Priming Democratic Rule: A Defence of the Primacy of EU Law in Times of European Democratic Backsliding

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Challenges to Democracy and the Rule of Law in European Politics

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INTRODUCTION

The European Union (EU) is facing major challenges to its democratic foundations and the rule of law, manifested through democratic backsliding in some of its member states (MS). This phenomenon not only threatens the stability and integrity of the Union but also questions the effectiveness of EU institutions in safeguarding democratic values. In the face of these challenges, Beetz (2024) defends the normative obligation of the EU to "protect its democratic peoples from backsliding governments" (p. 13). My argument contends that, instead, it is its constituent MS that have a normative obligation to guarantee that EU action is effectively crystallised.

Constitutional pluralism (CP) aims to equalise EU and MS legal orders in a hypothetically harmonious coexistence between national courts and the Court of Justice of the European Union (CJEU). The systematic disregard for the primacy of EU law —over conflicting national law— has permitted the abuse of CP to further despotic policies (Faraguna, 2017). With years charged with populism, the primacy of EU law may offer a promising alternative path for European democracies.

This thesis proposes "enshrined primacy" as a potential safeguard against democratic backsliding. "Enshrined primacy" defends the normative obligation for primacy of EU law to be codified in MS national orders to deepen its effective enforceability and protect the rule of law. First, the rise of national authoritarianism, notably in Hungary and Poland, presents one of "the greatest threats to democracy in Europe" (Kelemen, 2017, p. 212). Second, these endogenous illiberal trends have resulted in popular demands for safeguards against the erosion of the rule of law (Blauberger & van Hüllen, 2021). Third, MS have a duty to resort to measures that combat this new form of democratic deficit. In this way, "enshrined primacy" is a tool to coherently support EU law foundations and deter authoritarianism.

An emphasis on national codification is scholarly relevant as it builds on questions of legal certainty, equal application of principles as well as wider normative considerations like justice and the legitimacy of supranational political action. This gap in the literature has important societal implications, as "enshrined primacy" serves two equally crucial purposes: granting persuasive action to uphold democratic values, whilst empowering and legitimising the Union as a democratising actor.

Failing to formally enshrine primacy would delegitimise EU actions, contradict the authority of the CJEU and jeopardise democracy and the integrity of the *acquis communautaire* —the body of EU law. I endeavour to answer: *should EU member states nationally enshrine the primacy of EU law as a safeguard against democratic backsliding?*

METHODOLOGICAL APPROACH

The paper will first provide conceptual rigour in the literature review. Since concepts will be key for the posterior argumentation, the review is methodologically determined by different scholarly studies through conceptual analysis as a political science approach (Olsthoorn, 2017, p. 153). This will ensure that the arena of contestation will be the normative one and avoid falling into a conceptual trap. The methodology will be largely shaped by analytical political theory, with an argumentative structure that combines different approaches to political analysis. Firstly, an argument is developed through conditional reasoning as a social sciences method to establish logical validity to our premises. Secondly, a legal-doctrinal section examines how to limit the valid outcomes that legal reasoning as an interpretative approach offers (Allen, 2018). Lastly, the analysis elevates the preceding arguments to the normative dimension. This attempts to defend normative obligations to enshrine primacy, rather than mere desirability. Overall, the methodological foundations and deductive structure of the paper guarantee the logical validity and normative rationale to draw valid and meaningful conclusions.

The decision to opt for analytical political theory over positivist methods is justified by the nature of the subject. To ensure compliance, unlike factual research, morality "is not a voluntary under-taking from which one can opt out as one desires" (Müller, 2024, p. 165). Morality is a normative phenomenon and serves to translate empirical reasons to undertake a particular course of action into a normative requirement. It is precisely because it is a normative phenomenon that morality guarantees that human actions are subjected to it. These normative groundings will be the key to establishing duties for democratic action and preventing autocratisation.

LITERATURE REVIEW

Constitutional pluralism

The debate on CP dates back to the early stages of European integration (Davies, 2012). Despite this, only now has CP been weaponised to justify violations of EU law and fundamental values as well as contraventions of primacy. On descriptive and normative accounts, CP is the idea that both EU and MS legal orders coexist in a conceptual heterarchy whereby neither system is regarded as normatively superior nor supreme (Flynn, 2021, p. 241). I define the EU's legal system as, neither fully constitutionally pluralistic, nor fully uniformly centralised. CP is present in European discourse appealing to national identities. Nevertheless, it has not become the norm guiding the structure and governance of the Union.

Normatively, there is no consensus on CP's desirability. Supporters argue that the abolition of all elements of CP in the EU's legal order would conflict with national sovereignty and that the legitimacy of the Court and the implementation of the *acquis* emanates from MS. In contrast, opponents defend that CP —abused by autocrats— poses a risk to democracy in Europe, whilst it is European citizens that legitimise the EU rather than MS. These two antithetical positions are depicted by Loughlin (2014) and Goldmann (2016). Loughlin (2014) makes a normative critique of CP, arguing that it is contradictory, excessively ambiguous and disregardful of the importance of authority in judicial disputes. CP is thus oxymoronic and normatively undesirable. Goldmann (2016) challenges these claims, arguing "that this is a fallacy" (p. 120) and favouring a position of ambiguity. Ambiguous laws through CP could then partially resolve the paradox of competing national-European legal orders.

