

The Case for the Authority of Legislation within the European Union
(work in progress – please do not circulate; comments very welcome)

The European Union legislature has been an extremely prolific institute. These days, legislative acts are vast in number and scope, regulating most domains of EU law. That raises the question of what we are to make of its authority and to what extent we should value its decisions. Some EU lawyers question the significance of legislative decision-making and find it unproblematic if the Court of Justice of the European Union (CJEU or Court) undermines its authority. Francis Jacobs, a former Advocate General (AG) at the Court, named it 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 It may not surprise that one of the most eminent of members ever to have served at the Court holds such beliefs, but it appears indicative of what many EU lawyers think of legislatures and legislation. Charlotte O’Brien bluntly claimed that ‘judicial decisions and intellectual commentary, not legislation, have transformed conceptions of human rights and democracy’,² the minimal empirical evidence that exists to support that position notwithstanding.³ Going even further, Floris de Witte has made the argument that the EU must contain national legislative processes by re-allocating responsibilities ‘to a different *type* of government, whether judicial ... expert based ... administrative ... or the individual’.⁴ In other words, EU political decisions are to be taken by any institution but the legislature.

In this article, I offer an alternative view that emphasises the benefits of legislative decision-making within the European Union. I shall do so by exploring the downsides of dominant perspectives on legitimate political authority within the EU, which frequently lead EU lawyers to reject the authority of EU legislation. They tend to adopt so-called ‘instrumentalist approaches to authority’,⁵ according to which the legitimacy of a decision depends on its moral qualities and the authority enjoying

¹ Francis Geoffrey Jacobs, *The Sovereignty of Law: The European Way* (Cambridge University Press 2007) 1.

² Charlotte O’Brien, ‘I Trade, Therefore I Am: Legal Personhood in the European Union’ (2013) 50 *Common Market Law Review* 1643, 1680.

³ That lawyers are overly optimistic about what can be and has been realised by judicial decision-making is something that democratic theorists have emphasized for on multiple occasions. 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. See also, Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard Univ Press 2007).

⁴ Floris de Witte, ‘Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law’ (2013) 50 *Common Market Law Review* 1545, 1554 (footnotes omitted).

⁵ For a critical discussion of instrumentalism, read Thomas Christiano, ‘The Authority of Democracy’ (2004) 12 *Journal of Political Philosophy* 266.

legitimacy is that which realises the best substantive outcome. The EU legislature, it is important to clarify immediately, is negatively affected by such instrumentality. As a result, legislation is treated as the baseline; as legitimate unless we can conceive of better outcomes. Those legislative decisions that we like are authoritative, while others are ready for a second round of debate in court.

By demonstrating the shortcomings of that approach, I shall highlight the benefits of legislative decision-making. Section 1 shows that accounts informed by instrumentality offer us wholly inconsistent positions on institutional questions, such as the interpretation of legislation and rule-following. Turning to recent literature on social justice within the EU, section 2 highlights the commonality of instrumental conceptions of legitimacy in EU scholarship and uncovers the two core assumptions underlying such conceptions. These assume that (1) we can come to a shared understanding of justice and the common good and (2) that the judiciary is more likely to produce desirable outcomes. Section 3 establishes that the first is implausible because it overlooks our reasonable disagreements on justice. Section 4 rejects the second, for resting upon an overly optimistic (pessimistic) view of the CJEU (the legislature). The distinct qualities of the EU legislature become evident once we accept their implausibility. In argue in section 5 that the authority of legislation deserves wider recognition among EU lawyers for reasons of political legitimacy and because of the EU legislature's specific institutional abilities. Section 6 offers a response to two final arguments EU lawyers may bring against my claim that the authority of legislation deserves better recognition. Against those who claim that the EU's hierarchy of legal sources demands the Court to police the legislature strictly and that legislation is not always of adequate quality, I shall respond that existing shortcomings may be the consequence of us not giving the EU legislature sufficient freedom to amend legislation.

To add flesh to my normative claims, I situate my argument in the context of recent case law on EU citizenship. That may seem like an unlikely candidate for my argument, because few think that the EU Citizenship Directive is an exemplar piece of legislation.⁶ The domain of EU citizenship proves interesting, however, for a number of reasons. First, much of the literature on social justice centres on the mobility of Union citizens and dominant responses to recent decisions in this field demonstrate how our accounts of political legitimacy are informed by instrumentalist conceptions. Second, the literature demonstrates how, without a better awareness of how often our views on what is legitimate for EU institutions to do is conditioned almost solely by what we believe is the best outcome, leads to inconsistent positions on institutional questions. Third, the Court is known for its non-deferential

⁶ 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.

attitude towards EU citizenship legislation. While that has changed somewhat in recent years, the judiciary's inconsistent attitude towards EU citizenship legislation offers additional insights into the problematic presumptions underlying instrumentalist accounts of legitimate authority. Finally, while it is common knowledge that the EU Citizenship Directive is plagued by a degree of inconsistency, it is much less noted that some of the shortcomings are attributable to the judiciary's dominance and the widely held view, also internalised by some of our legislators so it appears, that the EU legislature must be subservient to CJEU.

