JOHANN MORITZ LAUX

Public Epistemic Authority

Grundlagen der Rechtswissenschaft
42

Mohr Siebeck

Grundlagen der Rechtswissenschaft

herausgegeben von

Marietta Auer, Horst Dreier und Ulrike Müßig

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Johann Moritz Laux

Public Epistemic Authority

Normative Institutional Design for EU Law

Mohr Siebeck

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To my lovely parents

Preface

This doctoral thesis has been accepted by the Faculty of Law of the University of Hamburg in December 2018. The subsequent changes to the institutions of the European Union (EU) caused by the withdrawal of the United Kingdom from the EU in 2020 could not be accounted for in this book. The results of the thesis remain unaffected, unless explicitly stated in the text.

I am tremendously grateful to my supervisors, Peter Niesen and Markus Kotzur, for their support and input during all stages of my work on the thesis. I am forever thankful for the trust they placed in me to freely develop my ideas. I am also grateful to the Stiftung der Deutschen Wirtschaft (Foundation of German Business) and the FAZIT-STIFTUNG (FAZIT Foundation) for their generous financial support of my research. Thanks to the Johanna und Fritz Buch Gedächtnis-Stiftung, Hamburg for its contribution to the printing costs of this thesis.

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Berlin, December 2021 Johann Laux

Content Overview

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List of Abbreviations

AEPD	Spanish Data Protection Agency
BSE	bovine spongiform encephalopathy (mad cow disease)
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
CJT	Condorcet Jury Theorem
CoJ	Court of Justice
CRISPR	clustered regularly interspaced short palindromic repeats
CST	Civil Service Tribunal
DNA	deoxyribonucleic acid
DTA	Diversity Trumps Ability Theorem
EAEC Treaty	Treaty establishing the European Atomic Energy Community
EC	European Community
ECHA	European Chemicals Agency
ECHR	European Charter on Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EFSA	European Food Safety Authority
EU	European Union
FCC	German Federal Constitutional Court
FDA	U.S. American Food and Drug Administration
GC	General Court
GDP	gross domestic product
GDPR	General Data Protection Regulation
IA	impact assessment
MEP	Member of the European Parliament
MMT	methylcyclopentadienyl manganese tricarbonyl
NJT	Normal Justification Thesis
PACE	Committee of Ministers and the Parliamentary Assembly
PEA	Public Epistemic Authority
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
U.K.	United Kingdom
U.S.	United States of America

Introduction

According to an old and still dominant paradigm, it is the competence of *the* judge which determines the competence of a court.[1] The judge's knowledge and character, her skills and methods are what guarantees the quality of judicial decision-making or jeopardizes it. This understanding demands at the same time too much and too little, as this thesis argues. It demands too much of a judge because judging in the 21st century means deciding ever more complex and technical matters for which legal training alone is insufficient. It demands too little of courts because it does not account for the potency of collective decision-making, the wisdom which may emerge when people aggregate their judgments.[2]

The old paradigm is beginning to crumble.[3] In legal theory, a heterogeneous cluster of many-minds arguments on judicial decision-making is pouring into the mainstream.[4] Drawing on precedent, some say, allows judges to tap into the judicial minds of their forerunners. Others stretch the definition of a court and count not only the heads of the judges but add those of adjuncts and experts to form an

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[1] A prime example of this individualist paradigm is Scott Brewer, "Scientific Expert Testimony and Intellectual Due Process", in: (1997–98) 107 *Yale Law Journal* 6, 1535–1681. The judicial selection process at the Court of Justice of the European Union (CJEU), to draw on an empirical example, focuses first and foremost on the candidates' individual legal capabilities and not on their contribution to the collective competence, cf. Articles 253–255 of the Treaty on the Functioning of the European Union (TFEU). Chapter Five will discuss the selection of the European judiciary at more detail.

[2] The idea of collective wisdom can be traced back to Aristotle's *Politics*, as Part I will explain at greater detail. One widely held account of Aristotle's argument is that large groups can make better decisions than individuals or small groups by pooling their knowledge, cf. Daniela Cammack, "Aristotle on the Virtue of the Multitude", in: (2013) 41 *Political Theory* 2, 175–202.

