The Authority of Legislation within the EU

An Exploration of the Connection between Legitimate Authority, Legislative Rules and Text in the Context of EU Citizenship Law

Martijn van den Brink

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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Examining Board

Prof. Claire Kilpatrick, EUI (supervisor)
Prof. Richard Bellamy, EUI
Prof. Niamh Nic Shuibhne, University of Edinburgh
Prof. Daniel Halberstam, University of Michigan

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Department of Law – LL.M. and Ph.D. Programmes

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Abstract

This thesis studies the authority of legislation within the European Union. I believe that the EU legislature is an institution that does not always receive the attention it deserves, that the value of legislative decision-making remains misunderstood, and that our understanding of what it means for the acts of legislation to be recognised as authoritative still is underdeveloped. Drawing upon political and legal theory, I argue that the EU legislature must have a certain primacy over other sources of authority within the EU in the process of ordinary decision-making. That is, I suggest, primarily because the EU has reasonable legitimacy when subject to the control of the EU legislative process and also because legislation contributes to stability in EU decision-making and gives guidance to those subject to EU law. In addition to explaining the benefits of EU legislative decision-making, this thesis will provide the benchmarks that allow for a determination of whether other institutions recognise legislative acts as authoritative. I establish the connection between authority, legislative rules, and legislative text and argue that the authority of legislation is recognised if the constraints laid down by the rules of legislation and the text that articulates these rules are accepted. The authority of legislation is studied in the context of decision-making in the field of EU citizenship.

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Introduction

This thesis defends the authority of legislation within the European Union. I believe that the EU legislature is an institution that has not received the attention it deserves. The value of legislative decision-making still is underestimated and our understanding of what it means for the acts of legislation to be recognised as authoritative still is underdeveloped. Former Advocate General (AG) Francis Jacobs once claimed it to be the 'European way' that 'many fundamental choices for society are now made, and probably have to be made, not by the legislature, not by the executive, but by the courts'.[1] Not just did he offer an analytical description of the present reality; the underlying message of normative approval is impossible to miss for the reader of his book.[2] That this statement comes from one of the most eminent of members ever to have served at the Court of Justice of the European Union is perhaps no surprise, but I believe it reveals what many other EU lawyers think of legislatures and legislation.

This thesis challenges that position. Drawing upon political and legal theory, I shall argue that the EU legislature must have a certain primacy over other sources of authority within the EU in the process of ordinary decision-making. That is primarily because the EU has reasonable legitimacy when subject to the control of the EU legislative process, but also because legislation contributes to stability in EU decision-making and gives guidance to those subject to EU law. In addition to explaining the benefits of EU legislative decision-making, this thesis will provide the benchmarks that allow for a determination of whether other institutions recognise legislative acts as authoritative. I establish the connection between legislative authority, legislative rules, and legislative text and argue that the authority of legislation is recognised if the constraints laid down by the rules of legislation and the text that articulates these rules are accepted.

This may seem so intuitively plausible to some that it raises the question of whether these issues truly merit out attention. Few would dispute, for example, that the executive is subordinate to the legislature and bound by its decisions and neither is it too controversial that the Member States are to implement and comply with EU legislative acts. In the abstract, moreover, it seems uncontroversial to argue that the Court must recognise the authority of legislation. That is, it seems

[1] Francis Geoffrey Jacobs, *The Sovereignty of Law: The European Way* (Cambridge University Press 2007) 1.
[2] His study conveys the idea that the authority of parliament is to be limited and that 'the ultimate source of authority is … certain values, or certain fundamental principles, which form an inherent part of a well-functioning legal system'. ibid 61–62.

entirely credible to believe that, when a legal dispute confronts the Court, its discretion must depend on whether or not the legislature has enacted rules governing the dispute. Members of the Court realise that controversial decisions can be more easily justified if these respect the constraints of legislation and will insist that legislative rules are followed when their wording is clear.[3] Only the greatest adversaries of legislatures will dispute the position that the judiciary should take seriously the constraints of legislation.

Nonetheless, a certain reluctance to recognise the authority of EU legislation exists. Upon closer inspection, for example, the ECJ's attitude towards legislative acts turns out to be more ambivalent than the judges would like us to believe. This may in part be because some EU lawyers are somewhat adverse towards legislative decision-making. Some bluntly claim that it is 'judicial decisions and intellectual commentary, not legislation, [that] have transformed conceptions of human rights and democracy',[4] notwithstanding the fact that empirical evidence in support of that position is hard to find.[5] However, I would be careful not to interpret all illustrations of the Court failing to recognise the authority of legislation as evidence of such adversity. In part also, EU lawyers remain unaware of what kind of judicial behaviour is compatible with the primacy of legislation, which cannot surprise seeing that remarkably little thought has been put into questions of legislative interpretation and the role of rules.

1. Justice, legitimate authority, and interpretation

To see some of the bewilderment that exists, it proves useful to begin with a hypothetical situation: A Member State national, having difficulties being accepted to her preferred degree of study in her state of nationality, decides to move to another Member State in order to pursue a similar degree there. Following two years of residence in the host Member State, she decides, due to a lack of financial resources, to apply for financial aid, to which that Member State entitles its own nationals. The host Member State denies the application and invokes the secondary law enacted by the EU legislature in

[3] Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) 20 Columbia Journal of European law 3, 9; Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013).

[4] Charlotte O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union' (2013) 50 Common Market Law Review 1643, 1680.

[5] Robert A Dahl, *Democracy and Its Critics* (Yale University Press 1991); Thomas Christiano, 'An Instrumental Argument for a Human Right to Democracy' (2011) 39 Philosophy & Public Affairs 142; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard Univ Press 2007).

its defence. The national authorities point out that the enacted legislation obliges the Member States to confer benefits to those who have been resident for a five-year period, but not to those who do not satisfy that criterion. The mobile citizen disagrees with the enforcement of the five-year rule and contends that it undermines the substantive purpose behind the rule. That purpose, it follows from the legislation, is to realise justice in the treatment of mobile citizens, meaning concretely that the conferral of benefits can be restricted to well-integrated EU citizens. It is beyond dispute that the citizen has become well-integrated during her two years of residence within the host Member State, which is why she claims that the substantive ambitions of EU legislation would not be realised if the five-year rule would be enforced in her case.

This situation raises (at least) three important questions: (1) what is the host Member State due to the student, according to the law in force; (2) what do we think it is for that person to be given her due; (3) who should decide and establish which treatment gives the student her due? These three are interrelated, though ultimately concern very different sets of sub-questions: the first is about legal interpretation, the second justice, and the third legitimate authority. The subsequent question that arises concerns the right ordering among them. EU lawyers, this thesis demonstrates, often make their answer to questions 1 and 3 dependent on their answer to question 2. That is, their idea of who has legitimate authority to decide these matters depends on who decides in accordance with accepted principles of justice and the method of interpretation to be employed is the one that realises justice.

Alternatively, our conception of political legitimacy and our theories of legislative interpretation can be separated from the question of justice. One can treat questions of legitimate authority within the EU content-independently, legitimacy being conditional not on some measure of justice, but instead on the fairness of the decision-making process by which we resolve our disputes. And one can think of the task of legal interpretation, not as involving establishing what is just, but about defining what the author of the legal norm that is interpreted actually meant when it established that norm. If that is true, and I think it is, the question becomes how we decide who enjoys legitimate authority within the EU, how that institution exercises its authority and, thereby, what is the best method of interpreting its decisions so as to establish what it meant when it exercised its authority. I will defend this alternative approach in this thesis.

To get a first indication of the saliency of this issue, and of how easily our perspectives on legitimate authority and interpretation are made dependent on some understanding of the best outcome, it is useful to make the above hypothetical more concrete by contrasting two areas of EU citizenship law: the rules conditioning access of EU citizens to social assistance within the host

Member State and the rules governing the expulsion of EU citizens from the host Member State. Much of this thesis is structured around these two areas and I will explain my choice for this case selection in a moment. These examples are somewhat complex and later chapters will unpack their different elements in further detail. Briefly drawing out the contrast between these two areas, however, should be sufficient for now to understand the relevance of exploring the authority of legislation in more depth.

Let us say that the hypothetical citizen is a national of the Netherlands, who moved to Germany with the purpose of pursuing a degree there. She claims social assistance benefits following two years of residence there and has not engaged in an economic activity during her stay in Germany. Based on those facts, the German authorities decide to deny her the assistance she seeks. The authorities invoke Article 24(2) of the Citizenship Directive,[6] which they interpret as allowing the Member States to deny the aid requested to students who have not resided for a continuous period of five years in the host Member State.[7] The Dutch national disputes that interpretation and asserts that the written rule laid down in Article 24(2) should not be applied to her and must be interpreted in light of the Directive's background purpose. She invokes the 16th recital of the Citizenship Directive, which holds that Member States cannot expel residents simply because they have taken recourse to social assistance, but that an assessment must be made of the claimant's personal circumstances.[8] She asserts that her personal circumstances indicate a great degree of integration in the German society; she speaks the language, has German family living nearby, and even lived in Germany herself for a period of three years during her childhood. Hence, because she believes that the Directive is to be interpreted, not according to its text, but in line with its more general purpose, it is not just periods of residence, but also these individual elements that are to condition access to the assistance requested by her.

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[6] Article 24(2) of Directive 2004/38/EC holds that 'the host Member State shall not be obliged … prior to acquisition of the right of permanent residence, *to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers*, self-employed persons, persons who retain such status and members of their families'.

[7] Article 16(1) of Directive 2004/38/EC.

[8] More precisely, recital 16 states that '[a]s long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion.' To be clear, I am aware that recital 16 speaks of expulsion, which our hypothetical citizen does not face. Yet, as later chapters will show, it is this recital that is often invoked in defence of a requirement of an individual assessment.

Now consider a somewhat different hypothetical. The Dutch citizen completed her studies and found employment in Germany subsequently. Following a period of residence of around six years, she was caught for dealing drugs, which she sold to her social network of friends and relatives. She dealt in fairly minor quantities, but this did not withhold the German authorities from issuing her an expulsion order on the ground of public policy. She objects and, in her defence, invokes Article 28(2) of the Directive. Accordingly, those with the right to permanent residence – that is, individuals with five years of legal and continuous residence within the host Member State[9] – cannot be expelled 'except on *serious grounds* of public policy or public security'. Even if she, because of her past behaviour, poses a threat to the public policy of Germany, she argues that her offence certainly was not of such a nature that there were 'serious grounds' for expelling her. The German authorities acknowledge the existence of that rule but contest its applicability in this case. They claim that the result realised, if the rule were followed and applied, would be incompatible with the substantive intentions behind the legislative act. The intentions to which the authorities refer are expressed in the 18th recital of the Citizenship Directive, which indicates that the status of permanent residence is to serve as a 'genuine vehicle for integration'.[10] The German authorities argue that the status of permanent residence is to be available only to those who show that they are integrated, which is an assessment that cannot be based on an individual's period of residence alone, but instead, requires an examination of the individual's personal circumstances. The criminal behaviour of the Dutch citizen serves as a strong indication that integration is lacking, which must mean that Article 28(2) is inapplicable. The German authorities argue, in essence, that the text of Article 28(2) must be interpreted in light of the 18th recital of the Directive, which gives expression to the intentions the legislature had in mind.

Note the great similarities between both situations: they raise questions about the correct interpretation of the Citizenship Directive. Does a period of residence alone define the legal position of the Union citizen, or should that depend also on an assessment of the individual's personal circumstances? The answers to these questions depend on our preferred method of interpretation; should the rules laid down in the written text of the Directive's operative part be leading (textualism), or should it be interpreted against the purposes that lie behind the enacted law, as expressed in the recitals of legislation (purposivism)? Either the method we prefer depends on what we perceive to be

[9] Article 16(1) of Directive 2004/38/EC.

[10] More fully, the text of the recital is as follows: 'In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.'

the most reliable method for defining what the legislature intended to achieve when adopting the legislation, or, alternatively, on what is the best outcome, which some may believe to be more important than judicial fidelity to legislative intentions. Ultimately, therefore, these situations raise important institutional questions, over who decides and about what is the appropriate balance between different fora of decision-making within the EU.

One important difference exists between both situations, which concerns the outcomes produced, either by carrying out an assessment of individual circumstances or by accepting the temporal periods laid down in the text. A valuation of the citizen's individual circumstances rather than deference to legislative text is likely to reinforce the legal position of the Union citizen in the first scenario, while it would weaken her position in the second case. That is, it may entitle the citizen to social assistance before she has satisfied the periods of residence laid down in the Directive, while it could diminish the protection against expulsion she would have enjoyed based on the written rule alone. Should those outcome-based considerations alone determine which method of interpretation is to be employed, whether the legislative rules are to be followed, or when deference to legislative authority is justified?

Some EU lawyers seem to think so. In *Förster*, the Court of Justice of the European Union (ECJ or Court) upheld a Dutch rule that made eligibility to maintenance grants for students conditional upon a five-year residence period.[11] In doing so, it gave effect to Article 24(2) of the Citizenship Directive, which contains the same eligibility criterion.[12] More recently, in other decisions conditioning the eligibility of EU citizens to social assistance benefits, the Court also deferred to the written rules and permitted the Member States to deny social assistance to those who had not satisfied the prescribed temporal requirements.[13] Several scholars have criticised these decisions, arguing, among others, that the case law fails to take into consideration the substantive purposes behind the written rules, and, because of that, the individual circumstances of the applicants. In marked contrast, the ECJ

[11] Case C-158/07 *Förster*, ECLI:EU:C:2008:630.

[12] According to Article 24(2) of Directive 2004/38/EC, 'the host Member State shall not be obliged … prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families'.

[13] In Case C-67/14 *Alimanovic*, ECLI:EU:C:2015:597, for example, the judges deferred to Article 7(3)(b) of the Directive, which stipulates that the status of worker or self-employed is retained by an EU citizen if 'he/she is in duly recorded involuntary unemployment after having been employed for *more than one year* and has registered as a job-seeker with the relevant employment office'. Case C-299/14 *García-Nieto*, ECLI:EU:C:2016:114 provides a similar example with respect to the rule that states that no social assistance benefits need to be conferred 'during the *first three months* of residence'.

received condemnation when it decided that Member States could take into account the individual personal circumstances and degree of integration of the person facing an expulsion decision in addition to that person's length of residence. An important point of criticism was that a textual reading of the Directive tells us that the level of protection against expulsion is not conditioned primarily by an assessment of individual circumstances, but is defined initially by periods of residence. Significantly, it is not just that different authors have coincidentally opted for different methods of interpretation in different situations; the same scholars have taken opposite positions. For example, Spaventa holds that 'there is not much to be said in favour' of those decisions that clarify 'that those Union citizens who do not satisfy *the black letter conditions* contained in the Directive' are not entitled to equal access to social assistance,[14] but also criticised the individual assessments introduced by the expulsion case law for introducing elements incompatible with the text of the Directive.[15] Nic Shuibhne, moreover, has lamented the social assistance case law for radically downgrading 'the formerly central place of individual assessments',[16] but argues that the expulsion case law limits rights 'in disruption of the will of the legislature'.[17] Whether the text of the Citizenship Directive is to be leading and constrain the judges, and the rules therein to be applied, apparently depends on the circumstances of the case.

2. Instrumentalism and the fragmentation of legislative authority

It appears that some connection exists between the authority of legislation, the rules laid down by those legislative acts, and the written text that articulates these rules, but also that the Court as well as commentators are puzzled about what that connection is precisely. It is not always clear what informs these ostensibly contradictory positions. No doubt, there are genuine misunderstandings about what it means to recognise the authority of legislation, which this thesis will address. Furthermore, that Nic Shuibhne speaks of the 'the *formerly* central place of individual assessments' seems an indication that her dissatisfaction concerns the case law's inconsistency with previous decisions. She seems to approach the decisions from a legal doctrinal perspective, the dominant method in EU legal

[14] Eleanor Spaventa, 'Once a Foreigner Always a Foreigner: Who Does Not Belong Here Anymore? Expulsion Measures', *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (Intersentia 2016) 96 (italics added).
[15] ibid 105–106.
[16] Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889, 913.
[17] ibid 921 (italics omitted).

scholarship, which concerns itself with systematising and reconstructing legal sources.[18] That, however, she also offers a number of normative reasons for favouring individual assessments over general rules suggests that there deeper worries exist about the rule-based nature of the social assistance case law.[19]

It seems impossible to understand the inconsistencies in full if not we recognise that approaches to legitimate authority, rule-following, and interpretation are greatly content-dependent in EU legal scholarship. That is, dependent on the perceived justness of the outcome secured thereby. There is nothing novel in that conclusion. As Somek observed, EU lawyers 'are inclined to tolerate reasoning flaws so long as policy results are to their liking'.[20] That fits neatly with Waldron's more general remark about lawyers, namely that opposition to the judiciary 'tends to be "a sometime thing," with people supporting it for the few cases they cherish … and opposing it only when it leads to outcomes they deplore'.[21] The examples above offer a good indication of what are called 'instrumentalist approaches to authority'.[22] Accordingly, the legitimacy of a decision depends on its moral qualities and the authority enjoying legitimacy is that which realises the best substantive outcome. From that perspective, the primary concern is securing morally desirable results and our accounts of legitimate institutions as well as rule-following and interpretation will be modified so as to make them compatible with the results we seek.

It is important to realise that such instrumentalist approaches to legitimate authority are not neutral to institutional questions. Negatively affected by instrumentality is the EU legislature; the enacted legislation is treated as the baseline, whose authority can be legitimately curtailed if better outcomes are secured thereby. Those legislative decisions that we like are authoritative, while others are ready for a second round of debate in court.[23] As a consequence, the authority of legislation becomes fragmented, deserving of recognition only if compatible with our best understanding of

[18] Armin von Bogdandy, 'The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe' (2009) 7 International Journal of Constitutional Law 364.
[19] Nic Shuibhne (n 16) 913.
[20] Alexander Somek, 'The Emancipation of Legal Dissonance' in Henning Koch and others (eds), *Europe: The New Legal Realism: Essays in Honor of Hjalte Rasmussen* (Djøf Pub 2010) 669–700.
[21] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 The Yale Law Journal 1246, 1351. Waldron made his remark in the context of his discussion of the constitutional review of legislation, but his conclusions are equally valid outside of this context.
[22] For a critical discussion of instrumentalism, read Thomas Christiano, 'The Authority of Democracy' (2004) 12 Journal of Political Philosophy 266.
[23] One advocate for further rounds of debate in Court is Miguel Poiares Maduro, 'Interpreting European Law - On Why and How Law and Policy Meet at the European Court of Justice' in Henning Koch and others (eds), *Europe: The New Legal Realism: Essays in Honor of Hjalte Rasmussen* (Djøf Publishing 2010) 468.

morality and justice. It is difficult to believe that such instrumentalist approaches to authority and the subsequent belief that it is legitimate for the judiciary to overrule legislative decisions when that produces better results does not in some way also signal a vote of no-confidence in legislatures. After all, if we have no confidence that the reviewer will do a better job than the reviewed,[24] our position that the judiciary is to debate again important questions of public morality and policy, as settled already by legislation, is simply untenable.

The focus on the substantive moral qualities of political decisions also almost inevitably produces a certain institutional neglect. Take the following questions concerning the EU legislature: what does this institution bring to the process of European integration; what does rule-based decision-making require and what good comes from that; and how should we define what the law means and interpret legislation? If it were possible to reply to all those questions with, 'that depends on the substantive results achieved thereby', and if these could all be responded to by reference to some accepted and desirable standard of the common good, we would hardly need to think of such questions independent of our concern over substantive results. But if, as this thesis will demonstrate, that reply is inadequate, any argument that suggests that acts of legislation are legitimate and the ambitions behind it to be realised by the judiciary only if the legislature acted in accordance with respected principles of morality and justice becomes far less sustainable. Likewise, it no longer is possible to claim that rules ought to be followed when fair to the individual subject to them, nor to suggest that the law means what it ought to mean according to our best understanding of justice. Sooner rather than later, we must confront those institutional questions and think of legitimacy, rule-following, and interpretation in content-independent terms.

3. Neglecting the EU legislature

It appears that, when compared to the burgeoning literature on the Court of Justice of the European Union (ECJ or Court), EU lawyers have put relatively little thought into what the legislature brings to the governance of the EU. In recent years and decades, constitutional discourse has considered itself primarily with the interaction between the ECJ and national (constitutional) courts and the constraints the former places on domestic political procedures. That focus is as understandable as it is unduly narrow. The Court's pre-eminence in the European integration process, still today, is hard to dispute

[24] Neil K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997) 207.

and merits our attention. On the other hand, the EU legislature's prolificacy is equally difficult to deny; its regulatory decisions span a vast variety of sectoral fields, affecting millions on a daily basis.

The complexity of legislative decision-making within the EU is well-known. It seems hardly possible, for example, to speak of 'the' legislative institution or process within the EU, which is in no small part because three of the EU's institutions – the Commission, European Parliament, and Council – are involved in the process. In addition, the Treaties have always included multiple legislative processes, the use of which was conditioned by the subject-matter of the policy proposals under discussion.[25] Even following the simplifications introduced by the Lisbon Treaty, after which most decisions are taken under the so-called ordinary legislative procedure,[26] decision-making within the EU remains convoluted. The place of each of the three institutions within the process of European rule-making has always been much-debated and still is controversial. On the other hand, while institutional questions internal to the EU legislative process(es) have been subject to extensive discussion, the relationship of the EU legislature with other decisional authorities within the EU still receives insufficient attention.[27]

This may reflect a broader pattern of neglect for the institution of legislation.[28] We have witnessed a global ascend of legal institutions and in democratic states around the world, disputes over public morality and policy are increasingly resolved by judicial bodies.[29] Lawyers have even been accused of putting legislatures into disrepute.[30] At the very least, one should conclude that the institution of legislation is looked upon with quite some suspicion. After all, without a fair degree of distrust towards decision-making by legislative bodies, the support that exists for the judicialization of politics is difficult to explain.

That the EU fits into this global pattern cannot surprise. Like elsewhere, EU lawyers are part of the same epistemic community of legal experts, who speak and understand the same professional

[25] A useful summary of the three procedures currently still in use is offered by Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (Cambridge University Press 2014) 117–128.
[26] Article 294 TFEU.
[27] For some exceptions, Phil Syrpis, 'Theorising the Relationship between the Judiciary and the Legislature in the EU Internal Market' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012); Phil Syrpis, 'The Relationship Between Primary and Secondary Law in the EU' (2015) 52 Common Market Law Review 461; Gareth Davies, 'Legislative Control of the European Court of Justice' (2014) 51 Common Market Law Review 1579.
[28] Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press 2006).
[29] On judicialization, see: Ran Hirschl, 'The Judicialization of Politics' in Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008).
[30] Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999).

legal language and whose vocation depends on the success of courts.[31] It is plausible to believe, however, that it is not the US or any other constitutional democratic state, but the EU that is 'at the vanguard' of the movement that brings about a total judicialization of politics.[32] In part, this may be because the EU legislature is an institute that is hard to capture and describe, its decision-making involving three different institutions and their relative powers depending on the legislative process that applies. In comparison, the Court offers a much cleaner forum for deciding disputes, which can take decisions and contribute to problem-solving also when proposed legislation gets stuck in the intricate machinery of legislating, and whose decisions offer clarity as to where the parties stand in the form of clear winners and losers. Additionally, it probably is fair to say that the EU legislature never has been the most glamorous of EU institutions. If we would be asked to list those moments that defined the EU, we would think of the ground-breaking jurisprudence by which the Court 'constitutionalised' the Treaties,[33] or the great bargains by which national political leaders defined the EU's destiny.[34] If the EU legislature would make it to that list, it would probably not rank very high. Thirdly, it may not be immediately apparent what is lost if the authority of EU legislation is undermined. Because while the authority of the legislature in democratic states is grounded in democracy, it would conceivably be rather odd to speak of the EU legislature in the same democratic terms. We will see that the fact that the fragmentation of legislative authority within the EU is not perceived of as a legitimacy loss explains why the relevance of the legislature and qualities of legislation are downplayed among EU legal scholars.

This thesis places the legislature centre-stage and asks why we should and what it means to recognise the 'dignity of legislation' within the EU.[35] The ambition is to create an understanding of the EU legislature as an institution with qualities and values that sets it apart from the Court and that

[31] Martin Shapiro, 'The European Court of Justice' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999). Furthermore, as Vauchez remarked, in the case of EU scholarship 'it proves hardly feasible to draw a clear-cut line between those actors who have been engaged in theorising the process and those who have actually been taking an active part in it'. Antoine Vauchez, 'The Transnational Politics of Judicialization. *Van Gend En Loos* and the Making of EU Polity' (2010) 16 European law Journal 1, 4.

[32] Michael A Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76 The Modern Law Review 191, 213. See also, James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65 The Modern Law Review 204, 207.

[33] Among the more ground-breaking studies, Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403; Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 The American Journal of International Law 1.

[34] Famously, Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998).

[35] Waldron (n 30).

makes it an indispensable as well as highly reputable institution within the process of EU decision-making. It is important to clarify at the outset, however, that my ambitions are limited to exploring the authority of legislation in the EU's process of ordinary, not constitutional, decision-making. In other words, this thesis does not aspire to develop a theoretical account of judicial review within the EU. This requires a clarification, because discussion on the desirability of judicial officials' increasingly important role tends to revolve around the practice of judicial review. I do believe that it remains a remarkable feature of European scholarship that it mutes discussion of this matter,[36] and yet, have decided to focus on the institutional division of labour characteristic of ordinary and day-to-day decision-making, and the place of the EU legislature and legislation therein. It is the case that ordinary and constitutional adjudication raises a set of similar questions, in particular concerning legitimacy. However, a defence of the primacy of legislation in the process of ordinary decision-making needs not automatically result in opposition to judicial review of legislation on constitutional grounds.[37] That is because ordinary and constitutional adjudication also bring up a package of distinct questions. Therefore, even if the EU legislature is recognised as having primacy of authority in the process of ordinary politics, we still ought to define if and under what conditions the Court could legitimately strike down enacted legislation. A full discussion of judicial review within the EU would need to examine the different grounds for review – is the challenge brought rights-based, does it concern the EU's federal division of powers, or is the challenge the result of a conflict over the appropriate procedure of decision-making.[38] These questions are of such complexity that these cannot be explored adequately in a thesis that aspires to shed light on the authority of legislation within the process of ordinary decision-making within the EU, certainly when the authority of legislation in the ordinary

[36] Alec Stone Sweet, 'Why Europe Rejected American Judicial Review: And Why It May Not Matter' (2003) 101 Michigan Law Review 2744, 2779–2780. I am very aware of certain scholars who have forcefully and eloquently challenged the Court. Read, for example: Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Nijhoff 1986); Fritz W Scharpf, 'Legitimacy in the Multi-Level European Polity' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010); Richard Bellamy, 'The Liberty of the Moderns: Market Freedom and Democracy Within the EU' (2012) 1 Global Constitutionalism 141; Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2013).

[37] Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2008); Dahl (n 5). If this argument can be successful, in general but also within the context of the EU, is not something that concerns me here.

[38] There is no guarantee that the answer to the three is the same. Debate on judicial review often concerns the adjudication of constitutional rights. If these considerations are easily translated to questions of federalism is disputed. Nicholas Aroney, 'Reasonable Disagreement, Democracy and the Judicial Safeguards of Federalism' (2008) 27 U. Queensland LJ 129; Adrienne Stone, 'Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28 Oxford Journal of Legal Studies 1. The review of legislation on the ground of whether the correct procedure of decision-making was used is probably largely EU-specific.

process is equally underexplored. Debate on the interpretation of EU secondary legislation, for example, is still in its infancy, and discussion on the position of rules within legislation is possibly even scarcer. An exploration of these issues alone needs an entire thesis.

4. EU citizenship legislation

I offered a contrast between two areas of EU citizenship law early on, to get a sense of the conflicting perspectives on rule-following and interpretation taken by the judiciary and scholars. This thesis will as far as possible be structured around the legislation and case law conditioning access to social assistance within and protection against expulsion from the host Member State. Only the final chapter will explore one further aspect of the EU citizenship legislation – the rules on family reunification – because the question that chapter addresses is not easily discussed based on the law on social assistance and protection against expulsion alone. This thesis thus centres on EU citizenship and this section explains the choice for that case study.

The decision to structure this thesis around a limited set of cases has been a deliberate one and is essentially that sufficient space must remain for exploring the theoretical questions that linger below the doctrinal surface. Recent studies have turned the spotlight on the difficult relationship between the judiciary and legislation and do an excellent job when it comes to reviewing the different areas of EU law where tensions have arisen.[39] However, because these studies set out to offer an extensive overview of the relevant case law, they rarely leave enough room to uncover the normative presuppositions lying below challenges to the authority of legislation within the EU. In order to understand the different reasons that have led to the fragmentation of the authority of legislation, but also to show why a more convincing account of legitimate decision-making places the EU legislature centre-stage, these assumptions must be uncovered.

The decision to structure this study around EU citizenship law and not some different field that demonstrates the ambivalent approach towards legislation is because EU citizenship renders visible the different layers that concern the authority of legislation. To begin with, much of the recent literature exploring questions of justice within the EU takes place against the background of EU citizenship, allowing for a consideration of the legitimacy of EU decision-making in the context of substantive disagreement on justice and rights. I will argue that the need for a non-instrumentalist conception of authority arises and the value of legislation emerges clearly against the backdrop of

[39] Read for example, Syrpis, 'The Relationship Between Primary and Secondary Law in the EU' (n 27); Davies (n 27).

disagreement on substantive policies. Against that background, also questions of interpretation and rule-following become relevant. It turns out that many disputes in EU citizenship law turn around the position of rules, raising questions like: what is the connection between legislative authority and rules, what does rule-following consist of, and what are the advantages of decision-making in accordance with rules? Moreover, EU citizenship case law steers us towards the question about the connection between legislative intent, the rules articulated by the written text, and the substantive purposes behind the enacted legislation? EU citizenship, in other words, offers a perfect case for studying the authority of legislation.

The EU has had its own citizenship since the 1993 Maastricht Treaty entered into force. Since then, '[e]very person holding the nationality of a Member State shall be a citizen of the Union'.[40] EU citizens enjoy a bundle of rights, including democratic and diplomatic rights, but most case law concerns the right to move and reside freely within the territory of all Member States. These mobility rights take a central place in this thesis and are bestowed upon the citizen by a range of legal sources. Articles 20 and 21 provide EU citizens with the right to free movement, although that right is subject 'to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. The ancillary right of non-discrimination on grounds of nationality is laid down in Article 18 TFEU. Free movement within the EU was traditionally defined of course by economic activity and these economic freedoms, dating back to the original Treaties, have formed an essential part of EU law ever since. Currently, Articles 45, 49, and 56 TFEU accord protection to those who move in the capacity as workers, self-employed persons, or service providers respectively.

The secondary legislation that shaped the mobility of Member State nationals in the past, and to a lesser degree also in the present, reflects that economic orientation. Regulation 1612/68 on freedom of workers was adopted in 1968 and set out the rights of workers and their families.[41] A Directive setting out the rights for those pursuing activities as self-employed persons or service providers in other Member States was adopted in 1973.[42] These acts were accompanied by legislation stipulating the grounds that Member States could invoke to justify the exclusion and expulsion of

[40] Article 20(1) TFEU.

[41] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ L257/2). This Regulation was accompanied by a Directive setting out rules on visa and other forms of documentation. Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ L257/13).

[42] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ L172/14).

workers and, in addition, set out the circumstances that entitled economically active migrant workers to retain residence rights in the host state.[43] It was not until 1990 that the EU enacted laws covering the economically inactive. In that year, three Directives were adopted, according rights to students,[44] pensioners,[45] and those not covered by any other law, provided that they enjoy sufficient resources.[46]

Shortly after the adoption of these three Directives, the Maastricht Treaty was ratified and, when it entered into force, all Member State nationals became EU citizens simultaneously. However, until Directive 2004/38, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amended Regulation 1612/68 and repealed all of the other laws just mentioned, these legislative acts remained in force. Directive 2004/38 is central to this thesis. This 'Citizenship Directive', in combination with some other legislative acts, currently conditions EU citizens' right to move and reside freely within the territory of the Member States. By codifying existing legislation, the Citizenship Directive meant to simplify and strengthen the right to free movement and the Directive indeed consolidates the different areas that previous laws dealt with on an individual basis.[47] The scope of the Directive reflects this, seeing that it provides for the conditions governing the right to free movement and residence in the host Member State by all Union citizens and their family members.[48] It sets out the entry and exit rights of EU citizens, prescribing that all Member States should grant EU citizens with valid identity cards the right to enter and exit.[49] For the most part, the Directive is concerned with the right to residence. It distinguishes between the right to reside for up to three months,[50] the right to reside for over three months,[51] and permanent

[43] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ L172/14); Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (OJ L14/10); Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ L142/24).

[44] Council Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students (OJ L317/59).

[45] Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ L180/28).

[46] Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ L180/26).

[47] This intention is expressed in Recitals 3 and 4 of the Citizenship Directive.

[48] Article 3(1) of Directive 2004/38. Articles 2(2) and 3(1)(a) of Directive 2004/38 adopt a broad definition of the term family, which includes the spouse, registered partners, dependent children under the age of 21, and other dependent relatives. In addition, according to Article 3(1)(b), the Directive also gives protection to 'the partner with whom the Union citizen has a durable relationship, duly attested'.

[49] Articles 4 and 5 of Directive 2004/38.

[50] Article 6 of Directive 2004/38.

[51] Articles 7-15 of Directive 2004/38.

residence.[52] EU citizens are entitled to the right to residence for periods longer than three months if they are workers or self-employed, students, or individuals with sufficient financial resources in order not to become a burden on the social assistance system.[53] EU citizens acquire permanent residence status following a continuous period of legal residence within the host Member State of five years.[54]

Each of these three classes of EU citizens must satisfy a specific set of administrative formalities and, more importantly, enjoys specific packages of rights and entitlements. An important classifier for equal access to social assistance is periods of residence within the host state. Article 24 of the Directive stipulates that Member States can deny social assistance to Union citizens who are in their first three months of residence, as also to those who enjoy residence rights for longer periods on the ground that 'they are continuing to seek employment and that they have a genuine chance of being engaged'.[55] Maintenance aid can be denied to students without permanent residence.[56] In addition to periods of residence, entitlement to social assistance is conditioned also by periods of employment. Article 7(3) stipulates that social assistance must be conferred to the citizen if he or she is 'in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office'. Additionally, that provision states that if the citizen is in duly recorded involuntary unemployment 'after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months', the individual retains the status of worker 'for no less than six months'.

Finally, the Directive sets out different grounds that Member States can invoke to justify a decision to deny entry or expel a Union citizen. The three grounds are public policy, public security, and public health.[57] Of the relevant provisions, Article 28 has turned out to be the most controversial. That provision offers protection against expulsion on grounds of public policy and public security and distinguishes between three classes of Union citizens based on the duration of their residence. Citizens with less than five years of legal residence can be expelled on grounds of public policy and security. Heightened protection is offered to permanent residents, who can only be expelled 'on *serious* grounds of public policy or public security'. Those who have resided within the host state for the previous ten

[52] Articles 16-21 of Directive 2004/38.
[53] Article 7(1) of Directive 2004/38.
[54] Article 16(1) of Directive 2004/38.
[55] Article 24(2) in combination with Article 14(4)(b) of Directive 2004/38.
[56] Article 24(2) of Directive 2004/38.
[57] Articles 27-33 of Directive 2004/38.

years, in addition, cannot be expelled, 'except if the decision is based on *imperative* grounds of public security'.

One final reason that explains why EU citizenship offers such an interesting case study is that the Directive exposes the difficult and often obscure relationship between the EU's sources of primary law (the Treaties and the Charter of Fundamental Rights) and secondary legislation. A ten-year period exists between the introduction of EU citizenship and the creation of the Directive, during which the Court had started to develop the Treaty provisions on EU citizenship. While codifying and amending existing legislation, so as to define the new trajectory of free movement under EU citizenship, the drafters of the Citizenship Directive felt compelled to incorporate some of the principles the ECJ distilled from the Treaty provisions, but it did not fully incorporate all of the case law. This provides for the occasion, first, to assess the precise consequences of the felt obligation and attempt to incorporate these individual decisions into a general legislative framework. Later chapters will explain that many of the tensions internal to the Directive are a product of the attempt to unite the proposed legislative rules with the case law. Furthermore, it draws our attention to the normative controversies surrounding the relationship between primary and secondary law, because if, as appears uncontroversial, the sources of primary law are hierarchically superior over legislation, is it constitutionally permitted for the legislature to ignore the Court-created Treaty-based principles? EU citizenship, in other words, provides a good case to explore the authority of legislation in the context of earlier ECJ interpretations of the Treaties and raises the question to what extent the EU legislature can decide the EU's course of action considering the existing hierarchy between the different legal sources within the EU.

5. Thesis outline

Chapter 1 sets out in the abstract why the authority of the EU legislature is to enjoy a certain primacy over other sources within the EU. It challenges instrumentalist accounts of legitimate authority on two grounds. These ignore our reasonable disagreements on questions of morality and justice as well as the fact of institutional fallibility. I will explain how against the background of the facts of reasonable disagreement and institutional fallibility, the quality of legislation emerges clearly. I will explain that if the EU is to be reasonably legitimate, its course of action should be subject to the control of the EU legislature. Furthermore, certain of the institutional abilities of the EU legislature set it apart from and explain why it is this institution that is to be primarily responsible for deciding the EU's common policies. The EU legislative process allows for compromise between different visions on what ought

to be the substantive rules of EU law that bind the Member States and decision-making in accordance with rules creates the necessary stability, whereby those that are addressed by the law can guide their behaviour and decisions.

Chapter 2 explains in further detail the value of legislation in the face of reasonable disagreement about justice. I will do so based on a study of the law governing the eligibility of EU citizens to social assistance when resident in a Member States of which they do not possess nationality. Literature that dovetails the study of EU law with debates on justice tends to study this field of EU law and often criticises recent case law and existing legislation for falling short of the requirements of justice. I will show, in reaction, that our ability to decide on the inclusion of mobile EU citizens in the host Member State's social welfare system is affected by disagreement on what principles of justice demand in a transnational context. Bearing in mind our reasonable disagreements on what it means for EU citizenship law to constitute justice, I will highlight, from the perspective of political legitimacy, the value of judicial deference to the legislative standards enacted. Finally, the chapter returns to the earliest EU citizenship case law, which was decided before the current legislative framework was adopted, to show some of the problems that may emerge when the ECJ starts developing a legal framework on its own.

Chapter 3 continues where chapter 2 left us, namely the uncertainty and instability created by the ECJ's attempt to create a legal regime for EU citizens on its own. Chapter 3 explains that the key to understanding this is legislative rules and establishes a connection between those rules and the authority of legislation. This connection may seem obvious at first, but my analysis shows that EU lawyers are less inclined to follow rules when rule-application brings about a result that cannot be squared with the substantive goals behind the legislation. I will claim that decision-making in accordance with legislative intentions involves rule-following and accepting results that cannot be squared with the substantive intentions of the legislature. To understand this ostensibly counterintuitive argument, this chapter explains what rules accomplish and why the reasons for having rules are largely independent of the substantive goals behind them. Based on an assessment of the case law conditioning the grounds on which expulsion measures can be taken against EU citizens as well as the decisions examined in chapter 2, I will show that decision-making in accordance with clear and precise rules may be desirable over individual case-by-case decision-making. There are reasons for following such rules and for accepting outcomes that are hard to square with the substantive purposes behind the legislative rule and unfair in the individual case.

Chapter 4 will explain that not just is there a connection between the authority of legislation and legislative rules, but that there is a relationship as well between these two and the textuality of legislation. Because the rule the legislature has passed is the rule articulated by the words used, there must be a necessary connection between the authority of legislation, rule-based decision-making, and the written text. Legislation is authoritative only if the constraints imposed by the written text are treated as binding. The implication is that legislation is to be interpreted in accordance with principles of textualism, a method regularly rejected by EU lawyers. In part, this is because the method is widely misunderstood, but also because EU lawyers believe that decision-making in accordance with the substantive purposes of the legislature is what it means for the authority of legislation to be respected. This chapter will argue that that if the authority of legislation is contingent on the extent to which legislative rules are followed, it necessarily depends on whether the constraints imposed by the written text are accepted.

We will see that textualism does not disavow of purposive reasoning completely and recognises its relevance if the text runs out. Chapter 5 examines the constraints of purpose. I will claim that in case the written text underdetermines legal outcomes, the substantive purposes behind the legislation are the source to be considered if our ambition is to decide in accordance with the regulatory choices taken by the legislature. Based on an examination of the case law interpreting those provisions of EU citizenship legislation that govern the expulsion of EU citizens and their family reunification rights, I will demonstrate the constraints of purpose, even if these were not always recognised by the ECJ.

Chapter 1
Political Legitimacy and Institutional Ability – The Benefits of Legislation

Introduction

The EU can be understood as an aspiration to constitute justice beyond and among its Member States. That is possible only through collective decision-making and the EU has developed an intricate machinery of governance, whereby decision-making authority is divided between different institutions. The European Council, consisting of the Member States' heads of state or government, defines 'the general political directions and priorities' to be pursued by the EU.[1] The exercise of legislative authority, however, is reserved for the EU legislature, which divides power between three institutions. Under the ordinary legislative procedure, the Commission proposes legislation, which is to be jointly adopted by the European Parliament and the Council of Ministers.[2] The EU legislature has no authority, however, to enforce, apply, and interpret those acts of law it adopts. First, the EU institution in which executive power is vested is the Commission, which oversees the application of EU law and is responsible for its execution.[3] The Court of Justice of the European Union (ECJ or Court), moreover, has judicial authority and is responsible for observing and interpreting the law of the Union.[4] Adding to this complexity, deeply interwoven in all these processes of governing are the different national institutions. The national judiciary refers questions of EU law to and applies the decisions adopted by the ECJ,[5] domestic civil servants are involved in the implementation of EU law,[6] and the Member States' democratic representatives are obtaining an increasingly powerful position in the process of legislating.[7]

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[1] Article 15 TEU.
[2] Articles 289 and 294 TFEU.
[3] Article 17 TEU.
[4] Article 19 TEU.
[5] Article 267 TFEU. For further discussion, read: Morten P Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Second edition, Oxford university 2014); Takis Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (First edition, Oxford University Press 2015).
[6] Article 291 TFEU. Alexander Türk, 'Comitology' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015).
[7] Protocol No 1 to the Treaties on the role of national parliaments in the European Union and Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality.

Some of these features are unique to the EU, but what is not is its complex division of labour. Contemporary democratic states have a similar division of authority. The legislature enjoys the authority to write the laws that define and give expression to society's broader ambitions. As is the case within the EU, however, the implementation and enforcement of those policies is normally a responsibility that other authorities hold. Even though the legislature can define the shape of the executive and the limits of its powers, it is ultimately to the executive to give effect and implement, to the best of its judgment, enacted legislation. The state may also set up independent agencies with limited authority to carry out specific tasks. Finally, modern democratic states have an independent judiciary, which has authority to resolve disputes about the law and to apply it to concrete situations that come before it. Furthermore, we know that there is no strictly hierarchical relationship between these institutions. Institutions of subordinate authority may not always implement the higher norms to the best extent possible and we know that the interpretation of law comes with the making and discovery of new law. Nonetheless, there is reason for thinking that, as the political theorist Christiano said it, the authority of the legislature has a 'certain primacy' over these other institutions, meaning that these have reason to comply with the decisions taken by the legislature.[8]

I believe that we should think of the authority of legislation within the EU in similar terms and this chapter sets forth the reasons that the EU legislature ought to enjoy a certain primacy over other sources of law-making in the process of day-to-day decision-making. Were all Member States to decide individually on which policies to enact to realise the broader aims of European integration, the EU could not resolve collective problems that transgress the boundaries of the state with the same efficiency. A collective framework of action and a common set of rules must bind them, and I argue that the EU legislature should have a primacy of authority in shaping that framework. Two reasons support that claim: first, legislative authority ensures that EU law is reasonably legitimate to those living under it and, secondly, legislative rules enhance the guiding value of EU law and provide for a reasonable degree of stability in decision-making. This chapter sets out both reasons.

The bulk of this chapter concerns itself with the legitimacy of EU decision-making. The task of an account of legitimate political institutions is to describe when the exercise of coercive political power by political institutions is justifiable. Debate on legitimacy has historically centred on the state and its political institutions, but increasingly, the focus of the debate is shifting towards the

[8] Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2008) 255–258.

international order.[9] Among scholars of the European Union, the realisation that legitimacy could not be associated solely with the state probably occurred earlier. The long-lasting debate on the EU's democratic legitimacy and deficit testifies to this. The recognition that EU governance needs legitimation is probably in no small part because it is relatively undisputed that Member States are under an obligation to obey the commands issued by EU institutions.[10] EU decision-making, therefore, coerces the national citizen and forces us to think about the conditions under which EU institutions can legitimately wield their authority over the Member States.

Then the controversy begins, for few agree on the benchmarks of justifiable political power within the EU. To begin with, there is disagreement over whether legitimacy is a function of the moral qualities of the substantive political decisions, or instead, depends on the qualities of the political process by which these decisions came about. That is, is the concept of legitimacy content-dependent or content-independent, to be associated with or to be separated from justice and morality? And, if an account of legitimate decision-making within the EU is most plausibly content-independent, dependent instead on the fairness of the process of decision-making, which procedures and institutions legitimate the EU? Can the EU be legitimate only if democratic and is, therefore, the European Parliament the main source of its legitimacy, or instead, is that the Council, whose members are subject to democratic control within the Member States? Alternatively, some argue that neither of these two models is adequate and that, therefore, the ECJ is roughly as legitimate as these political institutions.

Section 1 explores the connection between legitimacy and justice and argues that an account of political legitimacy within the EU must be independent of our appreciation of the substance of political decisions. EU decision-making can be legitimate even if unjust. That legitimacy and justice are best treated separately is because it is implausible to assume that we will converge to a shared understanding of the requirements of justice within the EU, nor to think that one institution is better at realising a correct conception of justice. Therefore, the task of an account of political legitimacy within the EU is to outline a fair process of collective decision-making in the face of disagreement on

[9] For a variety of perspectives, read: David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995); Thomas Christiano, 'Democratic Legitimacy and International Institutions' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010); Philip Pettit, 'Legitimate International Institutions: A Neo-Republican Perspective' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010); Iris Marion Young, *Inclusion and Democracy* (Repr, Oxford Univ Press 2010).

[10] The principles of direct and effect and the primacy of EU law over national law have restricted the powers of the Member States. Case 26/62 *Van Gend en Loos*, ECLI:EU:C:1963:1; Case 6/64 *Costa v ENEL*, ECLI:EU:C:1964:66.

the substantive content of political decisions. Section 2 argues that once it is appreciated that political legitimacy is content-independent, the value of legislative authority within the EU emerges clearly. I will explore the dichotomy between output-oriented and input-oriented legitimacy, which has shaped debate on the legitimacy of the EU since Scharpf presented his influential account.[11] I suggest that due to our reasonable disagreements on justice and morality, outcome-oriented accounts cannot carry the burden of EU legitimacy. Instead, I offer an input-oriented account, but one which departs from dominant versions in that it disassociates itself from the idea of democracy within the EU. Contrary to a prominent view that the EU legislature lacks legitimacy because it is not grounded in democracy, I explain that the EU legislature has legitimate authority because it reasonably subjects the EU's collective course of action to the Member States' democratic processes. Finally, section 3 turns to the second reason supporting my case for the primacy of legislation. The EU legislature can decide on the EU's common course of action at the required level of generality and is best positioned to think through the implications of EU law for all those affected by it. In addition, through its rules, legislation serves as a guiding force to those bound by it and decision-making is stabilised because these rules withdraw decision-making power from lower authorities, including Member State institutions.

1. Reasonable Disagreement and Institutional Fallibility

If the EU can be understood as an attempt to realise justice transnationally, it is tempting to think that its legitimacy is dependent on its realisation of justice, and that the institution whose decision is authoritative is that which realises the best substantive outcomes. In the introduction to this thesis, I demonstrated that EU lawyers take contradictory stances on legislative interpretation and rule-following and explained that that must be because these scholars make their preferred theories of interpretation and accounts of rules dependent on the substantive result they want to see realised. Moreover, the concept of justice has become a beloved field of inquiry among EU lawyers in recent years and,[12] as the following chapter demonstrates in more detail, these studies all tend to conflate justice and legitimacy. That is, they adopt an instrumental approach to authority and treat legitimacy as a content-dependent concept, inseparable from the moral qualities of policies' substantive

[11] Fritz Wilhelm Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999).

[12] Prominently, Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015); Dimitry Kochenov, Gráinne De Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015); Päivi Johanna Neuvonen, *Equal Citizenship and Its Limits in EU Law: We The Burden* (Hart Publishing 2016).

outcomes.[13] They claim, in other words, that the authority of the EU can be justified if exercised with respect to principles of justice.

The introduction to this thesis sketched the consequences of instrumentality for the authority of legislation within the EU. I explained that it is the legislature that is negatively affected by content-dependent understandings of legitimacy; it leads to the position that its authority can legitimately be sidestepped by the Court (or any other institution) if more desirable results are realised thereby. Legislation is authoritative when just. Two assumptions reinforce that position, which Bellamy described as the core tenets of legal constitutionalist thought. These are, first, that we can rationally agree on the kind of substantive outcomes political decision-makers must realise and, secondly, that the judicial process can more steadfastly achieve these results.[14] Much of the debate on justice within the EU takes place against these background assumptions. As one prominent contributor to the debate claimed, 'human rights possess sufficient normative substance and legal appreciation together with sufficient commonality and sufficient moral weight to acquire support amongst the people' and, therefore, enjoy 'reasonable normative stability'.[15] Another author defended the position that 'a well-functioning institution of judicial review contributes in a very practical way to the attainment of justice by ensuring that correct values, procedures and principles are observed in the process of law creation'.[16] This section challenges these assumptions and argues that neither is it plausible to believe in the notion of reasonable stability or agreement on questions of rights and justice, nor that the judicial process functions so that it offers a more reliable procedure for realising justice. That is because of our reasonable disagreements on justice and morality (1.1) and because of institutional fallibility (1.2).

This is not the same as saying that the substantive content of the political decisions taken is irrelevant, and that there should not be concern for, or debate over their justness and goodness. It is not, as two EU scholars worry, that a turn to legitimacy prevents 'thinking about justice in the EU'.[17] Our appreciation for political institutions comes precisely from our realisation that we can constitute

[13] On instrumentalist conceptions of authority, Thomas Christiano, 'The Authority of Democracy' (2004) 12 Journal of Political Philosophy 266.

[14] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 20.

[15] Andrew J Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge University Press 2010) 321–322.

[16] Dorota Leczykiewicz, '"Constitutional Justice" and Judicial Review of EU Legislative Acts' in Dimitry Kochenov, Gráinne De Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 98.

[17] Dimitry Kochenov and Andrew Williams, 'Europe's Justice Deficit Introduced' in Dimitry Kochenov, Gráinne De Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Bloomsbury Publishing 2015).

justice in our societies only through collective decision-making.[18] It would be a mistake, therefore, not to address and discuss the outcomes realised by such processes. I argue, however, that legitimate political institutions within the EU do not depend on our conceptions of justice and morality. Hence, I suggest not that legitimacy must substitute justice, but instead, that we should complement our accounts of justice with a theory of legitimate decision-making within the EU.[19] The concepts of legitimacy and justice must be distinguished and in case of conflict, the former prevails over the latter.[20]

1.1 Reasonable disagreement

An instrumentalist theory of legitimate institutions considers the exercise of authority legitimate when just. That suggests that the possibility exists for us to define the requirements of justice and possibly even that we can come to agree on what that discovery entails. This assumption, however, that we will converge on a shared understanding of justice, morality, and rights, is implausible.[21] Disagreement simply is too persistent a fact of our political lives and extends beyond the confines of the state, also affecting transnational policy-making. This is not to say that EU lawyers have exaggerated the importance of respecting rights and principles of justice. The great majority of individuals living in this world share the belief that the protection of individual rights merits serious attention, but the precise import of rights raises grave disputes. Recent controversies over the precise requirements of gender equality and the economic right to freely conduct a business demonstrate the prematurity of speaking of a reasonable stability of rights within the EU.[22] Likewise, most people expect the EU to uphold principles of justice and yet there is no consensus on what it means for the EU to act accordingly. Long-standing disputes among EU lawyers about the protection of social and labour

[18] Christiano, 'The Authority of Democracy' (n 13) 269.

[19] As noted by Waldron, the 'emphasis on justice as the key topic [for study] is a little one-sided'. Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016) 4.

[20] Christiano, 'The Authority of Democracy' (n 13); Richard Bellamy, 'Turtles All the Way down? Is the Political Constitutionalist Appeal to Disagreement Self-Defeating? A Reply to Cormac Mac Amhlaigh' (2016) 14 International Journal of Constitutional Law 204, 214.