1. Justice, legitimate authority, and interpretation

To understand the consequences of instrumentalist accounts of legitimate political authority, it proves useful to begin with a hypothetical situation: An EU citizen with the nationality of the Netherlands moves to Germany in order to pursue her preferred degree of study there. She does her best to integrate and after two years has an impressive command of the German language. Due to financial troubles, however, it is uncertain if she can stay and she applies for financial aid, to which Germany entitles its own nationals. The German authorities deny that request and support that decision by pointing out that the Citizenship Directive obliges them to confer benefits to long-term residents (EU citizens with continuous legal residence for a period of five years), but not to those who do not satisfy those criteria.⁷ The Dutch national disagrees with that interpretation of the Directive and argues that it ignores the substantive purpose behind the rule. Having carefully studied the Directive's recitals, she concludes that its ambition is to realise justice in the treatment of mobile citizens, meaning concretely that well-integrated EU citizens must be conferred benefits.⁸ For that purpose to be realised, and to examine her degree of integration, the responsible authorities should not solely consider her period of legal residence within Germany, but also her individual circumstances. These tell that it is beyond dispute that she has become well integrated, which for her is reason to conclude that the five-year rule should not be enforced if Germany wants to realise the substantive ambitions the EU legislature had in mind.

Her parents, worried that bringing a legal case against Germany would distract her too much from her studies, decided to transfer the money she needs. As result, she manages to complete her degree and even finds employment in Germany subsequently. However, following a period of legal and continuous residence within Germany of approximately six years, the police discovers she sold

⁷ Article 16(1) in combination with Article 24(2) of Directive 2004/38/EC.

⁸ Read, for example, recital 16.

drugs to her social network of friends and relatives. Notwithstanding the fact that she dealt in minor quantities, the German authorities issue her an expulsion order on the ground of public policy. She objects and invokes Article 28(2) of the Directive in her defence, according to which those with the right to permanent residence cannot be expelled ‘except on *serious grounds* of public policy or public security’. She accepts that her behaviour constituted a violation of German public policy, but argues that it certainly was not so serious that an expulsion order was justified. The German authorities acknowledge the existence of that rule but contest its applicability in this case. They claim that if it were followed and applied, the result realised would be incompatible with the substantive intentions behind the legislative act. Recital 18 of the Citizenship Directive indicates that the status of permanent residence is to serve as a ‘genuine vehicle for integration’. To realise these intentions, the status of permanent residence cannot be available to those who demonstrate a lack of integration, which requires an assessment not just of periods of residence but of the citizen’s individual behaviour and 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. Hence, not the Directive’s text must be leading, but the substantive purposes behind the written rule.

Note the great similarities between both situations. Both raise questions about the correct interpretation of the Citizenship Directive. More specifically, the question is if a period of residence alone defines the legal position of the Union citizen, or whether that depends on the individual’s personal circumstances. The answer to that question depends on our preferred method of interpretation. Should the rules laid down in the written text of the Directive’s operative part be leading (a more textualist approach), or should it be interpreted against the purposes that lie behind the enacted law, as expressed in the recitals of legislation (a more purposivist approach)? Either the method we prefer depends on what we perceive to be 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.

The main difference between both situations is that 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. When the CJEU upheld a Dutch rule that made eligibility to maintenance grants for students conditional upon a five-year residence period in *Förster*,⁹ and gave effect to Article 24(2) of the Citizenship Directive in doing so, many argued that it should have considered her individual circumstances.¹⁰ The same criticism fell on the Court when it deferred to the Directive's written rules and permitted the Member States to deny social assistance to those who had not satisfied the prescribed temporal requirements in more recent social assistance case law.¹¹ However, in marked contrast with the social assistance case law, recent decisions on the justifiability of expulsion measures deviate from the Directive's precise rules that condition EU citizens' protection against expulsion upon their period of residence in the host state, and made the level of protection conditional upon the degree of integration and personal ties of convicts.¹² Equally noticeable is the case law's assessment in the literature, scholars arguing that a textual reading of the Directive tells us that the level of protection against expulsion is defined initially by periods of residence. This time, and in contrast with the social assistance case law, the Court should not have considered the citizens' personal circumstances. 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. Eleanor Spaventa held, on the one hand, 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',¹³ but also criticised the individual assessments introduced by the expulsion case law for introducing elements incompatible with the text of the Directive.¹⁴

⁹ Case C-158/07 *Förster*, ECLI:EU:C:2008:630.

¹⁰ 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.

¹¹ It did so in Case C-67/14 *Alimanovic*, ECLI:EU:C:2015:597 and Case C-299/14 *García-Nieto*, ECLI:EU:C:2016:114.

¹² Among other decisions, in Case C-378/12 *Onuekwere* ECLI:EU:C:2014:13.

¹³ 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).

¹⁴ *ibid* 105–106.

Niamh Nic Shuibhne, moreover, has lamented the social assistance case law for radically downgrading ‘the formerly central place of individual assessments’,¹⁵ but argues that the expulsion case law limits rights ‘in disruption of the will of the legislature’.¹⁶ Apparently, whether the text of the Citizenship Directive must be leading and constrain the judges, and the rules therein to be applied, depends on the circumstances of the case.

