The idea of relative authority in European and international law

Venzke, I.; Mendes, J.

DOI
10.1093/icon/moy005
Publication date
2018
Document Version
Final published version
Published in
International Journal of Constitutional Law

The idea of relative authority in European and international law

Ingo Venzke* and Joana Mendes**

The present contribution reacts to concerns about the legitimacy of supra- and international public authority by introducing the idea of relative authority. It argues that public authority is relative, first, in the sense that the exercise of authority by one actor always stands in relation to others and, second, that the allocation of authority should be informed by the legitimacy assets that different actors can bring into the governance process. It develops an argument in favor of a specific, articulated allocation of public authority. Like other legal approaches to global governance it is inspired by domestic legal theory and thinking. It distinguishes itself through its focus on questions of institutional choice: Who should do what in European and international law? While ideas of the separation of power face an uphill battle in the variegated institutional settings on the European and even more so international level, the core normative program embedded in this idea provides traction. The contribution offers the idea of relative authority as a core part of an argumentative framework to critique and help justify the exercise of supra- and international public authority.

1. Authority in global governance

The exercise of public authority in global governance is evidently contested, both in public opinion and in academia.[1] We see challenges to international public authority flare up, for instance, in the backlash against investment arbitration, which is a

* University of Amsterdam. Email: i.venzke@uva.nl.

** University of Luxembourg. Email: joana.mendes@uni.lu. This article draws together the insights of a larger research project that focused on the idea of relative authority. We are indebted to all participants for their engagement and willingness to think along: Maurizia de Bellis, Jochen von Bernstorff, Eoin Carolan, Joseph Corkin, Deirdre Curtin, Diane Desierto, Mikael Rask Madsen, Chantal Mak, Dominique Ritleng, Susan Rose-Ackerman, Andreas von Staden, and Bruno De Witte. We thank Fay Valinaki for her assistance in editing the manuscript.

[1] By exercise of public authority, we mean acts based on law that have the capacity to impact the freedom of others. For this conception of public authority *see* A. von Bogdandy, M. Goldmann, & I. Venzke, *From Public International to International Public Law: Translating World Public Opinion into International Public Law*, 28 Eur. J. Int'l L. 115 (2017). On the contestation of international public authorities *see* M. Zürn, *The Politicization of World Politics and Its Effects: Eight Propositions*, 6 Eur. Pol. Sci. Rev. 47 (2014); J. K. Cogan, *Representation and Power in International Organization: The Operational Constitution and Its Critics*, 103 Am. J. Int'l L. 209 (2009).

topic that has made it even onto market squares where citizens campaign against the Trans-Atlantic Trade and Investment Partnership (TTIP). With different nuances, this topic has drawn significant attention in scholarship. Questions include not only how balances between investment protection and other public policy objectives are struck but also who should strike them. The backlash against judicial authority in investment law has prompted the creation of intergovernmental commissions, possibly as a counterbalance to the authority of arbitral tribunals.[2] The exercise of public authority in the field of trade regulation has faced similar challenges for a while now. Should international adjudication in that field decide about the legality of import prohibitions of hormone treated beef or of seal products? Should it decide on the legality of levying carbon taxes? Should it defer to the normative output of specialized standard-setting bodies when it comes to these issues or others? What is decisive with regard to such questions, and for the contestation of public authority more generally, we submit, is the division and allocation of authority between different institutions. This is evident at the European level just as well, despite its very different institutional structure and constitutional framework. Should the European Central Bank take decisions on outright monetary transactions, given that such decisions can have a far-reaching impact on matters of economic policy?[3] Should the European Commission have the authority to reject national budget drafts and request changes? What is the legitimate reach of the European Court of Justice when it strikes balances between market freedoms and social rights?[4]

These exemplary questions have stirred heated debates. By and large, however, the underlying legitimacy concerns that fuel the contestation of public authority remain quite diffuse. They are trapped between the oftentimes unappealing and practically unrealistic option of retreating back to the state, on the one hand, and the limited legitimacy resources of international or supranational administrations and courts, on the other. The repatriation, as it were, of authority that is now exercised beyond the state is oftentimes normatively unappealing because the state offers neither a self-contained framework for decision-making nor the exclusive building block for legitimate supra- and international order. Tying the authority of inter- and supranational actors closer to the input of actors on the domestic level may oftentimes be a good option, but it comes with practical limitations. Experience, together with a wealth of research, has shown that supra- and international actors outgrow the terms of delegation, develop their own agenda, and, using a variety of mechanisms to increase their leverage, exercise authority in relation to their one-time creators.[5] That is especially the case where

[2] S. W. Schill & M. Jacob, *Trends in International Investment Agreements, 2010–2011: The Increasing Complexity of International Investment Law*, Y.B. Int'l Investment L. & Pol'y 141 (2012).

[3] *See* BVerfG, 2 BvR 2728/13 (Jan. 14, 2014), and Judgment in Case C-62/14 Gauweiler v. Deutscher Bundestag [2015] EU:C:2015:400.

[4] *E.g.* Judgment in Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti [2007] ECLI:EU:C:2007:772.

[5] In further support, M. Rask Madsen, *Bolstering Authority by Enhancing Communication: How Checks and Balances and Feedback Loops Can Strengthen the Authority of the European Court of Human Rights*, *in* Allocating Authority 79, 81 (J. Mendes & I. Venzke eds., 2018).

treaty frameworks create administrative and judicial bodies, which then contribute to the dynamic development of the law, including their own statute and their own competences.

These starting points leave us with multiple, scattered sites for the exercise of public authority.[6] Those sites are spread horizontally, across different institutions, and vertically across different levels of governance. In particular, the stark quantitative increase of international adjudication over the past two decades has pushed courts and tribunals onto the agenda of global governance as actors who exercise public authority, next to bureaucracies and standard-setting bodies.[7] At the same time, judicial authority has supported, and also partially controlled, the authority of other international actors.[8] In the European Union we note, for instance, the increasing powers of its executive in the Union's crises responses, including the powers of the European Central Bank and of the European financial agencies.[9] If one accepts that the exercise of public authority cannot be tied back to any single level of governance or any single actor, the question strongly suggests itself how such authority should be allocated. We focus on precisely this allocation. Allocation presupposes a division of authority and, at the same time, points to its more specific distribution. Allocated authority does not, however, presuppose a deliberate design, or even a constitutional settlement. Instead it can emerge through institutional interactions. In order to provide a basis for critique, for informing and possibly guiding such allocation of authority, we develop an understanding of public authority as relative.[10]

We see public authority as relative in two specific and closely connected ways. First, any actors' exercise of public authority in global governance can best be understood and assessed *if put into relation to other actors*. This shift toward seeing actors in

6 S. Casese, The Global Polity (2012).

7 *See* K. J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 Eur. J. Int'l Rel. 33 (2008); A. von Bogdandy & I. Venzke, eds., International Judicial Lawmaking: On Public Authority and Democratic Legitimacy in Global Governance (2012); A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann, & M. Goldmann, The Exercise of Public Authority by International Institutions: Advancing International Institutional Law (2010).

8 A. von Bogdandy & I. Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 Leiden J. Int'l L. 49 (2013).

9 One example of controversial powers exercised by the European Central Bank since 2008 is its decision on Outright Monetary Transactions announced in a Press Release (never formally adopted) on September 6, 2012, *available at* www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html, at stake in Gauweiler v. Deutscher Bundestag. On the powers of the financial agencies, *see* Judgment in Case C-270/12 United Kingdom v. European Parliament and Council (ESMA) [2014] EU:C:2014:18.

10 The term "relative authority" is used also in N. Roughan, Authorities (2013) [hereinafter Roughan, Authorities] to convey that authority's interdependence in principle has an impact on how to assess its legitimacy (*see, in particular*, *id.* at 138) and in N. Roughan, *Mind the Gaps: Authority and Legality in International Law*, 27 Eur. J. Int'l L. 329 (2016) [hereinafter Roughan, *Mind the Gaps*] to characterize international law's claim to authority as interdependent with that of other authorities (namely, of state authorities) and to stress that appropriate relationships need to be established between them. Roughan (*id.* at 340, 348) sees these relationships as a condition of legitimate authority over subjects. Our approach complements Roughan's work and, at the same time, distinguishes itself first of all by its aim of providing a framework for normative critique that draws on the institutional characteristics of each actor and on the specific legitimacy assets that they are able to mobilize.

context—especially international courts and supranational agencies—contributes to understanding and assessing the legitimacy of their authority.[11] For example, should an international investment tribunal defer to the authority of an international governmental commission when it comes to the interpretation of a vague treaty provision? Under which conditions should it do so? Should the EU legislator and the European Medicines Agency incorporate guidelines on the technical requirements of medicines that ensure their safety, efficacy and quality as adopted by an International Conference on Harmonisation, and, if so, in which terms? Second, we see the public authority of any actor as relative in the sense that it *relates to different legitimacy assets*. With legitimacy assets we wish to refer to the argumentative resources that an institutional actor can invoke in support of its authority. As we will argue, those resources specifically connect to the actor's inclusiveness, functional specialization, and capacity to protect rights.[12]

We wish to clarify at this outset that we notably conceive of public authority as a law-based capacity to influence the freedom of others. In our conception, authority does not imply normative legitimacy.[13] Public authority is the phenomenon whose normative legitimacy we wish to critique, inform, and improve. Furthermore, we do not purport or intend to define threshold conditions of ultimate (il)legitimacy—conditions under which authority may justifiably demand obedience.[14] Our approach is reconstructive and normative legitimacy, in our understanding, comes in degrees.