[21] Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999); Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (n 14); Christiano, *The Constitution of Equality* (n 8); Laura Valentini, 'Justice, Disagreement and Democracy' (2013) 43 British Journal of Political Science 177.

[22] On gender equality, Case C-236/09 *Test-Achats*, ECLI:EU:C:2011:100. For a useful analysis, JHH Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 242–244. On the right to freedom to conduct business, Case C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:521; Case C-157/15*, G4S*, ECLI:EU:C:2017:203. An interesting analysis of *Alemo-Herron* has been offered by Eduardo Gill-Pedro, 'Freedom to Conduct Business in EU Law: Freedom from Interference or Freedom from Domination?' (2017) 9 European Journal of Legal Studies.

rights under EU law offer an instructive example.[23] Similarly, we all think that the student who takes up residence in another Member State is to be treated fairly, but a shared conception of what such fair treatment would consist of is lacking. More generally, as the following chapter explores in detail, there is no agreed upon understanding of how principles of justice bear upon claims to social assistance by mobile Union citizens within the host Member State. Some believe that justice requires full and equal access of such benefits for all EU citizens, while others think that such claims can be denied to those who have never participated in the host Member State's economic life.

Disagreement is potentially infinite and happens against a background in which it seems unrealistic to think that correct moral truths are identifiable.[24] As Waldron explained, this is not necessarily because uniformly valid morals are non-existing, but because no one seems capable of their discovery.[25] Equally important, people generally disagree not because of self-interested or malign motives, but because of what Rawls called 'the burdens of judgment'.[26] Individuals have disparate interests and substantive moral beliefs, which are largely informed by our different experiences in life, the specific social conditions we grew up under, and the diverse sets of talent we possess. These different conditions shape our preferences and sense of justice, and contribute to disagreement about the ends to be pursued by politics. In addition, often we lack the ability to develop as good an understanding of the needs and desires of other persons when compared to our awareness of our own. Such cognitive bias increases the chance of moral fallibility in our understanding of other persons.[27] This does not deny that some are driven by malicious ambitions, but it appears implausible to think that this is true for the great majority of us. Disagreements on the good are, therefore, better considered as reasonable disagreements among reasonable people.

Political decision-making is made more complicated by our substantive political disagreements, but at the same time, such decision-making becomes all the more important because of it. These are what Waldron described as 'the circumstances of politics'.[28] In a world that we inhabit with many others, and where our actions have consequences for other individuals, there must be shared rules that guide our behaviour and describe the distribution of resources. Would there be a

[23] C-341/05 *Laval*, ECLI:EU:C:2007:809; Case C-438/05 *Viking*, ECLI:EU:C:2007:772; *Alemo-Herron* (n 22).
[24] Robert A Dahl, *Democracy and Its Critics* (Yale University Press 1991) 66.
[25] Waldron, *Law and Disagreement* (n 21) Chapter 8.
[26] John Rawls, *Political Liberalism* (Columbia University Press 1993) 54–58.
[27] Christiano, *The Constitution of Equality* (n 8) Chapter 2. A strong assumption underlying the case for democracy, as Dahl explained, is that 'no person is, in general, more likely than yourself to be a better judge of your own good or interest or to act to bring it about'. Dahl (n 24) 99.
[28] Waldron, *Law and Disagreement* (n 21) 101.

shared understanding of justice and of the kind of behaviour that is tolerable, it may be that our societies could function with far fewer rules. Absent agreement on those matters, however, it is necessary at some point to settle on a certain set of policies and to decide on common rules that bind all living under it. Hence, precisely the kind of disagreement that complicates political decision-making also necessitates it.

The circumstances of politics also govern decision-making within the EU. Precisely because a common understanding of the broader ideals of European integration is lacking among the Member States and so is, certainly, agreement upon how to best implement these ideals, a political process that decides on the EU's common course of action and decides on a set of shared rules is needed. But if the fact of disagreement complicates policy-making in general, it certainly poses a challenge to instrumentalist accounts of legitimate decision-making within the EU. The claim that the EU has legitimate authority only when it acts in the interest of justice disregards that finding objectively true principles of justice has proven impossible so far and that our inquiries are limited by the burdens of judgment. Political procedures are needed exactly to settle our disagreements and to come to an agreed set of rules and rights. Therefore, a theory of legitimate political decision-making within the EU cannot depend on some conception of justice. Instead, the legitimacy of decision-making within the EU must depend on the intrinsic qualities of the process by which decisions come about.[29]

1.2 Institutional fallibility

The suggestion that decisions taken by the EU legislature are authoritative until the judiciary designs a morally more desirable alternative outcome cannot rest solely on the assumption that it is possible objectively to decide on what constitutes a desirable result. Instead, it must logically assume also that the judicial process offers a more reliable procedure for realising justice. After all, if not we assume that the judiciary is more likely to realise justice in its decision-making, the position that the authority of legislation must be made subject to the judges' conception of the good is difficult to maintain. That is, if not there is reason to think that, comparatively speaking, the legislature's performance is below that of the judiciary, the position that the judiciary is not bound by unjust legislative decisions loses much of its attractiveness.

How the performance of either institution is assessed depends on one's appreciation of the substantive results realised, which places certain restrictions on our possibility to assess institutional

[29] Christiano, *The Constitution of Equality* (n 8) 232–234; Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (n 14); Waldron, *Law and Disagreement* (n 21).

performance. Nonetheless, it is possible to consider the abilities specific to different institutions as well as the limitations affecting all. Section 3 will consider certain abilities that are unique to the legislative process, while here I want to discuss one institutional shortcoming that weighs against legislatures and courts equally. Both institutions are fallible and none will decide matters correctly all the time.

The fallibility of legislatures is all too easily accepted and no plausible account of this institution will deny that the members of our legislative bodies, even the wisest among them, can have an incorrect understanding of the matter in front of them or may fail to see the full consequences of their acts. While, however, legal scholars regularly emphasize the imperfections associated with representative bodies, there is a tendency to assume that the judicial process offers or can be turned into a relatively 'frictionless' alternative to the legislative process.[30] This 'nirvana fallacy', the phenomenon of comparing the actual performance of legislatures with an ideal conception of courts,[31] occurs within EU law scholarship as well. Some EU lawyers, we saw above, maintain that 'a well-functioning institution of judicial review contributes in a very practical way to the attainment of justice'.[32] No institution, no matter how well it performs, is able to decide with such a degree of perfection; because our world is not an ideal one, our theories of judicial behaviour should not presume some ideal process.[33]

That EU lawyers belong to the same epistemic community as ECJ judges, sharing the same interests, understandings, and preferences, may partly explain the propensity to over-idealise the performance of the judicial process, when compared with the legislative process.[34] That some consider it to be among courts' tasks to remedy legislative shortcomings probably contributes to that tendency as well. As one regular contributor to the EU citizenship debate claimed, '[i]n in ideal world the Court … should not be deferential to the legislative outcomes of a democratic process which are harmful or make no sense'.[35] That we find this statement in an article that otherwise vilifies the ECJ for having

[30] Neil K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997) 26. See also, Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999).
[31]Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006) 40; Komesar (n 30). See also, Keith E Whittington, 'In Defense of Legislatures' (2000) 28 Political Theory 690.
[32] Leczykiewicz (n 16) 98.
[33] For such an idealisation, read: Charlotte O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union' (2013) 50 Common Market Law Review 1643, 1680.
[34] Martin Shapiro, 'The European Court of Justice' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999).
[35] Dimitry Kochenov and Uladzislau Belavusau, 'Kirchberg Dispensing the Punishment: Inflicting "Civil Death" on Prisoners in Onuekwere (C-378/12) and M.G. (C-400/12)' (2016) 41 European Law Review.

ignored legislative provisions, whereby it sacrificed the rights of individual citizens and failed to deliver justice, demonstrates that our world is not an ideal one. This seriously undermines any account that treats the Court as an ideal platform for further debate on legislative decisions;[36] it shows that judicial, like legislative decision-making, creates 'an institutional rule that necessarily produces a package of outcomes, both good and bad'.[37] Those who suggest that the ECJ should refuse to follow legislative acts that are undesirable fail to give sufficient thought to the question of which institution protects us against judicial fallibility. The point is that at some moment, our disagreements must be resolved and a decision be taken, which is treated as authoritative by others. It may be that the authority we favour as the most legitimate will occasionally decide certain matters wrongly in our view. That paradox is an inevitable feature of politics.[38] We value particular institutions and entrust them to decide our disputes despite all their limitations.

2. Political legitimacy

Precisely because of our disagreements, collective decision-making becomes essential, and there is no denying the need for collective decision-making also on issues that we passionately disagree about. Which institutions and processes of decision-making we prefer for resolving our disagreements cannot depend upon which is most likely to secure the correct outcome, for the need to decide arises precisely because individual conceptions of justice and rights are subject to reasonable disagreements, and because all institutions are likely to err in their judgment on occasions. Against the backdrop of the facts of reasonable disagreement and institutional fallibility, the value of legislative authority within the EU emerges clearly. I claim that the authority of the legislature must have a certain primacy over other political institutions within the EU and its decisions be treated as authoritative for two reasons. First, the legislative process offers the most legitimate process for deciding on the EU's course of action and, secondly, it generates stability in the entire process of EU decision-making and, thereby, provides clarity to those living under EU law. Section 3 turns to this second aspect; the focus of this section is on the legitimacy of decision-making within the EU.

[36] For an account that sees court as offering an appropriate forum for re-debating legislative decisions, Miguel Poiares Maduro, 'Interpreting European Law - On Why and How Law and Policy Meet at the European Court of Justice' in Henning Koch and others (eds), *Europe: The New Legal Realism: Essays in Honor of Hjalte Rasmussen* (Djøf Publishing 2010) 468.

[37] Vermeule (n 31) 231.

[38] On that paradox, Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 The Yale Law Journal 1246, 1372. See also: Christiano, *The Constitution of Equality* (n 8) 98.

Political legitimacy is about the justification of political authority and the exercise of political power over citizens.[39] I will claim that the EU is reasonably legitimate if its decision-making is subject to legislative control. To demonstrate this, section 2.1 explores Scharpf's influential account of input- and output-oriented legitimacy and explains how this dichotomy has contributed to the neglect of legislation. I argue that our reasonable disagreements on substantive outcomes weaken output-focused theories of legitimacy and that the input-side is associated too closely with democracy. Section 2.2 explains why the EU is lacking the preconditions for legitimate democratic decision-making. Therefore, section 2.3 disassociates the connection between input-legitimacy and democracy and offers an input-based account of legitimacy that treats the EU as a fair association of democratic states, which derives its legitimacy from domestic democratic processes. From that perspective, we can best understand the value of the EU legislature.

2.1 Output legitimacy, democratic legitimacy, and the precarious position of the EU legislature

The instrumentalist form of legitimate authority goes under the term 'output-legitimacy' in EU scholarship. Output-legitimacy theories see collective decision-making as deriving its legitimacy from its problem-solving capacity and the promotion of the general welfare.[40] Problematically, output-oriented accounts of legitimacy are insufficiently attentive to the contested and indeterminate nature of the aims of European integration. In their narrow form, arguments over output reduce legitimacy to concern over effectiveness and efficiency and treat as legitimate those decisions that more closely realise the ends pursued by the EU. Maybe, these benchmarks are adequate when the matters that are dealt with are of a highly technical nature, requiring expertise and specialisation, but when the matter is politically more contested, the question is 'effective to what end'.[41] A broader understanding of output-legitimacy considers political outcomes legitimate if in the interest of the common good. That

[39] Sometimes EU lawyers conflate the legitimacy of case law with its consistency. But, of course, the Court being consistently mistaken does not make its decisions legitimate. For such a conflation, read several of the contributions to the following book: Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013).

[40] Scharpf (n 11) chapter 1. See also: Dominique Ritleng, 'The Independence and Legitimacy of the European Court of Justice' in Dominique Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (OUP 2016) 108; Anand Menon and Stephen Weatherill, 'Transnational Legitimacy in a Globalising World: How the European Union Rescues Its States' (2008) 31 West European Politics 397; Giandomenico Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 European law Journal 5, 22–23.

[41] Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2013) 116. See also: Stefano Bartolini, 'Taking "Constitutionalism" and "Legitimacy" Seriously' [2008] European Governance Papers 13.

requires a shared understanding of the common good; the goals pursued must resonate with the subjective beliefs held by EU citizens.[42]

Often, however, political disputes revolve around and exist precisely because there is no shared understanding of what constitutes good output. Despite these disagreements, a political choice must be made and common policies enacted, but when what constitutes desirable output is the subject matter of the debate, the decision cannot be legitimated by reference to some preferred conception of output. An account of legitimate decision-making should offer grounds for why the citizenry should accept the output of political decision-making, even if in substantive disagreement with it,[43] which is why a plausible account of political legitimacy must be content-independent and privilege the quality of 'inputs' over 'outputs'.[44]

Output-oriented theories of legitimacy, however, are popular within EU scholarship precisely because of the conviction that input cannot bear the burden of EU authority. Input is associated with democracy and a widely shared perception is that the conditions supporting democracy are unrealised and perhaps unrealisable within the EU. Because there cannot be a democratic European Union, its legitimacy is considered to depend on the output of its policies and its contribution to the common welfare of all.[45] Scharpf used to defend this view and it has greatly influenced EU legal scholarship.[46] Illustrative is the now burgeoning debate on justice within the EU. The conclusion that we must turn to an analysis of the justness of EU law-making is often preceded by the conclusion that the EU lacks an autonomous democratic character.[47] In other words, precisely because the EU's authority is not grounded in democracy, it must produce just outcomes and act in the common interest of all.

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[42] Vivien A Schmidt, 'The Eurozone's Crisis of Democratic Legitimacy: Can the EU Rebuild Public Trust and Support for European Economic Integration?' [2015] European Economy Discussion Papers NO 15.

[43] Christiano, 'Democratic Legitimacy and International Institutions' (n 9) 120; Richard Bellamy, '"An Ever Closer Union Among the Peoples of Europe": Republican Intergovernmentalism and *Demoi*Cratic Representation within the EU' (2013) 35 Journal of European Integration 499, 501.

[44] Richard Bellamy, 'Democracy without Democracy? Can the EU's Democratic "Outputs" Be Separated from the Democratic "Inputs" Provided by Competitive Parties and Majority Rule?' (2010) 17 Journal of European Public Policy 2.

[45] For example, Miguel Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Pub 1998) 28. '[O]ne must recognize the importance of granting new rights to individuals as a form of legitimation; and even as a way to gain social legitimacy in compensation for the loss of formal legitimacy resulting from the developments in the integration process (the classic democratic deficit)'.

[46] Scharpf (n 11). It appears that he has nuanced and changed his original position somewhat over the years (Scharpf (n 21)).

[47] de Witte (n 12) 52–69; Jürgen Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (Oxford University Press 2012).

Section 2.2 argues that Scharpf had good reasons for thinking that democracy at the European level is still out of sight, but that he was mistaken in assuming that this negates the possibility of input-based legitimation for the EU. This suggests too tight a connection between, on the one hand, the preconditions for democratic decision-making and, on the other, legitimacy based on input-conditions. Scharpf was correct in thinking that absent a reasonably thick collective identity, the establishment of an institutional framework in which decisions are taken based on democratic procedures will not legitimate the outcomes generated by them,[48] but he concluded too hastily that input-oriented legitimacy is an impossibility in polities lacking a strong sense of collectiveness. In other words, the problem is that his account risks denying the import of input-considerations in polities in which democratic structures cannot legitimate decision-making. Not just is the consequent belief, that the quality of outputs conditions the legitimacy of institutions beyond the state, untenable, the risk is that it blinds us to the relevance of questions of process at the international level. Most of all, it can blind us to the relevance of legislative authority within the EU.[49]

A recent institutional account by de Witte, who resourcefully integrates a range of existing perspectives to explain how EU law should deal with national expressions of democratic self-determination, provides a good example. De Witte purports to mediate between two ostensibly incommensurate logics of how EU law ought to impact on the national legal orders, which he calls: 'the argument from self-determination' and 'the argument from containment'.[50] The first argument holds that '[t]he diversity in the moral and ethical policies that exist in Europe can both be explained and normatively defended with reference to the argument from (political) self-determination'.[51] That is, because 'the institutional preconditions' that are necessary for 'self-determination at the transnational level' are absent, the EU should defer to 'the capacity of national political processes to mediate between and legitimize' different conceptions of the good.[52] Embraced by the argument from self-determination thus is the notion that the norms expressed in national laws derive their legitimacy from the fact of them articulating the view of the democratic legislature, to which the EU should bow. In opposition to this argument, we find the argument from containment, which seeks to alleviate the burdens and negative externalities created by national decision-making. It holds that decisions of

[48] I will return to this in section 3.2.
[49] Scharpf himself, however, has given much attention to the legislative process within the EU and the difficulties associated with adopting legislation. See, for an example, Scharpf (n 46).
[50] Floris de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50 Common Market Law Review 1545, 1546.
[51] ibid (italics omitted).
[52] ibid 1551.

democratic assemblies of one Member State may undermine the democratic choices of another and that the EU is well positioned to contain those externalities based on principles of free movement and non-discrimination.

De Witte offers three arguments in support of the argument from containment, one of which interests me here: the argument from constrained democracy, which holds that national self-determination must be limited in order to incorporate the interests from the outsider. This argument is premised on the claim that national processes of democratic self-determination 'will almost invariably lead to scapegoating and territorial aggression, and to excesses of sovereign violence'.[53] It can hardly surprise that such a cynical view of the democratic process results in the complete negation of its relevance. After all, according to de Witte, political power is to be checked by re-allocating responsibilities 'to a different *type* of government, whether judicial … expert based … administrative … or the individual'.[54] The argument from containment allocates 'the formation and re-negotiation of moral, ethical or cultural norms … to the transnational level, and mainly its *judiciary*'.[55] Striking is the absence of the legislature in this account, whose authority apparently is irrelevant when it comes to drawing up those collective EU rules that bind all Member States.

That the legislature and legislation are being neglected is explicable once we turn to de Witte's argument from self-determination. In his view, the EU is missing the capacity 'to replicate the basic institutional preconditions that would allow for self-determination at the transnational level'.[56] This, in his account, undermines the legitimacy of all authority at the European level, irrespective of whether we speak of the legislature or the judiciary.[57] But of course, we can certainly conceive of forms of self-determination that are not democratic in nature and the EU offers a clear example. The EU has been institutionally able to adopt laws accommodating value disagreement and examples are plentiful. The EU citizenship legislation, of which I provided an overview in the introduction to this thesis, and which stipulates the conditions under which persons can exercise their free movement rights and claim rights and entitlements in the host Member State, offers but one example. It is an empirical mistake

[53] ibid 1554.
[54] ibid (footnotes omitted).
[55] ibid 1555–1556.
[56] ibid 1547. These basic institutional preconditions are democratic in character. See, for indications to that effect, the discussion on pages 1550-1551.
[57] 'A European public order, centred on majoritarian first principles, whether given shape through the EU's legislative process, through an overly strict application of the Charter of Fundamental Rights, or through the Court's case law, lacks legitimacy (which is derived from the institutional capacity for self-expression, mediation and re-iteration)'. ibid 1561.

to claim that transnational self-determination is impossible and the origins of this mistake are easy to see. De Witte essentially assesses the EU's ability for self-determination by applying the template of a system of democratic decision-making that realises public equality among citizens. Like many others, he believes that the EU lacks the capacity for autonomous democratic decision-making and, therefore, implicitly develops an output-based account of legitimate EU institutions – the authority of non-representative institutions is legitimate to the extent that they contain the negative implications of domestic democratic decision-making or produce just outcomes.[58] In all this, de Witte ignores the EU legislature, which is among the EU's institutions possessing the capacity for and exercising self-determination on a daily basis, and he appears to assume that this institution is as (il)legitimate as the judiciary. Others have asserted in more explicit terms that because the EU legislative process is not grounded in democracy, there will not be a loss to political legitimacy, and maybe its authority can be more easily justified,[59] if important political and moral decisions are made by the judiciary over the legislature.[60]

2.2 The barriers to democratic decision-making within the EU

Three plausible objections can be brought against this idea. To begin with, if it is the case that both institutions fall short of essential thresholds of input-legitimacy equally, it does not follow automatically that decision-making by the judiciary is desirable for outcome-related reasons. This is precisely what appears to be the suggestion of those favouring decision-making by judicial authority, but is far from evident absent agreement on a correct understanding of output. I will leave this objection for what it is, because it does not make the case for legislative authority in the required terms. Secondly, and more to the point already, to demonstrate that the EU legislature lacks the democratic legitimacy enjoyed by national legislative fora does not establish that the judiciary is as (il)legitimate, from an input-oriented perspective, as the legislature. There is an immense gap to be bridged by those who, because the EU legislative process does not satisfy accepted democratic

[58] Which de Witte calls 'aspirational justice'. ibid 1552. Problematically, his account of justice ignores our reasonable disagreements.

[59] Maduro expressed the rationale behind this idea as follows: 'National courts are traditionally contrasted with the democratic legitimacy of national parliaments *vis-à-vis* their lack of accountability. The European Court's constitutional activism was not faced with a traditional democratic representative body at the EU level'. Maduro (n 45) 11.

[60] See, for example, Anthony Arnull, 'Judicial Review in the European Union' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 379–385; Herwig Verschueren, 'The EU Social Security Co-Ordination System' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 181.

standards, draw the conclusion that the legislature and judiciary are equally (il)legitimate. That gap consists of the fact that decision-making through EU legislative procedures still requires the consent of politicians that are subject to a certain democratic control at home and also of the European Parliament, while the ECJ acts independently of these procedures.[61] As Nic Shuibhne has rightly asserted, '[t]he legislative process emits glows of democracy and legitimacy that seem then contaminated by assertions that the Court's understanding of EU citizenship, drawn quasi-enigmatically from the Treaty, should take precedence'.[62] Legitimacy being partly comparative,[63] it seems that on the basis of this second objection alone, the idea that there is no loss of legitimacy if the judiciary acts without regard to legislation is hard to maintain.

A third and stronger objection is available though. It is alike the second in that it suggests that in comparative terms, the judicial process is not as legitimate as the legislative, but takes more seriously the perceived shortcomings to democratic decision-making within the EU. The EU legislature must not enjoy primacy over other decisional authorities because it is most accountable to democratic decision-making, but precisely because the chances for the EU becoming democratic remain slim. This objection thus counters the suggestion that because the EU misses the preconditions for democratic decision-making, the legitimate authority of legislation is undermined, making the ECJ's failure to comply with legislative decisions less problematic. Rather, it asserts that the legislative process is important precisely because of the enormous hurdles the EU must overcome before being reasonably democratic. My account shows that the EU legislature has legitimate authority even though – and precisely because – it is not democratic.

Currently, debate on legitimate decision-making within the EU is strongly dichotomous. One conception holds that for as long as the EU's authority lacks democratic legitimacy it can only be justified based on the quality of its outputs, which is often better ensured through judicial decision-making. The counterclaim is that, outcome-dependent accounts of legitimate EU institutions being implausible, the EU must develop transnational processes of democratic decision-making. This view is so prevalent that even scholars who defend a position at the other end of the spectrum of that promoted by Scharpf see things this way. In 1993, the German Constitutional Court (GCC) delivered

[61] An argument resembling this second objection has been developed by: Niamh Nic Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the Case Law of the Court of Justice' in Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012).
[62] ibid 352.
[63] Waldron, 'The Core of the Case Against Judicial Review' (n 38) 1389.

its verdict on the Maastricht Treaty. The GCC postulated its no-demos thesis,[64] which reasons that without a sufficiently developed and thick European collective, democracy is impossible within the EU. Scharpf shared the GCC's misgivings on European democracy, invoking it as a barrier to democracy within the EU,[65] turning instead to output-oriented legitimacy. Not everyone did. Weiler expressed his profound reservations with the decision and was particularly concerned with the democratic consequences. According to him, '[y]ou simply cannot be serious about democracy in Europe and believe that given the present array of powers and competences already transferred to the Union, democratization can take place exclusively on the national level'.[66] Interestingly, despite Weiler's questioning of the 'no-demos thesis',[67] like Scharpf, also he closely associated input-based legitimacy with democracy at the European level. He challenged the no-demos thesis because it insists that 'the only way to think of a polity, enjoying legitimate rule-making and democratic authority, is in statal terms'.[68] Weiler appeared to grasp very well that due to the depth of European integration, output-based legitimacy is inadequate, which is precisely why believed that the only way of legitimating the EU was by democratising it.

Over 20 years after Weiler criticised the GGC's decision and made his case for the democratisation of the EU, it still falls short of any plausible conception of democracy. Central to any account of democracy is equality. When there is disagreement on substantive outcomes, the fairest way of resolving our disagreements and deciding on a common course of action is through democratic procedures that give equal weight to the preferences of all citizens.[69] The EU denies the equality of citizenship; the EU citizen is represented in the European Parliament based on the principle of degressive proportionality[70] – smaller Member States are being allocated more seats than

[64] BVerfGE 89, 155 (12 October 1993).
[65] Scharpf (n 11) 10.
[66] JHH Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1 European Law Journal 219, 237.
[67] Weiler strongly opposed the *Maastricht* decision of the German Constitutional Court, while Scharpf defended the GCC's opinion on the democratic implications of the absence of a common demos within the EU. I am uncertain if Weiler still ascribes to this position. Read, for example, JHH Weiler, 'Prologue: Global and Pluralist Constitutionalism - Some Doubts' in Grainne de Burca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2011) 12–13.
[68] Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (n 66) 238.
[69] Dahl (n 24); Christiano, *The Constitution of Equality* (n 8); Waldron, *Law and Disagreement* (n 21) 108–115; Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (n 14) 225–227.
[70] Article 14(2) TEU.

proportionate[71] – and the Council takes ordinary decisions by qualified majority.[72] Several scholars treat this characteristic feature of the legislative decision-making process – the political inequality of EU citizens – as corrosive of the EU's democratic legitimacy. Where they differ is in the solution they propose. Neyer, most prominently, suggests that '[a]pplying the democratic standard to the EU is nothing less than a categorical mistake' and that it is necessary 'to substitute the discourse on the democratic deficit of the European Union with a discourse on its justice deficit'.[73] Also de Witte appears to think that a renewed focus on the quality of the EU's outputs is the appropriate answer to the legitimacy deficit.[74] Kochenov, on the other hand, claims that it is the lack of equality among citizens itself that constitutes the problem, which suggests that the EU's legitimacy deficit is to be resolved by improving the fairness of the inputs to its political process.[75]

These solutions fall neatly within the dichotomy between output-oriented legitimacy and democracy-based input-oriented legitimacy that I described before, but forget to realise that political equality is no constitutive element of EU decision-making precisely to make it reasonably legitimate. Equality is at the root of democracy because of the widely held conviction that all who stand in a position of equality vis-à-vis each other must have an equal say over society's political directions. When there is disagreement about substantive political questions, decision-makers must be equally accountable to all citizens to prevent domination of certain individuals and groups over others. Its success, however, is conditional not solely on the democratic procedures that are put in place, but also on if the basic conditions that allow for these procedures to realise that aim exist. What is questionable is if international organisations satisfy these conditions and if, therefore, democratic equality is the appropriate ideal.[76] If equality is the core of democratic theory due to the belief that all who are equally

[71] This has led to the accusation of the EU violating the 'one man one vote' principle. Jürgen Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (Oxford University Press 2012) 59–61; Dimitry Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2011) 08/10 Jean Monnet Working Paper footnote 63.

[72] Article 238 TFEU. ' A qualified majority shall be defined as at least 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States'. Democratic theorists consider majoritarian decision-making fair because it roughly allows for the equal advancement of interests by everyone with a roughly equal stake in the society; it offers, as Dahl has explained, a decisive procedure for resolving disputes, which gives equal weight to and is neutral as to the citizens' preferences and is responsive to the greatest number. This standard argument in favour of majority rule was first offered by the mathematician Kenneth O May, 'A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision' (1952) 20 Econometrica 680. Dahl has presented the argument in non-mathematical terms. Dahl (n 24) 139–141.

[73] Neyer (n 71) 7.

[74] de Witte (n 12) 55.

[75] Kochenov (n 71) footnote 63.

[76] I presume that this conclusion is fairly controversial for many EU scholars. Underlying the longstanding debate on the EU's democratic deficit is a strong presumption that democracy is the ideal, even if not realised at present.

positioned must have an equal say over politics, it is questionable (a) if there is even some rough sense of equality among EU citizens and (b) if democratic procedures enable them to roughly have an equal say over the decisions that are taken.

The political response to the Euro-crisis has belied the idea that some rough sense of equality among Union citizens exists. The burden of the Euro-crisis was placed largely on a smaller group of weaker Member States, who were obliged to implement far-reaching institutional and economic reforms, with great consequences for their standards of national welfare.[77] Some sense of social solidarity among EU citizens was glaringly absent. If anything, it suggests that nationality still is the dominant cleavage cutting across the European political spectrum; a common European demos is still lacking, or minimally developed at best. When several cleavages cut across the political spectrum, the composition of majorities and minorities will shift after new elections and due to the need for coalitions and compromise,[78] but against the background of one major cleavage, the risk arises that certain minorities find themselves permanently insulated from political influence. These groups may be included in the democratic process, but if that rarely results in them having a say over the policies that are debated and their interests risk being consistently ignored, minorities are unable to promote their own interests through processes of representation, their lives, instead, becoming determined by strangers.[79] In the absence of a collective demos and a shared degree of commonality among EU citizens, Nicolaïdis was correct to observe that 'European citizens will not and should not accept to

Among democratic theorists, however, the conclusion that democracy is at present not even the appropriate ideal for international organisations is far less controversial. Christiano, 'Democratic Legitimacy and International Institutions' (n 9); Sarah Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State' (2012) 4 International Theory 39; Ian Shapiro, *Politics Against Domination* (Harvard University Press 2016) chapter 5; David Miller, 'Against Global Democracy' in Keith Breen and Shane O'Neill (eds), *After the Nation? Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2011); Robert A Dahl, 'Can International Organisations Be Democratic? A Skeptic's View' in Ian Shapiro and Casiano Hacker-Cordón (eds), *Democracy's Edges* (Cambridge University Press 1999).

[77] Mark Dawson and Floris Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 The Modern Law Review 817.

[78] Mark V Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999) 159; Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (n 14) 255; Ben Saunders, 'Democracy, Political Equality, and Majority Rule' (2010) 121 Ethics 148, 156.

[79] Christiano, 'Democratic Legitimacy and International Institutions' (n 9) 133–134.

be bound by a majority of Europeans'.[80] It would risk turning equality between EU citizens 'into *de facto* domination between peoples'.[81]

A second form of domination democratic decision-making within the EU will likely produce is elite-domination. Democratic states have witnessed the development of channels and structures that allow for political communication and dissemination of information, enabling citizens to get a reasonable understanding about the political choices debated and decided by politicians. EU-wide institutions that perform a similar role are either lacking or very underdeveloped and Union citizens are not nearly as informed about the political developments taking place in Brussels as when compared to their states. Mass political parties, which promote and channel discussion about conflicting visions on society,[82] are lacking and the media system is still national in orientation.[83] It seems unlikely that we will witness a rapid growth of the institutions necessary to mediate between citizens and political actors at the European level any time soon. One important reason that explains that the EU's public sphere remains underdeveloped is that it is characterised by great linguistic diversity. Most citizens are merely reasonably competent in their mother tongue and even citizens with a decent understanding of a second or third language rarely grasp it sufficiently to participate in European-wide debate.[84] Against this background, we should expect the EU's public sphere to remain relatively weak in the foreseeable future and absent a set of robust institutions that mediate between political institutions and the citizen, most EU citizens will remain mostly unaware of the political developments taking place within the EU. That diminishes their chance to participate in debate and exercise influence over political questions relevant to them, meaning that even if they are formally treated as equals in the

[80] Kalypso Nicolaïdis, 'European Demoicracy and Its Crisis' (2013) 51 Journal of Common Market Studies 351, 356. See also: Scharpf (n 11); Bellamy, '"An Ever Closer Union Among the Peoples of Europe"' (n 43); Francis Cheneval and Frank Schimmelfennig, 'The Case for Demoicracy in the European Union' (2013) 51 JCMS: Journal of Common Market Studies 334. According to de Búrca, the no-demos debate is circular, claiming that 'saying "no demos, no democracy" is no more helpful than responding to the chicken and egg problem by saying "no chicken, no egg"'. This misunderstands the no-demos claim, which does not concern the puzzle of what came first (the chicken or the egg), but rather asserts that a sufficiently thick collective must exist for legitimate democratic rule. Gráinne De Búrca, 'Developing Democracy Beyond the State' (2007) 46 Colum. J. Transnat'l L. 221, 131. That quote she lends from Joshua Cohen and Charles F Sabel, 'Global Democracy' (2004) 37 NYUJ Int'l. L. & Pol. 763, 767.

[81] Nicolaïdis (n 80) 359.

[82] Thomas Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Westview Press 1996).

[83] Christiano, 'Democratic Legitimacy and International Institutions' (n 9) 135; Scharpf (n 11) 10.

[84] Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford University Press 2001) 213–214. Those sceptical of this claim often point to Belgium or Switzerland as examples of multi-lingual democracies, but that reply is grossly inadequate. There is a great difference between regimes with 2-3 official languages and one with 24. Furthermore, those countries are likely the exception to the rule, where plenty of difficulties still arise absent a uniform language.

decision-making process, they will not roughly have an equal say over the political choices that are made. They will be inadequately represented and the system becomes governed by a European elite.[85]

Under these circumstances, there must be no attempt to recognise the political equality of all Union citizens in the EU's collective decision-making procedures, because it likely produces domination by larger and more powerful Member States and by a European elite. This suggests that different standards of legitimacy apply to the EU than to the Member States. The likely consequence of any effort to solve the democratic deficit by moving towards majoritarian decision-making and treating all citizens as equals is the exacerbation of the legitimacy deficit. Democracy might currently thus very well not be the appropriate ideal for the EU.

2.3 The EU as a fair association of democratic states

This necessitates a content-independent, input-oriented, account of legitimate institutions within the EU, which must recognise the different demoi and realise fairness of decision-making among them. That is realisable only if the EU's collective course of action is under the shared and equal control of the different Member States.[86] This third way departs from state consent and maintains that for international cooperation to be minimally legitimate, their decision-making ought to be subject to the control of national representative democratic processes of decision-making. Such a 'fair democratic association of states', as Christiano calls it,[87] offers the most plausible pathway to the legitimisation of the EU. Such an association is reasonably legitimate, if the participating states are constitutional democracies, have voluntarily joined the association, and the decision to join was subject to the approval of highly representative processes of decision-making. In addition, also the association's future course of action must remain under the shared and equal control of domestic representative processes, which the delegation of decision-making powers to national representatives enables.[88] International organisation will enjoy a certain independence, but in terms of the adoption of hard law, the input of all states in the collective decision-making procedures should be required.[89] A legitimate system of decision-making in fair associations of democratic states thus is that which makes decisions

[85] Christiano, 'Democratic Legitimacy and International Institutions' (n 9) 134–135.
[86] Bellamy, '"An Ever Closer Union Among the Peoples of Europe"' (n 43). See also some of the demoicratic principles as defined by Nicolaïdis (n 80).
[87] Christiano, 'Democratic Legitimacy and International Institutions' (n 9).
[88] R Bellamy, 'A European Republic of Sovereign States: Sovereignty, Republicanism and the European Union' (2016) 16 European Journal of Political Theory 188, 17; Christiano, 'Democratic Legitimacy and International Institutions' (n 9).
[89] Christiano, 'Democratic Legitimacy and International Institutions' (n 9) 123.

subject to control by the states' representatives, which, in turn, are subject to democratic control of representatives elected on the basis of fair electoral processes that treat all citizens publicly as equals. Importantly, this is a content-independent theory of decision-making, for it acknowledges that disagreement on outcomes also affects transnational governance.

This ideal is not easily realised in practice. The states forming the organisation may lack the democratic procedures that allow for the fair representation of their citizens' interests and, even if democratic, control of domestic democratic over international institutions is difficult to establish. Decision-making of such institutions is opaque and foreign policy often remains the prerogative of the executive rather than legislature. In addition, power asymmetries between the more and less powerful participating states to the organisation may result in domination and remove decision-making from their shared and equal control.[90]

While these objections can be validly raised against many international organisations, the EU fulfils many of the criteria necessary for the realisation of a fair association reasonably well. The Treaties have been ratified by domestic representative processes that publicly treat their citizens as equals and the European Council, consisting of the Member States' heads of state or government, defines the EU's broader aims and policy directions.[91] More important, the EU legislative process reasonably (though still inadequately) guarantees that EU decision-making is subject to the Member States' shared and equal control.[92] Decision-making by qualified majority, after all, much diminishes the chance that minorities are outvoted on a more or less permanent basis. Because this process seeks for a fair balance between smaller and bigger Member States,[93] legislative decision-making curbs the power asymmetries that exist between the different Member States.[94] The legislative process, therefore, enables debate between different groups that may disagree on the ideal outcome, but who need to come together and find solutions to common problems that partly satisfy the interests of many of them.[95] The EU legislature's institutional setup and framework for decision-making is designed precisely to enable the mediation between different values.[96] Compromise is needed, not

[90] ibid 124–126. In addition, see Pettit (n 9).
[91] Article 15 TEU.
[92] Bellamy, '"An Ever Closer Union Among the Peoples of Europe"' (n 43).
[93] ibid 508.
[94] See also the examples offered by Dawson and Witte (n 77).
[95] This is an essential feature of legislatures in general: Waldron, *The Dignity of Legislation* (n 30); Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (n 14).
[96] Damian Chalmers, 'The Democratic Ambiguity of EU Law-Making and Its Enemies' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (First edition, Oxford University Press 2015).

only among the different institutions involved in the process – the Council, the European Parliament, and national parliaments – but also within them. The EU's decisional rules, the heightened majority requirements, and the search for consensus, are all in one way or another meant to ensure that voice is given to this plurality of perspectives. The process of legislating offers strong safeguards against the domination of the weaker and smaller Member States, their views and votes being essential for the enactment of legislation, and ensures that those affected by EU law will have had a fair say in the process leading to the enactment of the applicable rules.

This does not suggest that the EU legislature is perfect, but it does indicate that the authority of the EU is better justifiable when subject to the control of the legislative process. Certain difficulties deserve attention. The EU has legitimate authority not simply if its course of action is controlled by the Member States; national democratic processes must be able to hold accountable those who represent them during European affairs, in order to legitimate the decisions made by those representatives. Domestic democratic bodies must, therefore, realise the importance of their role, but also be given the possibility to exercise such control. From that perspective, the strengthening of their position by the Lisbon Treaty constituted an important improvement. The power now enjoyed by them to engage in discussion and express concern over legislative proposals must be effectively realised in practice,[97] and so should national parliaments' opportunity to act collectively and initiate the so-called 'yellow-card' and 'orange-card' procedures, which, when initiated, requires the EU institutions to review the proposed legislation.[98] The limited transparency of European decision-making remains a key problem though; too many decisions are taken either by institutions over which representative processes have no control,[99] or through processes that are insufficiently open to be held accountable.[100] Perhaps, as some have suggested, the European Parliament can improve the situation, either by acting as a representative of the different national demoi,[101] or as a forum for flagging transnational problems and for opening up somewhat the rather EU's rather non-transparent

[97] Protocols No (1) and (2) to the Treaty on European Union.
[98] Article 7 of Protocol No (1) on the Application of the Principles of Subsidiarity and Proportionality.
[99] Chalmers expresses concern over the number of issues that are dealt with by the Commission under non-legislative procedures. Chalmers (n 96) 312.
[100] Often, agreement is already reached before the issues reach the legislative process, which happens through the institutionalised trilogue, which involves members of the Commission, members of the European Parliament, and national civil servants. Joint Declaration on Practical Arrangements for the Codecision Procedure (Art 251 of the EC Treaty) of 30 June 2007 (OJ C 145/5). For a study of the trilogue, Christine Reh and others, 'The Informal Politics of Legislation: Explaining Secluded Decision Making in the European Union' (2013) 46 Comparative Political Studies 1112. For a critique, Chalmers (n 96) 323–324.
[101] Bellamy, '"An Ever Closer Union Among the Peoples of Europe"' (n 43) 509.

decision-making procedures.[102] Ideally, therefore, the European Parliament acts to reinforce rather than to overcome the national demoi.

It will remain difficult for national democratic bodies to control their representatives and getting an adequate grasp of the matters that are debated by the different European institutions. At best, therefore, decision-making within the EU will be reasonably legitimate if exercised through the authority of the EU legislature. Unfortunate as that may be, it certainly is desirable over alternative approaches to conceptions of legitimate authority within the EU. As I explained, justice or some other substantive benchmark is no appropriate substitute for input-based legitimacy and the consequence of any attempt to make EU decision-making compatible with principles of democratic equality may exacerbate rather than resolve the legitimacy gap. Moreover, that the legitimacy enjoyed by the EU legislature will be more controversial than that of the democratic representative processes within the Member State cannot justify a transfer of authority from the legislature to the ECJ. One can question if the legislature currently is sufficiently accountable, but if that is the concern, it is difficult to see what the Court offers instead. The judicial officials are almost completely beyond the control of national democratic decision-making and,[103] in comparison, the legislature conforms to standards of procedural fairness to a much greater degree. The Court's ability is limited to containing domestic democratic procedures, while the EU legislative process allows for the Member States to act in concert and to shape the contours of European integration in accordance the interests and conceptions of the good as articulated by national fora of democratic self-determination. The EU legislature, in other words, is essential for legitimising the authority the EU exercises over the Member States and their citizens and should, therefore, enjoy primacy over other institutions.

3. Institutional ability

Governing the EU is a complex task and, for that process to be successful, the cooperation between different institutions is needed. There will be disagreement among those institutions about the appropriate directions of European integration, but at one point, some authority must overcome these

[102] Peter L Lindseth, 'National Parliaments and Mediated Legitimacy in the EU: Theory and History' in Davor Jančić (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (First edition, Oxford University Press 2017) 52.

[103] A response that emphasizes that also the members of the ECJ are appointed by national governments would, of course, be a wholly inadequate one. Beyond the initial appointment process, judges are beyond the Member States' control and they are assumed to be so. On the appointment of judges to the ECJ, read: Tomas Dumbrovsky, Bilyana Petkova and Marijn van der Sluis, 'Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States' (2014) 51 Common Market Law Review 455.

disagreements and take a decision on the EU's course of action. That decision must be authoritative and guide, rather than be debated anew, by those institutions responsible for the application and enforcement of EU law. This chapter argues that the institution enjoying primacy of authority over other institutions is the EU legislature, which is ideally the one that defines the EU's course of action and the policies that bind the Member States. That is, the previous section showed, to a great degree to legitimise the EU. A second reason supporting the primacy of legislation, however, takes seriously the EU legislature's institutional abilities. The generality of legislation and its rule-based nature offer the necessary clarity and stability.

Section 1 explained that, when debating institutions, one should not contrast the actual performance of one with an idealised account of another institution. However, that each institution is fallible and will err occasionally does not imply that all are able to perform all functions of government equally well. Some are better equipped than others to perform certain tasks. Normally, for example, we think that disputes over the precise consequences of specific legal provisions are to be resolved by the judiciary. That is in part because of their legal training, but also because the judiciary enjoys a presumption of neutrality and independence from the institution that drew up those rules.[104] Other political problems, however, are better resolved through the legislative process, simply because there is ample reason to think that that institution can discharge of certain tasks more adequately.

The task of drawing up and deciding the framework of general rules that is binding on all Member States is a complex task, requiring consideration of wide-ranging and often controversial questions of policy and morality, which are subject to substantive disagreement. The EU legislature provides not just a forum where the voices of all those affected by the decision can be heard, but also, it can think through the implications of their decisions and design solutions to common problems at the required level of generality; it addresses all rather than individual situations in specific.[105] ECJ case law often relates to one or some small group of individuals, but the implications of its decisions are felt far beyond its decisions. They create public policy and are precedent-setting, the principles provided governing future situations that come before it and arise within the Member States. The problem is, first, that these disputes can be highly idiosyncratic and because, we can safely assume, the judiciary tends to concentrate on these facts as well as the arguments presented by the different parties,

[104] Martin Shapiro, 'The European Court of Justice: Of Institutions and Democracy.' (1998) 32 Israel Law Review 3, 9; Christiano, *The Constitution of Equality* (n 8) 257; Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 Boston College Law Review 433.

[105] Waldron, 'Separation of Powers in Thought and Practice' (n 104); Christiano, 'Democratic Legitimacy and International Institutions' (n 9) 255–259. For a similar conclusion in the context of the EU, read Chalmers (n 96).

there is a risk that it does not consider broader political questions and consequences. Multi-layered questions of policy and morality are reduced to the case's narrower factual circumstances.[106] Secondly, judges will probably try to realise justice in the individual case. Commendable as that may be, the thought that the law must be fair to all individuals it addresses is potentially a very costly one, likely creating greater legal uncertainty and unacceptable administrative burdens. Subsequent chapters demonstrate that the ECJ, by drafting the contours of EU citizenship without much regard for the general interests, has created these costs.

The prominent cause behind this is that the ECJ is rather rule-averse. I do not believe that there is an a priori reason for assuming that the judiciary is less able to draft uniform rules, but experience tells us that the judges are hesitant about rule-based decision-making. This is, chapter 3 explores in detail, precisely because the Court is committed to realising fairness in individual cases, while rules, as Schauer's account of rule-based decision-making shows, deny lower decision-makers that opportunity. Rules withdraw decisional jurisdiction from subordinate authorities and rule-addressees are expected to follow the rule, rather than to consider all those facts and factors that otherwise would have been relevant for making the correct decision.[107] Bearing in mind that the EU divides decisional authority not just between different EU institutions, but also among the Member States, the relevance of rules becomes more obvious. These do not solely envision a withdrawal of jurisdiction from other European institutions, but also from those national authorities that enjoy responsibility for enforcing EU law. The Member States differ in their political orientation and also in their administrative and judicial capacity and, through rules, the legislature intends to ensure that the application of EU law is less affected by these differences. Would EU institutions merely instruct national authorities about the broader substantive purposes it wants to see realised, but confer full authority to decide on the best realisation of these ambitions to the Member States, the precise rules will vary per country. To remove some of that variation and to ensure that the requirements of EU law are similar throughout the EU, the EU legislature employs rules to withdraw such jurisdiction from the Member States. Hence, the EU, when deciding on the entitlements of mobile citizens to social assistance within the host state, will (ideally) not just instruct the Member States that benefits

[106] Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (n 14) 30; Waldron, 'The Core of the Case Against Judicial Review' (n 38) 1379–1380; Adam Tomkins, *Our Republican Constitution* (Hart 2005) 28–29.

[107] Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 2002). In addition, see also Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) chapter 8.

can be denied to those without an appropriate degree of integration, but adopt a more specific rule: social assistance must be conferred to all citizens with five years of residence (for example). National authorities are expected to defer to that rule and must consider only the factor relevant to deciding whether the rule is applicable (the citizen's duration of residence), even if they have a different vision on what would be the best means of realising the broader substantive ambitions of EU law.

These reasons justify the idea that the EU's broader aims are preferably drawn up through legislative procedures rather than judicial decision-making, but certainly imply that once the legislature has spoken, the ECJ should defer to these rules and realise legal outcomes compatible with the intentions of the legislature, also when it believes the legislature is mistaken in its understanding of justice and the meaning it assigns to the Treaties. The relation between legislative intentions, on the one hand, and rule-following and interpretation, on the other, is addressed in chapters 3 and 4, but it proves useful to set out briefly the reasons for thinking that legislative decisions should not be debated anew by the ECJ.

An important function of EU law is to guide those subject to it.[108] The guidance value of EU law is in part a function of its precision and clarity. As Raz explained, 'an ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.'[109] However, it also depends on other institution's willingness to accept the choices made by higher authorities. Rules 'allow agreement in the face of disagreement',[110] but that is not just agreement among different parties to the legislative process, whose rules regularly present the agreed upon compromise between disparate understandings of justice and the good, but also for the rule-addressees. That is, the ability of EU law to guide those subject to it will be greater if subordinate authorities treat the enacted rules as authoritative also if they think the legislature should have decided differently.

Once more, it is good to remember how diffuse the concept of authority is within the EU and how deeply interwoven domestic institutions are in the process of EU decision-making, bearing great responsibility for the application of EU law. If we think it is desirable that individual citizens are not misled or confused by the requirements of EU law, it is important that national institutions are neither.

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[108] It is widely accepted that an important function, if not the function of law, is to guide its subjects. I do not see reasons for assuming that this is different for EU law. On the guiding function of law, see: Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 222.

[109] ibid 214. See also: Lon L Fuller, *The Morality of Law* (Yale University Press 1978) 63; Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Georgia Law Review 1.

[110] Raz (n 107) 219.

That is possible only if also the EU's judiciary and executive officials recognise the desirability of rule-based decision-making and defer to the constraints imposed by legislative rules. If not, and they take the liberty to decide contrary to those rules if they see fit, national institutions cannot know with the required degree of certainty if their decision to follow the rules of EU legislation is also actually compatible with EU law. That is, if the agreed upon rule by the EU legislature is social assistance benefits after five years of residence, that rule can guide national authorities only if it is followed by all EU institutions. By extension, if the ECJ does not feel bound by legislation, national citizens can misleadingly believe that satisfying the requirements of those national measures that implement EU legislative rules entitles them to the benefits and protections offered to them under EU law. Hence, if EU institutions do not feel constrained by the written legislative rules and enforce them against national authorities, rules are likely to lose their force domestically and their ability to guide all those subject to those rules.

It is true that the degree of authority withdrawn by rules depends on their formulation; vague rules leave more discretion to lower decision-makers. What rules accomplish, therefore, is hard to establish context-independently and later chapters discuss the differences between precise and vague rules and the reasons that rule-makers can have for using different kind of rules. It is the case also that legislation can fall short of these ideals; the legislature may fail to address political problems from the required level of generality, the enacted rules may be too vague to offer guidance to those it addresses, which, in turn, can destabilise decision-making. Also these issues and the concerns that should lead to will be addressed in subsequent chapters. None of this has any implications, however, for the argument that the guidance value and stability of EU law is best served by the primacy of legislative rules over other sources of authority within the EU. An alternative form of decision-making that can more adequately realise these values is simply difficult to imagine.

Conclusion

This chapter made the case for according a certain primacy to the authority of legislation within the EU. The EU cannot contribute to collective problem-solving and the realisation of justice beyond and among the Member States without a common set of rules that bind all Member States. The process of making, administering, and enforcing the law is a difficult one, impossible to realise without a close cooperation between the different sources of authority within the EU, nationally and at the European level. Realising these policies is difficult and each of these sources plays an important part therein, but I have argued that in the process of day-to-day decision-making, the EU legislature must enjoy a

certain primacy over other institutions. It is the legislative process that is to bear the primary responsibility for defining the policies to be pursued and for designing the legal framework that enables their realisation. Instrumentalist approaches to authority fragment the authority of legislation and make it dependent on the desirability of the substantive decisions taken by the legislature. Such accounts turned out to be unsustainable against the background circumstances of reasonable disagreement and institutional fallibility, and the desirability of the authority of legislation within the EU emerged clearly against that background. The political legitimacy of the EU and the institutional abilities of the EU legislature were the two reasons offered in support of the primacy of legislation. The legitimacy of the legislature is grounded in content-independent reasons, the legislative process enabling the joint and equal control over EU decision-making by the domestic democratic institutions. The legislature offers an institutional setting that allows, to a far greater degree than the judiciary, for the consideration of a greater diversity of values and interests, more approximate to those held by the different Member States, at the required level of generality, and for compromise between those. A final reason for embracing the authority of legislation is the product of legislation itself and those rules provided by legislative acts, which can guide the behaviour of individuals and stabilise decision-making within the EU by allocating power between the different sources of authority within the EU.

Chapter 2

Justice, Disagreement, and Legitimate Authority – The Case of Social Assistance

Introduction

We all want the decisions taken by EU institutions to be compatible with accepted principles of justice and respectful of individual rights, which explains why we evaluate the policies enacted by the EU along dimensions that measure the quality of outcomes. In the previous chapter, I said that the EU can be described as an effort to realise justice beyond and among its Member States and that, therefore, it is necessary to study the output of EU decision-making. On the other hand, I also claimed that another benchmark exists for evaluating the legitimacy of political decisions. This second perspective considers as relevant the fairness of the political procedures that take the decisions. Accordingly, the legitimacy of a decision is not dependent on it being compatible with our best understanding of justice.[1]

It happens that both perspectives pull into opposite directions. That is, it occurs that the institution we think should ideally decide such matters delivers results that we believe are unjust, and vice versa. In the preceding chapter, I suggested that this is an inevitable paradox of political decision-making and that, against the background of disagreement on justice and institutional fallibility, it would be a mistake to try to circumvent this paradox by making our account of political legitimacy within the EU dependent on the substantive results realised by its institutions. Instead, the task of an account of political legitimacy within the EU is to outline a fair process of collective decision-making in the face of disagreement on the substantive content of political decisions. Decisions can be legitimate even when, to the best of our understanding, unjust.