[3] For an adaptation of the argument made in this thesis to the domain of international adjudication in general, see: Johann Laux, "Public Epistemic Authority: An Epistemic Framework for the Institutional Legitimacy of International Adjudication", Jean Monnet Working Paper 5/19, available under: https://www.jeanmonnetprogram.org/wp–content/uploads/JMWP-05-Johann-Laux.pdf (last accessed on: May 30, 2021)

[4] See Cass R. Sunstein, *Infotopia: How Many Minds Produce Knowledge* (Oxford: Oxford University Press, 2006); For an overview on the family resemblance of many-mind arguments including aggregative, evolutionary, traditionalist, and deliberative ideas, see: Adrian Vermeule: "Many-Mind Arguments in Legal Theory", in: (2009) 1 *Journal of Legal Analysis* 1, 1–45.

extended decision-making collective.[5] New voices are also sprouting on the national level, applying those and similar kinds of aggregative arguments to the practice of domestic courts.[6] This thesis recognizes the potential of certain, yet-to-be-introduced mechanisms of collective wisdom for international and supranational courts and debates about their legitimacy.[7] Whenever we create an international court – and we do this with increasing frequency[8] – we subject a particular area of conduct for states and individuals to the rule of law, the formal jurisdiction of this particular court, and the interpretive choices of the judges of that court. We have diverse reasons for the creation of such judicial authorities, a fact reflected in their 'multifunctionality'[9]. Coordinating behavior is amongst the first reasons which may come to mind. However, coordination could be had by an umpire flipping a fair coin instead of making use of judicial reasoning. There is thus more to the creation of international courts. The promotion of specific normative expectations plays a key role. In the institutional design of a court, we are making choices about what evidence is permissible, what arguments are acceptable, and who has the ultimate decision on both matters. In short, we are creating a decisional system whose task it is to *reliably determine correctly* whether or not the law has been breached.[10] To show that this is to a large degree a cognitive task, responsive to epistemic evaluation, is one of the main objectives of this thesis.

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[5] See James R. Dillon, "Expertise on Trial", in: (2018) 19 *Columbia Science and Technology Law Review* 1, 247–312.

[6] For U.S.-American applications, see: ibid.; Adrian Vermeule, "Collective Wisdom and Institutional Design", in: Hélène Landemore and John Elster (eds.), *Collective Wisdom: Principles and Mechanisms* (Cambridge: Cambridge University Press, 2012), 338–367. For a continental European perspective, see the historical account in: Wolfgang Ernst, *Rechtserkenntnis durch Richtermehrheiten: "group choice" in europäischen Justiztraditionen* (Tübingen: Mohr Siebeck, 2016).

[7] The discussion of group choice in the context of international adjudication is fairly recent. Chilton and Tingley claim to be the first to discuss the so-called 'doctrinal paradox' in the domain of international law, writing in 2012, cf. Adam S. Chilton and Dustin Tingley, "The Doctrinal Paradox & International Law", in: (2012) 34 *University of Pennsylvania Journal of International Law* 1, 67–137. The doctrinal paradox is a negative effect which may occur in group decision-making and will be discussed in Chapter Three.

[8] By one count, there were twenty-four international courts in operation in 2018, cf. Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, "International Court Authority in a Complex World", in: Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (eds.), *International Court Authority* (Oxford: Oxford University Press, 2018), 3–23, 3.

[9] Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014), 1.

[10] This task description builds on von Bogdandy and Venzke's account of international adjudication in: ibid.

Cognition will be understood broadly as "the collection of mental processes and activities used in perceiving, remembering, thinking, and understanding, as well as the act of using those processes."[11] When talking about the desirable institutional virtues of courts, issues of cognition are rarely mentioned explicitly. Courts are usually instructed to be impartial and independent.[12] Impartiality, however, includes the absence of bias, i. e., the systematic deviation from rationality in our cognitive judgments.[13] The phenomenon of 'motivated cognition', for example, affects national and international judges alike: without their full awareness, the judges' reasoning can be driven by their preferred normative outcomes.[14] As much as courts are also engaged in solving normative problems, cognition is a concept which allows us to say something about the expected quality of the solutions the judiciary can offer us.

