CHAPTER 13
SHAPING SOVEREIGNTY IN THE EU LEGAL ORDER: THE ROLE OF CORE VALUES

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The central question in this volume was how core values define the EU's legal order in terms of territory, authority and citizenship. Our general conclusion is that authority, citizenship and territory (the constituent elements of the sovereignty concept) and the core values by which sovereignty is shaped have all come to be shared between national and EU levels of government. Thus, sovereignty itself has acquired an 'in-between' status, between these levels in the EU legal order. What is more, there are no signs that this will only be a transitional phase. Instead, the in-between status of sovereignty is being consolidated and dealing with the consequences thereof is the main issue in law.

We will explain our findings in further detail below, but first we contrast our approach with that of scholars that focus on the *locus* of ultimate power in the European Union. The main issue for such scholars is whether and if so, to what extent the EU Member States have lost sovereignty and whether the European Union has in one way or other obtained its own claim to sovereignty. This raises in turn the question of how various 'sovereigns' can coexist in a shared legal order and what core values determine their mutual relationships. How can conflicting claims to sovereignty from these levels co-exist (the latter is indeed claimed by constitutional pluralists)?[1]

In the academic debate on the source of ultimate power, various features from the EU-national shared legal order, such as the principle of primacy; the lack of European '*Kompetenz-Kompetenz*' and the existence or absence of veto rights for Member States have been anchor points. For politicians and the public, it has become an equally pressing issue to determine what the ultimate *locus* of authority is in the European Union. Fears of an ever-expanding EU and the effects thereof on

[1] The literature on constitutional pluralism has been expanding rapidly in the last decade. Jaklic has mapped the various 'sub-version' of the theory and has thus provided for a comprehensive overview thereof: K. Jaklic, *Constitutional Pluralism in the EU*, Oxford University Press, Oxford 2014 (most notably part I).

national sovereignty and national democracies are conducive thereto. Such fears have been fueled even more in the current economic crisis. The United Kingdom will have a referendum on whether the country should remain part of the European Union and the level of skepticism on EU membership in other countries is on the rise as well.[2]

Our approach in this volume has been different in three respects:

- in addition to authority, citizenship and territory have been investigated as foundational elements of the concept of sovereignty;
- the influence of institutional and substantive core values has been analyzed as the main factor to explain how sovereignty is actually shaped in the shared EU-national legal order;
- the focus has been on the *exercise* rather than on the *origin* of sovereignty.

The international law concept of sovereignty includes the elements of authority, citizenship and territory. The core element of the concept is unity between territory, the people living on that territory and the authority exercised on that territory and on that people. In this light, the key question in this volume has been: how do core values influence the unity of territory, authority and citizenship in the EU-national legal order? The starting point has been the changes within territory, citizenship and authority. In addition to the nation states, we now also have concepts such as the transnational legal areas (the internal market, for instance), EU citizenship and EU sources of public authority. These changes will be discussed first in this concluding chapter. Following that, the effects of these changes on the other elements (e.g. the effects of changes in authority to citizenship) will be analyzed. In what follows, the question of how core values in the EU-national legal order have influenced the unity of territory, citizenship, and authority will be addressed. This concerns the second key element identified above. It is directly linked to the third one: the focus on what may be called the practice of sovereignty rather than on the search for the source of ultimate authority in the shared legal order.

Composite rather than singular citizenship

Initially, citizenship in the European Union was mainly limited to market citizenship and, as such, limited to nationals of the European Union that enjoyed the rights and freedoms based on EU Internal Market law (most notably free movement rights). This is no surprise as EU integration started primarily as an economic, market-oriented project. But the further evolution of European integration has brought changes to the citizenship concept. Van Eijken et al. have argued in this volume that

[2] Whereas trust of EU citizens in the EU institutions was as high as 57% in 2007, the most recent data show the level has dropped to only 31-37% in the past few years: <http://ec.europa.eu/public_opinion/archives/eb/eb82/eb82_first_en.pdf>.

the current, fundamental rights based conceptualization of citizenship has come to co-exist with market citizenship. Analyzing EU citizenship from a fundamental rights perspective reflects the way in which citizenship has been developed in the Member States, i.e. as a limit on public authority. This contrasts with conceptualizations of sovereignty in which citizenship serves to *legitimize* public authority rather than to limit it. The need for democratic rights and principles as mechanisms for citizens to provide *input* in decision making processes is a central element of such sovereignty concepts.[3] Political rights are part of a fundamental rights perspective as well. This is reflected by the Charter of Fundamental Rights (Title V) and in increased importance of political rights in the legal order of the European Union. But citizenship in the EU is shaped primarily by fundamental rights that limit public authority and the issues that arise from the diversity of sources of fundamental rights in the EU-national legal order.