In this vein we develop the idea of relative authority in the twofold fashion—highlighting how exercises of public authority need to be justified in relation to other actors and in view of different legitimacy assets. An actor can seek to justify its authority with reference to its composition and organization, to its procedures, or to its function. It can point to the way in which it is embedded within a context of other institutional actors. For example, the UN General Assembly supports its authority above all with reference to its inclusiveness whereas an arbitral tribunal would point to its independence, impartiality, and to the fairness of the judicial procedure. In the European Union, the European Parliament grounds its authority on inclusiveness and, specifically, on the direct representation of citizens at the EU level, whereas the Council and the European Council build draw from the representation of Member States at different levels. The European Commission thrives on its independence and collegiality.[15]

Setting up the idea of relative authority in this way suggests that it is not per se satisfactory that authority be divided so that no single institution rules, so to speak,

[11] On the diversity of relations between actors see, in particular, A. von Staden, *No Institution Is an Island: Checks and Balances in Global Governance*, *in* Allocating Authority 115 (J. Mendes & I. Venzke eds., 2018).

[12] *See below* section 3.

[13] For an overview with an argument in support of this position, *see* B. Peters & J. K. Schaffer, *The Turn to Authority Beyond States*, 4 Transnat'l Legal Theory 315 (2013); *see also* von Bogdandy, Goldmann, & Venzke, *supra* note 1.

[14] For such a focus *see, in particular*, S. Besson, *The Authority of International Law—Lifting the State Veil* 31 Sydney L. Rev. 343 (2008). This is another way in which our approach is different from that by Roughan, *Mind the Gaps*, *supra* note 10.

[15] *See* E. Carolan & D. Curtin, *In Search of a New Model of Checks and Balances for the EU: Beyond Separation of Powers*, *in* Allocating Authority 53 (J. Mendes & I. Venzke eds., 2018).

or encroaches upon the authority of others. Especially at the international level, the point is typically not that authority is too concentrated. Often it is too dispersed and fragmented.[16] In fact, such dispersion and fragmentation may even exacerbate legitimacy concerns as it may undercut accountability mechanisms and opportunities for critique. The point is that authority ought to be justified not by its sheer division but by virtue of its specific allocation. In other words, we aim at articulated rather than diffused governance.[17] The two ways in which we think of authority as relative are thus closely connected: The way in which each actor's public authority should relate to that of others presupposes a comparative analysis of their respective legitimacy assets.[18] The mere coordination and cooperation between actors is not a sufficient condition of public authority's normative legitimacy.[19] At the same time, looking for a specific allocation of authority does not necessarily call for a deliberate institutional design or constitutional settlement.[20] Even where an overarching institutional framework existed, its capacity to guide concrete allocations of authority is often limited. The allocation will thus be a product of institutional practice and interaction.

What, then, ought to guide a specific allocation of authority? This is of course a grand question that has neither an easy solution nor an ancillary straightforward methodology. One might cling to first principles of great abstraction or, on the other, to concrete practices without critical distance. We adopt a meso-level of theorizing and analysis that is akin to reconstructive approaches.[21] We see the allocation

[16] *See* E. Benvenisti & G. W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 Stan. L. Rev. 595 (2007) (showing how fragmentation serves the powerful).

[17] Christoph Möllers, The Three Branches: A Comparative Model of Separation of Powers 41–44 (2013); J. Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. Rev. 433 (2013); M. Goldmann, Internationale öffentiche Gewalt. Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung 317–319 (2015).

[18] This is also the basic premise in Mattias Kumm's work, with the difference that he grants the higher level of governance a default benefit of the doubt. *See* M Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 Eur. J. Int'l L. 907 (2004) [hereinafter Kumm, *Legitimacy*]. At the same time, the state may plausibly claim to be left alone in some domains. *See* M. Kumm, *Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities, and the Proper Domain of the Consent Requirement in International Law*, 79 Law & Contemp. Probs. 239 (2016) [hereinafter Kumm, *Sovereignty*].

[19] Unlike Roughan's work, our analysis focuses on allocation of authority and on comparative legitimacy analyses that may ground critique and contribute to the democratic justification of authority (*cf.* Roughan, *Mind the Gaps*, *supra* note 10, at 349), rather than on interdependencies and relationships as grounds for legitimate claims to obedience.

[20] *See*, *similarly*, the contributions in T. Broude & Y. Shany, eds., The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity (2008).

[21] Largely in that line, A. Honneth, Das Recht der Freiheit: Grundriss einer demokratischen Sittlichkeit (2011). Methods under the name of normative inductivism or even immanent critique come very close. *See* K. Nicolaïdis, *European Democracy and Its Crisis*, 51 J. Common Mkt. Stud. 351 (2012), with reference to A. Azmanova, The Scandal of Reason: A Critical Theory of Political Judgement (2012). For an early systematic treatment *see already* N. Lacey, *Normative Reconstruction in Socio-Legal Theory*, 5 Soc. & Legal Stud. 131 (1996). For an application of such a method that comes close to ours, *see* R. Howse & K. Nicolaïdis, *Democracy Without Sovereignty: The Global Vocation of Political Ethics*, *in* The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity 163 (T. Broude & Y. Shany eds., 2008).

of authority as a fundamental aspect of democratic legitimation, which provides us with some normative guidance. Concrete allocations of authority may result from institutional practices, but they should be assessed and re-enacted in view of their democratic justification. We see actual practices in European and international law in which the allocation of public authority is both sanctioned and contested. In the reconstruction of such practices, we draw further inspiration from the domestic level of governance and, specifically, from separation of powers thinking. We see that this source of inspiration is prone to lead to problems, as we will argue in further detail. The institutional setup on both the European and the international levels does not readily emulate the domestic context, nor is it clear that it should. And yet, the normative program that underlies the theory and practice of the separation of powers thinking is instructive, and it can travel across levels of governance.[22] It is by way of induction from practices on different levels of governance and by way of deduction from concerns for democratic legitimation that we identify the three main legitimacy assets that we already mentioned: inclusion, functional specialization, and rights protection.[23] Those assets, we add, are particularly significant in present theory and practice. They are not exhaustive or cast in stone. Other considerations may certainly be relevant for assessing an authority's normative legitimacy, especially concerns for redistribution in worlds of inequalities. But these legitimacy assets, we submit, provide a backbone for arguments on how authority ought to be allocated. That, once more, is our ambition: to provide a framework for arguments on who should do what to which extent.

Discussing relative authority both in the context of the European Union and on the level of international law, we add, is insightful for two reasons. First, the conceptual and practical developments at the European level are potentially instructive for international law. Drawing lessons or inspiration does not mean to emulate.[24] Differences may even become more apparent with a deeper understanding of contexts and underlying normative programs. Second, the exercise of authority within the European Union and in international settings poses similar normative problems. In particular, it moves the exercise of authority in the form of rule- or lawmaking away from intergovernmental fora (a feature that is perhaps more salient in international law, but also present in EU law) and away from the oversight of national parliaments, notwithstanding their involvement in EU affairs.[25] Our approach brings to the fore the

[22] On the appeal as well as difficulties of this idea in the European Union, *see* Carolan & Curtin, *supra note* 15); and for the international context see in particular, *see, in further detail*, J. von Bernstorff, *Authority Monism in International Organisations: A Historical Sketch*, *in* Allocating Authority 99 (J. Mendes & I. Venzke eds., 2018).

[23] These standards are widely shared and supported by comparative public law analyses. *See* Möllers, *supra* note 17; E. Carolan, The New Separation of Powers: A Theory for the Modern State (2009).

[24] For such a charge against other strands of scholarship, *see* J. E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 Tex. Int'l L.J. 405, 429 (2003).

[25] *See, e.g.,* D. Jančić, *National Parliaments and EU Fiscal Integration*, 22 Eur. L.J. 225 (2016) (arguing that despite the enhanced role of national parliaments in EU fiscal governance following the Euro crisis, democratic disconnect still favors executive federalism and marginalizes Parliaments).

important structural differences between the European Union and international settings. By highlighting them, it also critiques the existing iterations of separations of powers in the EU.

We develop our argument as follows. We start off by outlining the reasons why the contractual paradigm, which ties all public authority back to states, is descriptively and normatively unsatisfactory (section 2). The argument in itself is not new. The limits of a state-centric approach to global governance have been at the core of much theoretical work. But briefly revisiting the core of the debates forms the background of current concerns with public authority in European and international law. It indicates that any actor's authority is *relative to others*. It also indicates that state institutions remain important in the European and international settings. Next, we briefly outline the main scholarly responses to the contested public authority of supra- and international institutions in order to highlight the specific contribution that the idea of relative authority makes in this regard (section 3). We move on to develop the idea that authority is relative also because it *connects to different legitimacy assets*. While this idea originates in separation of powers thinking, there are good reasons to take distance from that specific framework of analysis. A functional division of competences, as it has developed in domestic settings, does not map well onto existing institutional arrangements. But its normative program bears promise. It teaches precisely that any authority should be divided in a way that is attuned to the specific legitimacy assets that each actor can bring into the governance process (section 4). Finally, we trace iterations of our normative program in practice—we focus on how this program may be reflected in practice and how it may inform that same practice (section 5). We conclude by highlighting the strength, but also the limitations, of the idea of relative authority in European and international law (section 6).