This chapter puts flesh on the bones of this account and explains the difference it makes to decision-making within the EU. This it does by embedding the previous chapter's argument in the context of the law condition access of EU citizens to social assistance within the host Member State. Justice being about the distribution of social goods and resources, the regulatory framework that

[1] On these two benchmarks, Thomas Christiano, 'The Authority of Democracy' (2004) 12 Journal of Political Philosophy 266. Fritz Scharpf's account of output-oriented and input-oriented legitimacy also offers that distinction. Fritz Wilhelm Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999).

defines the position of EU citizens vis-à-vis the host Member State's social system raises intricate questions of justice, which different scholars have explored in recent years. These studies all treat legitimacy as a content-dependent concept, suggesting that it is legitimate for the Court to ignore unjust legislative rules. These provide a useful point of departure, therefore, to understand the inadequacy of such an understanding of legitimacy. I will argue, in addition, that a recognition of the lack of agreement on justice also proves the inadequacy of two additional arguments often invoked in defence of the ECJ's decisions: that its case law contributes to a more meaningful concept of EU citizenship and that it protects the hierarchically superior Treaties against incursions by secondary legislation.

As an introduction to the topics this chapter addresses, section 1 discusses some of the more prominent contributions to debate on legitimate decision-making in the field of EU citizenship law. It shows that these studies disguise normative claims as conceptual analysis and promote a theory of constitutionalism that privileges the Court's interpretation of the Treaties over the enacted legislation. The remainder of the chapter explores the limits of such conceptual analysis and, most of all, highlights the limits of such accounts of constitutionalism against the background of disagreement on justice. Also recent discussion of justice in EU decision-making ignores that this is subject to reasonable disagreement, as section 2 demonstrates. These studies suggest that the authority of legislation must be curtailed if in the interest of justice. This argument ignores that there is a conception of justice that informs the current legislative framework on EU citizenship. Section 3 sets out that dominant conception. Section 4 submits that absent rational consensus on justice in the context of citizenship mobility within the EU, we must rethink the relationship between secondary legislation and the Treaties, which informs the position that the enacted legislation can legitimately be interpreted so as to be compatible with the ECJ's best understanding of the Treaties. Instead, I argue for judicial deference to the legislature's best understanding of the Treaties. Sections 5 and 6 connect this theoretical argument with the case law deciding on the conditions that entitle EU citizens to social assistance benefits, showing what it means to place the EU legislature centre-stage. Section 5 explores the relevant cases decided after the adoption of the Citizenship Directive. These decisions offer a palette of different approaches to the authority of legislation and, taken together, show the problems of the constant making and remaking of legislation by the ECJ. Section 6, finally, turns to EU citizenship case law from before the Citizenship Directive and asks the question if the Court's activist approach was legitimate and desirable in the first place.

One important caveat before I continue. This chapter assumes the connection between the authority of legislation, rule-based decision-making, and the text that articulates these rules. In other words, it assumes that legislation loses its authority if the written rules are not followed and that scholars who do not accept the constraints imposed by written rules do not recognise the authority of legislation. I am aware that this position is contestable and contested and needs a more elaborate defence than I have offered so far. Subsequent chapters provide support for that position. Some of the cases that I discuss raise rather intricate questions of legislative interpretation, certainly seeing the vagueness of some of the rules. Also these issues will be addressed later. First, it is important to establish why a defence of the authority of legislation is needed in the first place and why not we can simply make our understanding of rule-following and interpretation justice-dependent.

1. Legitimacy in EU citizenship literature

The law on the free movement of persons has profoundly reshaped the boundaries of national welfare and, during the past two decades, the judiciary accomplished much of this under the provisions on EU citizenship.[2] An impressive literature developed around these decisions, which offers an excellent understanding of the developments that took place since EU citizenship's introduction, but also shows the dominant benchmarks used to define case law's legitimacy. I will explore that literature to highlight the dominant approach to the EU citizenship case law. It is not my intention to be comprehensive and want to demonstrate merely that many of the most influential contributions adopt an instrumentalist take on legitimacy, treating the decisions as justifiable when contributing to a fuller realisation of the concept of citizenship within the EU. That comes, additionally, with a view of constitutionalism that suggests the supremacy of the judicial over the legislative understanding of the Treaties.

The age of EU citizenship is divisible, roughly speaking, into two periods and the dividing line is the moment the Citizenship Directive entered into force. Prior to that date, the scope of secondary legislation was limited to those engaged in an economic activity – workers, service providers and the self-employed – and the 1990 legislation on students, pensioners, and those with sufficient resources.[3] Following the introduction of the concept of EU citizenship by the Maastricht Treaty in 1993, the

[2] Maurizio Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (Oxford University Press 2005). In addition, see: Stefano Bartolini, *Restructuring Europe: Centre Formation, System Building and Political Structuring between the Nation-State and the European Union* (Oxford University Press 2005).
[3] The introduction to this thesis offers a more elaborate overview of the legislation.

question arose if that conceptual innovation challenged the status of the prior legislative acts then still in force. Notwithstanding the fact that the Treaties specify that EU citizens' right to move and reside freely is 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect',[4] the Court decided to complement the limitations provided by secondary legislation with its own interpretation of the Treaty provisions on EU citizenship.

Grzelczyk is illustrative. Mr Grzelczyk, a French student pursuing a degree in Belgium, claimed a minimum subsistence allowance during his fourth year of studies. Directive 93/96 on the right of residence for students grounds Mr Grzelczyk's right to reside in Belgium, but according to that Article 3 of that act, Member States were not obliged to confer maintenance grants to foreign students. The Court acknowledged that the Directive permits the Member States to deny the payment of maintenance grants,[5] but decided that students, if 'lawfully resident in the territory of a host Member State',[6] could invoke the Treaty principle of non-discrimination on grounds of nationality. Because Mr Grzelczyk enjoyed the right to reside legally within Belgium on grounds of Directive 93/96, he could claim equal treatment. The ECJ permitted the Member States to take the position that those taking recourse to social assistance lost the right to reside, but, it continued, 'in no case may such measures become the automatic consequence of a student … having recourse to the host Member State's social assistance system'.[7] In other words, while the Directive does not entitle mobile students to maintenance aid, the Treaty provisions on EU citizenship were interpreted as requiring the payment

[4] Now Article 21(1) TFEU.

[5] Case C-184/99 *Grzelczyk*, ECLI:EU:C:2001:458, para 39. Without further explanation, it implied that the benefits at issue did not consist of a maintenance grant but social security. During the rest of the case, the ECJ speaks of social assistance. One argument against my view that *Grzelczyk* ignores the limitations set by secondary legislation is that the benefit at issue was a social security benefit, not a maintenance grant for students (Niamh Nic Shuibhne, 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Pub 2009) footnote 38). The Court indeed uses the term social security on occasion, but the *minimex* benefit at issue possesses the classical characteristics of social assistance and is normally also defined as such. See, for example the classification of the *minimax* benefit by the OECD: <http://www.oecd.org/els/soc/29728474.PDF> (last visited: 24-08-2017). For criticism of the formalistic nature of the legal reasoning used, read Ferdinand Wollenschläger, 'The Judiciary, the Legislature and the Evolution of Union Citizenship' in Phil Syrpis (ed), *The Judiciary, the legislature and the EU internal market* (Cambridge University Press 2012) 313. To the oftentimes problematic interpretation of the terms social assistance and social security I will return in chapter 4.

[6] *Grzelczyk* (n 5) para 32. See also: Case C-85/96 *Martínez Sala*, ECLI:EU:C:1998:217, para 63; Case C-456/02 *Trojani*, ECLI:EU:C:2004:488, para 40. To be more precise, the ECJ added that the Union citizen had to fall within the material scope of EU law as well, but it added that anyone who exercises the right to move and reside freely does so (paras 32-33).

[7] *Grzelczyk* (n 5) para 43.

of such benefits to all students with lawful residence (under that Directive).[8] The Court subsequently curtailed the possibility to terminate the right to reside of students in need of social assistance.

Equally illuminating is *Baumbast*. That case established that the proportionality principle governs limitations to the right to non-discrimination. Among the questions confronting the Court was how strictly the requirement of comprehensive sickness insurance in respect of all possible health risks within the host Member State, as a condition for lawful residence, could be applied.[9] Mr Baumbast did not possess such coverage, but had sufficient resources, had been resident for a number of years and been economically active, never became a burden on the host Member State's social assistance system, and had comprehensive sickness insurance elsewhere. In view of these facts, the Court decided that it would be a disproportionate inference with his right to reside were that right terminated on the ground that his insurance does not cover all treatment in the host Member State.[10] Therefore, the rule could be applied only if proportionate in light of the objectives pursued by it.

The literature has largely welcomed these decisions and three important reasons have contributed to the positive assessments. One prominent perspective is that such decisions constituted a logical implementation of principles of citizenship. Through these decisions, the Court was creating a real form of citizenship with proper substance.[11] In addition, in the view of many, *Baumbast* establishes adequate constitutional checks on legislation, creating the proper relationship between Treaty norms and the hierarchically subordinate legislative acts. Proportionality review ensures that legislative acts are compatible with the relevant Treaty provisions and safeguards their constitutionality.[12] A third argument is at once both independent and supportive of these two. That is

[8] I do not believe the terminological confusion in that case changes this conclusion. The Court used the terms maintenance grants, social security, and social assistance almost indiscriminately and it does not appear that maintenance grants (the difference between such grants and social assistance is not at all clear also) could be denied to students if we follow the ECJ's argument.

[9] Article 1(1) of Directive 90/364/EEC specifies that Member State nationals who are not covered by any other provision of EU law are entitled to the right to residence under that law, provided that they 'are covered by sickness insurance in respect of all risks in the host Member State'.

[10] Case C-413/99 *Baumbast*, ECLI:EU:C:2002:493, para 88-93.

[11] For some examples, Anastasia Iliopoulou and Helen Toner, 'Case Note on Case C-184/99 *Grzelczyk*' (2002) 39 Common Market Law Review 609; Síofra O'Leary, 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 European Law Review 68; Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 The Modern Law Review 233. Such approaches to EU citizenship are still around today. Dimitry Kochenov and Sir Richard Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 European Law Review 369.

[12] Michael Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 31 European Law Review 613. For the constitutional aspects of *Baumbast*, read also: Eleanor Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects' (2008) 45 Common Market Law Review 13.

the idea that these decisions were justifiable because they realised a more desirable conception of the common good, constituting justice within the EU.

Before I explain the connection between the first two and the third, it is worth noting that the introduction of the Citizenship Directive did not produce an altogether different perception. It is true that there is a general idea that it is important for the judiciary to respect the legislature's political choices,[13] but such respect is often made conditional upon the compatibility of these choices with principles such as those developed in *Baumbast*. Legislation must be proportionate in light of the Treaties. That expresses the view that 'the introduction of Union citizenship furnished the Court with the opportunity, quite legitimately, to embark upon a more thorough judicial review of the relevant regulatory choices made by the [EU] legislature'.[14] This belief, section 4 will demonstrate, is still prevalent today and is informed by some correct view on what EU citizenship is about or is to become. Often, the legitimacy of the case law came in dispute only in face of the fear that these decisions could undermine the stability of the national welfare state, which many regard as an essential component of the legitimacy of the Member States.[15]

Only exceptionally is legitimacy treated as a content-independent concept and, even when that happened, the case law could still be justified by reference to some substantive evaluative perspective. According to Nic Shuibhne, criticism is deserved from a process-based point of evaluation, but '[i]f we apply an outcome-oriented criterion of evaluation, then most citizenship case law does make sense'.[16] Another suggestion one finds is that the case law benefits from input-legitimacy, because the Citizenship Directive incorporates many of the legal principles developed in earlier EU citizenship case law.[17] However, if, as we will see in this chapter, a general expectation exists that legislation must

[13] Nic Shuibhne, 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?' (n 5) 168.

[14] Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (n 12) 622. More recently, Dougan has taken a more critical stance: Michael Dougan, 'The Bubble That Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in Maurice Adams and others (eds), *Judging Europe's judges: the legitimacy of the case law of the European Court of Justice* (Hart Publishing 2013).

[15] Oxana Golynker, 'Jobseekers' Rights in the European Union: Challenges of Changing the Paradigm of Social Solidarity' (2005) 30 European law Review 111, 121; Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (n 12) 623. This argument can be turned around as well, leading to the conclusion that providing the EU with more competences in the field of social welfare enhances its legitimacy. Thomas Faist, 'Social Citizenship in the European Union: Nested Membership' (2001) 39 Journal of Common Market Studies 37. Whether this works so easily in a fair association of democratic states is uncertain, but I will not go into that issue here.

[16] Niamh Nic Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the Case Law of the Court of Justice' in Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 361.

[17] Daniel Thym, 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and Its Limits' in Maurice Adams and others (eds), *Judging Europe's judges: the legitimacy of the case law of the European Court of Justice* (Hart Publishing 2013) 156.

be drafted so as to comply with the ECJ's best understanding of the Treaties, it is uncertain if the legislative decision to defer to the case law is a useful benchmark for measuring the ECJ's legitimacy.

The criticism of the case law by Hailbronner still stands out as the notable exception to the general appreciation of the developments that took place. He worried about the ECJ's sidestepping of legislative intent and expressed concern about the unpersuasive legal methods and reasoning through which that occurred.[18] The decisions lack legitimacy, because it is 'up to the European Parliament and the governments of Member States to decide about an extremely sensitive and complicated issue of financial solidarity arising from free movement of non-economically active Union citizens'.[19] That alternative approach puts in question the normative work the concept of EU citizenship does for other scholars. That is, for Hailbronner, the case law cannot be justified because of the conceptual innovations introduced by the Maastricht Treaty. The ECJ should have deferred, instead, to the secondary legislation then in force. Hailbronner's account also puts in doubt the idea that the regulatory decisions taken by the EU legislature stand only if proportionate in light of the Treaties.

I think that Hailbronner's arguments are valid and that neither the conceptual nor the constitutional argument is solid. That is because of the limitations of a third argument that is often brought in support of the case law: that these decisions constituted justice within the EU. Much of the citizenship literature disguises normative theorising as conceptual analysis.[20] That is, it advances a normative claim by reference to the introduction and presence of the concept citizenship in the Treaties – the decision is justified because it contributes to a more real and substantive form of citizenship within the EU. It is implausible, however, to think that the question of whether or not equal treatment must be extended to mobile EU citizens depends on the conceptual presence of citizenship, on Member State nationals being citizens of the Union. Rather, our answer to that question is informed by our understanding of the requirements of justice and, because there is substantive disagreement on justice, there will be disagreement on the demands of EU citizenship. Moreover, once we recognise our disputes on substantive political outcomes, also the constitutional argument, that a strict interpretation of legislation is needed in order to safeguard the hierarchical relationship

[18] Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1245.
[19] ibid 1265–1266.
[20] Raz has expressed concern about conceptual analysis hiding normative preferences. He explained that 'concept is a product of a theory or a doctrine consisting of moral principles for the guidance and evaluation of political actions and institutions. One can derive a concept from a theory but not the other way round'. Joseph Raz, *The Morality of Freedom* (Clarendon Press 1988) 16.

between Treaty norms and subordinate acts of EU legislation, loses its force. Questions of social welfare and citizen mobility are subject to political disagreement. Such disagreements about the nature of justice within the EU present unsurmountable challenges to instrumentalist accounts of authority and the fact that these differences lead to different interpretations of the Treaty provisions on Union citizenship should preclude the reinterpretation of secondary legislation in the light of the provisions of primary law. The subsequent sections show that absent a rational consensus on justice, much of the case law lacked legitimacy and the grounds commonly invoked in defence of it are unsolid.

2. Instrumental authority and disagreement on the constitution of justice within the EU

To explain the consequences and problems of instrumentalist accounts of authority, let us consider the positions of Ms Dano and Ms Alimanovic. Ms Dano was a Romanian national who, together with her child, entered Germany in 2010. She lived there with her sister, who took care of her and her child. In 2011, she was issued a certificate attesting the right of residence of unlimited duration. There are signs, the ECJ tells us, that her integration into the German society is limited; Ms Dano never had a job in Germany, is untrained, and did not look for a job either. Ms Dano made applications for jobseeker benefits in 2011 and 2012, both of which the German authorities rejected.[21] A similar decision was taken by the responsible institutions in the case of Ms Alimanovic and her children, all Swedish nationals. The situation of the Alimanovic family differs from that of Ms Dano. Ms Alimanovic and one of her daughters had been in employment for a period of 11 months – from June 2010 until May 2011. In addition, the Alimanovic family had resided in Germany before and thus had stronger ties with Germany than Ms Dano.[22] Notwithstanding these differences, in both cases, the Court decided that the decision to withhold benefits was compatible with EU law.

Such cases raise questions of justice – what should have been due to the claimants? – and the case law has been criticised for having denied justice to the individuals in those cases. De Witte criticised *Dano* from his perspective of communitarianism, which supports his principle that EU citizens cannot be denied those benefits that 'prevent human need'.[23] The function of subsistence benefits such as those claimed by Ms Dano is aiding those in need and 'must be extended to all legally resident citizens, regardless of economic status, nationality, or engagement with the labour market in

[21] Case C-333/13 *Dano*, ECLI:EU:C:2014:2358, paras 35-41
[22] Case C-67/14 *Alimanovic*, ECLI:EU:C:2015:597, paras 25-32.
[23] Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) 132.

the host state'.[24] By denying the benefits to Ms Dano, the Court violated principles of communitarian solidarity. Neuvonen also finds *Dano* objectionable, but her criticism takes a more egalitarian angle. She claims that there is a structural equality problem in EU law and that *Dano* offers an illustrative case in point.[25] O'Brien has offered the most damning assessment of *Dano* and *Alimanovic*, alleging that the case law has created 'a moral vacuum within the free movement framework'.[26]

One may object to these accounts on substantive grounds, but that is, in my view, not their main shortcoming. The problem, rather, concerns the conflation of questions of justice with theories of authority. All three authors effectively suggest that, had the case law realised an outcome compatible with their understanding of justice, the Court could have legitimately ignored the derogations from the principle of non-discrimination the Citizenship Directive allows the Member State to apply. *Dano* and *Alimanovic* respect the limitations to equal treatment allowed under the Directive. In their evalutation of *Dano*, de Witte and Neuvonen seem to acknowledge that the Court deferred to the relevant legislative rules.[27] That the ECJ implemented the Directive in *Alimanovic* appears even harder to dispute; the text of the Directive offered great clarity about the intended result. Ms Alimanovic and her daughter had worked in temporary jobs for less than a year. As a consequence, they did not fall within the scope of Article 7(3)(b) of the Citizenship Directive, according to which

> a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person [when] he/she is in duly recorded involuntary unemployment after having been employed *for more than one year* and has registered as a job-seeker with the relevant employment office

They were covered by Article 7(3)(c) of the Directive, on the other hand, which provides those having completed fixed-term employment for *less than a year* with the right to retain the status of worker for no less than six months if in duly involuntary unemployment. It was beyond dispute, however, that

[24] ibid 155.
[25] Päivi Johanna Neuvonen, *Equal Citizenship and Its Limits in EU Law: We The Burden* (Hart Publishing 2016) chapter 2.
[26] Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 Common Market Law Review 937, 938.
[27] De Witte believes that '[b]y refusing basic provisions benefits to persons who come to Germany solely in order to benefit from the social assistance system of that Member State and who do not seek in any way to integrate themselves into the labour market, the national legislation is consistent, in my view, with the EU legislature's intention'. de Witte (n 23) 152. Neuvonen objects that *Dano* consists of a mere application of the Directive, while the Court should, in her view, have assessed the Directive in the light of the Treaties. This is to accept, of course, that based on a reading of the Citizenship Directive alone, the right outcome was the one reached by the ECJ. Neuvonen (n 25) 60–61.

Ms Alimanovic no longer enjoyed the status under this provision when they claimed benefits.[28] Despite not being within the scope of that provision, the family derived a right to reside in Germany from Article 14(4)(b). According to this provision, Union citizens 'may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged'. But since Article 24(2) of the Directive allows Member States to deny benefits to those falling within the scope of the Article 14(4)(b),[29] Germany was permitted to deny the family benefits.[30] The decision makes perfect sense if the Directive's text is considered. Therefore, the literature on justice suggests either that sidestepping legislative requirements was legitimate, or that the written text ought not to be leading when it comes to determining legislative intent and needs not constrain the Court in its interpretation of secondary law.[31]

For these scholars, justice informs their accounts of legitimate authority. What they ignore, however, is that no rational consensus exists on the requirements of justice the EU must realise and their accounts demonstrate that perfectly well. Because despite their agreement on the inadequacy of these decisions, Neuvonen appears to favour a much greater degree of equalisation than de Witte.[32] Moreover, the more persons we bring to bear upon such questions, the greater our disagreements on the constitution of justice within the EU will become. What is missing, therefore, is a recognition of the fact of disagreement on justice and reflection on what this ought to mean for our theories of legitimate authority within the EU. This is not to say that the outcomes of the case law implementing legislation are just. We can disagree with the substantive decisions taken, which is a valid ground for criticising the legal rule that supports that decision. What matters, however, is that whenever the legislature acts, it tries to establish justice. As Christiano said it,

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[28] *Alimanovic* (n 22) para 55.

[29] Ibid para 57.

[30] According to Article 24(2) of the Directive, by way of derogation from the principle of equal treatment, 'the host Member State shall not be obliged to confer entitlement to social assistance during … the longer period provided for in Article 14(4)(b)'.

[31] O'Brien, for example, claims that the case law 'is blithely at odds with *Brey*, with Recital 16 of the Directive, and with Commission guidance'. O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (n 26) 950. Frankly, the problem is difficult to understand. Were we to privilege executive decisions (Commission documents) over the text of legislation, a rather odd division of labour between the different sources of authority within the EU emerges. The argument that there is an inconsistency with earlier case law suffers from the same problem, because, of course, this is not a matter of which decision came before, but which of the different alternatives respects the boundaries set by the legislature. The third objection, concerning the recitals, concerns the question of whether the text or legislation's background purpose (recitals) is to be leading. These issues I will give further thought in chapters 3 and 4.

[32] On my reading of both accounts, de Witte favours equal access to benefits that purport to alleviate human need, while Neuvonen makes the case for virtually full equal treatment.

> to say that the legal system establishes justice among persons is not the same as to say that the legal system defines or constitutes justice among persons. To say that the legal system establishes justice is to say that what the legal system does will, for practical purposes, determine what justice demands among persons. We live in societies where there is a lot of disagreement about justice but we must live in accordance with common rules. …. So to say that the legal rules establish justice does not imply that we cannot think that they are unjust. Indeed, much discussion and debate in democratic societies concerns this very question.[33]

It happens regularly that we think that the EU legislature is mistaken in its substantive aspirations and that, had we been in charge, we would be living under a better and more just regime. That thought crosses everyone's mind from time to time and it is everyone's right to criticise the choices made and to offer better alternatives. What gets lost, however, once the legislation and implementing case law is assessed as having contributed to a moral vacuum is that it establishes a particular conception of justice.

3. Justice as reciprocity

A conception of justice supports the Citizenship Directive and the decisions implementing it, central to which is the idea of reciprocity. Before I go on explaining how reciprocity has informed the legislative choices made, it is important to note two things about how conceptions of justice translate into legal rules. To begin with, justice 'underdetermines' what kind of legal rules are to be enacted.[34] The same principles of justice can lead to the adoption of different rules and one may think one set of rules to result in a closer realisation of the justice than an alternative. In addition, legislative decisions are the result of compromise between different visions on what it means for justice to be constituted between the Member States and their citizens.[35] It is unrealistic to think, therefore, that legislative rules will ever be the perfect embodiment of one conception. What follows, therefore, does not contend that the EU citizenship legislation is fully and only informed by concerns of reciprocity, nor that no other rules could be devised that are compatible with the ideal of reciprocity.

[33] Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2008) 55.
[34] ibid 53–54.
[35] ibid 55.

For a start, reciprocity is central to many accounts of justice. According to Barry, '[a]ny theory of justice that tried to eliminate justice as reciprocity would be doomed from the start'.[36] Yet, theories of justice often complement their reciprocal elements, because of the inherent risk involved in predicating eligibility criteria upon principles of reciprocity; it leaves unprotected the vulnerable, who are the least likely to have contributed and participated.[37] However, if principles of reciprocity are normally complemented by a set of rights and entitlements provided to all human beings, there is reason to believe that these are substantially less well developed at the transnational level. A common view is that elaborate requirements of social redistribution hold only within the context of the state, where social interaction and ties between citizens are far more developed.[38] This does not mean that policy-making beyond the state is not meant to establish justice, nor that principles of justice are not applicable to the international realm. However, it may imply that the demandingness of justice depends on the purpose and political implications of international institutions.

Sangiovanni has developed an account of justice for the EU along these lines, which suggests that the EU must be careful to complement rather than transcend the Member States. He explains that the latter have been fairly successful for realising justice internally, but, he warns, the capacity to provide social goods and services 'is not manna from heaven. It requires the participation and collaboration of all persons residing in a territory'.[39] Therefore, the EU should take care not to undermine these relationships of reciprocity and, to determine the degree of social responsibility Member States should bear for nationals from other Member States, an issue to be kept in mind is the extent to which free movement respects the reciprocal ties underlying social entitlements.[40] Those who contribute to the 'joint production of collective goods' can demand a fair return.[41]

Similar concerns have been expressed by others who believe that Member States remain indispensable sites for social welfare and the principles of social justice that apply to the EU are not as demanding as those applying to states. Because systems of social sharing rest upon a degree of

[36] Brian Barry, *Liberty and Justice: Essays in Political Theory 2* (Oxford University Press 1991) 235.
[37] Juri Viehoff and Kalypso Nicolaïdis, 'Social Justice in the European Union: The Puzzles of Solidarity, Reciprocity and Choice' in Dimitry Kochenov, G De Búrca and Andrew Williams (eds), *Europe's justice deficit?* (Hart Publishing 2015) 289. Principles of reciprocity, therefore, tend to be complemented by a set of rights provided to every human being. Even theories that see the reach of social justice as limited to states believe that situations of governance beyond the state are still governed by human rights principles. A Sangiovanni, 'Solidarity in the European Union' (2013) 33 Oxford Journal of Legal Studies 213, 219.
[38] For a very brief discussion of some of the literature, read: Sangiovanni (n 37) 219.
[39] ibid 222.
[40] See also: Floris de Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe' (2012) 18 European Law Journal 694; Viehoff and Nicolaïdis (n 37).
[41] Sangiovanni (n 37) 220.

'closure',[42] they fear that there might be costs involved in the reshuffling of the national boundaries of welfare; solidarity, even though hard to pin down precisely, appears more robust within sufficiently bounded and cohesive communities.[43] Since the process of 'opening', upon which the European project rests directly challenges the 'closure' presupposed for systems of social sharing,[44] they contend that there are potential tensions between national solidarity and transnational solidarity.[45] To be clear, these theories do not suggest that solidarity is necessarily ethno-cultural.[46] Instead, those who take seriously reciprocity also extend social protection to those who have participated in and contributed to society's social, economic, and cultural life.[47]

Seeing these perspectives, it should not surprise that reciprocity is among the EU's guiding principles of justice. One sees this, for example, in the distinction made between economically active and inactive EU citizens. Member States are under no obligation to provide comprehensive social assistance to all newcomers from other Member States; the mere presence for brief periods does not establish sufficiently strong reciprocal ties. Simultaneously, those who have contributed to the host society are entitled by EU law to a fair return and are eligible for social assistance support. This is most evident in the case of those engaged in economic activity.[48] Without going into detail here, in the 1960s, workers were provided already with the right to non-discrimination as regards social and tax advantages;[49] a right confirmed by Regulation 492/2011 on free movement of workers.[50] These rights

[42] Ferrera (n 2) 2.
[43] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983) 31; David Miller, *Justice for Earthlings Essays in Political Philosophy* (Cambridge University Press 2013) 142.
[44] Ferrera (n 2) 2.
[45] Sangiovanni (n 37) 239–240. See also: Richard Bellamy, 'The Liberty of the Moderns: Market Freedom and Democracy Within the EU' (2012) 1 Global Constitutionalism 141; de Witte (n 40).
[46] David Miller, *On Nationality* (Oxford University Press 1999).
[47] 'Solidarity as interpenetration' as Somek called it: Alexander Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 European law Review 787, 811–812.
[48] This is not to say that all workers contribute to the host society in an equal manner and that no difficult decisions are to be taken on occasion. Frontier workers, for example, generally pay taxes in the Member State of residence, not the one of unemployment. de Witte (n 23) 91. In addition, not all workers are full-time employed. According the well-established case law '[a]ny person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a "worker" (Case 63/81 *Levin* [1982] ECR 1035, para 17; *Trojani* (n 6) para 15).
[49] Article 7(2) of Regulation 1612/68 on freedom of movement for workers within the Community. The term social advantages was given a broad meaning in *Even*, where the Court decided it to include all benefits 'which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community'. Case 207/78 *Even*, ECLI:EU:C:1979:144, para 22.
[50] Article 7(2) of Regulation (EU) No 492/2011 on freedom of movement for workers within the Community of 5 April 2011 (OJ L141/1).

were subsequently provided with more substance in the 1970s, when the adoption of Directive 79/7/EEC 'on the progressive implementation of the principle of equal treatment for men and women in matters of social security' provided the working population with equal treatment concerning benefits that provide protection against sickness, invalidity, old age, occupational accidents and diseases, and unemployment. The Citizenship Directive, in turn, in its specification of the situations in which derogations from the principle of equal treatment are allowed, guarantees equal access to social assistance for the economically active; they and their family members retain their right to reside also if they become a burden on the social assistance systems of the Member State in which they reside.[51] In addition, and as we saw in the above discussion of *Alminanovic*, also those who held employment status in the past may retain protection. According to the Citizenship Directive, the status of worker or self-employed is retained by those who have been employed for over a year.[52] Those with employment of less than a year, retain that status for a period of no less than six months.[53]

Of course, there are ways other than through economic engagement, plenty indeed, by means of which one can contribute to the host Member State. One may take up residence in another Member State, amongst other reasons, to pursue studies and training, undertake voluntary work, or simply to enjoy the good life after retirement. Those who are present for longer periods contribute by their societal participation and the remittance of taxes. Since the introduction of EU citizenship, this is increasingly taken into account. The Citizenship Directive determines that those who have been legally resident in another Member State for a continuous period of five years are permanent residents and those enjoying this status can enjoy a wider range of social benefits.[54]

4. The fact of disagreement and secondary legislation as Treaty interpretation

One may disagree with reciprocity being the guiding principle and think that the legislation in force falls short of the requirements needed to constitute justice within the EU – for example, believe the current legislative framework to be insufficiently egalitarian or communitarian. I have not given this question sufficient thought myself and do not aspire to persuade anyone that reciprocity-based justice is adequate in the context of EU citizenship. However, what should be clear by now is that there is no rational consensus on what it means for EU legislation to constitute justice and to be in the interest

[51] Art 14(4)(a) of Directive 2004/38.
[52] Art 7(3)(b) of Directive 2004/38.
[53] Art 7(3)(c) of Directive 2004/38.
[54] Art 16(1) of Directive 2004/38.

of the common good, and that current legislation establishes justice within the EU. This fact of disagreement should lead to a radical rethinking of the relationship between secondary legislation and the Treaties and about the idea that legislation is to be interpreted in light of the Treaties. Section 2 analysed some criticism of recent case law and we saw that those adopting such a critical stance must either believe that it was legitimate for the Court to ignore the legislative constraints imposed on it if desirable from a substantive point of view, or that the written text of secondary legislation should not be leading. The literature presents us with both perspectives.

On the one hand, there are those who find it legitimate for the ECJ to simply ignore the legislative decisions taken when justice and morality are served thereby.[55] Against those who invoke the will of the legislature, O'Brien retorts that 'maybe the rights of citizenship should not be delineated according to the reluctance of Member States to treat each others' nationals as in some way united to their own'.[56] To this she adds, 'the veil of non-interference is misleading [because deference] to the legislature does not make EU citizenship ideologically neutral, or immutable, and it does not discharge the duty of moral scrutiny'.[57] Beyond the fact that moral scrutiny and interference are two very different things, in the sense that one may voice moral objections but nonetheless believe that interference is illegitimate, the suggestion that those advocating for deference do so because that is essential to protect the ideological neutrality of EU citizenship misrepresents the argument of those concerned about instrumentalist approaches to legitimate authority. EU citizenship law as it currently stands embodies a conception of justice and, therefore, is ideologically inspired; and seeing our ideological disagreements, we are mistaken if our theories of legitimate institutions are being made contingent on some preferred ideology.

The argument for judicial deference does not just accept that legislative decisions are normatively inspired, but also the argument in itself is premised on deeper normative theoretical consideration, namely that against the facts of reasonable disagreement but also institutional fallibility, our theories of legitimate decision-making cannot be content-dependent, but must depart from consideration about procedural fairness. I have explained this in detail in the previous chapter, where I alleged that process-based considerations speak strongly in favour of the EU legislature, and will not

[55] See, in addition to O'Brien also for example, Dimitry Kochenov and Uladzislau Belavusau, 'Kirchberg Dispensing the Punishment: Inflicting "Civil Death" on Prisoners in Onuekwere (C-378/12) and M.G. (C-400/12)' (2016) 41 European Law Review 34.
[56] Charlotte O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union' (2013) 50 Common Market Law Review 1643, 1679.
[57] ibid 1679–1680.

repeat that argument here. It explains the limitations of those accounts that advocate for the authority of legislation to be directly flouted when in contravention of some theory of justice or conception of the good.

Most scholars do not seem to share the view that this is desirable. Rather, their arguments are subtler and concern questions over the appropriate relationship between the Treaties and secondary legislation. There is a strong sense that EU legislation ought to be interpreted against the backdrop of norms of primary law,[58] in order to ensure that the Treaties are not undermined by the legislation adopted. *Baumbast*, which introduced a proportionality assessment of legislative regulatory decisions, presents us with a form of 'harmonious interpretation',[59] and discussion of this case reflects the perceived desirability of this approach. Proportionality, according to Dougan, allows for 'the use by the Court of the Member State's obligations under the general principles of Community law to bridge the gap between what Community secondary legislation says and what the Treaty (as interpreted by the Court) actually requires'.[60] Hence, the authority of legislation is not to be curtailed because it is unjust, but because its decisions are not in line with what the Treaties demand (as interpreted by the Court). This bracketed caveat is crucial, of course, because of the impossibility of defining with uniformity what open-ended Treaty provisions like the ones on EU citizenship really require. Proportionality and Treaty-based interpretation are no tools to safeguard the Treaties, but are meant to safeguard the judicial supremacy of the Court.[61]

Members of the Court have been extremely unwilling to accept that deciding the scope of the Treaties is a shared prerogative and their position is supported by the literature. That is the case even when it comes to Article 21 TFEU, which makes itself 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. That provision has been described as 'half-hearted'[62] and the restrictions imposed by secondary law must be made subject to a

[58] Neuvonen (n 25) 61; Herwig Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano?' (2015) 52 Common Market Law Review 363, 382; Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889, 909–910.

[59] Wollenschläger (n 5) 327.

[60] Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (n 12) 616.

[61] On judicial supremacy, Stephen Gardbaum, 'What Is Judicial Supremacy?' [2016] UCLA Public Law & Legal Theory Research Paper Series No. 16-39; Jeremy Waldron, 'Judicial Review and Judicial Supremacy' [2014] NYU Public Law & Legal Theory Research Paper Series No 14-57.

[62] Gareth Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law Internat 2003) 188; Dimitry Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2008) 15 Colum. J. Eur. L. 169, 194. See also: Anne P van der Mei, 'Union Citizenship and the "De-Nationalisation" of the Territorial Welfare State' (2005) 7 European Journal of Migration and Law 203, 208.

proportionality assessment.[63] AG Sharpston took the extreme position that 'to interpret the Treaty in the light of secondary law implies a (dangerous) reversal of the institutional balance for rule-making in the European Union'.[64] This statement, at face value, amounts to a deep mistrust of forms of non-judicial decision-making, because it suggests that there is something dangerous in disallowing the judges to dictate the requirements of Treaty law and to recognise that also EU legislative officials enjoy that prerogative. Similarly, AG Szpunar believes that the interpretation of primary law in the light of secondary law could 'lead to a revision of the Treaties outside the procedures prescribed for that purpose'.[65] Ostensibly, the assumption is that Treaty provisions come with a specific meaning, which cannot change until after the next Treaty amendment. Seeing their open-endedness, however, this cannot be correct. The most evident problem though is that the Treaties actually make EU citizenship rights explicitly subject to measures of secondary law. Rather than leading to a revision of the Treaties, it appears that respecting secondary legislation is to respect the outcome of the Treaty negotiations conducted according to 'the procedures prescribed for that purpose'.

What these and similar statements ignore,[66] is that legislative politics does not take place merely inside the sphere of constitutional politics, but extends 'to the very constitution of the political'.[67] The act of legislating is about deciding on the appropriate conception, scope, and consequences of Treaty rights. There is no reason to assume that a judicial decision to extend or constrain EU citizens' free movement rights involves a deeper reflection of Treaty rights than a similar legislative decision. In other words, also the EU legislature engages in Treaty interpretation and deference to legislation thus amounts to accepting the legislature's best understanding of the Treaties. Rather than a reversal of existing practices, a more accurate description recognises this as the day-to-day reality within the EU. The Treaty-based nature of legislative politics extends, of course, far beyond Article 21 TFEU and the other fundamental freedoms are equally subject to the interpretative decisions of the legislature. In that sense, it is somewhat odd indeed that the Treaty drafters felt the need to make that explicit in the

[63] Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (n 12); Wollenschläger (n 5) 309–310; O'Brien, 'I Trade, Therefore I Am' (n 56) 1670.

[64] Daniel Sarmiento and Eleanor Sharpston, 'European Citizenship and Its Union: Time to Move On?' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press (forthcoming)).

[65] Case C-202/13 *McCarthy*, ECLI:EU:C:2014:345, Opinion of AG Szpunar, para 82.

[66] See also: Koen Lenaerts and José A Gutiérrez-Fons, 'Constitutional Allocation of Powers and General Principles of EU Law, The' (2010) 47 Common Market Law Review 1629; Neuvonen (n 25) 61.

[67] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 25.

context of Article 21 TFEU. It is as if also they forgot that legislative decision-making involves concretising the Treaties and deciding its precise meaning and scope.

This undermines the usual argument informing the belief that the legislative override of case law is unconstitutional and that legislative decisions must be interpreted so as to be proportional in light of the Treaties. The assumption behind that idea is a simple one: primary law is supreme over secondary law and it cannot be, therefore, that legislation undermines or detracts from the scope and meaning of the Treaties. This conviction motivates the statements of Advocates General Szpunar and Sharpston and other EU lawyers have voiced the same argument.[68] The problem with it is not that it mistakenly asserts the primacy of the Treaties. Primary law is indeed supreme over secondary legislation. It is not, however, the hierarchy of legal norms that such legislative decisions question, but the authority to define the EU's course of action.[69]

Treaty interpretation, we saw, is not ECJ's sole prerogative; legislative decision-making, by its nature, involves deciding the Treaties' meaning and scope. Different institutions may adopt different understandings of the Treaties and disagree on their best application to specific conditions. These disagreements exist because of, and are informed by, our disagreements on the requirements of justice in a transnational context. Those with an egalitarian perspective may come to a different understanding on the proper scope of the Treaty provisions on the free movement of persons than those who believe that principles of reciprocity must define what mobile Union citizens are to be entitled to; both may disagree with what a communitarian would prefer. Contrary to common understandings, therefore, the dilemma is not about and cannot be resolved by reaffirming the hierarchy of legal sources within the EU. Rather, the dilemma exists because different sources of authority have adopted different understandings on the Treaties.

These different understandings arose because of disagreement on justice between those institutions and the best realisation of that understanding of the good in practice. This clash between authorities cannot be resolved, therefore, by giving authority to the institution best able to approximate justice in decision-making, because the delivery of justice is precisely the subject of the dispute. Because these disputes produce different understandings on the best understanding of Treaty rights, moreover, neither is the problem resolvable by recognising that it is the Court who 'shall ensure that

[68] Síofra O'Leary, 'Equal Treatment and EU Citizens: A New Chapter on Cross-Border Educational Mobility and Access to Student Financial Assistance' (2009) 34 European Law Review 612, 622; Nic Shuibhne, 'Limits Rising, Duties Ascending' (n 58) 910–911.

[69] This issue has been addressed as well by Phil Syrpis, 'The Relationship Between Primary and Secondary Law in the EU' (2015) 52 Common Market Law Review 461.

in the interpretation and application of the Treaties the law is observed'.[70] To put it somewhat oddly, the dispute concerns the question which interpretation of the Treaties observes the law. Rather, absent rational consensus on what constitutes desirable Treaty interpretation, a determination on who holds legitimate authority when a clash between different institutions arises can be made only from the point of view of the quality of process.[71] As I claimed in the previous chapter, principles of political legitimacy weigh in favour of legislative decision-making within the EU, because it gives reasonable assurance that the EU's policy directions remain subject to the control of the Member States. There is a certain desirability, therefore, in treating legislation as a specific and legitimate form of Treaty expression that needs no further interpretation in light of Treaty rights. Embodied in legislation is an idea of what the Treaties ought to mean, which rests upon a delicate compromise between the different parties to the legislative process, and which risks being upset if reinterpreted in light of primary law.[72] Harmonious interpretation of secondary legislation, to ensure its compatibility with Treaty provisions, does not respect the regulatory choices made by the EU legislature, but is a form of interpretation that allows the Court to constrain the legislature's regulatory scope,[73] and which aspires to deny the legislature the prerogative to shape the Treaties in a manner it deems desirable.

5. Social benefits case law and the quality of legislation

By placing the legislature centre-stage and recognising the authoritativeness of its decisions, also a different vision on the role of the judiciary emerges. Its primary role is not the constitution of justice within the EU, but the application and interpretation of the conception of the good established by legislation. What happens if the ECJ accepts the primacy of legislation is best demonstrated through a more detailed study of the different decisions in the field of social assistance. This section considers important case law from after the introduction of the Citizenship Directive, while the following section turns to some of the decisions adopted prior to Directive. I will claim not just that the Court's actions

[70] Article 19 TEU.

[71] As was also recognised by Maduro, in such circumstances, 'one is not simply choosing among different interpretations of a norm but is also choosing among the institutions with jurisdiction to interpret a norm'. Miguel Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Pub 1998) 15–16.

[72] For a similar concern, read: Hailbronner (n 18).

[73] According to Wollenschläger, this method seeks 'formally to respect secondary law by interpreting it in a way not conflicting with judicial evolution of Union citizenship', but it is difficult to see how this method respects, even formally, the enacted legislation, because for that, interpretation should only concern the legislation. Wollenschläger (n 5) 327. For another such understanding of harmonious interpretation, read: Case C-209/03 *Bidar*, ECLI:EU:C:2004:715, Opinion of AG Geelhoed, para 64.

are politically illegitimate when it fails to treat legislative decisions as authoritative, but also that it destabilises decision-making when it assumes that legislation lacks authority.

Dano and *Alimanovic* were considered in section 2 above and I explained that *Alimanovic* follows the rules articulated by the Citizemship Directive. That position will be qualified somewhat in what follows, but what is most remarkable about these cases is their contrast with earlier and later case law. The Court has been extremely inconsistent in its acceptance of the constraints of legislation, sometimes deferring to the relevant legislation, while on other occasions bluntly favouring its own precedent over applicable rules. This section considers *Vatsouras and Koupatantze* (5.1); *Dano*, *Alimanovic*, and *García-Nieto* (5.2); and *Commission v UK* (5.3). The ambivalence towards legislation contributes to them failing to offer the stability that would have been realised had the legislative rules been followed more consistently.

5.1 From judicial supremacy…

Initially, the judges embraced the position that their interpretation of the Treaties could not be affected by the regulatory decisions taken by the legislature. To the extent that the Citizenship Directive's rules did not remain within the confines established by the Court's interpretation of the relevant Treaty provisions, it sought to square that incompatibility by reaffirming its decisions over those by the legislature.[74]

A conflict emerged in the area of jobseekers' rights. *Collins* decided that those who have 'for a reasonable period, in fact genuinely sought work' have established a sufficiently strong link with the host Member State's employment market and should be conferred jobseeker allowances.[75] The Citizenship Directive deviates from that decision and does not grant jobseekers the same entitlements.[76] Article 24(2) of the Directive allows Member States to derogate from the principle of

[74] It may seem as if Case C-158/07 *Förster*, ECLI:EU:C:2008:630, another case decided around the time the Directive entered into force, demonstrates the Court's respect for legislation, but the Dutch rule at issue in *Förster*, which was the same as the five-year residence requirement in the Citizenship Directive, did not conflict with earlier decisions. Case C-209/03 *Bidar*, ECLI:EU:C:2005:169 struck down UK rules on the ground that the eligibility criteria were impossible to fulfill for non-UK students, not because the three-year rule at issue in that case was in itself incompatible with EU law. It cannot be concluded on the basis of *Bidar*, therefore, that the five-year residency rule as found in the Dutch law violated EU law.

[75] Case C-138/02 *Collins*, ECLI:EU:C:2004:172, para 70.

[76] Dragana Damjanovic, 'Joined Cases C-22/08 & C-23/08, Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900, Judgment of the Court (Third Chamber) of 4 June 2009' (2010) 47 Common Market Law Review 847, 855; Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (n 12) 630; Gareth Davies, 'Legislative Control of the European Court of Justice' (2014) 51 Common Market Law

non-discrimination as concerns jobseekers and to deny them social assistance benefits. Together with Article 14(4)(b), it provides that Member States are under no obligation to grant social assistance to Union citizens who enjoy the right to reside on the ground that they are 'continuing to seek employment and that they have a genuine chance of being engaged' in the host Member State. The provisions do not indicate that jobseekers become eligible following a period in which they have genuinely sought work.

The validity of Article 24(2) was questioned in *Vatsouras and Koupatantze*. The applicants, two Greek nationals, had become residents in Germany, where they became unemployed following a period of employment of less than a year. They brought a complaint against the decision of the responsible authorities to terminate their jobseeker benefits. The dispute placed the national court in doubt about whether Article 24(2) of the Directive was compatible with the right to non-discrimination on grounds of nationality and the Treaty provisions on the right to free movement of workers.[77] The Court as also the Advocate General circumvented the validity question, which they managed by interpreting Article 24(2) against its text and in line with its prior jobseeker case law.[78]

AG Ruiz-Jarabo Colomer was asked about two possible interpretations of Article 24(2): jobseekers can be withheld allowances either indefinitely or for a period of five years. For the AG, it was plain and simple that neither could be correct, because both 'obviously contradict *Collins*'.[79] The Directive could only mean what was needed to ensure that it would not 'avoid the rule laid down in *Collins*'.[80] The reply to the national court, therefore, 'would need to be based on the case-law rather than on the provision whose validity is under consideration'.[81] It is unclear if the AG made some effort to interpret the provision, or simply decided to apply previous case law directly to the case, but it is beyond dispute that his conclusion deviates from Article 24(2). That he ignored this provision cannot surprise, of course, if his view is that it is 'obvious' that decisions of the Court cannot be contradicted by the legislature.

Review 1579, 1599. But see: Case C-22/08 *Vatsouras and Koupatantze*, ECLI:EU:C:2009:150, Opinion of AG Ruiz-Jarabo Colomer, para 54 and footnote 32.

[77] Joined cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, ECLI:EU:C:2009:344, paras 11-22.

[78] This is a technique the ECJ regularly employs: Kamiel Mortelmans, 'The Relationship Between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market–Towards a Concordance Rule' (2002) 39 Common Market Law Review 1303; Phil Syrpis, 'Theorising the Relationship between the Judiciary and the Legislature in the EU Internal Market' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 9.

[79] Opinion of AG Ruiz-Jarabo Colomer (n 76) para 54.

[80] Ibid para 57.

[81] Ibid para 60.

If the Directive could possibly contradict earlier case law was not even a possibility the Court was willing to contemplate. Instead, the Court elaborately summarised previous jobseeker case law, subsequently repeating that jobseekers who have established a real link with the labour market 'can rely on Article [45(2) TFEU] in order to receive a benefit of a financial nature intended to facilitate access to the labour market'.[82] In addition, it believed that 'the derogation provided for in Article 24(2) of Directive 2004/38 must be interpreted in accordance with Article 45(2) TFEU'.[83] The Directive, it turns out, could not contradict its jurisprudence and must be interpreted in light of the Court's understanding of the Treaties. That produced the conclusion that benefits 'intended to facilitate access to the labour market cannot be regarded as constituting "social assistance" within the meaning of Article 24(2) of Directive 2004/38'.[84] The Court failed to explain why such benefits lack the characteristics of social assistance and, by departing from the written text, placing jobseeker benefits outside of the scope of social assistance,[85] it managed to establish its primacy over legislation and avoid the validity question.

Vatsouras and Koupatantze proved wrong commentators who believed that the ECJ would not 'act so precipitously … by disregarding limits carefully negotiated by a Directive'.[86] Contrary to some assessments,[87] the case curtailed the Directive, requiring Member States to confer jobseekers with a genuine connection to their labour market the kind of benefits possessing the characteristics of jobseeker benefits. The members of the Court must have assumed that it is them possessing the comprehensive authority to decide the meaning and scope of primary law, which cannot be contradicted by later legislative decisions.[88]

5.2 … to judicial deference …

[82] *Vatsouras and Koupatantze* (n 77) para 40.
[83] Ibid para 44.
[84] Ibid para 45.
[85] Chapter 4 will explain that the jobseeker benefits at issue in these cases are social assistance in their main characteristics.
[86] Catherine Barnard, 'Case C-209/03, R (on the Application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills' (2005) 42 Common Market Law Review 1465, 1482.
[87] Despite the reasoning displayed, some maintained that *Vatsouras and Koupatantze* is faithful to the Directive. Dougan, 'The Bubble That Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' (n 14) 140–141; Thym (n 17) 158. For the reasons set out in this section, that position is implausible. As also Nic Shuibhne has noted, the case 'was an evasion, not interpretation, of the Directive'. Nic Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the Case Law of the Court of Justice' (n 16) 353.
[88] See, for such a perspective, Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 18.

More recent decisions display a different approach. One of these decisions – *Alimanovic* – I considered in section 2, where I explained that it followed the legislative rules conditioning eligibility to social assistance. That decision was confirmed in *García-Nieto*, a case involving a dispute on the denial of subsistence benefits to Spanish nationals resident within Germany within their first three months of residence there. The ECJ acknowledged that Article 6(1) of the Directive allows for residence for periods up to three months, but added that according to Article 24(2), 'the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence'.[89] This legislative rule proved sufficient for the ECJ to decide that the German law was compatible with EU law.

Prior to *Alimanovic* and *García-Nieto*, the Court decided *Dano*. This case is the most interesting of the three, not just because it was leading in the subsequent two decisions, but also because it proved more difficult to define what the Directive required. In *Alimanovic* and *García-Nieto*, it was evident that the applicants had not satisfied the temporal requirements set by the Directive. What is curious about the Directive is that Article 24(2) permits the Member States to deny social assistance during the first three months and to jobseekers and students, but is less explicit about the economically inactive who do not fall within those categories. This was the situation of Ms Dano, who had been resident for a period longer than three months, but had never worked and was not looking for employment either.[90] Therefore, Article 24(2) was not applicable to her case.[91] AG Wathelet spelled out perfectly the paradoxical situation that would arise were she entitled to social assistance benefits on that ground:

> we would arrive at a situation where a national of a Member State who has exercised his right to freedom of movement as a Union citizen without intending to integrate himself into the labour market of the host Member State would be in a more favourable situation than a national of a Member State who has left his country of origin in order to seek employment in another Member State[92]

Economically inactive Union citizens could claim benefits if they would end their search for employment.

It is interesting to study how that paradoxical situation came about. The initial proposal for a Citizenship Directive foresaw that the host Member State was under no obligation to confer social

[89] Case C-299/14 *García-Nieto*, ECLI:EU:C:2016:114, para 49.
[90] *Dano* (n 21) paras 35-39.
[91] Ibid paras 65-66.
[92] Case C-133/13 *Dano* ECLI:EU:C:2014:341 , Opinion of AG Wathelet, para 116.

assistance to economically inactive Union citizens, until the moment they had acquired permanent residence status.[93] During the negotiations, however, the Court decided that EU citizens can invoke the non-discrimination principle in all situations that fall within the scope of the Treaties. This includes situations involving the exercise of the right to free movement, meaning that those who had exercised the right to free movement were entitled to equal treatment.[94] The Court pushed the scope of EU citizenship beyond what the legislature had envisaged in its initial proposal and the latter took the decision to remove the initial derogation for economically inactive Union citizens from the Directive.[95] The permission to deny maintenance grants to students was the only derogation to equal treatment that remained, no doubt because such maintenance grants fell, per the case law, outside EU law's scope at that time.[96] Realising that also jobseeker benefits still fell beyond the Treaties' scope,[97] the Council proposed that such benefits could also be denied by the host Member State.[98] The other institutions accepted that suggestion, but a legal gap emerged as a result. Because while the Directive now allows Member States to deny social assistance to jobseekers who have not engaged in an economic activity of sufficient duration before, it is silent as to the position of the economically inactive who are not searching for employment. The Directive, as AG Wathelet pointed out, could be read even as suggesting the contradictory idea that the host Member State is not required to confer social assistance to jobseekers, but will be once the economically inactive give up their job seeking efforts.

