NGO participation in international lawmaking and democratic legitimacy

The debate and its future

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Part I

Democratic Legitimacy
Part I – Preliminary remarks

Part I presents what is understood in this study to be the meaning of democratic legitimacy. Chapter 1 explores the main features of democratic legitimacy. Chapter 2 reflects on the dual evaluation that is required when assessing the democratic legitimacy of law. Especially due to the many existing different interpretations of democratic legitimacy, the subsequent chapters require some preliminary explanatory remarks and caveats.

The following exploration does not offer an absolute, monolithic account of the collective concept of legitimacy as such. In this respect, it does not contradict the current scholarly trend to consider any validation of the exercise of authority as bound to be patterned after the nature of the object. As international law is far from centrally organized, but rather fragmented and multipolar, scholars generally have accordingly constructed legitimacy as a collection of parts. In their conceptions of legitimacy, these scholars chose to mould legitimacy according to the specific characteristics of international law. However, instead of searching for a type of legitimacy that suits the international exercise of authority best, the NGO democratic legitimacy thesis already provides an answer to how to evaluate international law, namely through democratic legitimacy by means of NGO participation in the making of it. Consequently, Part I aims to develop an independent standard of democratic legitimacy without rejecting in principle the premise as generally expressed by scholars that different types of authority might be judged by different criteria. We take as a pre-determined starting point ‘democratically legitimate law’ as ‘the ideal’, without giving an all-encompassing judgment on the ratio between democratic legitimacy and other

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60 This chapter does not attempt to explain when, how, and why democratic legitimacy as a concept to evaluate public authority was introduced. We only scantily touch upon the origins and causality of ‘democratic’ events. See for further reading on the history of origin, Mazo 2005, p. 3, referring to Geddes 1999; Dix 1994; Moore 1966; Binder 1971. See also Lipset 1994, p. 3-4; O’Donnel and Schmitter 1986, p. 10.

61 Such a construction is found in the work of Besson, who developed a concept of legitimacy, which is coordination-based, on Raz’s service conception of authority, which has a piecemeal character and encompasses many different justifications that can fit different social and cultural contexts. It is also found in the work of Buchanan, that also offers a model of legitimacy for international law specifically. In addition, Bernstein collects different grounds of legitimacy. Bernstein 2011, 17-51. The same has been done by Majone, who also assembles in his conception of legitimacy of international law different grounds of legitimacy. Majone 1996, p. 291.

62 Raz also acknowledges the theoretical space for different ways to justify authority. Raz therefore calls his justification thesis the ‘normal justification’. He indicates that his conception is not the only way but the normal and primary way to justify authority. See Raz 1989, p. 1179.

63 It is not the purpose of the subsequent chapters to demonstrate that democracy as a ground for the acceptability of authority to rule leads to the effective acceptance by the legal subjects of the rules to which they are submitted. A normative approach assumes, but cannot proof, that the leading criteria are ‘the criteria people in fact use in assessing the legitimacy of an institution’, Bodansky 2012, p. 7 (unpublished manuscript), p. 10. This research does not aim to present democracy as a dominant social fact. A constant awareness of our Western perspective is obligatory. Democracy is not taking root in much of the former Society Union, in the less industrialized Muslim states, and in many nations in Africa.
ideals, such as justice, or pleading for the primacy of democratic legitimacy above other forms of legitimacy.

The conception of democratic legitimacy serves to provide an analytical framework for evaluating the NGO democratic legitimacy thesis. It remains, as far as possible, indifferent to the type of political authority that produces the law. This is in line with Tasioulas’ assumption that every type of law, when it is indicated that it has or should have democratic legitimacy, should be evaluated according to the same standard of democratic legitimacy. Notwithstanding our non-territorial interpretation of a political community, the consolidated practice of lawmaking at the domestic level, including the democratic traditions that are found, functions as a source of inspiration, due to the long and rich history of democracy theory that has been developed in the domestic context. However, our conception of democratic legitimacy does not provide a normative presupposition about what specific manifestations of democracy ought to be pursued. Instead, the basic principles of democracy are considered in the abstract, in an attempt to account for the value or importance of different manifestations of democratic legitimacy. The selected sources of literature might seem eclectic from the outset. However, in the opinion of the author, these different strands of thought are more or less integrated by a traditionally republican motive for pursuing the democratic legitimacy of the authority to rule: that is, freedom from domination.

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64 See for a scholarly approach to a reconciliation of democratic legitimacy and justice, Buchanan 2004. Buchanan concludes, ‘if the wielding of political power is morally justifiable only if it is wielded in such a way as to recognize the fundamental equality of persons, and if democracy is necessary for satisfying this condition, then political legitimacy requires democracy, at least in circumstances in which democratic institutions are feasible’. Buchanan 2004, p. 250.

65 Many scholars uphold the idea that only if governments are democratically organized one can perceive them as representative agents of their peoples and hence as legitimate. See for example, Buchanan 2004, p. 142-143. See for an exploration of the general aspirations shared by many democratic theorists: Held 2006, p. 263.

66 In line with what Tasioulas has stated, and contrary to Buchanan, we hereby aim to protect ‘the univocal concept of legitimacy’ and a ‘fully legal characteristic’ of international law. Tasioulas 2010, p. 98-99. See for a dissenting opinion Buchanan 2010.

67 The institutions and manifestations as described in the inquiry rest upon different conceptions or ‘schools’ of democracy. And although many common democratic manifestations will pass in review, the conception of democratic legitimacy is in principle indifferent to the type of democratic decision-making, whether that is based on elections, on lottery systems, on referenda, on initiative, on representative recalls. It is aimed to achieve to understand the purpose of these democratic decision-making methods, what democratic legitimacy aims to protect. This is what is called the rationale of democratic legitimacy.

68 The discourse concerning democratic legitimacy is not only huge, but it is also very eclectic. We seem to have difficulties to agree on content of democracy, on hierarchy between democratic principles and even on the causes for a governing structure to become democratic. In his study of the democracy literature concerning democratization of the late twentieth century, Huntington finds no less than twenty-seven independent explanatory variables for democracy. Huntington 1991, p. 37-38.
1 Principles of democratic legitimacy

The appreciation of what counts as an adequate concept of democratic legitimacy is colored by the spirit of a particular time. Understandings of democratic legitimacy are continuously reinterpreted and may change radically over time. Notwithstanding these changes and differences, practically every approach to democratic legitimacy refers to the ideal of popular power, and the necessity for broad public support for governmental acts. Underlying the apparent consensus there are many essential nuances, perspectives, and variations in methodology that lead to different interpretations of democratic legitimacy. Some scholars primarily focus on the social conditions for public support, others on voting systems, some emphasize the origins of democratic thought, others the influence of different constitutional and political institutions on public support, and so on. These different accents, in often-implicit conceptions of democratic legitimacy, can easily result in a confusion of tongues.

This chapter aims to explore the main features of democratic legitimacy. It starts with a consideration of the collective term ‘legitimacy’ by distinguishing legitimacy from concepts that are interrelated with, but of a fundamentally different nature from, legitimacy. To demonstrate the characteristic features of legitimacy, section 1.1 discusses public authority, the acceptance of public authority, and the reasons for accepting public authority. Second, the concept of democratic legitimacy is explored. Section 1.2 discusses democratic legitimacy’s essential principles: freedom and equality. Section 1.3 focuses on the central manifestation of these principles: participation by all legal subjects in the making of the law by which they are governed. Section 1.4 concludes with a discussion on the relationship between trust, distrust, and democratic legitimacy.

1.1 Legitimacy

Law presents itself as prescriptive and mandatory. A legal rule is an authoritative instrument to guide, change, or create social constructions between legal subjects. Law requires justification with regard to its legal subjects to be legitimately authoritative, regardless of

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70 See for an overview: Held 2006.
71 See Lipset 1959, pp. 69-105.
72 See Dahl 1956.
73 See for example Reybrouck 2013, in which Van Reybrouck critically assess the current scholarly reliance on electoral representative democracy, holding it against conceptions of democracy developed in earlier historical periods, such as the Greek polis. For an overview on historical developments in conceptions of democracy, see Dunn 2005.
74 Cohen argues that ‘we know much too little about the relationship between consensus, pluralist and majoritarian varieties of democracy, presidentialism and parliamentarianism, federalist and unitary states, and the development of associations and publics a active components of will formation’ Cohen 1999, p. 242.
75 In legal and political theory, there is a widespread awareness that democratic legitimacy is one of those essentially contested concepts. An essentially contested concept is a term or concept that inevitably entails endless discussions about the appropriate use and interpretation. The concept was introduced in 1956 by the English philosopher Walter Bryce Gallie in a letter to the Aristotelian Society. Gallie 1956, p. 167–198. For an accessible start to study different democracy theory approaches, studies and theoretical work see Dahl, Shapiro and Cheibub 2003, containing excerpts of many influential scholarly works on democracy.
76 This section is inspired by the recommendation of Priel to make distinctions between legitimacy and closely related concepts. See Priel 2010.
whether it concerns a small or large and institutionalized group of subjects. Legitimacy of law functions as an evaluation tool. It refers to an idea or a feeling of legal subjects towards the law. More specifically, legitimacy concerns the acceptance or acceptability of a particular law. Acceptance of a law relies on the amount of trust of the legal subject in the institution that exercises the authority to rule. The legitimacy of a legal rule is confirmed when legal subjects believe that political institutions are worthy of trust. The conception of trust to which this research refers is ‘generalized trust’, and includes trusting institutions, such as the product law itself, process of lawmaking, and the makers of the law. Such general trust in institutions is implicitly associated with risk. Trust in a person or system is particularly relevant and deemed necessary when one has no clear insight into and knowledge of, respectively, the actions of the individual or the operation of the system. The trust that an individual places in an ‘expert system’, which lawmaking generally is for a complex and diversified society, cannot be based on a full review of the system. In this regard, a pragmatic element is inherent to trust, based upon the experience that such systems generally work as they are supposed to do.

