the legitimacy of EU law, how does this play out in the area of EU administrative law? Some have argued that the current crises mostly touched upon European principles and values, and thus on EU constitutional law.[23] EU administrative law had reached a consolidated state.[24] In this chapter, I argue that the constitutional crises continue to have fundamental effects on EU administrative law. On the one

16 *Ibid*, 30.

17 BVerfG, 30.06.2009 - 2 BvE 2/08 -, 1st leading paragraph, para. 229; M Ruffert, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund' (2007) 18 *Die Öffentliche Verwaltung* 761; C Möllers, 'Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung. Begriffe der Verfassung in Europa' in A von Bogdandy (ed.) *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, 2nd edn (Springer, 2003) 227.

18 M Ruffert, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund' (2007) 18 *Die Öffentliche Verwaltung* 761; M Ruffert, 'Verwaltungsrecht im Europäischen Verwaltungsverbund' (2015) 48 *Die Verwaltung* 547; A Voßkuhle, 'Der Europäische Verfassungsgerichtsverbund' (2010) 29 *Neue Zeitschrift für Verwaltungsrecht* 1.

19 A Noury/G Roland, 'Identity politics and populism in Europe' (2020) 23 *Annual Review of Political Science* 421, 424.

20 *Ibid*, 439, 424. For the terminology as to what counts as populism, compare A Klafki, 'Resilienz des Grundgesetzes im Zeitalter des Populismus' (2020) 103 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 113, 114 f.

21 S Bogojevic, 'Comment: Environmental Law and Populism: The Erosion of the Rule of Law: How Populism Threatens Environmental Protection' (2019) 31 *Journal of Environmental Law* 389.

22 S Besson, 'The Many European Constitutions and the Future of European Constitutional Theory' (2006) 105 *Archiv für Rechts- und Sozialphilosophie* 160.

23 M Ruffert, 'Verwaltungsrecht im Europäischen Verwaltungsverbund' (2015) 48 *Die Verwaltung* 547.

24 *Ibid*, 547.

hand, this is because core areas of EU law are administrative in character. On the other hand, EU constitutional law also affects EU administrative law, above all in the areas of environmental and migration policy.

Against this broader context, I will develop my thoughts on legitimacy principles in EU administrative law networks. I shall address each of the sub-questions related to that overall theme in turn. First, I will address the networked nature of European administrative law (B). Second, I will tackle the issue whether there is a legitimacy deficit in the European administrative law, and where it is (C). Third, I will debate where a principled approach to legitimacy has become relevant in EU administrative law (D). And the fourth part will illustrate where debates about fundamental legitimacy principles have arisen in EU administrative law (E). A fifth and final part will conclude.

II. On the Networked Nature of EU Administrative Law

When elaborating the role of principles in EU administrative law networks, we first need to establish what is meant by EU administrative law. This discussion ties into the well-known questions about the nature and function of the European Union, the role of EU law, and the member states. Revisiting those questions is important in order for us to understand today's legitimacy issues in EU administrative law.

1. What Counts as EU Administrative Law?

While we might have a clear vision of what constitutes constitutional and administrative law at the national levels, the categories "constitutional" and "administrative" remain problematic at the level of EU law.[25] The Constitutional Treaty of the Union has failed.[26] The Union of today is built upon the Treaty on the European Union and the Treaty on the Functioning of the

25 S Besson, 'The Many European Constitutions and the Future of European Constitutional Theory' (2006) 105 *Archiv für Rechts- und Sozialphilosophie* 160, 162; C Möllers, 'Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung' in A von Bogdandy (ed.) *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, 2nd edn (Springer, 2003) 227.

26 R Streinz, 'The European Constitution after the Failure of the Constitutional Treaty' (2008) 63 *Zeitschrift für öffentliches Recht* 159.

European Union (TFEU), both of which are associated with the Union's constitution.[27] Nonetheless, some have highlighted that the TFEU also contained rules and provisions belonging to the sub-constitutional, and thus administrative, level.[28] In addition, some aspects of EU constitutional law clearly address (national and EU) administration, like Art. 41 Charter of Fundamental Rights of the European Union (ChFR).[29] Some aspects of EU administrative law influence constitutional guarantees, such as the access to justice provisions of EU environmental law.[30] Hence, even after the adoption of the Lisbon Treaty, it remains difficult to determine what counts as constitutional, and what as administrative law.[31]

This is further due to the fact that European administration and European administrative law are heavily influenced by European law and the relationship of European administration to the national administrations of the member states. Accordingly, views on EU administrative law are shaped by different perspectives on how this relationship is to be understood: The common and popular view regards EU administrative law from the angle of national law. Thus, mostly principles and rules known from national administrative procedure are identified as European administrative law.[32] The opposite view argues that EU administrative law, like EU law itself, needs to be perceived from an autonomous EU perspective.[33] From this standpoint, EU administrative law is dominated by the principles of European (constitutional) law.[34]

Bearing these two perspectives in mind, there are even more ways of looking at the subject matter of EU administrative law. Some have held that EU administrative law primarily concerned subject areas where member states *transferred* exclusive administrative competences to the Union,

27 D Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie*, 3rd edn (C.H. Beck, 2016) 127.

28 *Ibid*, 131.

29 On this, see section D. II. below.

30 KP Sommermann, 'Transformative Effects of the Aarhus Convention in Europe' (2017) 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 320, 324.

31 For this discussion in the national context, see: F Wollenschläger, 'Verfassung im Allgemeinen Verwaltungsrecht: Bedeutungsverlust durch Europäisierung und Emanzipation?' in (2016) 75 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 187, 197.

32 F Brito Bastos, 'Doctrinal Methodology in EU Administrative Law: Confronting the 'Touch of Stateness'' (2021) 22 *German Law Journal* 593, 597.

33 *Ibid*, 621 ff.

34 *Ibid*, 621 ff.

such as in state aid and competition law.[35] In view of the principle of conferral, the primacy of Union law, and the principles of subsidiarity and proportionality, others have taken the position that European administrative law existed primarily where European law was *executed*.[36] This position requires administrative matters to be regulated by primary Union law. Member states have not yet rendered their sovereignty to the EU in the field of general administrative law. But the EU is competent to regulate matters of administrative law by way of annex in a field in which the Union is exclusively competent, if the regulation is necessary for the effective and proportional implementation of EU law.[37] Therefore, the law produced in those annex areas must also be considered as EU administrative law. In fact, the bulk of EU administrative law exists and is nowadays produced in those annex areas. Accordingly, and relatedly, EU administrative law in the Union of today not only concerns the *execution*, but also the *implementation* of EU law at the national levels:[38] Many rules contained in primary Union law establish or require institutions, or institutional arrangements, and national administrations cooperate with or integrate those institutional arrangements into their own administrative solutions.[39] This type of European administration exists, for example, in the area of the service sector, such as in telecommunications and energy law,[40] it concerns the area of trans-European networks,[41] the field of customs, competition, or pharmaceutics[42]. It exists both in areas of law under exclusive administration of the EU as well as in areas of law where member states are primarily competent to determine the execution of EU law. And independently of those previous classifications, European administrative action concerns both the passing

35 Arts. 86 and 107 TFEU; cf. P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 396; however, see also J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) L.

36 Art. 52 para. 5 ChFR.

37 Cf. CJEU, C-176/03, ECLI:EU:C:2005:542, *Commission v. Council*.

38 J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) L.

39 W Schroeder, *Grundkurs Europarecht*, 6th edn (C.H. Beck, 2019); P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 391.

40 P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 394.

41 W Schroeder, *Grundkurs Europarecht*, 6th edn (C.H. Beck, 2019) 133 § 8, para. 5.

42 *Ibid*, § 8, para. 5.

of individual administrative acts in areas regulated by Union law and legislative activities. [43] Until the adoption of the Lisbon Treaty, the Union passed administrative legislation by way of the comitology procedure.[44] The procedure bypassed regular decision-making in parliament and replaced it with a specific, deliberative supranationalist[45] procedure. It was often critiqued for its lack of legitimacy, and its problems were traditionally addressed as problems of European administrative law-making.[46] However, after adoption of the Lisbon Treaty, the comitology procedure was succeeded by delegation of secondary rule-making, as described in Arts. 290 and 291 TFEU. These articles succumb the adoption of delegated legislation to the regular law-making procedure involving Council and Parliament. The procedure outlined by Art. 291 TFEU provides vertical structures of interaction between the EU and member states.[47] It therefore acknowledges the structures of European administration, without bypassing the representative democratic decision-making procedures required by the European treaties.

Summing up, we can conclude that EU administrative law is conceived of the constitutional principles governing administration, as well as the law governing administrative activity (legislative as well as executive) in the EU. It concerns the execution as well as the implementation of EU law and all the relevant horizontal and vertical interactions between actors at the level of the EU and the member states involved in those activities.

2. Is EU Administrative Law Networked? Union of Law, the *Verbund* Theorem, Network Theory, Constitutionalism and Governance in EU Administrative Law

Now, considering the specifics of European administration outlined in the previous paragraphs, how must we perceive EU administrative law? Does it

43 P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 398.

44 *Ibid*, 357.

45 C Joerges/J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal* 273.

46 P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 398.

47 M Nettesheim, in E Grabitz/M Hilf/M Nettesheim (eds.), *Das Recht der Europäischen Union* (C.H. Beck, 80th supplement 2023), Art. 291 para. 10.

display network structures, like *Jürgen Schwarze* suggested, [48] and what are alternative conceptualizations?

The history of ideas about the EU and the nature of the European project is long. It starts well before it was first conceived as the European Coal and Steel Community.[49] In fact, it begins with the global peace movements of the 19th century and the iconic speech of *Victor Hugo* at the Paris Peace Congress, who envisioned a United States of Europe, in parallel and side by side with the United States of America.[50] Whereas this early view of the EU surely underscored the idea of the Union as a federal and in fact etatist project,[51] the initial drafters of the Union, most prominently *Walter Hallstein* and *Robert Schuman*, conceived the European Union primarily as a Union of law. In this project, the law created the framework for the common endeavour to ensure peace between the former warring parties and to communalize their coal and steel industry.[52]

The concept of the Union as a Union of law has relived a powerful renaissance in recent years, mostly because the federalist concept of an "ever closer Union"[53] has not found further proponents,[54] least of all with Eastern European states. In addition, the "Union of law" is able to accommodate recent suggestions, such as a Union built on *integrated legal*

48 J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) L.

49 Art. 2 Treaty of Paris, 1951.

50 V Hugo, Opening speech at the Paris Peace Congress, 21 August 1849, published in *Œuvres completes de Victor Hugo, Actes et Paroles*, Vol. I (Hetzel-Quantin, 1882): "Un jour viendra où l'on verra ces deux groupes immenses, les Etats-Unis d'Amérique, les Etats-Unis d'Europe […] placés en face l'un de l'autre, se tendant la main par-dessus les mers, échangeant leurs produits, leur commerce, leur industrie, leurs arts, leurs génies […]."

51 For later federal conceptualizations, see J Habermas, 'Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts – Ein Essay zur Verfassung Europas' (2012) 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1; J Habermas, *The crisis of the European Union: A Response* (Polity, 2012); P Häberle, 'Föderalismus, Regionalismus und Präföderalismus als alternative Strukturformen der Gemeineuropäischen Verfassungskultur' in I Härtel (ed.), *Handbuch Föderalismus – Föderalismus als demokratische Rechtsordnung und Rechtskultur in Deutschland, Europa und der Welt: Band 1* (Springer 2012), 251

52 W Hallstein, *Die Europäische Gemeinschaft*, 5h edn (Econ, 1979) 51 ff.

53 Arts. 1 and 23 TEU.

54 D Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie*, 3rd edn (C.H. Beck, 2016) 20.

pluralism.[55] It perceives the European legal order as one that is autonomous *lato sensu*. And in this order, the 27 member states have retained their constitutional autonomy.[56] The concept of a Union of law also focuses on the law and on the treaties, and not on the otherwise multi-faceted endeavours on how to understand the multiple interactions between the different actors involved.

Focusing on administrative law as part of the Union of law reminds us to look at the principles of primary law, and to the administrative rules found at the national levels. However, as the previous section showed, this approach has limits. At the level of EU law, the distinction between constitutional and administrative is not as clear-cut as in national law. Some principles of EU constitutional law dominate EU administrative law, while some rules of EU administrative law have constitutional character.[57] Moreover, EU administrative law is often principled and sectoral, European and national at the same time. In addition, focusing on the law alone would disregard the many formal and informal interactions that lead to administrative arrangements between member states, and to common standards and solutions. National and European approaches to administration are often shared, interwoven, and they display cooperative structures.

A look at those interactions and arrangements would, in turn, require one to perceive the Union as networked, as *Jürgen Schwarze* observed in his seminal treatise on European administration,[58] or integrated, in the sense originally developed by *Niklas Luhmann*.[59] Another way of highlighting the interactions between national and European administrative structures is *Matthias Ruffert's* and *Christoph Ohler's* characterization of European

55 S Besson, 'How international is the European legal order? Retracing Tuori's steps in the exploration of European legal pluralism' (2008) 5 *No Foundations: An Interdisciplinary Journal of Law and Justice* 50, 54 f. Distinguishing pluralism qua rank and pluralism qua validity (at 55).

56 *Ibid*, 56.

57 See section 'I. What Counts as EU Administrative Law? ' above.

58 J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) L.; G Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' in G Teubner (ed.), *Global Law Without a State* (Dartmouth, 1996) 3; G Teubner (ed.), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, 2011).

59 N Luhmann, *Legitimation durch Verfahren*, 9th edn (Suhrkamp, first published 1969, 2013).

administrative law as *Verwaltungsverbund*.[60] However, especially in those latter conceptualizations, focus is still on the law as the output and outcome of the network interactions. Moreover, the *Verbund* paradigm still perceives the Union as a constitutional association of EU member states.[61] The actors and interactions, and actors contributing to and realizing those outputs and outcomes, i.e., on government officials, regulators, judges and legislators, are not at the centre of this perception.[62] Administrative network theory, as envisaged by *Luhmann*, *Karl-Heinz Ladeur* and others,[63] in turn, focuses on the relationships and actions between the actors involved. The ordering principles governing those processes, defining hierarchies and conditioning actions by all actors involved are not of equal relevance. Thus, a network approach also ignores the different weight given to the rules and norms governing the field of EU administration, for example to the fundamental rights and constitutional principles that shape EU law in this area. Network approaches also accord less weight to the fact that EU primary law, or EU customary law, governs this area of EU law, side by side with national administrative laws and national constitutional provisions.