Paradoxes like these are a consequence of shortcomings during the process of legislating, but also of shortcomings in dominant theories on the authority of legislation within the EU. The decision

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[93] Article 21(2) of the Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ C270E/150).

[94] *Grzelczyk* (n 5) paras 31-32.

[95] Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty) /* COM/2003/0199 final - COD 2001/0111.

[96] European Parliament Report of 23 January 2003 on the proposal for European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States - Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (2001/0111(COD)). That these benefits fell outside of the Treaty's scope was decided in Case C-197/86 *Brown* ECLI:EU:C:1988:323, para 18. Also by the time discussion on the Directive took place, the Court had started to put in doubt whether maintenance grants still were excluded from the Treaty's scope: *Grzelczyk* (n 5) para 35.

[97] Case 316/85 *Lebon* ECLI:EU:C:1987:302, para 26. This decision was reversed when the drafting process of the Citizenship Directive came to a close in *Collins* (n 75).

[98] Common Position (EC) No 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ C54E/12).

to incorporate prior legal decisions, no matter the consequences, can be understood only against the background of the kind of judicial supremacy promoted by many EU lawyers. That is, it cannot surprise that the continued treatment of the Court as the principal in the process of European integration, leads to the legislature acting as the ECJ's agent.[99] Consider the documents published by the European Parliament proposing amendments to the Citizenship Directive then under negotiation. On several occasions, its *only* justification for an amendment was that the Court had decided a case that way.[100] The members of the European Parliament felt the need to obey the meaning accorded to the Treaties by the Court and saw no need for additional consideration over the desirability of these decisions, or their fit with the larger legislative framework.

That attitude denies the EU legislature the ability to act as a legislature, as the institution that is best positioned to consider political problems at the required level of generality, with the ability to create a coherent legislative framework that defines in the general and for all those governed by it their legal position. The consequence of the legislature being (or feeling) bound by prior judicial interpretations of Treaty provisions is that it shifts focus to the individual level; legislation is shaped by legal principles adopted in individual and case-by-case decision-making, which are born out of idiosyncratic disputes and informed by specific legal facts. When the Court, for example, decided that an expulsion measure cannot be the 'automatic consequence of [someone] having recourse to the host Member State's social assistance system',[101] the proposed legislation was amended so as to give effect to this decision.[102] Not just did that amendment produce an apparent tension with the provision that makes residence rights conditional upon the EU citizen not becoming an unreasonable burden on the social assistance system,[103] it also is questionable if, by including such judicial statements, the legislature maintains adequate focus on the general level and realises that it must provide guidance to all Member

[99] Gareth Davies, 'The European Union Legislature as an Agent of the European Court of Justice: EU Legislature as an Agent of the ECJ' (2016) 54 JCMS: Journal of Common Market Studies 846.

[100] European Parliament Report of 23 January 2003 on the proposal for European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States - Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (2001/0111(COD)).

[101] *Grzelczyk* (n 5) para 43. See also *Trojani* (n 6) para 45.

[102] Common Position (EC) No 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (OJ C54/12).

[103] Article 14(1) of Directive 2004/38. This tension is not irresolvable. One could imagine that an individual claim to social assistance is not sufficient proof that one is being an unreasonable burden. It has created a fair amount of confusion though. Somek (n 47).

States, which must implement the rules and realise legal outcomes that are in accordance with them.[104] We expect of the EU legislature that its decisions lack great levels of inconsistency and vagueness and rightly criticise it when it fails to deliver, but that expectation is hard to live up to if we also expect it to defer to prior case law. The tensions that emerge will subsequently have to be resolved by the ECJ.

This the Court was required to do in *Dano*. To resolve the paradox, the Court undertook some ingenious legal reasoning and reminded that in order to be eligible to equal treatment, Union citizens must satisfy the conditions for legal residence within the meaning of the Directive.[105] Article 7(1) stipulates under which conditions Union citizens enjoy the right to reside legally in another Member State. Not being a worker, self-employed, or a student, Ms Dano would enjoy residence rights on the basis of that provision only if she could demonstrate 'to have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence'. The Court decided that entitling individuals that find themselves in the position of Ms Dano to benefits would run counter to the Directive's objective to prevent mobile citizens from becoming an unreasonable burden,[106] and it decided that Member States must have the possibility to deny social assistance to those without the sufficient resources to claim residence there.[107] Seeing the paradox created by the Directive, the argument is not without its merits.

Unfortunately, the Court applied the same legal reasoning also in *Alimanovic*, while that dispute was comprehensively covered by the Directive's rules. It said that it would be contrary to the Directive's objectives if those without the right to residence within the meaning of the Directive could enjoy the same social assistance entitlements as the host Member State's nationals.[108] Therefore, the Court said, it must be decided 'whether the principle of equal treatment referred to in Article 24(1) of that directive is applicable and, *accordingly*, whether the Union citizen concerned is lawfully resident on the territory of the host Member State'.[109] That conclusion reads too much into Article 24 of the Directive. That provision indeed conditions the right to equal treatment, but it does not stipulate the criteria for lawful residence as suggested by the Court. To the contrary, under the Directive, Union citizens can be denied equal treatment and still enjoy the right to reside. The Court realised this some paragraphs later, saying that Article 14(4)(b) entitles mobile Union citizens who 'can provide evidence

[104] See also, Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 Boston College Law Review 433, 460–461.
[105] Dano (n 21) paras 68-69.
[106] Ibid para 74.
[107] Ibid para 78.
[108] *Alimanovic* (n 22) para 50.
[109] *Alimanovic* (n 22) para 51 (italics added). See also: *García-Nieto* (n 89) para 40.

that they are continuing to seek employment and that they have a genuine chance of being engaged' to reside, even though they are not entitled to social assistance in those circumstances.[110] In other words, whether one enjoys the right to reside and when one is entitled to social assistance are two separate questions under the Directive. If that distinction is not kept precisely, the residence rights of those not enjoying equal treatment under the Directive may be put in jeopardy.

Regardless of the fact that the solution offered by *Dano* to resolve the inconsistencies and gaps left by the Directive created some confusion in later case law, it is evident that the three cases discussed here show an attitude very different from that on display in *Vatsouras and Koupatantze*.[111] Three issues deserve attention: the Court is no longer searching for real links with the host society; it reinterpreted the meaning of social assistance; and the Court did not interpret the Citizenship Directive in light of the Treaties.

Vatsouras and Koupatantze prioritised prior case law over the Directive. That prioritisation included a confirmation of the legal principle that those who can 'establish a real link between the job-seeker and the labour market of that State' are entitled to jobseeker allowances.[112] The existence of such a real link, the Court repeated, 'can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State'.[113] The Citizenship Directive does not require an assessment of such links and the three cases discussed here no longer require the national authorities to conduct such an examination. The absence of an examination of the applicants' individual links in *Dano* might be explicable by the fact that Ms Dano had ostensibly not engaged in a substantial way with the host society – that she had never had a job nor searched for one.[114] In addition, also *García-Nieto* might not have required an examination of real connections, since the dispute was about what the Member State is due to mobile Union citizens in the first three months of residence. That such an inquiry was not present in *Alimanovic*, however, certainly is more striking. Ms Alimanovic had undertaken part-time employment for close to a year and was searching for jobs. Furthermore, she had lived in Germany before and her children were born there. Would the Court have cared about the individual links she had established with Germany and applied *Vatsouras and Koupatantze*, the outcome should probably have been different.

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[110] *Alimanovic* (n 22) para 56.

[111] Which is not to say that the ECJ explained convincingly the differences between *Vatsouras and Koupatantze* and the other three cases. For criticism about the quality of legal reasoning, read Daniel Thym, 'When Union Citizens Turn Into Illegal Migrants: The *Dano* Case' (2015) 40 European Law Review 249.

[112] *Vatsouras and Koupatantze* (n 77) para 38.

[113] Ibid para 39.

[114] *Dano* (n 21) para 39.

Secondly, in all four cases, the benefit at issue was the subsistence benefit for jobseekers under Book II of the German Social Code. Article 24(2) of the Citizenship Directive permits Member States to deny social assistance to jobseekers. The Court avoided having to address whether these benefits constitute social assistance in *Vatsouras and Koupatantze*, by creating a special kind of benefit – a benefit to facilitate access to the labour market.[115] Thereby, it placed such allowances outside the scope of social assistance as defined by Article 24(2).[116] *Dano* brought back that benefit into that provision's ambit and also *Alimanovic* and *García-Nieto* classified it as social assistance.[117] The Court interpreted social assistance as referring 'to all assistance schemes established by the public authorities … to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs'.[118] The benefit may facilitate the search for employment, but it followed from the benefit's main purpose that it was to be classified as social assistance.[119]

Finally, rather than requiring for the Citizenship Directive to be interpreted in light of the Treaty, so as to ensure its compatibility with prior case law,[120] from *Dano* onwards, secondary law is treated as being the specific expression of the Treaties. In *Dano*, the ECJ formulated this as follows:

> the principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression in Article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, exercise their right to move and reside within the territory of the Member States. That principle is also given more specific expression in Article 4 of Regulation No 883/2004 in relation to Union citizens, such as the applicants in the main proceedings, who invoke in the host Member State the benefits referred to in Article 70(2) of the regulation[121]

Instead of interpreting and applying the Treaty provisions, it decided to 'interpret Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004'.[122] The Court also refused to examine Ms Dano's situation in light of the Charter of Fundamental Rights. This conclusion it may not have

[115] *Vatsouras and Koupatantze* (n 77) para 40.
[116] Ibid para 45.
[117] *Dano* (n 21) para 63.
[118] *Dano* (n 21) para 63; *Alimanovic* (n 22) para 44.
[119] The classification of these benefits, of course, required a determination of the precise interaction between Directive 2004/38 and Regulation 883/2004. More specifically, it was necessary to define whether special non-contributory benefits under Regulation 883/2004 fell within the scope of social assistance or social security, as defined by the Citizenship Directive. To this issue, I will return in chapter 4.
[120] As the Court required in para 44 of *Vatsouras and Koupatantze* (n 77).
[121] *Dano* (n 22) para 61.
[122] Ibid para 62.

persuasively argued,[123] but even if the Charter had applied, it should not have provided the tool for reinterpreting the Directive. EU secondary legislation embodies a certain conception of primary legislation – which includes the Treaties and the Charter – and their interaction with other interests of public policy, which the judges should be careful not to interpret away.[124]

5.3 … to judicial override

If *Dano*, *Alimanovic*, and *García-Nieto* can appropriately be characterised as the Court's recognition of the authoritativeness of legislation, the fourth case in line – *Commission v UK* – demonstrates a radically different attitude. That case set aside unreservedly the secondary law in place once more. This the Court managed to accomplish by extending the argumentation used in *Dano*, *Alimanovic*, and *García-Nieto*, applying it also to social security entitlements. Crucially, the Citizenship Directive only governs access to social assistance, whereas social security benefits are within the scope of Regulation No 883/2004.[125] The Regulation sets out a number of conflict rules, which allow for a determination of the national legislation applicable and the Member State responsible for the payment of social security benefits. At issue in the case was Article 11(3)(e), which holds that if none of the other conflict rules applies, the person 'shall be subject to the legislation of the Member State of residence'. Residence is defined as 'the place where a person habitually resides'.[126] In dispute was the UK's decision to recognise as resident, not those with habitual residence, but only those satisfying the conditions for lawful residence within the meaning of Directive 2004/38, in particular the requirement that economically inactive persons must have sufficient financial resources to avoid becoming an unreasonable burden on the host state's social assistance system.[127] Thereby, it discriminated between its own nationals and other EU citizens. The Regulation makes no reference to the Directive nor its conditions for lawful residence, but holds, instead, that those covered by it 'shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof', unless the Regulation provides otherwise.[128] Yet, invoking *Dano*, the Court held that

[123] Concerns about the Court's argument were raised, for example, by Verschueren (n 58) 386–387.
[124] For a similar view, read: Thym (n 111) 256. For a somewhat different perspective: Dominik Düsterhaus, 'Timeo Danones et Dona Petentes' (2015) 11 European Constitutional Law Review 121, 136–138; Verschueren (n 58) 386–387.
[125] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L166/1).
[126] Article 1(j) of Regulation 883/2004.
[127] Case C-308/14, *Commission* v *UK*, ECLI:EU:C:2015:436, para 22.
[128] Article 4 of the Regulation.

'[i]t is in principle for the legislation of each Member State to lay down those conditions' creating the right to social benefits.[129] Previously, however, this statement was followed by another, namely that even though the Member States

> retain the power to organise the conditions of affiliation to their social security schemes, … those conditions may not have the effect of excluding from the scope of the legislation at issue persons to whom that legislation applies pursuant to Regulation No 1408/71 (now Regulation 883/2004).[130]

Commission v UK omitted that qualification and permitted the Member States to check whether residence is lawful for as long as these criteria 'comply with the requirements set out in the Directive',[131] thereby excluding from social security legislation those to whom the legislation ought to apply pursuant to Regulation 883/2004.

The UK Brexit referendum took place shortly after the decision was delivered, which may explain the motivations behind it, but it cannot be that the rights enjoyed by EU citizens under secondary legislation 'vaporize when exposed to political heat'.[132] Member States should not be permitted to get around the requirements of legislation if they can build sufficient political pressure, which would allow them to hijack the political debate and to impose unilaterally their will on others. Such a circumvention of the legislative process affects those Member States that are unable to exercise such pressures and removes decision-making from the Member States' shared and equal control; struck compromises will be subject to renegotiation in court. Moreover, the ECJ's retrospective rewriting of the Regulation undermines its stability, with possible confusion among national authorities who had always implemented the requirements of the Regulation, possibly imperilling the legal position of EU citizens if the Member States that applied the Regulation correctly take a different position following *Commission v UK*.

It is easy to focus on cases like *Vatsouras and Koupatantze* individually, to highlight their beneficial impact on EU citizens' rights, and use such cases in support of the primacy of judicial decision-making over legislation. Judicial behaviour can be adequately assessed, however, only in general and it turns out that even if our only concern is the substantive legal position of Union citizens,

[129] *Commission v UK* (n 127) para 65.
[130] Case C-106/11 *Bakker*, ECLI:EU:C:2012:328, para 33.
[131] *Commission v UK* (n 127) para 81
[132] O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (n 26) 952.

the judiciary offers us a mixed bag of outcomes.[133] In addition, the decisions highlight a certain desirability of rule-bound decision-making. The Court serves no one – neither the Member States nor the individual citizen – by constantly contradicting itself in its attitude towards and treatment of legislation. Those subject to it are not given the required certainty and delicate compromises between the different parties to the legislative process risk being undermined, with grave consequences for the legitimacy of EU law.

6. Early EU citizenship case law reassessed

The Citizenship Directive sat in an uneasy relation with earlier case law. By the time it was adopted, EU citizenship had been part of the Union legal order for over a decade and the foundational case law emerged in a period in which the legislature had not decided how to give effect to the relevant Treaty provisions. This, at least, is one perspective, because we also know that a comprehensive legislative regime governing the mobility of persons within the EU was already in place by then and that Article 21 TFEU subject the EU citizens' right to move and reside freely is 'to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. The question, which I will address now, is whether, against the background of my own account, the constitution of EU citizenship in the Treaties provided sufficient justification for the initial case law. That is, was judicial deference desirable only following the adoption of the Citizenship Directive, or does the argument apply with equal force to the case law of before?

The creation of EU citizenship placed the free movement of persons 'in a completely new normative context'.[134] Logically, therefore, it raised certain expectations about the changes it would bring to the EU, when it comes to free movement and beyond. However, I am uncertain, contrary to the conceptual work mentioned in section 1, if this changed normative setting alone justifies earlier case law. Many accounts suggest that because of the conceptual innovation brought about by the introduction of EU citizenship, the early decisions that challenged the existing legislative framework are justified. That is, the Court was correct to ignore the constraints of these legislative acts, because it contributed to a more real and substantive form of citizenship. That the decision to introduce citizenship within the EU's constitutional framework should have come with some consequences is

[133] Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006).

[134] Ferdinand Wollenschläger, 'A New Fundamental Freedom Beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 European Law Journal 1, 16.

an argument that is intuitively easy to comprehend.[135] The problem with it, however, is that it provides us with very little to work with. It does not provide us with any insights as to the kind of legal and political changes EU citizenship should have brought along; whether these ought to have been minor or major – and even, whether there had to be any at all beyond those already introduced by the Treaties.[136] Such conceptual analysis ignores, moreover, the absence of rational consensus on what it means to realise a substantively proper citizenship within the EU. Whether, for example, Member States must open up their social welfare systems to all EU citizens is not a matter of having citizenship or not, but of our sense of justice. And because justice is not beyond disagreement, neither is the question of what citizenship requires.

I shall argue that the legitimating factors behind the early decisions are difficult to see. I will discuss *Martínez Sala*, *Grzelczyk*, and *Trojani* (6.1), and *Collins* and *Bidar* (6.2). These decisions raise problems similar in part to those created by *Vatsouras and Koupatantze* and *Commission v UK*. They are politically illegitimate as concerns questions of process within the EU, fail to offer the necessary stability, and are inadequate as far as legal argumentation is concerned. Also following the introduction of citizenship in the Treaties, there was substantial rights disagreement, with diverging views on the appropriate meaning of the Treaty provisions on EU citizenship. The initial case law cannot be justified, therefore, from the perspective of having contributed to a more meaningful concept of Union citizenship, nor on the ground of some ideal theory of justice. Furthermore, as we will see, the foundational case law is so mind-bending that it is difficult to understand the directions offered by it, neither for the authorities responsible for their implementation, nor for Union citizens.

6.1 Towards equal treatment

From the moment the ECJ started deploying EU citizenship, its case law has been plagued by the dilemmas set out above. The first, and arguably also most difficult case was *Martínez Sala*.[137] The difficulty partly concerns the fact that Mrs Martínez Sala had been resident in Germany for a period of around 25 years when the legal dispute arose. In the meantime, she held various jobs and received social assistance. For considerable durations, she had held residence permits, but not during the period when she applied for a child-raising allowance. This benefit was denied to her on the ground that she

[135] Nic Shuibhne, 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?' (n 5) 181; Kostakopoulou (n 11).
[136] Most of all 'the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides', laid down in Article 22(1) TFEU.
[137] Case C-85/96 *Martínez Sala*, ECLI:EU:C:1998:217.

did not have the German nationality, nor a residence entitlement or permit.[138] The national court had not given sufficient information for the ECJ to decide if Mrs Martínez Sala enjoyed the status of worker and enjoyed the associated benefits and, as a result, it undertook an assessment of her position under the Treaty provisions on EU citizenship.

If she did not classify as a worker, Mrs Martínez Sala was unable to derive residence rights under other sources of secondary law. Directive 90/365, governing the residence rights of employees and self-employed persons who have ceased their job, and Directive 90/364 on the right to residence of those not covered by other provisions of EU law, require that Member State nationals and their families have sufficient financial resources to avoid becoming a burden on the host Member State's social assistance system.[139] Her situation was somewhat unusual, however, because even though she did not enjoy a residence permit when she requested the allowance, she could not be deported as a consequence of the European Convention on Social and Medical Assistance. Furthermore, she obtained residence permits in subsequent years.[140]

Because her authorisation to reside in Germany was not in dispute,[141] the Court did not examine whether EU law did provide Mrs Martínez Sala with residence rights on other grounds. Rather, the Court decided on what was to be the position under EU law of EU citizens with an authorisation to reside. The decision taken was that EU citizens with lawful residence in the host Member States can invoke Article 12 TFEU – the right to non-discrimination on grounds of nationality – if her situation falls within the material scope of EU law.[142] The requested child-raising allowance was covered by the then applicable social security Regulation, by which fact it fell within the material scope of EU law.[143] According to the ECJ, such discriminatory treatment with respect to matters falling within the material scope of EU law could no longer be justified and be compatible with EU citizenship law.[144]

The case emerged from a set of peculiar circumstances, consisting mainly of the fact that Mrs Martínez Sala could not be denied the right to remain in Germany, in accordance with the European Convention on Social and Medical Assistance, even if not in the possession of a residence permit. That she was given such permits in subsequent years also indicates that her right to reside legally in

[138] Ibid paras 13-16.
[139] Article 1(1) of Directive 90/365 and Article 1(1) of Directive 90/364
[140] *Martínez Sala* (n 137) para 14.
[141] Ibid para 60.
[142] Ibid para 63.
[143] Ibid paras 24-28.
[144] Ibid para 64.

Germany was not in question, nor that she could claim benefits when possessing a permit. Yet, the reasoning employed by the Court was not confined to those peculiar circumstances. To the contrary, the principle that Union citizens with lawful residence can invoke the principle of equal treatment with respect to those benefits falling within the scope of EU law was defined in general terms. By forgetting to clarify the relationship between that principle and the relevant secondary legislation conditioning the right to reside of mobile persons, certain tensions arose, which emerged in *Grzelczyk* and *Trojani*.

Section 2 described *Grzelczyk* as one instance of the Court setting aside the limits of legislation. We saw that this case concerned a French student pursuing a degree in Belgium, who claimed a minimum subsistence allowance during his fourth year of studies. Mr Grzelczyk enjoyed the right to reside in Belgium by virtue of Directive 93/96, governing the right of residence for students. Article 3 of that Directive, however, allowed Member States to deny the conferral of maintenance grants to foreign students and Article 1 specified that Member States may ask for proof that the student enjoys sufficient resources. Notwithstanding these provisions, the Court decided that because Mr Grzelczyk enjoyed the right of residence in Belgium on grounds of Directive 93/96, he could invoke the principle of equal treatment based on the principles established by *Martínez Sala*.[145] The judges, presumably aware of the fact that the decision of the Belgian authorities to deny the applicant the benefits requested was in conformity with the provisions of the Directive, decided that the right to reside could be revoked in case students took recourse to social benefits.[146] However, they also added that 'such measures [cannot] become the automatic consequence … of having recourse to the … social assistance system'.[147] Hence, whereas the Directive creates no obligation for the payment of maintenance grant to legally resident students, under the legal principles derived from the provisions of EU citizenship, the ECJ created such a duty nonetheless. The right to reside is revocable, but because such a revocation could not follow automatically a request for assistance, the mobile student was placed in a very different position vis-à-vis the host Member State's social assistance system than before.

Trojani demonstrates the full potential of this approach to EU citizenship.[148] A French national, who had moved to Belgium, was, following a stay at different locations, provided with accommodation in a Salvation Army in return for board and lodging and some pocket money. Directive 90/364

[145] *Grzelczyk* (n 5) para 43
[146] Ibid para 44
[147] Ibid para 43.
[148] *Trojani* (n 6).

contained a sufficient resources requirement, which prevented Mr Trojani from deriving residence rights therefrom.[149] However, observing that Mr Trojani was lawfully resident in Belgium under national law, it was decided that

> while the Member States may make residence of a citizen of the Union who is not economically active conditional on his having sufficient resources, that does not mean that such a person cannot, *during his lawful residence* in the host Member State, *benefit from the fundamental principle of equal treatment* as laid down in Article 12 EC.[150]

And while Member States may revoke the residence entitlements of those having recourse to social assistance, the ECJ again reminded that being in need of social assistance 'may not automatically entail such a measure'.[151]

Despite the boundaries set by secondary law, *Trojani* came close to establishing a right of equal treatment to everyone enjoying the authorisation to reside in the host Member State, including those with tenuous links to the host society. The restrictions provided by EU law were set aside, only to be replaced by a circumscribed possibility to withdraw someone's residence rights in case the person would risk becoming a burden on the national welfare system. These decisions were inspired by an understanding of the requirements of justice at the transnational level, informed by the introduction of the concept of Union citizenship, and defended on such grounds also in the literature.[152] The Maastricht Treaty may have transformed Member State nationals from market participants to citizens, but a consensus on justice and rights did not suddenly emerge thereby, which explains the difficulty of legitimating the Court's overhaul of the then existing legislative framework from an outcome-based perspective.

6.2 Searching for real links with the host Member State

Perhaps aware of the far-reaching implications of these decisions, subsequent case law introduced a test that aspired to integrate the extent of social integration in the host Member State into the

[149] Mr Grzelczyk could derive indeed derive the right to reside from the Directive governing the position of students despite the indication that he lacked the adequate resources. The precise reasons are irrelevant here, but according to the Court there were differences between the different pieces of legislation when it comes to the sufficient resources requirement, which it explained in *Grzelczyk* (n 5) para 41.
[150] *Trojani* (n 6) para 40 (italics added).
[151] Ibid para 45.
[152] O'Leary (n 11); Kostakopoulou (n 11); Iliopoulou and Toner (n 11).

examination of whether EU citizens should be granted the benefits requested.[153] These decisions allowed Member States to condition their treatment of non-national EU citizens as equal to their nationals on 'a real link [with] the geographic employment market'[154] or 'a certain degree of integration into the society of the host State'.[155] *Collins* and *Bidar* offer two examples, which are examined here. The real link and certain degree of integration tests merit a more substantial discussion than this chapter alone can offer, because it is partly on the basis of these tests that a state of rulelessness emerged in the domain of EU citizenship law. The following chapter will explain the reasons as well as the problems coming with it.

More is to be said about these tests though. Some suggest that these decisions mitigate the Court's case law; it may have disrespected the legislature's intentions, but has tolerated the Member States to erect barriers to access to the social welfare system.[156] Even if these tests display a certain sensitivity on the Court's behalf for the possible implications of EU law on national welfare, they meant no good for the EU's institutional balance and the position of the legislature. Because no matter how one interprets this innovation – as beneficial for the mobile Union citizens or the national welfare systems[157] – the ECJ simply added one more element to a string of requirements never adopted in legislation. The degree of vagueness by which *Collins* and *Bidar* replaced the legislative rules and the argumentation that it employed in support of its decisions, moreover, is astonishing.

With the exception of two brief periods of stay in the UK – a semester in 1978 for study purposes and 10 months between 1980 and 1981 for work purposes – Mr Collins, an Irish-American national, had lived and worked all his life outside the EU. He returned to the UK in 1998 to find work and claimed a jobseeker's allowance, which the national authorities refused on the ground that he did not satisfy the condition of habitual residence.[158] Under the applicable legislation – Regulation 1612/68 EEC – the position of jobseekers was clear. Their position was distinguished from that of workers, who were placed in an equal position with nationals as regards social and tax advantages.[159]

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[153] de Witte (n 23) 131; Charlotte O'Brien, 'Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity' (2008) 33 European Law Review 125; Michael Dougan, 'The Court Helps Those Who Help Themselves... The Legal Status of Migrant Work-Seekers under Community Law in the Light of the Collins Judgment' (2005) 7 Eur. J. Soc. Sec. 7.

[154] Case C-224/98 *D'Hoop*, ECLI:EU:C:2002:432, para 38; Case C-258/04 *Ioannidis*, ECLI:EU:C:2005:559, para 30; Case C-367/11 *Prete*, ECLI:EU:C:2012:668, para 33.

[155] *Bidar* (n 74) para 57; *Förster* (n 74) para 49.

[156] Wollenschläger (n 5) 317.

[157] For some different perspectives, read: Somek (n 47); O'Brien, 'Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity' (n 153); Golynker (n 15).

[158] *Collins* (n 75) paras 18 and 19.

[159] Article 7(2) of Regulation 1612/68.

Those seeking employment in another Member State, however, were entitled to the assistance provided by employment offices only.[160] The case law of before the introduction of Union citizenship reflected this distinction. [161]

Collins changed this by reinforcing jobseeker rights on the basis of EU citizenship precedent.[162] The Court acknowledged that the law in force did not refer to benefits of a financial nature, but held that the legislation was to be interpreted in light of the Treaties, in particular Article 12 TFEU – the right to non-discrimination on grounds of nationality.[163] It reaffirmed that EU citizens enjoying the right of residence can invoke the right to non-discrimination,[164] which was the right the UK habitual residence requirement violated, because it could be met more easily by UK nationals.[165] Such discrimination was not prohibited per se; it could be justified on the ground that it was legitimate for the Member States to ensure that 'there is a genuine link between an applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographic employment market in question'.[166] Someone who has 'for a reasonable period, in fact genuinely sought work in the Member State in question' would establish such a link.[167]

Hence, even though the applicable legislation did not oblige Member States to place jobseekers on the same footing as its own nationals as regards social benefits, *Collins* decided differently. By reading secondary law so as to make it compatible with the ECJ's understating of the Treaties, those jobseekers who have established a genuine connection with the employment market were placed in an equal position. It is at this point that the reasoning becomes most remarkable. Because while the UK could require a connection between the claimant and the employment market, and while a residence requirement was deemed appropriate for that purpose, for such a residence requirement to be proportionate,

> its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, … the period must not

[160] Article 5 of Regulation 1612/68.
[161] Those moving in search for employment 'qualify for equal treatment only as regards access to employment'. Case C-316/85 *Lebon*, ECLI:EU:C:1987:302, para 26. Case C-278/94 *Commission v Belgium* [1997] ECR I-1035, para 17.
[162] For an analysis see: Golynker (n 15).
[163] *Collins* (n 75) para 60.
[164] Ibid para 61.
[165] Ibid para 65.
[166] Ibid para 67.
[167] Ibid para 70.

exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.[168]

It is hard to conceive of anything that is clearer and easier to know in advance than some residence criterion, but, most of all, a determination of whether someone has been genuinely seeking work cannot possibly depend on a person's habitual residence, but requires an assessment of someone's individual behaviour.[169] As I will explain in the following chapter, the Court did not create a new rule to replace the one provided by legislation, or national law; rather, it denied national authorities to decide in accordance with rules.

Bidar provides us with an equally problematic decision. The legal dispute at issue concerned the implications of the introduction of Union citizenship for mobile students' entitlements to assistance for maintenance. Under the relevant legislation, students did not enjoy such entitlements, and the case law confirmed this.[170] *Bidar*, nonetheless, decided that those lawfully resident in the host Member State come within the Treaty's scope 'for the purposes of obtaining assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs'.[171] The Court offered several reasons in support, the most remarkable of which is probably that the EU legislature had taken 'the view that the grant of such aid is a matter which … now falls within the scope of the Treaty'.[172] In support, a reference was made to Article 24(2) of the Directive, which had not entered into force at that time. More importantly, while that provision indeed mentions maintenance grants for students, it allows the Member States to deny such grants to foreign students who have not had five years of legal and continuous residence.

The judiciary acknowledged that Article 3 of Directive 93/96 did not 'establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefitting from the right to residence', but decided that that same provision did not preclude

[168] Ibid para 72.
[169] Golynker (n 15) 118; Helen Oosterom-Staples, 'Case C-138/02, Brian Francis Collins v. Secretary of State for Work and Pensions' (2005) 42 Common Market Law Review 205.
[170] Article 3 of Directive 93/96; Case 39/86 *Lair*, ECLI:EU:C:1988:322; Case 197/86 *Brown*, ECLI:EU:C:1988:323.
[171] *Bidar* (n 74) para 44.
[172] Ibid para 43.

> a national of a Member State who, by virtue of Article [21 TFEU] and Directive 90/364, is lawfully resident in the territory of another Member State … from relying during that residence on the fundamental principle of equal treatment enshrined in the first paragraph of Article 12 EC.[173]

The reasoning is odd. In accordance with the secondary law on mobile students then in force, Member States were permitted to deny benefits to foreign students, but since those students can derive residence rights directly from other sources of EU law, they enjoy equal treatment nonetheless.

It may be, of course, that a person like Mr Bidar can derive residence rights from alternative sources of EU law, but only if the conditions for residence set out by those sources are fulfilled. Directive 90/364 requires that Member State nationals and their families have sufficient financial resources to avoid becoming a burden on the host Member State's social assistance system. Instead, it decided that the grant of student benefits could be limited 'to students who have demonstrated a certain degree of integration into the society of that State',[174] which may be 'established by a finding that the student in question has resided in the host Member State for a certain length of time'.[175]

The relationship with the enacted legislation is dubious, most of all because by interpreting legislation in the light of the Treaties, the Court secured results that cannot be squared with the legislative rules. What stands out, moreover, is the opaqueness of the criteria by which the legislative rules are being replaced. The first set of Union citizenship cases established that expulsion cannot be the automatic consequence of having recourse to social assistance, but that statement was not further clarified; *Collins* required that the responsible authorities take into account 'genuine links' with the employment market and precluded them from denying benefits to those who are 'genuinely seeking work'; and, according to *Bidar*, 'a certain degree of integration' could be proven by being within the Member State for a 'certain length of time'. Such vague requirements serve no one. Had the Court in mind that respect for the national regulatory decisions is desirable, and that the use of such vague requirements contributes thereto, it had better deferred to the law in force and accepted the zone of discretion offered to the Member States under that legislation. Union citizens are unlikely to be aided by these decisions either, because the likely result is that the principles established by ECJ case law are interpreted differently by the Member States and variations in application may also occur within them, depending on how the national authorities apply the decisions to individual cases. Inequality,

[173] Ibid para 46.
[174] Ibid para 57.
[175] Ibid para 59.

arbitrariness, and uncertainty are the possible side-effects of the judiciary's attempt to help the Union citizen.

Conclusion

I began this chapter by observing that decisions taken by EU institutions can be evaluated from a substantive and processual point of view and that, in case of a collision between both, privilege should be given to process over substance. The current legislative framework establishes justice between Union citizens and the Member States, but its legitimacy does not derive therefrom, but from it being grounded in the authority of the EU legislature. Because we will not converge to the same understanding of what it means for decisions to be just and in the interest of the common good, those accounts who advocate for a judicial departure of legislation on such grounds are hard to sustain. Our disagreements on the requirements of justice also produce different visions on the best meaning and scope of the Treaties. And because EU legislation embodies a certain understanding of what is the best concretisation of open-ended Treaty provisions, secondary law should not be interpreted in light of the Treaties.

That several scholars advocate for such an interpretative method of secondary legislation is probably not that surprising seeing its pervasiveness in much of the case law discussed above. Certainly not all decisions transgressed the boundaries of secondary legislation and there is no consistent perception of what is the appropriate balance between the judiciary and the legislature. The case law complementing secondary legislation with principles derived from or implementing it in light of the Treaties raises difficult questions of legitimacy. Not just that, these decisions failed to guarantee the degree of stability and clarity offered by legislation. By deducing general legal principles from idiosyncratic factual circumstances, changing legal course when feeling like it, and decision-making on the basis of vague criteria, inadequate guidance was offered to those authorities responsible for deciding on the bearing of EU law on concrete situations. In the end, the main victim of these developments may very well be the Union citizen, whose legal position is uncertain and at the mercy of national authorities unbound by legal rules.

Chapter 3
Residence and Time –
The Benefits of Rule-Based Decision-Making

Introduction

The previous chapter explored the presence of substantive disagreements on the good at the transnational level and inquired into the question of legitimate day-to-day decision-making within the EU against the background fact of reasonable disagreement on justice. I explained that our preferred understanding of the Treaties depends on our personally held beliefs on the requirements of justice within the EU and that disagreement on the latter precludes consensus on the best meaning and scope of the Treaties. Not just that, legislation embodies an ideal conception of the Treaties and legislative decision-making involves the thinking and rethinking about the best Treaty interpretation and the enacted legislation. Prohibiting the legislature to enact a different understanding of the Treaties than that preferred by the judiciary is to undermine its authority. This is what happens if the constraints imposed by legislation are sidestepped, or, more subtly, acknowledged but interpreted in accordance with the limits set by the Court's best understanding of the Treaties. Such a form of interpretation sits uncomfortably with principles of political legitimacy, but, as we could see, also undermines the stability offered previously by EU legislation.

The key to understanding why these decisions undermine the primacy of legislation and create instability is legislative rules. At first sight, the connection between rule-following and the authority of legislation may seem evident: the Court fails to recognise the authority of legislation if it refuses to accept the constraints of rules. That is, if a rule permits Member States to deny maintenance assistance to mobile students who are not permanent residents, the Court ignores the directions of legislation if it requires national authorities to confer such benefits also to students without permanent residence. The reality is more difficult, however, because what if rule-application brings about a result that cannot be squared with the substantive goal behind the rule? Should not in that case the substantive purpose the legislature had in mind be followed rather than the rule? Is that not what it means to decide in accordance with the goals the legislature intended to reach?

What, to use a concrete example, was the correct outcome in the case brought by Ms Förster against the application of that specific rule to her case?[1] She had applied for a student maintenance grant in the Netherlands, which was denied to her because she had not satisfied the five-year residency requirement. However, she had integrated very well within the Netherlands and since the rule purportedly intended to exclude from benefits those without a sufficient degree of integration, the decision of the Dutch authorities to apply the rule to Ms Förster seemingly created a result that was difficult to square with the substantive reason for having the rule. In addition, it appears contrary to our sense of fairness to deny the benefit to a person as well-integrated as Ms Förster. Nonetheless, the Court upheld the rule, for which, as the final section to this chapter shows, it has received heavy criticism. Most EU lawyers believe that the substantive ambition behind the rule, rather than the rule itself, should have been applied and that, by denying benefits to Ms Förster, the Court denied legislation its authority.

I believe that *Förster* was decided correctly, but the reasons for that cannot be understood if not we first understand what rules purport to do. The question of what it means to interpret legislation in accordance with the intentions of the legislature and why that requires an interpretation in accordance with the written rules will not even be fully answered until the next chapter. First, we must see that the reasons for having rules are largely independent of the substantive goals behind them and that by using rules, the legislature intends to accomplish more than some wider substantive ambition. I will claim that decision-making in accordance with legislative intent may involve producing and accepting outcomes that are incompatible with the substantive ambitions of the legislature. This is not as contradictory an idea as it may seem now, but an understanding of rule-based decision-making and its benefits is needed to explain this in full.

Once the function performed by rules is clear, it also is easier to understand the aversion against rule-based decision-making that exists among EU lawyers, at least among those who have contributed to EU citizenship discourse. Rule-following is easily characterised as formalistic, even archaic perhaps, which is because rule-application occasionally produces results that seem unfair to the individual affected by them.[2] Rule-application is often considered arbitrary and unfair when producing results that are difficult to square with the substantive aims behind legislation. When confronted with unfair outcomes in the individual case, the constraints of rules are most likely to be

[1] Case C-158/07 *Förster*, ECLI:EU:C:2008:630.
[2] Frederick Schauer, 'Formalism' (1988) 97 The Yale Law Journal 509.

ignored and, I will claim, legislation is most likely to lose its authority. Many believe it to be justified in such circumstances to disapply rules and I think this position is mistaken.

The key to understanding the attractiveness of legislation thus lies in realising the function performed by legislative rules, and to explain why a certain primacy is to be given to the authority of legislation, the challenge is to explain why legislative rules are to be followed also when occasionally producing outcomes that are unfair. The answer to that question is more elaborate than a simple 'that is what the legislature intended', and what concerns me in this chapter is the question of why the EU legislature would want to make impossible the full realisation of its substantive ambitions by enacting rules. What, in other words, are the reasons and benefits of having such rules in the first place?

Based on Schauer's account of rules, I shall argue that the ambition of rules is to produce better results in the aggregate, even if that occasionally means a worse result for the individual, which rule-makers want to realise by more clearly allocating decision-making power between different authorities.[3] Accepting and implementing the rules as written is not the same as sheepishly and thoughtlessly obeying with whatever has been decided. Rather, what it amounts to is acknowledging one's own fallibility and bounded capacity and to act accordingly. In addition, it demonstrates an awareness of the fact that within a Union in which authority is divided over various institutions, at the European and national level, there are certain tasks one should not perform.[4] As we will see, Schauer was correct when he explained that rule-following 'is not necessarily abdicating responsibility. One form of taking responsibility consists in taking the responsibility for leaving certain responsibilities to others'.[5]

It is important to stress at the outset that a discussion about rules is context-dependent and if it is desirable to impose precise constraints on lower decision-makers is a question that partly depends on the matter we are trying to regulate. Having said that, seeing how hastily the idea of rule-following is sometimes dismissed by judges and scholars when it comes to matters of EU citizenship law, and how easily the benefits of having rules are being overlooked, it would surprise me if it not the aversion against rule-based decision-making extends considerably beyond the EU citizenship domain. Therefore, the first part of this chapter discusses (the benefits of) rule-based decision-making in more

[3] Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 2002).
[4] Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2008) 255–258; Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 Boston College Law Review 433.
[5] Schauer, *Playing by the Rules* (n 3) 162.

abstract terms, while the second part grounds the abstract in concrete examples from EU citizenship law. More concretely, the analysis conducted in this second part centres on the use of periods of residence (and occasionally periods of employment) used by the Citizenship Directive to define the legal position of Union citizens. Based on these criteria of 'residence' and 'time', the Directive determines whether a Union citizen is entitled to social assistance and enjoys higher protection against expulsion. Their attractiveness has been put in question and many find such rules too general in scope and insufficiently tailored to the individual. I shall demonstrate how this objection against generality has collapsed into an objection against rules and rule-following and has undermined, thereby, the Directive's allocation of decisional authority, with great repercussions for the position of the individual citizen.

Section 1 explores the difficult relationship between rule-based decision-making and fairness. I will explain that rules are generalisations based on some assessment of probability and that rules are by necessity under- and/or over-inclusive. Rule-following, therefore, will produce results that are not always fair to the individuals affected by them. The *Collins* case is revisited to demonstrate how objections against the generalising force of rules risk collapsing into arguments against rule-following. Section 2 explains the reasons that exist for believing that following rules is desirable also in the face of undesirable results in the individual case. When contrasted with a system of rule-free governance, rules' benefits become apparent. They delineate power between different sources of authority and aspire to produce good outcomes in the aggregate. Section 3 moves from the abstract to the concrete, providing an overview of the case law on Article 28 of the Citizenship Directive. Article 28 offers protection against expulsion and offers a greater degree of protection to those Union citizens who have resided within the host Member State for longer periods of time. The case law has produced legal effects incompatible with the written rules, which the Court accomplished by subjecting these general rules to individual assessments of the circumstances of the persons facing expulsion decisions. This case law is based on a mode of thinking that compares with the decisions in the field of social assistance. Section 4 explores that connection and explains that the Article 28 case law as well as some of the Court's decisions conditioning access to social assistance object not so much against the general standards offered by the criteria of residence and time, but against rule-based decision-making as such. Section 5, finally, emphasizes the problems associated with such an aversion against rule-following, explaining that the results of decision-making may become better in the aggregate if rules are followed and the constraints imposed upon lower decision-makers accepted. It will offer a defence of those provisions that condition EU citizens' legal position based on the criteria of 'residence' and 'time'.

One important caveat is in order. The focus of this chapter is on highly precise and general rules and, for the moment, vaguer rules are as far as possible ignored. Vagueness and the complexities this raises for legislative interpretation is the topic to which the following chapter turns. Also issues like legal gaps will be left out of the consideration here and will be addressed in more detail in subsequent chapters. The reason to focus on rules using the fairly precise and general criteria of residence and time is to highlight the workings of rules and the benefits of such generalisations. Considering the issue of vagueness simultaneously would unnecessarily complicate the analysis and risks obscuring the requirements and implications of rule-based decision-making, increasing the chances that the connection between rules and the authority of legislation is overseen.

1. Generality, precision, and rule-based decision-making: *Collins* revisited

To understand what explains that a certain aversion against rule-following exists among EU lawyers, the complicated relationship between rules and fairness must be understood. To follow rules means to accept the constraints imposed by rules and to decide in accordance with them also when that produces results in individual cases that seem unfair. It is at this point, when a conflict arises between rule-following and our sense of fairness, that the normative pressure provided by rules faces pushback and may collapse under the weight of our attempts to seek the best outcomes in the individual case.

The explanation for the fact that rule-following occasionally generates a sense of unfairness is because rules generalise and prescribe for all those belonging to a certain class or category what is prohibited, required, or allowed[6] – all individuals with an annual income of over X fall in the higher tax bracket Y. Behind every rule is a substantive justification – requiring rich people to pay higher taxes creates a fairer redistribution of wealth. Rules, however, will not always contribute to the realisation of that justification, which is because generalisations normally rest upon some assessment of probability – those with an annual income over X are normally rich and by making them fall within the higher tax bracket Y, a fairer redistribution of wealth is generated. This rule will thus to some extent over- and under-include. It over-includes to the extent that also those with high annual incomes (over X), but otherwise dire financial conditions, are considered rich; it under-includes because individuals with much greater financial wealth but a lower annual income are not required to pay an equal percentage in taxation. This rule thus creates results that should not have been produced had

[6] ibid chapter 2.

the substantive justification behind the rule been applied directly; it covers individuals that should not have fallen within the higher tax bracket, and vice versa, if we consider that same substantive goal.[7]

Generalisation is an inevitable consequence of having and enforcing a system of written rules and, as Schauer explains, is not simply a product of the specificity of the rule.[8] One may design a more sophisticated tax code, which allows for deductions based on one's financial situation in prior years, or the number of dependent family members, but no matter the specificity of our tax codes, we will not eliminate the fact that certain individuals are affected by rules to an extent that goes against the justification behind it.[9] Also more specifically crafted rules will produce outcomes, when followed, which are incompatible with the substantive reason for the rule's existence. This is not to say that it is undesirable if further categories and specifications are added to our tax code, but generalisation and over- and under-inclusiveness remain a necessary element of our societies for as long as we govern by rules. To follow rules, therefore, is to admit of outcomes that are not the best in the individual case.

The alternative is to remove these generalisations and to have a system of rule-free governance. This needs not be a system without rules, but can also be one in which rules leave unconstrained their addressees. Rules constrain if two cumulative conditions are fulfilled: the rule must be reasonably determinate *and* applicable also when the outcome of applying the rule violates the purpose behind having the written rule.[10] If not determinate to some extent, decision-makers enjoy the discretion to choose for themselves which criteria are relevant and what is the best outcome, having to decide, for example, whether certain behaviour is 'reasonable' or 'genuine'. Secondly, rules do not constrain when decision-makers are expected to dismiss and refuse to enforce the rule if rule-following produces a result that is incompatible with the substantive reasons behind the rule, that is, when producing an outcome that is unfair in the individual case.

To remove tax codes' over- and under-inclusiveness and ensure that these are applied in accordance with their background justification, one could, as Endicott explained, design a vague rule that offers tax authorities great discretion. The tax code could be rewritten as follows: "'the taxpayer must pay a proportion of income that is reasonable in the light of the revenue needs of the government and the taxpayer's circumstances"?'[11] Such a vague law offers tax authorities the discretion to decide

[7] ibid. Also: Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 205–207.
[8] Schauer, *Playing by the Rules* (n 3) 50.
[9] See also, Timothy Endicott, 'The Value of Vagueness' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) 23.
[10] Schauer, *Playing by the Rules* (n 3) 172–173.
[11] Endicott (n 9) 23–24.

for themselves which factors matter in the individual case and what is the result that is compatible with the justifications behind the rule. Secondly, one could also decide to have a system in which the tax rules are applied for as long as the outcome is compatible with their background purpose, but deviate from those in circumstances when the rule does not serve the justification. Hence, a rule providing that someone with an annual income of over X falls within tax bracket Y is applicable, unless that would be unfair to the person seeing his further circumstances (the size of his family or the low income in previous years). In that case, the tax authorities are not to apply the rule and tax the person in accordance with what is best seeing the purpose for which the rule was created. Once, we start applying rules in this fashion our allegiance to rules disappears fully, because what we apply is not the rule but its background justification. Rules, rather, become rules of thumb, applicable only whenever the law's wider substantive purpose is served by it.[12]

It is important to note the difference between the precision/vagueness and the generality/specificity of rules. A legal norm is precise (vagueness is its opposite) when there is clarity about the cases to which it applies.[13] The generality of a rule (the opposite is specificity) concerns the size of the class of cases it applies to.[14] An extremely general rule will apply to a greater class of cases. For example, a rule applying to all citizens is more general than a rule applying to all citizens over the age of 65. Both rules are precise, however, which would be different were the rule apply to all 'old' citizens. Such a rule is still more specific than a rule that applies to all citizens – there are citizens who are clearly not old and to whom the rule does not apply – but it is far less precise, because there are borderline cases in which case it is unclear if the citizen is considered old or not. It is important not to confuse these terms and to associate generality with vagueness.[15] Acts of legislation are normally written at a high level of generality, because they intend to regulate a great number of factual situations based on a limited set of rules, but can still be of great precision.

Despite the fact that there is no necessary correlation between generality and vagueness, both are easily confused. The consequence is that an objection against a rule's generality can collapse into an objection against rule-following. One may find a rule too over- or under-inclusive and find that it

[12] How those who deny that rules should be treated as rules of thumb are easily characterised as formalists is explained by Schauer, 'Formalism' (n 2).
[13] Endicott (n 9); Scott Soames, 'What Vagueness and Inconsistency Tell Us About Interpretation' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011).
[14] Ralf Poscher, 'Ambiguity And Vagueness In Legal Interpretation' in Peter Meijes Tiersma and Lawrence Solan (eds), *The Oxford handbook of language and law* (Oxford University Press 2012) 130; Jeremy Waldron, 'Vagueness in Law and Language: Some Philosophical Issues' (1994) 82 California Law Review 509, 522.
[15] Poscher (n 14); Waldron (n 14) 522.

should be made more specific to make it applicable to a smaller class of objects, but also such a more specific rule may produce outcomes in the individual case that are incompatible with the substantive reasons for having the rule. Therefore, if the goal is to prevent over- or under-inclusion, the constraints imposed by rules are to be removed altogether. I explained that this is accomplished either by drafting a vague rule that offers the responsible authorities the discretion to realise the justification behind the rule, or by treating written rules as rules of thumb, applicable only when compatible with this background justification. An argument that a rule is drafted at too high a level of generality (not sufficiently specific) thus easily becomes an argument for more vagueness and against rule-following.

To see how this can happen, it is useful to revisit parts of a case I discussed in some detail in the previous chapter – *Collins*. The ECJ decided that Member States were not obliged to provide jobseeker benefits to all nationals from other Member States who had arrived with the purpose of finding employment. It was legitimate for national legislation to try to ensure that a genuine link exists between an applicant for an allowance and the geographic employment market in question.[16] Such a link would be established if found that the applicant has 'for a reasonable period, in fact genuinely sought work in the Member State'.[17] UK legislation, however, did not examine so much the genuineness of the efforts to find employment, but used a habitual residence requirement to condition entitlement to such a benefit. While deciding that residence requirements are 'in principle appropriate *for the purpose of* ensuring such a connection',[18] the ECJ added that

> if it is to be proportionate … its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, … the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.[19]

In the previous chapter, I mentioned two problems with this argument. To begin with, if we are seeking for clear criteria, known in advance, a residence requirement seems highly useful – from the perspective of clarity, the criterion of 'genuine work seeking' pales in comparison. Furthermore, a determination of whether someone is genuinely seeking work requires an examination of the

[16] Case C-138/02 *Collins*, ECLI:EU:C:2004:172, para 67.
[17] Ibid para 70.
[18] Ibid para 72 (italics added).
[19] Ibid.

applicant's behaviour; the duration of residence in the host Member State provides us with no information at all as to whether the applicant for benefits has been searching for employment, let alone whether the efforts have been genuine.

Underlying this problematic paragraph is a worry about the under-inclusiveness of rules, in this instance the residence requirement applied by the UK. Based on its application, the UK authorities would have denied jobseeker allowances also to those without a habitual residence requirement, but who had genuinely tried to find work. Such under-inclusiveness should be avoided, the UK authorities are told. At first sight, therefore, it may seem as if the ECJ expected the UK to tailor its eligibility criteria so that also criteria that indicate work-seeking are taken on board. In other words, it may seem as if the judges were of the opinion that the residence rule was too general. Rather than making access to jobseeker allowances conditional upon a residence requirement, one can design a more specific rule, for example one that requires the applicant to register with the responsible national authorities for a period of 12 months, submit two job-applications a month, and participate in three courses organised by jobcentres. This rule is more specific than a residence requirement, but still precise; the authorities responsible for the application of such a rule are left with little to no room for discretion.

However, what was targeted by the ECJ was not the degree of specificity of the UK rule, but its precision and the idea of rule-following more generally. Remember, the judges demanded that the UK rule would 'not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work'.[20] Also a more specific rule would fall short of this demand. That an individual did not register with the unemployment office or submit two applications a month, does not proof, after all, that he or she did not genuinely seek work. The person may have very actively tried to find a new position, even if not registered or having complied with the requirement of two job-applications a month. Hence, also by following a more specific rule can the responsible institutions fail to confer unemployment benefits to some who were nonetheless genuinely seeking work. We can tailor the rule and make that category less general – 12 months of registration, two job-applications a month, and participation in three courses – but what remains is that all those who have not fulfilled those criteria are not entitled to the benefits, no matter how genuine their efforts to find a job.