Kelemen and Pech (2019) present the most compelling normative opposition to CP in the literature. CP could be normatively desirable in emphasising the value of diversity. However, these theoretical reasons are defeated in reality as the flexibility CP provides is unsuitable to prevent autocratisation (Kelemen & Pech, 2019, p. 60). This arises from the fact that authoritarian regimes deliberately refrain from complying with EU law and fundamental values by stretching this flexibility to the utmost. Therefore, CP is unfit to target anti-democratic forces' noncompliance, which is uncontestedly voluntary (Priebus, 2022).

Utopian confederal ideas are confronted with the stark reality: CP has been susceptible to abuse and is now virulently popular (Kelemen & Pech, 2019, p. 61). Even if the purpose was not to justify democratic backsliding, if autocratic leaders used it to that end, then the concept failed to accomplish its mission. For instance, Hungary's Prime Minister Viktor Orbán defended the "obligation to stand up for Hungary's constitutional identity" (Halmai, 2018, p. 36). Then, not only is CP normatively objectionable, but it may just be irremediably flawed by definition.

Moving away from the politicisation of EU affairs, Kelemen and Pech (2019) present a legalistic approach characterised by the juridification of EU action. This neglects the agency and relevance of other governance actors such as civil society and political parties. Moreover, it ignores the implications for national sovereignty and EU legitimacy. Therefore, the strong normative defences advanced by supporters of CP —such as the intrinsic value of diversity— are not being substantially challenged. The rhetoric falls into fallacies with the use of highly sentimentalist language and the distortion of the concept, qualifying CP as "an abnormally dangerous product" (Kelemen & Pech, 2019, p. 61). This shows how the authors may not only disagree with normative endorsements of CP but oppose the mere existence of the concept.

Kelemen and Pech (2019) also generate hasty generalisations that extrapolate the experiences of CP abuse in Hungary and Poland to the entire EU, with no empirical evidence or logical reasoning presented to support this uniform danger. Moreover, even if the arguments were exclusively based on black letter law, they would still fall short. For instance, their legal analysis does not mention the principle of subsidiarity, which has legal force under Article 5(3) of the Treaty on European Union (TEU). This carries normative and policy implications as its omission alienates MS and their sovereign autonomy in favour of a centralised power.

Lastly, the appeals to the CJEU and the laws governing the EU in their argument depict the authors' claims as having a monopoly over EU law. Nonetheless, as previously shown, EU law's doctrinal indeterminacy allows it to be subject to different interpretations that carry contrasting consequences for legal practice. The authors do not have the supreme verdict in the interpretation of EU law, it depends upon the eye of the beholder.

The defence of CP by Bellamy and Kröger (2021) incarnates the best confederal normative rebuttal to federal opponents. This pluralistic view is premised on the idea of *demoicracy*: a

shared authority with intergovernmental features that governs "together but not as one" (Nicolaïdis, 2013, p. 351). The authors defend diversity as indispensable for democratic governance, providing wider normative grounds to their understanding of CP. Albeit descriptively mentioning the opposing view's arguments, they also fail to substantially dismantle the federal narrative. Faced with autocratisation, Bellamy and Kröger (2021) argue that, although backsliding governments use CP as a blank check to further anti-democratic policies, their rhetoric is "avowedly anti-pluralist" (p. 623), which demolishes all possible credibility and coherence in appealing to CP.

The authors fail to discern the Union's areas of competence from the competence to determine court jurisdiction: the *Kompetenz-Kompetenz*. On this concept, similarly to Goldmann (2016), Bellamy and Kröger (2021, p. 621) see ambiguity and leaving questions unanswered as the magic bullet to the flaws emerging from the application of CP to issues of competence to rule on EU legislation apropos national laws. Kelemen and Pech (2019) show how this criticism dramatises an established division of coexisting jurisdictions, with the CJEU and national courts having the exclusive competence to review and annul EU and national law instruments respectively.

Bellamy and Kröger (2021) create illusionary dichotomies between the EU law status quo and the "mutual recognition of […] plural orders" (p. 627) as well as between proactive supranational institutions and independent bodies with civil society, falsely implying that the latter are currently excluded in the EU. They present the idea that "EU action must avoid appearing to be self-authorised" as it may further erode the EU's democratic deficit and perceived legitimacy (Bellamy & Kröger, 2021, p. 630). I reject binarist ideas of CP as the only viable legitimation instrument. As many MS object to Treaty revision, a realistic alternative is the codification of primacy by each MS in their legal orders: "enshrined primacy".

The primacy of EU law

Primacy is an important principle to ensure protection for TEU's Article 2 democratic values. Despite being added to the unsuccessful Constitutional Treaty, the Treaty of Lisbon failed to include EU law's primacy. The decision to exclude an explicit provision on primacy could a priori undermine the legitimacy and authority of the EU and the CJEU. Nonetheless, the 17

Declaration concerning primacy annexed to the Treaty of Lisbon recalled its establishment in the Court's case law, for instance, in the ruling of *Costa v E.N.E.L.* (1964). Therefore, its hypothetical inclusion in national orders should be seen as a mere opportunity to increase EU legitimacy. "Enshrined primacy" aspires for normative coherence and legitimation rather than providing legal enforceability —as this is already possible through case law.