2. A vote of no confidence in the EU legislature

Note that three different questions underlie the two hypothetical cases discussed in the previous section. These are: (1) what is the host Member State due to the mobile citizen according to the law in force; (2) what is it for that person to be given her due, in accordance with our best understanding of justice; (3) who should decide the requirements of justice and establish which treatment gives the citizen her due? These three questions are interrelated, but address very different issues. The first question is about legal interpretation, the second justice, and the third legitimate authority. The subsequent question concerns how we should order the three and decide which is leading. Two possibilities exist. The first is non-instrumentalist. That is, we can separate our conception of political legitimacy and our theories of legislative interpretation from the question of justice (separate 1 and 3 from 2). If that is the right approach, our theory of legitimate authority within the EU must be content-independent, i.e., not conditional on some measure of justice, but instead on the fairness of the decision-making process by which we resolve our disputes. And the task of legal interpretation is then about defining what the author of the legal norm that is interpreted actually meant when it established that norm, not about establishing what is just. The second option is instrumentalist and makes our theories of legitimate authority and interpretation content-dependent, conditional upon securing just results (condition 1 and 3 by 2). From that perspective, it follows that the institution holding 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.

The previous section demonstrates that EU lawyers are inclined to take this second approach and embrace a content-dependent conception of legitimate authority. The underlying motives are easy to gauge. We all want decisions taken by EU institutions to be just and respectful of individual rights, which explains why we evaluate the policies enacted by the EU along dimensions that measure the

¹⁵ Niamh Nic Shuibhne, ‘Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship’ (2015) 52 *Common Market Law Review* 889, 913.

¹⁶ *ibid* 921 (*italics omitted*).

quality of outcomes. It is tempting, therefore, to think that the EU's legitimacy is dependent on its realisation of justice and that the institution whose decision is authoritative is that which realises the best substantive outcomes. That is a common approach in EU scholarship. For example, all of the recent scholarship on justice within the EU conflates legitimacy with justice.

Consider first the positions of Ms Dano and Ms Alimanovic. Ms Dano, a Romanian national, entered Germany together with her child in 2010, where she lived with her sister, who took care of both. She was issued a certificate attesting the right of residence of unlimited duration in 2011. Ms Dano made applications for jobseeker benefits in 2011 and 2012, both of which the German authorities rejected.¹⁷ The responsible authorities took a similar decision in the case of Ms Alimanovic and her children, even though the situation of the Alimanovic family differs from that of Ms Dano in an important respect. While the latter, the CJEU tells us, did not demonstrate signs of integration within Germany,¹⁸ 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.¹⁹ Notwithstanding these differences, the Court decided in both cases that the decision to withhold benefits was compatible with EU law.

Both 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 those individuals. De Witte criticised *Dano* from his perspective of communitarianism, which leads him to adopt the principle that EU citizens cannot be denied those benefits that 'prevent human need'.²⁰ 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 the host state'.²¹ 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.²²

¹⁷ Case C-333/13 *Dano*, ECLI:EU:C:2014:2358, paras 35-41

¹⁸ *Ibid* para 39.

¹⁹ Case C-67/14 *Alimanovic*, ECLI:EU:C:2015:597, paras 25-32.

²⁰ de Witte (n 10) 132.

²¹ *Ibid* 155.

²² Päivi Johanna Neuvonen, *Equal Citizenship and Its Limits in EU Law: We The Burden* (Hart Publishing 2016) chapter 2.

O'Brien has offered the most damning assessment of both cases, alleging that they have created 'a moral vacuum within the free movement framework'.²³

Closer inspection shows that all three authors embrace an instrumentalist conception of authority – legislation is authoritative only when just – for they effectively suggest that, had the case law realised an outcome compatible with their understanding of justice, the Court could legitimately have refused to apply the Directive's rules. That is, they argue for the Court to circumvent the authority of legislation on grounds of justice. De Witte and Neuvonen acknowledge explicitly that *Dano* produces an outcome compatible with the relevant legislative rules.²⁴ That *Alimanovic* implemented the Directive is even harder to dispute, because its text 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 Ms Alimanovic no longer enjoyed the status under this provision when they claimed benefits.²⁵ 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

²³ 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.

²⁴ 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 10) 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 CJEU. Neuvonen (n 22) 60–61.

²⁵ *Alimanovic* (n 19) para 55.

to deny benefits to those falling within the scope of the Article 14(4)(b),²⁶ Germany was permitted to deny the family benefits.²⁷ The decision makes perfect sense if the Directive's text is considered.

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 in the name of justice do not 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,²⁸ our position that the judiciary is to debate again important questions of public morality and policy, as settled already by legislation, is simply untenable. As we could see in the introduction to this article, de Witte and O'Brien have also explicitly made the case against legislative decision-making. Two assumptions reinforce that position, which Bellamy described as the core tenets of legal constitutionalist thought: first, we can rationally agree on the kind of substantive outcomes political decision-makers must realise and, secondly, the judicial process can more steadfastly achieve these results.²⁹ Much of the debate on justice within the EU takes place against these background assumptions. To understand the problem of instrumentalist theories, we should realise the difficulties underlying these assumptions. The next two sections explore these.

3. 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. 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'.³⁰ That position, however, is implausible. Disagreement simply is too persistent a fact of our political lives and happens against a background in which it seems unrealistic to think that correct moral truths are identifiable.³¹ As Waldron explained,

²⁶ Ibid para 57.