What the UK was told was not to draft a more specific, but a less precise rule, which offers the responsible authorities the discretion needed to ensure a fair result in the individual case – which,

[20] Ibid.

according to the Court's standards of fairness, is that all persons who have established a genuine connection with the employment market (the legitimate purpose behind the rule) are to be given a jobseeker allowance when requested. Residence requirements shackle the authorities responsible for their enforcement, because they are expected to discriminate between individuals based on whether they have satisfied the conditions for residence and ought not to consider other factors that may seem relevant.[21] And this is exactly what *Collins* did not allow for, telling the UK authorities to consider all matters necessary to decide whether the applicant has a genuine link with the employment market. National authorities enjoyed insufficient discretion under a habitual residence rule to make a proper assessment as to whether the job-seeking efforts had been genuine.[22]

At this point, it becomes evident that *Collins* targets the idea of rule-based decision-making. Earlier, I explained that for rules to constrain, these must be somewhat determinate and be deemed applicable also when their application produces results that are at odds with the justification for having these rules. *Collins* targets both elements. On the one hand, *Collins* can be read as demanding the UK authorities to adopt an extremely vague rule: 'all those who have genuinely sought for employment in the national employment market are entitled to a jobseeker allowance'. Assuming the similarity between genuine work seeking and establishing a genuine connection with the employment market, such a rule would amount to a direct application of the justification for having the rule in the first place and will thus never produce any normative pressure for deciding a matter in a way that diverges from what was intended by that justification. *Collins* indeed does not want the authorities responsible for the conferral of jobseeker allowances to be rule-governed, because not just does the case amount to having a vague rule that is substantively alike its justification, the Court also told the UK to disapply its written rules 'when exceeding what is necessary' for the national authorities to confirm that the applicant for benefits had genuinely been seeking employment (the purpose as defined by the Court). That is, the written rule should not be followed when that produces normative tensions with the

[21] This also is true for a habitual residence rule, like that employed by the UK, which requires a consideration of the position of the individual when applied (See Case C-138/02 *Collins* ECLI:EU:C:2003:409, Opinion of AG Ruiz-Jarabo Colomer, footnote 32). Still, national authorities draw up a list of elements they take into consideration for determining habitual residence and are not expected to consider all other factors that may seem to matter.

[22] Discretion and precision are negatively correlated. Precise rules narrow the lower authorities' discretion, while vague and underdeterminate norms provide for fewer constraints. Endicott (n 9); Schauer, *Playing by the Rules* (n 3) 172.

justification for having that rule – ensuring a genuine link between the applicant and the employment market.[23]

Collins shows that unease over general rules can easily turn into a rejection of rule-following. A rule formulated at a high level of generality can be tailored and made more specific in order to remove part of its over-/under-inclusiveness, but an unwillingness to tolerate outcomes not specifically tailored to the individual signifies an unwillingness to follow rules. An argument for more specific rules can thus turn into an argument for abandoning the constraints imposed by rules. *Collins*' objection against the over-inclusiveness of the UK residency requirement turned into an argument for not following the rule in those instances in which benefits would be denied to individuals with a genuine connection with the employment market. The Court was seeking for the fairest outcome in each individual case – jobseeker benefits for all genuine jobseekers – while deciding according rules means to accept that not always will the best outcome be realised in each specific situation. To resist under-inclusiveness and unfairness in the individual case is to resist rules.

Despite the connection between the objection against generality and that against rules, it is important to keep both apart. An argument for rules and rule-following tells us little about rules' most desirable shape – whether the rules must be written at a high level of generality or with great specificity. Furthermore, one may find a rule too general and still believe rule-based decision-making to be preferable; that is, one may prefer a more specific rule over the UK residence requirement at issue in *Collins*, but still believe that the rule is to be applied also if that occasionally brings about a result incompatible with the purpose behind the rule. In what follows, I shall focus most on the objection against rule-based decision-making, but will return briefly to the benefits of general rules in the final section. I shall argue that our concerns with rule-based decision-making are largely mistaken and our objections against general rules overblown.

2. Rules, generality, and stability

For *Collins* to be implemented fully, national unemployment offices had to be given discretion, either by allowing them to decide under an extremely vague rule, or by allowing them to deviate from a more precise rule when its application would exceed what was necessary to ensure that a genuine connection exists between the applicant for benefits and the employment market. So far, I said nothing about the problems that come with such an attitude towards rule-following and the benefits of rule-based

[23] I am unsure if the Court would never have accept under any conditions some UK rule, but that acceptance cannot be squared with its reasoning, which is incompatible with the idea of decision-making in accordance with rules.

decision-making. I will not do so in relation to *Collins* specifically, but explain in more abstract terms the reasons that exist for following the legislative rules by which the EU's collective course of action is shaped.

By taking a cursory glance at the EU citizenship Directive alone, we see the centrality of rules: 'if a Union citizen has a valid identity card or passport, then that citizen is allowed to leave the territory of a Member State to travel to another';[24] 'if a Union citizen has been resident in the host Member State legally and for a continuous period of five years, then the citizen is entitled to permanent residence status';[25] and 'if the Union citizen is a permanent resident, then the citizen cannot be expelled from the host Member State, unless he poses a serious risk to public policy or public security'.[26] Such rules can guide the conduct of those subject to them and Union citizens can plan their lives and decide what kind of actions to undertake in the future around such rules. Beyond offering guidance to those living under them, however, these rules are meant to constrain lower decision-makers. The main addressees of the Citizenship Directive are the Member States, which are told what cannot be done – expel the Union citizen – or what actions are required – allow the Union citizen to enter their territory. But equally, these rules are meant to constrain the EU's judiciary and executive, because if not EU institutions feel bound by the written rules laid down in legislation and enforce them against national authorities, rules are likely to lose their force domestically. And when rules lose the force to constrain, they lose the force to guide, those subject to them unsure as to whether their implementation and enforcement by national authorities will be in accordance with what EU legislation laid down.

Rules thus have what Endicott described as 'process value' and 'guidance value'.[27] On the one hand, they guide individuals by offering greater clarity as regards their legal rights and obligations. The process value of rules, in addition, lies in their ability to allocate power between different authorities more precisely,[28] enabling decision-makers to define more easily and with greater accuracy the law's intended implications.[29] Of course, the process and guidance value of the law depends on the precision

[24] According to Article 4 of the Citizenship Directive, 'all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State'.
[25] Article 16(1) of the Citizenship Directive holds that 'Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there'.
[26] The rule in full is formulated in Article 28(2) of the Citizenship Directive as follows: 'The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security'
[27] Endicott (n 9) 19.
[28] Schauer, *Playing by the Rules* (n 3) 158.
[29] Endicott (n 9) 19.

of the legal rules at stake. Vague rules leave discretion to other decisional authorities, producing additional uncertainty about the bearing of a general rule on individual situations,[30] which is not to say that vague rules do not intend to limit the range of possible outcomes and purport to constrain lower authorities.[31]

Nonetheless, we value precision because we think it is desirable that legislation offers clarity to those enforcing the law as well as to those upon whom these rules are enforced.[32] Because of the felt need for precise rules, legislatures normally refrain from using terms like 'rich', 'tall', or 'old', but rather prefer using precise figures to define the class of persons the rule applies to.[33] For example, tax codes do not use vague terms like 'rich' and 'poor', but define with much greater precision the taxable assets of different classes of individuals, delineating based on annual income or the total value of possessions. We want tax codes to be fairly precise because we do not want citizens to be completely dependent on the discretion and best all things considered judgments of tax authorities. Administering the tax code would, of course, also become a sheer impossibility if the law offers inadequate guidance. Another example is a rule that limits the franchise to those who are of a certain age. We want the citizen to be of a certain political competence, but rather than subjecting each citizen to an individual examination that measures, somehow, whether it is sufficiently competent to exercise democratic rights responsibly, we draw up a general and extremely precise rule; an age-based boundary. One could design some test that purports to measure the citizens' political competence, but many feel uncomfortable with that idea, which is not solely because of administrative reasons, but also because we fear abuse and discrimination against certain groups in our society, and because of the ideal of democratic equality.[34]

At the same time, we object against the generality of such rules because they are perceived to be arbitrary and thus unfair. On that account, the previous section explained, rules are arbitrary to the extent they do not serve their background justification or purpose.[35] Hence, if a government purports to exclude those who are insufficiently mature to exercise the franchise responsibly, a voting age is clearly arbitrary to the extent that it excludes the politically competent that have not come to age and includes the over-aged but politically immature citizens. A voting age may be a reliable indication of

[30] Schauer, *Playing by the Rules* (n 3) 222.
[31] To the issue of vagueness in EU law and the interpretation of vague provisions, I will return the following chapter.
[32] There may be instances though in which vagueness is desirable over precision. Endicott (n 9).
[33] Andrei Marmor, *The Language of Law* (First edition, Oxford University Press 2014) 87; Endicott (n 9) 17–18.
[34] I take these examples of taxation and voting from Endicott (n 9).
[35] ibid 22. On the relationship between a rule and its background justification, read: Schauer, *Playing by the Rules* (n 3) chapter 2.

political maturity in some, but certainly not in all cases, and because this is the rule's justification, the boundaries created by that rule come across as arbitrary. Fairness, accordingly, requires that the right decision is taken in each individual citizens' case.

Generalisation was explained to be the unavoidable consequence of rule-based decision-making and results contrary to the substantive justifications behind the enactment of rules to be the inevitable product of rule-following. To apply rules is to apply the entrenched generalisations, unmodifiable when generating a result that had not been reached had the background purposes been applied directly. And because generalisation-following will allow for occasional under- or over-inclusion, to follow rules is to admit of outcomes that are not the best in the individual case. The alternative is a system bereft of substantive legal constraints, in which authorities enjoy the discretion either to decide matters in the way deemed most fair to them and to disapply rules when incompatible with their background justification. Such a system lacks any fidelity to legal rules, instead favouring their disapplication when in the interest of fairness in the individual case.

Most of us will understand that ensuring fairness in this sense when it comes to the exercise of voting rights is impossible as well as undesirable. Beyond that we disagree on what signifies political maturity, which makes conducting an objective examination problematic, great administrative burdens would be created if we would design a test of some sort. Furthermore, we generally feel that all those who are equally affected by political decisions should have an equal say in them, regardless of status and class, while examinations of political competence of some sort are likely to reinforce status-based differences. Furthermore, in their decision on whether someone is eligible to vote, election officials may take into consideration all sorts of elements we feel should not condition political rights – race, gender, education levels, etc.

Like we all see the entirely problematic consequences that come with letting election officials decide on a case-by-case basis whether the individual citizen possesses the political maturity to exercise voting rights responsibly, we will likely understand why we should not want tax officials to only apply the tax code when in accordance with the code's purpose. Such ad-hoc decision-making is unworkable from an administrative perspective – many more tax and election officials are needed for the successful election organisation and tax collection – but most of all, leaving individuals at the discretion of such officials greatly increases the risk of abuse and arbitrariness. Constraining tax official's discretion by rules will not always result in the fairest outcome in the individual case, but we hope that it will produce greater fairness in the aggregate.

Both examples show the value and benefits of rule-based decision-making. Rules are not merely justified to the extent that they serve the greater substantive ambitions of the lawmaker, but there also is an intrinsic justification in the usage of rules. That is, in addition to the 'substantive justifications' for legislation there are, as Schauer said it, 'rule-generating justifications'.[36] For reasons belonging to the latter, obedience to rules can be desirable also when their application to individual cases produces outcomes at odds with their substantive justification. Furthermore, the above examples tell us that rule-following is desirable not only for reasons of predictability and certainty; a precise voting rule exists not solely for the purpose of telling from what age they are entitled to vote. On the one hand, there are administrative reasons and such precise rules can make the administration of complex tasks – running elections or collecting taxes – much more manageable than when the responsible officials would have to apply the substantive justification behind the rule. But of course, rule-generating justifications are far more than administrative. Rules such as those examined allocate authority more precisely between different decision-makers and through rules, rule-makers withdraw power from lower sources of authority. That is, those decision-makers are prohibited from taking into consideration the facts and factors that otherwise would have been relevant for making a correct decision – election officials are to take into account the citizen's age and not all other factors that may seem to indicate (a lack of) political maturity. For that reason, rule-following may be perceived of as erroneous when bringing about results at odds with their purpose, but they guard against human fallibility, against possible errors lower decision-makers may produce if they were authorised to examine and take into consideration the full array of elements necessary to decide in accordance with the law's justification. Rule-makers indeed do not seek for the best and fairest result in the individual case and rule-following prevents the full realisation of the substantive ambitions of rule-makers. Rule-based decision-making, in other words, offers a form of 'second-best' decision-making.[37] By allocating power and withdrawing decisional authority from lower decision-makers, rule-makers prevent decision-makers from reaching better decisions, but also from making things worse.

In chapter 1, I explained that these considerations in favour of rules and rule-following acquire particular force and significance when it comes to decision-making within the EU, where decisional power is not only divided between different EU institutions, but also national authorities are essential

[36] Schauer, *Playing by the Rules* (n 3) 94–95. Likewise, Raz claimed that rules 'are, first, reasons for the acts they prescribe, but they are also, second, reasons not to act for some competing reasons'. Raz (n 7) 216.

[37] Schauer, *Playing by the Rules* (n 3) 152–153. Also relevant in this context: Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006); Neil K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997).

for the application and implementation of Union law. There exist great differences between Member States, not just politically, but also when it comes to administrative and judicial capacity. Expecting national authorities to implement EU legislation in accordance with their background justification and to apply the written rules only when compatible with the substantive reasons for having them will undoubtedly result in different applications of EU law throughout the EU, depending on the different administrative competences and political choices made. By removing decisional jurisdiction from the Member States, EU legal rules bring about a degree of stability that is beneficial for the national authorities and citizens alike. Domestic authorities are offered greater clarity as to the intended result of EU law, which eases their work, and which brings about greater stability for those falling within the domain of EU law, their legal position being less at the mercy of national administrative and judicial officials.

Only when EU legislative rules impose the needed constraints will decisional jurisdiction be removed from national authorities. That is, these rules must be reasonably determinate and believed valid also when conflicting with the purpose laying behind the adopted legislation. Whether, however, a certain discretion must be left to lower authorities cannot be decided in the abstract and is context-dependent. Sometimes it may be desirable if legislation leaves a certain freedom to those responsible for its application, who may be better positioned for deciding what is best. But while deciding on the degree of determinacy of rules is a responsibility of the legislature, whether national authorities are to follow the rules established by secondary legislation or treat them as rules of thumb, applicable only when producing a result that is compatible with the rules' background purposes, is not dependent on the legislative choices made, but on the decisions taken by those responsible for applying and enforcing legislation, the ECJ, but also the Commission and national authorities. The constraints of legislative rules thus greatly depends on the openness of those institutions, and, in this context that of the ECJ, to the idea of rule-following. If the judges believe that they can decide a case before them in a fairer way than an application of the relevant rules would allow for, rules lose their force, decisional authority is returned to national institutions, and EU legislation may stop offering the promised stability.

It should be clear by now also why a decision by the judiciary to not apply the rule may be unrelated to the judges' personal convictions about the broader substantive ambitions of legislation. Likewise, scholars may object against rule-following not so much because they find that the wider purposes are incompatible with standards of justice and morality, but also because they find that rule-following does not produce the substantive goals pursued by the legislature. The authority of

legislation can thus be undermined based on two rather different considerations. On the one hand, decision-makers or those evaluating their decisions may think that the substantive background purposes of legislation are unjust and are ideally not to be realised, akin to what we saw in the previous chapter. On the other hand, lawyers may agree with those substantive aims and precisely for that reason dismiss the idea of rule-following to the extent that that brings about results that cannot be squared with those wider ambitions. To take an example from the previous chapter, to which I will return below, certain EU lawyers find the substantive purpose behind the Citizenship Directive, that EU citizens are not to become an unreasonable burden on the social assistance system of the host Member State, intrinsically unjust and offer that as legitimation for those judicial decisions going against that purpose. Others may think that that ambition is fair, but that the Directive must be applied, and rules followed, only insofar as necessary for its realisation. Often, it is unclear if criticism of certain decisions is informed by a rejection of the broader substantive aims, or the rule-acceptance of the decision-maker. Often, that is, the justness of the substantive aims and the fairness of rule-following are targeted indiscriminately. This is understandable insofar as the application of the rule may contribute to those substantive purposes that scholars find unjust, but, if only for analytical reasons, a distinction must be drawn between the two rather different grounds that lead to the rejection of the authority of legislation.

We also ought to keep separate the question of whether the EU is to govern through rules from another question, which concerns the degree of generality/specificity these rules should possess. So far, I only offered several reasons that explain the value of rule-based decision-making and said nothing about whether we should want EU legal rules to be formulated at a great level of generality, or with greater specificity. The fact that rule-based decision-making is valuable provides us with little information about whether a certain degree of specificity is desirable, and very little can be said about the latter a-contextually. Rather, whether EU law is to be tailored to the individual and should provide lower authorities with a range of specificities which they are to consider depends on various circumstances, ranging from the likely consequences for individuals in the aggregate, to the presence of viable alternatives, and the administrative burdens created thereby.[38] Most of us feel that it is justifiable for tax codes to be of a degree of specificity and to be tailored to enhance the fairness of outcomes in the individual case, but might not want tax rules to be of extreme complexity, because of the resulting uncertainty and complications for enforcement. When it comes to voting requirements,

[38] Sophia Moreau, 'Equality Rights and Stereotypes' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 291.

on the other hand, we may not want voting to be conditioned by anything but an age limitation,[39] because we cannot conceive of an alternative that reliably measures political maturity and can be applied in an objective manner. Depending on the circumstances, it may thus be desirable to draw bright lines and govern through rules of great generality and precision, but regardless of our choice in that regard, consideration of the benefits of rule-following are independent from that of the generality of our rules.

3. The expulsion of Union citizens

The previous chapter discussed the case law conditioning the social assistance eligibility of EU citizens. Several of these decision required legislation to be proportionate in light of the Treaties and made it compulsory for the individual circumstances of the claimant – their real or genuine link – to be considered by the authorities deciding on the claim. In that process, precise legislative rules were set aside in favour of requirements with great ambiguity, demanding national authorities to take on board the Union citizen's degree of integration and the genuineness of her attempts to find employment. *Collins* told us that this ambition to come to the fairest outcome in each case comes with a certain dislike for rule-following. Following the previous section's explanation of the benefits of rule-based decision-making, we can begin to understand what explains the inadequacy of these decisions.

Before doing so, however, it is useful first to discuss another area of EU citizenship law. Because while the most recent social assistance case law, from *Dano* to *García-Nieto*, discussed in the previous chapter as well, no longer contains a proportionality examination, nor an assessment of individual circumstances, we would be mistaken in thinking that the ECJ's attitudinal shift is general in scope. At around the same time, the Court began interpreting Article 28 of the Citizenship Directive, which sets out the conditions under which expulsion measures can be taken by the host Member State against Union citizens. These cases – four in total – demonstrate that some of the difficulties we encountered in the previous chapter are rather persistent. The judiciary has a certain preference for individuation over generality and is willing to produce legal effects incompatible with the written rules when it sees fit. The decisions are complex and the reasoning confused, which is the reason for the detailed discussion that follows. After having disentangled the legislative framework in section 2.1, section 2.2 shows how the legislative framework was replaced by assessments of individual qualitative elements only.

[39] Many countries, of course, also exclude from the franchise those convicted for serious crimes and those with mental disabilities.

3.1 Expulsion in three steps

Chapter VI of the Citizenship Directive provides that Member States can restrict Union citizens' entry and residence rights on the grounds of public policy, public security, and public health. Article 28, the provision subject to our inquiry, sets out the conditions under which Member States can legitimately expel EU citizens from their territory for reasons of public policy and public security. This provision obliges the national authorities to undertake a three-step assessment of the position of the person facing an expulsion decision before a decision to expel the individual may be taken.

Article 28 of the Directive distinguishes between three classes of EU citizens and each group is given a specific level of protection against expulsion. The first step of the inquiry involves making a determination of the level of protection enjoyed by the Union citizen, by defining in which class he or she falls. The legislature realised that expulsion measures can be harmful for the individual citizen facing expulsion and his or her family, and also that the consequences are likely greater for those with a greater degree of integration in the host society. Therefore, it purported to offer those EU citizens that have stronger connections with the Member State and are more integrated there a greater degree of protection.[40] With that purpose in mind, a rule was drafted that made the level of protection contingent upon the criteria of 'residence' and 'time', the period of legal residence within the host Member State. Article 28(1) of the Directive states that Union citizens can be expelled on grounds of public policy and security.[41] Article 28(2), however, creates the first exception to that rule, which applies to those who have enjoyed legal and continuous residence in the host Member State for a period of five years. Such EU citizens enjoy permanent residence status and permanent residents cannot be expelled 'except on serious grounds of public policy or public security'.[42] Finally, under Article 28(3) no expulsion measures can be taken against those who have resided in the Member States for the previous 10 years or against minors, 'except if the decision is based on imperative grounds of

[40] Recitals 23 and 24 of Directive 2004/38/EC.

[41] Article 28(1) of Directive 2004/38/EC. In full, this provision reads as follows: '[b]efore taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin'.

[42] Article 28(2) of Directive 2004/38/EC. In full, this provision reads as follows: 'The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security'.

public security'.[43] Following a specific period of residence in the host Member State, in this instance five or ten years, one has presumptively developed such strong ties with the host Member State that a higher level of protection against expulsion becomes necessary.[44] Likewise, a period of absence of two continuous years is reason for the loss of permanent residence status according to the Directive.[45] Note that integration is not measured in the beginning in accordance with some framework that takes into consideration the individual's personal conduct and efforts to integrate.

Once a determination has been made of which of the three of Article 28's headings is applicable to the situation, national authorities must investigate if the grounds that allow for expulsion are fulfilled. That is, the question arises if the decision is justified on grounds of public policy or security and whether the threat the individual poses to one of these two interests is sufficiently serious. Article 28 establishes that those with residence rights of a period of below five years can be expelled on grounds of public policy and security, while those with permanent residence cannot be expelled 'except on *serious grounds* of public policy or public security'.[46] No expulsion measures may be taken to those who have been resident for more than ten years, according to Article 28(3)(a) of the Directive, 'except if the decision is based on *imperative grounds* of public security'.[47] The additional protection offered to the latter group is not merely one of scale – serious versus imperative grounds – but also follows from the nature of the threat they should pose: they cannot be expelled on grounds of public policy under any circumstances.[48] Only rare circumstances allow for the expulsion of those falling within this third category.[49]

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[43] Article 28(3) of Directive 2004/38/EC. In full, this provision reads as follows: 'An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) Have resided in the host Member State for the previous ten years; or
(b) Are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989

[44] Recital 24 of Directive 2004/38/EC. See, for this conclusion, also: Case C-145/09 *Tsakouridis*, Opinion of AG Bot, ECLI:EU:C:2010:322, paras 42-43; Dora Kostakopoulou, 'When EU Citizens Become Foreigners' (2014) 20 European Law Journal 447, 458; Emanuela Pistoia, 'The Unbearable Lightness of a Piecemeal Approach. Moving Public Policy of Public Security Offenders in Europe' (2014) 20 European Public Law 745, 753. That there is a presumption of integration underlying these provisions has been observed also by: Dimitry Kochenov and Benedikt Pirker, 'Deporting the Citizens Within the European Union: A Counter-Intuitive Trend in Case C-348/09, P.I. v Oberbürgermeisterin Der Stadt Remscheid' (2013) 2 Colum. J. Eur. L. 369, 385; Pistoia 759.

[45] Article 16(4) of Directive 2004/38/EC.

[46] Article 28(2) of Directive 2004/38/EC.

[47] Article 28(3) of Directive 2004/38/EC.

[48] Theodora Kostakopoulou and Nuno Ferreira, 'Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship' University of Warwick Legal Studies Research Paper 2013/18 13–14.

[49] The latter is recognised also by Recital 24 of Directive 2004/38/EC.

Thirdly, if it turns out that there are indeed sufficiently serious grounds of public policy or security that in principle permit Member States to take an expulsion decision, Article 27(2) of the Directive requires the measure to comply with the proportionality principles. The severity of the threat must outweigh the individual's personal circumstances, which requires in accordance with Article 28(1) that the responsible decision-maker 'shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin'.

3.2 Individual qualitative elements

Those responsible for taking decisions under Article 28 are in the first place required to take into account the duration of the residence period of the individual facing the decision. Beyond the two criteria of residence and time, no further assessment is required by the Directive during the first stage of the examination and for measuring the presumptive degree of integration. The judges, however, decided differently. As a result, the two criteria of residence and time have greatly diminished in relevance and an assessment of a variety of individual qualitative elements largely conditions the protection available to Union citizens.[50]

The first step to the individualisation of Article 28 was undertaken in *Tsakouridis*. Mr Tsakouradis had resided within Germany for over 20 years before he left for Rhodes, Greece, to run a pancake stall from March to October 2004. A year later, in October 2005, Mr. Tsakouridis returned to Rhodes and resumed running the pancake stall and lived there until he was arrested in November 2006 and extradited to Germany in March 2007. This case placed the judges in a difficult situation. The question that arose was whether the ten-year period of Article 28(3) is interrupted by residence abroad, which the Directive leaves unanswered. That Article 28(3) speaks of residence during 'the previous ten years' indicates that protection under that provision is not permanent, but under which circumstances it is lost is unclear.[51] Article 16(4) of the Directive establishes that permanent residence status is lost following an absence of two years, but the legislature forgot to define the conditions for

[50] In addition, the case law has also conflated the concepts public policy and public security. The result is the complete collapse of the there-stage analysis. I will return to this distinction between the concepts public policy and security in the subsequent chapter. It is unrelated to this chapter's focus, on rule-based decision-making and the generality of rules.

[51] Case C-145/09 *Tsakouridis* ECLI:EU:C:2010:708, para 31; Opinion of AG Bot (n 44) para 101.

loss of protection under Article 28(3).[52] The national court asked whether Article 16(4) of the Directive is to be applied by analogy to Article 28(3).[53]

The ECJ did not directly answer the question of whether Article 16(4) was to be applied by analogy, but from its decision it follows that it was not.[54] Its decision was that national authorities

> are required to take all the relevant factors into consideration in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State. It must be ascertained whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned.[55]

Rather than applying Article 16(4) – the clear criteria of periods of residence within or away from a Member State – the Court required an assessment of individual considerations to consider the strength of the EU citizen's ties. The fact that the Directive was silent as to the conditions under which protection under Article 28(3) could be lost complicated matters for the Court, but with hindsight, it is possible to conclude that *Tsakouridis* has been the decisive first step towards the incapacitation of Article 28.

The second factor contributing to this development was the Opinion of Advocate General Bot in *P.I.* This case concerned the position of Mr I., an Italian national, who, following a period of residence of over ten years in Germany, was convicted to a period of imprisonment of seven-and-a-half years for the repeated sexual abuse, sexual coercion, and rape of a minor for a period of 11 years.[56] The German authorities decided to terminate his entry and residence rights, a decision challenged by Mr I. In his Opinion, AG Bot reflected upon whether Article 28(3) was applicable to the case and whether Mr I. enjoyed the protection under that provision because he had been legally and continuously resident for more than ten years. The AG rejected this idea, deciding that the provision is based upon 'a simple presumption of integration, which is rebutted here by the facts themselves'.[57]

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[52] Which the Court acknowledged (ibid para 29). See also, Opinion of AG Bot (n 44) para 101.
[53] *Tsakouridis* (n 51) paras 19-21.
[54] Presumably, the judges were convinced by AG Bot's reasoning, who thought Article 16(4) could not apply. Instead 'it is the retention of a strong link with the host Member State which will be decisive' (para 109). Evidently, this cannot explain why Article 16(4) was inapplicable, because that provision serves as a measure of integration and it presumes that following an absence of two years, the strong link is no longer retained.
[55] *Tsakouradis* (n 51) para 33.
[56] Case C-348/09 *P.I.* ECLI:EU:C:2012:300.
[57] Case C-348/09 *P.I.* ECLI:EU:C:2012:123, Opinion of AG Bot, para 56.

The degree of integration is 'based on territorial and time factors [but also] on *qualitative* elements'.[58] Because of the crimes committed since his third year of residence, Mr I. showed that he was insufficiently integrated within the German society, which meant that he could not enjoy the enhanced protection offered by either the second or the third paragraph of Article 28.[59]

The ECJ did not follow the directions suggested by the AG in *P.I.*, but its decision in *Onuekwere* shows the influence of the Opinion. The Court was asked whether periods spent in prison should be taken into account for the acquisition of the right to permanent residence. In other words, do periods of imprisonment count towards the fulfilment of the five-year continuous residence requirement?[60] There is uncertainty as to whether the term legal and continuous residence also applies to and covers periods of imprisonment,[61] but rather than considering whether EU citizens enjoy legal residence during the periods spent behind bars, the Court concluded that the EU legislature 'made the acquisition of the right of permanent residence … subject to the integration of the citizen of the Union'.[62] This is plain wrong, for permanent resident status depends only upon whether the EU citizen has had a continuous period of five years of legal residence in the host Member State.[63] A clear difference exists between using periods of residence as a proxy to indicate integration and using integration as a condition for permanent residence status. The implications of this confusion are far-reaching, for the Court hold that

> [s]uch integration, which is a precondition of the acquisition of the right of permanent residence … is based not only on *territorial* and *temporal* factors but also on *qualitative* elements … to such an extent that the undermining of the link of integration between the person concerned and the host Member State justifies the loss of the right of permanent residence even outside the circumstances mentioned in Article 16(4) of Directive 2004/38[64]

The consequence is that it no longer is a two-year continuous period of absence from the host Member State only that terminates permanent residence, but also any other qualitative element that

[58] Ibid para 60.
[59] Ibid paras 59-64.
[60] Case C-378/12 *Onuekwere* ECLI:EU:C:2014:13, para 17.
[61] According to the Commission guidance on the implementation of the Directive, 'Member States are not obliged to take time actually spent behind bars into account when calculating the duration of residence under Article 28'. Communication from the Commission to the European Parliament and the Council (n 35) under 3.4.
[62] *Onuekwere* (n 60) para 24.
[63] Article 16(1) of the Directive.
[64] *Onuekwere* (n 60) para 25 (italics added).

demonstrates a lack of integration. The ECJ added grounds for the termination of permanent residence that are nowhere to be found in Article 16(4) of the Directive.[65]

No case exemplifies more clearly the implications of these decisions than *M.G*, a decision that led to the wholesale revision of Article 28. Ms G, a Portuguese national, who had been resident in the UK for more than ten years, was convicted to a 21-month term of imprisonment for assaulting a person under 16 years. While in prison, the UK authorities made Ms G subject to an expulsion order on grounds of public policy and security. The case raised two important questions: first, whether periods spent in prison discontinue the period of legal and continuous residence to fall within the scope of Article 28(3) and terminate the enhanced protection it offers; second, whether the period of ten years had to be continuous and had to be determined by counting back from the expulsion decision or by counting forward from the commencement of residence.[66]

The second question was answered as requiring that the ten-year period had to be calculated by counting back from the moment the expulsion decision had been adopted and that residence in those years 'must, in principle, be continuous'.[67] In addition, invoking *Onuekwere*, it decided custodial sentences to be an indication of a lack of integration, which could interrupt the continuity of residence.[68] This effectively quashed Article 28(3).[69] That the period of continuous residence is to be counted backwards from the moment the expulsion measures is taken, but that periods of imprisonment interrupt this period, means that the protection offered by Article 28(3)(a) is available only to those who have been ordered to leave the country ten years after they have served their sentence. This simply will not happen. No Member State will decide ten years after the convict was released from prison that the person is to leave the country.

Article 28(3) was effectively rendered meaningless and the right to permanent residence, which grants access to the protection offered by Article 28(2) can be interrupted, the Court decided in *Onuekwere*, if the link of integration has been undermined, of which criminal conduct may be an

[65] See also: Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889, 920.
[66] Case C-400/12 *M.G.*, ECLI:EU:C:2014:9, para 21.
[67] Ibid, paras 24-27.
[68] Ibid, paras 31-33.
[69] The result is indeed 'nonsensical and unclear': Eleanor Spaventa, 'Once a Foreigner Always a Foreigner: Who Does Not Belong Here Anymore? Expulsion Measures', *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (Intersentia 2016). See, for a further critical reviews: Dimitry Kochenov and Uladzislau Belavusau, 'Kirchberg Dispensing the Punishment: Inflicting "Civil Death" on Prisoners in Onuekwere (C-378/12) and M.G. (C-400/12)' (2016) 41 European Law Review; Nic Shuibhne (n 65) 922; Leandro Mancano, 'Criminal Conduct and Lack of Integration Into the Society Under EU Citizenship: This Marriage Is Not to Be Performed' (2015) 6 New Journal of European Criminal Law 53, 72–74.

indication. The consequence is that in many situations, only Article 28(1) remains of relevance. According to this provision, the host Member State shall, before taking an expulsion decision on grounds of public policy or public security, 'take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin'. National authorities must weigh the personal circumstances of an individual facing an expulsion decision before he or she can be expelled on grounds of public policy or security. *M.G.* said essentially the same, holding that also non-continuous periods of residence during the ten years prior to the expulsion decision may result in enhanced protection, but that a conclusion to this effect must depend on an overall assessment 'of that person's situation on each occasion at the precise time when the question of expulsion arises'.[70] All these relevant factors, including the fact that the EU citizen had resided for a ten-year continuous period in the host Member State prior to imprisonment, may be taken into consideration to decide whether enhanced protection is available for the EU citizen.[71] What matters, once it is established that a Union citizen poses a threat to the host Member State's public policy or security, is how the individual circumstances of the person facing a decision are measured and weighed by the different authorities. The duration of the Union citizen's legal residence may be weighed heavily or not, and the seriousness of the threat may be a relevant factor or not. National institutions are unfettered in deciding which of the individual's circumstances matter and are decisive.

It is clear that under Article 28(1), the responsible authorities are to consider the personal circumstances of the individual before an expulsion measure can be taken, but there is a great difference between, on the one hand, a rule that requires these circumstances to be weighed only when all other grounds for expulsion are satisfied and, on the other hand, a legal norm that conditions expulsion decisions based on an assessment of such individual circumstances only. What once appeared like a fairly clear system of protection against expulsion, the ECJ transformed into a hotchpotch of individual assessments that cannot but result in entirely random outcomes, depending on how these qualitative elements are evaluated and weighed by national authorities and courts. Qualitative elements are to be considered not only when a determination is to be made of whether absences from a Member State interrupt the continuity of residence (*Tsakouradis*); they may also interrupt the continuous period of residence when the host Member State was never left (*Onuekwere*).

[70] *M.G.* (n 66) para 35.
[71] Ibid, paras 36-38.

If that did not complicate the situation enough, when continuous periods of residence have been interrupted, all factors of the individual's situation taken together may nonetheless require that enhanced protection is extended to those whose period of residence has been interrupted (*M.G.*).

The difference is not primarily about the protection offered to public policy and security convicts, because theoretically, persons facing expulsion may receive very substantive protection still if the relevant individual qualitative elements are weighed in their favour. Rather, it concerns the constraints imposed on the discretion enjoyed by authorities responsible for deciding on whether to take expulsion measures. The Directive's three-step process places substantive limitations upon national authorities' decisional power, simply because they are forbidden to take certain actions against individuals that have fulfilled longer periods of residence. The case law, instead, removes the Directive's regulatory constraints. And indeed, bearing in mind the kind of treatment former convicts often receive, certainly when of a different nationality, this legal reality is unlikely to bode well for them.

4. Rule-based decision-making and its adversaries

The case law interpreting Article 28 displays a preference for individual qualitative assessments over the general criteria of residence and time, and this made the constraints imposed on those taking expulsion decisions nationally disappear. Rather, the responsible decision-makers are supposed to decide in a way that is fair in light of the individual circumstances of the person facing an expulsion decision. However, Article 28 has lost its force to constrain not solely because of the indeterminate nature of the newly created norms, but also because of the ECJ's more general aversion against rule-based decision-making. The indeterminacy of the current legal framework is largely explained by the transformation of the rules of Article 28 into rules of thumb, applicable only when compatible with the law's background justifications.

Take, for a start, AG Bot's Opinion in *P.I.* He acknowledges that expulsion can do serious harm to those who are genuinely integrated, which is the reason that the Directive purports to offer a greater degree of protection against those who demonstrate a greater degree of integration within the host Member State.[72] With that purpose in mind, the legislature created three different classes of Union citizens, each enjoying a different level of protection against expulsion. The greater the length of residence within the host Member State, the greater the degree of protection. This is a crude rule

[72] Opinion of AG Bot (n 57) paras 53-54.

that can easily result in outcomes that are incompatible with the law's purpose. Some citizens will establish close ties with the host Member State and display a high degree of integration within only a year or two; others will need a much longer period to reach the same level of integration. Nonetheless, the less well integrated citizen who enjoyed legal and continuous residence for a longer duration is offered better protection.

This the AG refused to accept and informs his decision not to apply the rule to the case, but rather, to solve the dispute by directly applying the law's background purpose. He invokes recitals 23 and 24, which are read by him as proclaiming that a higher degree of integration should be available for the better integrated, and recital 17, which maintains that the status of permanent residence is introduced to promote social cohesion.[73] To realise those goals, AG Bot argues that a Union citizen's integration cannot be based on 'territorial and time factors' but must also be 'based on qualitative elements'.[74] Subsequently, the AG reasons that the applicant's conduct demonstrates his unwillingness to integrate into the host society, whose fundamental values he violated.[75] And because the applicant showed no desire to integrate, it would be wrong could he rely 'on the consequences of having completed a period of 10 years which was not interrupted because his conduct remained hidden owing to the physical and moral violence horribly exercised on the victim for years'.[76] 'An offence of that nature, just because it has lasted a long time, *cannot create a right*.'[77]

Of course, it is not the duration of the crime that creates the right but the legislative rule that defines the level of protection against expulsion available upon the duration of the period of legal and continuous residence. AG Bot refused to apply this rule, because the outcome would have been incompatible with the rule's purpose; that is, with the fact that greater protection must be offered to the better integrated. Because a violation of the criminal code demonstrates a lack of integration, the justification for having Article 28 would be undermined if an application of the rules ensures that criminal convicts receive heightened protection. We can debate if such criminal behaviour truly constitutes conclusive evidence of a lack of integration,[78] but that is besides the point here. According to the AG, such behaviour does indicate the Union citizen's unwillingness to integrate, and because rule-following would protect individuals with inadequate integration, the rules were disapplied.

[73] Ibid paras 53-54 & 57.
[74] Ibid para 60.
[75] Ibid.
[76] Ibid.
[77] Ibid para 61 (italics added).
[78] Kochenov and Pirker (n 44) 386; Mancano (n 69) 70.

A similar aversion to rules and their generalising force was on display in *Onuekwere*. Key to *Onuekwere* was the Directive's 17th recital. Departing from the premise that permanent residence purports to enhance social cohesion, the ECJ concluded that the EU legislature 'made the acquisition of the right of permanent residence … subject to the integration of the citizen of the Union in the host Member State'.[79] Notwithstanding that the written law does not say so, it followed that permanent residence could be lost 'even outside the circumstances mentioned in Article 16(4) of Directive 2004/38'.[80] The judges refused to apply the written rules, because of their incompatibility with the ambitions behind them. This infidelity to the Directive's rules, we saw in the discussion of *M.G.*, proved fatal to Article 28.[81]

One can object against the disapplication of the Directive's rules by pointing out the grave implications the decisions hold for public policy and security offenders, whose protection against expulsion was most likely obliterated.[82] This point is pertinent, but we should not be focused on the cases' outcomes only, for that would lead us to miss the origins of the problem – the idea that rules are to be enforced unless incompatible with the justifications for their enactment. Following this logic, Member States should be permitted to deny permanent residence or enhanced protection on other grounds demonstrating a lack of integration as well – a limited language proficiency perhaps?[83] Additionally, the reason that an outcome-dependent perspective alone is inadequate is because it leads us to take wholly contradictory positions when it comes to rule-based decision-making, dismissing rule-following when producing results that please us, but defending it when the alternative is worse. The ECJ is certainly not the only adversary of rule-following; opposition to rule-based decision-making is common among scholars as well when applying the purpose behind the rule produces a more desirable result. A comparison with the case law on social assistance and scholarship on the most recent case law offers a demonstration.

Article 28 of the Directive conditions the level of protection against expulsion based on the criteria of residence and time, but periods of legal residence in the host Member State are relevant not just when it comes to the expulsion of Union citizens. These (or periods of economic activity) are used also to define eligibility to social assistance. We saw in the previous chapter that the most recent

[79] *Onuekwere* (n 60) para 24.
[80] Ibid para 25 (italics added).
[81] In *M.G.* (n 66) paras 31-32, the Court applied the doctrine developed in *Onuekwere*.
[82] Spaventa (n 69); Kostakopoulou and Ferreira (n 48); Kochenov and Belavusau (n 69); Stephen Coutts, 'Union Citizenship as Probationary Citizenship: *Onuekwere'* (2015) 52 Common Market Law Review 531.
[83] Coutts (n 82) 538.

case law held that Member States are under no obligation to confer social assistance to those who have not fulfilled the required periods as set out in the Directive, without needing to examine the claimant's individual circumstances. Germany was entitled to deny the Alimanovic family the requested benefits on the ground that the duration of their economic activities fell short of the twelve-month period required under Article 7(3)(c).[84] Similarly, the García-Nieto family could be denied benefits because they found themselves in the first three months of residence within the host Member State.[85]

Scholars have proposed, along similar lines as the expulsion case law, to constrain the Directive's rules defining eligibility to social assistance benefits when in conflict with the justifications behind those rules. Verschueren maintains that limitations to the right to equal treatment are justified if 'intended to prevent "benefit tourism" and an unreasonable burden on the host State's social assistance system'.[86] Preventing Union citizens from becoming an unreasonable burden is one of the Directive's objectives and the reason for the existence of those rules that allow to withhold certain benefits to mobile Union citizens.[87] Verschueren seems to suggest that applying those legislative rules that derogate from the principle of non-discrimination on grounds of nationality is justified to the extent that their application is in line with the reason for having that rule. In such cases, he argues, 'no further proportionality test or "genuine link" test would be required'.[88] The implication is that if the application of the rule does not contribute to the Directive's substantive aims, the rules are to be made subject to the proportionality principle, which should mediate between the different objectives and interests at stake, as also an assessment of the individual circumstances of the applicant, to see if a genuine link with the host Member State has been established.

This idea, that rules can be dismissed if not plainly contributing to the realisation of the Directive's purposes, is to advocate for a return to the ECJ's early case law. The Court recognised in *Baumbast* that the right to free movement can be limited and made 'subordinated to the legitimate interests of the Member States', which, in that case was that 'beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State'.[89] It continued, however saying that those limitations must be applied in accordance with the

[84] Case C-67/14 *Alimanovic*, ECLI:EU:C:2015:597.
[85] Case C-299/14 *García-Nieto*, ECLI:EU:C:2016:114.
[86] Herwig Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano?' (2015) 52 Common Market Law Review 363, 373.
[87] Recital 10 of Directive 2004/38.
[88] Verschueren (n 86) 373.
[89] Case C-413/99, *Baumbast*, ECLI:EU:C:2002:493, para 90.

proportionality principle, to ensure that the national measures 'must be necessary and *appropriate to attain the objective* pursued'.[90] The treatment Mr Baumbast received was deemed disproportionate, but an opposite conclusion was reached in *Trojani*. The reason that Mr Trojani claimed the benefits was his lack of resources. Mr Trojani did not derive residence rights under EU law for that reason and, contrary to the circumstances of *Baumbast*, 'there [was] no indication that, in a situation such as that at issue in the main proceedings, the failure to recognise that right *would go beyond what is necessary to achieve the objective pursued* by that directive'.[91] Rules are to be applied unless that would undermine the goals pursued by legislation.

Hailbronner has criticised the Court's use of proportionality, suggesting that its application needs no specific justification when there is a restriction of a right, but should not be used to establish non-existent rights.[92] One can indeed question if by the time *Trojani* and *Baumbast* were decided, EU citizenship had created new rights, the full enjoyment of which was denied to the applicants in these cases, but that certainly changed with the introduction of the Citizenship Directive. The Directive provides that all Union citizens are to enjoy the right to equal treatment, but also introduces restrictions to this right, denying certain groups of Union citizens access to the host Member State's social assistance system. If I understand Hailbronner correctly, and he claims indeed that no 'special justification' is needed for courts to examine the proportionality of restrictions, an application of this principle has become legitimate since the Directive has entered into force. Were that the case, decisions like *Dano* and *Alminaovic* should be criticised indeed for failing to consider the proportionality of the German authorities' decisions to deny the requested benefits. I believe that the Court was right, however, which can only be if rules restricting rights should not be subject to a proportionality analysis. The simple reason is that rules conditioned by proportionality, irrespective of whether this assessment takes place in light of Treaty goals or the substantive reasons behind legislation, are not rules at all. Often, courts assess a rule's validity when considering whether it is proportionate; either the rule stands following this evaluation and can be applied, or it is considered disproportionate and must be struck down. The EU citizenship case law, however, is not concerned with the validity of the relevant rules, but with their proportionate application. When a rule is applicable only when proportionate against the background of some substantive aim, decision-makers are permitted – required even – to

[90] Ibid para 91 (italics added).
[91] Case C-456/02 *Trojani*, ECLI:EU:C:2004:488, para 36.
[92] Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1245, 1254.

take into consideration factors and make choices that the direct application of the rule had not permitted, and the rule loses its rule-like elements.[93]

The same happens when those general rules are being conditioned by individual assessments, such as obligations to assess whether a sufficiently genuine link has been established with the host Member State and whether the Union citizen's degree of integration is adequate. In her analysis of *Dano*, *Alimanovic*, and *García-Nieto*, O'Brien proclaimed that

> [t]he finding that individual assessments are not necessary to establish unreasonable burdens relies heavily upon generalizations, asserting that individual claims do not ever place unreasonable burdens on a system, so a reasonable burden test must be based on accumulated claims, not individual circumstances. This is blithely at odds with *Brey*, with Recital 16 of the Directive, and with Commission guidance.[94]

No doubt, she is correct in concluding that generalisations are key. The criteria of residence and time are highly general and leave no room for an assessment of the applicant's individual circumstances, but note how her objection against generality collapses into a rejection of rule-based decision-making. The rule could be written with more specificity in mind, allowing national authorities to take into consideration other criteria than periods of residence or employment, but instead, O'Brien proposes to directly apply the Directive's recitals to the case, and also that Commission guidance and precedent are to prevail over the written rules. The individual assessments are needed to realise the background justifications for having the rule, that is, preclude the application of the rule if an adequate degree of integration exists before the expiry of the period laid down in the legislation.

5. Individual fairness versus the aggregate benefits of general rules

In the previous chapter, I explained how the interpretation of legislation in light of the Treaties and the use of the proportionality principle undermines the authority of legislation. This, we can see better now, cannot surprise, seeing that this form of interpretation leads to the disavowal of legislative rules, as does the privileging of the legislation's background purposes over its written rules. The main reason that explains why members of the ECJ as well as scholars have objected against the use of such general

[93] On the difference between proportionality and rule-based decision-making, read Frederick Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012).

[94] Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 Common Market Law Review 937, 950. For a similar perspective, see Nic Shuibhne (n 65) 913.

criteria is individual fairness. Intended by the legal arguments discussed so far is the removal of rules' over- and/or under-inclusiveness, ensuring that the rule does not apply to individuals who ought not to have been affected by it seeing the justification for having the rule. Periods of residence (or periods of employment) are too crude a measurement for someone's connection with or contribution to the host Member State, ostensibly making the individual assessment mandated by the Court superior.

To witness the concern for individual fairness among members of the Court, the Opinion by AG Mazák in *Förster* provides an excellent example. Ms Förster had applied for a student maintenance grant in the Netherlands. The Dutch rules under examination restricted access to benefits to those who had been resident for five years, which was the same period as that adopted by the Directive. The AG held that these residence requirements were in violation of EU law, because they failed to pay due notice to the mobile citizens' actual connection with the host society. He argued that

> it can reasonably be assumed that a number of students may have established a substantial degree of integration into society well before the expiry of that period. That is especially the case with students who, like Ms Förster, have also pursued occupational activities in the host Member State in addition to their studies. In fact (…) a residence requirement of five years may prevent students (…) from benefiting from their right to equal treatment as citizens of the Union in respect of study allowances, regardless of the actual link they may have established with the society of the host Member State.[95]

His argument has convinced a great number of scholars.[96] The Court, however, took a different direction and upheld the Dutch rule. What the judges purported to do essentially amounted to upholding legal precedent while respecting the Directive.[97] After repeating that Member States can legitimately confer assistance 'only to students who have demonstrated a certain degree of integration

[95] Case C-158/07 *Förster,* ECLI:EU:C:2008:399, Opinion of AG Mazák, para 130.

[96] Among others, Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) 160–161; Síofra O'Leary, 'Equal Treatment and EU Citizens: A New Chapter on Cross-Border Educational Mobility and Access to Student Financial Assistance' (2009) 34 European Law Review 612; Henri de Waele, 'EU Citizenship: Revisiting Its Meaning, Place and Potential' (2010) 12 European Journal of Migration and Law 319, 326–327. For more positive notes: Moritz Jesse, 'The Value of "Integration" in European Law—The Implications of the Förster Case on Legal Assessment of Integration Conditions for Third-Country Nationals' (2011) 17 European Law Journal 172; Golynker (n 115). Jesse seems to have changed its mind on *Förster*: Moritz Jesse, 'Joined Cases C-424/10, Tomasz Ziolkowski v. Land Berlin, and C-425/10, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v. Land Berlin, Judgment of the Court of Justice (Grand Chamber) of 21 December 2011' (2012) 49 Common Market Law Review 2003.

[97] The Directive had officially not entered into force yet when the facts of the case arose.

into the society of that State',[98] it decided that the fact of integration can be established by measuring the length of someone's residence and that a five-year residence requirement contributes to that aim.[99] In addition, the Court assessed the measure's proportionality, concluding that due to the clarity provided by residence requirements and the resulting certainty and transparency, the measure was proportionate.[100] That the reasoning has been described as 'superficial' is easy to understand,[101] because if the objective is ensuring equality for those with a sufficient degree of integration, one may wonder how legal rules that will exclude those with strong ties to the host Member State are proportionate.[102]

The problem, as I said above also, lies in the idea that a proportionality analysis is needed in the first place; that it serves as an 'optimisation requirement'[103] of EU citizenship law and that the personal circumstances of the individuals before them must always be considered, rather than that the rules are applied. That lawyers, whose focus tends to be on the particular, not the general, are at unease with the use of rules and their generalising force is easy to comprehend. They see that what is the best decision in the individual case is 'put aside in the service of generalization'.[104] AG Mazák saw that Ms Föster, who showed clear signs of integration in the Dutch society, would be withheld benefits because of crude residence requirements. Therefore, a disapplication of the rule was justified to ensure an outcome that was fair to Ms Föster. What the AG misunderstood, however, is the nature of proxies. That Union citizens can be integrated before the five-year period has elapsed is evident and surely a period of five years is more likely to exclude those who are well integrated than a period of three. However, as Moreau explained, 'there is no such thing as a perfectly tailored generalization: all generalizations are over-inclusive and under-inclusive to some degree'.[105]

If no such generalisation is allowed, rules become rule of thumb, unable to constrain and divide decisional authority between different institutions. No matter the difficulty of accepting that rule-following will lead to results in individual situations that may seem unfair, following the social

[98] *Förster* (n 1) para 49.
[99] Ibid paras 50-52.
[100] Ibid paras 56-58.
[101] Ferdinand Wollenschläger, 'The Judiciary, the Legislature and the Evolution of Union Citizenship' in Phil Syrpis (ed), *The Judiciary, the legislature and the EU internal market* (Cambridge University Press 2012) 323.
[102] This was the view expressed also by AG Mazák' in his Opinion (n 96), paras 128-135.
[103] Päivi Johanna Neuvonen, *Equal Citizenship and Its Limits in EU Law: We The Burden* (Hart Publishing 2016) 61–62. Neuvonen took her inspiration, of course, from Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010).
[104] In addition to Schauer's work on rules, he explained this well in, Frederick Schauer, *Profiles, Probabilities and Stereotypes* (HUP 2006) 259.
[105] Moreau (n 38) 291.

assistance as well as expulsion case law examined thus far, we can understand the desirability of applying and following the written rules. By removing discretion from lower decision-makers, the results of decision-making can improve in the aggregate. Like we oppose ad-hoc decision-making when it comes to the right to vote, because we fear arbitrariness and abuse, so we can oppose providing discretion over whether or not someone is entitled to remain within the host Member State to the assessment of local law-enforcers. By transforming the legal regime governing the expulsion of Union citizens into a quagmire of individual assessments, the Court not simply created great burdens for the responsible national authorities, but also greatly expanded the scope for the arbitrary and abusive treatment of those facing expulsion. The same, of course, goes for the case law on social assistance. It is tempting to support the Court ignoring general rules when beneficial for the individual claimant fortunate enough to be able to bring a case (as well as other indirect beneficiaries), but in a time of increasing hostility against Union citizens seeking welfare support, the benefits of removing decisional discretion from the Member States by offering them clarity concerning the permissible may very well outweigh the positive result in the individual case. And finally, there is the question of the cross-pollinate effects of rule-looseness and -circumvention between different legal areas. Considering that the EU's judicial officials are not infallible,[106] it is unsurprising that encouraging the ECJ to ignore the written rules in one domain produces a set of negative outcomes in the other.