Trust is assumed necessary to maximize the chances that a legal subject will comply with the legal rule that prescribes a certain behavior. Compliance in its turn is necessary to maximize the effect of laws: to offer a stable legal order where the well-being and safety of legal subjects is protected. The assumption of the legitimacy doctrine is that obeying rules

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79 Warren explains trusting an institution as ‘a way of saying that one knows the normative idea of the institution, which one extends to the individuals who populate it on the assumption that they are motivated to abide by its normative expectations’. Warren 1999c, p. 349-350. There are scholars that doubt the very possibility of individual trust in institutions. Hardin argues that for most people, most of the time, government institutions are too distant for the basic condition of trust – knowledge of the interests of the trusted – to be met. See Hardin 1999. Cohen admits that ‘[i]t makes little sense to use the category of generalized trust to describe one’s attitude toward law or government. On can trust only people because only people fulfill obligations. But institutions (legal and other) can provide functional equivalents for interpersonal trust in impersonal settings involving interactions with strangers because they institutionalize action –oriented norms and the expectation that these will be honored.’ Cohen 1999, p. 222.
80 Warren 1999a, p. 1.
81 To trust something or someone is to some extent based on ‘blind faith’, a leap into faith that one is willing to make based on the experience that it usually ends well. One can contrast the current importance of trust for the legitimacy to rule with the absolute character of legitimation in the ancient regime. The monarchs had an indisputable right to rule attributed by gods. However, a monarch did not reign in his own name but in name of something that all, both himself and his people, transcends. The monarch could derive its power from a divine law or from an enlightened reason. The authority of the monarch was legitimized by the belief that the monarch himself is bound and accountable to that external body. Finer 1997, p. 39. Although the legitimacy was based on an external source, monarchies were not freed from commitments to law, which are illustrated by, to use a well-known example the Magna Carta, protecting the people (or barons) against the king. See Tamanaha 2004.
82 Franck, as one of the first international legal scholars concerned with legitimacy issues, has proposed the following working definition of legitimacy: ‘Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.’ Franck 1990, p. 24. The question remains open whether legitimacy generates an obligation to obey. Or that, even when legitimate, there are particular cases justification not to obey. See Dworkin 1986, p. 191. See for further reading the ‘normal justification theory’ and the ‘service conception’ of Raz 1986, p. 56.
out of habit or self-interest cannot provide the same level of stability in a legal order as the sociological fact that legal subjects have a certain amount of trust in a particular social order. When accepted by legal subjects, a lawmaking institution is less vulnerable when there are gaps in its capacity to exert coercion or when a reasonable alternative to the rules of the institution occurs. The beneficial consequence of the trust of legal subjects in the exercise of authority is an increasing likelihood that these legal subjects will obey the law, as they recognize and confirm the legitimacy of the authority to rule.

Trust and acceptance are no static touchstones for a legitimate governing system. Trivial events and larger calamities can interrupt almost constantly the balance of trust of legal subjects in the institutions of law, lawmaker, and lawmakers. Legitimacy aims to capture this specific dependency relationship between law and legal subjects. Legitimacy is the qualification of the exercise of authority. A lack of trust would in this reading lead to the appraisal of the exercise of authority to rule as illegitimate.

The motives for accepting law may differ per legal subject. They range from motives relating to the content, the efficiency, and the legality of law. Confering legitimacy on laws is not always an explicit act. Legal subjects could also accept in general every act, including laws, or exercisers of authority because these exercisers of authority are considered to be charismatic leaders or deities of god. To think about law and the acceptability of law in a more abstract way, this chapter forgoes a discussion on individualized motives for accepting law, and focuses on common grounds that are, from a normative perspective, considered the most desirable grounds for accepting public authority.

1.1.1 Accepting public authority

Authority, according to the general meaning of authority, can be vested in someone or in offices. Authority’s main characteristic is the aim to gain ‘unquestioning recognition by those who are asked to obey; neither coercion [n]or persuasion is needed’. The public

85 Buchanan 2010, p. 81.
87 Wheatley would object this, as in his opinion ‘(…) there is no such thing as illegitimate authority – an ‘illegitimate authority’ is not an authority.’ Wheatley 2012, p. 162. In his conception of authority, authority derives from legitimacy. ‘An authority which does not claim to be legitimate, or which is not recognized as being legitimate, is not an authority (…)’ Wheatley 2011, p. 533. Although we agree with the general claim of authorities to be legitimate, in this study, as will be discussed in the subsequent subsections, we understand legitimacy and authority as two separable concepts. In our opinion, the exercise of authority does not inherently imply that it is legitimate, it rather constantly requires confirmation of its legitimacy.
88 See Weber 1968, p. 46.
89 See for an alternative approach to legitimacy: Fossen 2011. Fossen pleas for a pragmatic strategy. As Fossen states, ‘[t]hey embark from different starting points, and so they incur different theoretical commitments: a normativist approach takes a kind of theorizing aimed at the philosophical justification of norms for granted, whereas the pragmatist approach starts from an account of the political practice of ascribing and contesting legitimacy, and thereby presupposes a theory of language and practice’. Fossen 2011, p. 5.
90 Parents can exercise authority over their children, just as teachers over their pupils. Authority is understood in line with how McDougal, Lasswell, and Reisman perceive it: ‘By authority is meant expectations of appropriateness in regard to the phases of effective decision processes. These expectations specifically relate to personnel appropriately endowed with decision-making power; the objectives they should pursue; the physical, temporal and institutional features of the situations in which lawful decisions are made; the values which may be used to sustain decision, and so forth.’ McDougal, Lasswell, and Reisman 1966, p. 256.
91 Arendt 1972, p. 144.
authority to create laws is a form of practical authority: the authority to direct the behavior of others. Law is also a manifestation of public authority. Public authority is understood as the actual exercise of power by governmental officials: as Follett has called it, the ‘power over’ people. Public authority in this respect represents having a ‘right to rule’, a right to issue commands and, possibly, to enforce these commands using coercive power. Public authority refers to institutionalized power in organized communities, and is uncoupled from the general concept of power, which terms, in colloquial language, are often conflated. As further explained in section 1.2.1, this research understands power as a type of spontaneous power, based on Arendt’s concept of power. This spontaneous power has the potential to transform into public authority.

The concept of legitimacy bridges public authority and this type of spontaneous power. Evaluating authority on its legitimacy qualifies the extent to which legal subjects support public authority. When one assesses the legitimacy of a law, one tries to assess whether legal subjects withhold or grant the ‘right to rule’ to a public authority that enacts the law. The rightfulness of the law’s claim to authority might derive from different sources: from the characteristics of the law, of the lawmakers, or from the way the lawmakers exercise their authority to rule.

Notwithstanding the dependency of a law on the acceptance by legal subjects, the legitimacy of a law does not affect the existence of that law. Legitimacy as such is not engaged in the determination of whether law is law. Contemplating the normativity of law invites us to judge whether, apart from a legal subject’s motivation to comply with laws, a law provides normative reasons for action, whether a specific norm creates rights and duties. In respect of the normativity of law, it can be questioned whether, and based on what grounds, the very existence of laws that centrally regulate the behavior of individuals

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93 Parker Follett 1942, p. 76. In footnote 3 at p. 77, Follett remarks that the definition of power she formulated here should be understood as a temporary working definition.
94 See Peter 2014.
95 How public authority is created and constituted, is left aside here. Whether public authority is created by a social contract and serves to ensure self-preservation, as Hobbes influential account of authority in Leviathan prescribes, or that authority is created by convention, reached in a civil state as Rousseau states in, Social Contract I:6; cf. section 3.3 will not be discussed here. We follow Hampton, who states that political authority ‘is invented by a group of people who perceive that this kind of special authority is necessary for the collective solution of certain problems of interaction in their territory and whose process of state creation essentially involves designing the content and structure of that authority so that it meets what they take to be their needs’. Hampton 1998, p. 77. This perception is comparable to Arendt’s perception that we need promises in order to prevent the unpredictability of individuals’ capacity of action to derail into something e as society cannot accept. ‘The remedy for unpredictability, for the chaotic uncertainty of the future, is contained in the faculty to make and keep promises’. Arendt 1998, p. 237.
96 See section 1.2.1 on power.
98 While focusing on the state as executor of political authority, Simmons argues that the justification of political authority, based on its moral defensibility should show that having a state is morally better than not having a state. The justification of the existence of the executor of political authority is a necessary condition for generating obligations such as laws. Simmons 2001, p. 125.
99 Normativity is concerned with the question ‘how (...) a social, factual, practice, [could] create norms?’, while legitimacy deals with the question, ‘what gives any particular putative law-maker the right demands that one should, prima facie, obey?’. Priel 2011, p. 6.
is acceptable. This leads to the fundamental matter of how law can guide behavior.\textsuperscript{100} It relates to the determination of the extent to which the content prescribed by a legal norm is ‘non-optional’;\textsuperscript{101} the way in which legal norms create obligations that people take, or refrain from taking, certain actions.\textsuperscript{102} Legitimacy, on the other hand, presupposes law as an ordering instrument.\textsuperscript{103} Even without or before legal subjects grant legitimacy to a particular law, law relies on a claim to authority, derived from the lawmakers’ claim to authority. Postema insightfully describes this claimed authority of lawmakers aside from its legitimacy quest.