In the academic sphere, the possibility of using national codification as a legitimation of the principle of primacy has not been extensively discussed. Some authors have examined codification, although in EU Treaties (Claes, 2015). Based on Avbelj's (2011) structural principles of EU law, I conceptualise primacy as the precedence and prevailing application of certain valid norms over others, with the potential non-application of the latter. I opt for conceptual clarity to avoid normative arguments being made by definitional distortion (Olsthoorn, 2017).

The distinction between primacy and supremacy in this paper is deliberate, with the same conceptual caution practised by Kelemen and Pech (2019). Even though the indistinct use of these terms is rife in academia, supremacy carries wider legal and normative implications because, unlike primacy, supremacy has hierarchical validity connotations (Avbelj, 2011, p. 758). This is reflected for instance in Spanish jurisprudence, with the Constitutional Court distinguishing both concepts to conclude that the *primacy* of EU law is compatible with the *supremacy* of the Constitution (de Areilza Carvajal, 2005). Fabbrini (2015) conceptually favours supremacy. The indiscriminate use of the concept especially when referring to CJEU jurisprudence erroneously implies that supremacy —a different principle— has been established in European case law. Moreover, Fabbrini (2015) uses the word supremacy to refer to other authors' arguments that decided to use primacy instead, which misrepresents their perspectives.

Primacy offers an ambitious approach to counter backsliding as it allows EU law to deter attempts to undermine democracy in Europe. Yet, it is attainable as it only requires a hospitable institutional and legal environment for EU law. This favourable context is also a *sine qua non* for MS to legitimately demand vigorous actions and enforcement of EU law in another MS. In other words, primacy could prevent autocratisation through a robust application of the law and it only requires MS to provide welcoming legal conditions.

Coming back to CP, Walker (2002, p. 319) argues that modern constitutionalism suffers from a so-called constitutional fetishism. I argue that states have a normative duty to abandon this legal egocentrism and embrace EU law as the catalyst to ensure the fulfilment of constitutional rights and aspirations of democratic rule and equality before the law.

Even though Bellamy and Kröger (2021) present naive ideas of Courts' self-restraint and ambiguity, they admirably present the intrinsic defence of diversity. Their idea of a "counter-punctual" system endorses judicial dialogue and mutual respect for diverse European constitutional systems (Bellamy & Kröger, 2021, pp. 626-627). Conversely, Kelemen and Pech (2019) fail to provide a substantial defence of unity and centralisation. My argument endorses the idea that unity makes strength, and defending primacy means defending unity in diversity. This is the intrinsic defence of primacy as unity that Kelemen and Pech (2019) should have supported. Furthermore, although it may be inferred from their argumentation, there is no evidence of defending primacy as effectiveness. Is a robust European central authority more effective in exerting pressure on a MS for failures to uphold fundamental democratic values? The idea that one voice speaks louder than 27 dispersed ones has been a pillar of European integration and a determinant of its prosperity.

Kelemen and Pech (2019) then, despite having more solid legal grounds and higher normative coherence, do not materialise their normative justifications to the same level. One point that elucidates these deficiencies is their neglect of the normative objection to disintegration and how it would deteriorate and virtually annihilate any coherent and united attempt to effectively challenge autocratic regimes. This paper will be novel in presenting the normative desirability of primacy in the legal-doctrinal section, arguing for the importance of primacy's centralised effective control given neofunctionalist imperatives.

ARGUMENTATION

Conditional logical reasoning

Logical rhetoric has been the object of study for many philosophers, psychologists and, more recently, political scientists. Building on studies of logic, this section will be grounded in a conditional argument by *modus ponens*. These contain a conditional statement as the central premise that, if shown to be true through an empirical condition, derives a logically valid

conclusion (Nickerson et al., 2019, p. 132). For the defence of primacy, the central conditional premise is that countries with general compliance with EU law also widely respect the rule of law and democratic institutions. Then, the analysis of a group of MS in terms of legal compliance and rule of law may corroborate or contradict the theoretical expectations. This argumentation will endeavour to be logically accurate and true, with references and empirical observations being extracted from reputable sources.

The first step is to determine which countries actually comply with EU law. One of the most prominent investigations on this subject was undertaken by Falkner et al. (2007) and then updated by Falkner and Treib (2008) to account for the Eastern enlargement. In both studies, the category of *World of law observance* is consistent, characterised by the dutiful transposition of EU directives —that is, adopting European secondary legislation into national law. The category is further associated with primacy as it requires a compliance culture that is irrespective of "conflicting national policy" (Falkner & Treib, 2008, p. 296).

Out of 19 MS being analysed, only Denmark, Finland and Sweden fulfilled the stipulated criteria. This study remains a relevant piece of literature as it has been the basis of analysis for numerous scholarly articles in European Studies. For instance, Börzel (2021, p. 66) uses Falkner and Treib's (2008) typology to account for the different levels of compliance with EU law across the Union. Against all expectations, these countries have dualistic systems, meaning that for international law to have full effect domestically, it must be adopted through national legislation (Kirchmair, 2016). Despite this, the three countries have the lowest average number of reasoned opinions as part of the European Commission's mechanism to ensure compliance with EU law: the infringement procedure (Börzel, 2021, p. 63). As a result, it seems that monistic constitutions —making international law automatically incorporated into domestic legal systems— are not a requirement to ensure compliance.