An overarching conceptualization underscoring this differently weighted influence and importance of the principles and values of EU law is EU constitutionalism.[64] EU constitutionalism highlights the hierarchical structures ordering the horizontal relationships between the public actors interacting

60 "Association of Administrations". Cf. C Ohler, 'Verwaltungszusammenarbeit Art. 197 AEUV' in R Streinz (ed.), *EUV/AEUV*, 3rd edn (C.H. Beck, 2018) para. 10 ff; M Ruffert, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund' (2007) 18 *Die Öffentliche Verwaltung* 761; cf. A Klafki, 'Kooperative Verfahrenselemente im transnationalen Verwaltungsverbund am Beispiel von Planungsverfahren' (2019) 58 *Der Staat* 367, 367; M Nettesheim, in E Grabitz/M Hilf/M Nettesheim (eds.), *Das Recht der Europäischen Union* (C.H. Beck, 80th supplement 2023), Art. 291 para. 9.

61 BVerfG, 30. June 2009 - 2 BvE 2/08 -, 1st leading paragraph, para. 229.

62 For a network approach based on those interactions, see A-M Slaughter, *A New World Order* (Princeton University Press, 2004).

63 N Luhmann, *Legitimation durch Verfahren*, 9th edn (Suhrkamp, first published 1969, 2013); K-H Ladeur, 'The Role of Contracts and Networks in Public Governance: The Importance of the "Social Epistemology" of Decision Making' (2007) 14 *Indiana University Press* 329.

64 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022) 267 ff.; C Möllers, 'Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung. Begriffe der Verfassung in Europa' in A von Bogdandy/J Bast (eds.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, 2nd edn (Springer, 2009) 227, 250 ff. See for global constitutionalism M Kotzur, in this volume, 71 ff.

at EU level. EU constitutionalism has a huge bandwidth of possible and diverse understandings of the European constitution: *Jürgen Habermas's* idea of a European federal state would fall into this category,[65] as would *von Bogdandy's* take on EU law as constitutional law transforming the European public sphere.[66] A looser conceptualization that is still based on the idea of constitutional principles is *Samantha Besson's* pluralist account.[67] However, the constitutionalist idea would at least require an agreement upon the fact that Europe may already be perceived as a federalist state, or that it is nearing the overarching conceptualization of a federation of states. *Von Bogdandy* recently outlined convincing thoughts on why this may already be a reality.[68] Still, the major drawback to this is that some member states, in particular Hungary, Poland and Slovakia, do not share this common perception. European constitutionalism is bound by its own political realities. Now, this might be overcome by emphasizing the power of European public law, or by highlighting alternative, soft constructions that do justice to the political realities, like the *Verbund* paradigm. Still, I am sceptical whether even those soft constructions would match current realities. Certain national policies adopted in Eastern European member states pose a serious threat to European constitutional values and are currently discussed and adjudicated before the CJEU.[69] In addition, constitutionalism yet again focuses on the hierarchy of European public law, without paying equal attention to the actors and institutions, which contribute to its formation.

A combination of the insight that the European legal order must be perceived as *integration* of 27 autonomous national orders into one autonomous European legal order *and* the fact that European administration and European administrative law are constantly shaped by a multitude of actors, practices and policies in a highly complex structure[70] created the idea that

65 J Habermas, *The Crisis of the European Union: A Response* (Polity, 2012).

66 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022) 267 ff.

67 S Besson, 'The Many European Constitutions and the Future of European Constitutional Theory' (2006) 105 *Archiv für Rechts- und Sozialphilosophie* 160, 162.

68 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022) 70 f.

69 CJEU, C-619/18, ECLI:EU:C:2019:531, *Commission v. Poland*. CJEU, C-156/21, ECLI:EU:E:2022:97, *Hungary v European Parliament and Council of the European Union*; CJEU, C-157/21, ECLI:EU:C:2022:98, *Poland v European Parliament and Council of the European Union*.

70 HCH Hofmann/AH Türk, 'An Introduction to EU Administrative Governance' in HCH Hofmann/AH Türk (eds.), *EU Administrative Governance* (Edward Elgar Pub-

the European political and legal sphere must be understood as *governance*. Similar to the constitutionalist idea, governance can be defined in various ways. As *Herwig Hofmann* and *Alexander Türk* noted:

> "[A]t the one end of the spectrum, governance is simply defined as the exercise of public power that is what governing institutions (but not necessarily governments) do. At the opposite end, governance is used to describe a very particular form of steering, in which public and private actors interact in an open way in order to reach common policy aims. Between those definitions we find governance often used to denote mechanisms of 'governing or steering' not exercised solely by governments, but including the governing and regulatory activities of different governmental, quasi- or semi-governmental as well as non-governmental actors."[71] In this way, governance also describes an analytical perspective, which focuses on the "procedures within these complex governance settings."[72]

In line with *Hofmann* and *Türk's* suggestion, I purport that this understanding of European administration and administrative law as governance is still the most adequate way of understanding the complex and multi-faceted ways of administration in and by EU law. The category of governance also corresponds to the self-perception of the Union. In 2012, the Commission published the White Paper e-book of European Governance.[73] Numerous legal acts enacted after that refer to this term, most recently in EU climate change law.[74] After all, the reality of EU administrative law is not networked, but governed.

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lishing, 2006) 1, 5; M Dawson/F de Witte, *EU Law and Governance* (Cambridge University Press, 2022) 48.

71 HCH Hofmann/AH Türk, 'An Introduction to EU Administrative Governance' in HCH Hofmann/AH Türk (eds.), *EU Administrative Governance* (Edward Elgar Publishing, 2006) 4.

72 Ibid, 4.

73 Commission of the European Communities, 'European Governance – A White Paper', 12 December 2001, COM (2001) 428 final.

74 Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council.

III. Legitimacy in EU Administrative Law

1. Legitimacy in the EU

Now, what about legitimacy – and legitimacy in EU law, in particular? As the previous chapters in this book illustrate, the notion of legitimacy is difficult to grapple with. Legitimacy as a product of the enlightenment period is an answer to questions concerned, amongst others, with the authority and acceptance of national and international institutions.[75]

However, as *Anna-Bettina Kaiser's* contribution in this book illustrates,[76] at the level of constitutional law, the term democratic legitimation is sometimes more common. It refers to the core of what is commonly perceived to connect the authority exercised by state institutions to the will of the people. Yet, focusing on democratic legitimation ends up in musing about the – often institutional – ways and conditions in place of how public decisions can be referred back to the individual vote of the citizen.[77] Legitimacy, on the other hand, points to the procedures and standards of how public decision-making can be referred back to the approval of individual citizens, in ways exceeding the vote in elections.[78]

This perception, however, is less than unanimous. *Carl Schmitt*, for example, perceived legitimacy as equivalent to legality. He understood legitimacy as referring public decision-making back to the procedures of law-making.[79] This view is still common, especially in positivist legal thought: Legitimacy as legality focuses on the law as the main procedure constituting and channelling public decision-making.[80]

Legitimacy as a concept tying the will of the people to institutional authority only gained legal followers when it became clear that a positivist, legalistic perspective would fall short when public, and especially adminis-

75 A Føllesdal, 'The Seven Habits of Highly Legitimate New Modes of Governance' (2005) *NEWGOV Consortium Conference New modes of governance working paper DTF/D01a* 1, 4.

76 AB Kaiser, in this volume.

77 RA Dahl, *Democracy and Its Critics* (Yale University Press, 1989) 135 ff.

78 A Føllesdal, 'The Seven Habits of Highly Legitimate New Modes of Governance' (2005) *NEWGOV Consortium Conference New modes of governance working paper DTF/D01a* 1, 4.

79 C Schmitt, *Legalität und Legitimität* (Duncker & Humblot, first published 1932, 2012) 14.

80 PG Kielmansegg, 'Legitimität als analytische Kategorie' (1971) 12 *Politische Vierteljahresschrift* 367, 368.

trative decisions were in conformity with, and based on, existing laws, but violated considerations of morality or natural laws. This insight grew after the German experience with the Nazi regime.[81] The concept of legitimacy found even further promoters from the 1980s onwards, when authors began addressing the crisis of traditional democracy, specifically the public's loss of faith in public administration and the ballot box.[82] Legitimacy of institutions beyond the state also became an issue.[83] This is mostly because democratic legitimation of – and the decision-making procedures in – those institutions was largely perceived as defunct, suboptimal and generally too remote from the vote at the national level.[84]

Though today, there is a certain consensus that legitimacy is an issue at the supranational level, there is no unanimity on the question how legitimacy can or might be attained. Authors propose and discuss a variety of standards. *Fritz Scharpf's* differentiation between input, output and throughput legitimacy[85] frequently serves as a standard in the political and social sciences, for both the national, supranational and the international context. *Luhmann's* focus on process-based legitimacy is famous in the European context, where certain qualitative features of substantive legitimacy are perceived to be problematic (no equal elections to the European Parliament).[86] Also, *Joseph Raz* is well-received by scholars dealing with

81 N Luhmann, *Legitimation durch Verfahren*, 9th edn (Suhrkamp, first published 1969, 2013) 27.

82 C Sternberg, 'Ideologies and imaginaries of legitimacy from the 1950s to today: trajectories of EU-Official siscourses read against Rosanvallon's Democratic Legitimacy' (2021), *iCourts Working Paper Series* No. 230 2.

83 TM Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705; TM Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990).

84 A Føllesdal/S Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies* 533, 545.

85 FW Scharpf, 'Democratic Legitimacy under Conditions of Regulatory Competition. Why Europe Differs from the United States' in K Nicolaidis/R Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001) 355; FW Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 *European Political Science Review* 173. For its reception, see, for example, V Schmidt/M Wood, 'Conceptualizing throughput legitimacy: Procedural mechanisms of accountability, transparency, inclusiveness and openness in EU governance' (2019) 97 *Public Admin* 727.

86 A Kemmerer, 'Spheres of Transformation, Limits of Integration: Seeing European Union Citizenship Through Luhmann's Lenses' (2010) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682551 .

the exercise of supranational authority.[87] His rational account of legitimacy focuses on the reasons for subjects to follow an authority.[88] Finally, *Pierre Rosanvallon* is often cited in the EU context. He argues that impartiality, reflexivity and proximity could serve as alternative modes of legitimation in contexts beyond the state.[89] I do not need to decide which of these approaches to legitimacy I consider apt for the EU level. Here, it suffices to say that we can safely conclude that legitimacy can serve as an approach to deal with some of the challenges of the exercise of administrative authority by the EU and its institutions.

2. Legitimacy Challenges in EU Administrative Law

Let me now turn to the legitimacy challenges that have arisen at the level of EU administrative law. The 1980s were not the only period during which the acceptance of EU institutions among the European polity became an issue. Discussing the development of European public law, *von Bogdandy* identified three major phases in the development of the Union and European public law. The first phase was the founding phase of the Union. The second phase started with the breakdown of socialism in 1989 and ended with the adoption of the Maastricht Treaty in 1992. Finally, the third phase comprised the current period, which started with the financial crisis of the Union in 2009.[90]

Building on this argument, I suggest the story of EU administrative legitimacy spans five periods. The first phase, in which the newly created Union was called into question, comprises the time after the birth of the

87 S Besson, 'The Authority of International Law: Lifting the State Veil' (2009) 31 *Sydney Law Review* 343; S Besson, 'The Legitimate Authority of International Human Rights: On the Reciprocal Legitimation of Domestic and International Human Rights' in A Føllesdal/JK Schaffer/G Ulfstein (eds.), *The Legitimacy of International Human Rights Regimes: Legal, Philosophical and Political Perspectives* (Cambridge University Press, 2013) 32.

88 J Raz, 'Authority, Law and Morality' (1985) 68 *The Monist* 295, 299; J Raz, *The Morality of Freedom* (Oxford University Press, 1988) 42, 47; B Peters/JK Schaffer, 'Introduction: The Turn to Authority beyond States' (2014) 4 *Transnational Legal Theory* 315, 321 f.

89 P Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton University Press, 2011).

90 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022) 49.

Union right up to the election of the first European parliament in 1979. It starts with the initial self-assertion of the EU and its administration: This is the phase when the CJEU issued its famous and far-reaching decisions on the principle of primacy in application, van Gend and Loos[91] and Costa,[92] and formulated its views on the autonomous interpretation of Union law.[93] However, this period also encompasses the broadening of competences and policy areas and, thus, administrative authority of the Union. For example, the Union acquired new functions in the field of environmental policy in 1972. In addition, the period addresses some first initiatives to tie the Union and its institutions to the individual citizen by codifying citizen rights. Since 1974, suggestions circulated in the Union to include the right to participate in municipal elections, a unified passport law, and rights to raise individual claims before the CJEU.[94]

The second phase comprises the span from 1979 up until 1992, when the European treaties were consolidated by the Maastricht Treaty. The Maastricht Treaty not only codified the fundamental values of the Union, but also approved individual Union citizenship and further citizenship rights, such as the right to petition the European Parliament.[95] In addition, the Maastricht Treaty introduced the European citizen representative.