2. Starting points: Beyond the contractual paradigm

Public authority in global governance does not belong in the absolute to any specific actor. This simple observation notably breaks with the short-lived and yet classic view that states' authority is the be-all and end-all of legitimate order. That such a view is implausible has long permeated European law scholarship. The departure from the contractual paradigm with Member States as the exclusive building block of legitimate order dates at least to the 1963 decision in *Van Gend en Loos*, whose political significance is as least as important as its legal repercussions precisely because it breaks with that paradigm.[26] One can trace that break even further back to the Treaty establishing the Coal and Steel Community in 1951, in particular to the supranational competences of the High Authority.[27] Of course, formally the EU can only act within

[26] Judgment in Case C-26/62 Van Gend en Loos v. Netherlands Inland Revenue Admin. [1963] EU:C:1963:1; A. Vauchez, *The Transnational Politics of Judicialization.* Van Gend en Loos *and the Making of EU Polity*, 16 Eur. L.J. 1 (2010); J. H. H. Weiler, Van Gend en Loos*: The Individual as Subject and Object and the Dilemma of European Legitimacy*, 12 Int'l J. Const. L. 94 (2014).

[27] Arts. 9, 14, 46, and 47 ECSC Treaty (Treaty establishing the European Coal and Steel Community).

the boundaries of the principle of conferral.[28] Competence creep aside, the principle of conferral is there to remind us that states nominally remain at the origin of EU powers. Nevertheless, claiming that the EU institutions, as those of the European Communities before it, only derive their legitimacy from the states as subjects of international law is far from satisfactory. Above all it is simply too one-sided. The Lisbon Treaty clearly links the democratic legitimacy of the EU to the representation of its citizens in the European Parliament.[29]

It has been long recognized that the EU's legitimacy cannot rest on its formal-legal setup alone. It needs to extend to the daily functioning of its institutions.[30] Institutional practice molds the vague treaty terms that define the division of authority within the EU. Even where it is formally up to the so-called inter-governmental institutions to decide, the authority of those decisions cannot be linked back to the Member States, or solely to them. Intergovernmental institutions decide in a setting that is crowded by other actors. To take one prominent example, the EU legislative acts formally require, first, a proposal of the Commission, acting in the general interest of the EU, second, that of the European Parliament, representative of the EU citizens and, third, that of the Council, voicing the "will" of the Member States.[31] Comitology is another case in point. Its claimed purpose includes the control by Member States over the implementation of legal acts of the Union. But comitology committees are so enmeshed in the EU's institutional setting that one may doubt whether they further this aim of increased control, as they also serve the EU needs for the implementation of its laws by providing the necessary expertise.[32]

At the international level of governance the contractual paradigm of international order continues to keep a strong hold on conceptions of legitimacy, even if it has always come with considerable critique and some qualifications.[33] It persists with quite some resistance. States are the only sites where public authority can be legitimized, it might be argued. Their interaction thus takes the form of contracts, whose terms are, at the most, *enforced* by those international bureaucracies and the judicial bodies that they created. This view is too shortsighted. Over time, international courts and administrators tend to outgrow the terms of delegation. What is more, they shape

[28] Arts. 4(1), 5(2) TEU (Consolidated Version of the Treaty on European Union). *See also* art. 48(6) TEU, according to which a simplified revision by unanimous decision of the European Council shall not increase the competences of the EU.

[29] Art. 10(2) TEU.

[30] P. Pescatore, *Les exigences de la démocratie et la legitimité de la Communauté européenne*, 10 *Cahiers de Droit Européen* 499, 509 (1974).

[31] Monjal eloquently refers to a "dialectic co-existence of legitimacies." P.-Y. Monjal, *Remarques sur l'emploi de la notion de fonction législative en droit communautaire*, 23 Revue de la Recherche Juridique, Droit Prospectif 1117, 1141 and 1148–1149 (1998).

[32] *See* C. Blumann, *Un Nouveau Depart pour la Comitologie: Le Règlement No 182/2011 du 16 Février 2011*, 47 Cahiers de Droit Européen 23, 31 (2011).

[33] On the travails of the contractual paradigm already in an age of traditional international institutions, *see* C. Brölmann, *International Organizations and Treaties: Contractual Freedom and Institutional Constraint*, *in Research Handbook on International Organizations* 285 (J. Klabbers, ed., 2009). On competing paradigms more generally, *see* A. von Bogdandy & S. Dellavalle, Universalism and Particularism as Paradigms of International Law, 3 IILJ Working Paper (2008).

many important fields of life and law through their practice. It is impossible to understand human rights law in Europe, for instance, without looking at the case law of the European Court of Human Rights (ECtHR).[34] It is only through its practice that one can understand, for example, the naked text of article 3. In its entirety article 3 simply reads that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." It has been consistently developed to support the principle of non-refoulement—i.e. that a refugee may not be sent back to a place where she would be persecuted.[35]

While there are legal and political constraints on the public authority of supra- and international institutions,[36] the power of states is limited because once a treaty is in place, its interpretation is no longer in their hands alone.[37] As the classic canon of treaty interpretation already teaches, the first aim is to give an objective meaning to the text, within its context, and in light of its object and purpose.[38] While the aim may still be to credit the will of the parties in this way, the text offers a basis for interpretative practice that may carry the law away from what might once have been intended. Especially through the interpretative practice of judicial institutions the law develops dynamically in a way that cannot be well explained as merely filling in the gaps of a contract. The working of precedents contributes to a body of case law by way of which, and on the basis of which, international courts and tribunals exercise public authority.[39] When it comes to international actors such as secretariats, bureaucracies, or administrations, it is almost unavoidable that they enjoy a certain degree of autonomy and authority if they are to effectively pursue their tasks. In this sense there is no gain without a certain loss of control.[40]

The way in which public authority unfolds in supra- and international settings shows the limits of the contractual paradigm. The rather amorphous and porous decision-making process is what the concept of global governance has initially highlighted.[41] Even if single acts may be attributed to a collectivity of states (e.g. the

[34] Madsen, *supra* note 5.

[35] S. Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, *in* Max Planck Yearbook of United Nations Law 205 (vol. 12, 2008).

[36] On those constraints on international courts specifically, *see* M. R. Madsen, *Sociological Approaches to International Courts*, *in* Oxford Handbook of International Adjudication 388 (C. P. R. Romano, K. J. Alter & Y. Shany eds., 2014); M. A. Pollack, *Political Science and International Courts*, *in* Oxford Handbook of International Adjudication 357 (C. P. R. Romano, K. J. Alter, & Y. Shany eds., 2014).

[37] I. Venzke, How Interpretation Makes International Law: On Semantic Change and Normative Twists (2012).

[38] Art. 31(1) VCLT (Vienna Convention on the Law of Treaties); *see already* R. Bernhardt, Die Auslegung völkerrechtlicher Verträge. Insbesondere in der neueren Rechtsprechung internationaler Gerichte (1963).

[39] M. Jacob, Precedents and Case-Based Reasoning in the European Court of Justice. Unfinished Business (2014); A. von Bogdandy & I. Venzke, *The Spell of Precedents: Lawmaking by International Courts and Tribunals*, *in* Oxford Handbook of International Adjudication 503 (C. P. R. Romano, K. J. Alter, & Y Shany eds., 2013).

[40] That, too, is the lesson of ages of rational-choice views on delegation and agency. *See* D. G. Hawkins & W. Jacoby, *How Agents Matter*, *in* Delegation and Agency in International Organizations 199 (D. G. Hawkins et al. eds., 2006).

[41] Classically, J. N. Rosenau & E-O. Czempiel, *Governance, Order, and Change in World Politics*, *in* Cambridge Studies in International Relations 20 (J. N. Rosenau & E.-O. Czempiel eds., 1992). For an instructive mapping of the trajectory of global governance research, *see* H. Enroth, *The Concept of Authority Transnationalised*, 4 Transnat'l Legal Theory 336 (2013).

conclusions of the European Council defining a pact for the Euro), their authority cannot be isolated from the acts of the institutions and bodies that implement them or carry them forward (e.g. the European Commission's reports on Member States' compliance with fiscal rules of the Treaty of Stability, Coordination and Governance). The public authority that an actor exercises by interpreting its mandate may just as well be curtailed or endorsed by other actors (e.g. the *Gauweiler* judgment, where the Court of Justice enforced the Treaty rules on the Economic and Monetary Union in a way that endorsed the contested authority of the European Central Bank (ECB) to issue its outright money transactions (OMT) decision).[42] Decisions are embedded within institutional settings and in socioeconomic and political contexts that further shape the exercise of authority.[43]

In addition to reasons of practical feasibility, we have suggested that moving decision-making back to the nation state is normatively unappealing. On occasion it might indeed be advisable to move decision-making closer to home, possibly to be embedded in transnational democratic processes, and possibly under the shadow of supra- or international frameworks.[44] But such a move is hardly a panacea. The legitimacy of decisions would frequently be much more worrisome if they were taken at the level of one domestic polity only, both because of their externalities (e.g. the effect of domestic decisions on foreigners) and for the principled reason that some decisions should just not be left to states alone (e.g. the safeguarding of human rights).[45] That is not to say that domestic institutions do not play an important role in checking public authority at the supra- and international levels of governance and in contributing to its legitimation. In fact, there is a strong link between horizontal and vertical divisions of authority.[46] Member States' checks on supra- and international authority oftentimes compensate for comparatively weak institutional structures beyond the state. In turn, savvy actors on the supra- and international level are compelled to take the consequences and likely repercussions of their actions among domestic institutions

[42] Conclusions of the Heads of State or Government of the euro area of March 11, 2011, A Pact for the euro. Stronger economic policy coordination for competitiveness and convergence, *available at* www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/119810; art. 8 of the Treaty on Stability, Coordination and Governance (or "fiscal compact"), *available at* www.consilium.europa.eu/european-council/pdf/Treaty-on-Stability-Coordination-and-Governance-TSCG/; on Gauweiler v. Deutscher Bundestag, *see* V. Borger, *Outright Monetary Transactions and the Stability Mandate of the ECB:* Gauweiler, 53 Common Mkt L. Rev. 139 (2016).