International courts may have an advantage at fulfilling cognitive tasks due to the cognitive diversity residing on their benches. 'Cognitive diversity' is a technical term which will be properly defined later in this thesis. For now, it suffices

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[11] Mark H. Ashcraft, *Cognition*, 4th edition (Upper Saddle River: Pearson, 2006). Legal constructivists identify legal communications as the main cognitive instrument of the law. Gunther Teubner famously argues that law is an "autopoietic social system", consisting "neither of rules nor of legal decision-makers", but of "legal communications", creating a self-reproductive network of communications: "Legal communications are the cognitive instruments by which the law as social discourse is able to 'see' the world. Legal communications cannot reach out into the real outside world, neither into nature nor into society. They can only communicate about nature and society. Any metaphor about their access to the real world is misplaced. They do not receive information from the outside world which they would filter and convert according to the needs of the legal process. There is no instruction of the law by the outside world; there is only construction of the outside world by the law", Gunther Teubner, "How the Law Thinks: Toward a Constructivist Epistemology of Law", in: (1989) 23 *Law & Society Review* 5, 727–758, 740. This thesis does not share the constructivist view. It is beyond its possibilities, however, to present an adequate response to Teubner's account. We must pragmatically exclude it from our analysis.

[12] This is no different for the CJEU, especially within the more recent discussion on whether it is more akin to a constitutional court or to a supreme court (see further: Chapter Four). As Bobek writes: "The strength and legitimacy of a genuine supreme court lies, however, in its impartiality and independence. The source of its legitimacy rests less in substance (result or outcome) and more in the process itself. A genuine supreme court in a larger federal unity ought to decide evenhandedly in favour as well as against the federation. Such a court draws its legitimacy from the impartial process itself […]", Michal Bobek, "The Court of Justice of the European Union", in: Damian Chalmers and Anthony Arnull (eds.), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), 153–177, 176.

[13] See Chapter Five for a thorough description of cognitive biases in the law.

[14] For an application of the phenomenon of 'motivated cognition' to the fact-checking of the International Criminal Court, see: Johann Laux, "A New Type of Evidence?: Cyberinvestigations, Social Media, and Online Open Source Video Evidence at the ICC", in: (2018) 56 *Archiv des Völkerrechts* 3, 324–360.

to say that it refers to the difference in which judges are attempting to solve problems they encounter in adjudication. Cognitive diversity is a property which we will regularly attribute to a group of decision-makers, thus leaving behind the individualist paradigm of judicial competence. A single judge will regularly not have too much cognitive diversity at her own disposal. The normative framework required for making cognition matter when legitimizing judicial authority will be developed in this thesis. This framework will be called Public Epistemic Authority and its purpose is to improve the normative institutional design of courts. While principally applicable to all kinds of courts,[15] this thesis focuses on courts operating in the field of (global) constitutional adjudication[16] and takes the supranational Court of Justice of the European Union (CJEU, the Court) as its research object.[17]

If there was ever a time to think about the legitimacy of our highest courts, it is now. Domestic contestations have dragged questions of judicial independence, selection, and authority into the political limelight. In the United States of America, the presidential transformation of the Supreme Court[18] and the federal judiciary[19] has kept the public in suspense throughout the year 2018.[20] In Poland, tens of thousands took to the streets when the government purged the country's Supreme Court in the summer of the same year.[21] In the European Union (EU),

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[15] Public Epistemic Authority is in principle also applicable to other institutions such as central banks whose epistemic competence is likewise a strong reason for their creation.

[16] For an overview on the field of 'global constitutionalism', see: Antje Wiener, Anthony F. Lang Jr., James Tully, Miguel Poiares Maduro, and Mattias Kumm, "Global Constitutionalism: Human Rights, Democracy and the Rule of Law", in: (2012) 1 *Global Constitutionalism* 1, 1–15.

[17] For a broader application, see: Laux, "Public Epistemic Authority".

[18] See, for example: Joel Achenbach, "How Trump and Two Lawyers Narrowed the Field for His Supreme Court Choice", in: *Washington Post*, July 8, 2018, available under: https://www.washingtonpost.com/politics/how-trump-narrowed-the-field-for-his-supreme-court-pick/2018/07/08/b9d3b16a-808c-11e8-b660-4d0f9f0351f1_story.html?noredirect=on&utm_term=.084a55cc32eb (last accessed on: May 30, 2021).