Van Eijken *et al*. define the legal situation that has arisen as 'composite citizenship', indicating that citizens in the European Union have different relations with different layers of public authorities governed by different systems of fundamental rights protection. While multiple sources of protection of fundamental rights may seem to be good news, they also bring challenges along. Their analysis primarily reflects how the concept of citizenship and fundamental rights, in addition to their role as a limit on public authority, have come to serve as a source of authority themselves. Recent cases on the scope of the Charter for instance tremendously widen the potential impact on national discretion. Yet their analyses also reveal, and quite surprisingly from a citizens perspective, that the case for citizenship is still weak in the area of transnational law enforcement. There we see that citizens are strongly encouraged to use their freedoms of movement and residence, but without a legal framework that protects them from interferences with their fundamental rights as a result. As long as the EU legislator remains silent, this problem will continue to exist.

Such problems are the result of the complexity of this 'in-between' legal situation, i.e. between the national and European legal orders. From a legal perspective, we do not witness a replacement of national citizenship with that of European citizenship and the possible political tensions associated with that. Rather, citizenship has entered into a complicated legal web in which European and national dimensions are mixed. Furthermore, the position of citizens in a transnational law *enforcement* context may be particularly problematic, as law enforcement authorities primarily function in a national context. This requires the horizontal, transnational dimension of citizenship to be further developed and the position of citizens which are confronted with multiple national legal orders to be better regulated. Paradoxically, if EU citizenship would have absorbed national citizenship completely, and a single citizenship would

[3] The German Federal Constitutional Court based its decision on the constitutionality of the Treaty of Lisbon primarily on such a conceptualization of sovereignty as it underlined the inseparable link between sovereignty and democratic decision-making: BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, available at: <www.BVerfG.de/entscheidungen/es20090630_2bve000208.html>.

thus have been established – which would have suggested that this part of sovereignty would have been located exclusively at the European level – such problems would probably not have arisen in the first place.

Territory: 'Asymmetric' borders

A similar 'in-between' situation may be identified with regard to the concept of territoriality. The prime objective of EU Internal Market policies has been to remove the borders between the EU Member States. Similarly, the central idea of the Area of Freedom, Security and Justice is to create a single area with regard to justice issues. The reality is, however, that internal borders in the EU continue to exist. Moreover, new borders have been created: between the Eurozone Member States and the non-Eurozone members and between Schengen and non-Schengen Member States.

The various contributions in this volume have zoomed in on various aspects of the continued relevance of national borders and the implications this may entail. The first aspect concerns what Ryngaert and Vervaele have labelled as 'functional territoriality'. It implies that the level of Europeanization varies from one policy area to another. Hence, while borders have been removed for some issues and policy areas, they remain in place for other issues (think, for instance, of border-free area for goods but not for citizens of third countries). This creates a 'constitutional asymmetry' which may cause problems. Such an asymmetry is perhaps most visible in the decoupling of economic and social spheres (the term is from Fritz Scharpf)[4] as was demonstrated in the contribution by Veldman and De Vries. In contrast to economic policies – and despite social values being part of the EU legal system – shaping the social dimension in EU policies has largely remained an issue for the individual Member States. What is more, this asymmetry is based on an inequality between economic and social values as only the former have acquired constitutional status in the EU. Thus far, the relevance of borders matter more in social policies than in economic policies.

Secondly, as Vervaele and Ryngaert have observed, the diversity of modes of EU intervention affects national borders. EU legislative intervention (harmonization of national laws and policies) is not necessarily complemented with a Europeanization of enforcement systems or at least the establishment of cooperation mechanisms between national authorities. In other words, open borders and functional territoriality as results from EU legislative action 'do not lead automatically to a redesign of the jurisdictions and applicable law of regulatory and enforcement agencies'. National border 'walls' may, thus, be low – if existent at all – when it comes to applicable substantive laws. At the same time, they may be still high in relation to enforcement.

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4 F.W. SCHARPF, *Governing in Europe. Effective and Democratic?*, Oxford University Press, Oxford 1999, Chapter 2.