[43] J. Mendes, *Rule of Law and Participation: A Normative Analysis of Internationalised Rulemaking as Composite Procedures?*, 12 Int'l J. Const. L. 370 (2014) (stressing how reception of international decisions in EU law reinforces their authority, and analyzing the procedural consequences thereof).

[44] S. Cassese, *Global Standards for National Administrative Procedure*, 68 Law & Contemp. Probs. 109 (2005); R. D. Keohane, S. Macedo, & A. Moravcsik, *Democracy-Enhancing Multilateralism*, 63 Int'l Org. 1 (2009); A. von Bogdandy & I. Venzke, In Whose Name? A Public Law Theory of International Adjudication 198 (2014).

[45] *See also* Kumm, *Sovereignty*, *supra* note 18.

[46] They lean on each other in support as well as opposition. *See* von Staden, *supra* note 11; B. Kingsbury, *Three Models of "Distributed Administration": Canopy, Baobab, and Symbiote*, 13 Int'l J. Const. L. 478 (2015); E. Benvenisti & G. W. Downs, *Toward Global Checks and Balances*, 20 Const. Pol. Econ. 366 (2009).

into consideration. What we are left with, once more, is an irreducible multiplicity of sites of public authority.[47] It is against that background that we inquire into relative authority.

3. Toward relative authority: Comparative institutional assessments

The limits of a state-centric, contractual, approach have led to different lines of analysis beyond the contractual paradigm.[48] Resonating with the ways in which supra- and international institutions themselves have responded to contestations of their authority, many scholars have turned to transparency and accountability as core elements of legitimacy.[49] The normative program of global administrative law (GAL) further adds obligations of reason giving and opportunities of judicial review.[50] Sure enough, transparency is a virtue, at least within certain limits, and accountability is a core element of democratic rule. In our view, however, these considerations are not sufficient. They do not respond to the more profound questions of legitimacy that the idea of relative authority may, at least in part, be able to capture.[51]

Accountability is concerned with who gives account to whom, with the question of how an actor gives account, and with which possible consequences.[52] It questions the legitimacy of authority only insofar as such authority is exercised without control. One could maybe claim that accountability networks may counter potential black holes in settings of scattered authority.[53] But, regardless of which functions those networks may or may not fulfill, they are ill-suited to inform the ways in which decision-making competences are in fact divided and allocated. The focus on holding authority to account only gives secondary consideration to a division and justification of authority

[47] With an emphasis on the plurality of authority on different levels of governance or, in other words, in support of constitutional pluralism, *see, in particular*, D. Halberstam, *Local, Global, and Plural Constitutionalism: Europe Meets the World*, *in* The Worlds of European Constitutionalism 150 (Grainne de Burca & Joseph Weiler eds., 2012); M. Kumm, *Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism*, *in* Constitutional Pluralism in the European Union and Beyond 39 (M. Avbelj & J. Komárek eds., 2012). In the same direction, but with a critique of the vocabulary of constitutionalism, *see already* N. Krisch, Beyond Constitutionalism. The Pluralist Structure of Postnational Law (2010).

[48] *See, in further detail*, von Bogdandy, Goldmann, & Venzke, *supra* note 1.

[49] *See* J. Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 Reg. & Governance 137 (2008); A. Bianchi & A. Peters, eds., Transparency in International Law (2013).

[50] B. Kingsbury, N. Krisch, & R. B. Stewart, *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs. 15 (2005); L. Casini & B. Kingsbury, *Global Administrative Law Dimensions of International Organizations Law*, 6 Int'l Org. L. Rev. 319 (2009).

[51] *See* S. Rose-Ackerman, *Democratic Legitimacy and Executive Rule-making: Positive Political Theory in Comparative Public Law*, *in* Allocating Authority 29 (J. Mendes & I. Venzke eds., 2018) (placing these legitimacy claims in specific constitutional contexts and highlighting how they may conflict with others).

[52] M. Bovens, D. Curtin, & P. 't Hart, *The EU's Accountability Deficit: Reality or Myth?* *in* The Real World of EU Accountability What Deficit? 1 (M. Bovens, D. Curtin, & P. 't Hart eds., 2010).

[53] C. Scott, *Accountability in the Regulatory State*, 27 J. L. & Soc'y 38 (2000); J. Corkin, *Refining Relative Authority: The Judicial Branch in the New Separation of Powers*, *in* Allocating Authority 159 (J. Mendes & I. Venzke eds., 2018).

that is informed by legitimacy assets. Discourses on transparency, in turn, emphasize the visibility of decision-making, potentially to enable control. At the same time, they have nothing to say regarding the relative role of decision-makers in exercising public authority. As much as accountability and transparency are important elements of legitimation, they fall short of questioning the underlying reasons that may justify the allocation of authority to one actor instead of another. They are silent when it comes to inquiring who should do what to which extent.

Speaking to the international level specifically, the GAL approach paints with a rather broad brush, prescribing the same cure against legitimacy concerns arising with regard to quite different actors and quite different kinds of acts.[54] It treats under the overarching concept of *administration* such different acts as the practice of international adjudication of the World Trade Organization (WTO), decisions of the Basel Committee about capital requirements, and refugee status determinations of the United Nations High Commissioner for Refugees (UNHCR).[55] By and large, GAL is concerned with institutions and regulatory structures, the legitimacy and accountability of which may fail to match their capacity to deploy authority. This motto has guided an impressive wealth of research analyzing whether and how such institutions and structures correspond with administrative law principles, namely, participation, transparency, reason-giving, and review.[56] One merit of the GAL approach, relevant to our concept of relative authority, has been the unveiling of the interactions between different actors.[57] Yet, overall problems of legitimacy are confronted with the same toolkit applied to quite diverse realities.[58] We contend that normative assessments of exercises of authority and possible responses need to be more fine-tuned. Is the WTO Appellate Body the most apt institution, in terms of its organization, composition, and procedures, to develop trade law and to take decisions that have such a far-reaching socioeconomic and political implications? Which reasons can it offer to support its authority, which legitimacy assets can it tap into? The same questions could be asked with regard to the Basel Committee or the UNHCR, leading to very different answers. Assessments of exercises of authority would need to differ between different kinds of institutions, the legitimacy assets that they do enjoy, and

54 For a discussion of its achievements and limitations, *see* the symposium in 13 Int'l J. Const. L. 465 (2015).

55 *See* N. Krisch & B. Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 Eur. J. Int'l L. 1 (2006); R. B. Stewart & M. R. Sanchez Badin, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 Int'l J. Const. L. 556 (2011); L. Casini, *Beyond Drip-painting? Ten Years of GAL and the Emergence of a Global Administration*, 13 Int'l J. Const. L. 473 (2015).

56 *E.g.* S. Cassese et al., The Global Administrative Law Casebook (3d ed. 2012).

57 Kingsbury, *supra* note 46.

58 On the normative contributions of this approach, *see* R. B. Stewart, *The Normative Dimensions and Performance of Global Administrative Law*, 13 Int'l J. Const. L. 499 (2015). Acknowledging the diversity of the phenomena, M. Savino, '*What If Global Administrative Law Is a Normative Project?*, 15 Int'l J. Const. L. 492 (2015), argues that "GAL focuses on three functional dimensions—global regulation, global execution, and global adjudication" (*id.* at 493).

the main effects that their acts produce.[59] The GAL approaches are not attuned to this type of analysis.[60]

Similarly, but with a different impetus, global constitutionalism has reacted to the shift of authority beyond the state by articulating an alternative to the contractual paradigm.[61] With due regard to its variations, global constitutionalism is mainly geared toward the effective pursuit of community values and their protection, be they articulated in the form of *jus cogens*, human rights, or other constitutional aspirations. Despite the normative concern with the enabling and constraining authority, on the whole the focus of global constitutionalism rests on citizens' rights and protections, democratic self-determination, and the conditions therefore in regional and global settings. By suggesting the concept of relative authority we too draw on constitutional thinking, relying on the normative program of separation of powers and proposing a reconstruction that may fit the reality of global governance. Yet, our ambitions are more limited as we do not suggest that there is a constitutional setup or settlement, at least not at the international level. Our point is that the concern to guide politics into the direction of the pursuit of public goods has so far only led a few scholars of global constitutionalism to focus on the allocation of authority between actors.[62] Even those who embrace a constitutional pluralism—i.e. the plurality of authority between different levels of governance—do not readily break down their argument to specific institutional actors.[63]

Against this background of two dominant responses to the exercise of authority in global governance, we recall the gist of comparative institutionalism and place the assessment of any actor in relation to its "imperfect alternatives."[64] Institutional choice is what the idea of relative authority places center stage.