[19] See, for example: Jason Zengerle, "How the Trump Administration Is Remaking the Courts", in: *New York Times Magazine*, August 22, 2018, available under: https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html (last accessed on: May 30, 2021).

[20] The heavily politicized hearings of the Senate Judiciary Committee for Supreme Court nominee Brett Kavanaugh were covered live on all major news networks in the fall of 2018. For a general critique of politicized judicial selection, see: Charles Gardner Geyh, "Judicial Selection Reconsidered: A Plea for Radical Moderation", in: (2012) 35 *Harvard Journal of Law & Public Policy* 2, 623–642.

[21] Cf. Marc Santora, "Poland Purges Supreme Court, and Protesters Take to Streets", in: *New York Times*, July 3, 2018, available under: https://www.nytimes.com/2018/07/03/world/europe/poland-supreme-court-protest.html (last accessed on: May 30, 2021).

the jurisdiction of the CJEU over the United Kingdom was made into a key issue by Brexiteers in the referendum of 2016.[22] It appears that in an ideologically polarized society, the fear of the *gouvernement des juges*[23] actualizes itself whenever the 'wrong' judges ascend to the bench.[24]

At the same time, the job of the judge has become more difficult. As the informational architecture of our societies is changing, the technological complexity judges are facing in their cases increases.[25] "Numerology", as Rachlinski writes, "is sweeping the professions."[26] This is hardly a new phenomenon, and yet its urgency is rising.[27] In its Judicial Activity Report of 2017, the CJEU notes the "increased complexity and technical nature of the cases brought before the Court"[28]. It may be a general feature of our existence that the challenges modern societies are facing are becoming ever more complex.[29] If this is true, we have

[22] See further: Michael Blauberger and Susanne K. Schmidt, "Free Movement, the Welfare State, and the European Union's Over-Constitutionalization: Administrating Contradictions", in: (2017) 95 *Public Administration* 2, 437–449.

[23] Historically: Edouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux* États-*Unis: l'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (Paris: M. Giard & Cie, 1921). For a critical reflection on the German Federal Constitutional Court's history, see: Matthias Jestaedt, Oliver Lepsius, Christoph Möllers, and Christoph Schönberger, *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Berlin: Suhrkamp, 2011).

[24] For some commentators, the judiciary has moved from the "least dangerous branch" to the "most dangerous branch", cf. Kaplan's play with Bickel's famous term: David A. Kaplan, *The Most Dangerous Branch: Inside the Supreme Court's Assault on the Constitution* (New York: Crown, 2018); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merril, 1962).

[25] See further: Kylie Burns, Rachel Dioso-Villa, and Zoe Rathus, "Judicial Decision-Making and 'Outside' Extra-Legal Knowledge: Breaking Down Silos", in: (2016) 25 *Griffith Law Review* 3, 283–290, 283; citing: Richard A. Posner, *Divergent Paths: The Academy and the Judiciary* (Cambridge, MA: Harvard University Press, 2016); Richard A. Posner, *Reflections on Judging* (Cambridge, MA: Harvard University Press, 2013).

[26] Jeffrey J. Rachlinski, "Evidence-Based Law", in: (2011) 96 *Cornell Law Review* 4, 901–924. Rachlinski obviously writes from his American perspective, but the general trend holds true also in the European legal system. For a German example, see: Hanjo Hamann, *Evidenzbasierte Jurisprudenz: Methoden empirischer Forschung und ihr Erkenntniswert für das Recht am Beispiel des Gesellschaftsrechts* (Tübingen: Mohr Siebeck, 2014).

[27] See generally: Sheila Jasanoff, *Science at the Bar: Law, Science and Technology in America* (Cambridge, MA: Harvard University Press, 1995). The problem of judicial competence has already been a major focus of the school of American Legal Realism, see: Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Oxford University Press, 1997), 65–159; See also: Christoph Möllers, "Kognitive Gewaltengliederung", in: Hans Christian Röhl (ed.), *Wissen: Zur kognitiven Dimension des Rechts* (Berlin: Duncker & Humblot, 2010), 113–134, 129, 131.