The third period in the history of the Union comprises the eight years between the adoption of the Maastricht Treaty and the negotiation of the Constitutional Treaty in 2000, which famously failed. Nonetheless, consensus was achieved on the Charter of Fundamental Rights,[96] with its guarantees on good administration, and on access to justice, which play an overarching role in administrative contexts. From 1992 to 2000, legitimacy issues, in particular concerning the EU administration, above all the European Commission, were high on the European agenda. It was argued that the Union had to develop a more transparent administration closer

91 CJEU, C-26/62, ECLI:EU:C:1963:1.
92 CJEU, C-6/64, ECLI:EU:C:1964:66, *Costa v ENEL*.
93 *Ibid*, para. 585; See further: Opinion 1/17, re CETA ECLI:EU:C:2019:341, para. 109.
94 S Magiera, 'Die europäische Gemeinschaft auf dem Weg zu einem Europa der Bürger' (1987) 40 *Die Öffentliche Verwaltung* 221 ff.; Final Communiqué of the Hague High Level Meeting of the Heads of States of the European Communities, EC General Report 3/1969, para. 4.
95 Treaty of Maastricht, signed 7 February1992, entry into force on 1 November 1993.
96 Charta of Fundamental Rights of the European Union (2000/C 364/01).

to the European citizens.[97] Right around 2000, when the European Constitutional Treaty was negotiated, the European Commission published its White Paper on European Governance, in which it suggested additions to the hitherto dominating perception of representative democratic legitimation. The Commission argued that representative democracy alone was not sufficient to bring EU administration closer to its citizens.[98] In that White Paper, the Commission underscored that output factors, such as transparency, coherence and the widest public participation, would enhance the legitimacy of the Union administration.[99]

Questions of legitimacy and authority were consolidated by important actors during the fourth period, from 2000 to 2009, culminating in the entry into force of the Lisbon Treaty. During this time, and a bit earlier, certain areas of EU administrative law developed the notion of the "informed citizen", which emphasized the transparency principle, the participation of the public in decision-making processes, cooperative administrative decision-making, as well as a broad access to justice in administrative matters.[100]

The Lisbon Treaty, together with the entry into force of the European Charter for Human Rights, marks the entry into force of the renewed European constitutional order. This fourth phase describes the years from 2009 to 2015, when the new Union was consolidated under the Lisbon Treaty and experienced its first major drawbacks and tests, with the financial crisis and the birth of new European economic institutions like the European Stability Mechanism (ESM), new economic policies like the Public Sector Purchasing Programmes (PSPP) of the European Central Bank (ECB), the exit decision of Great Britain in 2012, and the refugee crisis, which put European collective administrative action to a test. Those challenges arose both within and outside of the existing legitimacy framework of the Lisbon Treaty. The financial crisis was counteracted in a first reaction by an international treaty which created the ESM, and in a second reaction by the PSPP programmes of the ECB, which acted within the existing framework of the TEU and TFEU. In the refugee crisis, existing

97 C Gusy, 'Demokratiedefizite postnationaler Gemeinschaften unter Berücksichtigung der EU' (1998) 45 *Zeitschrift für Politik* 267.

98 Commission of the European Communities, 'European Governance – A White Paper', 12 December 2001, COM (2001) 428 final, 7.

99 Ibid, 7.

100 J Martin, *Das Steuerungskonzept der informierten Öffentlichkeit: Neue Impulse aus dem Umweltrecht des Mehrebenensystems* (Duncker & Humblot, 2012), 119 ff.

collective regulations concerning the administration of asylum seekers remained unapplied. In addition, solidarity was revived as an important and fundamental value of the Union to guide new administrative solutions in the migration context.[101] But whereas previous crises challenged the very foundation of the EU, both literature and practice addressed those new crises from within the existing treaty framework of the Union.[102]

The years following 2015 mark the hitherto final fifth phase of European administrative development. During the refugee crisis, the Eastern European member states in particular had discovered the benefits of their consolidated action in the so-called Visegrád group. Although the group was founded long before 2015,[103] the states in that group used their collective power visibly and strategically, particularly to block the further reform of EU refugee law.[104] Thus, the most recent phase in the legitimacy challenges of the EU began as a crisis of EU administrative law. Most lately, the challenges to EU authority also turned to a crisis of EU constitutional law and fundamental values.[105] On the one hand, the growing nationalization and illiberalism of some of the EU member states threatens and questions the further realization of common European values, above all the rule of law. The European Court of Justice has already decided on several rule of law infringement procedures.[106] On the other hand, fundamental values of the Union, like sustainability and environmental

101 E Karageorgiou/G Noll 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4 *Jus Cogens* 131; L Marin/S Penasa/G Romeo, 'Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity' (2020) 22 *European Journal of Migration and Law* 1.

102 See the literature cited in notes 5-8 above.

103 The group was founded in 1991, after the fall of the Soviet Union, to further EU membership and accession of the respective member states.

104 JS Frelak, 'Solidarity in European Migration Policy: The Perspective of the Visegrád States' in A Grimmel/SM Giang (eds.), *Solidarity in the European Union: A Fundamental Value in Crisis* (Springer, 2017) 81.

105 LD Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 *German Law Journal* 1182, 1182.

106 CJEU, C-619/18, ECLI:EU:C:2019:615, *Commission v. Poland*; CJEU, C-156/21, ECLI:EU:C:2022:97, *Hungary v European Parliament and Council of the European Union*; CJEU, C-157/21, ECLI:EU:C:2022:98, *Poland v European Parliament and Council of the European Union*.

protection, have gained new importance and influence administrative decision-making in new areas, such as in the area of state-aid law.[107]

The Union of today does not struggle any more with its overbearing bureaucracy. Neither do member states question the democratic legitimation of the Union's institutions. Today, the Union's legitimacy conflicts have become internalized: The Union struggles with some of the fundamental values and procedures it agreed upon in Maastricht and Lisbon to enhance its further legitimacy.

IV. Principles, Concepts and Rules as Legitimacy-Enhancing Factors in Administrative Governance Relationships

1. The Role of Principles

Having considered the current constitutional and administrative framework of EU administrative governance, we now need to develop further which standards provide legitimacy in the context of EU administrative law. In governance contexts, principles provide the very foundation for the governance system: They structure decision-making processes as well as the balancing of interests at stake.[108] This is due to the specific nature of principles: *Robert Alexy* has described principles as *Optimierungsgebote*, aspirational norms.[109] In contrast to norms, or rights, which provide a certain programme of action or inaction that is capable of determination by legal interpretation, they allow for a greater degree of discretion and a variety of state action attaining the standard protected by the principle.[110]

In the broader context of legitimacy, the extensive programme of action prescribed by principles guides the process[111] of how to attain acceptance

107 CJEU, C-549/18, ECLI:EU:C:2020:742, *Austria v. European Commission*; B Peters, 'EuGH, 22.9.2020 – C-594/18 P: Beihilferecht: Britische Beihilfen zugunsten des Kernkraftwerks Hinkley Point C' (2021) *Europäische Zeitschrift für Wirtschaftsrecht* 72.

108 N Krisch/B Kingsbury, 'Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law* 1, 2.

109 R Alexy, *Theorie der Grundrechte* (Suhrkamp, 1994), 76.

110 *Ibid*, 76.

111 T Würtenberger, *Die Legitimität staatlicher Herrschaft: Eine staatsrechtlich-politische Begriffsgeschichte* (Dunckler & Humblot, 1973), 27.

with all actors involved for institutional decisions.[112] This implies that legitimacy principles are conceived as living standards. They are subject to constant shaping and reform by way of contestation and debate.[113] Such exchange furthers the mutual understanding and trust of all relevant actors in those principles and ultimately leads to and guarantees the very acceptance that legitimacy seeks for. As *Føllesdal* and *Hix* have highlighted: In the EU, debate by all actors and institutions involved on standards agreed to provide legitimacy constitutes perhaps the very essence of (democratic) legitimacy.[114] Thus, principles found the very framework of European legitimacy. They provide overarching and general guidelines on how European and national administrative structures need to respond and deal with the individual when executing EU law.

2. The Principles Providing Legitimacy in EU Administrative Law Contexts

In the supranational context other than the European one, it may be difficult to outline a set standard of principles dominating administrative law. Principles may be too contested, and attributed with content that is not shared by all actors and regions of the world.[115] In the context of the EU, however, the question which principles may provide legitimacy in EU decision-making appears a settled issue. Relevant principles have been agreed upon by all European states, above all in Art. 2 TEU, but also in Arts. 9-11, in Art. 1 ChFR, in the preamble to the European Convention on Human Rights,[116] and in further provisions of primary and secondary law.

Arts. 9-11 TEU refer to the concept of representative and participatory democracy and highlight the principles of transparency and participation.[117] Moreover, Art. 2 TEU codifies fundamental principles governing

112 B Peters, *Legitimation durch Öffentlichkeitsbeteiligung? Die Öffentlichkeitsbeteiligung am Verwaltungsverfahren unter dem Einfluss internationalen und europäischen Rechts* (Mohr Siebeck, 2020), 143.

113 A Føllesdal/S Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies* 533, 545.

114 *Ibid*, 545.

115 See M Kotzur, in this volume.

116 J Schwarze *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) LIV.

117 Art. 10 para. 1 TEU mentions the concept of representative democracy. It also reminds the Union to conclude decisions openly and as closely as possible to its citizenry in paragraph 3. Art. 11 TEU further supports this with the direct participation

the adoption, application and implementation of EU law as "fundamental values". Yet, in the context of Art. 2, the term "value" is misleading. The values enumerated in that article have legal character, are justiciable[118] and have already been the subject of disputes before the CJEU.[119] The term "value" merely points to the fact that they serve as fundamental yardsticks dominating EU law.[120]

Principles dominating governing relationships in EU law may further be derived from Art. 1 of the ChFR, in the preamble to the European Convention on Human Rights,[121] as well as from individual provisions guaranteed in those instruments. For example, in administrative contexts, the right to good administration[122] and the provision of judicial review[123] are of fundamental importance. In addition, customary principles dominate the field of EU administrative law. These are the principles of equivalence, effectiveness, proportionality and transparency.[124] Finally, the Court has acknowledged "general principles of law", derived from the constitutional traditions of the member states, as a source of EU administrative law, emphasizing, for example, proportionality, legitimate expectations, fair hearings and equality.[125] Most of those principles were developed long before the adoption of the Lisbon Treaty, in the early jurisprudence of the CJEU.[126] Hence, the various sources of EU primary law as well as the constitutional and administrative traditions of the member states actually provide for a

of EU citizens in the legislative decisions of the Union, as well as the transparency of Union decisions. Its para. 4 provides that every citizen shall have the possibility to participate in the political life of the Union.

118 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022) 154.

119 See the rule of law-infringement proceedings cited at n 106, above. For the principle of subsidiarity, see, for example, CJEU, C-547/14, ECLI:EU:C:2016:325, para. 218, *Philipp Morris*.

120 A von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2022) 156.

121 J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) LIV.

122 Art. 41 ChFR.

123 Art. 47 ChFR.

124 They are also contained in the access to documents, information and transparency directives.

125 For a discussion of the corresponding jurisprudence, see P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 329 ff., 331 ff.

126 *Ibid*, 376.

solid basis of fundamental rules governing the legitimacy of administrative action in the EU.

Following their provenance, some principles are genuinely European,[127] like the principle of subsidiarity; some govern administration also at the level of national law, like the rule of law, judicial review,[128] and access to justice,[129] the principle of legitimate expectations, the proportionality principle,[130] the principles of participation and information, and an administrative procedure based on the rule of law.[131] Last, but not least, there are certain areas of EU law where mostly secondary rules dominate administrative procedures; at EU level, at the national levels, or both. EU environmental law is a case in point, as is EU migration law. The standards of the Aarhus Convention (AC) form the fundamental pillars of EU environmental law. The principle of solidarity, though named in Art. 2 para. 2 TEU, is highlighted in Art. 80 TFEU and featured as the prominent principle dominating the further evolution of EU migration law and policies.[132]

Whereas primary, secondary and customary Union law provide for a seemingly settled standard of administrative legitimacy in the EU, the preceding sections and paragraphs have illustrated that this standard is subject to constant debate and contestation. In fact it appears to be the very essence of legitimacy in EU (administrative) law that its fundamental and underlying values are constantly questioned and renegotiated. I will now turn to two incidences where I perceive this to be the case.

V. Debates on Legitimacy Principles in EU Administrative Law: Two Examples

The examples discussed in this section concern the traditional field of *Verbund*, or cooperative administration between the EU and member state

127 Art. 5 para. 3 TEU. A Føllesdal, 'The Principle of Subsidiarity as a Constitutional Principle in International Law: The case of the EU and the European Convention on Human Rights' (2011) *Jean Monnet Working Paper 12/11 – Global Governance as Public Authority: Structures, Contestation, and Normative Change* 1.

128 P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 379.

129 Art. 47 ChFR, Arts. 6, 13 ECHR.

130 Art. 5 para. 4 TEU.

131 J Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2nd edn (Nomos, 2005) LV; Art. 41 ChFR.

132 E Karageorgiou/G Noll, 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4 *Jus Cogens* 131, 132.

authorities. On the one hand, in the area of state-aid law and, on the other hand, administration in the implementation of EU environmental law.

1. *Verbund* Administration in State-aid Proceedings: Affirming Sustainability?

In a case brought forward by Austria after the UK had granted permission to build a new section to an existing nuclear power plant in the UK, Hinkley Point C,[133] the question arose whether state-aid proceedings should be governed by the general principles of EU environmental law, such as the principle of sustainability. The case concerned the legality and conformity of British state-aid measures with regard to a new plant section of Hinkley Point C. The case had been long awaited since it concerned the controversial financing of new nuclear power in the EU. This was fiercely debated between the member states. Austria had claimed that EU environmental law, in particular the principles guaranteed in Arts. 191 TFEU and 11 TEU, applied to the situation, which is why the UK should have abstained from the provision of state aid. The principle of sustainability prohibited an investment in high-risk technologies such as nuclear energy.[134]

The Austrian argument was new because the catalogue of reasons permitting or prohibiting state aid measures is usually assessed against the criterion of a market failure.[135] Pursuant to Art. 107 para. 3 TFEU, in order to be justified, the objectives for granting state aid must outweigh the negative distortion of the internal market caused by the aid.[136] For example, it was purported that there existed a market failure in the market for renewable energies, which at least for some time could not compete against conven-

133 CJEU, C-594/18, ECLI:EU:C:2020:742, *Austria v. European Commission*.

134 *Ibid*, para. 40.