²⁷ 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)'.

²⁸ Neil K Komisar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997) 207.

²⁹ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 20.

³⁰ Andrew J Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge University Press 2010) 321–322.

³¹ Dahl (n 3) 66.

this is not necessarily because uniformly valid morals are non-existing, but because no one seems capable of their discovery.³² Equally important, people generally disagree not because of self-interested or malign motives, but because of what Rawls called ‘the burdens of judgment’.³³ 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.³⁴ Some of us may be driven by malicious ambitions, but it appears implausible to think that this is true for the great majority of us. Disagreements on the good, therefore, are better considered as reasonable disagreements among reasonable people.

Such disagreements extend beyond the confines of the state and equally affect 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.³⁵ 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. For example, 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. Not even Neuvonen and de Witte, their

³² Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) Chapter 8.

³³ John Rawls, *Political Liberalism* (Columbia University Press 1993) 54–58.

³⁴ Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2008) 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 3) 99.

³⁵ 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*.

common position on *Dano* notwithstanding, share the same conception of justice.³⁶ 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.

This is not to say that we should think of the outcomes produced by the case law implementing legislation as just. We can disagree with the substantive decisions taken, which is a valid ground for criticising the legal rule that supports that decision. What we should realise, however, is that the legislature tries to establish justice when it decides to act. That is, as the political theorist Christiano said it,

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. 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.³⁷

It happens regularly that we think 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 said to have contributed to a moral vacuum is that it establishes a particular conception of justice.

All of this is to say that also the EU is affected by, what Waldron termed, 'the circumstances of politics'.³⁸ That means, 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. In a world we inhabit with, and in which our actions have consequences for others, there must be shared rules that guide our behaviour and describe the distribution of resources. Would there be a 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

³⁶ 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.

³⁷ Christiano, *The Constitution of Equality* (n 34) 55.

³⁸ Waldron, *Law and Disagreement* (n 32) 101.

also necessitates it. This is no different in the EU. Precisely because a common understanding of the broader ideals of European integration is lacking among the Member States and their citizens 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.

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, our theories of legitimate political authority within the EU should be more greatly concerned with the intrinsic qualities of different institutional processes.³⁹ To be clear, 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'.⁴⁰ Our appreciation for political institutions comes precisely from our realisation that we can constitute justice in our societies only through collective decision-making.⁴¹ It would be a mistake, therefore, not to address and discuss the outcomes realised by such processes. I argue 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.⁴²

I will build on this premise and make the case that the authority of legislation within the EU deserves much wider recognition on this ground in section 5. At any rate, we should be critical of the position, offered by O'Brien in response to those who invoke the will of the legislature, that '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'.⁴³ Beyond

³⁹ This distinction between justice and legitimacy is common among political theorists these days: **xxx**

Christiano, *The Constitution of Equality* (n 34) 232–234; Bellamy (n 29); Waldron, *Law and Disagreement* (n 32).

⁴⁰ 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).

⁴¹ Christiano, 'The Authority of Democracy' (n 5) 269.

⁴² 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.

⁴³ O'Brien (n 2) 1679–1680.

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.

4. 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. Otherwise, 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.

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.⁴⁴ This 'nirvana fallacy', the phenomenon of comparing the actual performance of legislatures with an ideal conception of courts,⁴⁵ occurs within EU law scholarship as well. It has been said 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'.⁴⁶ No institution, however, no

⁴⁴ Komesar (n 28) 26. See also, Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999).

⁴⁵ Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006) 40; Komesar (n 28). See also, Keith E Whittington, 'In Defense of Legislatures' (2000) 28 *Political Theory* 690.

⁴⁶ 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.

matter how well it performs, is able to decide with such a degree of perfection. Beyond our substantive disagreements on justice, we should recognise the fact of institutional fallibility and build our institutional theories from there. Our theories of judicial behaviour should not presume that judicial institutions perform in accordance with some idealised process. If the literature on EU citizenship is somewhat representative of EU legal scholarship more generally speaking, our institutional accounts frequently neglect this more realistic assumption.

Not just that, the literature also demonstrates the risks involved in not recognising the fallibility of the judiciary and encouraging the Court to neglect legislative rules if in the interest of justice. It is tempting to focus on cases such as *Dano* and *Alimanovic* individually, highlight the beneficial implications of a departure from the rules for the individual claimants, and claim that the Court ought not to be deferential to the delineation of citizenship rights in legislation. Those who argue that the judiciary should be free to disregard legislative decisions it considers objectionable must at least accept, as Vermeule emphasised, that also judicial rule ‘produces a package of outcomes, both good and bad’.⁴⁷ For example, the judicial attitude advocated for by opponents of *Dano* and *Alimanovic* also gave us *Commission v UK*, a decision known for disregarding legislative provisions at the expense of EU citizens’ social rights.⁴⁸

Even more telling is the contrast the social assistance case law offers when compared with the expulsion case law. As I explained in section 1, the literature assesses both domains differently and takes inconsistent positions on matters of interpretation and rule-following. The social assistance case law has been criticised for its deference to the Citizenship Directive’s written rules and for conditioning entitlement to social assistance based on periods of residence within the host state. Rather, the argument goes, the Court should have considered the applicants individual circumstances and have realised an outcome that is proportionate seeing the substantive purposes behind the rule.⁴⁹ To witness the consequences of that approach, one only needs to turn to the expulsion case law.