[28] CJEU, *2017 Annual Report: Judicial Activity* (Luxembourg, 2018), 98.

[29] For such an argument, see: Thomas Homer-Dixon, *The Ingenuity Gap* (New York: Knopf, 2000).

even more reason to question the old paradigm of judicial competence and focus instead on the *collective epistemic reliability* of courts.

The empirical focus of this thesis lies therefore with judicial decisions under uncertainty and complexity. The CJEU proves a highly interesting court to study because it is regularly asked to decide cases under scientific and technical complexity[30] while also being entrusted to adjudicate fundamental rights. It acts as a public authority 'beyond the state'[31], its practice is thus illustrative for theorizing international court authority. The research focus on uncertainty and complexity further matches an understanding of public law as being inherently forward looking. Adopting public laws means to make predictions about factual states of the world. Where there are predictions, there is regularly some kind of uncertainty involved, whether empirical or normative. Both kinds of uncertainty have normative implications as they affect the ways in which public claims of knowledge can be made reasonably.[32] An approach which ties matters of legitimacy to cognition and epistemic reliability must thus find its place among the plausible accounts of legitimate authority.

Most theorists and philosophers define legitimacy as the right to rule which may come with a right to coerce for the authority and an obligation to obey for its subjects.[33] Democracy, it seems, provides the most satisfying answer to the citizen who asks the authority, "who are you to tell me what to do?".[34] The democratic reply goes, "We (the rulers) are you – you chose us, or accepted the procedure that gave us this authority. You are responsible for the conditions of your own rule."[35] Very well, some theorists and philosophers say, but would we not want an authority to make better decisions for us than we could make ourselves? Our will might be too weak, our capacities to balance the pros and cons of an action too small, our time too short. The idea that authority can provide some instrumental service to us has been a powerful one, especially in the philosophy

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[30] Cases concerning the foot and mouth crisis or conglomerate effects in merger control illustrate this forcefully, cf. Eric Barbier de La Serre and Anne-Lise Sibony, "Expert Evidence Before the Court", in: (2008) 45 *Common Market Law Review* 4, 941–985, 941.

[31] Cf. Armin von Bogdandy and Christoph Krenn, "On the Democratic Legitimacy of Europe's Judges: A Principled and Comparative Reconstruction of the Selection Procedures", in: Michal Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford: Oxford University Press, 2015), 162–180, 166.

[32] Such communications are governed by the norms of public reason as well as discourse ethics, see Part I.

[33] See Chapter Two for a conceptual analysis.

[34] In the liberal tradition since Hobbes, every political subject has the standing to make this basic legitimation demand, cf. Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton: Princeton University Press, 2005), 135.

[35] Christopher Kutz, *On War and Democracy* (Princeton: Princeton University Press, 2016), 3.

of law.[36] It clashes, however, with our sense of autonomy and equality. Our quest for a viable account of legitimacy for judicial authority will therefore have to avoid pure instrumentalism.

The last paragraph only touched on one of three dimensions in which we use the concept of legitimacy. This was the *moral* dimension, where procedural, instrumental, and contractualist accounts rival to present the most plausible justification of authority's claim to rule. The second is the *factual* dimension of what the citizens – the public – actually believe to be a legitimate authority. The first and the second dimension may or may not overlap. While there is an important conceptual relationship between both dimensions which will be mentioned further below, the factual dimension is not the direct subject of this thesis. Finally, the third dimension is *institutional*. It is the dimension in which we formulate our expectations in terms of (professional) competence for our authoritative institutions, given the very functions we assigned them to fulfill.[37] Again, the institutional dimension may or may not overlap with the moral and the factual dimension. There are also important conceptual and methodological relationships between the moral and the institutional dimension, as will be argued below.[38]

Our quest for a viable account of legitimacy may begin by distinguishing general accounts of public authority from specialized accounts of democratic and judicial authority. Democracies come in one institutional form or another and authority is regularly dispersed over several branches of government. Möllers has shown that the traditional scheme of the separation of powers can not only be described in terms of its normative accomplishments, but also in terms of its cognitive capabilities.[39] Such a "cognitive division of powers" is of particular interest for judicial authorities beyond the state: whereas the sphere of international law creates ever more highly specialized panels,[40] the European judiciary remains vested with an all-encompassing jurisdiction.[41] In the face of such variance, how do we conceptualize the legitimacy of judicial authority *vis-à-vis* our democratic commitments? The answer suggested in this thesis lies in introducing epistemic constraints to the judicial share in public authority, which in turn is predominantly justified by procedural norms.