‘[C]ertain persons in society are designated as officials and are charged with special responsibility for maintenance of the system of rules – some watch for rules that need to be made or repealed, others will watch for compliance, others will settle disputes that arise with respect to the rules. They will be able to accomplish this in part because their actions and decisions are accorded a special status or authority and they are able, in a way no other members of the society can, to give their resolutions about matters – whether making of rules, interpreting them or enforcing them – a degree of finality. That is, they have the power of making decisions that in an important respect and to a significant degree hold or bind even if others regard them as mistaken. So, authoritative decisions and the rules put in place through them are able to claim a kind of practical significance apart from their merits. This makes it possible for such officials to create rules and expect them to govern citizens’ conduct even before they are widely practiced. Thus, law can create and seek to control social practices, rather than being entirely dependent on them.’\textsuperscript{104}

However, in order for law to be accepted, the legitimacy doctrine is based on the assumption that law requires more than claimed authority, backed up by (the threat of) force to enforce compliance. Coercion is only a means that the institutions use to secure authority, but it does not automatically contribute to upholding authority.\textsuperscript{105} Legitimacy is considered decisive for public authority to have a systemic ‘title to rule’.\textsuperscript{106} In other words, legitimacy is understood as the acceptance of a governing law or régime as an authority that distances itself from a raw assertion of authority but claims the right to exercise it.\textsuperscript{107} Instead of

\begin{footnotesize}
\begin{enumerate}
\item The study of normativity has many different focal points. See for further reading on normativity of law, Bertea and Pavlakos 2011.
\item As Besson defines normativity; ‘[b]y contrast to the plain normativity of social rules in general, legal rules are characterized by their claim to exclusionary normativity’. Besson 2010, p. 173.
\item There are also conceptions of legitimacy that primarily focus on the legitimacy of coercive power instead of law. In this thesis the focus is on the legitimacy of the authority to rule, as lawmaking is central to this research, instead of law-implementation or compliance. See for an elaboration on the two different functions of legitimacy: Ripstein 2004, p. 2-35.
\item Postema 2011, p. 207, on Hart, and its second order rules.
\item In Greens words, ‘[c]oercion threats provide secondary, reinforcing motivation when the political order fails in its primary normative technique of authoritative guidance’. Green 1988, p. 75.
\item Lipset 1994, p. 7, referring to Dogan 1988; As Buchanan states, ‘[a]n institution that attempts to rule (govern) is legitimate in the normative sense if and only if it has the right to rule’. Buchanan 2010, p. 79.
\item Raz 1986, p. 25-28. This is contrary to alternative ‘Hobbesian’ approaches to legitimacy that might argue that the main function of legitimacy is exactly to justify the raw coercive power itself. See Ripstein 2004; Habermas 1996, p. 90.
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seeking to justify the political authority of the lawmakers to rule in se, legitimacy focuses on the rightfulness of the makers, the resulting laws, or the way that ruling is exercised.\textsuperscript{108}

It is debatable what the consequences are for the effectiveness of the authority of law when laws are illegitimate. Some scholars argue that without legitimacy, the exercise of authority is unjustifiable. Consequently, these acts of authority cannot entail any obligation to obey. This approach questions whether illegitimate authority has any ‘authority’ to make laws.\textsuperscript{109} This research does not consider acceptability or acceptance decisive for effectiveness of the authority to rule. Even when the exercise of authority cannot be accepted, and legal subjects have no reason to trust political institutions, these institutions may still be effectively authoritative. As long as the claimed authority to rule leads to compliance, and thus in that respect is effective, the exercise to rule can be considered de facto authoritative, although not legitimate.\textsuperscript{110} Such an exercise of authority does not hold the right to rule and to create political obligations, but it can still claim the authority to rule.\textsuperscript{111} De facto authority remains in this conception independent from, and unaffected by, legitimacy concerns.\textsuperscript{112} The reason for following Raz’s account is that law, as an instrument of guiding societal behavior, should uphold the status as a continuous, stable instrument, which is hard to maintain when the authority to make law is directly dependent on the legitimacy.\textsuperscript{113}

\textsuperscript{108} The authority theory of Raz, for example, does not exclude claims made by law independently of the officials themselves. In this sense we can refer to the authority of the law itself. This stance is often criticized, among other by Himma, but for Raz it explains the authority of customary rules, which arises independently of official enactment. See Raz 1979, p. 29; Himma 2001, pp. 271–309.

\textsuperscript{109} See for this conception of illegitimate authority, Rawls 1993. See also Wheatley 2012, p. 162. Others argue that even when legitimate, the exercise of authority might be disobeyed on other ground. Additional normative conditions need to be satisfied. See Buchanan 2002, p. 689-719. Weber would contest this view, as for Weber, practically all successful domination, is inherently ‘legitimate’ domination. Weber stated that ‘[a]side from the extreme case of slavery, domination in the sense of brute force without some belief in legitimacy – at least on the part of staff enforcing the order - is untenable. Weber 1978, p. 214. The ‘continued exercise of every domination (. . .) always has the strongest need of self-justification through appealing to the principles of its legitimation’. Weber 1978, p. 954. Weber seems to approach the legitimacy/illegitimacy quest descriptively and argues that if there is a type of exercise of authority that entails domination, excluding the exceptional case of slavery, it will be based on a ground for legitimacy, although the ground for legitimacy might have been shifted normatively.


\textsuperscript{111} This conception, and the conception followed in this research, is in sharp contrast with a school of philosophical anarchists that argue that there cannot be a legitimate right to subject one’s will to that of another. See Wolff 1998.

\textsuperscript{112} Raz even argues that for legal authorities, such a de facto authority might be an additional necessary condition of legitimacy. The primary role of legal authority is to solve coordination problems, and those problems can only be successfully solved when the entity in the authoritative role is being generally obeyed. Raz 1985, p. 21; Raz 1986, pp. 49-50, 56.

\textsuperscript{113} Postema 2011, p. 315. Compare this perspective with Lipset who states, in the context of a democratic system, that; According to Lipset, ‘The best immediate institutional advice is to separate the source and the agent of authority’. (. . .) ‘The agent of authority may be strongly opposed by the electorate and may be changed by the will of the voters, but the essence of the rules, the symbol of authority, must remain respected and unchallenged. Hence, citizens obey the laws and rules, even while disliking those who enforce them.’ Lipset 1994, p. 8. However, this approach towards a detached conception of legitimacy from de facto authority does not solve the issue of authority when the exercise of authority is normatively illegitimate, and lacks compliance. Notwithstanding the assumed stability of a legal order, this situation might lead to revolt.
1.1.2 Reasons to accept public authority
What instigates legal subjects to trust authority, and accept law? Studies that aim to understand the origins of the behavior of a specific political community approach legitimacy from a sociological perspective. Trust is determined descriptively by empirical studies, focusing on what was, in a certain situation, by a certain group of individuals, perceived as a valid ground for trust in lawmaking institutions. As trust and acceptance are individual experiences, the grounds constituting them might differ per legal subject. Legal subjects take into account many different aspects to assess the legitimacy of a law, concerning among others the efficiency of a law, the congruity of law with justice considerations, democratic procedural considerations, the content of a specific law, or the level of expertise that characterizes the lawmaking process. Also, the legal validity of the rule might form an incentive for the legal subject to accept the authority of the law. The mere existence of a lawmaking authority can be enough; the source of the exercise of authority might be decisive for acceptance of the result of the exercise of authority. The legitimacy of a certain law depends in that case on the legitimacy of the institution that created and applied the law. Another reason to accept the exercise of authority lies in the procedures followed by the lawmaking authority. These descriptive conceptions of legitimacy are primarily concerned with the social acceptance of authority and with the instrumental questions of whether or not an institution is likely to be effective or stable.

One could also theorize normative grounds as to why legal subjects ought to accept the exercise of the authority to rule. These normative grounds focus on law’s acceptability. They are abstracted from individual motivations that have led to acceptance of the authority of law. Such a normative approach to legitimacy does not aim to discover, but instead, to prescribe the grounds on which trust in public authority is justifiable. The actions of an entity are thus placed in a broader framework and measured by pre-determined standards.

114 Questions central to descriptive approaches to legitimacy are: What standards do actors actually use in assessing the legitimacy of institutions? To what degree are institutions in fact accepted as legitimate? What are the causal consequences of an institution’s perceived legitimacy? Bodansky 2012.

115 The relational aspect is best illustrated by Raz’s Normal Justification Condition. Raz has developed the Normal justification Condition (NJC) as the condition for legitimate authority. NJC: A has legitimate authority over B if the latter would better conform to reasons that apply to him if he intends to be guided by A’s directive that if he does not. See Raz 2006, 1014; Raz 1986, pp. 53-69, and chapter 3. See for an international perspective on this issue: Weiler 2004, p. 548.

116 See Bodansky 1999, p. 596; Besson and Tasioulas 2010a, p. 176.

117 In section 1.2 we come back to the distinct but often closely related concept of validity of law.

118 Buchanan 2010, p. 80.

119 Whether or not one of these approaches of legitimacy is in se correct, or whether the different conceptions of legitimacy compete or complement each other, is outside the scope of this research, as it exclusively focuses on democratic legitimacy.

120 In one of the classical texts on legitimacy, for instance, Weber identifies rational, traditional and charismatic legitimacy as the three pure types of legitimacy. By analyzing legitimacy in terms of the motivations that underlie individual action, Weber’s concept of legitimacy is sociological rather than normative. For a strong piece on the discussion of normative versus sociological concepts of legitimacy in the global governance literature, see also Bernstein 2001.

121 While taking a normative perspective, scholars assess the legitimacy of an institution through an internal and evaluative statement. This is a political and philosophical question, in which notions of fairness, justice and consent play a role. See Meyer 2009; Bodansky 2012, p. 7.

122 As Suchman clarifies, normative legitimacy is a ‘generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed systems of norms, values, beliefs and definitions’. Suchman 1995, p. 574.
A normative approach to the evaluation of the exercise of authority tells us something about the features of the subject of legitimacy itself, and less about the individual legal subject’s beliefs in, or support for, the authority. A normative justification of law’s authority is autonomous from law’s claim to authority, or the de facto exercise of authority. However, one can doubt whether, in the long run, a normative account of legitimacy is justifiable if it has never been subjected to empirical studies to test the assumptions on which legitimacy is built. Notwithstanding the abstracted grounds for understanding the acceptability (in contrast to acceptance) of law, legitimacy is still primarily characterized by a relational aspect as it functions as an evaluation tool of the relationship between an act or exercise of authority and legal subject.

