CHAPTER 1
SOVEREIGNTY IN A SHARED LEGAL ORDER: ON THE CORE VALUES OF REGULATION AND ENFORCEMENT IN THE EU

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1. CORE VALUES OF REGULATION AND ENFORCEMENT IN A SHARED LEGAL ORDER

Internationalisation, mobilization and technological innovation offer new opportunities for modern societies. Simultaneously, these developments also bring challenges in the sense of confronting nation states and their citizens with questions and problems which they can no longer address on their own. Collective efforts are required. The European Union (hereafter: EU) is part and parcel of this development. In answer to the problems and challenges posed by, *inter alia*, the integration of markets, the migration of workers, or transnational forms of crime, the EU and its Member States have engaged in a process in which the tasks and powers of nation states are transferred to or redesigned in light of their new international, transnational or supranational setting. Nowadays, the EU has the legal power to intervene in almost every aspect of economic, political and social life; the EU may issue rules that entail rights and duties not only for the Member States, but also for its citizens in many different policy areas.

The EU legal order is characterised by a high level of interdependence between its constituent elements, including its Member States and its citizens. These elements do not however completely disappear in the overarching entirety of the EU's institutional and legal architecture. The Member States need the EU to achieve goals which they cannot achieve individually; conversely, the EU is dependent on its Member States for the realization of the Union's goals, particularly through the implementation and enforcement of EU law. Concepts such as supremacy and autonomy, the four freedoms, mutual recognition, conferred powers, subsidiarity, proportionality, respect for national constitutional identities and loyal cooperation indicate, on the one hand, the high level of mutual interdependence of the EU

and its Member States, and yet, on the other, the relatively high level of national autonomy.

The EU and the Member States are therefore connected in vertical processes of cooperation, which generate (legal) effects both 'top-down' from the EU to the Member States, but also 'bottom-up' from the Member States to the Union level. Besides these vertical processes common European policy areas (such as the internal market) and the transnational dimension of EU policies increasingly necessitate horizontal cooperation between national actors and authorities. The removal of (checks at) internal borders leads to mobility streams, including new forms of criminality, which require a response. EU citizenship may sometimes clash with national rules related to nationality or residency, such as student maintenance grants and social security benefits. Solutions to the Euro crisis rely heavily on solidarity between the Member States and affect national fiscal sovereignty.

In the current political and societal discourse, the concept of sovereignty is highly volatile and controversial. It is often used to posit the European and national legal orders as two distinct orders and to shield the national legal order as much as possible from intervention by 'Brussels'. The concept is therefore a normatively charged one. The question is how this interpretation of (national) sovereignty relates to reality, particularly to the regulation and enforcement of the commonly defined interests of the EU and its Member States. The way in which the EU's shared legal order is shaped as a result of the aforementioned dynamics, conflicts and synergies between the national and EU levels, or between the legal orders of different EU Member States, varies depending on the area, the moment and the circumstances of the case. Nonetheless, such variations are by no means tantamount to the often implicit assumption that these dynamics, conflicts and synergies take place in an uncontrollable, unaccountable, or even arbitrary way. On the contrary, they are to a large extent standardised through several basic institutional/procedural principles which, as core values, constitute both the basis for and the limits on the regulation and enforcement of EU policies.

In this book, we assume that no *a priori* and model-based expression of sovereignty is possible, but that the factors which cause these dynamics, synergies and conflicts should be identified and analysed. It does so by exploring how the EU's core values guide and limit the processes of the regulation and enforcement of EU policies at the interface of the various legal orders that together constitute the European Union, and how core values are in turn shaped by these processes. Core values are therefore the 'legal anchors' which provide for the design, substance and direction of the shared legal order of the EU.[1] The key questions of the project are the following:

[1] Core values are 'those multiple (legal) values which function as standards of normative evaluation, are not instrumental and which are inherent in the shared European-national legal order (contribution by GERBRANDY and SCHOLTEN, Chapter 2 of this volume).

1. How do core values define the relation between EU territoriality and national territory, EU and national citizenship, and between national institutional autonomy and EU interventions for the regulation and enforcement of the common EU goals and policies?
2. How are conflicts between diverging core values addressed within this shared legal order?

2. APPROACH AND METHODOLOGY: THE CONCEPT OF SOVEREIGNTY AS AN ANALYTICAL TOOL

Legal steering is an indispensable condition for achieving EU policy goals. This requires proper interaction and coordination between regulation (policy formulation, legislation and regulations) and enforcement, yet this aspect is often not given much attention. As a result, various links in the policy cycle (of policy development – legislation – implementation – enforcement – policy adjustment) do not function optimally, and the interaction between these links exhibits flaws. The policy cycle in the EU context runs a greater risk of encountering these types of problems, because the institutional design of the EU is predicated on the idea of shared administration between the EU and the Member States. Sharing is thought to bring benefits in coping with the collective challenges whilst respecting national autonomy, yet it can also run certain risks, such as the diffusion of power and of responsibility.