With the legally compliant countries being reduced to three, it becomes crucial to establish whether the Nordic trio is also democratically compliant concerning the rule of law. The World Justice Project's (n.d.) Rule of Law Index operationalises the latter as the adherence to "accountability, just law, open government, and accessible and impartial justice". This quantitative analysis is "one of the most systematic approaches to conceptualising and measuring the rule of law worldwide" (OECD, 2019). The findings are coherent with the theoretical expectations: Denmark, Finland and Sweden have had the highest rates of rule of law abiding in the EU since the Index was introduced in 2015. National public opinion also

displays the highest levels perceiving the judicial system to be very good in terms of its independence, based on the 2023 EU Justice Scoreboard (European Commission, 2023). However, perceptions may be disconnected from reality and they should only serve to complement the above-mentioned quantitative factual evidence.

These empirical corroborations show that countries highly abiding by EU law also show higher levels of rule of law integrity. In this vein, there is a reliable basis to believe that the starting premise is true and the empirical conditions hold. Thus, effective domestic EU law primacy often overlaps with rule of law compliance.

The purpose of this conclusion through logical means is not to establish causality in the relationship between priming EU law and rule of law performance. Instead, it is aimed at constructing a robust and valid logical basis, which illustrates how a legal compliance culture may be positive to ensure that the rule of law and democratic principles prevail in a country. The conclusion shows that there are *prima facie* no empirical grounds to logically infer that upholding the primacy of EU law is detrimental to rule of law indicators. Consequently, in the absence of any certainty over how these causal links lie, the imperative to protect the rule of law demands proactivity to ensure effective compliance with EU law. What is more, the logical reasoning may also suggest that abandoning CP in exchange for primacy could be beneficial to democracy. Given the unpredictable future of our democratic societies, enshrining the primacy of EU law might be, at the very least, a prudent try.

Doctrinal basis and legal theory

When Bellamy and Kröger (2021) normatively claim that CP and cooperation between courts are beneficial to democracy, they assume the first premise —judicial self-discipline— to be true. However, it is difficult for this syllogism to hold empirically since Courts have systematically abstained from self-restraint. Therefore, the sincere cooperation envisaged in Article 4(3) of the TEU seems no longer possible and the primacy of EU law then becomes our last resort to guarantee democratic rule (Kelemen & Pech, 2019, p. 60).

Failing to uphold the principle of primacy found in case law would then jeopardise the nature of EU law and its legal basis, violate the principle of sovereign equality and other "fundamental rule of law principles" (Kelemen & Pech, 2019, p. 62): legal certainty and

equal application of the law, *inter alia*. Therefore, CP is —at least, empirically— incompatible with uniformity and coherence (Bellamy & Kröger, 2021, pp. 627-628). Confederalists advocate reciprocal negotiation of rules, which inevitably leads to an unequal application of the law —contingent on MS's constitutional identities— in a pick-and-choose exercise of justice (Kelemen & Pech, 2019, p. 62). My pragmatic defence grounded on effectiveness contends that CP's judicial dialogue expectations have not materialised in legal confrontations between national courts and the CJEU. Consequently, because the initial premise of national self-restraining courts has been proven to be absent, the uniform application of equal rules cannot be followed. It seems then that, in a factually quasi-federal structure like the EU, ambiguity is untenable as it could endanger the system of legal remedies and the equality of MS.

Firstly, states are duty-bearers because, traditionally, it has been deemed more "efficient to legally distribute and prioritize duties" at this level (Müller, 2024, p. 254). However, the reasoning behind this is purely functional and for efficiency-maximising purposes. In the same way that the protection of individual rights has been paradigmatically assigned to the state for functional reasons, primacy has been established in the EU legal order due to its neofunctionalist dynamics. In this way, the consensual advancements of European integration have increasingly required the primacy of EU law for the Union to be effective and successful. Without recognising primacy, the EU's mandate and *raison d'être* would become a paper tiger. Even more importantly, states voluntarily decided to abide by EU law, thereby restraining their sovereign margin of manoeuvre through the subjugation of all state actions to the supranational level (Skogly, 2009, p. 834). Although sovereignty considerations will be further explored in the normative analysis, doctrinally, we may conclude that the extensions of the Union's competences and authority were legitimate. These were just a product of the institutional structure, sovereign constraints and the legal obligations to which states consented to upon ratification of EU treaties.

Accordingly, as states advanced integration, primacy has strengthened its status in the configuration of the EU. All desirable features of the Union that incentivise membership such as the internal market or the freedom of movement require primacy. In other words, excising primacy from the EU's legal order would mean the beginning of the end of the current EU and its virtues, achieved through spillover effects. As for the EU's institutional structure, it seems that form follows function: the nature and powers of the Union are determined by the

tasks assigned to it by the Treaties. Consequently, even though plausible arguments could be made to defend primacy in referring to ulterior liberal-supranational considerations, primacy is also just a requisite for the EU to function.

Secondly, states counter primacy and portray it as an incompatible reality with national values. However, these contradictions and normative inconsistencies present an obstacle to democratisation as they push EU action to the confinements of a grey zone between legitimate and illegitimate action, between just and arbitrary intervention. I argue that primacy has desirable features of equality and justice as it guarantees the uniform application of the law and generates mutual trust and reciprocity between national and European jurisdictions.