Besides democratic legitimacy, which will be explained in the following section, there are other abstracted, pre-determined grounds that have been theorized for legal subjects to find the exercise of legislative authority acceptable. Two grounds can be considered dominant. Authority can be regarded as acceptable because of the validity of a law or because of the content of a law. These grounds are briefly discussed in order to contrast them with democratic legitimacy. One dissimilarity between these two grounds for legitimacy and democratic legitimacy immediately catches the eye: whereas validity and content focus specifically on the characteristics of a law, the conception of democratic legitimacy adhered to in this study focuses on the specific properties of the making of the law and the authors of a law.

Validity
The validity of a law refers to the question of whether a particular rule is part of a legal system. The concept of legal validity explains why a certain rule should be indicated as a legal norm, and in what ways it distinguishes itself from a moral norm or a social convention. A legal system consists of, besides the behavior-regulating norms, criteria of valid enactment that distinguish law from non-law. Legal validity departs from the process of lawmaking by the focus on the event and moment of enactment. The validity of law is decoupled from the process of possible deliberation and decision-making preceding the enactment of the law.

123 See Besson 2011a, p. 5.
124 As Simmons explains in relation to the legitimacy of the state: ‘That a state is legitimate with respect to a subject will typically, we hope, result in that subject’s actually having feelings, beliefs, or attitudes that generate allegiance, support, etc. But this will, of course, not necessarily be the case. States may actually be legitimate with respect to us without their in fact receiving from us much or any support, provided only that we are sufficiently immoral, deceived, stupid, overwhelmed (by war or disaster, say), weak-willed, or manipulated. In such cases it is correct and perfectly natural to say that a state is legitimate, but unstable or unpopular or unsupported. When people fail to uphold a state due to their own shortcomings, rather than to its lack of moral authority, this cannot plausibly be described as a diminution of its legitimacy.’ Simmons 2001, p. 134.
125 There are also alternative conceptions of democratic legitimacy that see specifically on the content of the law, and its democratic characteristics. Dworkin indicates this approach as the ‘dependent condition’. The dependent condition is based on the substantial appraisal of the result of a democratic law-making process that should lead to an equal treatment of all members of the community with equal concern. Dworkin 2000, p. 186. In this version one may observe that democracy is in fact a derivative of justice, or of substantive equality in general: our opinions regarding which laws treat people with equal concern, in whatever field of distribution, may be decisive for our views about whether the system that creates the laws is democratic. See Sadurski 2008, p. 74.
126 See Hart on rule of recognition, the most important social rule (not a law itself), on the basis of which officials can judge on the validity of law. Postema 2011, p. 269.
127 Waldron 1999a, p. 34. See for further reading: Postema’s overview on different legal theorists’ conception of, a.o., the validity of law. Postema 2011.
result of these processes, and obviously excludes all parts of discussions that did not make it into law.\textsuperscript{128}

Hart famously explains that the decision as to whether a law is valid, and thus whether a law is part of a legal family, should exclusively be taken by law-applying officials. They rely, to make that decision, on a (established by convention) social rule of recognition.\textsuperscript{129} The political legislature determines whether a rule has the validity of law and courts ‘settle contests of interpretation over the application of valid but interpretable norms in a manner at once judicious and definitive for all sides’.\textsuperscript{130} Part of the function of legal validity and the systematics of validity is to deny ‘legal persons in their role of addressees of the power to define the criteria for judging between lawful and unlawful’.\textsuperscript{131} The validity of a legal norm, the fact that the legal norm is recognized as being part of a legal system, can be a ground for legal subjects to accept a legal rule.

Closely related to the validity of a rule is the broader concept of legality.\textsuperscript{132} Both concepts give legal subjects reasons to accept the law by the anchoring of a legal rule in the law. Legality is understood as compliance of the exercise of public authority with law.\textsuperscript{133} According to the principle of legality, governments may restrict the liberty of citizens only if these restrictions are equally applicable to all, and are laid down by laws, which are enacted via procedures which rules are also laid down in legislation.\textsuperscript{134} Only public authority based on legal standards might be exercised.\textsuperscript{135} Different scholars have different views on the relationship between legality and legitimacy. Some scholars argue that legitimacy is an essential part or function of legality, in the sense that ‘the law should be made in such a way that it can claim to be legitimate and hence to bind those to whom it applies’.\textsuperscript{136} But also, vice versa, the recognized validity of a rule or the legality of the exercise of authority can be a source of legitimacy of rules. Legal norms demarcate the extent to which the legislature is legally authorized to create laws. When authority is (perceived as) legitimate, it is lawful by virtue of being authorized by or in accordance with law.\textsuperscript{137} As Kelsen argues:

‘The validity of legal norms may be limited in time, and it is important to notice that the

\begin{footnotesize}
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\item Waldr\textsuperscript{on} 1999a, p. 40-41.
\item Habermas 1996, p. 115.
\item Besselink, Pennings and Prechal distinguish three functions of legality: 1. The democratic function of legitimating the existence of public authorities, their powers and the exercise thereof within the limits of the set legal rules; 2. The instrumental function of attributing public authorities with powers and responsibilities in line with preferences and the local situation, and in accordance with a prevalent distribution of powers; 3. The normative function of regulating the use public authorities can make of such powers. Besselink, Pennings and Prechal 2011, p. 6-7.
\item The distinction between legality and legitimacy does not exclude mutual interrelationships between the two concepts. We saw a similar mutual dependency between legitimacy and authority. See subsection 1.2.1.
\item Besson 2009a, p. 60. See also Besselink, Pennings and Prechal 2011, p. 6.
\item See Hart 1997.
\end{enumerate}
\end{footnotesize}
end as well as the beginning of this validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way, which the legal order itself determines. This is the principle of legitimacy.\textsuperscript{138}

This has led to a concept of legal legitimacy, the condition of being in accordance with law or principle. Legal legitimacy takes an internal perspective: particular directives are justified in terms of a regime’s secondary rules about who can exercise authority, according to what procedures, and subject to what restrictions.\textsuperscript{139} In this regard, the legitimacy of the law is based on a rational, coherent judgment of correctness that illustrates a belief in the value of truthful legal procedure.\textsuperscript{140} Instead of trusting an authority to rule based on the content, process, and merits of the enacted laws, which inherently has an \textit{ad hoc} character, the system of legal rules is accepted as a whole, and individual rules are accepted based on the fact that they are part of that legal system. Luhman is explicit about the role of legality in maintaining trust in lawmaking: ‘Legal arrangements which lend special assurance to particular expectations, and make them sanctionable, are an indispensable basis for any long-term considerations of this nature; thus, they lessen the risk of conferring trust.’\textsuperscript{141}

Content

The exercise of lawmaking authority could also be acceptable based on the fact that the content of the laws serves the legal subjects ruled by it. The content of a legal norm is what a specific norm stipulates, proscribes, and authorizes legal subjects to do. Taking the content of a law as decisive for its legitimacy is often called ‘output legitimacy’.\textsuperscript{142} When the content of a law is acceptable because it is considered a ‘good’ law, it is considered to enjoy legitimacy. The qualification of ‘good’ in this respect is often related to the effect of a law: the prosperity, stability, and security a law might bring about.\textsuperscript{143} It is generally assumed that a basic level of trust is reached when legal subjects are convinced that the laws established by the lawmaking authority develop a fair and stable legal order. Legitimacy in this case originates from a mixture between the fact that a law is able to achieve certain objectives, and a general satisfaction of the legal subject with the results of a particular exercise of legislative authority. The authority to make laws in the latter case is justified by referring to the effectiveness of the resulting laws.\textsuperscript{144}

\textsuperscript{138} Kelsen 2007, p. 117.
\textsuperscript{139} See Bodansky 1999.
\textsuperscript{140} This is called legal-rational authority, in line with Weber’s theory of legitimacy. Legal rational authority rests upon norms whose legitimacy is ascribed to the fact that they have ‘… been established in a manner which is recognized to be legal’. Spencer 1970, p. 125.
\textsuperscript{141} Luhmann 1979, p. 34. Luhmann further states that ‘possibilities of sanction produce a generalizing effect in the context not only of hierarchical relations, but also in between equals. They stabilize interaction through the anticipation of extreme contingencies’, which it makes it easier to extend trust.’ Luhmann 1979, p. 37.
\textsuperscript{142} Output legitimacy refers to the problem solving quality or the efficiency of laws and rules, which can be observed by a researcher or interpreted by participants of the lawmaking processes, or the people who are subjected to the rules. Zürn distinguishes output legitimacy from throughput legitimacy, and input legitimacy. Zürn 1998, p. 233-236.
\textsuperscript{143} For example, legal subjects understand peace and security as a precondition for a good life and consider law as a necessary and legitimate instrument to create and maintain peace and security. Goossens 2003a, p. 31.
\textsuperscript{144} Weiler illustrates this type of legitimacy with regard to the legitimacy of a war, ‘[t]here is no better way to legitimate a war than to win it’. Weiler 2012, p. 828.
The acceptability of the content of law can also be based on the conviction that laws express values that convey moral issues. The authority to rule is justified in this respect by the congruence between the substance of the law and a generalized perception of morality. The content of the law reflects principles that are consonant with what is perceived morally ‘right’ or ‘just’ in a society. Fuller, while focusing on the necessary congruence between law and social practice, states that efforts to legally guide the behavior of legal subjects can only succeed when legal norms conflate with their ordinary practices and customs. There should be a ‘sufficient degree of substantive congruence between law and extralegal social practices’. The moral acceptance of law also touches upon the relationship between legitimacy and a more generalized perception of justice. The rightful content of a law as a ground for legitimacy should correspond with communal practice and a common spirit regarding the understanding of what is ‘just’. The complexities associated with a ground for legitimacy based on content are obvious, as who is to interpret and decide what is ‘just’, and what behavior of what part of society is decisive to forming a ‘communal practice’ or ‘common spirit’?