Article 28 of the Directive distinguishes between three classes of EU citizens, offering each group a specific level of protection against expulsion. To offer a greater degree of protection to EU citizens with stronger connections to the host state, protection is contingent upon their periods of residence within the host state. Article 28(1) of the Directive states that Union citizens can be expelled

⁴⁷ Vermeule (n 45) 231.

⁴⁸ Case C-308/14 *Commission v UK*, ECLI:EU:C:2016:436.

⁴⁹ 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; O’Brien (n 23) 950.

on grounds of public policy and security. 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’. 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 public security’. 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.⁵⁰ Likewise, a period of absence of two continuous years is reason for the loss of permanent residence status according to the Directive.⁵¹

Rather than following these rules, the responsible judges decided to add an assessment of individual qualitative elements to the decision on whether or not expulsion is permissible. By reference to the Directive’s recitals, the Court reasoned that the EU legislature ‘made the acquisition of the right of permanent residence ... subject to the integration of the citizen of the Union’.⁵² 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.⁵³ 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, however, 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

⁵⁰ 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.

⁵¹ Article 16(4) of Directive 2004/38/EC.

⁵² *Onuekwere* (n 12) para 24.

⁵³ Article 16(1) of the Directive.

the loss of the right of permanent residence *even outside the circumstances* mentioned in Article 16(4) of Directive 2004/38⁵⁴

Adding grounds for the termination of permanent residence that are nowhere to be found in Article 16(4) of the Directive,⁵⁵ 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 demonstrates a lack of integration.

Subsequently, in *M.G.*, the Court rendered Article 28 practically meaningless. It decided that the ten-year period of residence, which grants EU citizens the most extensive degree of protection against expulsion, 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’.⁵⁶ In addition, invoking *Onuekwere*, it decided custodial sentences to be an indication of a lack of integration, which could interrupt the continuity of residence.⁵⁷ This effectively quashed Article 28(3).⁵⁸ 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. Furthermore, since Article 28(2) can be interrupted, so the Court decided in *Onuekwere*, if integration has been undermined, of which criminal behaviour offers proof according to *M.G.*, also protection under Article 28(2) was rendered meaningless.

All that is left is Article 28(1), which requires national authorities to 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

⁵⁴ *Onuekwere* (n 12) para 25 (italics added).

⁵⁵ See also: Nic Shuibhne (n 15) 920.

⁵⁶ *Ibid*, paras 24-27.

⁵⁷ *Ibid*, paras 31-33.

⁵⁸ The result is indeed ‘nonsensical and unclear’: Spaventa (n 13). 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 15) 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.

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’.⁵⁹ 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.⁶⁰

The Court did in the expulsion case law exactly what different scholars encouraged it to do in the case law delineating citizens’ access to social assistance, i.e., apply the recitals rather than the written rules and condition rights by individual assessments rather than periods of residence. This time, however, there were no positive implications for the individual citizen, which explains the negative response in the literature. After all, while 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, 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. The difference is not just 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. It also concerns the constraints imposed on the discretion enjoyed by authorities responsible for deciding on whether to take expulsion measures. The Directive 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.

Those who suggest that the CJEU should refuse to follow legislative rules if these produce undesirable consequences or are unfair to the individual affected by them fail to give sufficient thought to the question of which institution protects us against judicial fallibility. For example, opposing the fact that the Citizenship Directive allows for the expulsion of Union citizens, Kochenov and Belavasau argued that ‘[i]n ideal world the Court ... should not be deferential to the legislative outcomes of a democratic process which are harmful or make no sense’.⁶¹ However, that we find this statement in

⁵⁹ Case C-400/12 *M.G.*, ECLI:EU:C:2014:9.

⁶⁰ *Ibid*, paras 36-38.

⁶¹ Kochenov and Belavasau (n 59).

an article that otherwise vilifies the CJEU for having 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, in which giving such powers to the Court necessarily is beneficial. 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.⁶² We value particular institutions and entrust them to decide our disputes despite all their limitations.

5. The Case for the Authority of Legislation within the EU

The previous two sections highlighted the shortcomings of the two assumptions supporting instrumentalist theories of legitimacy that favour the Court circumventing the authority of legislation when necessary to realise their conception of justice. Meanwhile, I highlighted certain of the values we should associate with legislative decision-making. In this section, I will flesh out these values more clearly and focus on two distinct qualities of the EU legislature: political legitimacy and institutional ability.

I argued against content-dependent conceptions of legitimacy and explained the need for theories of legitimate political authority within the EU that are separate from our conceptions of justice. Once we adopt a content-independent account of legitimate decision-making within the EU, the value of legislative decision-making is difficult to deny. Some EU lawyers resist this conclusion, by creating an interesting sort of catch-22 the legislature cannot escape and always designates the Court as the most legitimate institution. On the one hand, they assume content-dependent reasons speak for judicial decision-making. On the other hand, when confronted with process-based accounts of legitimacy, they will argue that the EU legislature's authority is not grounded in democracy and that, therefore, there will not be a loss to political legitimacy if important political and moral decisions are made by the judiciary over the legislature.⁶³ Because of the assumption (1) that process-based reasons

⁶² 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 34) 98.