Thirdly, descriptively, the EU is best defined as an organisation with both supranational and intergovernmental characteristics (Schlenker, 2015). Primacy is often regarded as a supranationalising feature that only reinforces the idea that Europe is becoming a naively cosmopolitan federal conception. This notwithstanding, I contend that it is precisely the EU's embedded intergovernmental traits within the supranational structure that require primacy to ensure that all state powers abide by the same rules. This configuration *sui generis* makes the primacy of supranational law only applicable to an organisation like the EU, with an institutional structure where supranational and intergovernmental attributes coexist.

Fabbrini (2015) demonstrates how the principle of sovereign equality enhances uniformity's equality-based defence, as it prevents MS from unilaterally redefining the law a posteriori and ensures that MS "remain equally bound to the terms they have unanimously agreed to" (p. 1015). Therefore, there are strong doctrinal reasons to endorse a functional defence of the primacy of EU law. This stems from the imperative for consistency, unity and legal certainty in the application of European law. Stipulated in the ruling of *Costa v E.N.E.L.* (1964), the case shows that challenging or failing to uphold primacy would deprive EU law of its enforceability and impartiality, thus inexorably jeopardising the legal basis on which the Union is built. The rationale for concern is that, if the legal basis is violated, EU action becomes futile and, with this, all advantages of membership vanish.

Fourthly, the European constitutionalised multi-level system may be positioned in the legal literature as part of the wider constitutional paradigms between a public-international-law understanding and a distinct legal order (Mayer, 2005, p. 513). The latter is defended by the

CJEU jurisprudence, whilst the German *Bundesverfassungsgericht* (BVerfG) is a manifest supporter of the former, contending the CJEU's authority and primacy. It seems logical that only the CJEU would endorse "enshrined primacy" as it would reaffirm its scope of legitimate legal action. However, specifically analysing the jurisprudence of the BVerfG, I argue that even the most sceptical MS constitutional courts have a duty to respect primacy and favour its codification in national legal orders.

My analysis explores German jurisprudence on primacy due to the BVerfG's success in "exporting German constitutional law and constitutional review" (Schönberger, 2020). Analysing an influential and revisionist court may reveal flaws in the chain of thought of judicial challenges to primacy. This will address the main caveat to my argument: the normative desirability of primacy for countries that, despite high levels of rule of law indicators, challenge the principle of primacy. Legal theory will justify national codification of primacy in contexts where autocratisation is not omnipresent but challenges to primacy are rife.

There are renowned cases, including *Maastricht* (1993) or *Weiss* (2018), that have marked a revisionist jurisprudence incompatible to counter authoritarianism at the EU level. In this case, the German court should refrain from such challenges to primacy and favour the establishment of a compliant case law. Failing to do so will be tantamount to normative incoherence, inconsistent legal practice and hypocritical treatment of sovereign equals. Even if the arguments and legal principles invoked by a state to impede backsliding in another MS are positive, they need to be logically accompanied by the application of the same rules and legal principles while choosing not to abide by them themselves. The legal maxim of equity encapsulates this principle: *one who seeks equity must do equity*.

The BVerfG recognises that the German Basic Law is sustained by a framework of protection for individual rights that binds the state and any form of state authority (Larsen, 2022). These constitutional individual rights, according to the Court, are also connected to international human rights. This nexus is understood in universal terms as limiting those constitutional rights territorially would deprive international rights of their transnational protection (Müller, 2024, p. 266). Following this reasoning, it is doctrinally incoherent for the BVerfG not to fervently endorse the idea of primacy as EU law is a body of international law that confers rights to individuals. To put it differently, the German Constitutional Court simultaneously protects constitutional individual rights —relatively analogous to international human

rights— whilst depriving EU law of its legal force on individuals. These double standards could even suggest that the commitments to international justice and individual freedoms are a purely deceptive facade with empty words. I argue that, if the BVerfG rejects primacy as a feature of EU law —which is an international body of human rights protections— then it must act coherently by saying that the Basic Law confers rights territorially and independently of international human rights obligations. In the absence of such recognition, this would amount to a problematic legal contradiction and normative inconsistency. This would violate the principles of legal certainty and uniform application: two elements carrying practical and substantive implications, not just aspirational objectives. Should European rights be relegated to a secondary optional position, this would be untenable as EU rights are to be accepted in their entirety. A rejection of one of the enshrined rights could even suggest that the Court rejects the legal force of international individual rights altogether.

Another vital point of criticism is the Court's diverging behaviour when it comes to fundamental considerations of its relationship with international law more broadly. On the one hand, in their view, the Basic Law provides a hospitable environment for international obligations in that it "abandons a self-serving and self-glorifying concept of sovereign statehood" and, instead, the constitutional framework views sovereignty by the individual state as "freedom that is organised by international law and committed to it" (*Urteil des Zweiten Senats*, 2009, para. 223).

Looking into the Court's jurisprudence, challenges to primacy are rife. A behaviour that is, if anything, precisely self-glorifying and neglectful of its international commitments. Similarly to my argument on individual rights, this self-glorifying approach is not inherently wrong or undesirable. However, I do argue that this implicit chauvinism must be publicly and clearly acknowledged. Otherwise, individual citizens are presented with two mutually exclusive positions, which undermines the Court's moral and legal duty to provide legal certainty to its appellants and rights-holders.