Of course, that rule-based decision-making comes with clear advantages does not tell us whether rules must be written at a high degree of generality or should be more specific, to allow for a consideration of factors other than, for example, one's period of residence within a country. Likewise, that rule-following can be beneficial in the aggregate is not to claim that lower decision-makers must always function under stringent regulative constraints. Whether more specific rules or additional vagueness is desirable is context-dependent and our assessment of this matter depends on the matter we are regulating. For certain situations, it will be better for an individual's legal position to be defined based on some highly general as well as precise criterion, such as a period of residence only, while other circumstances demand for more specific rules or additional discretion.

For example, when it comes to deciding whether to adopt an expulsion measure, there is reason for thinking that the individual situation and living circumstances of the person are to be considered, even if the individual's behaviour is of such kind that the grounds that allow for expulsion are clearly satisfied. A consideration of circumstances such as where the citizen was born, spent his or

[106] On the relevance of fallibility, Schauer, 'Formalism' (n 2); Vermeule (n 37); Komesar (n 37).

her childhood, and the connections built during periods of residence allows the responsible authorities to decide whether expulsion is reasonable in light of these circumstances. These may outweigh the reasons that exist for expelling the citizen, which may be the case, as the Directive holds, for those 'who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life'.[107] Hence, there are reasons for thinking that Article 28 of the Directive rightly requires the Member States to take account of considerations of the individual facing an expulsion decision, if the other conditions that allow for expulsion in that provision are satisfied.

On the other hand, notwithstanding that a certain degree of vagueness, and the associated discretion, can be desirable on occasion,[108] this chapter also showed some of the reasons for believing that limiting the room for individual examinations can be desirable. Many of the rules in our society are relatively crude and there is nothing inherently problematic about that. To the contrary, the idea that one's right to vote is to be at the mercy of some electoral authority's assessment is normally dismissed as extremely undesirable and we prefer the generality as well as specificity of age-based boundaries to the franchise. More generally, for administrative reasons it is impossible to do away with general and specific rules and criteria altogether. Whether it is desirable to make certain legislative provisions somewhat more specific or provide decision-makers with a certain degree of is a context-dependent matter. As Moreau noted, it requires us to ask the following questions: "'What degree of over-inclusiveness [or under-inclusiveness] is permissible in this context?" and "Is an individual assessment required in this context?"'[109]

Let us consider these questions by applying them to the criteria of residence and time, in which case the second question must be explored first. The analysis above showed that one problem with making eligibility to social assistance or one's protection against expulsion dependent on one's real links with or degree of integration within the host Member State is that a separate examination is required for every single case. The Court, which is deciding on a case-by-case basis, has the capacity to examine the individual's real links with the host Member State in every case that comes before it, but such a requirement would place unacceptable burdens on national authorities, who are dealing with larger numbers. This certainly is the case if Member States are required to take into consideration

[107] Recital 24 of Directive 2004/38/EC. See also: Communication from the Commission to the European Parliament and the Council (n 35) under 3.4
[108] Endicott (n 9).
[109] Moreau (n 38) 291.

a whole range of 'representative elements',[110] including 'family,[111] employment, language skills or the existence of other social and economic factors',[112] but also the location were schooling has been completed,[113] though that cannot of course be the only requirement,[114] the chance of a future link with society,[115] and, it has been suggested even, the distance of the location of birth to the border of the host Member State.[116] These requirements, while inevitably ensuring virtually perfect inclusion of all those with some sort of a link to the host Member State, impose an inappropriate burden on the Member States. As de Witte has pointed out accurately, we have reason to be concerned about those requirements 'for reasons of legal certainty, the risk of endless litigation, administrative burdens, and added legislative complexity'.[117]

For these reasons, certain bright lines are needed to delineate decisional authority and to prevent the imposition of unreasonable and excessive burdens upon national authorities. The Citizenship Directive provides those. Notwithstanding that periods of residence are rigid and do not wholly reflect the actual integration of the mobile Union citizen in the host Member State, these criteria provide the best solution to the problem at hand. As explained by Carens,

> [i]f we want to institutionalize a principle that gives weight to the degree to which a person has become a member of society and if we expect to have to deal with a large number of cases, we will want to use indicators of social membership that are relevant, objective, and easy to measure. *Residence* and *time* clearly meet these requirements. Other ways of assessing social membership do not[118]

There is no alternative to the criteria of residence and time that adequately captures the degree of integration and meanwhile allows national administrations to decide in an objective way who belongs. Evidently, someone's social interaction with society is much better captured by an elaborate and

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[110] Case C-75/11 *Commission v Austria*, ECLI:EU:C:2012:605, para 62; Case C-503/09 *Stewart*, ECLI:EU:C:2011:500, para 95.
[111] See also: Case C-367/11 *Prete*, ECLI:EU:C:2012:668, para 48; *Stewart* (n 114) para 100.
[112] Case C-523/11, ECLI:EU:C:2013:524*, Prinz and Seeberger*, para 38.
[113] Joined Cases C-11/06 and C-12/06 *Morgan and Bucher*, ECLI:EU:C:2007:626, para 45.
[114] Case C-224/98 *D'Hoop*, ECLI:EU:C:2002:432; *Prete* (n 111).
[115] Case C-20/12 *Giersch*, ECLI:EU:C:2013:411, para 67; Case C-542/09, *Commission v the Netherlands*, ECLI:EU:C:2012:346, para 77.
[116] Opinion of AG Mazák (n 95) para 97.
[117] de Witte (n 96) 137–138. See also: Michael Blauberger and Susanne K Schmidt, 'Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits' (2014) 1 Research & Politics 1.
[118] Joseph H Carens, *The Ethics of Immigration* (OUP 2013) 165 (italics added). For an overview of different theories that take presence as a proxy for social membership: Paulina Ochoa Espejo, 'Taking Place Seriously: Territorial Presence and the Rights of Immigrants: Taking Place Seriously' (2016) 24 Journal of Political Philosophy 67.

comprehensive assessment of a whole range of personal circumstances, but such a requirement simply is infeasible once national authorities have to deal with a substantial number of persons and undesirable for the other reasons I just gave. For that reason, '[s]omehow *being* somewhere over *time* indicates that someone belongs'.[119] Of course, as a result, citizens with a too minimal degree of affiliation to the host Member State may be included and so may such criteria result in the exclusion of those who are very well integrated but have been resident for an insufficiently long period. Unfortunate as it may be, we need to accept that regulation of large numbers of people will likely involve some degree of imperfection.

That leaves us with the second question, that concerning the permissible degree of over- or under-inclusiveness. That the five-year residency requirement is too under-inclusive and for that reason unjust cannot be excluded in advance. Likewise, one may debate whether protection against expulsion should have been divided in three categories and if not the fact of being permanently resident alone should warrant the greatest degree of protection. Perhaps even, as suggested by Chalmers and Booth, integration should be presumed to have been established following a briefer period of three years.[120] To determine whether the proxy used is based on fair and just criteria or to demonstrate that a durational requirement is too underinclusive, a thorough examination is required, not of the individual applicant's situation, but of the population as a whole. This is a task that lies outside the scope of this research. Note two things though. First, it should be evident why those determinations are ideally left to the legislature. They are much better placed to deal with general issues when compared to courts. Second, that the 5-year period might be under-inclusive, does not change the desirability of the criteria of residence and time over an individual assessment in this area.

Conclusion

That scholars find it difficult to accept decisions like *Förster* is easily understood. We all want individuals to be treated fairly and in a way that does justice to his or her personal situation, while Mrs Förster was denied the student benefits even though she had become well-integrated into the Dutch society. Even though that outcome was difficult to square with what appeared to be the substantive justification behind the rule that led to the denial of benefits, the Court was right to follow the rule

[119] Alexander Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 European law Review 787, 812 (italics added).

[120] Damian Chalmers and Stephen Booth, 'A New European Citizenship and Integration Directive' [2014] Open Europe Briefing 11/2014.

and allow the Member States to deny such benefits also to well-integrated citizens like Mrs Förster. The reason is that even though rules are meant to contribute to the realisation of the substantive justifications behind legislation, the reasons for having rules are largely non-substantive.

Through rules, rule-makers withdraw decisional authority from lower decision-makers and preclude them from taking into consideration facts that otherwise seem very relevant and from making choices that they could have made had they been allowed to apply directly the substantive reasons behind legislation to individual cases. Also EU legislative rules impose substantive regulatory constraints, on the national authorities responsible for enforcing them, but also on those EU institutions who determine the legal effects of legislation and examine if the written rules are enforced correctly by the Member States. Rules are meant to protect against human fallibility and the bounded capacity of institutions. By governing through rules, the legislature accepted that the full realisation of their substantive aims became impossible, and decided that minimising decisional errors and removing responsibility and certain administrative burdens from lower decision-makers outweighed their full realisation. This explains the ostensibly contradictory idea, mentioned in the introduction, that decision-making in accordance with the intentions of the legislature can involve the creation of results that cannot be squared with the substantive justifications behind the enacted legislation. If legislation is interpreted so as be proportionate in light of, or compatible on other grounds, with the background justifications of legislation or the substantive ambitions the Court reads into the Treaties, the legitimate authority of the legislature is undermined and the potential for stable decision-making within the EU diminished. We can now begin to understand what it means to interpret legislation in accordance with its intentions and why textualism is the method to be preferred. The next chapter explains this in detail.

Chapter 4
The Case for Textualism

Introduction

The previous chapter established the connection between the authority of legislation and legislative rules and explained that legislation loses its authority when the normative pressure produced by legislative rules disappears. This chapter adds a third element and explains that because the rule the legislature has passed is the rule articulated by the words used in the act of legislation adopted, there must be a necessary connection between the authority of legislation and the written text. The purpose behind using those words that express the rule is constraining other authorities, who are expected to enforce the written text even if displeased with the broader aims the rule aspires to contribute to, or by the particular consequences of rule-application in the individual case. This chapter establishes the connection between the authority of legislation, rule-based decision-making, and the textuality of legislation. Legislation is authoritative only if the constraints imposed by the written text are treated as binding.

This issue is correlated with the long-standing debate over whether the interpretation of legislation is to happen in accordance with its text or purpose. This debate has taken place largely outside the realm of EU law scholarship, which is remarkable, because, as Marmor said it, 'how judges determine what statutes mean significantly determines who gets to make the law'.[1] This does not deny that the exercise of interpretation by definition involves and requires the making of new law; rather, it suggests that we need to define a method of interpretation that allows judicial law-making to take place within the constraints established by legislation. In other words, we must be seeking for an interpretative method that supports the authority of legislation and is in conformity with the ideal of political legitimacy.[2] I shall make the case for textualism in this regard.

Among EU lawyers who have explored questions of interpretation, the textual method is easily rejected.[3] A variety of reasons can inform this position, two of which must be mentioned immediately

[1] Andrei Marmor, 'The Immorality of Textualism' (2005) 38 Loyola Law Review 2063, 2064. See also: Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 266.

[2] For similar concerns, Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 84; Raz (n 1) 236.

[3] An exception is Syrpis, who has explained that a particularly attractive account of judicial behaviour within the EU is one that claims that legislation 'should, as far as possible, try to read secondary legislation literally [and] be

so that this chapter's approach and scope are clear. First, existing scholarship is case law oriented and its ambition is to understand the interpretative techniques employed by the ECJ. These studies are useful, but employ a methodological approach that has two likely shortcomings. To begin with, the risk involved is that the interpretation opted for by the Court is treated as the only possible approach in the case that came before it. And because the ECJ is not necessarily known for its textual approach to interpretation, textualism is easily dismissed as futile. The resulting is-ought confusion is perhaps not entirely surprising seeing that the main contributors to the debate on interpretation are current or former members of the Court.[4] Another problem is that our orientation towards case law tends to distort our view of the stability of the EU legal order, which is because the focus is on the exceptional (those cases reaching the ECJ) rather than the ordinary (all those legal situations that do not). To avoid these pitfalls, questions of interpretation are considered in more abstract terms and only the final section will connect that discussion with the areas of EU citizenship law discussed in previous chapters. A second reason explaining the lack of faith in textualism is that existing studies do not always differentiate between primary and secondary law. It is not a given that the method preferred by one for reading the Treaties must be the same as that used to give meaning to secondary legislation.[5] Not just that, a focus on Treaty interpretation can lead to the belief that EU law is highly open-ended and indeterminate and that text does not fetter decision-makers. The reality is different when it comes to secondary legislation, which concerns the focus of this chapter.

This chapter begins by clarifying some of the used definitions, explaining that what is commonly referred to as legal interpretation is a two-stage process, involving the interpretation of the text as well as the construction of legal effects based on the text. A first indication of what it is that textualists claim can be given based on that clarification. Section 2 explains that, despite a certain aversion to textualism, textuality is a necessary feature of EU law and all EU lawyers must be textualists to some degree. Textualism, if unknowingly, is the dominant method of interpretation. This is not to

prepared to adjust its own interpretation of Treaty texts in the light of the stance adopted by the legislature'. Phil Syrpis, 'The Relationship Between Primary and Secondary Law in the EU' (2015) 52 Common Market Law Review 461, 482–484. The second part of this claim I defended in chapter 2. Here, I will explain that the Court is to respect the written text.

[4] Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) 20 Columbia Journal of European law 3; Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20 Fordham International law Journal 656; Miguel Poiares Maduro, 'Interpreting European Law - On Why and How Law and Policy Meet at the European Court of Justice' in Henning Koch and others (eds), *Europe: The New Legal Realism: Essays in Honor of Hjalte Rasmussen* (Djøf Publishing 2010); Thijmen Koopmans, 'The Theory of Interpretation and the Court of Justice' in Gordon Slynn Slynn of Hadley, David O'Keeffe and Antonio Bavasso (eds), *Judicial review in European Union law* (Kluwer Law International 2000).

[5] Lawrence B Solum, 'Communicative Content and Legal Content' (2013) 89 Notre Dame Law Review 479, 514.

suggest that judicial officials always defer to the textual constraints imposed by EU law, which the subsequent sections show. Section 3 explains the unsustainability of the idea that linguistic constraints are to be softened when in the interest of good results and section 4 dismisses the claim that a purposive method of interpretation is comparatively more legitimate. Following this clarification of some purposivists' beliefs, the case for textualism can be made. In section 5, I shall argue that weight is to be given to those words on paper because these are the most reliable indicator for defining the legislature's intentions and the compromises reached during the law-making process. Having made this case, one final objection against textualism must be addressed, which suggests that textualism is futile and fails to offer guidance when the text is incomplete. This claim, section 6 explains, largely rests upon a misunderstanding of the arguments of contemporary advocates of this method. Section 7, finally, brings to bear these theoretical considerations by analysing the use of the terms social assistance and social security in ECJ case law. The textual constraints of the Citizenship Directive are greater than is sometimes presumed.

1. Interpretation, construction and the implications for textualism

The practical exercise of deciding on the meaning of a particular legal act or provision and bringing that to bear on a concrete dispute is what is normally called legal interpretation. These days, hardly anyone disputes that legal interpretation is an activity that involves more than just deciding the meaning of the language used; the legal text cannot always determine the legal consequences to be produced. This is the case in particular when legal provisions use text that is vague and indeterminate.[6] For that reason, deciding on the legal effects produced by legal texts involves a two-step process – interpretation followed by construction.[7] Interpretation is the process by which the linguistic meaning of a legal text is defined; construction concerns the exercise by which the legal meaning and effects of legal texts are produced.[8]

[6] Solum (n 5); Scott Soames, 'What Vagueness and Inconsistency Tell Us About Interpretation' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) 51; Timothy Endicott, 'Interpretation and Indeterminacy: Comments on Andrei Marmor's Philosophy of Law' (2014) 10 Jerusalem Review of Legal Studies 46; Andrei Marmor, *The Language of Law* (First edition, Oxford University Press 2014) chapters 4 & 5.

[7] Tun-Jen Chiang and Lawrence B Solum, 'The Interpretation-Construction Distinction in Patent Law' (2013) 123 Yale Law Journal 530; Solum (n 5). This distinction can be described differently. Endicott appears to make a distinction between interpretation and application. Endicott (n 6).

[8] Chiang and Solum (n 7) 543–562.

The act of interpretation, of deciding what the law communicates, can be a complex task. The linguistic meaning of a text is in part the product of semantics, semantics being a combination of the literal meaning of words and rules of syntax (rules governing the structure of sentences). The semantic meaning consists of those features of language that are learnable and which constitute the main instrument for communication.[9] However, semantic meaning alone is not always sufficient for understanding what is actually asserted by a sentence. The assertive content is in part a product of semantic content, but crucial for understanding what the speaker asserted is the context in which sentences are uttered. That is, semantic content may under-determine what the speaker actually said.[10] For example, the Citizenship Directive entitles to permanent residence status those who have resided in the host Member States for a continuous period of five years, but it is clear that what is meant is five years or more, not five years precisely.[11] In general, lawmakers will of course want to avoid that situations arise in which the law does not say what it meant to say and will want to use language that is not overly context-dependent,[12] even they will not always succeed.

Like semantic meaning can underdetermine a text's linguistic meaning, the linguistic meaning can underdetermine a text's legal effects. A law may have a clear linguistic meaning and still, there may be uncertainty as to the legal effects it should produce in the individual case. That legal effects cannot always be deduced from linguistic meaning is because the law is said to be incomplete,[13] to which several factors contribute.[14] To begin with, a law may be vague, which is to say that it has borderline cases. In cases of vagueness, the law may or may not be applicable, but that decision cannot be taken based on the linguistic meaning of the text and terms used. Imagine a law using the term 'old' with the purpose of defining the class of persons to which it applies. In many situations, the application of the law will be undisputed; it will not apply to a one-year old baby, but an 80-year old senior will be encompassed by the rule. That is, many people are either clearly old or undoubtedly not old, but borderline cases will exist, in which case there is no determining if the person is old or not. The

[9] Marmor, *The Language of Law* (n 6) 22–23.

[10] ibid 22–24; Andrei Marmor, 'Introduction' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) 10; Soames, 'What Vagueness and Inconsistency Tell Us About Interpretation' (n 6) 42.

[11] Article 16(1) of Directive 2004/38. For other examples, read Marmor, *The Language of Law* (n 6) 25.

[12] For a good illustration of this difference, read: Scott Soames, *Philosophical Essays, Volume 1 - Natural Language: What It Means and How We Use It* (Princeton University Press 2009) 412–415.

[13] Chiang and Solum (n 7) 544; Kent Greenawalt, 'Vagueness and Judicial Responses to Legal Indeterminacy' (2001) 7 Legal theory 433, 435; Soames, 'What Vagueness and Inconsistency Tell Us About Interpretation' (n 6) 43; Marmor, *The Language of Law* (n 6).

[14] The distinction that follows I take from Solum, which he presented in its most succinct form in: Solum (n 5) 509–510. See also: Marmor, *The Language of Law* (n 6) chapters 5 and 6.

linguistic meaning proves of no avail, because the language pulls both ways.[15] A second contributing factor is that the law fails to address the situation that arises. When that happens, we tend to say that there is a gap in the law. We encountered such a gap in the previous chapter, when discussing *Tsakouridis*, a case in which the Court was confronted with a question about the interruption of residence periods, which the legislation left unanswered.[16] When the law fails to address an issue, the text does not determine the legal solution.[17] Thirdly, different provisions of the same or different laws may have contradictory meanings and determining the effects intended by the law will then require a consideration of non-linguistic elements.[18] The *Dano* case, examined in chapter 2, concerned such an inconsistency.[19]

It occurs that those responsible for the interpretation of a certain text give it an effect that is very different from its linguistic meaning. This will happen if the judiciary constructs the law so that not the linguistic meaning of the text, but some other factor defines what the law means. When that happens, we say that the interpreter uses a non-textualist method of interpretation.[20] The interpretation-construction distinction thus sheds light on what textualism asserts and also what no plausible account of textualism could possibly claim. Because the law can be incomplete and underdetermine which legal effects are in accordance with the text, textualists cannot assert that the legal consequences of a law can always be deduced from the linguistic meaning of its text. Any plausible account of textualism will recognise the necessity of construction in order to resolve borderline cases or provide answers when the law contains gaps. What textualists assert normally, however, is that the linguistic meaning of the text of a law should be leading and constrain the judges when deciding on the law's legal meaning and consequences. That is, while the textualist will allow for construction when the law is incomplete, they dismiss as problematic construction that overrules the constraints imposed by the text's linguistic meaning.[21] Vice versa, those who dismiss textualism and favour, for example, purposivism, may acknowledge that the text has a clear linguistic meaning, but

[15] Solum (n 5) 509; Scott Soames, *Analytic Philosophy in America: And Other Historical and Contemporary Essays* (Princeton University Press 2015) chapter 13.
[16] Case C-145/09 *Tsakouridis* ECLI:EU:C:2010:708.
[17] Chiang and Solum (n 7) 558.
[18] Solum (n 5) 510.
[19] Case C-333/12 *Dano*, ECLI:EU:C:2014:2358.
[20] Chiang and Solum (n 7) 554–555.
[21] ibid.

that it should be overridden when in conflict with, for example, the law's alleged background purpose.[22]

2. Legal determinacy and the day-to-day reality of textualism

An idea, popularised by the legal realism and critical legal studies movements in the US, is that legal rules tend to be indeterminate and cannot constrain, allowing judges to square any legal result with the positive law.[23] While this debate is not as pronounced within the EU,[24] also EU lawyers have emphasized the overwhelming indeterminacy of the law of the European legal order.[25] The idea that often EU law lacks a clear linguistic meaning has contributed to the notion that textualist theories of interpretation are of limited use and textualism has been either denounced in full on these grounds,[26] or has been argued to be of limited avail because of EU law's open-endedness.[27]

While I do not doubt that plenty of provisions of EU law are somewhat indeterminate, nor that complications can arise by the fact that the law is to be translated in all of the EU's 24 official languages,[28] it must be that EU legislation is greatly determinate. Otherwise, the EU legal order could not function as it does. That is, as Leiter explained, there must be '*massive* and *pervasive* agreement about the law throughout the system'.[29] Were this not the case within the EU, its legal system would 'collapse

[22] To a discussion of purposivism, as interpreted by one of EU law's purposivists, I will return below.

[23] For a legal realist perspective, read: Karl N Llewellyn, 'Remarks on the Theory of Appellate Decision & the Rules or Canons About How Statutes Are to Be Construed' (1950) 3 Vanderbilt Law Review 395. One of the most renowned critical legal scholars adopted a similar perspective. Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, a Greater Task* (Verso 2015) 86–90. Patterson remarked that 'for Unger, the "truth" of law is a product of a political vision, and nothing more'. Dennis Patterson, *Law and Truth* (Oxford University Press 1999) 15. For another critical discussion of the notion of legal indeterminacy, Lawrence B Solum, 'On the Indeterminacy Crisis: Critiquing Critical Dogma' (1987) 54 The University of Chicago Law Review 462.

[24] A forthcoming study intends to address this gap: Tamara Perišin and Siniša Rodin (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart Publishing 2018).

[25] For an extreme position, read Anne Lise Kjaer, 'Nonsense: The CILFIT Criteria Revisited - from the Perspective of Legal Linguistics' in Hjalte Rasmussen and Henning Koch (eds), *Europe: The New Legal Realism: Essays in Honor of Hjalte Rasmussen* (Djøf Pub ; Sold and distributed in North America by International Specialized Book Services 2010).

[26] Maduro (n 4); Jan Komarek, 'Legal Reasoning in EU Law' in Anthony Arnull and Damian Chalmers (eds), *The Oxford handbook of European Union law* (First edition, Oxford University Press 2015).

[27] Lenaerts and Gutiérrez-Fons (n 4).

[28] Language diversity is often mentioned as the primary reason for legal indeterminacy within the EU. For a discussion of how unfamiliar language and can create difficulties of interpretation, read Chiang and Solum (n 7) 551–552.

[29] Brian Leiter, 'Explaining Theoretical Disagreement' (2009) 76 The University of Chicago Law Review 1215, 1227. Lawrence Solum made a similar point: 'the reason that easiest cases are not "cases" at all is that the law's relative determinacy does not permit us to make a "case" out of them. The very determinacy of the law prevents us from even recognizing hem as cases in any grand empirical study to determine the percentages of hard and easy cases'. Solum (n 23) 495.

under the weight of disputes'.[30] The fact that it does not and that relatively few cases reach the ECJ is because the law is relatively determinate. The scope of EU law is vast, greatly penetrating the national legal orders and citizens' lives, and yet, only around 450 preliminary questions are submitted to the ECJ by national courts annually.[31] Of course, it will occur, perhaps fairly regularly, that national courts forget to refer preliminary questions to the ECJ about the correct interpretation of a provision of EU law when arguably they should have. Even when that is accounted for, however, the number of preliminary references is astonishingly low, bearing in mind the reach and coverage of EU law. Most of the time, those affected by EU law will realise that there is no case to be made against the decision affecting them and national courts will be able to decide the case brought against decisions under EU law at their own motion. Would EU law not greatly constrain the set of outcomes that decision-makers can reach within the bounds of the law, that would not happen and we should expect many more cases to arise. It must be, therefore, that there is pervasive agreement on the meaning of EU law.

Great clarity about what the law intends to achieve can exist only if two conditions are fulfilled: the linguistic meaning of the legal text is normally rather easy to define *and* this linguistic meaning greatly constrains decision-makers, who produce legal effects that are compatible with the linguistic meaning of legislation. We should expect many more disputes if, each time someone is confronted with a law, he or she would need to go beyond the legal text and assess the purposes behind the law, if only because those purposes are normally not readily available. Likewise, we should expect far more disagreement if a certain hierarchy between text and purpose is lacking when it comes to legal interpretation, that is, if it is uncertain whether it is the text or the background purpose(s) of the law that apply. Great agreement is possible only, therefore, if a central feature of the law is 'its pervasive even if not necessary textuality'.[32] It is hard to see how textualism cannot be the day-to-day reality within the EU.

Most likely, EU law's relative determinacy goes unnoticed because of our (understandable) focus on ECJ case law. Those cases making it all the way up to the Court are more likely to concern disputes over incomplete legal provisions.[33] But even the cases coming before the ECJ are often about legal provisions that greatly constrain the range of possible outcomes in cases. A study by Beck shows

[30] Leiter (n 29) 1226.

[31] An accessible overview of the statistics of judicial activity from 2016 is available here: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170017en.pdf> (last visited: 04-04-2017).

[32] Frederick Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012) 312.

[33] The point that our perception is distorted by our focus on the most controversial cases was made also by: Solum (n 23); Leiter (n 29).

that the meaning of legal provisions is often readily apparent, which the Court recognises when it decides disputes of, what he calls, a more technical nature, covered by rather detailed legislation. Such disputes the ECJ tends to resolve based on the linguistic meaning of the operative text of secondary law.[34] It also appears that it is hardly disputed that the text should be leading and enforced as written in such cases. Rather, the judges feel bound to accept the constraints imposed by the legal text and to construct legal effects within the boundaries set by it.

Also when the law does not fully determine the set of outcomes that can be squared with the text, the law usually is only somewhat indeterminate. There is, as Hart said it, 'a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out'.[35] The legal meaning and effects may not be deducible from the text's linguistic meaning in all circumstances, but in a great number of situations, it is unquestionable that the conditions for the application of the rule are satisfied. Hence, even provisions that are somewhat indeterminate place constraints on the range of possible legal outcomes compatible with the written text. That means, as Solum pointed out, that the law is not indeterminate, but underdeterminate as to the outcomes to be realised.[36] For example, the concept lawful residence in the Directive will evoke disputes at its border, but is stable at its core. Most of the time, it will be beyond dispute if the requirements of legal residence have been satisfied and if the rule applies.[37] In addition, a dispute may arise over whether someone whose economic activities are minor classified as a worker, but in the overwhelming majority of cases there will be clarity about someone's economic status.[38]

To be clear, I do not argue that the legislative text always fully determines the outcomes that are compatible with it, nor do I suggest that most of the cases reaching the Court do not revolve around text that is somewhat underdeterminate at the least. At the same time, however, it would be a mistake to think that the fact that the mere existence of a legal dispute is proof of legal

[34] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012) 294–298.
[35] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, 607–608.
[36] Solum (n 23) 473.
[37] Disputes have arisen over whether periods of residence from before the Directive entered into force legal residence under national law also count towards the periods laid down in the Directive. Case C-325/09 *Dias*, ECLI:EU:C:2011:498; Case C-162/09 *Lassal*, ECLI:EU:C:2010:592; Case C-424/10 *Ziolkowski and Szeja*, ECLI:EU:C:2011:866.
[38] Disputes of that kind were resolved by the Court, deciding that '[a]ny person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a "worker" (Case 63/81 *Levin* [1982] ECR 1035, para 17; Case C-456/02 *Trojani*, ECLI:EU:C:2004:488, para 15).

underdeterminacy. As previous chapters have shown, plenty of legal disputes centre on the application of legislative rules when in tension with some different understanding of the Treaties or the substantive purposes behind that rule. Once we accept that for reasons of political legitimacy, the legislative conception of the Treaties must be leading and that, because of stability in decision-making, the rules must be applied also when producing results that cannot be squared with the substantive reason for having that rule, less uncertainty will exist over the intended consequences of legislative acts. Under those conditions, a rule stipulating that 'the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years' is highly determinate,[39] and so is the rule that Member States are not obliged, 'prior to acquisition of the right of permanent residence, to grant maintenance aid for studies'.[40]

This is to say that the necessary and pervasive textuality of EU legislation does not tell us if a legal text's linguistic meaning always constrains the range of possible outcomes. Whether linguistic meaning will be leading depends partly on judges' personal beliefs on what is the appropriate method of interpretation on their commitment to their theoretical beliefs. Judges may think it to be important that they are faithful to the written text, but still override it on occasion. This neither demonstrates that the language used was more uncertain, nor that more situations fell within the penumbra of the rule than anticipated. Schauer accurately remarked that 'it may be conceptually possible for language to constrain choice [but] it may still be beyond the psychological capacity of those who make decisions to abide by these constraints'.[41] The ECJ's discretion is partly a function of legal underdeterminacy,[42] but other institutional features, including the presence or absence of an effective political counter-balance equally determine its zone of discretion.[43] The absence of realistic options for legislative override provides judges with greater discretion, which they may or may not (ab)use, depending on

[39] Article 16(4) of Directive 2004/38/EC.
[40] Article 24(2) of Directive 2004/38/EC.
[41] Frederick Schauer, 'Formalism' (1988) 97 The Yale Law Journal 509, 508–509. See also: Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text' (n 32) 315.
[42] Martin Shapiro, 'The European Court of Justice' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 323.
[43] Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) 7–9.

the behaviour considered appropriate.[44] Those who emphasize the value of judicial fidelity to written text do not deny that judges have a choice, but find that they should refrain from using it.[45]

To what extent text constrains decision-makers is an empirical matter and the question about the desirability of such constraints a normative, depending on one's theory of interpretation (or construction) and rule-following. It appears, however, that those rejecting textualism must acknowledge the essential textuality of EU law and face the difficult task of having to answer why EU law must not be primarily textual and applied in a manner compatible with the textual boundaries set by the law. I can identify three reasons that suggest that such an answer exists. The first maintains that methods of interpretation should only be of secondary relevance. What should inform legal decision-making is the quality of substantive results and the method to be applied is to be modified in order to realise the best and most desirable outcome. I do not think many EU lawyers will identify with a position defined in such strong terms, but as section 3 demonstrates, a certain 'interpretative opportunism' is not alien to EU law scholarship either.[46] EU lawyers more readily downplay textual constraints when necessary for providing them the leeway to achieve the desired result. Having explained the untenability of that position, section 4 will explore a second point of opposition against textualism. Some suggest the desirability of purposivism over textuality on the ground that the former shows greater fidelity to legislative intent. I shall argue that the opposite is true, precisely because purposivism proposes to sidestep the rules articulated by the words used by the legislature. Thirdly, after having made the case for textualism in section 5, section 6 engages with what is perhaps the greatest challenge to textualism, namely that this method is unemployable because of the fact that the text is frequently incomplete. That point would be pertinent if textualism alleges that all legal disputes can be resolved within the confines of the text, but, it turns out, that characterisation of the textual method misrepresents the claims of contemporary textualists. Their claim, instead, is that the textual constraints are to be accepted and the linguistic meaning to be leading, not that all disputes are resolvable by an application of legislative text alone.

3. Interpretative opportunism in EU law

[44] Hirschl stressed that institutional features alone cannot explain the rise of courts. Also important is the judicial behaviour of judges and their attitude towards judicial decision-making. Ran Hirschl, 'The Judicialization of Politics' in Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008).

[45] Schauer aptly remarked that formalism 'is not the denial of choice *by* the judge ... but the denial of choice *to* the judge'. Schauer, 'Formalism' (n 41) 521.

[46] Leiter (n 29) 1244.

In previous chapters, we saw that the ECJ has a mixed record as regards accepting the limits of legal language. This was most visibly demonstrated by the judges' attitude towards legal provisions that precisely delineate an EU citizen's legal position by using temporal criteria, such as periods of residence or employment. The case law on Article 28 of the Citizenship Directive, on the host Member State's permissibility to force Union citizens to return to their Member State of nationality, evaporated the differentiation Article 28 establishes by using temporal criteria between three classes of Union citizens resident within the host Member States. Certain decisions in the field of social assistance and EU citizens' access thereto, to the contrary, accepted that if not EU citizens' periods of residence or employment satisfy the duration laid down in the Directive, they are not entitled to these benefits.

These cases prove interesting for examining questions of interpretation, if only because of the inconsistencies on display in the case law. Leading in the Article 28 case law were the recitals and the purposes of legislation articulated therein. Based on certain recitals, the Court added additional criteria for expulsion and loss of residence rights to those listed in the Citizenship Directive.[47] The social assistance case law on the other hand, even though referring to the background justifications of the legal provisions under considerations,[48] certainly displayed a greater openness towards the written text of the Citizenship Directive.[49] What explains these inconsistencies is difficult to tell and it is uncertain how much of it is the product of political pressure and to what extent the judiciary truly deems faithfulness to the written text important.[50]

Not just the Court has taken incompatible positions on interpretation. Equally irreconcilable are the arguments on interpretative methods in the literature. One of the main points of contention surrounding recent social assistance case law is that the Court refused to consider the individual conditions of the applicants claiming benefits.[51] Such a consideration of those circumstances, we saw

[47] Most telling is perhaps Case C-378/12 *Onuekwere* ECLI:EU:C:2014:13, which used recital 17 to justify 'the loss of the right of permanent residence even outside the circumstances mentioned in Article 16(4) of Directive 2004/38'.

[48] The Court invokes recital 10 of the Citizenship Directive, explaining that the derogations from the right to equal treatment are meant to prevent 'Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State'. Case C-67/14 *Alimanovic*, ECLI:EU:C:2015:597, para 50; Case C-299/14 *García-Nieto*, ECLI:EU:C:2016:114, para 39.

[49] Although one may wonder what the Court had decided had it not concluded that Article 24(2) 'is consistent with the objective of maintaining the financial equilibrium of the social assistance system of the Member States pursued by Directive 2004/38, as is apparent, in particular, from recital 10 in the preamble to that directive'. *García-Nieto* (n 48) para 45. Even in a case largely resolved, and perfectly resolvable by applying the written text alone, the Court cannot forbear examining whether the rule is compatible with its background justification.

[50] These cases certainly make nonsense of the Court's current President's claim that 'the ECJ will *never* ignore the clear and precise wording of an EU law provision'. Lenaerts and Gutiérrez-Fons (n 4) 9.

[51] The previous chapter engaged with the arguments of scholars promoting an individual assessment. I will not repeat the discussion here.

in chapter 2, was required by the Court in its early citizenship jurisprudence and the suggestion is that the Court adopted too much of a black-letter-approach in refusing to consider the applicant's individual conditions. That is, its reading of the Directive was insufficiently purposive and inattentive to what the recitals said.[52] On the other hand, scholars appear uniformly critical about the case law on the grounds of expulsion in Article 28 of the Directive. Perhaps, the most disputed aspect of that decision is the introduction of an assessment of individual circumstances, which the Court deemed appropriate because of its reading of the recitals to the Directive. The decisions were criticised for failing to acknowledge the constraints of the Directive's written text. Some of that critique came from the same scholars who dismissed the idea of textualism in the social assistance case law.[53]

One explanation would deny the inconsistency of the positions taken, but suggest that I am mistaken about the determinacy of the Directive's provisions governing eligibility to social assistance. Some scholars argue that the Directive requires national authorities to examine the individual circumstances of the applicant and that access to social assistance is not conditioned merely by periods of residence. To support that claim, Articles 8(4) and 14(3) of the Citizenship Directive are usually invoked.[54] However, these provisions concern the right to residence within the host Member State and the termination of that right. Article 8(4) specifies that a decision on whether a Union citizen satisfies the sufficient resources requirement as a condition for legal residence cannot be taken without considering the person's individual situation.[55] All that Article 14(3) says is that an 'expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State'. These provisions condition the right to reside, *not* eligibility to benefits; the provisions on eligibility do not refer to individual assessments. It turns out that the underdeterminacy of those provisions has been overstated, which may be, as Solum

[52] Most clearly criticising the black-letter-approach, Eleanor Spaventa, 'Once a Foreigner Always a Foreigner: Who Does Not Belong Here Anymore? Expulsion Measures', *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (Intersentia 2016) 5. See also, in addition, Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889, 913 (italics omitted); Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 Common Market Law Review 937.

[53] Spaventa (n 52) 13; Nic Shuibhne (n 52) 920–923.

[54] Herwig Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano?' (2015) 52 Common Market Law Review 363, 373.

[55] In full: 'Member States may not lay down a fixed amount which they regard as 'sufficient resources', but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State'.

explains, because '[if] one believes that the rules are strongly determinate, but fundamentally wrong, one is left with very little room to manoeuvre within the limited horizons of legal scholarship'.[56]

Alternatively, rather than attempting to stretch the constraints of legal text, one could think that these textual boundaries are best ignored altogether when an alternative outcome is more desirable.[57] This position suggests that concern over substantive results should be prioritised over questions of interpretation of secondary legislation. That is, those interpreting the law should be instrumental in the selection of their method of interpretation, the method to be used the one offering the most desirable result. In previous chapters, I have explained the twofold problem of this perspective. To begin with, our substantive disagreements on justice complicate such instrumentalist approaches to legitimate legislative interpretation. Instead, a content-independent perspective must be taken also on matters of interpretation. In addition, and in line with the previous chapter's argument, finding that the addressees of legislation should be seeking the ideal result and not be text-bound implies accepting that the decision-maker will at times do worse than what it would have accomplished had it accepted legislation's textual shackles.

4. The argument from purpose and telos

The objection to textualism need not be indifference to questions of interpretation and a prioritisation of substantive results. Some object not to the method on instrumental grounds, but believe that textualism, comparatively speaking, is less legitimate than its alternative: purposive interpretation. I will consider this idea based on the account developed by one of EU law's most pronounced purposivists, Maduro. He refers to his preferred method as teleological reasoning, but it turns out to be indistinguishable from purposive theory.[58] The reason for taking his account as my point of reference is that it is developed independent of the ECJ's case law and does not suffer, therefore, from the is-ought fallacy I mentioned in the introduction. In addition, Maduro does not ascribe to purposive reasoning simply because he presumes textualism is inadequate in situations of legal indeterminacy, but also because of his conviction that the method is normatively desirable as such. Unfortunately, Maduro does not clarify whether he is concerned with Treaty interpretation only, or also with that of secondary legislation, but it seems reasonable to assume that he favours a teleological interpretation

[56] Solum (n 23) 497.

[57] For a suggestion into that direction: Charlotte O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union' (2013) 50 Common Market Law Review 1643, 1679–1680.

[58] At times Maduro appears to claim the opposite, but he also regularly conflates the two. Both, at any rate, believe that text must be interpreted in light of the broader purpose or telos.

also of legislative acts. After all, he devotes considerable attention to the political process' difficulty of reaching agreement, which cannot but concern the EU legislative process.

Maduro departs from the position that the EU is a pluralistic legal order, which contributes to legal ambiguity. Because of deep normative disagreements within the Union and between the Member States, legislative consensus is hard to reach and legislative rules are the result of complex processes of negotiation and, therefore, often incomplete. Clarity is further hampered by the equal authenticity of EU law's different language versions.[59] Therefore, theories of textualism, which 'articulate a vision of judicial deference and a conception of courts as simple "carriers" of the legislative will, devoid of any autonomous set of normative preferences or value choices',[60] are inadequate. The ECJ, instead must resort to teleological interpretation. Up until this point, the argument is one to which also other EU lawyers dismissive of textualism seem to ascribe to,[61] but Maduro pushes the argument further. That is, his rejection of textual reasoning is not informed solely by the conviction that legal indeterminacy devalues the method; he thinks that the teleological (or purposive) method is objectively better.[62]

His first argument is that interpreting law in conformity with telos is more likely to result in the uniform application of EU law at the national level.[63] This argument is difficult to understand, frankly, because a decision is uniformly valid regardless of whether it is based on text or telos. This argument is also not too relevant to his account and more interesting is his claim that 'in the context of ambiguous or conflicting provisions, telos signifies a higher constraint than pure reference to wording or intent'.[64] The interpretation of legal provisions against the aim behind legislation, he appears to suggest, ensures that legislative acts can be more consistently read. Unfortunately, Maduro does not formulate the claim very incisively, because, of course, also a consistent application of textualism guarantees a consistent reading of legal provisions, but, when re-formulated somewhat, his argument resembles closely that of traditional purposivists. They maintain that it is the legislature's job to determine the broader aims behind legislation, not to work out its details and ponder over its

[59] Maduro (n 4) 463–467. For the same argument, read: Fennelly (n 4); Lenaerts and Gutiérrez-Fons (n 4).
[60] Maduro (n 4) 466.
[61] Komarek (n 26); Lenaerts and Gutiérrez-Fons (n 4).
[62] Maduro's argument quoted in full below shows that teleology is taken as the same thing as paying attention to the goals of legislation.
[63] Maduro (n 4) 466.
[64] ibid 467.

semantic specificities. Courts, therefore, are advised to depart from the purpose behind legislative acts in order to ensure that their decisions defer to the intentions of the legislature.[65]

Against that background, we can also understand the core of Maduro's argument, which I will quote in full:

> [t]eleological interpretation can also be seen as more faithful to the democratic outcome, since it prevents textual manipulation of the legal rules. In fact, an interpretation that pays attention to the goals of the rule, and not simply its wording, prevents opportunistic behaviours and minimises the risk of an interpretative manipulation of the legislation. Such a manipulation would derive, in practice, effects from those rules which were neither wished for nor debated in the political process.[66]

Parts of this statement are rather puzzling. What a textual manipulation of legal rules consists of is unclear, for legal rules we find in the text, but presumably Maduro meant the textual manipulation of legislative intention. And why opportunistic behaviour is prevented by goal-oriented interpretation remains underspecified. Nevertheless, Maduro's approach towards judicial interpretation is quintessentially purposive; judges should pay careful attention to the reasons and aims behind enacted legislative acts and the rules laid down therein, because these best capture the intentions of the legislature. The written text should be subordinate to background purpose.

The appeal of such purposive reasoning is easy enough to understand. Legislatures enact law with a substantive reason in mind, to which the enacted legislation is supposed to contribute. Being faithful to the intentions of the legislature thus necessitates a form of interpretation that ensures that the outcome of decisions is in line with the substantive goals that underlie a certain legislative act of legal provision. In other words, the background purposes of legislation should enjoy primacy over the written text and those rules expressed by the words used by legislation. Conflicts between text and telos must be resolved by disapplying the text or interpreting it so as to ensure an outcome that is compatible with the goals the legislature had in mind when the text was enacted. This notion, characteristically purposivist, also appears to inform the position of others who want to give pride and place to recitals.

[65] For a brief summary of this position, read John F Manning, 'What Divides Textualists from Purposivists?' (2006) 106 Columbia Law Review 70, 96–99.
[66] Maduro (n 4) 467–468.

The problem with that argument is that it considers the substantive justifications of legislation only and ignores what Schauer called the rule-generating justifications.[67] The EU adopts legislation with provisions of varying degrees of specificity and precision, but not just because it wants to attain certain substantive goals. Had that been its only purpose, the Member State could have been told simply to contribute to realising the free movement of Union citizens, while they remain permitted to prevent mobile citizens from becoming an unreasonable burden. Likewise, the EU could have decided solely to instruct the Member States to accomplish the substantive aim of ensuring a reasonable balance between free movement, national public policy and security interests, and the individual situation of the criminal convict, but leave the realisation of this goal up to the Member States. Legislation, however, does not just indicate the broader substantive ambitions the EU legislature had in mind, but also provides what it sees as the best way of attaining those ambitions. Member States can prevent Union citizens from becoming an unreasonable burden and, with that purpose in mind, are permitted to deny social assistance benefits to Union citizens who have not been legally resident for sufficient long and continuous periods, or not been economically active for an adequate duration. Likewise, when it comes to national interests of public policy and security in relation to the individual interests of the person facing an expulsion decision, the Citizenship Directive does not solely provide for some general ambitions, but provides for some clear instructions, establishing the boundaries of the tolerable for the Member States to realise these goals.

Legislation accomplishes this task through rules, which, the previous chapter demonstrated, instruct their addressees about the decisions they cannot adopt and the actions they are required to take. That is, rules allocate authority between different institutions and levels of government and exclude lower-decision-makers from considering otherwise relevant factors for coming to the best decision. They constrain and prohibit the decision-maker from seeking the optimal result in the individual case, whereby the actor adopting these rules aspires to offer stability and guidance to those living under them. Importantly, this legislation accomplishes based on those words it uses to articulate those rules.

That legislation is guided by a combination of substantive and rule-generating justifications is the reason that explains the otherwise contradictory idea that textualism is purposive and the kind of purposive interpretation appreciated by Maduro anti-purposive. He takes regard solely of the substantive justifications behind the law, but ignores the rule-generating justifications and the fact that

[67] Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 2002) 94–95.

one reason for adopting legislation is providing clear instructions to its addresses about the kind of action required. That is, the decision to employ rules shows that the legislature intended to allow for the possibility that legislation does not realise its substantive ambitions. Therefore, the interpretive technique that is most likely to approximate the results the legislature intended to achieve is the one that realises the application of the written rule over the purpose for having that rule. The focus on the broader substantive ambitions makes us forget that legislation also aspires to ensure a certain stability in decision-making and uniformity of outcomes throughout the EU.

At one point, Maduro accepts this and shifts gear completely. He acknowledges that the outcomes produced by teleological reasoning can be incompatible with legislative intent, but at least, that it 'favours a debate among alternative normative preferences [while] a simple appeal to the text would hide those alternatives and preclude debate among them'.[68] Apparently, the idea that telos constrains has gone out of the window, for what really seems to matter is that teleological interpretation allows for discussion over the normative decisions taken by the legislature. Maduro saw this correctly, of course, because the story told by the case law on Article 28 of the Citizenship Directive is that AG Bot and the Court did not just debate a different normative conception of what constitutes a just treatment of a public security of policy convict, but also imposed that conception upon the Member States, who are now permitted to adopt harsher treatment than the text of legislation allows for. Likewise, part of the scholarship condemning *Dano*, *Alimanovic*, and *García-Nieto*, for failing to realise the goals expressed in the Directive's recitals, aspires not to implement the overall purpose behind the relevant provisions, but to generate further normative debate with the ambition to convince the judges to establish a different conception of justice.

5. The case for textualism

Textualism does not normally differ from purposive theory in that it alone finds that the judiciary should respect legislative intent. Normally, also purposivists seek to ascertain what the legislature meant when enacting a particular legislative act. Textualism differs in that it believes that the most reliable source for discovering intent is the written text itself, not some general statement that explains the reasons behind the adopted text. Once account is taken of the fact that legislation is informed by substantive as well as rule-generating justifications, it becomes clear that it is deference to the written text that constitutes a recognition of legislative authority within the EU.

[68] Maduro (n 4) 468.

In addition to text being the best source for capturing the different justifications behind legislation, textualists have a second reason that explains their emphasis on the written text. The size of legislative bodies normally is considerable, its members coming from different ways of life and representing very different interests and beliefs. Decision-making by such a body, composed by such a multitude of individuals, can function relatively orderly only if the procedures to be followed are relatively clear. It is probably with reason that the Treaties specify the ordinary legislative procedure in such great detail, being particularly explicit about the order in which the different institutions involved are to act and when proposed legislation is deemed to be adopted. The reality of legislating within the EU might be immensely more complex than this provision suggests, but the order of the process and the institutional responsibilities are defined clearly. So is that what is decided on: the 'wording' and 'text' proposed by the other institutions.[69] Based on the text in front of them, the members of the legislature can understand which of the proposed solutions is still on the table, which compromise is voted for, and whether or not to support proposed amendments or to accept the final proposal. Waldron was right to remark that normally we pay great attention to the text of legislation because '[t]he rule that has been posited by the legislature is the rule expressed by the very words that are used in the bill that the legislature has passed'.[70] The written text is the compromise that acquired the support of the needed majority.

Because of the need for compromise, final outcomes can be untidy and even contradictory at times, certainly when the parties coming together represent a diversity of values like those within the EU.[71] The presence of tensions and contradictions within legislation need not be, therefore, the result of legislative incompetence. If the legislative text is characterised by a certain messiness, it can be that it rests upon a fraught compromise between the different parties involved in the drafting process, who were committed to different and conflicting ambitions and goals. That fraught compromise, Manning explained, risks being set aside when the words put on paper are ignored:

> [l]awmaking inevitably involves compromise; that compromise sometimes requires splitting the difference; and that courts risk upsetting a complex bargain among legislative stakeholders if judges rewrite a clear but messy statute to make it more congruent with some asserted background purpose.[72]

[69] Article 294 TFEU.
[70] Jeremy Waldron, 'The Dignity of Legislation' (1995) 54 Maryland Law Review 633, 652.
[71] Marmor, *The Language of Law* (n 6) 50.
[72] John F Manning, 'Second-Generation Textualism' (2010) 98 California Law Review 1287, 1290.

Indeed, when the ECJ knocked over Article 28 of the Citizenship Directive, it likely upset a delicate balance and sided with those in favour of a more lenient expulsion regime. Maduro ignored this when he praised teleological reasoning as allowing for the continuation of debate.[73] At one point, debate must end and our conflicts be settled and resolved. That is not to say that no further debate of legislative decisions should happen, nor that decisions should never be reconsidered in the future, but the appropriate forum for such debate is the legislature, not courts. And of course, purposive interpretation does not truly generate debate, for allowing the Court to decide differently and depart from the written rules is just that: it settles the debate in favour of that what is deemed correct and desirable by the judiciary.

The recitals, of course, will reflect the different ambitions underlying a piece of legislation and, hence, will offer far fewer constraints than text. To be clear, recitals are text, but are as expressing the broader purposes behind legislation, because they do not belong to the operative part of legislation. The use of recitals in the case law on the Citizenship Directive is illustrative of the high underdeterminacy of recitals. Sometimes, the Court construed some of the Citizenship Directive's provisions widely because the Directive is meant to 'strengthen the right of free movement and residence of all Union citizens'.[74] On other occasions, however, the Court employed different recitals, giving us a more narrow understanding of free movement. Central to recent social assistance is recital 10, according to which the right to residence can be made subject to conditions 'to prevent such persons from becoming an unreasonable burden on the social assistance system of the host Member State'.[75] To realise the ambition, as expressed by recital 17, that 'the right of permanent residence is a key element in promoting social cohesion and was provided for by that directive in order to strengthen the feeling of Union citizenship', *Onuekwere* introduced qualitative elements.[76] Instead of recognising that recitals hardly constrain and can be selectively invoked to reach the intended result, EU lawyers decided to step up the recital game, with the purpose of countering the Court. The social assistance

[73] Maduro (n 4) 468.
[74] This ambition is expressed in recital 3 and greatly informed, for example, the reasoning in the *Metock* case. Case C-127/08 *Metock*, ECLI:EU:C:2008:449, para 59.
[75] *Dano* (n 19) para 71; *Alimanovic* (n 48) para 62; *García-Nieto* (n 48) para 39.
[76] *Onuekwere* (n 47) para 24.

case law from *Dano* onwards was held to ignore recital 16,[77] while others contend that recital 17 was misinterpreted in the Article 28 case law.[78]

Recitals do not offer greater constraints than text, if only because there may be internal conflicts between them, without there being a way to work out which to favour in such circumstances.[79] Even one and the same recital can produce two opposing interpretations. It is extremely unhelpful, therefore, to believe that the judiciary must act in accordance with legislative intent and treat the recitals as authoritative. This, of course, should not come as a surprise, bearing in mind that applying the recitals is to directly apply (one of) legislation's background justifications. The previous chapter explained that the rule-governed part of legislation intends to constrain lower decision-makers, by removing discretion from them and disentitling them to consider all factors that would otherwise have been useful for reaching a result that is in line with the goals to be achieved by legislation.