⁶³ Floris de Witte, for example, has argued that any process within the EU lacks legitimacy (in itself a puzzling conclusion) and placing the legislature and judiciary at the same level: '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)'. de Witte (n 4) 1561. See also, 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

speak for (or against) the CJEU and legislature equally and (2) that outcome-based reasons speak for judiciary, we should not be too worried about judicial override of legislative decision-making, for as long as justice is served thereby.

That notion is subject to a number of plausible objections. 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 what those favouring decision-making by judicial authority suggest, but is far from evident absent agreement on a correct understanding of output and the fact of institutional fallibility. I will leave this objection for what it is, because it does not make the case for legislative authority in the required terms. Far more importantly, 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 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 as well as the European Parliament, while the CJEU acts independently of these procedures.⁶⁴ It appears hard to disagree with Nic Shuibhne, who said that '[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'.⁶⁵ A considerable group of political theorists would even reject as illusory the idea that democracy is applicable even as an ideal to international organisations and that the best we can strive for is international associations of democratic states, which derive their legitimacy from being subject to the shared and equal control of national democratic

Security Co-Ordination System' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 181.

⁶⁴ 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).

⁶⁵ *ibid* 352.

assemblies.⁶⁶ The EU legislature ensures that reasonably well. Legitimacy being partly comparative,⁶⁷ it seems that based on this second objection alone, the claim that no loss of legitimacy occurs if the judiciary acts without regard to legislation is hard to maintain.

A second reason supporting the case for the authority of legislation within the EU takes seriously the EU legislature's institutional abilities. The previous section explained that we ought not to 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. Normally, for example, we think that disputes over the precise consequences of specific legal provisions are to be resolved by the judiciary, if only because the judiciary enjoys a presumption of neutrality and independence from the institution that drew up those rules.⁶⁸ 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.⁶⁹ It enjoys the time, resources, and institutional capacity to process large quantities of information and evaluate alternative policy resolutions properly. The judiciary, on the other hand, is far less equipped to realise comprehensive reform and consider the broader implications of its decisions. It decides in a piecemeal fashion and its case law usually revolves around

⁶⁶ Thomas Christiano, 'Democratic Legitimacy and International Institutions' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010); 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).

⁶⁷ Waldron, 'The Core of the Case Against Judicial Review' (n 63) 1389.

⁶⁸ Martin Shapiro, 'The European Court of Justice: Of Institutions and Democracy.' (1998) 32 *Israel Law Review* 3, 9; Christiano, *The Constitution of Equality* (n 34) 257; Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 433.

⁶⁹ Waldron, 'Separation of Powers in Thought and Practice' (n 69); Christiano, 'Democratic Legitimacy and International Institutions' (n 67) 255–259. For a similar conclusion in the context of the EU, read 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).

the specific circumstances of one or a small group of individuals, while the factual circumstances behind the disputes can be highly idiosyncratic. Because, we can safely assume, the judges tend to concentrate on these circumstances as well as the specific arguments presented by the different parties, the judicial principles provided for are often not drafted with the general good in mind but come mostly from the judges' concern to realise an equitable result in the individual case they decide. Being precedent-setting, however, and governing future situations that come before it and arise within the Member States, they may have all sorts of unforeseen political implications.⁷⁰

One instructive example is *Martínez Sala*, in many ways an highly unusual case, but one that explains to a considerable degree why we are debating today of whether social assistance can at all be denied to mobile Union citizen. Mrs Martínez Sala had enjoyed legal residence in Germany for a period of around 25 years, held various jobs and also received social assistance during that period, when a request for a child-raising allowance was denied, on the ground that she did not possess a residence permit when she made the application.⁷¹ Mrs Martínez Sala's right to remain in Germany was not in question though and secured by the European Convention on Social and Medical Assistance. Furthermore, she received permits in subsequent years, indicating that Germany recognized her right to reside legally and to claim benefits. The decision to deny benefits to someone who enjoyed 25 years of legal residence and contributed to the host society through economic participation comes across as extremely arbitrary. The Court, perhaps aspiring to address this wrong, invoked principles of EU citizenship, but did not confine itself to these peculiar facts and reasoned in general terms. It defined the principle that Union citizens with lawful residence in the host state can invoke the right to non-discrimination on grounds of nationality if their situation falls within the material scope of EU law,⁷² to which it later added that all situations involving the exercise of free movement rights constitute such a situation.⁷³ As a result, all mobile Union citizens with legal residence acquired a claim to social assistance, while the Member States were simultaneously denied the right to revoke someone's residence status as an automatic consequence of that person's recourse to social assistance.⁷⁴ That is to say, a rather unusual case is largely responsible for those general legal principles that make us, approximately 20 years later, discuss whether the duties of social justice demand the Court to disregard even those few derogations from the principle of non-discrimination that remain in the Citizenship

⁷⁰ Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press 2012) 122.

⁷¹ Case C-85/96 *Martínez Sala*, ECLI:EU:C:1998:217, paras 13-16.

⁷² *Ibid* para 63.

⁷³ Case C-184/99 *Grzelczyk*, ECLI:EU:C:2001:458, para 33.