On the note of international commitments, a wider criticism may shed light upon legal principles and considerations. Under the principle of *pacta sunt servanda*, agreements must be kept. In this light, the BVerfG's failure to fulfil the requirements established by the Treaties will result in violations of the law, which may entail detrimental penalties to terminate the violation and deter future attempts to do so. What is more, should there be no acts upon violations of the *acquis*, then this would be inadvertently signalling that such

violations are acceptable and shall be perpetrated by other MS in the future. Here, I establish a coordination claim, whereby if primacy is instituted in a country, it raises pressure on other MS to act similarly. Sedelmeier (2017) advocates the normative obligations for the EU to use instruments of "social pressure to confront breaches of liberal democratic principles" (p. 2). In the same way, I argue that enshrining primacy nationally activates horizontal mechanisms of social pressure for domestic changes in other MS. Moreover, the more states uphold the *acquis* in implementing primacy, the higher pressure is exerted on those that refrain from doing so.

Conversely, this correlative mechanism also applies in cases of transposition neglect as it encourages other Courts throughout the continent to adopt this self-glorifying position. German jurisprudence has normalised an *ultra vires* doctrine that has encouraged other national jurisdictions to operate themselves as the *ultima ratio* and challenge CJEU decisions on EU law, notably in Hungary and Poland (Anagnostaras, 2021). This empirical claim shows the coordination that is established especially when the challenger is one of the most traditionally prominent states in the EU. For the German case, neglecting primacy contradicts its wider positioning on the compatibility and relation of national and international legal obligations. Furthermore, the coordination claim shows how the revisionist position normalises *ultra vires* doctrines in countries that, unlike Germany, are at risk of democratic backsliding domestically.

This is not to establish a clear causality between the two. Rather, it indicates that there are strong reasons to reject attempts to challenge primacy as it could go to the detriment of —in this case— German nationals abroad, who could be subject to other MS constitutional courts' deprivation of their fundamental rights derived from EU law. In this sense, whilst I argue that the BVerfG is not normatively complicit in the strict definition, a pragmatic approach may suggest that judicial self-restraint might be a cost worth bearing for the German courts to ensure that their own citizens enjoy the same minimal individual protection conferred in one's own country by belonging to the EU and abiding by its laws. Additionally, a stable democracy domestically does not absolve from enshrining primacy given the doctrinal analysis desirability and the coordination claims of social pressure on other MS. This applies to both self-restraining and interventionist Courts as the value of social pressure is exacerbated by the number of persuaders rather than their traits only.

Overall, this section shows that, regarding the primacy of EU law for the functioning of the Union, there is little to no doctrinal indeterminacy as the legal basis is quite clear (Posner, 2008). It does not follow from this that there is no room for debate on the desirability of primacy. However, any attempts to reject it must recognise that, in doing so, they would also be determined to eradicate the institutional foundations on which the EU is sustained to this day. The debate on the desirability of the features from the EU falls outside of the scope of this research. Nevertheless, this legal-doctrinal analysis reveals that there is plausible evidence and even strong normative reasons to codify primacy when there are no objections to the EU by definition. The latter could only be coherently resolved through the voluntary and unilateral withdrawal of the MS under Article 50 of the TEU. Furthermore, the normative and legal contradictions by the BVerfG show that the rationale for primacy must be consistent. Whilst challenging primacy is not inherently wrong, such contestation must be aware of the detrimental implications that it has for the correct functioning of a supranational authority. In other words, for primacy to be effectively implemented, states must either take it or leave it. Any attempt to accept the current neofunctionalist European institutions whilst rejecting primacy will only result in fallacies, cynicism, normative incoherences and practical dysfunctionality.

A normative duty

This section brings logical and doctrinal reasoning conclusions into analytical political theory, thereby transforming a desirable policy into a normative obligation. The core argument is that MS have a normative obligation —not just normative reasons— to enshrine the principle of primacy of EU law in their national legal systems to counter autocratisation. The doctrinal analysis is ambitious in saying that primacy is structurally required for the functioning of the EU. Nevertheless, this requirement is grounded on effectiveness, which is positive although not a moral duty. Consequently, the argument only establishes the desirability of primacy, not the obligation to enshrine it.

The main impediment to establishing a normative obligation is that primacy is now only something good, yet not an ethical imperative. In this sense, the non-codification of primacy is a negative and yet permissible practice. It is irrelevant if a state is implementing anti-democratic policies due to another state's non-codification of primacy. It is only the state

that commits those impermissible acts —in this case, anti-democratic policies— that is the wrongdoer and, thus, the only duty-holder. Therefore, even if a state knows that, in failing to codify primacy, it might be encouraging anti-democratic policies abroad, it does not have a normative obligation to enshrine primacy. This creates a vicious cycle of detachment that allows to perpetuate the current state of affairs.

Under this logic, the codification of the principle becomes something supererogatory, an action that goes "above and beyond what is required" by moral or ethical rules (Khan et al., 2023). These non-mandatory desirable consequences are omnipresent in political theory, but my goal will be the creation of a moral *sine qua non* in this subject. My argument challenges this supererogation and contends that the duty to enshrine primacy extends to all MS, irrespective of the circumstances and positions of other governments. This will be achieved drawing largely from Müller's (2024) normative defence of extraterritorial application of International Human Rights Law (IHRL), which will shed light on the validity and potential for legal enforcement mechanisms outside of statism.