In most legal debates, the key issue is how to manage these two asymmetries rather than taking them away. The case of financial regulation (Duijkersloot and Van Bockel) is exceptional in this sense as it now entails Europeanization of both regulation and supervision. In most other areas Europeanization of enforcement has not been the case nor has it been envisaged as a possible viable option for the future. In this light, the question becomes how to manage the negative effects of these asymmetries. The case of the Eastern European migrant prostitutes (Oude Breuil and Marguery) provides a good illustration of how pressing the negative consequences of such asymmetries can be. Oude Breuil and Marguery have qualified the case of migrant prostitutes as a 'de-territorialized phenomenon' that is addressed by territorialized law enforcement systems. Their contribution shows that principles that are de jure meant to facilitate cross border law enforcement – the *ne bis in idem* and mutual recognition principles – may de facto render the protection of victims more difficult. Various policy studies in this volume include solutions to deal with negative consequences of the territorial asymmetries, such as the creation of networks of national enforcement authorities, which enhance cooperation in enforcement matters. The 'smart mix' of regulatory measures in the case of the Kimberley Process Certification Scheme, which aims at stemming the transnational flow of conflict diamonds, is another good example here (Vervaele and Ryngaert). It shows that such issues need to be addressed by tailor-made rather than by general solutions.

Vervaele and Ryngaert have argued that the concept of territory has changed in yet another way. Placing demands for access to the EU market effectively enables the European Union to exert authority outside its territory ('territorial extension of EU law'). The capacity of the European Union to do so raises, however, the issue of legitimacy, as well as questions on the compatibility thereof with international law. Arguably, this capacity is based on the factual market power of the EU and, thus, concerns a capacity that the Member States would not have possessed individually. In any case, it challenges the classic unity of authority, citizenship and territory in relation to the external borders of the EU as much as the above mentioned developments have done in relation to the internal borders in the EU. The implications on sovereignty of territorial extension of EU law beyond the EU borders necessitates further research and this theme will, therefore, be further explored in one of follow-up projects within the Renforce Research program.[5]

Shared instead of single authority

The third element of sovereignty, authority, reveals a similar picture. Whereas sovereignty suggests singularity of authority, we see it in the European legal order at both national and European levels. Authority is dispersed and partly shared

5 For the activities and output of this project, see <http://renforce.rebo.uu.nl>.

between these levels, whereas the issue of what ultimate source of authority is, remains essentially undecided – as was observed in the beginning of this chapter.

The perspective of the legislative and judicial practice highlights two important factors. First, the system of principles and mechanisms to decide on the division of authority between the EU and the Member States is now – as a result of the Treaty of Lisbon – more comprehensive than ever before. Several constitutional innovations of the Treaty of Lisbon have been introduced for the purpose of demarcating national and EU authority in a clearer fashion. Arguably, the political need to introduce these innovations has been the expansion of the activities of the EU. As a consequence of this expansion, the 'functional logic', i.e. the reasoning that activities of the EU may be understood from a limited list of concrete responsibilities in concrete policy areas, has lost credibility. Thus, it has become more important to include constitutional rules on the division of power between the EU and the Member States. However, these constitutional provisions do not result in a return to a more singular conceptualization of authority. Instead, in their intricacy and interconnection, they confirm the shared nature of authority in the European legal order. The principle of subsidiarity is good example: it includes a preference for lower levels of government but at the same time it justifies EU action if lower levels of government cannot achieve EU objectives adequately. Moreover, the principle is not self-standing, but is connected to the principles of conferral and proportionality. Consequently, distinguishing between EU and Member States' authority has become increasingly difficult.

The second factor is the multitude of actors that define authority. Not only the Member States as parties to the founding treaties of the EU define how authority is divided between the EU and the Member States, but the legislative institutions of the European Union, the European Council, and the CJEU as well. Moreover, Member States act not only as unitary actors, but their parliaments and constitutional as well as ordinary courts are involved in defining authority in the European legal order too. Even private actors may be involved.[6] This obviously adds to the dispersion of authority.

The vertical division of powers has received much attention and has been developed into an intricate and complex legal system. The current efforts are therefore geared mostly towards a further refinement of the system. A good example are the current proposals to improve the system of subsidiarity monitoring (e.g. to include a so-called 'green card' procedure). By contrast, the horizontal dimension of authority still remains underexplored. This horizontal dimension is triggered when the authority of more than one EU Member State is at stake. The current economic crisis has exposed the interdependencies between the Member States' economies and the effects of their fiscal and macro-economic policies. This is currently perhaps one of the most striking and urgent horizontal issues, but the

6 The role of private actors in regulatory and enforcement processes is the general theme of a separate Renforce research project.

horizontal dimension of authority matters equally when it comes to the protection of citizens in a transnational law enforcement context (see the contribution by Van Eijken *et al.*) or in the difficulties that Member States face when they want to uphold higher social standards compared to other EU Member States and have to apply free movement rights at the same time.