Finally, the idea that a consideration of the wider purposes, as expressed by the recitals, better captures the intentions of the legislature, rests upon an untenable assumption. It presumes that the members of the legislature are either uninterested in the written text or fail to understand it. Even if this is true for specific details and technicalities, no account of law-making can plausibly suggest that it is a common feature of legislation that it contains 'rules which were neither wished for nor debated in the political process'.[80] As Raz realised, 'the very idea of law-making institutions is that of institutions which can make the law they intend to make. No alleged justification of law-making institutions which does not include that assumption can make sense. None can be believable'.[81] It simply is incredible to believe that the Member States and their representatives are more interested in legislation's substantive goals than the rules articulated by the written text, simply because it is these rules the national authorities will be obliged to abide by and must implement into the national legal framework. Surely, the objective of a provision that entitles Member States to withhold benefits to

[77] Verschueren (n 54) 373; Daniel Thym, 'When Union Citizens Turn Into Illegal Migrants: The *Dano* Case' (2015) 40 European Law Review 249, 31.
[78] Eleonora Spaventa, 'Striving for Equality: Who "Deserves" to Be a Union Citizen?' in Antonio Tizzano (ed), *Scritti in Onore di Giuseppe Tesauro* (Uitgever opzoeken 2016).
[79] Minderhoud finds worrying that the recital selected as the basis for decision-making in the recent social assistance case law conflicts with the earlier use of another recital, according to which the Directive's aim is to facilitate and strengthen free movement, but that simply begs the question. Paul Minderhoud, 'Job-Seekers Have a Right of Residence but No Access to Social Assistance Benefits under Directive 2004/38' (2016) 23 Maastricht Journal of European and Comparative Law 342, 348.
[80] Maduro (n 4) 467–468.
[81] Raz (n 1) 275.

jobseekers for a specific period of time must have been to permit Member States to deny jobseekers social assistance for that period, any contradictory recitals notwithstanding. Similarly, Article 16(4) of the Citizenship Directive, which establishes that permanent residence 'shall be lost only through absence from the host Member State for a period exceeding two consecutive years', must mean that the legislature intended to protect EU citizens against the loss of this status on other grounds. To assume otherwise is to assume either the incompetency or the disinterestedness of the legislature.[82]

Weight is thus to be given to those words on paper because the text (1) best captures the intentions of the legislature, (2) in its compromised (3) and rule-like form. The case for textualism, in other words, is premised upon the belief that to find out what the enacted legislation purports to achieve, we must discover the substantive as well as rule-generating justifications for legislation. The decision to choose a certain wording over another is in part because the lawmaker thought that choice to be the best among its alternatives to realise the substantive goals that led to the enactment of the act. The text also represents the agreement reached among the different parties to the legislative process. In addition, legislation will not realise the desired degree of stability in decision-making if subordinate authorities are entitled, or even expected, to debate legislative decisions anew. To that effect, legislation withdraws authority from lower decision-makers, based on the rules articulated by the text. Those justifications for having rules will remain unrealised if not the text prevails over purpose.

This is not to say that justice is realised when textual constraints are accepted; individuals will face results that are unfair in consideration of the law's substantive goals, while these broader ambitions may fail to establish justice in the first place. Of course, a second round of debate by the judiciary offers no guarantee of justice being delivered either and serves no one, other than the occasional winner. The textuality of law is generally accepted not because we feel that justice and fairness are naturally served thereby, but because it legitimises the results taken. Maintaining the authority of legislation is deferring to the authority that offers the fairest mechanism for deciding political disputes when there is disagreement about the best outcome. A textualist method of interpretation is compatible therewith.

6. Textualism and legal underdeterminacy

[82] Manning (n 72) 1290; Raz (n 1) 275.

Even those who are in principle inclined to accept this may dismiss the textual method, thinking that textualism may be useful when legal rules are precise and legal effects can be deduced directly from the written text, but not when law-enforcers are confronted by vague rules and legal gaps, or when inconsistencies emerge. This argument must be addressed, because if textualism cannot account for legal underdeterminacy, nor describe what kind of judicial behaviour is appropriate under such circumstances, there seems no point in making the case for this approach to interpretation.

One EU lawyer recently remarked that textualism 'ignores many problems of linguistic indeterminacy [and in order] to solve them it needs to overcome the text and becomes self-defeating'.[83] Maduro, we just saw, described textualists as believing in and supporting a vision of the judiciary as 'simple "carriers" of the legislative will, devoid of any autonomous set of normative preferences or value choices'.[84] Even if not all those who defend the textualist method do so on the same grounds or understand the theory similarly, it is fair to say that these characterisations are plain wrong. No textualist promotes such an outdated vision of the judiciary, ascribing to the notion of judging as law-application bereft of any normative consideration. They do not pretend that textualism is ideologically neutral, nor that decision-making in accordance with principles of textualism allows law-appliers always to decide cases in ways not involving the creation of new law.

Manning, in a study of what divides textualists from purposivists, explained that 'modern textualists do not believe that it is possible to infer meaning from "within the four corners" of a statute'.[85] Textualists acknowledge, first of all, that the assertions of lawmakers are a product of language in context. The plain meaning of the utterances used in legislative acts is essential, but not always sufficient to understand what was said. Language acquires its specific meaning based on its everyday usage within a community and linguistic meaning cannot always be determined a-contextually.[86] There is a shared understanding of language and of the meaning of the words by which legal rules are articulated, without which, as section 2 explained, our legal orders could not function. That means that language and text can and normally do constrain and it is these constraints that the judiciary must respect.[87] This is not to say that deciphering the linguistic meaning is necessarily easy; not all words have an immediately apparent meaning. What matters is how the 'reasonable user of

[83] Komarek (n 26) 41. Komarek added in a footnote that this statement is 'overly simplistic and the adherents of textualism will feel mistreated'. That acknowledgement is accurate but does not change the fact that his statement mistreats textualist accounts.
[84] Maduro (n 4) 466.
[85] Manning (n 65) 79.
[86] ibid 78; Jonathan T Molot, 'The Rise and Fall of Textualism' (2006) 106 Columbia Law Review 1, 34–35.
[87] Schauer, 'Formalism' (n 41) 528–529.

language' understands specific words and phrases, which may be someone with a decent understanding of a specific discipline.[88] That does not mean that the meaning given to a specific term or phrase is not contestable. At the same time, that someone contests the legal meaning adopted does not mean that no ordinary legal meaning exists. The individual claiming that a rule on apples also extends to oranges does not change that the term apple has a meaning that is shared by the great majority of the community's members.[89]

It is the case that not every legal dispute can always be resolved by directly applying the linguistic meaning of the legal text to the dispute. Textualists acknowledge the presence of vagueness in law and concede that the linguistic meaning of a text does not always fully determine the outcome to be achieved. Sometimes it will be unclear if a situation falls squarely within or outside the core of the legal rule and two or more different outcomes can be compatible with the text's meaning, in which case a further precisification of the text's meaning is needed to decide whether the rule applies to the case. There is no doubt that such a construction of legal effects is inherently normative and that,[90] when the linguistic meaning is underdeterminate as to the outcome to be reached, must involve the application of non-textual considerations, which may include an assessment of the law's broader purpose.[91]

Like purposivists tend to take seriously normally the written text's linguistic meaning, textualists are not necessarily opposed to a certain degree of purposivism. Normally, both theories are not worlds apart and divide mostly over the right point of departure for legal analysis.[92] Textualists take as leading the written text's linguistic meaning, which they will prioritise over the substantive reasons behind the enacted law, while purposivists are likely to privilege background purpose over text when in conflict.[93] Textualists realise that law-appliers will encounter indeterminacy and accept that judges go beyond the written text in such circumstances. Textualism thus copes with legal indeterminacy by allowing for the application of non-textual considerations when the text runs out. However, they also emphasize the constraints of language and expect the judiciary to respect these

[88] Manning (n 65) 79–81.
[89] Schauer, 'Formalism' (n 41) 526.
[90] Chiang and Solum (n 7) 558; Soames, 'What Vagueness and Inconsistency Tell Us About Interpretation' (n 6) 43–44.
[91] According to Chiang and Solum, 'when the text is vague and the dispute falls within the construction zone … virtually no one contests that courts may legitimately use non-linguistic considerations to fill the gap'. Chiang and Solum (n 7) 530. See also: Manning (n 65) 84.
[92] Manning (n 65) 87; Molot (n 86).
[93] Manning (n 65).

boundaries. That is the main disagreement with non-textual theories, which find such neglect permissible. Against this, a textualist objects.

7. Social assistance, social security, and the textual difference

This final section intends to remove some scepticism that may remain by considering the implications of the application of this method. So far, my argument centred mostly on the Court's usage of the highly precise provisions, using temporal criteria for defining Union citizens' legal position. That example is convenient for explaining rule-based decision-making, but also for studying if the judiciary accepts the constraints of the written text. Normally, after all, there will not be uncertainty if these temporal conditions were fulfilled, nor will there be much doubt as to whether the criteria of residence or employment were satisfied. Such rules greatly determine the outcomes that are compatible with the text. Certain rules are less determinate and do not offer the same precision about the intended result. Yet, as I will explain here, also more underdeterminate rules still narrow down the range of possible outcomes that can be squared with the text, which this section demonstrates through an assessment of the Court's application of the concepts social assistance and social security.

In chapters 2 and 3, I argued that recent decisions on access to social assistance respect the boundaries of the Directive's rules. The Directive, however, does not solely establish the conditions that must be fulfilled before an entitlement to benefits arises, but also specifies the kind of benefits the citizen can claim under those conditions, namely social assistance. The term social assistance is vague and there are borderline cases, in which case it is not clear whether the term applies or not. Mobile Union citizens can claim a great number of benefits in the host Member States and it is no surprise, therefore, that litigation has ensued over whether these benefits must be classified as social assistance or not.

Social assistance is normally contrasted with social security. The Citizenship Directive allows the Member States to make the conferral of social assistance benefits conditional upon the claimant satisfying the conditions laid down in the Directive. If the national benefit is classified as social security, however, it is not within the scope of the Directive, but covered by the Social Security Coordination Regulation.[94] The Union citizen can be subject to the social security legislation of her Member State of residence or of the one where she is employed or receives other benefits, depending

[94] Regulation 883/2004/EC of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L166/1).

on her situation,[95] but the Regulation does not make the grant of social security conditional upon the same residence requirements as the Directive.[96] How the benefit is classified thus can make a difference for the individual citizen as well as the Member States.

Social assistance is normally defined as assistance available to those in need and funded through public taxation.[97] Social security is the term used for insurance-based benefits granted by right to all insurance-contributors.[98] Often, national social benefits will be clearly social assistance or obviously social security; they belong to the core of one of the two concepts and if a decision-maker classifies as social security a publicly paid for benefit for those without sufficient means, we can say that the legal meaning given to the term social security is clearly incompatible with its linguistic meaning. The textualist would say that the decision-maker was clearly mistaken were this to occur.

To understand the current legal situation, it is necessary to return to and consider the interpretation of social assistance and social security in case law from the 1970s and 1980s, which occasionally produced legal effects incompatible with those terms' linguistic meaning. Decision-making is complicated by the fact that the distinction between social assistance and social security is neither clear cut in practice, nor in EU law; certain benefits are hybrids between classical social assistance and social security. In the 1970s and 1980s, a set of cases was decided in which the Court was confronted with benefits of an allegedly mixed nature. What made these decisions controversial was not that the Member States in question refused to grant the relevant benefits to those legally resident, but because they denied that those benefits were exportable and could be claimed by former residents living in another Member States. Regulation 1408/71, the social security coordination Regulation in force at that time, prohibited Member States from making certain social security benefits subject to a residence requirement.[99] Therefore, Member States could prevent exportability if the benefit in questions was defined as social assistance, but not if the Court classified it as social security.

[95] Article 11 of the Social Security Coordination Regulation.

[96] This has changed after the decision in Case C-308/14 *Commission v UK*, ECLI:EU:C:2016:436. I will return to this decision later and explain its limitations.

[97] Consider for example the definition provided by the OECD in its Glossary of Statistical Terms, available at: <https://stats.oecd.org/glossary/download.asp> (last visited: 21-08-2017), or the European Convention on Social and Medical Assistance, available at <https://rm.coe.int/16800637c2> (last visited: 21-08-2017). See also: Anne Pieter van der Mei, 'Regulation 1408/71 and Coordination of Special Non-Contributory Benefit Schemes' (2002) 5 European Law Review 551, 553.

[98] See once more the OECD Glossary of Statistical Terms of the descriptions offered by van der Mei (ibid 552.).

[99] Article 10(1) of Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

The decisions recognised that there are borderline cases for social assistance as well as social security:

> Although it may seem desirable, from the point of view of applying the regulation, to establish a clear distinction between legislative schemes which come within social security and those which come within assistance, it is possible that certain laws, because of the classes of persons to which they apply, their objectives, and the detailed rules for their application, may simultaneously contain elements belonging to both the categories mentioned and thus defy any general classification.[100]

This statement was often followed by the assertion that the national benefit under consideration did classify as such a borderline case, the Court saying that the national law

> has something in common with social assistance legislation — particularly in view of the fact that that Law adopts lack of means as the fundamental criterion for its application and does not prescribe any requirements as to periods of employment, affiliation or insurance — it is none the less related to social security in view of the fact that, whilst no provision is made for individual assessment, which is a feature of social assistance, it confers a legally defined status on recipients entitling them to a benefit analogous to the old-age benefits referred to in Article 4 of Regulation No 1408/71.[101]

Therefore, the Court reasoned, 'such legislation in fact fulfils a double function; it consists on the one hand in guaranteeing a subsistence level to persons wholly outside the social security system, and on the other hand in providing an income supplement for persons in receipt of inadequate social security benefits'.[102]

In all of its decisions, the Court adopted a broad definition of social security, allowing for the exportation of the national benefits claimed. On the way, this term was on occasion interpreted so broadly that also benefits that are alike social assistance in every aspect were treated as a benefit falling within the scope of the Regulation. In *Frilli*, the first in a line of cases on the exportability of benefits, the Court defined social security as a benefit which does 'not prescribe consideration of each individual

[100] Case C-1/72 *Frilli*, ECLI:EU:C:1972:56, para 13; Joined cases 379, 380, 381/85 and 93/86 *CRAM Rhône-Alpes v Giletti*, ECLI:EU:C:1987:98, para 9; Case C-356/89 *Newton*, ECLI:EU:C:1991:265, para 12.
[101] Case C-139/82 *Pisticello*, ECLI:EU:C:1983:126, para 11. See also: *Frilli* (n103) para 14.
[102] *Frilli* (n 100) para 15; *Pisticello* (n 101) para 12; *Newton* (100) para 14; *CRAM Rhône-Alpes v Giletti* (n 100) para 10.

case, which is a characteristic of assistance, and confers on recipients a legally defined position'.[103] This definition was applied in subsequent decisions, including *Pisticello*, where it said that the old-age pension at issue 'is related to social security in view of the fact that, whilst no provision is made for individual assessment, which is a feature of social assistance, it confers a legally defined status on recipients'.[104] This, however, was simply not the case, seeing the Court's description of the benefit: it was granted to all 'whose income from all sources is below the minimum income fixed by law'.[105] That requires an assessment of the individual's financial means. Certainly, the Italian government acknowledged that those benefits are 'granted *automatically* to any elderly person not in receipt of any other social assistance or social security benefit who, on the basis of his taxable income, does not have sufficient means to meet his vital needs'.[106] The discretionary aspect of social assistance, however, lies not in the fact that they are not granted automatically to everyone satisfying the conditions, but that it depends on an assessment on the claimant's personal financial means. Social security is available as of right to all contributors, independent of that person's financial situation. There are borderline cases for the term social security, but *Pisticello* extended the term to benefits falling beyond its border and classified normally as social assistance.[107]

In certain of the decisions decided in this period, the Court encountered benefits at the edge of the meaning of social security. *Newton*, for example, involved a dispute in relation to a non-contributory benefit not dependent on the individual's personal means and conferred by right to all persons suffering from certain physical disabilities.[108] The benefit was publicly paid for, granted by right to all physically disabled unable to walk, independent of the claimant's financial position. The law was vague and encountered a benefit that did not belong to the core of either social security or social assistance; neither classification would be incompatible with the legal provision. It could have decided either, as it did, that the term social security within the meaning of the Regulation applies to benefits such as the one under consideration in *Newton*, or that, seeing some non-linguistic consideration, it was covered by the concept social assistance. From a linguistic point of view, the ECJ was not mistaken to classify the benefit as a social security benefit within the meaning of the Regulation.

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[103] *Frilli* (n 101) para 14
[104] *Pisticello* (n 101) para 11
[105] Ibid page 1429
[106] Ibid page 1431 (italics added).
[107] See, in addition to *Pisticello*, see also *CRAM Rhône-Alpes v Giletti* (n 100).
[108] *Newton* (100) para 5

Whether the argumentation that led to its decision is plausible, however, is another matter. The Court first emphasized the dual nature of the benefit:

> On the one hand it seeks to ensure a minimum level of income for handicapped persons who are entirely outside the social security system. On the other hand it provides supplementary income for recipients of social security benefits who suffer from physical disablement affecting their mobility.[109]

From this, it followed that

> in the case of an employed or self-employed person who by reason of his previous occupational activity is already covered by the social security system of the State whose legislation is invoked, that legislation must be deemed to fall within the field of social security within the meaning of Article 51 of the Treaty and the legislation adopted in implementation of that provision, although in the case of other categories of beneficiaries it may be deemed not to[110]

But whether the benefit classifies as social security or not within the meaning of the Regulation cannot depend on the characteristics of the individual claiming the benefit; whether the person had been subject to the social security system of the state previously. The Court appears to have conflated two questions. The one is whether the benefit is social security within the meaning of the Regulation; the second whether it can also be claimed by the individual. This conflation becomes apparent in the statement that benefits such as the one at issue in *Newton*

> cannot be regarded as falling within the field of social security within the meaning of Article 51 of the Treaty and Regulation No 1408/71 in the case of persons who have been subject as employed or self-employed persons exclusively to the legislation of other Member States[111]

The Court rightly noted that for reasons related to the stability of the national social welfare systems,[112] the Regulation intends to prevent that EU citizens are subject to the social security systems of two or more Member State, but that is irrelevant for deciding the nature of the national

[109] Ibid para 14.
[110] Ibid para 15.
[111] Ibid para 16.
[112] Ibid para 17.

benefit at issue in *Newton*. The nature of a benefit depends on its characteristics, not on which Member State's social security system the citizen is subject to. If not the benefit is to be classified as social security in the first place, the Regulation does not apply and it is irrelevant where the individual claiming the benefit has been economically active. This is not to say that no other grounds could exist that could have justified the classification of the benefit, and, as I said above, the decision cannot be objected to on textual grounds.

These decisions were so controversial that the legislature intervened and created a category of benefits holding the middle-ground between social security and social assistance. The 1990s saw these legislative amendments, creating so-called special non-contributory cash benefits.[113] Entitlement to national benefits classified as special non-contributory cash benefits could be made conditional upon a residence requirement and their exportation could be precluded. This distinction between social security, social assistance, and special non-contributory benefits was maintained in Regulation 883/2004,[114] the current legislative instrument coordinating which social security system applies to persons who are or have been covered by more than one system.[115]

The Citizenship Directive, however, does not know this threefold distinction and speaks of social assistance only. It could not surprise, therefore, that at one point the question would arise whether these special non-contributory cash benefits were to be classified as social assistance under the Directive or not. That is, whether such benefits could be denied to those Union citizens who have not fulfilled the criteria entitling them to social assistance benefits within the meaning of the Citizenship Directive. The question came up in *Brey* and *Dano*. The benefit under consideration in *Brey* was a compensatory supplement to pensions where the pension received by those resident in Austria falls below the threshold for minimum subsistence. *Dano* concerned the jobseeker benefits provided by Germany under Book II of the German Social Code (SGB II), need-based benefits provided by the German government. It was not in contention that these benefits constituted special non-contributory cash benefits within the meaning of Regulation No 883/2004.

The German jobseeker benefits had already been considered previously by the Court in *Vatsouras and Koupatantze*, which is useful to consider first, because of the remarkable contrast it provides with *Dano* and also *Brey*. *Vatsouras and Koupatantze* was discussed earlier, in chapter 2, where

[113] Regulation 1247/92. For useful analyses, read: van der Mei (n 97); Herwig Verschueren, 'Special Non-Contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ' (2009) 11 Eur. J. Soc. Sec. 217.
[114] Art 3 of Regulation 883/2004. For an analysis see: Verschueren (n 205).
[115] Art 2(1) of Regulation 883/2004.

I criticised it for departing from what had been decided by the legislature and the provisions of the Citizenship Directive. At issue was Article 24(2) of the Citizenship Directive, under which the Member States are permitted to deny social assistance benefits to mobile Union citizens seeking employment in the host Member State. Germany had denied the claimants benefits under SGB II. Previously, in *Collins*, the Court had decided that following the introduction of Union citizenship, benefits 'of a financial nature intended to facilitate access to employment in the labour market of a Member State' could not be denied to Union citizens.[116] Under the Directive, however, Member States were allowed to deny benefits to jobseekers if the benefits claimed were social assistance, and *Vatsouras and Koupatantze* confronted the judges with this tension between its case law and the legislation. The response, as we saw in chapter 2 as well, was that the Court excluded jobseeker benefits from the scope of social assistance. According to the Court, 'the objective of the benefit must be analysed according to its results and not according to its formal structure'.[117] It thought that the fact that one of the conditions to be satisfied for the benefits of SGB II to be conferred – that the person is 'capable of earning a living' – indicates that 'the benefit is intended to facilitate access to employment'.[118] Regardless, Article 24(2) could not overrule its previous interpretation of the Treaties, which made the Court conclude that benefits 'intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38'.[119]

Obviously, the Court did not consider if its classification of SGB II was compatible with the meaning normally given to the term social assistance. That is, it did not assess whether these benefits were paid for by public taxation with the purpose of assisting needy individuals whose income is below a certain level. Rather, as AG Whatelet concluded in his Opinion on *Dano*, the Court merely noted that in order to receive these jobseeker benefits, the person must be capable of working. Rightly, he concluded that fitness to work cannot be determinative of whether the benefit qualifies as social assistance or not. Instead, the AG claimed that the benefit's objective was to be considered and whether what SGB II intends was compatible with the definition of social assistance adopted in *Brey*.[120]

The definition adopted by the Court in *Brey* was that the term social assistance covers

[116] Case C-138/02 *Collins*, ECLI:EU:C:2004:172, para 63.
[117] Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, ECLI:EU:C:2009:344, para 42.
[118] Ibid para 43.
[119] Ibid paras 44-45.
[120] Case C-333/13 *Dano*, ECLI:EU:C:2014:341, Opinion of AG Whatelet, Paras 65-72.

> all assistance introduced by the public authorities … that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State[121]

In addition, a more specific definition was offered when the Austrian benefit claimed by the applicants in *Brey* was considered. Because the benefit was 'intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient, is funded in full by the public authorities, without any contribution being made by insured persons', it constituted social assistance in the meaning of the Directive.[122]

The legal meaning adopted in *Brey* is very different from that in *Vatsouras and Koupatantze*, but certainly much closer to how social assistance is normally understood. This approach the ECJ continued in *Dano*, where it assessed SGB II very differently from how that same benefit was classified in *Vatsouras and Koupatantze*. The benefit was a publicly provided for benefit for those without sufficient alternative resources and was decided to fall within the meaning of social assistance as defined by *Brey*.[123] The Court constructed social assistance by providing the term with a legal meaning that is compatible with its linguistic meaning and, thereby, the case law should produce legal effects within the Member States' legal orders in accordance with the constraints imposed by the text of the Citizenship Directive.

Notwithstanding the fact that these decisions are broadly compatible with a textualist method of legal reasoning, they still display a certain text-looseness that characterised earlier citizenship case law. Both cases centred on the interpretation and meaning of social assistance, but occasionally the judges used the more generic terms 'social benefits' or 'the welfare system'.[124] In the context of these decisions, it will be evident that the Court was referring only to those benefits offered by the national welfare systems that are to be classified as social assistance, but an a-contextual application of these parts of *Dano* and *Brey* will allow for outcomes unintended by legislation. *Commission v UK* offers proof of this risk. The Commission had brought a case against the UK for making the conferral of social security benefits conditional on the claimant satisfying the conditions for legal residence under the

[121] Case C-140/12 *Brey*, ECLI:EU:C:2013:565, para 61.
[122] Ibid para 62.
[123] *Dano* (n 19) para 63.
[124] *Brey* (n 121) para 44; *Dano* (n 19) paras 76 and 83. For this criticism, see also Verschueren (n 54) 377–378.

Citizenship Directive.[125] Because social security is a matter covered by Regulation 883/2004, and not the Directive, and because the Regulation did not make reference to such conditions for legal residence, the Commission believed the UK to act in violation of EU law. The Court, however, ruled in favour of the UK and, invoking *Brey* and *Dano*, decided that 'the grant of *social benefits* to Union citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the host Member State'.[126] Passing by the fact that *Brey* and *Dano* concerned social assistance, the regime laid down by the Directive was extended to the Regulation, allowing Member States to created additional barriers to the entitlement of social security.

These decisions, from various periods in time, allow us to understand the difference a textualist method of interpretation can make also when judges are confronted with vague terms and cases situated at the border of these terms. Also vague provisions narrow down the range of acceptable outcomes and not all possible legal outcomes can be squared with the constraints created by them. Somewhat vague terms are still stable at their core and it is only at their boundaries that fuzziness arises. When it comes to the construction of legal effects under provisions deploying the terms social assistance and social security, we saw that at times, the Court applied the term social security to benefits clearly being social assistance, but also that in more recent times it has provided a more careful articulation of social assistance and decided in accordance with that term's linguistic meaning.

If a text's linguistic meaning should also determine legal outcomes and constrain decision-makers in their construction of the law is not an empirical matter, but rather, depends on one's normative theory of interpretation. What this discussion does show, however, is that textualism cannot be dismissed either based on the empirical claim that indeterminacy renders redundant the method. If the use of the concepts social assistance and security told us one thing, it is that whether or not the Court interprets legal text in accordance with its linguistic meaning can make a considerable difference with respect to the position of individual citizens and the obligations of Member States under EU law.

Conclusion

This chapter has explored the relationship between the text and authority of legislation and I have argued that there is a necessary connection between the two. When decision-makers fail to constrain themselves in accordance with the written text, they fail to follow the instructions of the legislature.

[125] *Commission v UK* (n 96) paras 21-26.
[126] Ibid para 68 (italics added).

Those concerned with the legitimacy of decision-making within the EU should favour a textualist method of interpretation. As I explained, this seems uncontroversial normally and without the necessary textuality, there could not be the pervasive agreement on matters of EU law that we could logically assume to exist. We saw that textualism can cope with the challenges often raised against it and offers more plausible response to many of those things that normally matter to us – political legitimacy, compromise, and legal stability – than purposive theories of interpretation are capable of. Only when the legal language is incomplete and legal effects cannot be constructed by deducing legal meaning from the written text, non-linguistic considerations become central. Does that mean that judges must enjoy the freedom to decide borderline cases in the way that seems best to them when that occurs? I do not think so, but this topic is explored in the next chapter.

Chapter 5
The Constraints of Purpose

Introduction

The previous chapter discussed the constraints of legal text and made the case for a method of legal interpretation that allows for decision-making in accordance with these written constraints. Yet, as is widely known, it will occur that the text of legislative provisions runs out; borderline cases may or may not be covered by a written rule and legal gaps or inconsistencies may emerge. In those instances, legal effects cannot be produced simply by deduction from the meaning of the words on paper. While that does not undermine the plausibility of textualism, it raises the question of what it means under those circumstances to respect the authority of legislation, and if something meaningful can be said about that at all.

One may think that judges enjoy discretion when the law runs out, being unfettered by any other reasonable constraints, but that is not how most EU lawyers seem to think of things.[1] A commonly accepted position is that decision-makers can take into account the substantive intentions of the legislature and decide in accordance with them when the written text underdetermines legal outcomes. As Advocate General Maduro once succinctly put it '[s]ince an analysis of the text provides no assistance, it is necessary to refer to its objectives'. It was for the Court to decide 'in such a way that [the objectives] are given the full scope necessary … but no more'.[2] In other words, when the text runs out, the judiciary can legitimately consider the substantive purposes behind the text and create legal effects in accordance with them, but no more than that. Textualists accept that the intentions of the legislature are conclusive when the written text underdetermines legal outcomes, which is a perspective shared, of course, by purposivists. As I explained in the previous chapter, what distinguishes textualists from purposivists is not that the former never allow for a consideration of

[1] A possible exception is perhaps Komárek, who claims that 'it is difficult to deny that the ECJ is constrained much less strongly than its national counterparts—and that many cases are in fact "hard"'. Readers of his account will note that it suffers from several of the shortcomings I addressed in the previous chapter. It misunderstands the common textuality of EU law and overly simplifies that what textualists actually suggest. Jan Komarek, 'Legal Reasoning in EU Law' in Anthony Arnull and Damian Chalmers (eds), *The Oxford handbook of European Union law* (First edition, Oxford University Press 2015) 41.

[2] Case C-127/08 *Metock*, ECLI:EU:C:2008:449, View of AG Maduro, para 5. It seems that principles of legal reasoning accepted by Maduro while being a member of the ECJ were not those he has subsequently argued for in his scholarly work. The argument in *Metock* is remarkably textual and contrast with his brand of purposivism, which I discussed in the previous chapter.

background purposes, but that purpose comes in play at a different moment.[3] It is widely accepted, also among EU lawyers, that purpose constrains.

To me this seems a plausible position, but it raises the question of why, if no textual resolution to the case is available, decision-making is to take place in accordance with the substantive purposes of the legislature and, secondly, to what extent these can determine outcomes. Why is it that we attach such importance to the background purposes of legislation and what does it mean for us to accept the constraints of purpose? This final chapter explores these questions and inquires to what extent substantive purpose can and has guided the ECJ by considering two concrete examples from EU citizenship law. Section 1 defends the use of substantive purpose when the text runs out, explaining it is the second-best option for discovering legislative intent. Additionally, I shall explain that if we appreciate purpose because we want to recognise the authority of legislation, it is important to distinguish more clearly between the purpose behind legislation and that behind the Treaties. The remainder of the chapter considers the implications of accepting the constraints of purpose. Section 2 reconsiders the Article 28 case law and claims that had the ECJ accepted the constraints of text and purpose together, its decisions would have been different. Section 3 considers a new field of EU citizenship law, that on the family reunification rights of EU citizens, because it shows that purpose alone can also indicate which legal results can be squared with the legislation, even if the text is wholly indeterminate.

1. Which purpose and why purpose?

Most EU lawyers agree that purpose matters and that, at some point, it can be taken as conclusive in legal disputes that come before the ECJ, but this empirical fact cannot explain why purpose should constrain the EU's judiciary. Apparently, purpose does or represents something that makes EU lawyers believe that attention is to be paid to substantive intentions. This, it follows from the previous chapter, cannot be that the purpose is what the text means. Like it is often possible to know what the utterances of a speaker mean without first asking the speaker about the background purposes behind the utterance, we can know what the text of legislation means without first having to seek for the intentions of the legislature, simply because of our understanding of the language used.[4] If purpose indeed deserves the attention we give it, it must be for different reasons.

[3] John F Manning, 'What Divides Textualists from Purposivists?' (2006) 106 Columbia Law Review 70.

[4] Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 2002) 219.

In understanding why precisely EU lawyers stress the relevance of purpose, I am handicapped somewhat by the fact that the literature often speaks of the background purposes behind the Treaties and legislation interchangeably.[5] Which of the two is taken into account when the text of legislation underdetermines the legal result to be realised can make a considerable difference; the purpose behind the Treaties (if there is a clear one) may point into a very different direction than the recitals do. Distinguishing the two is important, not just for result-related reasons, but also because when we speak of the interpretation of legislation, a purposive method is normally one that pays attention to the substantive purposes of the body enacting the legislation, not the body enacting the constitutional framework. Seemingly, those who invoke Treaty purpose in the context of the interpretation of legislation confuse matters if they label their interpretative approach as purposive.

This, of course, is not a substantive reason for not letting background purposes behind the Treaties determine the legal effects in disputes when the text is inconclusive. To which of the two purposes we pay attention, or whether we give them any consideration at all, depends on our normative convictions. Should we treat the Treaties as 'a sacred text',[6] and those lofty ambitions behind it as the ultimate aims to be realised, there is ample reason for paying close attention to the substantive ambitions behind the Treaties rather than those more specific purposes behind legislation. Some indeed consider those elevated goals, such as the creation of 'an ever closer union among the peoples of Europe', as useful sources for maintaining 'the legal text updated',[7] and, presumably, the background purposes behind legislation must give in also when incompatible with these goals.

One obvious problem with that position is that irrespective of the number of times the Court invokes those noble ambitions and regardless of how energetically those responsible for the case law try to convince us of this being a normal and normatively desirable form of interpretation, these arguments paint completely unrealistic visions of legal interpretation. We do not normally think that the Treaties are a sacred text and that those elevated goals must decide the outcomes of legal disputes, and we would object if the Court constantly 'updates the legal text' or disregards the substantive ambitions behind the legislation by reference to the Treaties' preambles only. This is partly because of our realisation that the preambles are too indeterminate to offer plausible guidance, but also because

[5] Miguel Poiares Maduro, 'Interpreting European Law - On Why and How Law and Policy Meet at the European Court of Justice' in Henning Koch and others (eds), *Europe: The New Legal Realism: Essays in Honor of Hjalte Rasmussen* (Djøf Publishing 2010); Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) 20 Columbia Journal of European law 3.

[6] According to Shapiro's notorious characterisation of the state of EU legal scholarship in the 1970s. Martin Shapiro, 'Comparative Law and Comparative Politics' (1979) 53 S. Cal. L. Rev. 537, 538.

[7] Maduro (n 5). Apparently agreeing with this, Lenaerts and Gutiérrez-Fons (n 5) 34.

we would have a hard time squaring such theories of interpretation with what we think it is legitimate for the judiciary to do.

Someone may contend that considering Treaty purpose is desirable not because these purposes are of intrinsic value, but because the Treaties constitute the democratic compromise reached by the Member States and giving effect to these purposes means accepting these democratic constraints.[8] That position forgets that the Treaty provisions around which legal disputes normally revolve are rather open-ended and in need of further concretisation. Furthermore, as I explained in chapter 2, we tend to forget that also the legislature engages in defining the meaning of the Treaties when it enacts legislation. Those who propose that legislation must be interpreted in light of Treaty text or purpose promote a method that is illegitimate insofar as it denies the legislature this authority.

Against that, one could argue that purpose-based Treaty interpretation is not incompatible with principles of textualism when a legal dispute cannot be resolved by directly applying the written rules.[9] Such an argument would ignore, of course, that proponents of textualism do not defend this method for intrinsic reasons, but because it serves deeper political values, most of all principles of legitimacy. From that perspective, concerning the legitimacy of the decisions taken within the EU, it is unclear why Treaty objectives are to weigh more heavily than the substantive purposes behind the enacted legislation, and as I will explain in a moment, they should not.

Note first that theories that focus on the substantive purposes behind the Treaties and suggest that such objectives can be employed to update the legal text, promote a system of rule-free governance of Treaty-based decision-making. This is not the place to assess in detail whether the arguments for rule-following under secondary legislation, given in chapter 3, apply equally to Treaty rules. One example is probably sufficient to show why very few would truly desire Treaty purpose to acquire such relevance. It would lead to the conclusion that legislation enacted in violation of the prescribed Treaty procedures is valid nonetheless if contributing to the purposes behind the Treaties. That is, if clear Treaty rules stipulating the legislative process are ignored in the process of legislating,

[8] For such an argument, not in relation to the Treaties' background purposes in specific, but with respect to the Treaty framework more generally, read Anthony Arnull, 'Judicial Review in the European Union' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 384.

[9] I am not entirely certain how to read the following statement by Lenaerts and Gutiérrez-Fons, but on one reading it seems to suggest that the objectives pursued by the Treaties can legitimately be used to interpret legislation when the text is incomplete: 'While Treaty provisions are often concepts drafted in broad terms, secondary EU legislation is often highly technical and complex. Thus, in order to fill the gap between those two extremes-the generality of primary EU law and the high degree of precision of secondary EU law-the ECJ has no choice but to take into account the objectives pursued by the Treaties'. Lenaerts and Gutiérrez-Fons (n 5) 32.

the legislative act is valid nonetheless if, for example contributing the goal of 'an ever closer union among the peoples of Europe'.[10] I do not believe that anyone is truly committed to such a position, but that alone indicates that there are clear limits to what we think is a legitimate use of such Treaty objectives.

When insisting that attention is to be paid to purpose, most EU lawyers do not appear to allude to Treaty purpose. Rather, they insist that the Court in its decision-making should take into account the substantive purposes behind legislation. Previous chapters showed that such insistence on purpose has contributed to a rejection of rule-based decision-making, but when the textual rules are incomplete, there is reason for thinking that the substantive purposes behind legislation are more relevant than those the Treaty drafters had in mind. The reason that many find legislative purpose so important is due to the belief that following that purpose is what it means for decisions of the legislature to be implemented. As we saw in the previous two chapters, this idea is not completely accurate; to act in accordance with legislative decisions means to accept the constraints of written rules, but if the instructions of the legislature cannot be fully understood from a textual reading of the legislation alone, and if its ambition is to decide in accordance with what the legislature had in mind, the intentions behind the written text are the best alternative. The reason that the constraints of purpose are acknowledged by purposivists and textualists alike, is because both find that substantive intentions behind legislation must matter in polities committed to legitimate forms of government.[11] Certainly, a purposivist will disagree with a textualist on the gravity of substantive purpose, the latter indeed emphasizing the primacy of the written text, but that purpose must matter to some degree is accepted widely.

The previous chapter explored the benefits of textualism within the EU, but admitted that this method leaves room for a consideration of the substantive legislative intentions behind the enacted acts if legal disputes cannot be resolved by reference to the linguistic meaning of the text alone. It has become clear that this is not simply a matter of expediency and that a sound substantive explanation exists that explains why judges are to take into consideration legislative purpose and not, for example,

[10] Unless one suggests, perhaps, that following the legislative procedures in the Treaties contributes to another purpose, that it ensures that 'decisions are taken as closely as possible to the citizen', for example, in which case the person committed to background purposes would have to inquire into the purposes behind the purposes in the Treaty preamble to resolve this tension. That exercise I will not undertake here.

[11] 'when a statute is ambiguous, textualists think it quite appropriate to resolve that ambiguity in light of the statute's apparent overall purpose' Manning (n 3). 'The (comparatively) well-accepted position that where statutory language has run out, the original intentions of the body that enacted the legislation are to be taken as dispositive'. Schauer (n 4) 219.

the purposes behind the Treaties, some other conceivable source of inspiration, or take what they believe to be the best decision all things considered. That attention is paid to legislative purpose is a position informed by the belief that the decisions taken by the legislature need careful consideration and implementation within the EU and that, if the intended implications of its decisions are not immediately clear to us based on what the words on paper tell us, the best alternative is to take into consideration the substantive purposes that led to the adoption of the text.

This does not suggest that purpose always clearly points into one direction and that a consideration of the recitals of EU legislation will create results that always fit best with the overall legislative regime. There is no single account of legislative intent that fully explains the enacted rules. Different parties will bring different interests and value-preferences to bear on proposed legislation and the legislature may not be able to take decisions before having reached a compromise between the different points of view of the parties involved in the process. As we saw in the previous chapter, it is not just the text that reflects that a mediation between opposing ideas that took place, such differences will be visible also in the recitals preceding that text. The Citizenship Directive's recitals offered an indication of the conflicting visions behind it and different results were available under them, depending on the recital invoked, which explains why text offers greater constraints than purpose. This is not the same as saying, of course, that purpose leaves unfettered the judiciary and offers them the discretion they would enjoy if we were to allow them to make best all things considered judgments each time the text runs out. Purpose will not always indicate which result is to be reached, but in combination with the textual fetters, it can certainly tell decision-makers which outcomes are incompatible with the authority of legislation.

2. The Case of Article 28 of the Citizenship Directive

This section will explore how legislative text, when considered in combination with substantive purpose can guide decision-makers and exclude possible legal answers that they could have reached based on a consideration of the text alone. I will demonstrate this based on a further consideration of the legal decisions concerning Article 28 of the Citizenship Directive. In the previous two chapters, I explained that when deciding questions that arose on the required legal effects of these provisions, the Court disregarded its textual fetters. However, we saw also that in essential respects, Article 28 lacks clarity and partly underdetermines legal results, which complicated matters for the judges. I will argue that in trying to overcome these difficulties, the ECJ did not always adequately consider the substantive purposes behind the Directive and that, if the judges had considered the substantive purposes behind

the legislation together with the determinate elements of Article 28, it could not have decided some of the cases the way it did. First, I will discuss to what extent the textual framework is highly determinate (2.1), after which I will consider the account of substantive purpose that is compatible with these textual constraints (2.2).

2.1 The text of Article 28

Section 3 of chapter 3 set out the legal framework of Article 28.[12] We saw that a decision to expel a Union citizen on the grounds of public policy or security requires the responsible authorities to make three different decisions. First, the decision-maker must determine which of the three paragraphs of Article 28 is applicable. These three paragraphs provide different grounds that allow for the adoption of a decision that forces the Union citizens to leave the Member State. To decide this, the duration of legal residence is key. Those with legal residence of a duration of below five years can be expelled on grounds of public policy and security.[13] Has the EU citizen had legal and continuous residence for more than five years, but less than ten, no expulsion measure can be adopted 'except on serious grounds of public policy or public security'. If the person has been resident for the previous ten years, paragraph 3 applies and an expulsion decision can be taken only 'if the decision is based on imperative grounds of public security'.[14] Once the paragraph applicable to the case is clear, the national authorities must decide if the person facing the expulsion decision poses a threat that is of such a nature that the grounds that allow for expulsion are satisfied – are there grounds of public policy and security, and are these serious or imperative? If that is so, thirdly, the Directive requires the national authorities to examine whether the expulsion measure is proportionate; do the Member State's interests to expel the Union citizen outweigh that citizen's personal circumstances? In chapter 3, I explained that the Court

[12] Article 28 says the following:
1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they
a) have resided in the host Member State for the previous 10 years; or
(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

[13] Article 18(1) of Directive 2004/38/EC.

[14] Article 28(3) of Directive 2004/38/EC.

muddled these three steps and that the final step, in which individual assessments are key, became leading.

What is clear, first of all, upon a careful reading of Article 28 is that EU citizens cannot be expelled if not each of the three steps is considered. That requires, to begin with, that an assessment must be made of whether the person facing an expulsion decision enjoys heightened protection against expulsion. Whether that is the case depends solely on the duration of residence within the host Member State and not, as the Court decided, on '*territorial* and *temporal* factors but also … *qualitative* elements'.[15] The Directive does not, contrary to the case law, decide that periods of legal and continuous residence can be interrupted following an assessment of such qualitative elements, for example when such an assessment indicates that integration is lacking.[16] Encompassed by Article 28(2), and deserving of greater protection, are citizens with five years of legal and continuous residence within the host Member State. That status is lost, in according with Article 16(4) of the Directive, '*only* through absence from the host Member State for a period exceeding two consecutive years'. Both acquisition and loss of permanent residence, and thus protection under Article 28(2), depends on the criteria of residence and time. The Court's decision that 'the undermining of the link of integration between the person concerned and the host Member State justifies the loss of the right of permanent residence *even outside* the circumstances mentioned in Article 16(4) of Directive 2004/38' is incompatible, therefore, with what the Directive says.

Article 28 is clear also about there being a qualitative distinction between the criteria 'public policy' and 'public security'. EU citizens with residence rights of over five years and below ten years cannot be expelled 'except on serious grounds of public policy or public security',[17] while those who have been resident for over ten years can be expelled only 'if the decision is based on imperative grounds of public security'.[18] The difference thus is not merely one of scale – serious versus imperative – but also based on the nature of the threat they should pose: grounds of public security only can justify the expulsion of those who have been resident for 10 years.[19] Grounds of public policy, to the contrary, cannot be invoked against those who have had residence for the previous ten years. This

[15] Case C-378/12 *Onuekwere* ECLI:EU:C:2014:13, para 25.
[16] Ibid; Case C-400/12 *M.G.*, ECLI:EU:C:2014:9, para 31-33.
[17] Article 28(2) of Directive 2004/38/EC.
[18] Article 28(3) of Directive 2004/38/EC.
[19] Theodora Kostakopoulou and Nuno Ferreira, 'Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship' University of Warwick Legal Studies Research Paper 2013/18 13–14.

indicates a qualitative distinction between both concepts and, no matter the fact that these terms are vague, decisions that conflate the two terms cannot be squared with the Directive's wording.[20]

Such a conflation took place, nonetheless, in *P.I.*, when the ECJ decided that the crimes listed in Article 83 TFEU constitute threats to the Member State's public security. Article 83 TFEU allows the EU to legislate and to 'establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension'. It provides for a long list of offences it considers to be of a particularly serious nature.[21] According to the Court, such crimes constitute

> a particularly serious threat to one of the fundamental interests of society, which *might* pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security' … as long as the manner in which such offences were committed discloses *particularly serious* characteristics.[22]

That the crimes listed in that provision can be severe leaves no doubt, but by deciding that these therefore may constitute public security threats, the Court blurred the distinction between public policy and public security.[23] To understand how exactly, a comparison with *Tsakouradis* proves useful. Mr Tsakouridis had been convicted on several counts of illegal dealing in narcotic substances as part of an organised group and was convicted on these grounds. The Court decided that the dealing in narcotics as part of an organised group by definition constitutes a danger to a Member State's public policy,[24] but a threat to public security only if the internal and external security of the Member State

[20] See also Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC of 2 July 2009 (COM(2009) 313 final), point 3.1

[21] Namely, 'terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime'.

[22] Case C-348/09 *P.I.* ECLI:EU:C:2012:300, paras 25-28 (italics added).

[23] For similar criticism: Dora Kostakopoulou, 'When EU Citizens Become Foreigners' (2014) 20 European Law Journal 447, 460; Loïc Azoulai and Stephen Coutts, 'Restricting Union Citizens' Residence Rights on Grounds of Public Security. Where Union Citizenship and the AFSJ Meet: *P.I.*' (2013) 50 Common Market Law Review 553, 559; Dimitry Kochenov and Benedikt Pirker, 'Deporting the Citizens Within the European Union: A Counter-Intuitive Trend in Case C-348/09, P.I. v Oberbürgermeisterin Der Stadt Remscheid' (2013) 2 Colum. J. Eur. L. 369, 387; Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889, 922–923; Georgios Anagnostaras, 'Enhanced Protection of EU Nationals against Expulsion and the Concept of Internal Public Security: Comments on the PI Case' (2012) 37 European Law Review 627, 635; Emanuela Pistoia, 'The Unbearable Lightness of a Piecemeal Approach. Moving Public Policy of Public Security Offenders in Europe' (2014) 20 European Public Law 745, 754.

[24] Case C-145/09 *Tsakouridis* ECLI:EU:C:2010:708, para 54.

is affected and the behaviour constitutes a threat to the Member State's institutions and the survival of its population.[25] Illicit drug trafficking is among the areas of crimes listed in Article 83(1) TFEU and, following *P.I.* therefore, Member States are free to regard illicit drug trafficking as a threat to public security,[26] if 'the manner in which such offences were committed discloses *particularly serious* characteristics'.[27] *Tsakouridis*, instead, decided that the expression 'imperative' indicates that the threat is 'of a particularly high degree of seriousness'.[28] When compared with the latter, *P.I.* widened the scope of public security to cover any threat to the fundamental interests in society. If a particularly serious threat to the fundamental interests in society is an imperative ground to public security and if, in line with *Tsakouridis*, the particularly serious nature of the threat makes it an imperative one, it must be that 'the fundamental interests in society' is what defines public security, irrespective of whether these fundamental interests are security-related. *P.I.*, in other words, has largely undone the distinction between public policy and public security.

2.2 Article 28 in light of background purpose

While Article 28's text establishes clear distinctions between different degrees of protection against expulsion and the grounds of public policy and public security, it is far less determine with respect to at least four other questions that came up in the different cases. First, there is the question of the consequences of periods spent behind bars for periods of legal and continuous residence. Secondly, Article 28(3) is not nearly as precise as Article 28(2) and fails to specify when the required periods of residence must have taken place and when the protection offered by this provision is interrupted. Third, while the terms public policy and public security are distinct, these remain vague, and need to be further defined. Fourth, the national authorities will still need to carry out an individual assessment if the other conditions that allow for expulsion have been satisfied, to determine if not the individual circumstances of the person facing an expulsion decision outweigh the public policy and security interests of the Member States. I will consider these four in turn here.

First, the Directive does not specify the consequences of periods of imprisonment for periods of legal and continuous residence within the host state. There are three options. First, one could think

[25] Ibid para 43-48.
[26] Eleanor Spaventa, 'Once a Foreigner Always a Foreigner: Who Does Not Belong Here Anymore? Expulsion Measures', *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (Intersentia 2016).
[27] *P.I.* (n 22) para 28.
[28] *Tsakouridis* (n 24) para 41.

that there are no consequences attached to imprisonment and the periods spent in prison count towards the fulfilment of the periods of legal residence.[29] That answer seems difficult to square with the Directive, if only because periods of imprisonment are not grounds for legal residence under the Directive.[30] To the extent that the text is lacking clarity, moreover, the first option contradicts the connection between residence within the host Member State and integration there, which the Directive presumes.[31] The Commission was correct to note that 'no links with the host Member State are built' during periods of imprisonment.[32] The second possibility would be that periods of imprisonment interrupt the period of lawful residence and result in the loss of protection under Article 28 paragraphs 2 and 3.[33] Of that option, it one can conclude with certainty that the Directive's text does not support it. It leads to the untenable result reached in *Onuekwere*, namely that the right of permanent residence can be lost 'even outside the circumstances mentioned in Article 16(4) of Directive 2004/38'.[34] The third option is that those periods do not interrupt but also do not count towards fulfilling periods of lawful residence.[35] Only this option does not contradict the text of Article 28 or the broader substantive ambitions as expressed in the recitals.

A second difficulty concerns Article 28(3). That provision is very incomplete, when compared with Article 28(2), and leaves several important questions unaddressed. To begin with, to be covered by it, the Union citizen must have had residence during 'the previous 10 years'. The text underdetermines the legal outcomes that can be squared with it, because it fails to specify previous to *what*. The Court ignored this, saying in *Tsakouridis* that 'in view of the *wording* … the decisive criterion is whether the Union citizen has lived in that Member State for the 10 years preceding the expulsion decision'.[36] While that conclusion is not incompatible with the Directive, there is nothing to suggest that this was the only result that Article 28(3) allowed for. The decision ignores that multiple outcomes can be reached under it, because equally, it may mean residence for a period of ten years previous to being convicted.

[29] That view was defended by the applicant in Case C-378/12 *Onuekwere* ECLI:EU:C:2014:13.
[30] For the grounds of legal residence, see Article 7 of Directive 2004/38.
[31] Recitals 18 and 23.
[32] See the Commission guidance (n 20) point 3.4.
[33] The decision of the Court in *Onuekwere* (n 29).
[34] *Onuekwere* (n 29) para 25 (italics added).
[35] In line with the Communication from the Commission (n 25) point 3.4. See also, Stephen Coutts, 'Union Citizenship as Probationary Citizenship: *Onuekwere'* (2015) 52 Common Market Law Review 531, 544.
[36] *Tsakouridis* (n 24) para 31.

This had not mattered a whole lot in terms of legal consequences, had the Court not decided that imprisonment interrupts residence, but since it did, the question of the moment the citizen must have completed ten years of residence makes a world of difference. If 'previous' means ten years of residence previous to the expulsion decision, Article 28(3) loses its relevance. As a result, after all, only those against whom an expulsion decision is taken over ten years after they have served their sentence can enjoy protection under Article 28(3). That seems unlikely ever to happen, and seems clearly not the result the legislature intended to achieve, bearing in mind the clear statement in the Directive's 24th recital:

> [o]nly in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life.

Of the two different outcomes the Court could have reached under Article 28(3), seeing recital 24, a better decision had been for 'previous' to mean previous to the conviction of the person posing an imperative security threat. Only that interpretation is compatible with the idea that such persons can be expelled only in exceptional circumstances.