Firstly, states have a duty to implement primacy because they voluntarily decided to subjugate to EU law, thereby restraining its sovereign leeway. Both national legislation and ratification of international treaties are valid and legitimate approaches for a state to bind itself to certain norms of expected conduct. These expectations evolve over time and in the EU they have advanced substantially. However, MS still decided to impose broad legal obligations and create a Court with extensive powers, which could actively shape EU law through its jurisprudence. This is not to say that the magnitude of the evolution was easily predictable, simply that MS consensually built the supranational institutional structure in a way that would allow such evolutions to occur. As a result, the only viable way to evade these evolving expectations and withdraw state consent would be abandoning the Union.

Arguably, many of the rights granted under EU law are expressions of moral requirements for justice and equality. Consequently, for example, Hungary is morally bound to respect the rule of law but is also legally bound to do so as it initially manifested its consent when joining the EU. In this legal context, consent is a cumulative obligation, whereby continuous membership —deciding not to leave— and integration into the EU bring material benefits, but do reinforce commitments to abide by EU law. Even if a state only had material incentives to join, their uninterrupted membership amounts to consent to legal obligations too.

I argue that membership means consent and codifying primacy would only be a coherent attempt to fulfil the commitment expressed upon accession to the Union. "Enshrined primacy" is normatively mandatory because failing to uphold it would turn the state into an illegitimate and unaccountable political actor. States would become untrustworthy as they would only commit to the values enshrined in treaty and case law superficially. Moreover, state normative authority would vanish as the latter is contingent on the state's factual power towards its citizens (Müller, 2024, p. 260). If consent to EU law is withdrawn, EU membership must be withdrawn too for normative coherence. MS must codify primacy nationally because this ensures their legal and moral obligations and authority, whilst retaining their credibility vis-à-vis citizens' expectations.

Secondly, as the legal-doctrinal section indicates, the state is widely accepted as the duty-bearer for the application of the law due to functional imperatives to enhance efficiency. What is more, sovereignty for law enforcement is, in normative terms, instrumental instead of intrinsic (Müller, 2024, p. 266). Sovereignty is entrusted to the state to protect individual rights and contribute to the fulfilment thereof. This last purpose is omnipresent in the European Treaties, which give special consideration to human and minority rights. In this vein, states cannot use arguments on sovereignty and national identity to justify violations of their obligations as sovereigns. Again, sovereignty is constructed and conditional on the fulfilment of sovereign obligations of protection. If the body of EU law strengthens and codifies these moral obligations, neglecting it would be tantamount to neglecting one's own sovereignty. Defending EU law could then be necessary to implement the duties imposed on its MS by virtue of their instrumental sovereignty.

Confronted with this existential menace to the state, even critical courts like the BVerfG ensure that these sovereign obligations remain intact by recognising the CJEU's authority as legitimate and the EU as effective for individual rights protection. The *Solange II* (1986) decision rendered inadmissible —so long as the EU and case law kept protecting fundamental rights— legal bases citing EU secondary law infringing German constitutional fundamental rights. Here, the BVerfG decided to dismiss its jurisdiction on applicability of EU law. This jurisprudential shift demonstrates that EU law provides a robust framework of rights protection, which MS are obliged to respect in the interest of their own sovereignty.

Thirdly, sovereigntist approaches to the application of EU law corroborate the extent to which *Realpolitik* is now at the doors of European integration. The above-mentioned instrumental

sovereignty is essential for the protection of individual rights, which is a paradoxical double-edged sword for states: they are both the most effective in guaranteeing citizen protections and yet the most prone to violate them (Müller, 2024, p. 286). I argue that the obligations for democratic actions do not arise merely from membership or Treaty obligations, but from individual citizens' sovereignty.

The individual level is not only relevant for the application of EU law through citizens' individual sovereignty. It is also citizens as a group with collective sovereignty that make the EU and its respective MS legitimate authorities through a chain of democratic authorisation. The Union's transnational character requires authorisation to emanate from the European peoples (Beetz, 2024, p. 6; Theuns, 2020, p. 147). Consequently, dismissing individual rights could never act as the grounds to justify territorial state actions as the moral significance of its sovereignty emanates from its citizens (Müller, 2024, p. 311). EU law is a framework of norms that protects the freedoms of individual agents as rights-holders, but addresses the primary duty-bearers: the states (Müller, 2024, p. 255). Unlike individual citizens, the state does not possess an inalienable fundamental right to be sovereign (Peters, 2009, pp. 514, 534).

My argument here for "enshrined primacy" is that, even if the sovereignty of the state for the application of individual rights were to be contested, the state remains the duty-bearer *par excellence* in the contemporary political arena. For this reason, codifying primacy is a requirement for a state to comply with its function as a duty-bearer. National codification serves to affirm this function and guarantees that individual rights are protected by the state.