1.2 Democratic legitimacy

The NGO democratic legitimacy thesis urges us to investigate a specific moral reason to obey legal rules: law is assumed to be acceptable when it is democratically made. Scholars

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145 This might be the case with laws relating to criminal behavior, family law, but also with laws relating to civil rights. Spencer 1970, p. 127.
146 What should be perceived as morally right or just is inherently subject of controversy and has led scholars to offer a coherent and persuasive vision of a society, well ordered by principles of justice and right, in order to answer the fundamental normative question ‘what should the law be’. An often-cited theory is in this regard is Rawls’s ‘Theory of Justice’, publicized in 1971. See for an overview of contemporary theories of justice, Kymlica 2002. See for an account in which content plays a role in the normativity of law; Brunnée and Toope 2000-2001, referring to Postema, who argues that ‘legal norms and authoritative directives can guide self-directed social interaction only if they are broadly congruent with the practices and patterns of interaction extant in the society generally’. Postema 1994, p. 265.
147 Postema 2011, p. 320-321 referring to his explanation of Fuller’s work in chapter 3, p. 146-153.
148 Although this section discusses the content of the law as reason to accept authority, justice as standard of legitimacy might, besides evaluating the content of the norm, also evaluate the procedure in which the norm is created. Sometimes legitimacy and justice are presented independently from each other, sometimes the two concepts are conflated, and sometimes a hierarchy is applied between the two. Some scholars define justice as necessary element of legitimacy, while others explicitly define legitimacy as a criterion for minimal justice. See for an example of the latter: Buchanan 2002, p. 689-719: Rawls however separates the concept of justice and legitimacy, and subordinates legitimacy under justice. Legitimacy is related primarily to political institutions, while justice includes the broad scope of social and economic institutions. Rawls 1993, Rawls 1995, p. 132-180.
149 Spinoza stated in this respect that peace implies that citizens not only renounce violence, but also that citizens form a community characterized by ‘one spirit’ (una veluti mens). The common spirit is expressed in the law and consequently determines the commonality of the community in a fundamental way. The commonality in the law expresses the broader commonality existing in civil society, existing of many and varied spontaneous and voluntary social relationships and groups of citizens among themselves (family, neighborhood, associations, parties, churches) without which, more or less common values would not be formulated or would not be passed on. See De Dijn 2003, p. 88.
150 The focus on the moral reasons to obey legal rules does not imply that we focus on the moral correctness of the content of the law, but ‘on the moral duty to obey the law qua law’. Besson 2009a, p. 344-345.
151 Our focus on democracy as ground for legitimacy consequently does not tell us whether democratic legitimacy alone effectively leads to an unconditional duty of obedience to a legitimate law. We follow in this respect Sadurski, who argues that ‘it is impossible to combine the justification, legitimacy, and the duty to obedience in
engaged in the NGO democratic legitimacy thesis join a large cohort of scholars that assumes that in the current normative climate, democracy is one of the strongest justifications for the exercise of lawmaking authority.\textsuperscript{152} Democratic legitimacy as an evaluation tool to assess the authority to rule is quite a demanding standard. As Keane states, ‘understood simply as people governing themselves, democracy implied something that continues to have a radical bite: it supposes that humans could invent and use institutions specially designed to allow them to decide for themselves, as equals, how they would live together on earth’.\textsuperscript{153}

The now broadly embraced ideal that those who exercise authority should act in the name of the people has caused an immense conceptual change in terms of the legitimation of law.\textsuperscript{154} When the legitimacy of laws is accepted on democratic grounds, governments cannot rely on the authority to rule based on the conviction that any metaphysical forces have delegated the power to rule to the ruler, or on the authority of enlightened reason. Any external, transcendental body, whether it is reason or God, is replaced by the principled belief that the people should govern themselves; that they should provide for their own welfare, which terms are also to be determined by themselves, whether or not through representatives.\textsuperscript{155}

The dominant starting point in the literature concerning democratic legitimacy is that democratic legitimacy is provided when legal subjects, who are directly or indirectly affected by the law, have a say in its wording.\textsuperscript{156} This highlights the focus on a specific part of a lawmaking procedure when assessing the democratic legitimacy of law. The focus is on ‘legislature-made’ law, and not on ‘judge-made’ law.\textsuperscript{157} ‘Having a say’ in this respect concerns the opportunities for the legal subjects to participate in the creation of a new rule, one argument’. He prefers a ‘thinner concept of legitimacy: one in which justification endows the law with legitimacy, with the claims supporting the duty to obey requiring a separate argument’. See Sadurski 2008, p. 241.\textsuperscript{158} Weiler 2012, p. 828. See also Habermas who states; ‘[t]o be sure, the source of all legitimacy lies in the democratic lawmaking process, and this in turn calls on the principle of popular sovereignty’. Habermas distances himself explicitly from the dominant private law theory of, among others, Kelsen. As Habermas explains: ‘(...) private-law theory (as the doctrine of ‘subjective right’) got started with the idea of morally laden individual rights, which claim normative independence from, and a higher legitimacy than, the political process of legislation. The freedom-securing character of rights was supposed to invest private law with moral authority both independent of democratic lawmaking and not in need of justification within legal theory itself. This sparked a development that needed in the abstract subordination of ‘subjective’ rights to ‘objective’ law, where the latter’s legitimacy finally exhausted itself in the legalism of a political domination construed in positivist terms. The course of the discussion, however, concealed the real problem connected with the key position of private rights: the source from whence enacted law may draw its legitimacy is not successfully explained’. Habermas 1996, p. 89.

\textsuperscript{155} Keane 2009, p. xi-xii.

\textsuperscript{156} Although democracy as ground for legitimacy is widely embraced, and therefore often the dominant theme in legitimacy studies, we should be aware of the fact that in most states democracy developed in a system which kept its monarchic characteristics. ‘Most of the northern European and British Commonwealth nations developed democratic institutions while retaining what its known as traditional legitimacy derived from a continuing monarchy. Without these institutions and traditions already present, democracy might not have developed as it did, if at all.’ Lipset 1994, p. 7.

\textsuperscript{157} Goossens 2003b, p. 64-65.

\textsuperscript{158} Following Creighton, such an involvement of legal subjects has three primary goals. First, it gives credibility to decision-making process. Second, it facilitates the identification of public concerns and values, and third, it can promote consensus building on an issue-by-issue basis. See Creighton 1981.

\textsuperscript{159} The reason is obvious, as ‘judge made’ law, which is in se elitist in character, is hard to combine with democratic considerations. See for a critical account on the undemocratic nature of ‘judge made’ law, Waldron 1999. According to Kelsen; ‘[t]he distinction of democracy refers essentially to legislation. A state is regarded as a democracy if its legislation is democratic in nature.’ Kelsen 2007, p. 283.
and opportunities to control the governing authority, which is considered to establish a ‘fair’ decision-making procedure.\(^{158}\) Two disclaimers often follow. First, most scholars tend hastily to add that democracy has too many contradictory meanings to allow for any definitive qualifications.\(^{159}\) Second, scholars broadly accept that the general mission statement of democratic legitimacy does not lead to the conclusion that only direct democratic procedures can be accepted as democratically legitimizing law.\(^{160}\)

In a way, the necessity of the concept of legitimacy in itself, as a tool to test the acceptability of the authority to rule, implies that there is a distance between the ones that have the privilege to make the laws, and the rest of the political community that are expected to obey. A broad specter of modes of decision-making is often considered justifiable in terms of its democratic legitimacy in which the ‘say’ of legal subjects, or respect for the ‘say’, differs in form and intensity. From a substantive perspective, it is often assumed that when public concerns and interests determine the outcome of the exercise of authority, one can already speak of democratic legitimate law.\(^{161}\) From a procedural perspective many theorist have argued that indirect democratic decision-making through representatives suffices. What democratic legitimacy exactly entails, and how it can be contrasted with other related concepts, often remains unclear in these accounts.

This section aims to offer a presentation of the two central principles of democratic legitimacy: freedom and equality. The subsequent section 1.3 further explains the main vehicle for protecting these principles: participation in the exercise of authority. The essential principles of freedom and equality are closely related to the concept of power, as conceptualized in the next sub-section. Whereas freedom concerns the status of individuals that needs to be respected and guaranteed, and equality functions as a precondition for freedom to be of any relevance in a democratic sense, power relates to the activity of individuals who desire to effectuate their freedom to take their equal share in governing. This sub-section starts with the concept of power to clarify what type of activity requires protection and support. The following sub-sections on freedom and equality explain why power requires protection and support.

1.2.1 Power

In general, power is understood as the capacity ‘to bring about changes in the action of other units, individual or collective, in the processes of social interaction’.\(^{162}\) As mentioned above,

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\(^{158}\) See Gibson 1989, p. 483-86, discussing the importance of fair decision-making procedures to legitimate outcomes – even outcomes that are disliked.

\(^{159}\) Koskenniemi for example warns that the concept of democracy is in any case ‘too general to provide political guidance’. Koskeniemi 1996, p. 234-235.

\(^{160}\) Only a handful of scholars refuses ‘to accept in principle any conception of the political good other than that generated by ‘the people’ themselves’. Held 2006, p. 260.

\(^{161}\) Held 2006, p. 260-261. For some scholars, taking into account legal subjects’ interests, or consulting individuals can sufficiently contribute to the democratic legitimacy of law. Dunn for example states that the essence of democracy is respect for the individual as a human being, which ‘… includes the right to be consulted in regards to matters affecting his welfare, since consultation is one of the best ways of showing deference to him’. Dunn 1941, p. 18. One should be aware that in this assumption a specific notion of democracy is accepted in which a division between rulers and ruled is accepted. Hershovitz would argue against any division as from a democratic perspective there is no sharp division between the ‘binders’ and the ‘bound’. Hershovitz 2003, p. 201.