The Directive also failed to specify under what circumstances the status under Article 28(3), once acquired, is lost. The term 'previous' in the sentence 'have resided in the host Member State for the previous 10 years' must be taken as indication that Article 28(3) was not meant to apply indefinitely to EU citizens when they leave the Member State. In *Tsakouridis*, the Court was asked under what conditions protection under that provision was lost and if the required answer was that Article 16(4) of the Directive had to be applied by analogy. If so, Article 28(3) would no longer apply following the absence from the host state of a period exceeding two consecutive years. The ECJ invented a different solution, requiring instead that 'an overall assessment must be made of the person's situation on each occasion at the precise time when the question of expulsion arises'[37] and that national authorities are 'required to take all the relevant factors into consideration in each individual case'.[38]

The text supports, or does not precludes at least, the analogous application of Article 16(4) as well as the option favoured by the judiciary. Ostensibly, neither option is incompatible with the substantive purposes behind the Directive either. I do not think, therefore, that we can fault the Court

[37] Ibid para 32.
[38] Ibid para 33.

for deciding this question in contravention of the Directive. Which of the two solutions one prefers instead depends on whether one thinks that when a gap exists, the judiciary should make a best all things considered judgment (or, in this case, allow national decision-makers to make such a judgment) or whether it should produce legal effects most consistent with the existing set of rules. The distinction between these two alternatives, as Schauer noted, should not be exaggerated, because decision-makers are unlikely normally to adopt a best all things considered judgment if that is clearly contrary to what the legislature intended to achieve, and any attempt to realise the best fit with the existing legal arrangement is complicated by the fact that different solutions may all be reasonably compatible with existing rules and background purposes.[39] The frame offers a useful perspective for thinking about *Tsakouridis* though, seeing that the Court clearly favoured an all things considered judgment, while the national court hinted at a legal answer – the analogous interpretation of Article 16(4) – that emulates existing legal rules.

Personally, I believe that the analogous application of Article 16(4) had been the better solution. We saw in previous chapters that all things considered judgments may but certainly need not produce desirable outcomes in individual situations; much depends on which authority is responsible for making those decisions and whether we have faith in its ability and willingness to offer a fair assessment. Seeing that there is evidence that the Member States have generally shown little respect for those provisions that aspire to protect individuals against expulsion,[40] there seems ample reason to me for not putting those individuals at the mercy of national decision-makers. From that perspective, the analogous application of Article 16(4) was certainly the desirable alternative, it offering much more precise instructions to the relevant decision-makers. Having said that, while perhaps undesirable, *Tsakouridis* appears compatible with the constraints provided by the legislature.

Thus far, this section focused on the first of the three stages of analysis under Article 28. Once it is established which of the three paragraphs of Article 28 is applicable to the situation at hand, the responsible decision-makers must decide if the grounds that allow for expulsion are satisfied. That is, they must examine if the citizen poses a threat to the public policy or public security of the Member States, and if the threat is of a serious (28(2)) or imperative (28(3)) nature. The Court has recognised

[39] Schauer (n 4) 225–227.

[40] A Commission investigation into the transposition of the Directive into the national laws of the Member States showed that the transposition of Article 28 was among the Commission's main concerns, national legislatures but also lower decision-makers regularly failing to offer those facing expulsion the adequate safeguards. For this conclusion, read the Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States of 10-12-2008 (COM(2008) 840 final).

the distinction between normal, serious, and imperative grounds that permit for expulsion decisions.[41] In *Tsakouridis*, it said that '[t]he concept of "imperative grounds of public security" presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words "imperative reasons"'.[42]

The case law, however, as I explained in section 2.1, did not draw the required distinction between the concepts public policy and public security; the distinction faded in *P.I.* Before that, however, up until *Tsakouridis* the Court maintained a clearer distinction. Social security covers, first of all, 'both a Member State's internal and its external security'.[43] Furthermore, 'a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security'.[44] When it was asked about public policy, the judges said it 'presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat to one of the fundamental interests of society'.[45] These definitions are still very vague, leaving considerable discretion to national decision-makers to decide whether particular behaviour constitutes a violation of either public policy or public security. There is no reason to think this can be prevented altogether and demonstrates, as Endicott noted, that 'there is no general reason to expect interpretation to resolve indeterminacies in the law'.[46] What matters, however, is that were the Court to return to *Tsakouridis* and adopt the distinctions it draws in that and prior case law – between normal, serious, and imperative grounds, and also public policy and public security – the legal consequences produced under Article 28 would be more aligned with the different distinctions that provision creates.

Finally, if the individual satisfies the grounds permitting the Member States to adopt expulsion measures, national authorities must still, in accordance with Article 28(1), assess the proportionality of such a decision. That is, they must consider the person's individual circumstances before taking an expulsion measure. Even though the Directive indicates that these circumstances should weigh

[41] Commission guidance (n 20) point 3.4
[42] *Tsakouridis* (n 24) para 41.
[43] Ibid para 43; Case C-273/97 *Sirdar*, ECLI:EU:C:1999:523, para 17; Case C-285/98 *Kreil*, ECLI:EU:C:2000:2, para 17.
[44] *Tsakouridis* (n 29) para 44. This statement summarised the following case law: Case 72/83 *Campus Oil and Others*, ECLI:EU:C:1984:256, paras 34 and 35; Case C-70/94 *Werner* ECLI:EU:C:1995:328, para 27; Case C-423/98 *Albore*, ECLI:EU:C:2000:401, para 22; Case C-398/98 *Commission* v *Greece*, ECLI:EU:C:2001:565, para 29.
[45] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri*, ECLI:EU:C:2004:262, para 66; Case C-33/07 *Jipa*, ECLI:EU:C:2008:396, para 33; Case C-343/10 *Aladzhov*, ECLI:EU:C:2011:750, para 35.
[46] Timothy Endicott, 'Legal Interpretation' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 111.

particularly heavy if the person has been present within the host Member State's territory for most or all of her life,[47] such a proportionality analysis leaves authorities with considerable discretion. One should not underestimate, however, the difference between the manner in which the Directive envisages the relevance of personal circumstances and the Court's use thereof. The Directive tells its addressees that even if a Union citizen has fulfilled the conditions on which the person can be expelled, these circumstances must be considered, to decide if not expulsion would produce excessively harsh consequences for the individual and his or her family. The Court, to the contrary, held that if the person satisfies the conditions that normally give him or her heightened protection against expulsion, such protection can still be lost following an assessment of these individual circumstances. At any rate, decision-makers enjoy a fair amount of discretion under Article 28, but the degree of discretion is greatly expanded if, as the Court decided mistakenly, the individual circumstances of the person facing expulsion matter at each stage of the analysis and not just when the citizen satisfies the grounds, prescribed by the Directive, that justify expulsion.

2.3 Final remarks on Article 28

When the text of and purposes behind Article 28 are considered in combination, the range of legal outcomes that is compatible with the provision is more narrow than the case law suggests; not all of the circumstances under which expulsion is permissible according to the ECJ are also accepted by the Directive. Had the legislative boundaries been accepted, it had not decided that periods of lawful residence are interrupted by imprisonment and it had not conflated the meaning of the terms public policy and public security. Both are incompatible with the Directive's text, which creates a clear qualitative distinction between public policy and public security, and which stipulates that permanent residence is interrupted only by absences from the state's territory for a period exceeding two years. Article 28(2) covers those enjoying the right to permanent residence for as long as that right is not terminated by a prolonged absence exceeding two consecutive years. Article 28(3) is less precise, but if account is taken of the fact that the Directive intends to allow for the expulsion of those who have resided within the host Member State for prolonged periods only under exceptional circumstances, the better interpretation of 'previous' is previous to the prison sentence, rather than previous to the

[47] According to recital 24 of Directive 2004/38/EC, '[o]nly in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life'.

expulsion measure. Under the current case law, Article 28(3) has been deprived of most of its meaning. For Article 28(3) to enjoy its full effect, it would also be necessary to interpret the term public security more narrowly and not extend it to public policy. An interpretation of the terms public policy and public security along the lines of *Tsakouridis*, would ensure that Article 28 acquires the legal meaning similar to what it is supposed to have based on a reading of the text and objectives of the Directive.

3. Reconsidering *Metock*?

Article 28 imposed some textual fetters, but sometimes these are absent. Still, also then, the constraints of purpose can make a difference and tell decision-makers which outcomes can and cannot be squared with legislative intentions. This chapter's introduction quoted AG Maduro, who said that '[s]ince an analysis of the text provides no assistance, it is necessary to refer to its objectives'.[48] He explained that the Citizenship Directive 'seeks to guarantee the "primary and individual right to move and reside freely within the territory of the Member States"' and that it is in light of this purpose that the Directive must be interpreted.[49] In his view, this right 'must be understood in functional terms in such a way that [it is] given the full scope necessary to ensure the effectiveness of Union citizens' right to move and reside, but no more'.[50] This quote is from his Opinion in *Metock*, the leading case conditioning the family reunification rights of mobile Union citizens. As I will explain in a moment, Maduro was right in noting that the text of the Directive left open which of the two alternative conceptions of family reunification is supported by it, and he was equally correct to undertake an assessment of the background purposes of the Directive. The remarkable thing from this perspective, however, is that he reached a conclusion that fails to find support in the purposes behind the Directive. The case law, which implemented the AG's suggestion, is equally difficult to square with the Directive. I will begin by providing some background information to family reunification (3.1), after which I explain that despite the purposive reasoning of AG Maduro and the ECJ, *Metock* reached a conclusion not supported by the objectives of the Directive (3.2). Finally, I will explain that there are strong reasons for questioning *Metock*'s legitimacy (3.3).

3.1 Family reunification prior to the Citizenship Directive

[48] AG Maduro (n 2) para 5.
[49] Ibid.
[50] Ibid.

If citizens intending to exercise the right to free movement cannot bring their family along when they take up residence in another Member State, an obstruction to that right emerges. This straightforward idea motivated past legislation and presently still underlies the Citizenship Directive. The right to family reunification is instrumental in nature and meant to remove obstacles to the right to free movement. Regulation 1612/68, for example, said that 'obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family'. With that purpose in mind, the Regulation provided that having the right to accompany the worker are 'his spouse and their descendants who are under the age of 21 years or are dependants' as well as 'dependent relatives in the ascending line of the worker and his spouse'.[51] Persons who had not exercised free movement rights could not enjoy this right under provisions of EU law.[52]

Less certainty exists about the precise legal ramifications of the relevant provisions and two alternative interpretations are available. On the one hand, the relevant provisions can be read as encompassing only the situations in which the exercise of free movement rights would result in a break-up of the family. That is, only if the protection of the right to family life is necessary for safeguarding the right to free movement does EU law protect the family. Under a broader interpretation of the right, mobile Member State nationals are entitled to family reunification also if the denial of that right leaves unaffected free movement. In accordance, all EU citizens who have exercised the right to free movement enjoy family reunification rights under EU law, irrespective of whether their free movement is obstructed. Initially, the case law was marked by a certain inconsistency in the preferred approach; following the Citizenship Directive, the Court firmly settled for the second.

In *Singh*, the Court interpreted the right broadly. Mr Singh, an Indian national, and his wife, a UK national, moved to Germany for economic purposes shortly after their wedding. Upon their return, two years later, Mr Singh was granted a limited leave to remain, which was revoked following

[51] Article 10(1) of Council Regulation 1612/68/EEC of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2.

[52] This was first decided in Case C-35/82 *Morson and Jhanjan* ECLI:EU:C:1982:368. Concerning family reunification, this so-called purely internal rule, according to which only those situations with a cross-border element fall within the scope of EU law, has by and large been maintained ever since. Case C-459/99 *MRAX* ECLI:EU:C:2002:461, para 39; Case C-127/08 *Metock* ECLI:EU:C:2008:449, para 77. The only exception to this appears to be Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124. On *Ruiz Zambrano* and family reunification see: Dimitry Kochenov and Peter Van Elsuwege, 'On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13 European Journal of Migration and Law 443.

his divorce from his wife. The UK authorities subsequently made a deportation order against him.[53] The ECJ found a limitation to the right to free movement, reasoning that

> a national of a Member State might be deterred from leaving his country of origin (…) if, on returning to the Member State of which he is a national (…) the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State[54]

Maduro (in academic capacity) critically assessed the case and said it resulted from a 'confusion between the aim of protecting free movement and the exercise of free movement'.[55] The law applying to Mr Singh upon return is the same as when he would have stayed. As such, there is no obstruction to the right to free movement.[56]

Akrich represents the second approach to family reunification of mobile citizens. When Mr Akrich married a UK national, he had resided unlawfully in the UK for a number of years. Following the wedding, he was deported to Ireland, where his spouse had taken up residence since several months. The couple returned and, in support of their request for a leave to remain, the couple invoked the decision in *Singh*. The UK authorities refused and the ECJ decided in the UK's favour. Based on a purposive interpretation of Regulation 1612/68, the Court decided that the law 'covers only freedom of movement within the Community',[57] and that, accordingly, the rights apply only under the condition that 'the national of a non-Member State [is] *lawfully resident* in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated'.[58] In other words, because Mr Akrich had not acquired a residence permit in the UK before moving to Ireland, he could not claim a right to reside upon his return from Ireland on the ground that his partner had exercised the right to free movement. The mere exercise of the right to free movement by that EU citizen is not sufficient for that third-country national to evade national immigration rules.

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[53] Case C-370/90 *Singh* ECLI:EU:C:1992:296, paras 1-7.
[54] Ibid para 19.
[55] Miguel Poiares Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in Claire Kilpatrick, Tonia Novitz and Paul Skidmore (eds), *The future of remedies in Europe* (Hart Pub 2000) 124. See also: Niamh Nic Shuibhne, 'The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Boday?' in PR Beaumont, Carole Lyons and Neil Walker (eds), *Convergence and divergence in European Public law* (Hart Pub 2002) 188–189.The ECJ, nonetheless, still believes *Singh* to be good law. Case C-457/12 *S and G* ECLI:EU:C:2014:136, para 46.
[56] Maduro (n 55) 124–125.
[57] Case C-109/01 *Akrich*, ECLI:EU:C:2003:491, para 49.
[58] Ibid para 50 (italics added).

The critical reception of *Akrich* likely contributed to the swift curtailment and, ultimately, reversal of the decision.[59] Ms Jia, a Chinese national living in China, was Mr Shenzhi Li's mother. The latter also had Chinese nationality and was married to Ms Schallehn, a German national who was self-employed in Sweden. Ms Jia had been allowed to visit her son in Sweden and, while there, applied for a residence permit on the basis of her relationship to an EU citizen. In support of her application, she claimed that, because of her impoverished living situation, she was financially dependent on her son and daughter-in-law.[60] That mattered because the legislation required Member States to abolish restrictions on free movement and residence of Member State nationals who wish to pursue activities as self-employed persons or service providers in that country, but also on their relatives 'in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality'.[61] The meaning of dependency is contested, but it is uncertain if the answer should have mattered for deciding if Ms Jia had to be granted the right to join her son and daughter-in-law. The couple had already moved from Germany to Sweden and the right to move and reside there did not depend on whether or not their family in the ascending line could come and live with them in Sweden.[62] The Court, however, did not give this matter any thought and confined *Akrich* to its facts in *Jia*, deciding that the prior lawful residence requirement did not apply to situations such as that of Ms Jia.[63] Furthermore, the ECJ answered the national court's questions on the meaning of being dependent on an EU citizen, and interpreted it so that it covered also the situation of Ms Jia. The meaning of being dependent is being in need of 'the material support of that [Member State] national or his or her spouse in order to meet [the] essential needs'.[64] The Court suggested that EU citizens and their family members are entitled to family reunification on free

[59] For criticism: AP Van Der Mei, 'Comments on Akrich(Case C-109/01 of 23 September 2003) and Collins(Case C-138/02 of 23 March 2004)' (2004) 6 European Journal of Migration and Law 277; Eleanor Spaventa, 'Case C-109/01, Secretary of State for the Home Department v. H. Akrich' (2005) 42 Common Market Law Review 225; Robin CA White, 'Conflicting Competences: Free Movement Rules and Immigration Laws' (2004) 29 European Law Review 385; Helen Oosterom-Staples, 'Wanneer Is Er Sprake van Misbruik van Het Recht Op Het Vrij Verkeer van Personen? Het Arrest Akrich: Meer Vragen Dan Antwoorden' (2004) 10 Nederlands tijdschrift voor Europees recht 77. For a more positive comment see: Christophe Schiltz, 'Akrich: A Clear Delimitation without Limits' (2005) 12 Maastricht J. Eur. & Comp. L. 241.

[60] Case C-1/05 *Jia* ECLI:EU:C:2007:1, paras 16-19.

[61] Article 1(1)(c) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services.

[62] For a similar critique see: Alina Tryfonidou, 'Jia or Carpenter II: The Edge of Reason' (2007) 32 European Law Review 908.

[63] *Jia* (n 60) paras 25-33.

[64] Ibid para 43.

movement-related grounds also when the decision of national authorities to deny the third-country national entry and residence rights does not impair EU citizens' mobility rights.

3.2 Metock *and anti-purposive purposovism*

Imagine the situation of a Union citizen who, following her move to another Member States, and a period of residence there, enters into a partnership with a person having the nationality of a non-EU country. The EU citizen, single by the time she moved, met her partner only after a certain period of residence within the host Member State. The two marry, but that is of no avail to the residence status of the third-country national, who is denied the request for a residence permit by the responsible authorities and is expected to leave the country. The couple files an objection and claims that this decision entails a restriction of the Union citizen's right to freedom of movement and residence. The national authorities reject that claim and explain the citizen that she had not entered into a partnership when she exercised her right to free movement and that her partner did not enjoy prior lawful residence in the Member State where the citizen came from. Therefore, the national authorities claim, the decision does not pose a barrier to her rights as an EU citizen and the host state's immigration laws apply to that Union citizen in the same way as that they apply to that country's nationals, in accordance with the principle of non-discrimination of nationality.

Coming before the ECJ in *Metock* was the question if such a situation constitutes a restriction to the right to move and reside freely. All four applicants, nationals from non-EU Member States, were living in Ireland where they married EU citizens from Member States other than Ireland. The applicants got their asylum requests rejected, as well as subsequent applications for residence cards on the ground of *Akrich*: the applicants had not enjoyed lawful residence in another Member State before coming to Ireland and could not claim, therefore, that the Irish decisions limited the free movement rights of their EU citizen partners.[65] The applicants claimed that the condition of prior lawful residence was contrary to the Citizenship Directive, and Article 3(1) in particular.

The Directive had entered into force by the time these questions arose. Alike Regulation 1612/68, it purported to protect and also strengthen the right to free movement. To that aim, Article 3(1) of the Directive provides that it covers 'Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members'.[66] The question that arose

[65] *Metock* (n 52) paras 43-45.

[66] The term family members is defined in Article 2 and includes the spouse, the registered partner, direct descendants under the age of 21 or are dependants, and dependent direct relatives in the ascending line.

was whether, in light of this provision and also the Directive as a whole, third-country national family members of mobile EU citizens were entitled to residence rights within the host Member State, irrespective of whether third-country nationals had enjoyed prior lawful residence in another Member State, and when and where their marriage took place.[67]

AG Maduro rightly noted that the text of the relevant provision provides no clear answer and that, therefore, it is necessary to consider the Directive's objectives, in specific the 'primary and individual right to move and reside freely within the territory of the Member States'.[68] He proposed to consider if granting residence rights to individuals like those under consideration in *Metock* was necessary to ensure those objectives, or would go beyond the substantive purposes behind the Directive.[69] The AG emphasized the importance placed by the legislature as well as the ECJ on 'protecting the family lives of nationals of the Member States *in order to* eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty'.[70] In what followed, the Opinion focused not on the implications the national authorities' decisions had for the Union citizens' right to free movement, but on their right of residence. He argued that the requirement of prior lawful residence 'would infringe the right of the Union citizen to lead a normal family life and, therefore, his right to reside in the host Member State'.[71] That is because

> the fact that Union citizens established in Ireland are unable to have their spouses join them from outside the Community is such as to undermine their free choice to reside in that Member State since it will tend to induce them to leave Ireland and go to a State, whether a Member State or not, where they will be able to live together with their spouses[72]

In support of that claim, the AG invoked the Directive and compared it to previous legislation, concluding that it intends to 'strengthen' the Member State nationals' right to move and reside freely within the host Member State. He suggested, moreover, that 'whereas Regulation No 1612/68 concerned, to cite its title, only "freedom of movement" for workers within the Community, Directive 2004/38 relates, in line with the right set out in Article [21 TFEU], to the right of Union citizens not

[67] *Metock* (n 52) para 47.
[68] View of AG Maduro (n 2) para 5.
[69] Ibid.
[70] Ibid para 8 (italics added).
[71] Ibid para 9.
[72] Ibid.

only to "move" but also to "reside" freely within the territory of the Member States'.[73] A criterion of prior lawful residence and making the right to family life dependent on when and where the marriage had taken place would be incompatible with the Directive's purposes, in particular because of its repercussions for the stability of residence.

The ECJ implemented the AG's suggestions, believing it was time to 'reconsider' *Akrich*.[74] Informing that decision was that the Directive intended 'in particular to "strengthen the right of free movement and residence of all Union citizens", so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals'.[75] Like the AG, the Court held that the freedoms guaranteed by the Treaty would be seriously obstructed 'if Union citizens were not allowed to lead a normal family life in the host Member State':[76] the refusal to grant the right to residence to the citizen's family member 'is such as to discourage that citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State'.[77] At this point, the analysis centres on the freedom to move and reside equally, but later it becomes apparent that also the judges were concerned mostly with EU citizens' residence rights. Echoing the Opinion of AG Maduro,

> Where a Union citizen founds a family after becoming established in the host Member State, the refusal of that Member State to authorise his family members who are nationals of non-member countries to join him there would be such as to discourage him from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country.[78]

It makes no difference in that regard whether the third-country nationals and EU citizens had become a family before or after entering the host Member State.[79]

That the ECJ, alike the AG, decided to emphasize the right to reside freely is likely because both must have realised that the decision of the Irish authorities did not affect free movement rights. As others have noted as well, a Union citizen who meets a partner only after having moved another

[73] Ibid para 13.
[74] *Metock* (n 52) para 58.
[75] Ibid para 59. That in itself is a bizarre conclusion, of course, because that a new piece of legislation intends to strengthen rights previously protected by other legal instruments does not mean that that new law must in every respect offer equal or better protection than previous legislation.
[76] Ibid para 62.
[77] Ibid para 64.
[78] Ibid para 89.
[79] Ibid para 92.

Member State cannot be said to have her free movement obstructed.[80] The EU citizen applicants in *Metock* had moved to Ireland and been conferred the right to reside and the decision of the Irish authorities to refuse their partners residence permits left unaffected the right of the EU citizens to move to Ireland and also leave the country if they wanted to.

The decision's intention must have been, in the words of AG Maduro, to give 'the full scope necessary to ensure the effectiveness of Union citizens' right to … reside, but no more'.[81] Problematically, contrary to the initial appearance, the decision does far more; the right to reside was not at stake under a normal understanding of residence. For a start, the assumptions that ground the argument are questionable. The Union citizen will be discouraged from retaining his residence within the Member State only if there is an alternative Member State with immigration and family reunification policies that allow the partner to enter and reside there. Bearing in mind, however, that Member States do not often allow third-country national partners to join immediately, and regularly have a set of conditions that must be satisfied, it is uncertain how easily the EU citizen can move to another Member State to establish family reunification. That is, it is uncertain if it really is the case, as the Court believes, that in such circumstances, the citizen will be discouraged from remaining within the host Member State.

Regardless, the conception of residence adopted in *Metock* is wholly incompatible with a normal understanding of that concept. Imagine the situation of a Union citizen who, following her move to another Member State, claims that the host state obstructs her right to move and reside freely because its policies are not as generous as those of other Member States are. Say that the Union citizen has come to the realisation that other countries have established a more generous tax regime, or that university fees are lower elsewhere. The citizen claims that this differentiation complicates the exercise of her right to move and reside, because she is discouraged from remaining in her current state of residence and tempted to move to the Member State with the more generous regime. Normally, we would commend the citizen for her ingenuity, but tell her that under EU law, such matters are left to national democratic bodies and that national rules cannot be challenged on the ground that the rules in other Member States are more beneficial. In more academic terms, we would tell her that she is

[80] Alina Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (2009) 15 European Law Journal 634; Pedro Caro Sousa, 'Quest for the Holy Grail—Is a Unified Approach to the Market Freedoms and European Citizenship Justified?' (2014) 20 European Law Journal 499, 511. A similar argument was made by AG Geelhoed. Case C-1/05 *Jia*, Opinion of Advocate General Geelhoed, [2007] ECR I-1, para 71.
[81] View of AG Maduro (n 2) para 5.

entitled to 'vote with her feet'[82] and can move to another Member State where she can enjoy the life she desires.[83] That she can enjoy a more desirable life elsewhere (according to subjective standards of what is desirable), however, does not entitle her to the same standard of living in her current Member State of residence.

Now let us assume that the citizen is not interested in paying lower taxes, or obtaining a university degree for a lower price, but in family reunification in accordance with rules that are more beneficial than those provided by the Member State in which the citizen resides. Is this situation any different than that of the EU citizen who asserts that the host Member State obstructs her right to move and reside freely because its tax and social welfare policies are not as generous as those provided by of other states? The ECJ appears to think so and a different logic applies to the family reunification case law. Would we apply *Metock*'s understanding of residence to other areas, Member States' decisions to impose a higher tax rate than elsewhere within the EU, or to not provide the same standard of assistance would all constitute limitations to the right to reside. If not offering the Union citizen the desired family rights could 'discourage him from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country',[84] that is by necessity also the case when it comes to educational opportunities, tax rules, social benefits, etc., etc.

This explains why, contrary to what may have appeared to be the case, *Metock* is incompatible with the substantive purposes behind the Directive. Notwithstanding what is suggested by it, the case does not safeguard the mobile Union citizens' right to reside, nor does it protect the right to free movement. It is for a reason that, subject to certain exceptions, the EU citizen can claim equal treatment with the host Member State's nationals, and not the rights offered by another state. Based on *Metock*'s rationale, EU citizens could challenge all sorts of national rules and standards if able to demonstrate that better opportunities exist elsewhere, which allows them to claim that if no better treatment is offered by state of residence, they will be discourage them from retaining residence

[82] Richard A Epstein, 'Exit Rights Under Federalism' (1992) 55 Law and Contemporary Problems 147; Ilya Somin, 'Foot Voting, Federalism, and Political Freedom' in James E Fleming and Jacob T Levy (eds), *Federalism and subsidiarity* (New York University Press 2014). For a more sceptical view see: Douglas Laycock, 'Voting with Your Feet Is No Substitute for Constitutional Rights' (2009) 32 Harvard Journal of Law & Public Policy 29.
[83] Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) 61–64.
[84] *Metock* (n 52) para 89.

there.[85] *Metock* presents us with an extreme slippery slope and is at odds with a normal and workable conception of residence.

3.3 Metock *and the difficult questions of legitimacy*

Irrespective of the fact that *Metock* cannot be squared with the constraints of purpose, it has been valid law ever since. *Metock* was confirmed in *Sahin* shortly after,[86] and, more recently, *Jia* was upheld in *Reyes*.[87] *O and B* proves the clearest instantiation of the fact that *Metock*'s line of argumentation is valid also as concerns those exercising free movement falling outside of the Directive's scope.[88] I do not intend to consider these cases in detail, because what interests me is not so much their precise interactions and if all these cases are always entirely consistent or most persuasively argued. What concerns me, rather, is their reception in scholarship and how we should think of these decisions in terms of legitimacy.

EU lawyers have overwhelmingly favoured *Metock* and subsequent decisions over *Akrich*. If there is a point of criticism that is widely shared, it is that the Court did not push its arguments far enough and forgot to extend the boundaries of EU law even further and to give the same treatment to all Union citizens irrespective of whether they had moved or not.[89] Criticism of *Metock* is exceptional and defending *Akrich* is almost unthinkable.[90] The case has been labelled as 'the worst judgment in the long history of the Court of Justice'.[91] This must mean that either the decisions prior to *Akrich* were of impeccable quality, or that the decision is so grossly unjust that one cannot possibly defend this case without betraying basic principles of humanity. I have no doubt that some will take this position, but let me make the case against *Metock* nonetheless.

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[85] While little noticed, we can see this happening in Case C-212/06 *Walloon* [2008] ECR I-1683, where the Court's argument that the free movement rights of non-Belgian citizens resident in Walloon are obstructed if not they are entitled to benefits offered by the Flanders region is equally improbable.

[86] Case C-551/07 *Sahin*, ECLI:EU:C:2008:755.

[87] Case C-432/12 *Reyes*, ECLI:EU:C:2014:16.

[88] Case C-456/12 *O and B*, ECLI:EU:C:2014:135.

[89] Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 Legal Issues of Economic Integration 43; Dimitry Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2011) 08/10 Jean Monnet Working Paper; Stanislas Adams and Peter Van Elsuwege, 'Citizenship Rights and the Federal Balance between the European Union and Its Member States: Comment on Dereci' (2012) 2 European Law Review 176.

[90] The only scholarly criticism of *Metock* that I am aware of is a Danish article by Hjalte Rasmussen. For a reference to that article, see Catherine Jacqueson, 'Metock as a Shock? The Struggle between Rights and Sovereignty' in Hjalte Rasmussen and Henning Koch (eds), *Europe: The New Legal Realism: Essays in Honor of Hjalte Rasmussen* (Djøf Pub 2010). For a defence of *Akrich*, Schiltz (n 59).

[91] Steve Peers, 'Free Movement, Immigration Control and Constitutional Conflict' (2009) 5 European Constitutional Law Review 173, 178.

I do not suggest that *Akrich* is perfect and it could have far better clarified its precise scope and relation with prior decisions,[92] but no justice is done to the decision's underlying rationale if the judgment is dismissed in its entirety and classified as the worst ever. Instead, the Court protected, in the words of Maduro, 'the family lives of nationals of the Member States *in order to* eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty'.[93] *Akrich* did precisely what the AG and the Court said they were doing, but did not do, when deciding *Metock*. Has the partner of the EU citizen prior lawful residence in another Member State before moving to the host Member State, the refusal of the latter to give a right to reside to the family members would constitute a barrier to the freedom to move freely within the EU. Likewise, does the family member of the EU citizen acquire lawful residence in the host state, the citizen's Member State of nationality would erect a boundary to the right to free movement if refusing to let the national return with his or her family member.[94] In such situations, the right to move freely is at stake; not when the Union citizen establish a family following a move to and taking up residence within the host Member State. When its overall reasoning is our concern, *Akrich* cannot be that bad.

A more likely explanation for the positions taken, the general preference for *Metock* and dislike for *Akrich*, is outcome-related. *Metock* and subsequent case law have been defended on the grounds of justice and for contributing to a more meaningful form of citizenship within the Union.[95] Chapter 2 explored the argument from justice and the conceptual citizenship claims and explained their limitations. The 'citizenship' argument brings normative claims in the guise of conceptual analysis. That is, the scope of the right to family life within the EU depends on our conception of justice and fairness, not the conceptual presence of citizenship, and it is about the justice that there is lots of disagreement. It is tempting to think of *Metock* as being just, but if that decision necessarily produces just outcomes, it must be that all national immigration laws are by definition unjust, because *Metock* allows for the circumvention of all these laws by all mobile Union citizens. My argument is not that in

[92] For such a critique see: Peers (n 91); Spaventa (n 59). I do not find plausible, however, the claim that '*Akrich* can be classified as the erroneous judgment due to its apparent contradiction of the case law before it'. Which case is erroneous depends not on which came before. For that claim, Samantha Currie, 'Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court's Ruling in *Metock*' (2009) 34 European Law Review 310, 325.

[93] Opinion of AG Maduro (n 2) para 8 (italics added).

[94] Such a situation occurred in Case C-291/05 *Eind*, ECLI:EU:C:2007:771. This is not to say that situations such as the one that arose in *Eind* could be taken under the Citizenship Directive, which, in accordance with Article 3(1), applies 'to all Union citizens who move to or reside in a Member State other than that of which they are a national'. See to this also *O and B* (n 88) paras 37-38.

[95] Damian Chalmers, 'The Secret Delivery of Justice' (2008) 33 European Law Review 773; Currie (n 92); Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (n 80).

my view all national immigration rules and criteria, or those created by the EU for my part, are just and desirable, but those who defend *Metock* because it more closely conforms to principles of justice ignore that our reasonable disagreements also affect the scope and shape of immigration law.

Most of all, *Metock* is illegitimate as concerns questions of process. Two reasons exists for thinking that that is the case. The first is that the decision disregards the legislative constraints imposed by the Citizenship Directive; it cannot be justified by reference to its text and is incompatible with the substantive purposes behind it. In addition, there is the argument from subsidiarity and local democratic self-governance. As Halberstam has explained, '[al]l things being equal, democracy at the local level, especially when coupled with citizen mobility, is more representative of citizens' interests, allows for a greater satisfaction of diverse preferences, and is therefore more legitimate than democracy at a more distant level of governance'.[96] The Citizenship Directive did not mandate the result reached by *Metock* and absent any limitation of supranational mobility rights, questions such as those raised by *Metock* are more legitimately decided nationally. Without a barrier to the EU citizens' right to move and reside freely within the EU, the Union citizen resident within the host Member State is to be treated, in accordance with the principle of non-discrimination on the grounds of nationality, as the national of that state is treated. Non-discrimination thus provides an important legitimisation function, because it limits the extent to which the EU can intrude in national democratic processes. As accurately noted by Menéndez,

> [a]s long as free movement of persons was considered as an operationalisation of the principle of non-discrimination on the basis of nationality, the constitutional standards being applied were still national ones, an outcome in full accordance with the key legal role played by the collective of national constitutions as the deep constitution of the European Union, and consequently as the key source of democratic legitimacy of the synthetic constitutional order[97]

[96] Daniel Halberstam, 'Comparative Federalism and the Role of the Judiciary' in Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 152.
[97] Agustín José Menéndez, 'European Citizenship after Martínez Sala and Baumbast' (2009) 11/2009 ARENA Working Paper 1, 37. Of course, non-discrimination is a very slippery concept. It is difficult to draw a line between tackling discrimination and other obstacles to free movement. Alexander Somek, 'The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement' (2010) 16 European Law Journal 315.

Absent any countervailing interest of EU law, democratically legitimated Member State policies and national constitutional principles should be upheld rather than curbed. This, indeed, is what *Akrich* accomplished and *Metock* failed to ensure.

Conclusion

This chapter probed into questions of purpose and explained why the purposes behind legislation are relevant when the text runs out. I explained that in such circumstances, the best way of exploring the intentions of the legislature is to consider the substantive purposes expressed normally in the recitals of those acts of law it has enacted. Even though the objectives laid down therein may not always point into one direction, and even be contradictory, the subsequent analysis showed that the constraints of purpose exist, either when in combination with the textual constraints already offered, as was the case with Article 28, but also when the text is indeterminate as to the outcome to be reached, as was the case with the family reunification rights. At times, the constraints of purpose will produce results in accordance with our preferred conception of rights and justice, while on other occasions, deciding in accordance with the authority of legislation will produce results incompatible with how we would have preferred to have seen the matter decided.

Conclusion

This thesis has asserted that the EU legislature is to enjoy a certain primacy over other sources of authority and explained what it means for legislation to be treated as authoritative. I explained that because there is pervasive disagreement on what it means for justice to be constituted and principles of rights to be respected within the EU, and because these disagreements translate into disputes about the correct scope and meaning of the Treaties, the question of which source of authority can legitimately decide such matters cannot be answered on the ground of some instrumental account of authority. Instead, our account of legitimate decision-making within the EU must be independent of the outputs produced by them and should depart from considerations of input. I explained that for the EU to be reasonably legitimate, its course of action must be subject to the shared and equal control of national democratic fora, which is realisable only if the decisions taken by the EU legislature are authoritative and other sources of authority accept the constraints of EU legislation.

Much of my thesis has considered the question of what it means for other institutions to recognise the authority of legislation. I argued that other decision-makers should not aspire to realise as closely as possible the substantive purposes behind legislation and try to decide each individual case coming before them with that ambition in mind. Rather, those institutions must implement the rules enacted by legislation and realise the ambitions behind rule-based decision-making, namely, the generation of stability realised by withdrawing decisional authority from lower decision-makers and disallowing them from taking into consideration those factors that had otherwise been very relevant for realising a result approximating as closely as possible the substantive purpose behind the rule. And because legislative rules are articulated by the words used in legislation, rule-following and the authority of legislation depend on our recognition of the textuality of legislation and on decision-making in accordance with the constraints of the text. The substantive aims the legislation aspires to realise should be taken into consideration once the text runs out and underdetermines the outcomes to be reached.

Some will object that I have presented an extremely rigid account of legislative supremacy, overly reliant on text, and insufficiently open to exceptions if following the textual rules produces absurd results. Perhaps this is true and situations may arise in which following the constraints of text is so preposterous that it is better not to. This thesis has focused on what should be the norm, not on whether certain exceptions to this norm should be tolerated. Seeing that the current norm is one that

regularly fails to recognise the authority of legislation, it is preferable to focus on current practices and to consider a more desirable alternative than to focus on possible exceptions from this currently non-existent alternative.

Others may object that I have painted an overly rosy picture of the EU legislative process, that I underestimated the difficulty of judicial decision-making, or that my approach to law and legal scholarship fails to consider and do what legal academics should aspire to. In conclusion, I would like to offer some final reflections on each of these.

The responsibilities of the legislature

Some may think that my account of the EU legislative process is overly idealistic and out of tune with reality. They may claim that due to the heightened majority requirements and the subsequent difficulties of acquiring the required support for the adoption or amendment of legislation, it is impeded from acting in the common interest and cannot easily adjust previously enacted legislation so as to make it compatible with changed realities.[1] That possibility cannot be excluded, though it bears emphasis that the legislature has been remarkably productive despite all these hurdles. The question I sought to address was what lower-decision makers must do once the legislature has acted. One could claim that the judiciary must enjoy a certain freedom to 'update' legislation if, due to a failure to reach agreement on amendment, legislation becomes hopelessly outdated. That argument goes two ways, of course, because were the judiciary to assume such responsibilities, it could equally produce undesirable results. These are as difficult to overturn as outdated legislation. Furthermore, also this question belongs to debate about the exception to the norm and not become an excuse for changing the norm. That is, nothing indicates that the legislation considered in previous chapters was so outdated by the time the Court began refusing to follow it that the case law is justified on these grounds.

From the beginning, I have emphasized the fallibility of all decisional authorities, which, needless to say, includes the EU legislature. I also acknowledged that the EU legislature falls short of what should be the ideal currently, its processes of decision-making being insufficiently transparent and control by national parliaments over national representatives involved in the process still being inadequate. It was not my intention to portray the legislature as a near-perfect institution and further work is needed to make this process conform to desired standards of transparency and accountability.

[1] Fritz W Scharpf, 'Legitimacy in the Multi-Level European Polity' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 94–95.

I did not have the time, nor space, to reflect adequately on possible solutions, but I do not believe these are to be found in further judicial control. The judiciary has been part of the problem, has removed control over decision-making from legitimate fora of decision-making, and does not provide a process that is adequately transparent and open to the various interests that are at stake. A judicial solution to these problems is most likely self-defeating, posing further barriers to the legitimisation of EU decision-making.

All of this is not to say that there is no need for improving the performance of the legislature. Chapter 2 argued that the legislature fails to act responsibly if it introduces amendments to proposed legislation simply and only because the ECJ has rendered a verdict on the matter and designed one or another legal principle to resolve the dispute before it. This is not to claim that the legislature must ignore the case law when debating legislation, but that it should carefully consider whether it believes it to be desirable to follow the Court's lead or to reject its decisions. The legislature forgets its importance if it decides complex questions of public policy not in the general and with an eye for the broader range of interests affected by its decisions, but based on the particular and narrower set of factual circumstances of those cases before the Court.[2] The legislature fails to take responsibility for EU decision-making if it incorporates judge-made legal principles irrespective of how these fit with the overall scheme of legislation, without motivating its decisions, and without consideration of whether the best solution in the individual case also is the best solution for the EU as a whole, implementable by those who are expected to execute and enforce the law.

Concerning problems of transparency and accountability, the solution cannot be shifting responsibility to non-transparent and non-accountable institutions like courts. Problems to the input-side of decision-making within the EU need to come from within and will not be resolved by a shift of focus to output. Offering national parliaments a more prominent role is part of the solution and recent developments into that direction are to be welcomed.[3] The domain of foreign policy, however, remains dominated by national executives and for domestic democratic bodies to exercise greater control, therefore, it also is necessary for the Member States to offer more transparency about ongoing debates within the EU.[4] The responsibility also largely rests with national decision-makers, who should

[2] Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 Boston College Law Review 433.

[3] Richard Bellamy, 'Democracy without Democracy? Can the EU's Democratic "Outputs" Be Separated from the Democratic "Inputs" Provided by Competitive Parties and Majority Rule?' (2010) 17 Journal of European Public Policy 2.

[4] Thomas Christiano, 'Democratic Legitimacy and International Institutions' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010).

welcome greater oversight of national parliaments, but also should hear the other side, that is, must not just taking into consideration the interests of their own constituency, but also ensure that EU decision-making does not become dominating over democratic decision-making within other Member States. In recent years, important decisions are increasingly taken by political leaders outside the confines of the legislative process, which has affected the Member States' possibility to exercise shared and equal control over the decisions taken, instead resulting in the domination of the stronger over the weaker Member States.[5] The current situation can be improved on only with greater awareness of all for the benefits of shared decision-making of Member States over EU decision-making.

The responsibilities of the judiciary

I have made the attempt to offer as fair an assessment of the judiciary as possible and give it credit where credit is due. I intend to believe, however, that much of its case law falls short of acceptable standards, in particular when it comes to the quality of its legal reasoning. Arguments cannot always made sense of, frequently are not spelled out in full, and sometimes are mostly stipulative. The 'Union citizenship is destined to be the fundamental status of nationals of the Member States'[6] 'argument' offers a good case in point. Beyond the fact that it remains unclear whose intentions the Court was giving effect to – the argument appears contrary to 'text, teleology and legislative history' of the Treaties indeed[7] – it remains a mystery how a status that is (or better put, may or may not be) destined to become fundamental can produce legal effects at this point in time while it has not reached the state of fundamentality yet. Yet, the Court has managed to resolve legal disputes on ground of this statement alone; no further legal argumentation was needed in the judges' view.[8]

One striking feature of its case law is the weight given by the judges to precedent, also in the face of ostensible tensions with previous case law and legislation. Rarely is a statement of the kind 'as the Court has previously decided/said…' followed by some consideration of what the legislature actually decided/said. The Court failed to acknowledge the tensions between its decisions and legislation in the case of clear incompatibilities with already existing legislation (the Article 28 case law), when previous decisions were overruled by a new legislative act (*Vatsouras and Koupatantze*), or

[5] Mark Dawson and Floris Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 The Modern Law Review 817.
[6] Case C-184/99 *Grzelczyk*, ECLI:EU:C:2001:458, para 31.
[7] JHH Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 248.
[8] Most famously, Case C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124.

when it had to consider the relevance of previous rulings in a very different context governed by a very different set of legal provisions (*Commission v UK*). Failing to recognise the authority of legislation, it upheld previous decisions or applied them to very different contexts in all of these situations.

Too frequently, moreover, is the task of clarifying how specific cases relate to precedent and alternative legal sources left to legal commentators, who must regularly be as puzzled and unaware of the precise implications as the law's addressees must be.[9] For example, as I explained in chapter 2, it cannot be that *Dano* and *Alimanovic* are compatible with what the Court decided earlier in *Vatsouras and Koupatantze*. The contrast between these cases is too dramatic for that to be possible. However, because it remained silent on which of the principles leading to the decision in *Vatsouras and Koupatantze* had been reversed, there still is no adequate clarity about what is valid law. The Court's credibility, I fear, may be harmed by its failure to offer adequate explanations and justifications for its decisions.

It is not always easy to figure out what exactly explains the Court's erratic attitude towards legislation. It is fair to say, I think, that multiple factors contribute to the Court's shortcomings in recognising legislation as authoritative. On occasion, it is simply a disdain for legislative decision-making. *Vatsouras and Koupatantze*, discussed in chapter 2, provide such an example. The AG thought it was obvious that legislation could not contradict earlier case law and the Court refused simply to consider that option. I believe that a number of far more important reasons exists that explain the problems discussed in this thesis. Sometimes it may simply be because the political heat it feels that it decides legal questions one way rather than another. It seems difficult to explain *Commission v UK* in full without taking into account the raging debate in the UK on whether or not to withdraw from the EU and the referendum that was scheduled shortly after the case was decided. More often, however, the reasons for the Court's failure to defer to legislation may be more benign. It seems plausible to think that the judiciary's unawareness about what it means to treat legislation as authoritative is as great as that of EU lawyers at large. The fact that some judicial officials think it is very normal if the Court uses different methods of interpretation interchangeably shows this.[10]

We should also not ignore the difficult conditions under which legal officials perform their jobs. Due to concern about the backlog of cases to be decided and the consequent pressure to deliver decisions within a short timeframe, the quality of decision-making may have suffered at times. It can

[9] Which is a common and critique of *Dano* and also *Alimanovic*: Daniel Thym, 'When Union Citizens Turn Into Illegal Migrants: The *Dano* Case' (2015) 40 European Law Review 249.

[10] Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) 20 Columbia Journal of European law 3.

perhaps not surprise that under such circumstances, those drafting the decisions resort primarily to previous case law, which explains the weight of precedent and the application of previous case law to new situations with very different contexts. That does not justify the decisions, but, in fact, demonstrates precisely the importance of legislation and, in particular, the stability and clarity offered by legislative rules. If the current case load is a problem, one of the solutions is rule-based decision-making and following the constraints imposed by the written text of legislation. Coming to a coherent perspective of legal interpretation, whereby all treat the text of legislation as leading and not the purposes behind the legislation or the Treaties has two advantages. First, it would ease decision-making for the members of the Court, who know which source of law to consider primarily. To the extent that the text determines the outcome, no further consideration of purpose and the Treaties is needed. Secondly, it may also offer national decision-makers further clarity of what is expected of them, likely with positive consequences for the workload of the Court.

The responsibilities of scholarship

Perhaps I should not use the term 'responsibilities' in relation to scholarship and it is better to speak of the directions academic approaches to law should take. The first issue that merits our attention is the considerable obsession with substantive results, which reaches far beyond the domain of EU citizenship and creates an institutional neglect. As this thesis has shown, do we like the result of purposive reasoning, we favour that method, if not, we advocate for textualism; do we agree with the result of rule-application, the rules are to be followed, if not, the constraints of rules should be ignored. More generally, do we approve of legislation, it should not be interpreted in light of the Charter of Fundamental Rights and the Court refrain from considering it,[11] but if the application of Charter rights could give us a result we perceive of as more just, its provisions should have been considered;[12] do we consider minimum harmonisation desirable, the ECJ should not restrict the Member State's

[11] Which was the reaction of some scholars to Case C-426/11 *Alemo-Herron*, ECLI:EU:C:2013:521.

[12] The Court's refusal to apply the Charter in Case C-333/13 *Dano*, ECLI:EU:C:2014:2358 was, if understood, certainly not popular.

discretion,[13] but if the minimum standards are not sufficiently far-reaching, further constraints are to be imposed by case law.[14]

Much of what we think of a decision depends on our perception of the result and that perception influences our account of legitimate political institutions within the EU. This position is untenable, simply because its underlying assumptions are. We will not come to a shared understanding of the requirements of justice at the transnational level and no institution is positioned where it can objectively discover moral truths. Against that background, it is necessary to consider not just the substantive results produced by EU decision-making, but also these decision-making processes themselves. In other words, we cannot keep adopting contradictory positions on questions of authority, legal interpretation, the relationship between primary and secondary law, and rule-following, depending on which position brings us the result that pleases us. We have no choice but to take institutional questions more seriously.[15]

That these questions escape our attention too frequently is probably also because of the dominant methodological approaches in EU law scholarship and the frequent neglect of the insights produced by different but highly relevant disciplines. Scholars working in other domains have long highlighted the difficulty of political decision-making when there is disagreement on substantive results, be it political theory or US legal scholarship. Somehow, EU lawyers remain largely oblivious to these debates, or perhaps they were aware and forgot to think through the implications for EU law. That is the case not just when it comes to debate on legitimate decision-making in complex societies marked by considerable disputes on the substantive content of the law, but also of many of the other issues this thesis addressed. For example, to the extent that methods of interpretation grabbed the attention of scholars, the literature fails to consider the literature that is situated beyond the boundaries of EU legal scholarship, be it theory on law, language, and interpretation, or debate on statutory interpretation by US legal scholars. I also think that the ease by which EU lawyers think it is

[13] Case C-157/14 *G4S Secure Solutions*, ECLI:EU:C:2017:203. For a brief but thoughtful analysis, Eleanor Spaventa, 'What is the point of minimum harmonization of fundamental rights? Some further reflections on the Achbita case' (2017) EU Law Analysis, available at: <http://eulawanalysis.blogspot.nl/2017/03/what-is-point-of-minimum-harmonization.html> (last visited: 31-08-2017).

[14] Article 7(3)(c) of the Citizenship Directive stipulates that EU citizens who have worked for less than 12 months, shall retain the status of worker 'for no less than six months'. Member States are free to extend that status of worker beyond this period, but nothing in the Directive obliges them to do so. This the Court recognised in Case C-67/14 *Alimanovic*, ECLI:EU:C:2015:597, but some contend it should merely have treated this period as a floor and have obliged the Member States to extend this status beyond this period Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 Common Market Law Review 937, 959.

[15] For a plea for further institutional analysis read the first chapter of Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016).

appropriate for rules to be set aside cannot be explained fully if it were not for the absence of wider debate on rule-based decision-making.

That EU legal scholarship often shows little awareness of neighbouring disciplines and, as a consequence, forgets to uncover the theoretical assumptions upon which many legal arguments are based must be, it seems to me, because of the dominance of the doctrinal method. Von Bogdandy once asserted that 'the highest scientific goal of the doctrinal construction is to reconstruct and represent both public and private law as complexes of systematically coordinated concepts',[16] which it accomplishes not

> by way of political, historical, or philosophical reflection, but through structure-giving concepts such as *state, sovereignty*, or *individual rights in public law*, which are conceived of as *specifically legal* and, thus, autonomous, which as a consequence fall under the exclusive competence of legal scholarship.[17]

Presumably, these autonomous concepts include legitimacy and citizenship and it is desirable, the doctrinalist believes, to treat these as exclusively legal. If Von Bogdandy is correct about the dominance of this approach, and I believe he is, the a-theoretical nature of much EU legal scholarship cannot surprise. It is only natural that discussion on legitimate political decision-making within the EU ignores theoretical accounts on legitimacy and democracy beyond the state and that discussion on EU citizenship remains highly conceptual, unaware of broader theoretical reflection on citizenship. This is not to suggest that the doctrinal method is of no relevance, the legal developments being unworthy of serious study, but the concepts that are so central to the legal discipline have been debated at length by other disciplines and it would be a shame not to use their insights to create a greater awareness of and think through the normative presuppositions underlying the legal debate.

My objections against EU lawyers' efforts to capture legal developments in terms of substantive outcomes should not be understood as a dismissal of these efforts. In large parts, the ambition of recent work on justice is precisely to escape the doctrinal confines of the discipline. However, as I have argued before, while legitimacy is no substitute for justice, it is certainly a necessary complement to work that focuses on substantive results. Unfortunately, some of the more recent

[16] Armin Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 European Law Journal 95, 99.

[17] Von Bogdandy (n 17); Armin von Bogdandy, 'The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe' (2009) 7 International Journal of Constitutional Law 364, 373.

scholarship is so preoccupied with the justness of decision-making that institutional questions are virtually deemed unworthy of consideration. One scholar holds that the expression of concern over democracy and legitimacy is the embrace of some conception of 'legal formalism', obstructing the realisation of 'equality and justice' within the EU.[18] Another holds that one should better not invoke 'the will of the legislature' because of the degree of 'xenoscepticism' underlying the citizenship legislation.[19] I believe that nothing is gained by labelling those who have no justice-based objections against permitting Member States to deny certain foreigners social assistance as xenosceptics or legal formalists. A more fruitful approach is to recognise these as individuals with a different understanding of justice, with whom there can be reasonable disagreement, and that, against that background, democracy and legitimacy are issues as important as justice and equality. If not, we will remain wholly oblivious to 'the circumstances of politics',[20] that is, the need for a common framework of collective rules that is accepted by everyone as legitimate while there is so much disagreement on the ideal substantive content of that framework. We must begin to recognise that the pervasive disagreements on the EU's course of action and the substantive content of its policies happens normally between reasonable people with different upbringings, talents, and interests and that, therefore, all EU citizens must be offered grounds on which they can accept the outcomes of EU decision-making, even if in substantive disagreement with them. For that, the recognition of the authority of legislation is indispensable.

[18] Dimitry Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2011) 08/10 Jean Monnet Working Paper.
[19] Charlotte O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union' (2013) 50 Common Market Law Review 1643, 1679.
[20] Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 101.

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