Fourthly, coming back to the doctrinal analysis, we can elevate the desirability of uniform application to the normative arena as an obligation for justice. In political theory, justice is only guaranteed insofar as a normative principle applies "equally to everyone who is equal with respect to the relevant basis on which the principle is assigned" (Müller, 2024, p. 311). In this case, it would be unjust to apply EU law differently across the Union because the relevant basis is EU citizens qua being EU citizens. This uniformity is necessary for the realisation of justice, which makes codifying primacy a normative duty. Legally, globalisation has made boundaries increasingly porous for the application of individual rights derived from the law. Philosophically, Kant's cosmopolitanism illustrates how traditional understandings of interstate law are obsolete (Cavallar, 2015). Instead, they ought to be replaced by

individual-based legislation with world citizenship integrating external and internal features of sovereignty (Kleingeld, 2011).

The geographical location of right-holders in the EU should not arbitrarily determine the level of protection they receive. For this reason, the EU adopts the teleological-interpretative idea of *effet utile*. This ensures that, in the application of rights under EU law, it is individual citizens that matter rather than where they are located (Ganesh, 2021, p. 476). Accordingly, rights obligations enshrined in EU law "apply whenever EU law applies, irrespective of the territorial location of the individual" (Müller, 2024, p. 53). Primacy must be codified in national legislation because it guarantees uniform application of norms. Universally shared EU citizenship demands the equitable assignment of rights to its citizens, which is a normative duty of justice (Mahlmann, 2023). Objecting primacy would require resorting to implausible and extreme premises to disregard principles of equality and justice, which are fundamentally recognised by all MS.

Lastly, "diagonal public enforcement" shows how nontraditional forms of regulatory litigations may be more suitable to the EU's transnational nature and functional requirements (Clopton, 2018, p. 1077). The idea of European citizenship turns individuals into direct legal subjects, thereby generating diagonal obligations between MS and individuals who, albeit holding EU citizenship, are nationals of other EU countries. There are intrinsic and instrumental normative duties to support diagonal enforcement of EU law through primacy. On the one hand, diagonal relations are normatively relevant for the promotion of solidarity and cross-border mutual respect. It is a moral imperative for states to treat all citizens fairly and equitably, whether within sovereign borders or in another MS. On the other hand, EU law does not derive its normative obligations exclusively from universalist moral ideas, but on the principle of equality of EU citizens that the diagonal relations across the Union demand. Primacy is a functional guarantee that the rights of country nationals are protected elsewhere in the EU. Therefore, even if a state might be sceptical of supranational authorities, its duty to expand and ensure the rights of citizens surpasses any form of reticence.

This argument shows that the rights enshrined in European primary law protect citizens in the diagonal duties and interactions between MS. Primacy is a normative duty because diagonal relations require subjugation to the same normative standards. The primacy of EU law, thus, is the minimally protective instrument that ensures that no MS is immune to moral norms and legal duties (Müller, 2024, p. 263). MS then have a normative obligation to endorse

"enshrined primacy" so as to protect their nationals abroad —who become outsiders in other MS— and equip them with a regime of basic legal and moral security. This self-binding mechanism offers citizens a refuge from authoritarian rule in the EU and majoritarian decisions that disregard the rights and interests of minorities (Buchanan, 2015, p. 256).

CONCLUSION AND DISCUSSION

Democratic backsliding is now one of the most critical challenges for the future of the EU and European integration. In light of this, upholding the primacy of EU law is no longer an ideal, but a necessity. Primacy is necessary to give binding effect to provisions of EU law. This may become essential to safeguard European nations against autocratisation and the erosion of democratic values. The codification of primacy in national legal orders could be a critical juncture for the process of continental integration: it could set a precedent that makes EU membership henceforth contingent on enshrining primacy. This will enable MS to establish a robust framework of legitimate action that ensures the consistent application of justice and the protection of the rule of law across the EU.

Despite showing the overlap between law compliance and respect for the rule of law in this paper, the establishment of causation could be the object of future empirical studies. The value of this analysis comes from normativism and especially from the imposition of moral duties. The normative obligation to "enshrined primacy" is essential for maintaining the integrity of the European legal order and upholding the rights and freedoms of all its citizens. This duty partly entails commitments to promoting transnational solidarity, equitable treatment and mutual respect amongst MS and their citizens. The diagonal enforcement of EU law unavoidably requires primacy, thereby ensuring that the rights of individuals are protected irrespective of their location within the EU.

The lack of adherence to certain norms or the failure to meet certain standards does not mean that they should not be pursued at all. This constitutes a so-called "Is-Ought" fallacy. Introduced into political thought by Hume (1740/2007), the fallacy evinces the adversities in elevating argumentation from the empirical to the normative arena. In terms of the primacy of EU law, the fact that many states have objected codifying the principle —both in Treaties and

national legal orders— does not imply that this should not be the case. Its normative desirability and moral duties go beyond what one observes in the geopolitical realm. Therefore, even if there have not been major attempts to enshrine primacy, its normative status, desirability and obligations still hold and should not be diminished.

The failure to codify primacy risks undermining the authority and legitimacy of the EU and perhaps, most importantly, compromising its ability to tackle democratic backsliding. As seen in the doctrinal arguments, enshrining primacy in national legal systems is, not only a normative imperative, but a pragmatic necessity in the current European project's democratic institutional design. MS should codify primacy and, in doing so, they may strengthen the Union's capacity to defend our shared democratic values and foster a more just and cohesive Europe.

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