135 Which is why J Buckler, 'State Aid Law' in B Peters/EJ Lohse (eds.), *Sustainability through Participation? Perspectives from National, European and International Law* (Koninklijke Brill NV, 2023) 231 does not assert great weight to the decision. But see B Peters, 'EuGH, 22.9.2020 – C-594/18 P: Beihilferecht: Britische Beihilfen zugunsten des Kernkraftwerks Hinkley Point C' (2021) *Europäische Zeitschrift für Wirtschaftsrecht* 72.

136 Cf. V Verouden/P Werner, 'Introduction – The Law and Economics of EU State-Aid Control' in P Werner/V Verouden (eds.), *EU State Aid Control* (Wolters Kluwer, 2017) 7, 52 ff.

tional ones.[137] Even more generally, however, the Commission regarded environmental protection as one of the areas in which a market failure justified an intervention by the state.[138]

In Hinkley Point C, the Court did not follow the Austrian argument. Nonetheless, the Court conceded that primary and secondary EU environmental law was applicable to the case at hand. The Court found that the Commission had to consider EU environmental law, and most notably Art. 11 and Art. 37 ChFR, when assessing the conformity of state aid measures with the European treaties.[139] It could declare state aid measures as incompatible with the common market, if the economic activity furthered by those measures violated EU environmental law.[140] Still, the Court saw no violation of EU environmental law in the case at hand.[141] The British measures did not violate Arts. 107 ff. TFEU.

The decision indicates that the Court is mindful of the EU's cross-cutting policies, like sustainability and environmental protection. The question whether the economic activity involved a market failure was not the only aspect relevant to the Court. On the contrary, the Court held it to be decisive that the economic activity supported by the aid had not violated fundamental environmental principles. Hence, future state aid decisions of the Commission, as well as national administrators involved in the provision of state aid, will have to consider the additional argument that the economic activity involved is compatible with Art. 11 TEU, Art. 191 TFEU, Art. 37 ChFR, as well as secondary EU environmental law.[142]

2. Administrative Review in Environmental Decision-Making

The second example involving a debate on a legitimacy standard in EU administrative law concerns the access to justice, which is possibly the

137 Cf. K Struckmann/G Sapi, 'Energy and Environmental Aid' in P Werner/V Verouden (eds.), *EU State Aid Control: Law and Economics* (Wolters Kluwer, 2017) 663, 666 ff.

138 See: Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, C/2022/481, *OJ C 80, 18.2.2022, p. 1–89*, and the previous versions of that document.

139 CJEU, C-594/18, ECLI:EU:C:2020:742, paras. 41 f., *Austria v. European Commission*.

140 *Ibid*, para. 45.

141 *Ibid*, paras. 48 ff.

142 CJEU, C-411/17, ECLI:EU:C:2019:622, paras. 177 ff., *Inter-Environnement Wallonie ASBL v. Conseil des ministres*.

most important backbone of EU administrative governance. In the Union context, access to justice has a particular context and meaning. Providing access to justice to EU citizens does not serve the only purpose to address violations of individual rights and legal guarantees before national and Union courts, in the proper sense of Art. 47 ChFR. At EU level, access to justice in administrative matters also mobilizes European citizens for the implementation of EU administrative law.[143] This reinforces and enhances the primacy of European rules and ensures their proper implementation, and ultimately member state adherence to EU law.

Due to this both individual and overarching importance of access to justice, the CJEU has always interpreted Art. 47 ChFR in a very broad fashion. For example, the Court applied Art. 47 ChFR as interpretational aid where individual procedural rights, but no corresponding access to justice provisions, were contained in European instruments, such as in EU migration law.[144] The Court has also applied Art. 47 ChFR in environmental cases where implementation deficits are part of the daily business and perhaps the most contingent. Most particularly and controversially, the Court has sought to proffer the access to justice provision of Art. 9 para. 3 of the AC, which provides access to justice in all cases provided for by national law in environmental decision-making. Thus far, the provision is not implemented in secondary Union law. Because of its wording, it is commonly held that Art. 9 para. 3 AC is not directly applicable.[145] The provision hinges on the very precondition that member states grant access

143 Some have highlighted that the purpose of access to justice as implementation aid was contingent to EU environmental law. However, the concept is also applied in areas exceeding the environmental context, in particular in EU migration law. Its broad application may be derived from the provisions in the TEU regulating the dual concept of European democratic legitimation, and Art. 1 para. 2 of the TEU, i.e., all central provisions which apply to EU law as a whole. In particular, the firm foundation of the concept in EU primary legislation makes it hard for critiques to persist that the concept does not exceed the narrow confines of EU environmental law.

144 S Fontana, 'Der EuGH zwischen Rechtsschutzgewährleistung und Rechtsfortbildung – Methodische Erwägungen, dargestellt am Beispiel des Europäischen Asylsystems' (2019) 1 *Zeitschrift für das gesamte Verfahrensrecht* 1 ff.

145 CJEU, C-470/16, ECLI:EU:C:2018:185 para. 52, *North East Pylon Pressure Campaign Ltd. and Maura Sheehy v. An Bord Pleanála*; CJEU, C-873/19, ECLI:EU:C:2022:857, para. 66, *Deutsche Umwelthilfe v. Bundesrepublik Deutschland*.

to justice in cases concerning the environment in their national laws.[146] If national laws do not provide for such a possibility, Art. 9 para. 3 has no relevance.

In the famous Slovak Brown Bear decision, but even more so in the decisions following that initial dictum, the CJEU reasoned that Art. 47 CHFR provided broad access to justice for environmental interest organizations.[147] Since environmental NGOs must be regarded as privileged claimants, pursuant to Art. 2 para. 5 of the Aarhus Convention, they are always considered as affected by environmental decisions. Accordingly, member states could not bar environmental interest organizations from claiming the violation of European environmental provisions under Art. 9 para. 3 of the Aarhus Convention.[148]

This series of judgments caused significant upheaval in the member states, in particular in Austria and Germany. In both member states, administrative lawyers feared that this interpretation might lead to the marginalization of the rights-based approach to access to justice, upon which the German and Austrian systems of administrative review are built.[149] Most particularly, it was feared that Art. 9 para. 3 AC could open administrative review to individual claimants. After all, the text of Art. 9 para. 3 AC did not

146 CJEU, C–826/18, ECLI:EU:C:2021:7, para. 49, *Stichting Varkens in Nood ua. v. College van burgemeester en wethouders van de gemeente Echt-Susteren*.

147 CJEU, C-240/09, ECLI:EU:C:2011:125 para. 50, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*; CJEU, C-260/11, ECLI:EU:C:2013:221 para. 33, *The Queen, on request of David Edwards, Lilian Pallikaropoulos v. Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs*; CJEU, C-664/15, ECLI:EU:C:2017:987 para. 45, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd*; CJEU, C-470/16, ECLI:EU:C:2018:185 para. 53, *North East Pylon Pressure Campaign Ltd., Maura Sheehy v. An Bord Pleanála, The Minister for Communications, Energy and Natural Re-sources, Ireland, The Attorney General*; CJEU, C-752/18, ECLI:EU:C:2019:1114 paras. 34 f., *Deutsche Umwelthilfe e. V. v. Freistaat Bayern*.

148 *Ibid.*

149 KF Gärditz, *Funktionswandel der Verwaltungsgerichtsbarkeit unter dem Einfluss des Unionsrechts – Umfang des Verwaltungsrechtsschutzes auf dem Prüfstand: Verhandlungen des 71. Deutschen Juristentag – Gutachten D* (C.H. Beck, 2016); BW Wegener 'Nein, nein, nein?! – Kein Funktionswandel der Verwaltungsgerichtsbarkeit unter dem Einfluss des Unionsrechts?' (2016) 17 *Juristenzeitung* 829 ff. For an actual overview over the discussion, see W Kahl, 'Subjektives öffentliches Recht im Unionsrecht' in W Kahl/M Ludwigs (eds.), *Handbuch des Verwaltungsrechts Band IV* (C.F. Müller, 2022) § 94 para. 69.

refer to environmental interest organisations in particular, but to claimants in general.[150]

After a series of judgments, which largely supported access to justice in cases concerning Art. 9 para. 3 AC last year, the court used the opportunity of a claim by an individual to clarify the system of judicial review in environmental cases.[151] In contrast to its previous decision, where it had mostly underlined the broad access to justice, which the Aarhus Convention and Art. 47 ChFR provide, it held that Art. 9 para. 3 AC must not be understood as providing judicial review for individual claimants, who are *not* granted with a right to review under either national or European law. European law, and specifically the Aarhus Convention, granted judicial review only in cases where individuals are *affected* by environmental decision-making.[152] As the court underlined, with its reference to "national laws", Art. 9 para. 3 AC offered judicial review mainly in cases where the national laws provided such an opportunity.[153] The court therefore provided a much-needed clarification for member states like Germany and Austria which – from the outset – offer limited administrative review for individuals. Its decision also responded to the criticism coming from those member states, namely that a broad interpretation of Art. 47 ChFR could not lead to the effect that their decision for systems of individual administrative review cannot prevail under European law.

150 Against this view, most recently: BVerwG, 28.11.2019, BVerwG 7 C 2.18. See the summary by D Römling, 'Europäisierung des Individualrechtsschutzes im Umweltrecht: Anmerkung zum Urteil des Europäischen Gerichtshofs v. 3.10.2019 – C-197/18' (2020) 42 *Natur und Recht* 686, 687.

151 CJEU, C–826/18, ECLI:EU:C:2021:7, *Stichting Varkens in Nood ua. v. College van burgemeester en wethouders van de gemeente Echt-Susteren*.

152 *Ibid*, paras. 36, 51. Nonetheless, a definition of what exactly constitutes affectedness is still pending.

153 CJEU, C-664/15, ECLI:EU:C:2017:987, para. 86, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*; CJEU, C–826/18, ECLI:EU:C:2021:7, para. 49, *Stichting Varkens in Nood ua. v. College van burgemeester en wethouders van de gemeente Echt-Susteren*; CJEU, C-873/19, ECLI:EU:C:2022:857, para. 63, *Deutsche Umwelthilfe v. Bundesrepublik Deutschland*.

VI. Conclusion

What can we conclude about legitimacy in EU administrative law networks? The following needs to be taken into account:

First, legitimacy is still an issue in EU law, and in EU administrative governance in particular. Yet, legitimacy is not debated *lato sensu* anymore. Discussions surrounding legitimacy in European administrative governance are nowadays tied to specific discussions around the interpretation and application of the agreed and existing legitimacy yardsticks in Art. 2 TEU, the ChFR and the ECtHR.

Second, these discussions are useful to clarify the scope of the rather broad principles contained in Art. 2 TEU (and Art. 47 ChFR). In fact, debate by all actors and institutions involved on standards agreed to provide legitimacy is inherent in the concept of legitimacy and perhaps the very essence of legitimacy. Legitimacy is, after all, about the socio-legal conditions and procedures aiming at the acceptance of all actors involved with institutional decision-making processes.

Third, where actors have agreed to provide this acceptance, legitimacy does not stop with the adoption and acceptance of legitimacy principles. Legitimacy principles are no fixed standards with uniform or universal content. Rather, legitimacy implies that the very principles providing legitimacy are living principles. They are subject to constant shaping and further forming by way of contestation and debate. Such exchange on the scope and reach of legitimacy principles furthers the mutual understanding and trust of all relevant actors in those principles, ultimately leading to and guaranteeing the very acceptance that legitimacy seeks.

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Legitimacy of Executive Power Shifts in Times of Crisis

Anna-Bettina Kaiser[*]

I. Introduction

In his famous essay "Legality and Legitimacy", *Carl Schmitt* asserted vehemently that he did not want to talk about crises: "There shall be no talk of 'crises' – be they of a biological, medical or economical nature, postwar-crises, crises of trust, crises of recovery, puberty crises, shrinkage crises or whatever."[1] Yet, talking about crises was precisely what he wanted to do – particularly about the one that occupied him the most: the crisis of parliamentarism. To this end, he famously contrasted "legality" and "legitimacy."

Today's task recalls this *Schmittian* project: Again, a crisis is occupying our minds – in what follows, I will address the government's handling of the COVID-19 pandemic in Germany. Again, parliament seems to be weakened – as illustrated by the assigned title of my text. And again, there is a question of legitimacy, or of legality and legitimation.

It makes sense therefore to take a step back yet again and to ask whether *Schmitt's* observations still carry explanatory weight today. In what follows,

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1 C Schmitt, *Legalität und Legitimität* (Duncker & Humblot, 2012 [1932]) 7 (author's translation).

I will first make a few introductory remarks on the three vital Ls: legality, legitimacy and legitimation (II.). I will then briefly recall *Schmitt's* ideas (III.), before turning to the central question whether it still has explanatory value. At first glance, one might think that it does hold value, and I will in fact show that, especially at the onset of the crisis, when we were witnessing a certain power shift towards the executive (IV.), parts of German constitutional-law scholarship again took up Schmitt's narrative (V.). A closer look, however, reveals that the talk of a simple power shift towards the executive proves much too one-dimensional. What we can instead observe is three over-stretched powers that wrestle with their respective positions during the crisis to try and prove their problem-solving capacities (VI. and VII.).

II. The Three Ls

Legitimacy is a dark concept. We do not really know what it means precisely. While "legality" and "legitimation" became legal terms (in German doctrine), "legitimacy" as the third element in the group remained neglected and was later left to the political sciences and political theory. Yet, it remains a concept of constitutional theory.

The political sciences and political theory, too, were unable to find a common usage. I will therefore follow *Hasso Hofmann*,[2] who distinguishes a variety of different concepts of legitimacy: in social psychology (*Max Weber*), in constitutional theory (legitimizing the constitution), in discourse theory (*Jürgen Habermas* describes legitimacy as the acceptability of a political order) and elsewhere.

It was famously *Carl Schmitt* who pitted the two concepts of legality and legitimacy against each other in the final years of the Weimar Republic. I am turning now to his use of the terms.