The lack of comparative institutional assessments haunts most pointed critiques of specific exercises of authority. When it comes to judicial decisions, one may critique, for instance, an arbitral tribunal's extensive definition of investment to include the mere purchase of bonds, the broad interpretation of expropriation to include regulatory takings, or the narrow reading of circumstances precluding wrongfulness. One may also call into question the authorization to market pesticides for overlooking

[59] *Also see*, placing emphasis on the effect of the acts, M. Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 German L.J. 1865 (2008).

[60] While Savino argues that different functions (regulation, execution, and adjudication) postulate different legitimacy problems and that GAL recipes differ accordingly, the solutions he identifies still return to the same principles of administrative law. *See* Savino, *supra* note 58.

[61] *See, e.g.*, P. Dobner & M. Loughlin, eds., The Twilight of Constitutionalism? (2010); J. Klabbers, A. Peters, & G. Ulfstein, The Constitutionalization of International Law (2009); M. Payandeh, Internationales Gemeinschaftsrecht (2010); T. Kleinlein, Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre (2012). On the similarities with the GAL approach, *see* Savino, *supra* note 58

[62] A. Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 Leiden J. Int'l L. 579 (2006). Stressing that constitutionalism, in its pluralist variant, facilitates the acceptance of claims of authority, Halberstam, *supra* note 47, at 164.

[63] *See, e.g.*, Kumm, *supra* note 47.

[64] N. K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy (1997).

environmental concerns, critique a decision based on the scientific opinion of the European Medicines Agency to approve a drug that research has shown to have dangerous side effects, or a Council regulation imposing anti-dumping duties based on a contested finding of threat of injury to EU industry. That is a worthwhile endeavor. Pointed critique may be well received by decision-makers. The trajectory of the WTO Appellate Body, for instance, shows how it—*sub silentio*, usually—reacts to debates in the Dispute Settlement Body and, arguably, to scholarly criticism. But this kind of critique has its limits, too. More forward-looking and lasting answers oftentimes turn toward institutional questions.

We suggest looking for a better allocation of authority with reference to the legitimacy assets of their authors.[65] It will never happen that a single right balance between competing interests will be found and the job is done. Balances need to be constantly re-enacted and renegotiated. Neil Komesar rightly writes in his manifesto for institutional comparison: "[g]oal choice, no matter how elegantly executed, is no substitute for institutional choice."[66] Thinking on relative authority leads us to asking not only *how* to strike balances but also *who* should have the authority to strike them. Such a comparative assessment is a principled petitum.

If we situate our inquiry within the landscape of larger theoretical work that looks beyond the contractualist paradigm, we place ourselves in line with research on international public authority.[67] This line of research notably suggests zooming in on specific exercises of authority, to standardize specific acts and their effects, and to ask what kind of legitimacy is required for those acts.[68] We build on this general approach to authority beyond the state and focus more specifically on how authority should be allocated. Building on the more general approach to international public authority, we stay especially attuned to the way in which authority is exercised in processes of governance where combinations of different actors shape a specific issue area. We claim that it is in their interaction that we can best understand and assess public authority.

Actors use, contest, and legitimize the authority of others. Authority is exercised via the combined effect of a series of mutually reinforcing acts. It is instructive to look at the dynamic process in which authority unfolds and to thus better understand and assess it.[69] The guidelines on pharmaceutical testing of the International Conference on Harmonization serve as an illustrative example. They have a significant impact within the EU because of European regulations referencing them. To offer yet another

[65] Such a critique can, of course, also be articulated in light of specific decisions. *See* G. Shaffer & J. P. Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 Va. J. Int'l L. 103 (2011).

[66] N. K. Komesar, Law's Limits 151 (2001).

[67] A. von Bogdandy, M. Goldmann, & I. Venzke, *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 Eur. J. Int'l L. 115 (2017); A. von Bogdandy, P. Dann, & M. Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 German L.J. 1375 (2008).

[68] *See* M. Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 German L.J. 1865 (2009); J. Bast, Grundbegriffe der Handlungsformen der EU. Entwickelt am Beschluss als praxisgenerierter Handlungsform des Unions—und Gemeinschaftsrechts (2006).

[69] Mendes, *supra* note 43, at 22–24.

example: formally non-binding food safety standards amount to weighty exercises of authority through their incorporation in WTO law and jurisprudence.[70] Within the EU, the country-specific recommendations proposed by the Commission on national budgetary policies—which may be simply endorsed by the Council—have a potentially significant impact on national economic and social policies.[71] Thorny questions about who should adopt these acts—and critiques of how authority is allocated in existing institutional solutions—can best be answered if placed in this relational setting. It is also in that interaction that we can best see the legitimacy resources that specifically actors bring to the table—which legitimacy assets they possibly feed into the process of global governance and which combination of inclusion, rights protection, and functional specialization can support the legitimation of authority.

The idea of relative authority emphasizes and links these two thoughts—that an institutional actor's authority be put into relation to other actors and that its authority connects to different legitimacy assets.[72] It links them through the recognition that no exercise of authority can only be grounded on inclusion, specialization, or rights protection alone. Relative authority is as much about connections as it is about divisions. A parliament cannot do without expertise. Decisions of executive leaning on the specialized knowledge of its authors may fall short of inclusion. Each may conflict with fundamental or contractual rights. The legitimacy of a court judgment, conversely, ought to be assessed in light of possible political–legislative responses.[73] Our point is precisely that, while in relation to others, each actor connects to legitimacy assets. These connections ought to be considered when assessing existing institutional arrangements that undergird the dynamic processes in which authority is exercised. They should guide choices regarding the allocation of authority.

Importantly, each actor should be embedded in a political context in which choices regarding the way in which specific exercises of authority ought to be justified may be challenged and re-enacted. In particular, the division between questions deemed to be of a political nature and therefore in need of inclusive decision-making processes, on the one hand, and those that are deemed to be of a technical nature, and thus best in the hands of a functionally specialized institution, on the other, is itself of a highly political nature and best dealt with through inclusive political processes. This division must at least be subject to possible contestation. Too often has a claim to expertise in European and international law shielded the exercise of authority from scrutiny.[74]

[70] R. Howse, *A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "International Standards," in* Constitutionalism, Multilevel Trade Governance and Social Regulation 383 (C. Joerges & E.-U. Petersmann eds., 2006).

[71] Arts 5 and 6 of Regulation (EU) No 1176/2011 of the European Parliament and of the Council of November 16, 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L 306, 25–32.

[72] On the former dimension of relative authority, *also see* Roughan, Authorities, supra note 10, at 137–145.

[73] *See further* C. Mak, *First or Second Best? Judicial Law-making in European Private Law*, *in* Allocating Authority 217 (J. Mendes & I. Venzke eds., 2018); Corkin, *supra* note 53.

[74] D. Ritleng, *Judicial Review of EU Administrative Discretion: How Far Does the Separation of Powers Matter?*, *in* Allocating Authority 183 (J. Mendes & I. Venzke eds., 2018).

4. Normative traction: Toward a framework for assessment

4.1. Legitimacy claims

Different actors make different legitimacy claims with which they justify their authority. Authority is relative in this sense even on any single level of governance. In basic terms, the ideal type of judicial adjudication gains its legitimacy from the law that it applies, from party consent, independence, and impartiality. Its legitimacy bases are different from those assets that underlie the idea of legislation (representativeness, inclusion) or the idea of administration (competence, expertise).[75] Specific actors feed different legitimacy assets into global governance.

To illustrate the point, the European Commission, for instance, draws its legitimacy to act "in the general interest of the Union" mainly from the competence and independence of its members, from its collegial way of acting, and from the way in which it is embedded in the EU institutional system (not only via the powers of oversight of the Parliament).[76] These are the core constitutive elements that define the institutional capacity of the Commission and that explain the authority that the Treaty allocated to this institution.[77] In view of the democratic provisions of the Treaty, and depending on its concrete functions, the procedures of the Commission should be transparent and politically inclusive. Arguably, the extent to which they ought to incorporate such concerns depends on the effects of the acts they adopt. To illustrate the argument further, most EU agencies derive their legitimacy mostly from the expertise that they bring into EU decision-making. Because they incorporate, in different ways, bureaucrats from Member States, the knowledge that they provide also reflects the views of national administrations and, eventually, national social and cultural perceptions.[78]

The examples of the Commission and of agencies illustrate that the composition, organization, and procedures of these actors enable them to connect to legitimacy assets when exercising authority. Those assets justify their authority to determine whether aid granted by Member States is compatible with the rules of the Treaty (in the case of the Commission), and to provide an opinion on the safety of a given food (the task of one of the EU agencies). They also inform a critique of their authority. Thus, for instance, the Commission's legitimacy to give opinions on draft budgetary plans of Member States is questionable, given *inter alia* the potential re-distributional effects of those opinions in policy areas that are outside the competences of the EU (even if such a mandate is given by an act of the Parliament and of the Council).[79]

[75] *See* Möllers, *supra* note 17; B. Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. 633 (2000).