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[36] See the discussion of Raz's Service Conception of Authority in Chapter Two.

[37] This is not to say that standards of excellence internal to a social practice do not have moral aspects. On this point, see further: Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2nd edition (London: Duckworth, 1985), 187.

[38] Midway between the moral and the institutional dimension lies the heart of this thesis. It has thus an irrevocable pragmatist flavor.

[39] Möllers, "Kognitive Gewaltengliederung", 134.

[40] Jonathan I. Charney, "Is International Law Threatened by Multiple International Tribunals?", in: (1998) 271 *Recueil des Cours*, 201–382.

[41] See also: Möllers, "Kognitive Gewaltengliederung", 129.

Taking stock of the current scholarship on international court authority reveals a significant growth in methodological approaches. The field now includes legal formalist, normative, sociological, compliance and performance-based, as well as practice-based accounts.[42] In a very recent contribution, Alter, Helfer, and Madsen separate the study of the authority of international courts from the study of their legitimacy.[43] While the *de facto* authority of national courts can often be presumed, international courts face challenges in establishing in fact the authority they were legally given.[44] Consequently, their approach focuses contextually on how the audiences of international courts interact with their rulings.[45] These studies acknowledge[46] what Krisch has theorized as "liquid" authority: the "informality and multiplicity of governmental institutions and tools"[47] in the global[48] realm. Liquid authority is said to be different from "solid" models of authority usually borrowed from the domestic realm which focus primarily on commands issued by single institutions.[49]

These studies are insightful even for those interested in the normative questions of legitimacy as there is a conceptual relationship between *de facto* authority and normative legitimacy. Many would argue that being able to establish *de facto* authority is a necessary condition for being a morally legitimate authority.[50] Now, establishing *de facto* authority becomes an intricate, but by no means impossible task when the public's understanding of legitimacy does not match the authority's claim to rule. Nevertheless, this thesis will insist on and defend the view according to which any institutional design of courts – whether national, international, or supranational – requires a defensible normative benchmark. In the light of the recent scholarship this thesis may thus appear old-fashioned as it understands authority in the solid sense of a command-structure, the kind of thing which may rule and even coerce us – if it is, after all, legitimate.

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[42] See the list in Alter, Helfer, and Madsen, "International Court Authority in a Complex World", 5–14.

[43] Ibid.

[44] Ibid., 3.

[45] Ibid., 4.

[46] Ibid., 5, fn. 2.

[47] Nico Krisch, "Liquid Authority in Global Governance", in: (2017) 9 *International Theory* 2, 237–260, 238.

[48] The idea of a 'global law' within theories of global governance tends to merge international and domestic law, cf. von Bogdandy and Venzke, *In Whose Name?*, 207. To speak of global governance, or global constitutionalism however, does not necessarily require the dismissal of the domestic/international dichotomy.

[49] Krisch, "Liquid Authority in Global Governance".

[50] See further: Chapter Two.

Further reflection on recent contributions will set us on our path towards our legitimatory strategy. It starts with von Bogdandy and Venzke's observation that international courts have long been understood to be "mere instruments of dispute settlement"[51]. Their authority has been justified by the consent of the signatories of the treaties which created them, i. e., the national states in whose name they decide.[52] This understanding is changing[53] and gives way to a 'public authority' claim about the international judiciary. Authority beyond the state has become a popular subject of scholarship.[54] Some speak thus of "international public authority"[55]. In their public law theory of international adjudication von Bogdandy and Venzke see international courts as "actors who exercise public authority"[56]. Accordingly, von Bogdandy and Krenn categorize the CJEU and the European Court of Human Rights (ECtHR) as public authorities "beyond the state"[57], describing them as "multifunctional institutions that exercise public authority"[58]. Whether international or domestic, public authority always raises the question of (democratic)[59] legitimacy posed above.[60]

Von Bogdandy and Venzke depart from the empirical observation of both a quantitative increase in international adjudication and a qualitative change within this type of adjudication from settling disputes towards solving problems for a global society.[61] This twofold change is then held to require a broader legitimatory foundation:

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[51] Von Bogdandy and Venzke, *In Whose Name?*, 1.