The current high levels of interaction between the national and EU legal orders is a source of constant tension. Ever since the Peace of Westphalia of 1648, nation states have been the primary vehicle for organizing polities on the European continent. The doctrine of state sovereignty vests in the state the sole and exclusive power of authority on a certain territory, over a certain group of people. In this view of sovereignty, only states have the power to issue prescriptive rules to its citizens, to enforce those rules and to provide for a system of adjudication. States may on occasion transfer these powers to others, but that is regarded as their own sovereign decision, which may – in that view – be revoked unilaterally. Sovereignty therefore has two dimensions. The internal dimension is concerned with how a particular nation can exercise its fundamental right to self-determination. The external dimension deals with the question of how multiple sovereigns – i.e. nation states – relate to each other.

In both of its two dimensions, sovereignty is a controversial concept, and is considered by many to be unsuitable as a model for analyzing and explaining the world around us. Scholars struggle with the issue of what sovereignty implies in terms of the process of Europeanization and the definition of the European Union as a new legal entity. There are those authors who defend the position that ultimately all EU powers are vested in the Member States, as they are still the

'masters of the Treaties'. Others, however, hold the view that with the establishment of the EU some sort of new *supranational* sovereign has been established.[2] And this has led a third group of authors to conclude that sovereignty is an opaque concept, not suitable for analyzing and describing the processes of intertwinement and the genealogy of new forms of political and legal power as are currently taking place in the European Union.[3]

We believe, however, that an analysis of how and why core values define the triangular relationship between authority, citizenship and territory in the regulation and enforcement of EU policies is still a very suitable approach for analyzing the nature and ways of European integration, particularly the regulation and enforcement of EU policies.[4] The concept of sovereignty is key in such an approach. Processes of increasing mutual interdependence are, after all, often associated with conflicts and are framed in terms of 'attacks on national sovereignty'. This is because the activities of the European Union easily conflict with the (protection of) national territory, national citizenship (or with the refusal to grant rights to persons other than a Member State's "own" citizens) and/or national regulatory competences. It is no coincidence that these three elements – territory, citizenship and authority – are usually combined to define the sovereignty of nation states in a public international law context.[5]

In our approach, we will not wade into the debate as to whether the Member States, their authorities (legislative, judicial, executive) and citizens are simultaneously part of two distinct, but interrelated legal orders, or whether national courts, legislators, and the executive are part of the EUs legal order at a distinct (national) level, or form an integral part of the composite legal order of the EU, in constant dialogue with other participants.[6] Rather, what interests

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2 See the analyses of the debates, offered by N. WALKER, 'Late sovereignty in the European Union' in N. WALKER (ed.), *Sovereignty in transition*, Hart Publishing, Oxford; Portland; Oregon 2003, p. 11 *et seq*.; J.W. VAN ROSSEM, *Soevereiniteit en pluralisme*, Kluwer, Deventer 2014, pp. 196-207; N. MACCORMICK, 'Beyond the sovereign state' (1993) *The Modern Law Review*; see also H. KELSEN, 'Sovereignty and international law' (1960) 48 *The Georgetown Law Journal*, pp. 627-640.

3 *Cf*. MACCORMICK, *supra* at 2, pp. 1-18.

4 In a similar vein, WALKER, *supra* at 2.

5 *Cf*. U. BECK and E. GRANDE, *Cosmopolitan Europe*, Polity Press, Cambridge; Malden 2007, p. 77; T.J. BIERSTEKER, 'State, sovereignty and territory' in B. SIMMONS, W. CARLSNAES and T. RISSE (eds.), *Handbook of International Relations*, Sage, London 2001, pp. 157-176; T. BLOM HANSEN and F. STEPPUTAT, *Sovereign Bodies*, Princeton University Press, Princeton; Woodstock; Sussex 2005, pp. 1-2; J.A. CAPORASO, 'Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty' (2000) 2:2 International Studies Review, pp. 1-28.

6 See the debates between such theories as constitutional pluralism, multilevel constitutionalism, and composite constitutionalism. Among many others, see WALKER, *supra* at 2, pp. 3-32; N. WALKER, 'The Idea of Constitutional Pluralism' (2002) 65:3 *Modern Law Review*, pp. 317-359; M. POIARES MADURO, 'Three Claims of Constitutional Pluralism, Three Claims of Constitutional Pluralism' in M. AVBELJ and J. KOMÁREK (eds.), *Constitutional pluralism in the European Union and beyond*, Hart Publishing, Oxford 2012; I. PERNICE, 'Multilevel constitutionalism and the Treaty of Amsterdam: European constitution making revisited' (1999) 36 *Common Market Law Review*, pp. 703-750; L.F.M. BESSELINK, *A composite European Constitution*, Europa Law Publishing, Groningen 2007.

us is how the actual legal conflicts, gaps and overlaps between national and EU citizenship, national and EU sources of authority, and national territory and the common EU legal areas (the internal market, et cetera) influence the regulation and enforcement of EU policies and what role core values have in defining and shaping these processes in practice.