In various contributions in this volume several fundamental issues that emerge with regard to horizontal authority have been highlighted. Such issues include:

- whether economic policies in the EU and the Treaty on the European Stability Mechanism are based, at least in part, on solidarity (Van den Brink and Van Rossem);
- how judicial accountability must be set up in a transnational law enforcement context (Van Eijken *et al.*);
- how transparency and accountability can be ensured with regard to networks of public authorities (that are set up to deal with the horizontal dimension of authority);
- what the relation is between mutual trust and mutual recognition and how it relates to fundamental rights protection (Van Eijken *et al.*).[7]

Such fundamental issues have only started to be addressed, if at all. Instead, the horizontal dimension of authority is shaped mostly in a rather pragmatic fashion. Some examples of this pragmatic approach to the horizontal dimension of authority include:

- the principle of proportionality is applied to guide the decision on whether to apply own or foreign social standards (Veldman & De Vries);
- EU legislation in the field of internal market law often includes Rule of Reason exceptions to enable Member States to continue applying their own legislation and standards;
- the proposal on a Common European Sales Law includes the possibility for market parties to choose for either a national or the proposed European regime;
- thus, linking these pragmatic approaches to the fundamental issues that emerge in light of the horizontal authority dimension is the challenge for scholars and practitioners alike.

Interplay between citizenship, authority and territory

All three main elements of sovereignty have undergone fundamental changes. These changes need not necessarily be qualified as a shift from the national to the European level. Rather than a change from national to European citizenship,

[7] In a separate Renforce research project, the principle of Mutual recognition will be studied in a more integral fashion.

from national territory to European territory and from national authority to EU authority, all three elements have acquired an 'in-between' status. Furthermore, there are no indications that this 'in-between' status is merely transitional and that the end result will be full Europeanization of citizenship, territory and authority. Rather, the developments point at a further consolidation of this in-between status. Hence, in order to mitigate possible negative implications, the pits and falls of the new status need to be explored.

The interaction between citizenship, territory an authority in this 'in-between' situation is a key issue. As the policy studies undertaken in this book show these elements are very much interlinked. For instance, when dealing with power imbalances, a shift from viewing citizens as subjects of law to viewing them as actors in the legal order has taken place (Senden *et al.*). This requires citizens to be empowered with relevant rights and guarantees, which has been the trigger for the EU to act. This is, thus, an example in which citizenship directly affects authority. The element of territory may have a similar relationship with the element of authority. The cross-border nature of a problem or phenomenon is an essential factor in justifying whether the EU may act (both in terms of the application of legal bases, such as Article 114 TFEU, as for the outcome of the subsidiarity test). The rise of financial market regulation in light of the global nature of financial markets is a good example in this regard (Van Bockel and Duijkersloot).

At the same time, mismatches between these elements exist as well. Perhaps the most striking example in this volume is the case of migrant prostitutes (Marguery and Oude Breuil) in which transnational citizenship is, as it was argued, insufficiently addressed with appropriate legal protection, either from the French or the Bulgarian authorities. In other words, authority is lagging behind here. From a sovereignty perspective, the issue is, therefore, a troublesome relationship between citizenship, territory and authority.

Explaining sovereignty in a shared legal order from a core values perspective

How may changes in relation to territory, authority and citizenship in the EU shared legal order be explained from the perspective of core values? The various contributions in this volume indicate that we have to distinguish between the *identification* of core values, the *weight* that is attached to them and their *interaction* with other core values.

From a legal perspective, the identification of core values has proved to be largely unproblematic.[8] In most areas, the existence of core values may be derived from the Treaties or secondary legislation. In the area of economic governance, it has been argued that a new principle of solidarity has emerged (Van den Brink & Van Rossem) and in competition law it has been an issue of particular interest whether consumer protection, consumer welfare or even consumer fairness

[8] See contribution by Gerbrandy and Scholten, Chapter 2 of this volume.

may be considered as core values (Van Bockel and Duijkersloot). In most areas, however, the identification of core values is rather straightforward. The precise interpretation thereof can be a much more thorny issue as the concept of 'social market economy' has indicated.