2 H Hofmann, 'Legalität, Legitimität', in Ritter, Gründer and Gabriel (eds), *Historisches Wörterbuch der Philosophie online* (Schwabe AG, 1980), https://www.schwabeonline.ch/schwabe-xaveropp/elibrary/start.xav?start=%2F%2F*%5B%40attr_id%3D%27verw.legalitat.legitimitat%27%20and%20%40outline_id%3D%27hwph_verw.legalitat.legitimitat%27%5D <02/2024>.

III. Schmitt's *Narrative*

It is 1932, towards the end of the Weimar Republic. *Carl Schmitt*, the central, vicious, influential critic of liberal democracy, tells us a story of the good old days of the 19th century, where the legislative state still ensured a permanent, stable legal order and the resulting *legality* itself provided *legitimacy*. For *Schmitt*, however, this *coincidence* of legality and legitimacy is a phenomenon of the *past*: For a long time now, it had been other powers that had intervened into the legislative state: extraordinary legislators, in particular the President of the Reich, who, with his power to issue emergency decrees under Article 48 (2) of the Weimar Constitution, which had not originally been provided for by the constitution,[3] had become a substitute legislator.

Carl Schmitt attacks this practice, but also his colleagues:[4] "Incidentally, one […] does not seem to find anything conspicuous in the fact that an extraordinary legislator who creates law enters into the legality system of the Constitution of the Reich without the constitutional quality of his orders being in any way different from the law of the ordinary Reich legislator" (71). Legality and legitimacy diverged (14). "Instead, the President of the Reich receives legitimacy through the plebiscitary election of the people" (92 et seq.), i.e., the "only recognized system of justification that remains" (93).

IV. Measures to Control the Pandemic

Especially at the beginning of the pandemic, parts of the constitutional-law scholarship had the impression of witnessing a development that was eerily similar to Schmitt's description of Weimar. It was the confluence of six central components that gave rise to this concern and created a picture in which parliament was the big loser of the pandemic:

1. Firstly, the creation of a new state of health emergency, the epidemic situation of national scope, in § 5 for the Infection Protection Act, the proclamation of which indeed had extraordinary legal consequences

3 AB Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck, 2020) 136 ff.

4 All quotations taken from C Schmitt, *Legalität und Legitimität* (Duncker & Humblot, 2012).

(and still has, § 28a Infection Protection Act), in particular a shift of powers to the Federal Minister of Health. Ultimately, we are indeed dealing with a new state of emergency. One can try to separate a health emergency terminologically from a state of exception, but such attempts will necessarily fail. And, what is more, in a proposal of § 5 of the Infection Protection Act by the Federal Government, it was the executive that was supposed to have the power to declare it.[5]

The powers that accrued to the Federal Minister of Health with the amendment of the Act of March 2020 were arguably unconstitutional in two respects.[6] On the one hand, he was given the power to amend numerous, more detailed Acts of Parliament, which seems hardly conceivable in terms of the hierarchy of norms.[7] On the other hand, he was supposed to be able to issue orders, e.g., to companies, which raised the question of compatibility with Art. 83 et seq. of the Basic Law, i.e., the extent of the federal administrative competence.[8]

2. Secondly, the then Bundestag President, Wolfgang Schäuble, demanded the creation of an emergency parliament beyond Art. 53a of the Basic Law (Joint Committee), which could have been used during the pandemic. Had this emergency parliament been set up, this would have easily entailed a shift of competence, and thus power, away from parliament.[9]

5 Formulierungshilfe für die Koalitionsfraktionen für einen aus der Mitte des Deutschen Bundestages einzubringenden Entwurf eines Gesetzes zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite (23 March 2020), https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Gesetze_und_Verordnungen/GuV/S/Entwurf_Gesetz_zum_Schutz_der_Bevoelkerung_bei_einer_epidemischen_Lage_von_nationaler_Tragweite.pdf <2/2024>.

6 J Kersten/S Rixen, *Der Verfassungsstaat in der Corona-Krise* (C.H. Beck, 2022) 324 ff.; T Mayen, 'Der verordnete Ausnahmezustand. Zur Verfassungsmäßigkeit der Befugnisse des Bundesministeriums für Gesundheit nach § 5 IfSG' (2020) *Neue Zeitschrift für Verwaltungsrecht* 828, 832 f.

7 H Heinig et al., 'Why Constitution Matters – Verfassungsrechtswissenschaft in Zeiten der Corona-Krise' (2020) 75 *JuristenZeitung* 861, 867 f.; K Gärditz/M Kamil Abdulsalam, 'Rechtsverordnungen als Instrument der Epidemie-Bekämpfung' (2020) 7 *Zeitschrift für das Gesamte Sicherheitsrecht* 108, 114 f.

8 C Waldhoff, 'Der Bundesstaat in der Pandemie' (2021) *Neue Juristische Wochenschrift* 2772, 2773.

9 P Austermann/C Waldhoff, *Parlamentsrecht* (C.F. Müller, 2020) para. 630; see also the criticism by C Möllers, 'Über den Schutz der Parlamente vor sich selbst in der Krise' (20 March 2020) *Verfassungsblog*, https://verfassungsblog.de/ueber-den-schutz-der-parlamente-vor-sich-selbst-in-der-krise/ <2/2024>.

3. The third component regards the COVID-19 regulation regime of the *Länder*: The greatest restrictions of fundamental rights in the history of the Federal Republic of Germany were brought about by way of regulations, despite the fact that, due to Germany's history, regulations are only possible under the Basic Law within a very narrow framework of restrictions. In particular, the so-called essentiality theory (*Wesentlichkeitstheorie*) of the Federal Constitutional Court requires that the restrictions on fundamental rights that are "essential" to these rights must be decided upon by the parliamentary legislature.[10]
4. The restrictions on fundamental rights, which in some cases clearly exceeded the limits of constitutionality, are of central importance: blanket bans on assemblies in all federal states with the exception of Bremen;[11] dying people in hospitals who were not allowed to be visited;[12] bans on visits to retirement homes; closing churches, but opening DIY stores, in the first lockdown, that is, to my mind, decisions about what was allowed to remain open that were contrary to constitutional rights – all based on regulations.
5. For many months, there was no suitable authorising basis for these regulations. That only came with § 28a of the Infection Protection Act in the autumn of 2020. However, this § 28a was a rushed job and had technical deficiencies[13] – the Bundestag had hesitated too long, hoping that the pandemic would go away.
6. The "Conference of Minister Presidents", plus the Federal Chancellor, developed as a new format – this, too, certainly served to strengthen the executive. Many observers got the impression that the actual decisions were made in this body, effectively side-lining the state legislatures.[14]

10 BVerfGE 150, 1, para. 191. Regarding Covid-19, see BVerwGE 177, 60, para. 35 ff.; BVerwG 16.5.2023 – 3 CN 6/22, para. 22 ff.

11 J Kersten/S Rixen, *Der Verfassungsstaat in der Corona-Krise* (C.H. Beck, 2022) 350 ff.; B Völzmann 'Versammlungsfreiheit in Zeiten von Pandemien' (2020) 77 *Die öffentliche Verwaltung* 893, 893 ff.

12 AK Mangold, 'Relationale Freiheit. Grundrechte in der Pandemie' (2021) 80 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 7, 27.

13 For an overview of the criticism see T Kingreen, 'Der demokratische Rechtsstaat in der Corona-Pandemie' (2021) *Neue Juristische Wochenschrift* 2766, 2767 ff.

14 C Waldhoff, 'Der Bundesstaat in der Pandemie' (2021) *Neue Juristische Wochenschrift* 2772, 2774 ff.

V. *Through* Schmitt's *Eyes*

The elements described do indeed point, at least in part, to an alarming shift of power in favour of the executive and at the expense of parliament, or parliaments. And so, it is not surprising that large parts of constitutional-law scholarship strongly – *and often rightly* – criticise the aforementioned pandemic control measures. *I expressly do not wish to belittle these problems.*

However, over time, a grand narrative emerged that was alarmingly similar to *Schmitt's*: The Bundestag and the parliaments in the *Länder* had failed in what was perhaps the greatest crisis of the Federal Republic.[15] The judiciary, too, had failed miserably, so the narrative ran, by uncritically waving through all measures to control the pandemic.[16] The Federal Constitutional Court had disappointed as a control authority;[17] while generally active, its silence during the pandemic appeared conspicuous.

The winner of this power shift was, according to the narrative, the executive, first in the form of the Federal Minister of Health, who created a kind of "emergency regulation authorisation" for himself via § 5 of the Infection Protection Act that appeared reminiscent of Art. 48 of the Weimar Reich Constitution; and then in the form of the state executives, who had largely issued the COVID-19 regulations.[18]

As with *Schmitt*, this diagnosed a major crisis of the legislative state and branded the executive branch as a legislator extraordinaire. The idea of an "executive unbound" – the diagnosis about the US system by *Posner* and *Vermeule* – was thus transferred to Germany.[19]

Admittedly, contrary to Schmitt, the question of legitimacy was rarely raised explicitly: The focus was rather on the lack of *legality* of the measures in question – for example, in the original version of § 5 of the Infection Pro-

15 W Merkel, 'Who Governs in Deep Crises? The Case of Germany' (2020) 7 *Democratic Theory* 1.

16 J Lindner, 'Justiz auf Linie' (28 January 2021) *Die Zeit*, https://www.zeit.de/2021/05/corona-politik-verwaltungsgericht-grundrecht-lockdown-pandemiebekaempfung <2/2024>.

17 O Lepsius, 'Einstweiliger Grundrechtsschutz nach Maßgabe des Gesetzes. Eine Analyse des Beschlusses des BVerfG vom 5.5.2021 zum Ausgangsverbot der „Bundesnotbremse"' (2021) 60 *Der Staat* 609.

18 T Kingreen, 'Eine solche Hindenburg-Klausel' (26 March 2020) *Süddeutsche Zeitung*, https://www.uni-regensburg.de/assets/rechtswissenschaft/oeffentliches-recht/kingreen/kingreensz.pdf <2/2024>.

19 See the evidence given by A Nußberger, 'Regieren' (2022) 81 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 7, 42 f.

tection Act and in the cases of the restrictions on fundamental rights and of the insufficient statutory authorisation – and on the lower democratic legitimacy of the executive legislator in comparison to parliaments. But the question of legitimacy kept lurking in the background – as the topic of this volume demonstrates.

VI. Not a Power Shift, but Overstretched Powers

What is to be made of this grand narrative? Like all grand narratives, it captures important aspects – while other aspects that do not conform to it fall by the wayside. At this point, therefore, I would like to offer a *counternarrative* that adds a few shades of grey to the picture painted so far, by drawing attention to problems that have hitherto gone almost unnoticed. To this end, I would like to look at the legislative and judicial branches and their role in the pandemic, and then conclude by comparing the resulting picture with that of the grand *Schmittian* narrative. In doing so – and this is important to me –, it is explicitly not my intention to play down the legal problems that I have outlined so far. Some of the mistakes that were made are unforgivable, especially the bans on visiting terminally ill patients,[20] and also the more or less blanket bans on assemblies in place during the first lockdown. My only concern is to put into perspective the black-and-white that is heard all too often. More ambivalence. More grey.

1. The Legislature

With regard to the Bundestag and the state parliaments, I would like to highlight four points:

1. I start with the smallest argument: Many of the fears have not come true at all:
   a) Under the Infection Protection Act, the epidemic situation of national importance is proclaimed by the Bundestag, not by the executive; the draft bill that had provided otherwise precisely *did not* become law.

20 AK Mangold, 'Relationale Freiheit. Grundrechte in der Pandemie' (2021) 80 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 7, 27.

b) The same can be said about the emergency parliament: There was *no* corresponding amendment to the Basic Law.
And I would just like to add that, ever since the Basic Law came into force, there has been a discussion as to whether there is a loophole in the Basic Law if the Bundestag should ever cease to function outside of a case of defence.[21] It is true that the Basic Law, both in its rules which already existed before the emergency constitution and then through the insertion of the emergency constitution from 1968 itself, provides for many exceptional situations. But what is not provided for is the case of parliament becoming the victim of a terrorist attack, for example. Schäuble's proposal thus took up an old debate from the constitutional-law literature – a debate that merely flared up again during the pandemic.

c) The concerns regarding the "Conference of Minister Presidents plus Chancellor" format in place at the time also seem to me to be at least overstated, for several reasons:

– It is true that the Basic Law does not provide for any such body and that it runs the risk of weakening the state parliaments.
– However, it was clear to all actors at all times that the body's decisions were not legally binding, despite a great deal of de-facto pressure on the *Länder* to adhere to the format's results.
– This point regarding the lack of any legally binding effect is not just theoretical. In fact, the longer the pandemic lasted, the more the *Länder* (such as, prominently, the Saarland) started to break ranks, which ultimately led to the so-called federal emergency brake (to which I will turn in a moment).
– And finally, and as regrettable as one may find it, we know from organisational sociology that informal formats always emerge upstream of legal procedures.[22] From the academic system, for example, we could cite the assembly of professors, which is foreign to the, e.g., Berlin Higher Education Act; rather, the Act provides for the Departmental Council or Faculty Council as the central body at faculty level (§ 70), which are not purely professorial bodies.

21 AB Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck, 2020) 153, 342 f.
22 Regarding the many semiformal and informal bodies of Germany's federalism, see, famously, P Katzenstein, *Policy and Politics in West Germany* (Temple University Press, 1987) 45 ff.

- My argument is not that we should not take competences seriously. My point is simply to take a more realistic look at constitutional practice, which will never be without prior informal agreements.

2. As mentioned, with § 28a of the Infection Protection Act, the Bundestag finally and belatedly created, in the autumn of 2020, a suitable authorising basis for the numerous restrictions on fundamental rights by the *Länder* regulations. The courts had called for such an authorising basis and clearly communicated in their decisions that they would no longer accept the previous legal situation without a more specific basis clearly laying out the possible encroachments on fundamental rights.[23] Rightly so. Parliament had had plenty of time indeed to adjust to the new situation.

   At the same time, however, the then enacted § 28a shows the whole ambivalence of such a provision. For those who no longer have § 28a in mind: It allows, for example, the prohibition or restriction of cultural events, as well as the prohibition or restriction of the operation of catering establishments, the closure or restriction of businesses, trades, retail and wholesale trade etc.