⁷⁴ *Ibid* para 43.

Directive. For example, had the Court decided *Dano* differently and placed the Member States under the obligation to extend equal treatment to persons with rather minimal social connections with the host state, it is uncertain in which circumstances it would still be permissible for the Member States to deny social assistance. Such a decision, while maybe realising justice in the individual case, certainly could have had broad ramifications for the boundaries of social welfare within the EU. I would argue that it is questionable if such decisions are for European judges to make and it seems unlikely that they are in the position to assess the full implications of their decisions.

The case law also frequently demonstrates a certain unawareness for the fact that national authorities are dealing with much larger number of applicants. For a long period, the Court made eligibility to social assistance subject to an assessment of the applicants' real links with or degree of integration within the host Member State.⁷⁵ Expulsion decisions, we saw in section 4, still primarily centre on convicts' social ties. The thought must have been that the law must be fair to all individuals it addresses, wherefore we should reject generalisations and consider the personal circumstances of all individuals properly to see if the Directive's rules apply. That may seem a commendable approach, but is likely a costly one. For a start, 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 many more individuals. Such requirements result in far greater administrative costs and legal uncertainty.⁷⁶

Moreover, as I have argued elsewhere in more detail, by requiring national authorities to assess the individual circumstances of EU citizens each time they must decide on whether a legislative rule applies, the Court removes the constraining force of rules.⁷⁷ Particularly in a Union that divides decisional authority not just between different EU institutions, but also among the Member States, whose political preferences and institutional capacities are highly diverse, there are benefits to rule-based decision-making. It ensures more uniform results and ensures that EU citizens' legal position is

⁷⁵ 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; Case C-209/03 *Bidar*, ECLI:EU:C:2005:169, para 57; Case C-158/07 *Förster*, ECLI:EU:C:2008:630, para 49.

⁷⁶ See also, de Witte (n 10) 137–138; Michael Blauburger and Susanne K Schmidt, 'Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits' (2014) 1 Research & Politics 1.

⁷⁷ xxx

less at the mercy of national administrative and judicial officials.⁷⁸ We should oppose making decisions over whether or not someone is entitled to remain within the host Member State to the full discretion 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.

6. On the need for more freedom for the EU legislature

One may accept my argument that on grounds of political legitimacy and institutional ability the authority of legislation deserves wider recognition and still reject the idea that the Court's case law has been problematic. It appears to me that two arguments are available to those who wish to resist my claims. First, EU citizenship scholars could accept my normative premises, but try to counter the conclusions I draw from those by insisting that the Citizenship Directive is a poorly drafted piece of legislation and that it is not at all evident what the legislature intended to realise. Hence, my conclusion that the case law disrespects the authority of legislation is too strong. Secondly, EU lawyers more generally could equally accept my arguments of legitimacy and institutional ability, but counteract me by arguing that I ignore the EU's hierarchy of legal sources, which demands that the Court policies the legislature strictly and ensures that its decisions are compatible with the Treaties. I believe that I can accept both claims at an abstract level, but that neither affects my argument. Instead, I will demonstrate in this section, many of the shortcomings of the Citizenship Directive are attributable to our failure to acknowledge the constitutional dimension of legislation and refusal to give the EU legislature the freedom it needs to amend the law consistently.

⁷⁸ That argument closely follows Frederick Schauer's account of rule-based decision-making. Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 2002).

A frequently heard argument is that legislation is subordinate to the Treaties, which justifies the Court's position vis-à-vis the EU legislature.⁷⁹ It is not in dispute that the Treaties bind the different institutions. Of course, if that is so, we must recognise that 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 makes it difficult to understand, for example, AG Szpunar's statement that the interpretation of primary law in the light of EU citizenship legislation could 'lead to a revision of the Treaties outside the procedures prescribed for that purpose'.⁸⁰ Rather than leading to a revision of the Treaties, it appears that respecting secondary legislation in the field of EU citizenship is to respect the outcome of the Treaty negotiations conducted according to 'the procedures prescribed for that purpose'.

More importantly, we need to recognise that the hierarchy of legal sources argument is not as solid as its proponents think. That is because legislative politics does not take place merely inside the sphere of constitutional politics, but extends 'to the very constitution of the political'.⁸¹ The act of legislating is about deciding the appropriate conception, scope, and consequences of Treaty provisions. No reasons exist for assuming 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. The EU legislature, odd as this may sound, also engages in Treaty interpretation and deference to legislation thus amounts to accepting the legislature's best understanding of the Treaties. Already at present, the EU legislature is, as Davies said it, a co-interpreter.⁸² Hence, scholars were right to assert the primacy of the Treaties, but the dilemma of the EU legislature's institutional position in the EU's constellation of governance is not easily resolved by invoking the hierarchy of legal sources. Rather, our answer to these questions, as was emphasized by Syrpis before, depends on one's conception of political legitimacy within the EU.⁸³

Some may worry that if we are to embrace the authority of legislation within the EU we must automatically also oppose the practice of judicial review. While it is true that some authors find the institution of legislation so dignified that they oppose the notion of judicial review of legislation

⁷⁹ 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 22) 61. Case C-202/13 *McCarthy*, ECLI:EU:C:2014:345, Opinion of AG Szpunar, para 82.