[76] *See, respectively,* arts 17(3) TEU and 245 TFEU (Treating on the Functioning of the Union); art 17(6)(b) TEU; arts. 226, 230 and 234 TFEU.

[77] *See, in more detail,* J. Mendes, *La legittimazione dell'amministrazione dell'UE: tra istanze istituzionali e democratiche, in* L'Amministrazione europea e il suo diritto 89 (L. de Lucia & B. Marchetti eds., 2015); Ritleng, *supra* note 74.

[78] *See* Carolan & Curtin, *supra* note 15.

[79] Regulation (EU) No. 473/2013 of the European Parliament and of the Council of May 21, 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L 140, 11–23.

Our argument runs close to separation of powers thinking, which indeed emphasizes the distinct legitimacy assets that different actors and institutions bring into the process of governance. In this way the idea of the separation of powers—however odd it may sit at first sight with modern forms of governance—continues to express a normative program that in our view aids critique. In a prominent formulation of the German Federal Constitutional Court, the "institutional and functional differentiation and separation of powers serves the distribution of political authority [*politischer Macht*] and responsibility as well as the control of those in power. *It pursues the aim that, as much as possible, decisions are right.* This means that they be *taken by those institutions*, which, according to their organization, composition, function, and procedure, are *best suited* for taking them."[80] When asking "who should do what to which extent?" we are indeed opening up toward a rich tradition of political–philosophical and legal–doctrinal work in which normative criteria have ripened to fine-tune institutional balances and allocations of authority. But the idea of separation of powers is also one of functional separation and specialization. That holds promise but also comes with limits, in particular for supra- and international exercises of authority.[81]

4.2. The separation of powers: Dividing governmental functions

We are concerned with how authority is allocated in supra- and international settings. Revisiting thinking on the separation of powers allows us to go back to the underlying ideas for divisions of authority between institutions that are bound to act in specific ways.[82] Notably, it reminds us that the ways in which specific institutions can act is tied to the legitimacy assets that they can bring forward.[83] Discourse theory's reconstruction of the separation of powers is insightful in this regard. It suggests that the legitimacy assets that an institutional actor can claim for itself impact the way it should be allowed to reason and justify its decisions. Jürgen Habermas distinguishes discourses of norm justification (the work of the legislature) from discourses of norm application (the work of the administration and the judiciary, in distinct ways). Only the legislature enjoys unlimited access to normative, pragmatic, and empirical reasons while the norm application of the judiciary has to stay within the bounds of what is permitted in *legal* discourse.[84] The separation of powers is reflected in the "distribution of the possibilities for access to different sorts of reasons."[85]

The idea of the separation of powers has oftentimes been caricatured and easily dismissed. Reasons for dismissive tones are that powers do not necessarily come neatly packaged in the three branches of the legislature, judiciary, and executive, nor are those powers neatly separated. Neither reason is compelling for abandoning the

[80] 68 Bundesverfassungsgericht (BVerfG) I, 86; 98 BVerfG 218, 251–252 (emphasis added).

[81] On those challenges more generally, *see* Carolan, *supra* note 23; Carolan & Curtin, *supra* note 15.

[82] Möllers, *supra* note 17, at 93; Waldron, *supra* note 17, at 457, 466.

[83] Möllers, *supra* note 17.

[84] J. Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 192, 229–237 (W. Rehg trans., 1998); *see further* T. Lieber, Diskursive Vernunft und formelle Gleichheit: zu Demokratie, Gewaltenteilung und Rechtsanwendung in der Rechtstheorie von Jürgen Habermas (2007).

[85] Möllers, *supra* note 17, at 192.

normative program of separation of powers thinking or its more specific and doctrinal manifestations. Critiques tend to set up a straw man. Their take on the separation of powers as hermetically split into three cannot even be attributed to Montesquieu.[86] Already James Madison argued in the Federalist Papers that powers are "by no means totally separate and distinct from each other."[87] He clarified that Montesquieu's concern was not with clinical separation. To the contrary, it is clear that "[d]epartments must be connected and blended, as to give so each a constitutional control over the others."[88] What is more, in its dominant reading, the separation of powers postulates a tripartite distinction of functions. While a *tripartite* division is by no means a necessity, any suggestion of a clear-cut distinction of functions may indeed be a reason to take some distance from separation of powers thinking when analyzing supra- and international exercises of authority.

In the dominant reading of separation of powers, a division of authority that focuses on the links between the legitimacy claims and ways of acting presupposes a distinction between legislative, executive, and judicial functions.[89] Roughly, the legislator, as the most *representative and inclusive* institution, is tasked with laying down general and abstract laws. A court exercises public authority in the context of adjudication, retroactively and not on its own motion, in concrete disputes. It is set up in some distance to the political–legislative process dominated by majority voting. At least when it comes to constitutional adjudication, but also in the enforcement of private contracts or statutory provisions, it aims at the effective *protection of rights*. In this respect, courts are by far the most constrained institutions. Administrations, too, follow highly formalized procedures when acting as adjudicators, or less so when they act as rulemakers.[90] They rely on *competence* or *specialized knowledge* to implement policies, whether enshrined in legislation or not. They carry forward democratic constitutional government.[91] It is this way in which the division and allocation of authority is enmeshed in separation of powers theory with a functional specialization that can be particularly problematic when analyzing supra- and international authority.

[86] In this sense questionable, B. Ackerman, *Good-bye Montesquieu*, *in* Comparative Administrative Law 128 (S. Rose-Ackerman & P. L. Lindseth eds., 2010). *See also* J. Ziller, *Separation of Powers in the European Union's Intertwined System of Government. A Treaty Based Analysis for the Use of Political Scientists and Constitutional Lawyers*, 73 Il Politico 133, 137 (2008).

[87] A. Hamilton, J. Madison, & J. Jay, The Federalist Papers 294 (1982).

[88] *Id.* at 300. On the early American constitutional experiences as revealing of the practical impossibility of hermetic divisions, and generally on the problems of a tripartite division, *see* Carolan, *supra* note 23, at 19–21.

[89] Möllers, *supra* note 17, at 79–80, distinguishes between the effect of certain acts according to their scope (who is subject to them?), their temporal orientation (are they directed toward the past or prospective?), and their degree of legalization (to which degree is the decision already framed by law?).

[90] The degree to which this is the case varies across legal systems and fields. Variations across legal systems and fields will necessarily temper such a sweeping statement. Further note that the borderline between what is adjudication and what is rulemaking can certainly be contested.

[91] On democracy, rights, and competence as three core principles of legitimacy, *see* S. Rose-Ackerman, S. Egidy, & J. Fowkes, Due Process of Lawmaking: The United States, South Africa, and the European Union (2015); Rose-Ackerman, *supra* note 51.

4.3. Limits of the separation of powers and its potential

Revisiting the normative program of separation of powers thinking is one thing; quite another would be to attempt to project onto the supranational and international realms any ideal type of a balanced constitution anchored in a tripartite division of functions. The difficulties in delimiting the borders of these functions and the typical absence, at least in international settings, of functioning politico-legislative processes are important reasons to take such distance. A workable theory of separation of powers would also presuppose a division attuned to the specificities of a sufficiently defined system of government in a given constitutional framework.[92] While European constitutionalists could argue that this condition is fulfilled in the European Union, the evolutionary character of the EU also continuously questions the institutional design.[93]

That thinking in terms of a tripartite division of competences could lead us to ask the wrong questions is illustrated by the hitherto vain attempts in European law to delimit delegated acts from implementing acts by reference to their quasi-legislative or executive nature.[94] The division between the two categories of acts was intended to "guarantee that acts with *the same legal/political force* have the *same foundations* in terms of democratic legitimacy."[95] This normative ambition comes quite close to our emphasis on relative authority. However, the prism of the separation of powers turned the question of which acts have the same legal or political force into one of demarcating the substantive realms of legislation and execution.[96] Core to this interpretation was the claim that the "more technical aspects or details of *legislation*" still belong to the legislator, so to speak. Reasons of efficiency and flexibility arguably justify their delegation to the executive.[97] As "quasi-legislative matters," they could not be fully taken out of the purview of the legislator at the risk of jeopardizing the legitimacy of the delegated acts. This means enhanced controls. By contrast, when the Commission exercises "purely executive" power, controls by the legislator are not required. They are in fact barred by the Treaty.[98] Where to draw

[92] *Also see* Carolan, *supra* note 23.

[93] As shown by P. Craig, *Institutions, Power, and Institutional Balance*, *in* The Evolution of EU Law (2d ed.) 41 (P. Craig & G. de Búrca eds., 2011); Carolan & Curtin, *supra* note 15.

[94] For a systematic attempt, *see* Case C-427/12 Commission v. European Parliament and Council (Biocides) [2013] EU:C:2013:871, Opinion of AG Villalón. For those difficulties in the context of financial governance, *see* M. de Bellis, *Relative Authority in Global and EU Financial Regulation: Linking the Legitimacy Debates*, *in* Allocating Authority 241 (J. Mendes & I. Venzke eds., 2018).