   But to what extent is such a provision ambivalent, given that it was required by law? I am alluding to the old dilemma of legalising exceptional situations: The danger of such an emergency provision is always that it will gradually bleed into the law of the normal times. This phenomenon can be observed particularly well in the French *état d'urgence*, the state of urgency. It was first declared in the wake of the terrorist attacks in Paris in 2015 and then repeatedly extended. Under President *Emmanuel Macron*, this state of emergency was finally ended – but not without first transferring the relevant provisions into normal law. The emergency law became the law of the normal situation.[24]

   However, precisely because such a normalisation is a well-known phenomenon of emergency law and was also prominently put forward as a counter-argument in the discussion on the emergency constitution, the hesitation on the part of the Bundestag can perhaps also be explained by an at least *implicit* knowledge of the ambivalence of such a provision.

   There is another observation that points in the same direction: the *Querdenker* movement (which mobilised against the COVID-19 measures)

23 Bayerischer Verwaltungsgerichtshof 27.4.2020 – 20 NE 20.793, *juris*, para. 45; Verwaltungsgerichtshof Baden-Württemberg 9.4.2020 – 1 S 925/20, *juris*, para. 37 ff.

24 Cf. AB Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck, 2020) 189 ff.

really only sprung up with § 28a InfSG. Thus, of all things, the provision that was necessary for rule of law and democracy reasons became the rallying point for a movement that questions the German Federal Republican system.

3. The central point, however, seems to me the following: The story of the abdication of parliaments is a fairy-tale spread, for example, by the political scientist Wolfgang Merkel. In 2020, he wrote in the journal *Democratic Theory*: "The parliament has fallen to the status of a rubber-stamping institution."[25]

   By now, however, quantitative evaluations of parliamentary activities during COVID-19 are available. In this respect, I refer to the results of the political scientist *Sabine Kropp* and her team from Free University Berlin. They analysed the work of *Länder* parliaments which had been accused of the same hesitancy as the Bundestag.[26] The results are astounding. "Based on the stenographic minutes of the plenary sessions in the 16 *Länder* parliaments, all proceedings with a direct COVID-19 connection that were debated there between 1 February 2020 and the elections to the German Bundestag on 26 September 2021 were integrated into a data set."[27] How often did the state parliaments deal directly with the pandemic, be it via legislative activity, parliamentary question procedures, or other avenues? The result is the figure of 2,677 parliamentary procedures that make direct reference to COVID-19. Kropp sums up: "The state parliaments and their deputies have fulfilled their functions during the pandemic."[28] There is no question of rubber-stamping institutions.

   The political scientist *Sven Siefken* from the University of Halle studied the Bundestag itself and came to comparable conclusions. His answer to why the work of the Bundestag in the pandemic was often perceived as so weak is that the Bundestag is traditionally a "working parliament",

25 W Merkel, 'Who Governs in Deep Crises? The Case of Germany' (2020) 7 *Democratic Theory* 1, 4.

26 S Kropp et al., 'Landesparlamente in der COVID-19-Krise' (2022) *Berlin University Alliance Policy Brief* 1, https://www.berlin-university-alliance.de/commitments/knowledge-exchange/_media/policy-brief-landesparlamente.pdf <2/2024>.

27 S Kropp et al., 'Landesparlamente in der COVID-19-Krise' (2022) *Berlin University Alliance Policy Brief* 1, 2 (author's translation), https://www.berlin-university-alliance.de/commitments/knowledge-exchange/_media/policy-brief-landesparlamente.pdf <2/2024>.

28 *Ibid.*

not a "speaking parliament", and had *sold* itself particularly badly in the pandemic – but had not *worked* particularly badly.[29]

4. In April 2021, the federal government finally decided on uniform federal provisions with the so-called federal emergency brake (*Bundesnotbremse*) and stipulated the measures themselves, dependent on certain infection numbers, in § 28b Infection Protection Act (in its version at the time).

   Previously, individual states such as the Saarland (see above) had not adhered to the informal agreements of the Conference of Minister Presidents and the Federal Chancellor. But now, with the uniform federal provision, the excitement was particularly great. People did not celebrate a shift of power back to parliament, but complained – not at all unjustifiably, but nevertheless I would like to make the point – about the self-executing character of the provision and the – at least alleged[30] – deterioration of legal protections. Now, suddenly, the advantages of the old COVID-19 regulation regime were recognized, which had at least made it possible to attack the regulations by way of interim injunctions via § 47 VI *Verwaltungsgerichtsordnung*, at least in many *Länder*.

   And what do the critical voices of constitutional scholarship say, looking through *Schmitt's* eyes? They are now suddenly warning against "parliamentary absolutism",[31] forgetting that it was they themselves who had resolutely advocated the primacy of parliament.

2. The Judiciary

This brings me to the judiciary. As already indicated, the judiciary has been berated repeatedly over the course of the pandemic for being too uncritical.

First, it should be noted: According to the *Juris* database, the administrative courts have handed down several thousand decisions that make

29 ST Siefken, 'The Bundestag in the Pandemic Year 2020/21 – Continuity and Challenges in the Covid-19 Crisis' (2023) 32 *German Politics* 1, 16 f.

30 On procedural means for legal protection against federal regulations, see BVerwGE 111, 276; BVerwGE 166, 265, para. 22.

31 O Lepsius, 'Der Rechtsstaat wird umgebaut' (10 December 2021) *Frankfurter Allgemeine Zeitung*, https://www.faz.net/aktuell/feuilleton/corona-notbremse-entscheidung-des-bundesverfassungsgerichts-17676024.html <2/2024>.

direct reference to COVID-19, although the exact number is unclear, as there is no obligation to enter decisions into the database.[32]

And without question, among these decisions were grave mistakes. Just think of an early decision of the Gießen Administrative Court from the spring of 2020. Several assemblies were to take place in Gießen on various dates in April 2020, with approximately 30 (!) participants expected. The organisers had prepared hygiene measures and appointed stewards to ensure that the social-distancing rules in place would be complied with. Nevertheless, the city of Gießen prohibited these assemblies, referencing the Hessian COVID-19 regulations in force at the time.[33] In the end, it was the Federal Constitutional Court that ruled that the ban had violated the protesters' freedom of assembly and that interpreted the Hessian COVID-19 regulations more leniently to make them conform with the constitution.[34]

Incidentally, the principle of proportionality has proven to be a major problem in many administrative-court decisions. I have already dealt with the limits of the principle in my monograph on emergency constitutional law,[35] and I think that the pandemic has confirmed my observations. At least two problems are virulent. The first could be called the knowledge problem. On the first two levels of the proportionality test, suitability and necessity, the courts must ask themselves whether certain pandemic-control measures are *actually* suitable, for example, to prevent infections and thus protect life, and whether less stringent, but equally effective, means are not apparent. In both these assessments, the legislature and probably also the executive legislator enjoy a certain level of discretion.

To answer these questions, the courts had to rely on outside expertise. Whether curfews were suitable, what effect FFP2 masks had or what dangers come from (formerly) unvaccinated schoolchildren had to be assessed through outside expertise. And since there were divergent opinions on many of these questions, also among experts, the courts had no choice but to rely on the presentation of the available knowledge by the Federal Disease Prevention Agency, the Robert Koch Institute, which continuously

32 Early on, J Kruse/C Langner, 'Covid-19 vor Gericht: Eine quantitative Auswertung der verwaltungsgerichtlichen Judikatur' (2021) *Neue Juristische Wochenschrift* 3707 ff., analysed more than 5000 decisions.

33 Verwaltungsgericht Gießen 9.4.2020 – 4 L 1479/20.GI, *BeckRS 2020,* 5767, para 3 ff.

34 BVerfG (2020) *Neue Juristische Wochenschrift* 1426. On this, see M Hong, 'Coronaresistenz der Versammlungsfreiheit?' (17 April 2020) *Verfassungsblog*, https://verfassungsblog.de/coronaresistenz-der-versammlungsfreiheit <2/2024>.

35 AB Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck, 2020) 232 ff.

put the various expert opinions in relation to each other,[36] that is, the same knowledge that was also available to the other two powers. The courts did not and do not have superior knowledge.

In addition, there is a balancing problem at the level of proportionality *sensu stricto*. The more important the goods to be protected are, the more intensive the encroachment on fundamental rights can be without becoming disproportionate. As a reminder: According to the Robert Koch Institute, 172,215 people had died of or with Covid in Germany by 19 April 2023.[37]

Therefore, in my view, the accusation that the courts have not been strict enough is unfounded.[38] *What is true, however, is that the courts are only as good as their standards.*

The courts have also seen this problem and probably also for this reason strengthened the principle of equal protection as an alternative standard. In this way, the principle of equal protection has acquired considerable significance in the review of pandemic-control measures.[39]

In some cases, attempts have been made by the judiciary to control the measures more strictly overall, possibly to counter the accusation of laxity. But such attempts have sometimes been accompanied by major methodological errors.

For example, some courts, such as the Constitutional Court of the Saarland, relied on individual studies instead of meta-studies made available by the Robert Koch Institute.[40] Often, however, these individual studies were not sufficiently valid.

Another example was the voiding of the rule in the retail sector that only vaccinated or recovered persons could access shops by the Appellate Administrative Court of Lower Saxony in December 2021.[41] This decision attracted a lot of attention at the time. Here are some background details to the case: The legislator had provided, for proportionality reasons, for ex-

36 HH Trute, 'Ungewissheit in der Pandemie als Herausforderung' (2020) 7 *Zeitschrift für das Gesamte Sicherheitsrecht* 93, 96 f.

37 See Statista, 'Todesfälle im Zusammenhang mit dem Coronavirus (COVID-19) in Deutschland nach Alter', https://de.statista.com/statistik/daten/studie/1104173/umfrage/todesfaelle-aufgrund-des-coronavirus-in-deutschland-nach-geschlecht/ <2/2024>.

38 See the early analysis, pointing in the same direction, by A Klafki, 'Kontingenz des Rechts in der Krise' (2021) 69 *Jahrbuch des öffentlichen Rechts der Gegenwart* 583.

39 A Edenharter, 'Grundrechtseinschränkungen in Zeiten der Corona-Pandemie' (2021) 69 *Jahrbuch des öffentlichen Rechts der Gegenwart* 555, 578.

40 Verfassungsgerichtshof des Saarlandes 28.4.2020 – Lv 7/20, *juris*, para 36.

41 Oberverwaltungsgericht Niedersachsen (2022) *Neue Juristische Wochenschrift* 256.

emptions from the rule for unvaccinated people; indeed, the legislator was not allowed to exclude the unvaccinated from access to grocery stores in particular. The COVID-19 Regulation was therefore unquestionably "right" to include this exception, which the Court itself also assumed (para. 33).

This exception therefore existed precisely in order to take account of the requirements of proportionality. Strangely enough, however, this is precisely where the court intervened. At the level of suitability, it criticized a reduced appropriateness due to the exceptions mentioned, in order finally to use the argument of reduced appropriateness as a decisive factor at the proportionality level *sensu stricto*, and in order to find the regulation disproportionate (para. 50). In other words: In the Senate's reasoning, an exception that had to be introduced for reasons of proportionality leads to the disproportionality of the 2G rule. Proportionality then results – via the intermediate step of reduced suitability – in disproportionality. This cannot be right.[42]

I have singled out this ruling from a multitude of decisions. It is interesting because it stands for the attempt of an Appellate Administrative Court to be critical, perhaps particularly critical, and at the same time illustrates that this, too, can create problems.

3. The Executive

My final reflections concern the executive. First of all, we have to speak of the executive in the plural; it was precisely during the COVID-19 pandemic that the effectiveness of a vertical separation of powers came to the fore. We were not dealing with one leader who ruled the country, or with Viktor Orbán, who in fact used the pandemic to introduce a kind of enabling legislation and further transform the Hungarian system towards an autocracy,[43] but with 16 *Länder* governments that at least made every effort to find appropriate solutions.

After all that has been said, the overall assessment of the pandemic-control measures appears to be much more nuanced than is often assumed.

42 See in more detail AB Kaiser, 'Vorläufiger Rechtsschutz gegen Corona-Verordnung mit 2G-Regelung im Einzelhandel' (2022) 64 *Juristische Schulung* 382, 383 f.

43 See G Halmai/G Mészáros/KL Scheppele, 'From Emergency to Disaster' (30 May 2020), *Verfassungsblog*, https://verfassungsblog.de/from-emergency-to-disaster/ <2/2024>.

And that has been my point: not to negate the problems that actually occurred, but only to take the other side into consideration as well.

But if we now look ahead, what is there to consider?

VII. Resilience in the Administrative State

My last point regards the resilience in the administrative state, because I wish to point out problems that have arisen at the *lower* levels in the administration, and which have been lost sight of in the grand narrative.

- One thinks of the overburdened health offices that gave up contact-tracing at some point.
- In Berlin, for example, civil servants were no longer able to enforce so-called distancing orders (i.e., quarantines) in a legally correct manner. To take an example from my own experience: In a private day-care centre, it was the day-care centre *itself* that messaged an administrative order to the parents.[44] Of course, this was highly problematic in terms of the rule of law: no legal remedy notice, vagueness, no legal basis, etc. And this was not an isolated case, but the new norm.
- One also thinks of the regulatory chaos; for instance, complete confusion over COVID regulations, some of which should have been implemented immediately, but the administration was not in a position to do so at all.
- One thinks of lingering problems of non-knowledge: The German Medical Association warned of a "data blindness" (*Datenblindflug*) with regard to the autumn and winter of 2022;[45] we knew little about the immunity status of the population, about the occupied intensive-care beds and about the actual number of COVID infections, because people no longer had PCR tests done, etc.
- Consider the example from the "Federal Emergency Brake Decision II":[46] School administrations often failed to organise online teaching and limited themselves to analogue homework. On the one hand, this may have been due to data-protection problems (can Zoom legally be

44 See, on such a case, V Schürmann/R Hensel, 'Schule unter Quarantäne' (2021) 64 *Juristische Schulung* 970.

45 See Deutsches Ärzteblatt, 'Bundesärztekammer warnt vor 'Datenblindflug' im Coronaherbst', https://www.aerzteblatt.de/nachrichten/134955/Bundesaerztekammer-warnt-vor-Datenblindflug-im-Coronaherbst <2/2024>.