⁸⁰ Case C-202/13 *McCarthy*, ECLI:EU:C:2014:345, Opinion of AG Szpunar, para 82.

⁸¹ Bellamy (n 29) 25.

⁸² Gareth Davies, 'Legislative Control of the European Court of Justice' (2014) 51 *Common Market Law Review* 1579.

⁸³ Phil Syrpis, 'The Relationship Between Primary and Secondary Law in the EU' (2015) 52 *Common Market Law Review* 461.

altogether,⁸⁴ alternative theories of political legitimacy place legislation front and centre for the reasons I outlined in the previous section, but leave some room for judicial review.⁸⁵ These theories, however, all tend to reject instrumentalist accounts of political legitimacy as implausible and will recognise our reasonable disagreements on justice and acknowledge the fallibility of all institutions. I will leave open the question if and under what circumstances judicial review is justified within the EU. What I hope to have shown is that we should not be overly dismissive about legislative decision-making within the EU. Whatever our position on legislation, we should not take the position AG Sharpston recently took, who argued 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’.⁸⁶ To suggest that there is something dangerous in disallowing the judges to dictate the requirements of Treaty law amounts to a deep and uncorroborated mistrust of forms of non-judicial decision-making.

An unfortunate side-effect of many EU lawyers’ dismissive attitude on the EU legislature is, as Ekins argued, ‘the common good will not be well served if the lawmaking body lacks sufficient freedom to change the law as reason demands’.⁸⁷ The domain of EU citizenship demonstrates this all too well. We should expect the legislature to act responsibly and offer sufficient guidance in the decisions that it adopts. The EU Citizenship Directive arguably falls short of those standards at times, but a closer inspection of the drafting process tells us that certain of the shortcomings are directly attributable to the fact that certain individual legislators appear to have thought they had to act as the agent of the Court.⁸⁸

In section 2, I argued that *Dano* and *Alimanovic* respected the constraints of the Citizenship Directive. That, I believe, is a straightforward conclusion in the case of *Alimanovic*. 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

⁸⁴ Waldron, *The Dignity of Legislation* (n 44); Bellamy (n 29).

⁸⁵ Christiano, *The Constitution of Equality* (n 34); Philip Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012); Dahl (n 3).

⁸⁶ 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)).

⁸⁷ Ekins (n 71) 120.

⁸⁸ 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.

period longer than three months, but had never worked and was not looking for employment either.⁸⁹ Therefore, Article 24(2) was not applicable to her case.⁹⁰ 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 State⁹¹

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

To understand how that paradoxical situation came about, we should begin by the initial proposal for a Citizenship Directive, which foresaw that the Member States were under no obligation to confer social assistance to economically inactive Union citizens, until the moment they had acquired permanent residence status.⁹² During the process of negotiating, the Court started developing its jurisprudence on EU citizenship and decided that EU citizens can invoke the non-discrimination principle in all 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.⁹³ 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.⁹⁴ Initially, the only remaining derogation to equal treatment remaining was the permission to deny maintenance grants to students, no doubt because such assistance fell, per the case law, outside EU law's scope at that time.⁹⁵ Probably realising that also jobseeker benefits still fell beyond the

⁸⁹ *Dano* (n 17) paras 35-39.

⁹⁰ *Ibid* paras 65-66.

⁹¹ Case C-133/13 *Dano* ECLI:EU:C:2014:341 , Opinion of AG Wathelet, para 116.

⁹² 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).

⁹³ *Grzelczyk* (n 74) paras 31-32.

⁹⁴ 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.

⁹⁵ 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*

Treaties' scope,⁹⁶ the Council proposed that Member States could also deny such benefits.⁹⁷ 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 legislature fell short of what we should expect of it, but that cannot be entirely understood without taking into account dominant theories on the authority of legislation within the EU. 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.⁹⁸ Ostensibly, 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. 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 and shapes legislation in accordance with legal principles adopted in individual and case-by-case decision-making. For example, it amended the Directive to give effect to the Court's decision that expulsion measures cannot be the 'automatic consequence of [someone] having recourse to the host Member State's social assistance system',⁹⁹ thereby at least creating tension with the provision that conditions lawful residence on the EU citizen not being an unreasonable burden on the social assistance system.¹⁰⁰ It is questionable if, by simply

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 74) para 35.

⁹⁶ 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 Case C-138/02 *Collins*, ECLI:EU:C:2004:172.

⁹⁷ 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).

⁹⁸ 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)).

⁹⁹ 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).

¹⁰⁰ 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. Alexander Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 *European Law Review* 787.

incorporating such judicial statements, the legislature maintains adequate focus on the general level and seeks to offer adequate guidance to all Member States, which must implement the rules and realise legal outcomes that are in accordance with them. We expect the EU legislature to deliver acts that are reasonably consistent and offer guidance to lower decision-makers and rightly criticise it when it fails to do so, but that expectation is hard to live up to if we also expect it to always defer to prior case law. Hence, while constitutional limits may not be objectionable per se, ‘they should be closely specified and adopted with caution’.¹⁰¹ If we want to improve the quality of legislation, we should at least offer the EU legislature the room to act reasonable and responsibly.

Conclusion

To be written

¹⁰¹ Ekins (n 71) 120.