\(^{162}\) Parsons 1963, p. 232.
this study takes a different starting point and relies on Arendt’s conception of power. Arendt’s concept of power refers to the existential power to express oneself and to act as a human being between other human beings. This conception of power distinguishes itself from the more general concept of power by focusing on the origins of power instead of on the means of employment. In the words of Follett, power in this sense is ‘defined as simply the ability to make things happen, to be a causal agent, to initiate change’. Power focuses on ‘power with’ instead of ‘power over’ and is distinct from authority, strength, force, and violence. Arendt subjectifies power as an act, or the effect, of gathered individuals acting in concert. Power is dependent on a plurality of individuals who use that power collectively. Any potential transformation in political constellations, whether related to a single legislative action, or to the overthrowing of a political constellation, depends on the collective action of individuals. Power refers to the capacity to act in concert for a public-political purpose. The resulting power is what keeps in existence the public realm, which Arendt understands as the potential space of appearance between acting and speaking men.

The usefulness of Arendt’s notion of power for our conception of democratic legitimacy lies in this practical application. Arendt’s account of power is particularly relevant in understanding the generation of power, which clarifies the foundation of democratic legitimacy. As discussed, it is generally assumed that in the long term, rules and the consequential authority to command and force legal subjects to obey these rules can only

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163 Arendt’s concept of power is in our understanding not inherently related to a democratic reading of power. There is an interesting debate whether Arendt’s work on power and authority should be understood as inherently non-democratic or democratic. Its critics argue that Arendt offers an elitist understanding of political action, as only some are considered to have the virtues to participate in politics. See Wolin 1983. Scholars in favor of a democratic reading argue that Arendt’s concept is inherently democratic, as Arendt’s critique on representative democracy should be read as a plea for a richer reading of democracy, where representative democracy is complemented by bottom-up democratic processes, rising from every group of individuals gathering and acting together. See Isaac 1994.

164 To act is something fundamentally different from doing something in order to make a certain object. Acting as being-between-others has no finality other than itself. The same is true for speaking, as it coexist between others. Goossens 2003a, p. 14-15.

165 Follett 1942, p. 76. She adds in her footnotes that this is not her final definition of power. See for a demonstration of how Arendt’s conception of power differs from other leading conceptions of power and for a exploration of its weaknesses, Habermas 1977.

166 Arendt 1972, p. 143-155. Unlike strength, it is not the property of an individual, but of a plurality of actors joining together for some common political purpose. Unlike force, it is not a natural phenomenon but a human creation, the outcome of collective engagement. And unlike violence, it is based not on coercion but on consent and rational persuasion.

167 According to Arendt, ‘Power is never the property of an individual; it belongs to a group and remains in existence only so long as the group keeps together. When we say of someone that he is ‘in power’ we actually refer to his being empowered by a certain number of people to act in their name’. Arendt 1972, p. 143. Habermas understands Arendt’s concept of power as communication power, ‘it is a collective effect of speech in which reaching agreement is an end in itself for all those involved’. Habermas 1977, p. 6.

168 Political power’s limitation is the existence of other people, but this limitation, Arendt notes, ‘is not accidental, because human power corresponds to the condition of plurality to begin with’. Arendt 1958, p. 201. Arendt defines plurality as ‘the fact that men, not Man, live on the earth and inhabit the world’, and states that it is the condition of human action ‘because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live’ Arendt 1958, p.7-8.

169 For Arendt, power is a sui generis phenomenon. Power results out of action shows its collective characteristics by the fact that in order for action to become power, action relies on persuading the other in debates in order to secure consent. Arendt notes, ‘is not accidental, because human power corresponds to the condition of plurality to begin with’. Arendt 1958, p. 201.
be effective when power belonging to everyone supports these rules. That specific support is the proof of acceptance and is indicated as the conferral of legitimacy to both rules and rule makers. However, Arendt’s conception of power is not very helpful for understanding the employment of power, relating to the ‘power to rule’. This is why we distinguish the ‘power to rule’ from our conception of power, by defining it as the ‘exercise of public authority’.

The potential of generating power is important here. In Arendt’s words, ‘power springs up between men when they act together and vanishes the moment they disperse’. Actions by individuals, and especially concerted action resulting in power, but also the results of power, are unpredictable. The desire to reduce the chances of the possibly unwanted consequences of people acting collectively that arises from a ‘suspicion for acting’, as Arendt calls it, could be understood as one of the main motivations for setting rules to which everyone who is part of a specific community should adhere.

Such mutual self-restraint by laws facilitates mutual ‘traffic’ between people. Laws offer members of society guidance in order for them to live together and interact with each other as fairly as possible. Laws also contribute to mutual protection, striving to safeguard individuals from predation by others. The attractiveness of mutual protection and regulation by law might be based on the realization that the costs of self-protection or self-regulation are too high. Besides, by agreeing to the setting of laws, individuals can undertake constructive projects that would be too large to do on their own. Law is considered a favorable instrument for solving demanding coordination problems such as the ones that can arise by the unpredictable exercise of power by a collective gathering and acting of individuals. Members of a specific community can lawfully and politically live together based on these laws only when some are entitled to command and the others to obey. In order for laws to be acceptable because of their democratic legitimacy, the exercise of authority,

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170 Habermas 1977, p. 17.
171 See section 1.1.1.
172 As Arendt explains: ‘[t]he word itself, its Greek equivalent dynamis, like the Latin potentia with its various modern dervatives or the German Macht (which derives from mogen and moglich, not from machen), indicates its ’potential’ character.’ Arendt 1998, p. 200.
174 Rules, contracts, agreements, and constitutions – ‘promises’, as Arendt calls them – are considered to be ‘islands of certainty in an ocean of uncertainty’. Arendt 1998, p. 245.
175 Butler 2012, p. 95.
176 Raz considers this very instrumentality of law as one of the five reasons for accepting legal authority. Raz has theorized five situations in which individuals are, in general likely to find submission to law acceptable. (1) When public authority generating rules has more expertise with regard to the, to be regulated, object. (2) When the authority is less disposed to ‘bias, pressure or temptation’. (3) Where the costs of direct individual decision-making are substantially higher than a decision concerning the to be regulated matter by the authority. (4) When the authority ‘is better placed to achieve the individual’s (reason-based) goals than the individual left to himself’. (5) When law is our best bet to solving demanding coordination problems. See Ehrenberg 2011, p. 884–894.
177 Ehrenberg summarizes Raz’ account of paradigmatic circumstances. He refers to Raz 1986, p. 75.
178 Arendt 1998, p. 222. See also Arendt’s remark that ‘The sovereignty of a body of people bound and kept together, not by an identical will which somehow magically inspires them all, but by an agreed purpose for which alone the promises are valid and binding, shows itself quite clearly in its unquestioned superiority over those who are completely free, unbound by any promises and unkept by any purpose. This superiority derives from the capacity to dispose of the future as though it were the present, that is, the enormous and truly miraculous enlargement of the very dimension in which power can be effective.’ Arendt 1998, p. 244.
during that specific law formation but also in general,\textsuperscript{178} is required to respect the two essential principles of democratic legitimacy: freedom and equality. These principles protect the potential of every legal subject’s capacity to act and speak in concert for public political purposes.

1.2.2 Principles of democratic legitimacy
Freedom and equality together form the essential principles of democratic legitimacy. The outline that follows, in conjunction with the further elaboration of their infrastructure and operational aspects in chapter 2, establishes an analytical yardstick for assessing the extent to which the thesis that NGOs contribute to the democratic legitimacy of international law approximates this ideal.\textsuperscript{179}

Freedom
The concept of freedom has been the subject of study for many influential philosophers, from Hobbes, Locke, Bentham, and Mill to Hegel, Marx, Arendt, and Habermas.\textsuperscript{180} Most democratic theorists consider freedom to relate to concepts of autonomy and self-government that in concert form the fundamental premises of democracy.\textsuperscript{181} Testing the democratic legitimacy of the exercise of authority evaluates the extent to which the exercise of public authority respects an equal regard of citizens’ individual freedom,\textsuperscript{182} or, put in a more emancipatory way, the right of individuals to autonomy. Public authority based on the principle of freedom facilitates ‘each citizen to exercise his or her powers of agency, to develop the capacities for judgment and to attain by concerted action some measure of political efficacy’.\textsuperscript{183}

To remain free, everyone should be able equally to exercise capacity to act in concert for public political purposes independently, which collectively leads to self-government. This understanding of freedom points towards a participative account of freedom, focusing on the opportunities to act.\textsuperscript{184} Freedom in this respect means that everyone is able to pursue the essence of being a political human. Freedom is understood as self-realization as a citizen,\textsuperscript{185} and is related to a legal subject’s admission to a political realm.\textsuperscript{186} Therefore, freedom

\textsuperscript{178} See chapter 2 in which the dual evaluation (of the specific lawmaking process and of the system at large) is explained.

\textsuperscript{179} Only if we understand what the ideal we are striving for actually aims to protect are we in a position to say ‘how far existing legislatures fall short of that ideal and what exactly, it is that they fall short of’. Waldron 1999a, p. 33.


\textsuperscript{181} Locke is considered the founding father of classical liberalism. He wrote ‘no one ought to harm another in his life, health, liberty, or possessions’. See Locke 1988; Mill 1993; Hayek 1960. See for an introduction to moral right to freedom as non-domination and autonomy as the basic premise of democratic theory, Waldron 1999a, p. 215.

\textsuperscript{182} Rossi 1997, p. 180.

\textsuperscript{183} See d’Entreves 2008.

\textsuperscript{184} This reading of freedom understands freedom as a relational concept, enabling political action and participation. A republican approach to freedom is based on certain skepticism towards the liberal conception of freedom that focuses primarily on rights as the moral property of isolated individuals. See Waldron 1987.

\textsuperscript{185} See Skinner 2014.