[52] Ibid., 1.

[53] Apart from von Bogdandy's and Venzke's contribution, see also: Cesare P.R. Romano, Karen J. Alter, and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014); Benedict Kingsbury, "International Courts: Uneven Judicialization in Global Order", in: James Crawford and Martti Koskenniemi (eds.), *Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), 202–228; Geir Ulfstein, "The International Judiciary", in: Jan Klabbers, Anne Peters, and Geir Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009), 126–152.

[54] Cf. Birgit Peters and Johan Karlsson Schaffer, "The Turn to Authority beyond States", in: (2013) 4 *Transnational Legal Theory* 3, 315–335.

[55] See Matthias Goldmann, *Internationale* Öffentliche *Gewalt* (Berlin: Springer, 2015).

[56] Von Bogdandy and Venzke, *In Whose Name?*, 1.

[57] Von Bogdandy and Krenn, "On the Democratic Legitimacy of Europe's Judges", 166.

[58] Ibid., 163; Referring to: von Bogdandy and Venzke, *In Whose Name?*.

[59] In Western modern normative thought the question of legitimacy of public authority is first and foremost one of democratic legitimacy, Jürgen Habermas, "The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society", in: (2008) 15 *Constellations* 4, 444–455.

[60] Obviously, the authors see that for themselves, cf. von Bogdandy and Krenn, "On the Democratic Legitimacy of Europe's Judges", 164.

[61] The authors state that in the since 2002, international courts have rendered more judicial

"We do not deny that the consensus of the states continues to constitute an important resource of legitimacy; however, it alone no longer sufficiently sustains many of the decisions made in recent decades."[62]

Adding our own understanding of public law, we could say that achieving international coordination by consent of national states is no longer justification enough if international courts are creating and observing public law norms. The premise on which von Bogdandy's and Venzke's call for a normative refinement is grounded is the very 'multifunctionality' of international courts mentioned earlier. The public authority of international courts recognized today includes the settling of disputes, but also the stabilization of normative expectations, the development of the law and thus the creation of normative expectations, the making of law through precedent, as well as the controlling and legitimizing of the authority of other public institutions.[63] In the international sphere this lawmaking happens even though a judicial decision is legally binding only on the parties of the case.[64]

Despite the notion of multifunctionality, the institutional role of courts is to "determine what the law is and apply it to a concrete case"[65]. This binary task description – a norm is the law or is not the law and a concrete case falls under it or does not fall under it – may seem trivial, but it allows for the application of powerful mechanisms of institutional design introduced in Part I of this thesis. Of all the tasks the judiciary fulfills not all lend themselves equally well to a cognitive approach.[66] Important conceptual distinctions will need to be introduced in Chapter One. For now, it suffices to mention a fundamental distinction on which our account depends: the difference between people's preferences and their judgments. This distinction has its origins in social choice theory and main-

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decisions every single year than was the case from time immemorial up to 1989, cf. von Bogdandy and Venzke, *In Whose Name?*, 1. It is unlikely that this trend has been reversed in the years since their writing.

[62] Ibid., 3.

[63] Von Bogdandy and Krenn, "On the Democratic Legitimacy of Europe's Judges", 163. On judicial lawmaking, see further: Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (Cambridge: Cambridge University Press, 2014); Markus Fyrnys, "Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights", in: Armin von Bogdandy and Ingo Venzke (eds.), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Berlin: Springer, 2012), 329–363.

[64] Cf. Marc Jacob, "Precedents: Lawmaking Through International Adjudication", in: (2011) 12 *German Law Journal* 5, 1005–1032.

[65] Von Bogdandy and Venzke, *In Whose Name?*, 7.

[66] According to the authors, determining what the law is includes: individual dispute settlement, the stabilization of normative expectations, lawmaking, and the control and legitimation of public authority, cf. ibid., 8–17.