46 BVerfGE 159, 355.

used by public authorities in Germany?), but often also due to a lack of willingness on the part of those responsible.
- Final example: During the summer of 2022, an elderly lady collapsed next to me in Berlin Mitte. I called the Berlin fire brigade for the first time ever, but to my great surprise I got put on hold and had to listen to the announcement: "We are currently in a 'state of emergency'. Our entire staff is currently busy. Please consider whether your request is really important."

We do not see an energetic administration here, an overreaching executive that has accumulated broad powers, but a completely overstretched second power that is lacking personnel and equipment.[47] Yet we should pay attention to that – a grand narrative that is interested in the big questions, but then partially overlooks them, misses these points because it is not interested in what is happening on the ground.

Of course, in sociological terms, my examples have only anecdotal value, but I suspect you will agree that the examples I have chosen are indicative of the overall picture after all. My thesis is therefore: A resilient crisis-management system needs a high-performing administration, especially at the lowest levels. Even a perfect COVID Regulation is of no use if it cannot be implemented on the ground.

VIII. Conclusion

To sum up, we were able to observe three powers in the pandemic that were strongly challenged and in part overstretched. In a way, this should not surprise us, because otherwise we would not have been able to speak of a crisis at all.

And what does that mean in terms of legitimacy? The "acceptability of the government" is certainly still given, but legitimacy falters *when basic administration is no longer ensured*. The populists also pick up on this. Let us not leave the field to the populists. What COVID-19 teaches us is that it is crucial to create a resilient infrastructure, above all in terms of staff, so that we are prepared for future crises.

47 Without denying the distinction between the gubernative and the executive.

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Effectiveness and Output Legitimacy in Crisis

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> *"Whatever other values a constitutional system might be expected to realize, it must structure the exercise of public power so as to ensure the safety and security of its citizens, resolve conflicts, facilitate material prosperity, collect public revenue, participate in the international system, and fulfil the greater and smaller tasks that define a polity. In short, the constitution's authority at least partially rests on enabling effective government. Although the challenge of constitutional rule is often framed as one of calibrating the demands of individual liberty and popular sovereignty, it is more accurate to speak of a three-way balance between the principles of individual and collective autonomy and effective government."*[1]

Output legitimacy used to play an important part in our thinking about the legitimacy of political authority. Orientation towards public welfare was key to distinguishing legitimate rulers from tyrants in medieval and early-modern writings. Such ideas did not disappear from public law with the advent of democracy, as encapsulated in Abraham Lincoln's famous

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1 T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press, 2016) 41-42.

description of democracy as 'government of the people, by the people, for the people'.[2]

However, it is not clear what, if any, role the idea of 'government for the people' – or, in Isiksel's terms, effective government oriented towards providing things such as safety or prosperity – can play in democratic constitutionalism today. In scholarly writings, perhaps more so in Germany than elsewhere, there is a growing trend of thinking of (normative) legitimacy and legality as the same thing and, accordingly, there is no real need to think about the place of legitimacy in public law. This particularly affects the concept of output legitimacy, as well as the related idea of effectiveness, previously seen to be a central source of governmental legitimacy.

In this paper, I explore the role of output legitimacy and effectiveness arguments through the prism of debates about constitutional theory and with a particular emphasis on times of crisis where ideas of output legitimacy are usually especially prominent. I argue that the standard view today – that legitimacy is legality – is essentially correct, but that this leaves open the question how to address arguments about effectiveness, which I consider in three distinct forms: as arguments about implied powers, arguments from failure, and emergency arguments, all of which draw on ideas of necessity– and thus arguments about enabling effective government – in order to justify legal changes. I argue that these examples address the importance of considerations of effectiveness in public law as well as its dangers, and suggest something of a middle path when it comes to effectiveness as a public law value.

I. Staking Out the Problem

There is a long tradition of viewing output as central to the legitimacy of any government, and sometimes to its legality. For example, in medieval legal thinking, legitimate government was typically understood to be legal government, in the absence of a clear and comprehensive written constitution. Both input and output factors were thus relevant to assessing legitimacy and legality, such as the monarch's (hereditary) claim to his

2 A Lincoln, *The Gettysburg Address* (19 November 1863), The Avalon Project, Yale Law School, available at https://avalon.law.yale.edu/19th_century/gettyb.asp, last visited Sept. 1, 2023.

title, as well as his commitment to public welfare.[3] Some early-modern writers such as John Locke argued that a monarch who exercised his authority in a tyrannical fashion could be overthrown.[4] However, with the rise of modern constitutional states, the relationship between legality and legitimacy became more complicated. Famously, Max Weber theorized and distinguished between different forms of legitimate authority – charismatic, traditional and rational-legal –, but in doing so established legitimacy as a sociological rather than a normative category.[5] Treating the rational-legal form of authority as only one particular kind of legitimate government, Weber moreover severed the link between legitimacy and legality. In other words: Legitimate authority in sociological terms did not necessarily have to be legal. Carl Schmitt further built on Weber's distinction by juxtaposing legality as the central principle of Weimar's parliamentary democracy to its plebiscitarian elements, which he associated with legitimacy.[6]

In contemporary theories of democratic constitutionalism, the place of legitimacy, sometimes called legitimation,[7] and, in particular, of output legitimacy as a normative concept is often unclear.

Starting from the premise that constitutions both establish and constrain state power, it seems that there can be no (normative concept of) legitimacy beyond the respective constitution. This at least represents the standard position in contemporary German constitutional theory, which contrasts with traditional state-centered constitutional writings of Weimar and post-Weimar German writers, who frequently treated the state and its interests/survival as an obvious normative value of its own and as an overarching purpose of any theories of legitimacy, without recourse to specific constitutional text, and indeed preceding the latter.[8] Thomas Wischmeyer presents a convincing version of the contemporary argument in his mono-

3 W Reese-Schäfer, 'Legitimität staatlicher Herrschaft – die historische Perspektive' in A Thiele (ed.), *Legitimität in unsicheren Zeiten. Der demokratische Verfassungsstaat in der Krise?* (Mohr Siebeck, 2019)21-38.

4 J Locke, *Two Treatises of Government* (Yale University Press, 2003)191-192, § 207.

5 M Weber, *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie. Studienausgabe*. (, Mohr Siebeck, 1990) Kap. III, 1, § 2, 124.

6 C Schmitt, *Legalität und Legitimität* (Duncker & Humblot, 2012).

7 C Möllers, *Gewaltengliederung* (Mohr Siebeck, 2005) 11.

8 For the broader history of German "Staatsrechtslehre", see C Möllers, *Der vermisste Leviathan: Staatstheorie in der Bundesrepublik* (Suhrkamp, 2008); also, F Guenther (ed.), *Denken vom Staat her: Die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration 1949-1970* (Oldenbourg Wissenschaftsverlag, 2004).

graph on the role of purposes (*Zwecke*) in public law.[9] Dismissing traditional accounts, Wischmeyer argues that, in a constitutional democracy, there can be no purposes beyond those laid down in the constitution itself. In a democracy, citizens are free to make their own choices and decide which goals are worth pursuing within the respective constitutional framework.[10]

Christoph Möllers goes a step further and argues that output legitimacy has no place in constitutional theory. He argues that that questions of whether the parliament within a given society actually represents the will of the people or whether a given constitution will stabilize political order must remain outside of a legal theory of legitimation.[11] This is not to say, as Möllers explicitly clarifies, that lawyers cannot consider the consequences of state actions, but rather that those consequences themselves are only legally relevant insofar as they are themselves the product of democratic or rights-enforcing procedures rather than their precondition.[12] In other words, in a constitutional democracy, citizens realize their collective autonomy within democratic procedures, while rights protect their individual autonomy through individualized procedures; whereas whether they get rich or live in peace with each other while doing so is not relevant from the perspective of constitutional theory.

As a result, legitimacy in a constitutional democracy should be understood as being directed towards enabling individual and collective self-determination; there is no place for effectiveness considerations as a source of legitimacy of their own. Once again, it bears repeating that this is not an argument that outputs or goal mandated in the constitution itself may not be pursued, but rather an argument about constitutional legitimacy, or more specifically about the conditions under which we consider a constitutional democracy normatively legitimate as a matter of constitutional theory. If we follow Möllers, whether it enables effective government or not is not relevant in this regard. If we follow Isiksel, it is indeed relevant.

But Isiksel's argument, quoted above, really raises two distinct normative problems: The first is whether there can be recourse to considerations of (typically output) legitimacy that have no basis in the constitutional text. The second concerns the broader role of effectiveness arguments in consti-

9 T Wischmeyer, *Zwecke im Recht des Verfassungsstaates: Geschichte und Theorie einer juristischen Denkfigur* (Mohr Siebeck, 2015).

10 T Wischmeyer, *ibid,* 208.

11 C Möllers, *The Three Branches* (Oxford Unity Press, 2013) 53; C Möllers, *Gewaltengliederung* (Mohr Siebeck, 2005) 35.

12 C Möllers, *Gewaltengliederung* (Mohr Siebeck, 2005) 38.

tutional interpretation. In the next two sections of this chapter, I focus on these two problems.

II. Output Legitimacy and Legality

Isiksel's argument finds itself in a long tradition of constitutional theorists who have treated arguments about the need to protect certain vital state interests, such as security, as valid arguments as a matter of constitutional theory and constitutional law, sometimes independently of any basis in the constitutional text.

A good contemporary example is provided by Adrian Vermeule's recent theory of common-good constitutionalism. Vermeule argues that both progressive liberal theories of constitutionalism and originalist approaches are deeply flawed, albeit for different reasons.[13] If the search for original meaning is ultimately not possible and can lead to unconvincing results (such as the dismissal of the establishment of the US regulatory state), liberal theories prioritize individual self-determination with (in conservative eyes) unappealing results such as the creation of a right to same-sex marriage. Instead, Vermeule argues, US lawyers should look to classical theories of the public good to develop an account that roots individual freedom in a shared conception of (traditionally understood) public and social morality.[14] Though Vermeule believes that the framers of the US constitution shared a similar belief in a classical theory of the role of law as an instrument for public welfare, his argument does not hinge on any textual connection to the US constitution. Rather, he advocates an independent concept of law not tied to any particular textual reading of the US constitution. He views his account for this reason as partly Dworkinian in the sense of connecting law to public morality, albeit with a rather different understanding of morality than that advocated by Dworkin.[15]

Leaving aside the question whether or not we agree with Vermeule's conservative values, his account raises some interesting questions with regard to the broader relationship between legality and legitimacy today. For while Vermeule is not interested in making an interpretive argument in the strict sense, he is putting forward a normative account of law and

13 A Vermeule, *Common Good Constitutionalism* (Wiley & Sons, 2022), Introduction.
14 *Ibid.*
15 *Ibid,* 5 ff.

its function, which in turn informs his constitutional theory, and this raises the question whether legitimacy is something distinct from legality. The fact that Vermeule would possibly deny this reveals the murky terrain in which we are moving.

Consider as another example progressive theories of transformative constitutionalism which often stress certain substantive goals as key to the legitimacy of the constitution and the state itself, such ending or combatting poverty.

Both approaches clearly advocate the importance of certain outputs or values to constitutional theory and constitutional interpretation. We might even say that for both approaches a (differently defined) idea of the common good is central to the legitimacy of the respective constitutional democracy. Yet, while we are moving in murky terrain, transformative constitutionalism, at least in Klare's original version, understands itself as an interpretive account – it presents a specific and, Klare suggests, indeed the best reading of the South African constitution in its historical context.[16] This, to be sure, is not necessarily true for other proponents of transformative constitutionalism. For Klare, however, transformation did not represent a purpose external to the South African constitution, but rather one intrinsic to it. Is the same true for Vermeule's account? To me, it seems that the lack of a connection to any positive norms – a deliberate move by Vermeule – means that we are leaving the realm of what – normatively – constitutes constitutional theory as defined above, i.e., as a theory about a particular constitution. For while Vermeule presents a theory of law, it is in many ways not a theory about the US constitution, and I believe this is where we move from constitutional theory into the terrain of political theory.

Another way of making the same point is to say that Vermeule adopts an idea of a mainly output- oriented, i.e., welfare-oriented, concept of legitimacy that goes beyond the legal text, and thus legality, and stands in contrast to what I would characterize as being the more standard German view on this, which Friedrich Müller captures as follows:

> *"Legality is often associated with accordance with (statutory) law (...) Legitimacy is traditionally associated with supra-positive "values", such as the idea of law, to distinguish it from legality. This is, however, superfluous in modern constitutional states. Here, legitimacy is a term of positive law.*

16 K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

> *It expresses the statement that the results of legal action on the basis of the positive constitution conform to its central norms and structural principles and at the same time are open to an open legal debate about the sources and arguments for legitimacy.*"[17]

If we follow Müller, there is hence no room for a theory of output legitimacy going beyond those outputs explicitly set forth in the constitutional text. However, insofar as the constitution itself includes certain policy goals or values, in the form of a directive principle or by including explicit or implicit positive rights that enable individuals to put forward a constitutional argument demanding the state to act in a specific way, considerations of output matter, but not otherwise. Thus, from this perspective it does not necessarily follow that there cannot be an output-oriented source of legitimacy that supplements the two more standard ideas of individual and collective self-determination. For example, under a transformative constitution the need for social and political change may well constitute a source of constitutional legitimacy of its own that may have to be balanced with democracy and the need for individual rights protection, in contrast with Christoph Möllers' account.

This has broader implications for effectiveness arguments, which may thus be legitimate where they are directed towards effectively realizing the policies passed in democratic procedures or the more specific constitutional purposes of individual constitutions. However, there cannot then be a place for output legitimacy as such or, for that matter, for considerations of effectiveness decoupled from democratic procedures or constitutional norms.