\textsuperscript{186} Arendt 1998, p. 217. ‘The chief difference between slave labor and modern, free labor is not that the laborer possesses personal freedom—freedom of movement, economic activity, and personal in- violability—but that he is admitted to the political realm and fully emancipated as a citizen.’
embodies a political achievement and a civic status.\textsuperscript{187} In the end, legal subjects understand the exercise of public authority as created by themselves.\textsuperscript{188} This conception of freedom also includes a reference to the accompanying responsibilities of individuals to other individuals,\textsuperscript{189} and refutes a liberal conception of freedom that is disconnected from social ties.\textsuperscript{190}

Notwithstanding the emancipatory attraction, this ideal-type understanding of freedom is difficult to reconcile with being ruled by laws that other people have created if one has at least let go of the somewhat alienating idea that the exercise of authority can be equated with the ‘general will’ of the people.\textsuperscript{191} Being the subject of a legal rule inevitably involves a submission to the exercise of public authority by others. Therefore, an emancipatory approach to freedom should be complemented by an emphasis on how to protect the freedom of legal subjects in a context in which they are inherently submitted to law they did not directly make themselves. A situation in which legal subjects are considered free while submitted to legal rules points towards the paradoxical relationship between law and freedom. The ‘sobering truth about law’\textsuperscript{192} is that law is not only instrumental in preventing oppression, but also increases the chances of oppression.\textsuperscript{193} Law itself might result in a form of domination,\textsuperscript{194} which, due to the continuous characteristics of law, involves a significant level of voluntary compliance.\textsuperscript{195} The question arises to what extent the principle of freedom can effectively guide an evaluation of the acceptability of the exercise of authority.\textsuperscript{196}

The fact that being both free and part of a political community is impossible in the absolute sense does not affect the possibility of using freedom as a persuasive tool for evaluating the way we are governed. The fact that the exercise of public authority through law interferes with, or hinders one’s freedom can be acceptable.\textsuperscript{197} A promising route to

\textsuperscript{188} As Habermas states: ‘Legitimate law is compatible only with a mode of legal coercion that does not destroy the rational motives for obeying the law: it must remain possible for everyone to obey legal norms in the basis of insight. In spite of its coercive character, therefore, law must not compel its addressees but must offer them the option, in each case, of foregoing the exercise of their communicative freedom and not taking a position on the legitimacy claim of law, that is, the option of giving up the performative attitude to law in a particular case in favor of the objectivating attitude of an actor who freely decides on the basis of utility calculations.’ Habermas 1996, p. 121.
\textsuperscript{189} Rights, from a republican perspective, rely on the support and cooperation of others for their enforcement.
\textsuperscript{190} Liberals focus primarily on the domain of action in which individuals are not constrained. As Pettit states: a republican conception of liberty is a ‘social ideal that presupposes the presence of a number of mutually interactive agents’. Pettit 1997, p. 99.
\textsuperscript{191} The most famous founder of the idea of the general will is Rousseau. See Rousseau 1943.
\textsuperscript{192} Hart even states that without law, forms of exploitation and oppression are practically unimaginable. ‘The gains [red: of a legal world] are those of adaptability to change, certainly, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not.’ Postema 2011, p. 333, referring to Hart 1994, p. 202.
\textsuperscript{193} Waldron 1999c, p. 175, 181.
\textsuperscript{194} Weber has also characterized law as domination, pointing towards the capacity of law to constitute a compulsory relationship. Weber 1978, p. 52-53.
\textsuperscript{195} Weber 1978, p. 212.
\textsuperscript{196} As ‘no society tolerates absolute freedom even of conscience and of speech, no society reduces that sphere to zero’, compliance with the principle of freedom evidently becomes a matter of degree. See Schumpeter 2003, p.11.
\textsuperscript{197} This deviates from a more Hobbesean account of freedom, which focuses on both the exercise of authority and interference, which were understood as a disempowerment that makes you unfree, as you are prevented to take action or you are compelled to take action. Berlin explains this account of freedom as follows: ‘If I am prevented
reconciling submission to law and one’s freedom is to specify freedom as freedom from domination.198 The concept of domination here refers to ‘the authoritarian power to issue commands that are heeded to a significant extent’,199 and to ‘offer interpretations of the public good’.200 Freedom from domination requires an organization of the political system to defy tyrannical (autonomy-constraining) forms of exercises of authority.201 Freedom requires a balancing act in which individual autonomy needs to be preserved to the highest level that matches with the existence of authority.202 In other words, absolute freedom from domination is nuanced by a conception of freedom in which one agrees to a certain form of domination, provided that these forms of domination can constantly be adjusted and controlled, which one could call ‘constrained interference’.203

Constrained interference should be distinguished from arbitrary interference. Someone living under the discretion of an exerciser of authority, even when that exerciser prefers not to interfere, cannot be considered free. This conception of freedom emphasizes the non-arbitrariness of the exercise of authority over others, and consequentially the opportunities of subjects of authority to intervene. Pettit emphasizes in this regard the difference ‘between just happening to avoid such arbitrary interference – say, because the powers that be quite like you – and being more or less invulnerable to it’.204 This conception of freedom from domination has been developed in republican democratic theory. Freedom is illustrated by the famous distinction between a citizen and a slave. Being unfree, being a slave, means that interference with your freedom contrary to your interests may occur. Due to one’s dependency, that interference can be enacted at the arbitrary will or power of the dominating party.205

The key merit of democratic legitimacy is the ability to serve that intrinsically problematic relation between law and freedom. Precisely because the form of domination by law is perceived as necessary, a strong legitimation of the exercise of authority is required. The wish to be part of a society ruled and ordered by law requires us to turn the question around and ask to what extent legal subjects find it acceptable that their freedom is infringed. A democratic legitimation could explain why a ruler can have an impact on the autonomy of legal subjects to direct their own lives. Democracy, as a ground for legitimation, meets this existential requirement by arranging that it is not the ‘other’ who is impacting upon the individual’s autonomy, but the individual him or herself. A legal subject cannot speak of by others from doing what I could otherwise do, I am to that degree unfree; and if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved.’ Berlin 1958, p. 8, p. 3. See also Skinner 2014, referring to Hobbes, Leviathan, [1651] chapter XX and XXI – absence of external impediments of motions. Freedom is in this more libertarian reading related to a sense of personal or private liberty, ‘the protection of rights against all governmental encroachments, particularly by the legislature’. Held 2006, p. 55, referring to Wood 1969 p. 608-609.

198 The subsequent exploration of the rationale of democratic legitimacy is predominantly inspired by a republican approach to democracy as articulated by Arendt and Pettit. Pettit has brought back into scholarly debate on democracy the republican account of freedom. Pettit 2006; Pettit 1997; Pettit 2000. The centralization of the principle of freedom is typical to a republican approach in democratic theory. Pettit 2012, p. 152. Pettit 2010, p. vii-viii.


200 Bohman 2007c, p. 100.

201 Macdonald 2008, p. 36.


203 Pettit 2012, p. 152.

204 Pettit 2010, p. vii-viii.

205 Skinner 2014.
arbitrary domination when a law is the result of a democratic process, even if his or her specific opinion on the subject matter is not congruent with the majority of the political community. Provided that the exercise of lawmakers' authority has taken place in a political construction that offers every legal subject the opportunity to act, the fact that an individual’s own opinion is not reflected in the final result of legislative procedures is not itself a threat to his or her freedom from domination. The key test is whether those who disagree with enacted policies and laws have full civic and political freedom to mobilize others, to deliberate on laws, and to contest laws, which might eventually lead to democratically realized change.

Equality

An understanding of freedom from domination incorporates an ‘inclusive conception of the members of any society’. Particularly in a democracy where individuals are free from unwanted domination, it is essential to speak of capacity to act and speak in concert for public political purposes that every citizen can enjoy equally. Every legal subject should be able to have the opportunities to ‘begin’, to mobilize others, and to deliberate. The equal opportunity to exercise power is simultaneously a manifestation and a proof of the existence of freedom from domination.

The principle of equality not only refers to a right but also to an obligation. Lawmakers have the duty to ‘express public recognition of the equal worth of persons, conceived as autonomous centres of deliberation and action’. The principle of equality is lived up to when all citizens are equal before the law and have equal opportunities to capacity to act and speak in concert for public political purposes and to participate in the making of law. This obligation for the exercisers of public authority to respect equality is twofold: lawmakers should offer every legal subject an equal opportunity to participate in lawmaking, and they should guarantee that the product of lawmaking establishes a certain equality of legal subjects before and by the law, in line with a rule of law doctrine.

Although from a rule of law perspective it is a value in itself, equality is understood here as an essential property of democratic legitimacy, complementary and instrumental to freedom from domination. The complementarity of freedom and equality can be explained by the inherent reciprocal characteristics of freedom as a democratic principle. First, there is no reason to be concerned about the protection of one’s freedom and autonomy outside

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207 In this conception of freedom as basic rationale for democratic legitimacy we refrain from adding substantive accounts on what is necessary in terms of recourses for citizens to protect their freedom from domination by others. These resources might include financial means, and social standing. Here discussions on democratic legitimacy meet discussions on distributional ideals related to theories of justice. In this sense, we take a procedural approach to democratic legitimacy, notwithstanding its possible theoretical shortcomings. See Pettit 2008, p. 4.
208 As Pettit states, ‘they include at least all permanent residents who are adult and able-minded, not just the propertied, mainstream males on which political theory had traditionally focused.’ Pettit, 2008, p. 3.
209 Political equality as Arendt conceptualized it, does not rely on a theory of natural rights or on some natural condition that precedes the constitution of the political realm. ‘Rather, it is an attribute of citizenship which individuals acquire upon entering the public realm and which can secured only by democratic political institutions.’ See d’Entreves 2014.
211 Beitz 1989, p. 92.
212 See Dworkin 2000.
the context of a plurality of individuals forming a political community. Second, the reciprocity of the principle of freedom entails a responsibility not only for one’s own freedom but also for the protection of freedom of others. In this respect, freedom directly relies on the principle of equality. A situation in which one individual enjoys structurally more freedom and privileges than another, based on legal rules created by public authority – in other words, in which one legal subject is less obstructed by governmental interference than another individual – implies that the latter is inherently subject to domination. The impact of laws on individuals must therefore be egalitarian.