The weight that is attached to core values has a more immediate effect on the principle of sovereignty in the shared legal order. As a result of the economic crisis, economic and financial stability is now valued much higher than before. This has had a direct impact on the measures that the EU has adopted and, thus, on the division of authority in the European legal order. A similar development was identified in the field of public procurement law. The increased relevance of social protection has led to a new EU regulatory framework that provides public authorities with more opportunities to consider these.

This volume has shown that citizenship and territory are affected by core values as well. Citizenship is by its nature value driven. As Van Eijken c.s. have argued, citizenship in the European Union has increasingly been interpreted as a concept based on fundamental rights protection. Moreover, the Charter of Fundamental rights has connected citizenship to the core values of broad policy domains such as the Internal market and the area of freedom, security and justice. And indeed, many of the core values that have been identified in the policy studies concern specific manifestations of citizenship rights and interests, such as equality, social protection, freedom and security. The link between core values and territory has been discussed by Ryngaert and Vervaele in the sense that territorial obstacles may impede the effective realization of core values (e.g. in the field of transnational law enforcement).

Furthermore, the contributions to this volume have shown that internal market and economic values still carry much weight in the European Union, despite the rise of justice and social values. Many of the policy studies underline this observation. Internal market legislation still accounts for a substantial part of total EU law. Moreover, legislation which has another primary objective may still be based on Article 114 TFEU (e.g. financial regulation which is aimed at financial stability). Even if that is not the case, the legitimacy may still be sought in the economic domain, as the proposal on women on corporate boards has shown (see the contribution by Buijze, Koning and Senden). Thus, the economic rationale still determines to a great extent how authority is shared between the EU and the Member States. It also explains why citizenship at the EU level has for such a long time been synonymous to market citizenship. Even now that the EU concept of citizenship has gained other features as well, economic citizenship still constitutes the core.

Economic values have, thus, not lost any of their importance. Rather, the EU legal order now includes other values as well, but they are a reaction to (most notably social values) or a supplement of economic values. Indeed, much of the AFSJ and sectoral policies of the EU would lose much of their relevance without the Internal market. The equal status of the four economic freedoms to fundamental rights is

perhaps a logical consequence. This does not imply, however, that sovereignty in the European legal order must primarily be understood as economic sovereignty. Instead, sovereignty in the shared legal order is now determined most by the *interaction* (the third element of this section) of diverging core values, of which economic values are a prominent part.

The interplay between core values often results in conflicts. In all of the policy studies, such conflicts have been identified and analyzed. Conflicts between economic values and other values feature prominently in the European legal order. Although such values may enjoy equal status, economic values have generally had the advantage of being better enshrined and operationalized within the EU legal order. Thus, such conflicts may be understood as attempts to grant an equal level of protection to these other values as well, or, as Gerbrandy & Scholten put it, as an attempt to balance between economic and social values where this balance has not always been supported in legal and political terms. The clash between economic values and social values as discussed by Veldman & de Vries is one of the most prominent examples in this regard.

In other areas, similar conflicts between core values exist. The conflict between security and freedom in the case of the Bulgarian migrant prostitutes has undoubtedly the most poignant consequences. This unsatisfactory outcome as well as the factual imbalance between economic and other core values indicates what is perhaps a system defect of the European Union, the inability to adequately deal with conflicts between core values. This may be a legacy of the functionalist nature of the European Union in the past. Functionalism does not include mechanisms for balancing core values and resolving conflicts between them. Instead, it sees European integration as an instrumental process. Since the EU's remit has grown to include other issues than the attainment of economic goals, the next step becomes to explore dilemmas accompanying this development and to think of mechanisms of how to address arising conflicts.

In some of the policy studies, various mechanisms and solutions have been already identified to deal with conflicts between core values (e.g. the balancing of values through the proportionality principle). These have, however, been in part unsatisfactory, inefficient and/or only partly developed. The weaknesses of the European legal order to address fundamental conflicts between core values properly is perhaps the main reason why the sovereignty issue is raised in public and political debates. Yet, such debates have not been very fruitful, as they tend to focus only on the authority issue (the transfer of powers to the EU). The international law conceptualization of sovereignty may offer new perspectives here. The unity of authority, citizenship and territory may be seen as a way to create a public space to deal with issues as: what are core values, how should we interpret them and how should they be balanced? We hope that this volume will contribute to a further exploration of that public space and of the legal ways to shape it.