That said, there will likely be room to argue which kinds of policy goals or values may count as constitutional. What drives a particular constitution, its central beliefs and historical background, will feed into constitutional theory from which we can develop a normative account that speaks to the legitimacy of this particular constitution, as well as constitutionalism more broadly. Obviously, not all elements of a given constitution are relevant to its legitimacy in the same way, and different constitutional theories – each put forward on the basis of a particular reading of the constitution – may be in conflict with each other and accordingly support different readings of legality, i.e., of specific constitutional norms in concrete cases.

17 F Müller, 'Demokratie in der Defensive: Funktionelle Abnutzung – soziale Exklusion – Globalisierung' (Duncker & Humblot, 2001) 197 *Schriften zur Rechtstheorie*, 61f., my translation.

So far, so good. The question is whether this is enough or whether there is a need for an account of output legitimacy that is independent of specific constitutions. In other words, we need to ask ourselves if this is a convincing understanding of the relationship of legality and legitimacy as a matter of comparative constitutional theory.

To answer that question, the first challenge must be to think about whether the account above is any different from a constitutional theory that includes an independent idea of output legitimacy in modern constitutional systems. In other words, we must ask when we would want to refer to considerations of output legitimacy that are not themselves part of the constitution or set forth as policy in a democratic procedure.

One thing seems clear: Effectiveness arguments are widespread. Consider, as an example, electoral-threshold rules which allow representatives of a given party list only to take their seats in parliament when that party has reached a certain threshold of votes in the respective elections. Such rules are typically justified as a means of enabling effective governance through coalition-building, which can become difficult if seats are split among too many parliamentary factions. Treating effectiveness as a source of legitimacy of its own might allow us, as Isiksel argues,[18] to conceptualize the conflicts more clearly that are raised by the respective cases with regard to the two standard sources of legitimacy: democracy and the protection of individual rights. In our example, therefore, democratic representation may be curtailed for the sake of effective government.

But while this is true, effectiveness is mostly of instrumental value insofar as standard examples are dealing with the pursuit of democratically chosen goals. In other words: It is a democratic choice, too, to avoid parliaments being split by too many factions, and thus we ultimately do not need to have recourse to extraconstitutional values or vital state interests beyond the constitution. Add to this that many modern constitutions include a great number of rights, as well as, increasingly, other values or directive principles that constitutional theorists can draw upon if they are interested in making an argument about the importance of certain (constitutionally mandated) outputs. As a result, the range of issues that can be understood as constitutional issues has dramatically expanded in the last few decades. Transformative constitutionalism presents one example here, but there is

18 T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press, 2016) 41-42.

also a broader trend towards what Mattias Kumm has called 'the total constitution', where all political questions and interests can ultimately be reframed in terms of constitutional norms and principles.[19]

For these reasons, therefore, it can seem that today there is simply no need for drawing on any extraconstitutional source of output legitimacy and that effectiveness therefore is today always and necessarily of instrumental value, but this is also sufficient if we are worried about outputs. In other words, it is not clear that the question has any real stakes anymore. But is this really true?

In constitutional practice, the standard scenario for output arguments in the form of necessity are situations of crisis and emergency. The question is thus whether, under those circumstances, we need to rely on an extraconstitutional concept of output legitimacy after all?

To address that question, it is useful to take a step back and try to adopt a broader historical perspective. If we do so, we will realize that, from a historical perspective, crises and their management are central to understanding the emergence of modern bureaucratic states and key to their sociological legitimacy. Karin Loevy and others have drawn attention to the role of the financial crisis in the creation of modern US administrative states.[20] Similarly, Saptarishi Bandopadhyay shows, in a series of case studies from India to France, how disaster management became a core function of 18th-century states whose rulers began to frame disasters and emergencies not as a part of fate or God's will, but rather as situations to be managed and dealt with by the state.[21] The ability to get things under control and reinstate 'normalcy' thus became essential to the legitimacy of the states in question, and central to their establishment of modern bureaucracies.

While these examples do not amount to a normative argument as such, they demonstrate that, in the cases mentioned, output legitimacy in a sociological sense assumes a key role. More than that, the examples also

19 M Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2019) 7 *German Law Journal* 341, 346; see also M Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2015) 65 Amer*ican Journal of Comparative Law* 527; for a recent critique of this approach, see also M Loughlin, *Against Constitutionalism* (Harvard University Press, 2022)132 ff.

20 K Loevy, 'Emergencies in Public Law: The Legal Politics of Containment' (2016) 1 *International Journal of Constutional Law* 300.

21 S Bandopadhyay, *All Is Well: Catastrophe and the Making of the Normal State* (Oxford University Press, 2022) 173.

raise questions whether an instrumental understanding of effectiveness is sufficient in grappling with these cases from a normative perspective. This is because we often shift to an executive mode of decision-making. What is key in justifying actions taken to deal with the crisis at hand is frequently not that this represents a democratic choice, but rather necessity: the need to deal with a certain problem. There is, of course, always the possibility of drawing on constitutional norms to justify the actions in question. Under what Kumm considers as examples of a 'total constitution', in the sense that nearly all questions can be framed as constitutional questions, there may be no need to refer to ideas of output legitimacy outside of the constitutional framework.

However, under more classical constitutional regimes such as the US, such constitutional framing may be more difficult, and therefore the need to refer to 'extraconstitutional' ideas of output legitimacy arises. The standard trope in this context is that the constitution is not designed as a "suicide pact",[22] but allows for self-defense measures, and illustrates that point. These are therefore the kind of situations where traditional theories of state prerogatives or the reference to vital interests in international law claim primary relevance because necessity arguments fall outside of the constitutional framework. In other words, our answer will depend on the broader constitutional regime in place and its respective ideas of constitutional legitimacy. However, note that, even where we can identify some directive principle or constitutional right warranting defense and protection of certain rights or goals, and thus making room for effectiveness arguments, any references to effectiveness come with their own problems.

III. Effectiveness and Its Place in Constitutional Theory

The only real question remaining, then, is whether it is important for reasons of analytical clarity to treat effective government as a source of legitimacy of its own, which is the other half of Isiksel's point.

Again, it bears repeating that effectiveness considerations are ubiquitous in constitutional law. In the context of proportionality analysis, now a standard tool of constitutional review in many places, we ask, for example, whether there is a rational connection between the governmental means

22 See, e.g., *Terminiello v Chicago*, 337 U. S. 1 [1949] (US Supreme Court) (dissenting opinion, Justice Robert H. Jackson).

chosen and the purpose of the respective measure. We also ask whether there are other less-restrictive means available to achieve the purpose in question. Both elements raise, in different ways, questions regarding effectiveness. But this is not all there is. Teleological or purposive interpretation is typically concerned with interpreting laws in a way that realizes their – objective or subjective – purpose. All of this is part of a constitutional lawyer's standard toolkit.

Effectiveness assumes an even greater role in the context of arguments not about rights, but about the scope of competences which arise particularly often in multilevel systems such as the EU – hence Isiksel's interest in them –, but are not confined to such settings. Thus, one application of teleological arguments are arguments about implied powers. Essentially, implied-power arguments suggest that we should interpret an existing competence broadly as encompassing the means to fulfill certain functions attributed to the particular institutions.[23] From here, however, it is only a small step to what I call arguments from failure and emergency arguments, both of which serve as a basis for claiming competences in order to deal with an important problem and thus are about effective problem-solving. More precisely, arguments from failure involve one institution invoking the failure of another institution in order to expand its power to deal with a problem arising from this failure.[24] Think of Uniting for Peace Resolution as an example, with the UN General Assembly invoking the failure of the Security Council as a reason for recommending actions to the members states on its own, thus expanding its standard set of powers.[25] Emergency arguments are more familiar; they involve an appeal to a problem or threat of some scale and urgency as a basis for acting, in the absence of a specific legal competence. Like arguments about implied powers, emergency arguments and arguments from failure are functionalist, in the sense of being directed towards enabling good outcomes and effective problem-solving, and they should be understood as operating on a continuum. In implied-power arguments, an effort is usually made to put forward a structuralist reading of the respective powers – a reading that, while transcending the constitutional text, nevertheless seeks to take the positive constitutional rules and competences seriously. In emergency cases, this is only sometimes

23 The standard example for this kind of approach is the US Supreme Court's landmark judgment in *McCulloch v. Maryland*, 17 U.S. 316 [1819] (US Supreme Court).

24 For more, see M Hailbronner, *habilitation thesis* (note * above), Chapter 5 in particular.

25 UNGA Res. 377 V, UN Doc. A/1775 [1950].

the case – typically, here, we find the argument that the graver the danger or risk in question is, the more deviations from existing rules can be justified. The most interesting case, I believe, is arguments from failure which are typically based both on a sense of a shared project and the need to step in for others who are not fulfilling their proscribed role – which I would consider a more structuralist/legal approach – and, on the other hand, considerations of necessity.

Notably, in all three scenarios, effectiveness arguments may well be deployed in the service of protecting constitutional rights or constitutional principles, but this is not really the issue. Rather, the problem is that such arguments feed into a broader managerial paradigm of constitutionalism where legal competences are highly flexible in order to realize the best possible output. Alexander Somek has juxtaposed this managerial and essentially administrative approach to a legal understanding of constitutionalism where institutional powers are a priori legally delineated rather than dependent on outcomes.[26]

As we can see, this is not just a niche problem of constitutional interpretation. Arguments about the scope of competences in constitutional law are standard, and considerations of effectiveness often central to their resolution, not only in the context of multilevel constitutionalism. They also tie into modern theories on the separation of powers, which not only stress the importance of enabling effective governance as a central purpose of the separation of powers, but also the need for a degree of institutional flexibility and, in particular, for collaboration among different institutions. Nick Barber,[27] Dimitrios Kyritsis[28] and, more recently, Aileen Kavanagh[29] emphasize such considerations in different ways, defending, for example, the expansion of institutional powers in cases of institutional failure. Thus, Nick Barber argues that institutions should exercise their powers flexibly to compensate for failures of others, adding that the separation of powers should, accordingly, not be understood in a rigid manner.[30]

Without going into all the details, it is important to recognize that Barber's approach is driven ultimately by considerations of effective govern-

26 A Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014)222.
27 N Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018).
28 D Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford University Press, 2017).
29 A Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2023).
30 N Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018) 79.

ment, albeit employed in the interest of realizing a constitutional template or vision. To that aim, Barber is willing to accept a degree of institutional flexibility. This is not to say that effectiveness works only in one direction. It may well be that the rule of law, or aspects of it, is beneficial for economic growth or political stability and thus for achieving certain outputs.[31] But if this is the question we deem relevant, we are already buying into the logic of efficiency and functionalism of which Somek warns us.

What happens, therefore, if we take a more flexible approach to competences in order to maximize effectiveness? Somek develops his account primarily against the background of European law. By adopting an output-based paradigm of constitutionalism, Somek points out, we are essentially parting with the idea of a democratic rule of law. For what is legal now depends on its ability to bring about certain outcomes, rather than on whether it can be traced back to a democratic decision. In his reading, the European Union, which largely follows such a paradigm of law in his reading, becomes a system best described in terms of Herrmann Hellers' authoritarian liberalism.[32] We might also say, with Hannah Arendt, that such an understanding which she associated with Nazi ideology leads to confusion between what is right and what is good.[33]

It is too easy to dismiss these critical voices as overdramatizing the point, and this is all the more true in the current political climate, where we see a resurgence of populist modes of arguments in a range of countries, as well as democratic backsliding to authoritarian or semi-authoritarian regimes. The performance of crisis, in Benjamin Mofitt's terms, and the insistence on action is part of the standard repertoire of populist and authoritarian discourses.[34] Emergency arguments and arguments from failure are a central part of populist rhetoric, and the potential for abuse of such arguments is immense. Yet, as Somek's work shows, it is not just the deliberate bad-faith instrumentalization, and thus abuse, of such arguments, but also their good-faith deployment that is problematic.

31 There is a significant body of literature on this theme; for a more recent nuanced discussion, see, e.g., S Haggard and L Tiede, 'The Rule of Law and Economic Growth: Where Are We?' (2011) 39 *World Development* 673ff.

32 A Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014) 238.

33 H Arendt, *The Origins of Totalitarianism* (Harper Collins, 1973) 299.

34 B Moffitt, 'How to Perform Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism' (2015) 50 *Government and Opposition* 189.

IV. Conclusion

What, then, is the conclusion? Effectiveness arguments are firmly entrenched in public law as well as in large parts of constitutional theory. This, it seems to me, is not as such a bad thing. What we need to do is thus not get rid of such arguments entirely, which would hardly be possible anyway, but rather to clarify their relationship with other sources of constitutional legitimacy. Where the respective constitutional regime itself is closely connected to certain substantive ideas of justice, and thus aspirations and outputs, such ideas can serve as an independent third source of constitutional legitimacy, besides the protection of individual rights and democratic self-government. Indeed, even under more traditional narrow, i.e., non-aspirational, constitutions, it makes sense to treat the need for effective government as a source of legitimacy. Yet, effectiveness should always be understood as instrumental, as a tool to realize those goals set in democratic procedures, or as a necessary tool to protect constitutional rights.

Secondly, and relatedly, the need for certain (even constitutionally mandated) outputs must always be balanced with the need for democratic government and the protection of individual rights in constitutional theory. Conflicts between these different sources of legitimacy need to be clearly analyzed; in particular, effectiveness arguments may not be used to hollow out democratic and rights-based constraints in the sense of protecting the core of those ideas. This also means that, when we invoke effectiveness arguments, such arguments should never stand on their own, but rather must be embedded in a broader structural and constitutional analysis. In other words, necessity is never enough. If we argue for institutions to step in for others who are seen to be failing, or if we believe that, in order to realize its mandate, an institution's powers must be read broadly, the broader structural arguments matter; it matters whether there is a clear gap in the existing legal frameworks, or whether those frameworks seem comprehensive; it also matters what kind of institution is acting, and with what kind of democratic legitimacy.[35] Only by taking these broader legal concerns into account can we avoid sliding into an altogether different legal paradigm that thrives on the logic of effectiveness at the cost of democracy or of the protection of individual rights.

35 For more on this, see M Hailbronner, *habilitation thesis* (note * above).

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