[95] Secretariat of the European Convention, Final Report of Working Group IX on Simplification (Conv. 424/02, WG IX 13, 2002) [hereinafter Final Report] 2 (emphasis added).

[96] *Id.* at 8; Commission Communication, *Implementation of Article 290 of the Treaty on the Functioning of the European Union* [2009] COM 673 final, Brussels, 3; European Parliament Resolution of May 5, 2010 on the power of legislative delegation 2010/2021(INI), recital B; and the respective Explanatory Statement in Committee on Legal Affairs, Report on the Power of Legislative Delegation (2010/2021(INI), A7-0110/2010, 2010) 8–9.

[97] *Id.*; Final Report, supra note 95, at 8. Commission Communication, *supra* at 3.

[98] Art. 291 TFEU.

this line has become the core of institutional struggles that found their way to the court.[99]

In the *Biocides* case—the first after the entry into force of the Lisbon where the Court of Justice was faced with the question of delimitation between delegated and implementing acts—the Commission argued that the power to specify the fees, which need to be paid to the European Chemicals Agency, was of a quasi-legislative nature and could not be lawfully exercised via implementing acts. The Court sided with the Council and the Parliament, to whom it granted virtually full discretion in deciding what is "supplementing" a legislative act or "implementing" a legally binding act of the Union (the treaty terms). According to the Court, given the detail of the legislative act, the Council and the Parliament could "reasonably take the view" that the Commission was entitled to "provide further detail" to the normative content of the legislative act, and thus implement it rather than supplement it.[100] There is no satisfactory substantive criterion to distinguish between supplementing and implementing a legislative act. No substantive criterion may ground a normative assessment on whether the legislative choice complies with the scheme of the treaty.[101] The alternative, the Court seems to indicate, is to leave the decision on the negotiation table of the Commission, the Council and the Parliament.[102] Ultimately, inter-institutional bargaining (which different agreements between the institutions have tried to stabilize) will determine which checks apply: those of Article 290 or those of Article 291. In both cases, the Commission will be the author of the act,[103] but, crucially, the role and power of the Parliament and of the Council will be different.

The key question then is: If the distribution of powers of the institutions is currently determined solely by their practice under the imprecise Treaty rules, [104] how can one critique, from a democratic perspective, the legitimation of the adopted acts? The question reaches well beyond the example we mentioned. How far can the authority of the Commission to oversee the national implementation of its budgetary recommendations to Member States be justified solely on the basis of the mandate attributed jointly by the Parliament and by the Council? One could maybe invoke the principle of institutional balance as a possible source of limits to institutional practice. But this

[99] Judgment in Case C-427/12 Commission v. European Parliament and Council (Biocides) [2014] EU:C:2014:170; Case, C-65/13, European Parliament v. Commission [2014] EU:C:2014:2289 (on the scope of implementing powers); Case C-88/14, Commission v. European Parliament and Council [2015] EU:C:2015:499; Case C-286/14, European Parliament v. Commission [2016] EU:C:2016:183 (on different types of delegated acts).

[100] *Id.* ¶¶ 40 and 52; the same approach was confirmed in Judgment in Case C-88/14 Commission v. European Parliament and Council (Visa requirements) [2015] EU:C:2015:499, ¶¶ 28–30.

[101] *See, further*, Ritleng *supra* note 74 (arguing that the degree of discretion left to the institution adopting the act could be a distinguishing criterion).

[102] Case C-88/14, *supra* note 100, ¶ 32.

[103] The Council may adopt implementing acts in restricted circumstances (art. 291(2) TFEU).

[104] For an analysis of institutional practice and its consequences, *see* M. Chamon, *Institutional balance and Community method in the implementation of EU Legislation Following the Lisbon Treaty*, 53 Common Mkt. L. Rev. 1524 (2016).

principle has not prevented deep changes in the division of authority in the EU (by the combined effect of Treaty change and case law) "pulled along by the strongest current."[105] Returning to our example, is it enough that the Council and the Parliament (together with the Commission) determine "on a case-by-case basis whether and to what extent it was necessary to have recourse to "delegated" acts and/or to implementing acts and what their scope would be"?[106] If one tries to argue on the basis of the legislative/executive distinction, the answer is downheartedly positive. Then, however, one is forced to rely on the expectations, political weight and negotiating capacities of each institution under Articles 290 and 291 of the Treaty on the Functioning of the European Union, on EU non-legislative acts. The logic and rationality of this process may or may not be the satisfaction of legitimacy concerns that grounded and pervade the distinction, i.e. which acts have "the same legal/political force" is what the Council, the Parliament, and the Commission define, possibly in view of mutual power trade-offs. Their "foundation in terms of democratic legitimacy"[107] may be a secondary, perhaps uncertain, effect of the schemes of institutional collaboration or conflict that the Treaty rules originated and only partially and imperfectly contain.[108] There are thus good reasons to be critical of attempts to shape the EU's system of governance along the lines of a separation of powers thought as functional differentiation.[109]

Beyond the context of the European Union, thinking about tripartite division according to governmental function faces a yet steeper uphill battle. Neither the UN nor the WTO—one of the international institutions with most elaborate setups—ultimately implements a separation between legislative, executive, and judicial powers. The legislative function is generally lagging behind.[110] Historically, only one power of the state was internationalized: administration.[111] Even the WTO only seemingly relies on the conventional separation of powers. It effectively exercises only one of them: adjudication.[112] Article III section 1 WTO Agreement pertains to the executive, and it states that the WTO shall simply *facilitate* the implementation, administration, and operation of the Agreement. The role of many bodies, such as the array of committees, in fact, goes beyond that.[113] But that is not reflected in this Article III on the

[105] *See in detail* B. de Witte, *The Role of the Court of Justice in Shaping the Institutional Balance in the EU*, *in* Allocating Authority 43 (J. Mendes & I. Venzke eds., 2018); J. P. Jacqué, *The Principle of Institutional Balance*, 41 Common Mkt L. Rev. 383, 387 (2004).

[106] Final Report, *supra* note 95, at 8. The Court endorsed this position in the *Biocides* and *Visa Requirements* cases.

[107] Final Report, *supra* note 95, at 2.

[108] A similar argument is made in J. Mendes, *The Making of Delegated and Implementing Acts: Legitimacy Beyond Inter-Institutional Balances*, *in* Comitology and Commission Rule-making after Lisbon: The New Chapter (C. F. Bergstrom & D. Ritleng eds., 2016).

[109] Carolan & Curtin, *supra* note 15.

[110] *See* von Bogdandy & Venzke, *supra* note 44, at 119–128.

[111] von Bernstorff, *supra* note 22.

[112] *Id. Also see* R. Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 Eur. J. Int'l L. 9–77 (2016); P. Eeckhout, *The Scales of Trade—Reflections on the Growth and Functions of the WTO Adjudicative Branch*, 13 J. Int'l Econ. L. 3 (2010).

[113] A. Lang & J. Scott, *The Hidden World of WTO Governance*, 20 Eur. J. Int'l L. 575 (2009).

WTO's functions. Section 2 pertains to politico-legislative lawmaking, but suggests that the WTO merely *provide a forum* for negotiations. It thus does not institutionalize a legislative process. Only with regard to adjudication does section 3 state that the WTO shall *administer* the Dispute Settlement Understanding.[114] This imbalance creates difficulties and escapes any tripartite separation of powers.[115]

It may thus be questionable to look at the allocation of authority in international and European law in light of an idea of the separation of powers that has matured in a domestic context of governance that has taken a different, more defined, constitutional setup. We indeed suggest distancing oneself from a specific tripartite division of powers that closely ties functions to specific branches of government. That image does not travel beyond the state. But the core normative program that is vested in separation of powers thinking—above all that authority be divided and connected in specific ways that combines ways of acting with legitimacy assets—is an idea that does travel well and that is insightful for the exercise of authority beyond the state. It also finds resonance in concrete practices.

5. Iterations in supra- and international practices

The complexity of governance dynamics in the European Union and in international settings confirms our claim that the authority of any actor can only be assessed in relation to others. This complexity may also hinder the feasibility of our normative proposal of linking authority to legitimacy assets. But there are sufficient indications to think that it is indeed a fruitful endeavor—one that is met halfway by practice. The case law of the Court of Justice of the European Union has in different ways attempted to align authority exercised in heterarchical schemes with procedures that would render certain actors more suitable to adopt certain kinds of acts or decisions. While this practice does not amount to re-defining the allocation of authority within the EU, such "process-perfecting" review may adjust the legitimacy assets that EU institutions and bodies may mobilize in support of their authority to legitimately produce acts with given effects.[116] In particular, judicial review of discretion tests the boundaries of legitimate action both by administrators and by courts. To a great extent, it has been the role of the Court of Justice to define these boundaries, in ways that some may consider too invasive of discretion and others too deferential. It may seem that there are no normative yardsticks against which to approach these often shifting boundaries, other than the general claims of institutional and material capacity of courts in

[114] *See already* A. von Bogdandy, *Law and Politics in the WTO—Strategies to Cope with a Deficient Relationship*, *in* Max Planck Yearbook of United Nations Law 609 (vol. 5, 2001); L. Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism?*, 53 Int'l & Comp. L.Q. 861 (2004).