3. THIS VOLUME

The project seeks to take account of the complex political and societal reality by choosing a perspective on sovereignty which is focused on differentiation in the relationships between the EU and the Member States. In doing so, it follows a comparative approach: the focus is on law in action in different policy areas. In order to deal with both of the aforementioned central research questions, it builds on the expertise of various Renforce researchers who come from various (legal) disciplines (EU law, international law, private law, administrative law, labour law, criminal law and criminology). In their respective domains of expertise the contributors reflect on how core values determine and shape the EU legal order and how, in turn, they are influenced by it; Chapter 2 introduces the notion of core values. It has resulted in seven studies into 11 different EU policy areas, followed by three cross-sectoral studies on the concepts of authority, citizenship and territory. The policy studies address, to the largest extent possible, the following aspects:

(1) which core values of the EU shared legal order are identified as core values of their policy domains;
(2) why have they been identified as being core values; and
(3) how do the identified core values interact with each other in the shared legal order, in terms of their definition of the relationship between national territory and the common EU legal areas, national citizenship and EU citizenship and national and EU sources of authority;
(4) how are core values in turn influenced and reshaped by transformations in the shared legal order in terms of territory, citizenship and authority?

We define citizenship in this study in a wide sense, i.e. as the legal capacity to have rights and duties *vis-à-vis* sources of public authority.

Eleven policy domains explored in seven case studies follow in the next chapters. Buijze, Koning and Senden compare the areas of EU telecommunications law, air transport and gender equality law in light of their capacity to balance the principles of efficiency and justice, and thus to mitigate power imbalances (Chapter 3). Veldman and de Vries deal with the EU's internal market and its social market economy in light of the conflicting core values of the economic freedoms and social rights (Chapter 4). Van Bockel and Duijkersloot focus on the areas of the

EU supervision of the financial markets and competition law in light of consumer surplus (welfare) and financial stability (Chapter 5). Van den Brink and Van Rossem investigate the conflicting core values of (economic) stability, solidarity and sovereignty (Chapter 6). Kruisinga, Buijze and Keirse compare the recent proposals for a uniform European contract law and an EU law of administrative procedure in light of, particularly, the principle of equal treatment (Chapter 7). Pennings and Manunza deal with the core values of transparency, non-discrimination and social return in public procurement proceedings and social policy (Chapter 8). Oude Breuil and Marguery analyze the EU's Area of Freedom, Security and Justice and the question of how these core values materialize for Bulgarian sex workers in France (Chapter 9).

Three cross-cutting chapters on core values in relation to the notions of authority, territory and citizenship follow the policy studies. These contributions also include, to the extent possible, a comparison of the results of the various case studies of this volume. Van den Brink focuses on the concept of authority (Chapter 10). The aim of his contribution is to shed more light on how the EU actually exercises its competences and how this is determined by institutional principles, not only in the books, but also taking into account the law in action. Van Eijken, Emaus, Luchtman and Widdershoven dig into the concept of citizenship (Chapter 11). They focus on the question of how European citizenship, as a form of composite citizenship, creates links between the nationals of the Member States and the different governmental layers of the multi-layered European constitutional legal order. In their contribution, fundamental rights are chosen as a means to analyse the content and meaning of EU citizenship. Ryngaert and Vervaele address the question of how the concept of territory reshapes the regulation and enforcement of EU law (Chapter 12). The authors explore the changes which functional territoriality has undergone with respect to the regulation and enforcement of the internal market and the AFSJ, and demonstrate that the internal EU dimension of territoriality needs to be complemented by an external dimension to fulfil its true potential. A series of concluding observations by Van den Brink, Luchtman and Scholten conclude this book (Chapter 13). These observations also include a mid-term agenda of the research programme of the Utrecht Centre for Regulation and Enforcement in Europe (Renforce), established in 2013.[7]

This book is the second joint research project of Renforce and a first, important step towards our central research theme. Renforce's focus is on the relationship between regulation and enforcement at the interplay of national, European and other levels of government, as well as private spheres of regulatory enforcement. Renforce analyses and compares various fields of EU law in light of a comparative and interdisciplinary research format. It seeks to combine legal research with

7 The results of the first project have been published online in a special issue of the Utrecht Law Review on Regulation and Enforcement in the EU: Regimes, Strategies and Styles, Volume 10, Issue 5, December 2014.

research from other disciplines, such as economics and political science, that helps to provide a better understanding of these relationships. Examining and analysing diverse regulatory and enforcement regimes in various policy areas are not goals in and of themselves, but should, in the long run, make an important contribution to devising a theory and model for accomplishing an optimal mix of the shared regulation and enforcement of European policy.

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