[115] D. Desierto, *Relative Authority and Institutional Decision-making in World Trade Law and International Investment Law*, *in* Allocating Authority 271 (J. Mendes & I. Venzke eds., 2018).

[116] K. Lenaerts, *The European Court of Justice and Process-Oriented Review*, 31 Y.B. Eur. L. 3 (2012) (defending the argument that process-oriented judicial review may contribute to align political decisions with their legal framework); J. Corkin, *Constitutionalism in 3D: Mapping and Legitimating Our Lawmaking Underworld,* 19 Eur. L.J. 636, 659–660 (2013); Corkin, *supra* note 53.

reviewing acts of the EU institutions and bodies.[117] Nevertheless, on the basis of recent case law reflecting the institutional framework of legislative and non-legislative acts of the EU, the argument can be made that the legitimacy assets of the EU legislator and its "reserved" authority to make policy choices should entail a different degree of review (and deference) when compared to review of non-legislative acts.[118] At the same time, one may query the limits of judicial action in improving existing institutional and procedural frameworks of authority to make sure that, as far as feasible, decisions are right, i.e., taken by those that are best suited because of their legitimacy assets.[119] One may question in particular whether courts are themselves the institutions that are well placed to make such adjustments.[120]

When it comes to international practices, it may first of all be reminded that thinking in terms of relative authority faces an uphill battle not only because of repercussions of the long-dominant contractual paradigm but also because, historically, international institutions were constructed only to enhance national administration. They did not set up checks and balances but an administration for limited and specific tasks. This historical origin and rationale still resonates in the present day.[121] And yet, the proposed focus on relative authority, and the set of questions that comes with it, does inform a whole host of different inquiries. For example, it helps to respond to questions such as how much weight to attribute to international standards in trade law. Pieter Jan Kuijper opines in this regard that "[i]f one really wants to understand how the WTO functions, it is necessary to take into account the large number of organs and Committees of the organization, their interrelationship, and the division of powers between them."[122] While the WTO Appellate Body has not found a principle institutional balance in WTO law, it is surely sensitive to the relative allocation of authority.[123] The notion of "institutional sensitivity" that it uses stands as a placeholder for a more nuanced normative framework for the division and allocation of authority.[124]

In the field of investment law, too, there are sightings of an explicit discussion of relative authority. One prominent example, which testifies to the analytical purchase of discourse theory and its reconstruction of the separation of powers in terms of available reasons, stems from the controversial *Abaclat* award. The investment tribunal's majority concluded that it had jurisdiction to hear the collective claim of Italian holders of Argentine bonds because "it would be unfair to deprive the investor of its right to resort to arbitration based on the mere disregard of the 18 months litigation

[117] P. Craig, EU Administrative Law (2d ed.) 405–409 and 438 (2012).

[118] Ritleng, *supra* note 74.

[119] Rose-Ackerman, *supra* note 51; Corkin, *supra* note 53.

[120] *But see* Mak, *supra* note 73.

[121] von Bernstorff, *supra* note 22.

[122] P. J. Kuijper, *WTO Institutional Aspects*, *in* Oxford Handbook of International Trade Law 80 (D. L. Bethlehem et al. eds., 2009).

[123] India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, Appellate Body Report (adopted Aug. 23, 1999) DS90/ABR, ¶ 98, with reference to India's appellant's submission, ¶ 27.

[124] EC—Measures concerning Meat and Meat Products (Hormones), Appellate Body Report (adopted Oct. 16, 2008) DS26&48/ABR, ¶ 118.

requirement."[125] The dissenting arbitrator, Georges Abi-Saab, took issue with the invocation of fairness in his elaborate dissent. In his view, the majority "strike[s] out a clear conventional requirement, on the basis of its purely subjective judgment."[126] According to Abi-Saab, a balance of interests has been struck "at the appropriate legislative level, by the parties themselves." The balance is reflected in the treaty text, which opens up an avenue toward international arbitration but subjects it to an eighteen-month domestic litigation requirement. Arguments of fairness or expediency were on the table of drafting the treaty text and they have led to a certain outcome. The tribunal must not unravel the legislative agreement. It is at that level, the legislative or conventional level, that the balancing of interests takes place—at the level of establishing the law—not at the level of adjudication, whose domain is the application of the law.[127] It is not open to the tribunal to arrogate to itself the legislative jurisdiction or power of re-examining the rules in order to revise or refashion them, in the name of a rebalancing of interests of its own, according to its will or whim. In other words, such an exercise of "balancing of interests" is clearly *ultra vires* the powers of the tribunal, Abi-Saab argues.[128]

Thinking about relative authority is instructive not only when it comes to the interpretation of substantive law but also in procedural questions and institutional design. The only case so far in the field of investment arbitration in which the interplay between the political–legislative and judicial process was a real issue was *Pope & Talbot*, when the NAFTA Free Trade Commission (FTC) adopted an interpretation of the fair and equitable treatment standard with an eye on influencing ongoing proceedings.[129] The arbitral tribunal largely side-stepped questions about the role of the political–legislative branch, noted concerns about undue intervention and retroactivity, and held that its interpretation of the applicable standard in fact coincides with what the FTC had submitted to be the law.[130]

Beyond adjudication, the way global regulatory regimes are designed reveals by and large a concern with allocating authority to those bodies that are best fit for purpose. In some cases, a functional allocation of agenda-setting and standard-setting may be discernable, even if intricate relationships between different bodies may end up lumping them together to a significant extent, and thereby question the attempted coherence of the original design (e.g., the allocation of agenda-setting to technical

[125] Abaclat and Others v. Argentine Republic, Aug. 4, 2011, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5, ¶ 583.

[126] Abaclat and Others v. Argentine Republic, October 28, 2011, Decision on Jurisdiction and Admissibility, Dissenting Opinion, ICSID Case No. ARB/07/5, ¶ 30.

[127] The argument does *not* deny the lawmaking dimension of international adjudication but instead highlights the different kinds of reasons that are available at different stages of the lawmaking process. For the discourse theoretical reconstruction of this argument, see *supra* notes 79–80 and accompanying text.

[128] *Id.* ¶ 251.

[129] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, (July 31, 2001).

[130] Pope & Talbot Inc. v. Canada, Damages, May 31, 2002, NAFTA Ch. 11 Arb. Trib., 41 ILM 1347.

bodies).[131] However, the point is not one of neatness of institutional designs, whereby the authority to define the agenda in a given policy field would be allocated to a body composed of representatives at the ministerial level and technical issues (such as the equivalence of technical standards) would be relegated to experts from national or supranational bureaucracies, subject to duties of transparency and participation and, eventually, duties to report to parliaments. Whether agenda-setting and regulatory bodies anchor their authority on legitimacy assets capable of justifying the effects of their decisions on the life of citizens across the globe (and how their authority relates to that of other actors at various levels of governance) has been arguably one of the core issues in dispute regarding the institutional design of TTIP and of other mega-regional trade agreements.[132]

6. Conclusions

Who should do what in European and international law? We have developed a two-pronged approach to this question. First, every institution or actor exercises authority in relation to others. Seeing actors in context is important to understanding and assessing claims for the justification of their authority. Second, the division of authority between actors should be a *specific* allocation, one in which their authority can be justified in relation to the legitimacy assets of inclusion, functional specialization, and rights protection. On the contention that no process of governance can be based on only one of these assets, the question then is which mix of these assets does a concrete exercise of public authority require in view of its potential effects. Approaching authority as relative in this way allows us to draw on the normative program of the separation of powers without emulating at the supra- and international levels the division of governmental functions. We have offered the idea of relative authority as a tool that furthers the critique of existing institutional arrangements, and that may guide the assessment of institutional practices that enact current allocations of authority. Because it conveys a specific allocation of authority that is attuned to the legitimacy assets of those actors exercising authority, the idea of relative authority ultimately contributes to the ideal of democratic governance.

We acknowledge that thinking about an actors' relative authority does not offer a satisfactory response to some more fundamental and possibly categorical concerns that the exercise of authority raises in international and in European law, such as issues of redistribution, of Western biases, or of biases in favor of economic interests. It is also limited in its contribution to creating the social and political preconditions for legitimate governance beyond the nation state. But it is not toothless in that regard either. For example, much is amiss in the global financial regulation that has sensitive consequences for peoples and citizens. Decision-making remains largely hidden from

[131] de Bellis, *supra* note 94.

[132] *See* R. Bull, N. Mahboubi, R. B, Stewart, & J. Wiener, *New Approaches to International Regulatory Cooperation: the Challenge of TTIP, TPP, and Mega-Regional Trade Agreements*, 78 Law & Contemp. Probs. 1 (2015). *See also* Desierto, *supra* note 114.

view, removed from democratic input, shaped by a small set of functionally specialized elites that pervade different institutions. Asking how the authority of the G20 should be assessed as relative to others exposes the lacking embeddedness of the decisions of the G20 within any institutional context that could support the democratic legitimation of its authority. This is a limitation but also a strength of thinking in terms of relative authority. It highlights the questionable justification of an actor's authority. In the absence of ideal conditions, ours is a contribution that seeks to take one step further in the direction of legitimate authority. By asking how authority is allocated—who should do what to which extent—we hope to contribute to its democratic justification.