The importance of equality for democratic legitimacy relates primarily to the obligation to offer every legal subject an opportunity to participate in lawmaking. A detached conception of democracy is taken as a starting point. Equality is understood in terms of equal political participation and can be seen as a procedural principle to enable freedom, and therefore to enable democratically legitimate law. An equal right to participate in lawmaking processes includes a commitment to an equal determination of the outcome.

As was reflected in the previous sub-section regarding the difficulty of reconciling political authority with a principle of freedom, the practice of the exercise of public authority is, at first sight, also difficult to reconcile with the principle of equality. Apart from direct democracy theorists, most conceptions of democratic legitimacy seem to deviate from the requirement of a direct equal opportunity to participate. How is it that we still refer to a principle of equality in a political constellation when we accept that some people have the...
power to decide over others?\textsuperscript{217} Most democratic theorists argue that a certain division of labor is justifiable from a democratic legitimacy standpoint.\textsuperscript{218} Equality as presented in this study also upholds to a certain extent ‘the fiction of equal citizenship’.\textsuperscript{219} Here, the very concept of acceptability of law due to trust in law or in lawmaking processes based on democratic grounds again becomes relevant for our discussion. To be democratically legitimate, a law does not have to derive from a lawmaking process that is part of a governing system that takes up the responsibility of ensuring that participation by every legal subject is possible in every decision within the polity. Instead, due to the infeasibility, and in many cases the sheer impossibility of direct equal participation in the making of law because of the size and complexity of current democratic societies, Warren states that

‘trust would enable highly pluralized but relatively egalitarian patterns of participation. The pattern would be pluralized because at any point in time individuals selectively focus their participatory resources. The pluralism would be egalitarian if every individual possesses participatory resources (time, knowledge, security, rights of voting, association, speech etc) that provide them with roughly equal chances to influence political outcomes, should they choose to do so.’\textsuperscript{220}

The inevitable inequality in the exercise of public authority is justifiable if every citizen has the opportunity to participate equally in the decision-making processes as to who will exercise public authority and how it will be exercised.\textsuperscript{221} Withdrawal from politics, in the case where the choice to withdraw does not depend on an outside body and is not derogatory, is not contrary to the general principles of freedom from domination and equality as long as ‘those who do not belong are self-excluded’.\textsuperscript{222}

1.3 Participation

Democratically legitimate law, understood from a republican perspective, promises a reconciliation of the capacity of legal subjects to gather and act for public-political purposes with a submission to the exercise of public authority. In other words, democratically

\textsuperscript{217} The inherent weakening of the democratic principle of self-rule has led democratic scholars to the development of theories that only perceive direct democracy that involves direct participation of the members of a society in deciding on the laws as the only true democracy. See for further reading on direct democracy; Cronin 1989.

\textsuperscript{218} Warren describes this as ‘an altered ethos of democratic theory – away from strictly egalitarian conceptions of the responsibilities of citizenship, and towards pluralized egalitarianism’. Warren 1999c, p. 359.

\textsuperscript{219} According to Warren, ‘Most democrats accept the fact that there is a political division of labor, but only owing to the necessities of conducting politics within large scale, complex societies. Democrats do not, for the most part, accept the principle: the very idea of divided labor seems out of place in democratic politics. Unlike the division of labor for the sake of collective action, democrats do not think the epistemic labors of citizenship – their responsibility to decide – should be divided or in any way differentially distributed. Democratic politics is unique in this respect: it is the only sphere in which everyone is entitled to speak and vote, regardless of merit, knowledge, rank, power or wealth.’ Warren 1999c, p. 358.

\textsuperscript{220} Buchanan 2004, p. 249.

\textsuperscript{221} According to Arendt, ‘such self-exclusion, far from being arbitrary discrimination, would in fact give substance and reality to one of the most important negative liberties we have enjoyed since the end of the ancient world, namely freedom from politics, which was unknown to Rome or Athens and which is politically perhaps the most relevant part of our Christian heritage’. Arendt 1990, p. 280.
legitimate law is the proof of the actuality of ‘a sort of regime that can coerce citizens without depriving them of their freedom’. The underlying rationale is that notwithstanding the fact that laws prescribe the behavior of legal subjects, ‘politically free is he who is subject to a legal order in the creation of which he participates’. Whereas the potential of power belongs to every individual and can materialize by the gathering and acting of individuals together, it derives its democratic connotation when legal subjects exercise it in freedom from domination. This freedom can be protected when their power is channeled equally into formal lawmaking processes, in order for everyone to have an equal say in the final decisionmaking on a law. An equal opportunity to participate in governing is a necessary condition of freedom from domination and, at the same time, its most evident manifestation. This figure demonstrates democratic legitimacy’s circularity.

Figure 1 - Democratic legitimacy’s circularity

The translation of the democratic ideal to participation in governing must support citizens’ shared convictions that they have not given up their essential autonomy in the assertion of their individual rights and freedoms and, collectively, their ultimate sovereignty. To remain free from domination, lawmaking practices should offer fair and unconstrained opportunities for participation, which should be understood to be as broad as the participation in mobilization of others to formulate desirable laws, deliberation with others over these laws, and decision-making in the final enactment of law. Evidently, lawmakers should be responsive to these participatory acts of their legal subjects.

How to demonstrate that the exercise of authority to rule is in line with what the people want is a recurring puzzle for legal and political theorists. Freedom entails, on the one hand, the freedom to have a say in the decisions on the laws that govern you and, on the other hand, the ability to control the exercise of delegated public authority. Participation can manifest itself proactively by the giving of consent to specific laws; continuously, by deliberation on laws; and reflectively, by control over the specific exercises of lawmaking authority, which might lead to an adjustment or even an annulment of a specific law. These

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223 Pettit 2012, p. 147.
224 Kelsen 2007, p. 284.
226 As Rousseau already stated: ‘To find a form of association which may defend and protect with the whole force of the community the person and property of every associate, and by means of which each, coalescing with all, may nevertheless obey only himself, and remain free as before. Such is the fundamental problem of which the social contract furnishes the solution.’ Rousseau 1968, Book I, chapter vi.
manifestations are complementary to each other as, to a certain extent, they compensate for each other’s weaknesses. They are distinguished by their focus on a different moment in the continuous circle that characterizes participation in legislative processes. This section considers how participation meets the rationale of democratic legitimacy by focusing on consent as a means of demonstrating one’s approval of a specific law or of representatives that make laws; on deliberation, as the continuous opportunity to gather and discuss on the formulation of laws, and the desirability of old and new laws, and as the continuous activity of lawmakers to reach agreement on the specifics of a law; and on control, as a means of keeping the lawmakers in line with what the people want.

1.3.1 Consent
The first approach to participation relies on the democratic requirement to enable legal subjects to proactively exert influence in governing processes, and takes an activist approach towards the republican ideal of freedom from domination.\textsuperscript{227} In the beginning of republican thinking, freedom was predominantly conceptualized in light of the right of legal subjects to a share in government. The exercise of the authority to rule was considered democratically legitimate when it both empowers and enables citizens to decide collectively about the course of political events. The basic starting point of this account is that individuals desire to be their own master. To remain one’s own master one has to actively partake in decision-making that affects one’s life. To prevent being subject to another’s act of will, individuals want to rule themselves, to self-rule. As discussed, Arendt connects freedom to the ability to initiate, to collectively act and speak, referring to this proactive participative conception of freedom.\textsuperscript{228} Habermas translates this quite abstract strategy into legislative practice: ‘only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted’.\textsuperscript{229}

The proactive approach is well illustrated by the adage that the will of the people constitutes the ultimate source of the democratic legitimacy of public authority.\textsuperscript{230} The obligation to take into account individuals’ interests equally to respect individuals’ freedom from domination should entail more than the equal right to participate in the political process. To give substance to this principle, a commitment to operationalize opportunities is required that enables actually and equally partaking in lawmaking, ensuring that the ‘actual level of determination of the outcomes will be roughly similar for the different participants’.\textsuperscript{231}

Whether or not different participants have had the actual and equal opportunity to take part in lawmaking can be demonstrated by their consent or dissent. A strong tradition in democratic thought holds that democratic legitimacy rests on some comprehensive democratic approval. The proof of such approval is captured by the notion of consent. The emphasis on consent can be traced back to the Aristotelian notion of the self-governing citizen and the Roman dictum that ‘what concerns all, all must discuss and approve’.\textsuperscript{232}

\textsuperscript{227} See Morone 1998.
\textsuperscript{228} d’Entreves 2008.
\textsuperscript{229} Habermas 1996, p. 110.
\textsuperscript{230} Roth 2000, p. 38
\textsuperscript{231} Sadurski 2008, p. 77-78.
\textsuperscript{232} Karlsson 2006, p. 3. Karlsson further states, ‘[b]oth the Aristotelian notion of the self-governing citizenry and the Roman dictum imply that liberty means living according to laws that you have given yourself’. Karlsson 2006, p 3.
Democratic approval is often even equated with democratic legitimacy. Manent, for example, argues that democratic legitimacy is served best when individuals give their consent to the exercise of political authority.\textsuperscript{233}

The ideal of consent and the relation to democratic legitimacy theory recognizes different levels of abstraction. It might refer to the consent of legal subjects to actual laws, but also to the fundamental idea that the basic structure of the state should be based on the consent of the governed, as introduced by Hobbes. The state, while perpetrating interference against its citizens, can only be legitimate when the subjects have the freedom of contract. The idea is that if someone consents to an arrangement with another under which they suffer the other’s intervention, in this regard through the establishment of a political constellation which enacts laws that are binding for all legal subjects that are part of that constellation, then such an invited form of intervention does not count as interference and does not take away the autonomy of the legal subject.\textsuperscript{234} This idea of a private contract in which the governed establish an ex ante, or in our words, a proactive, commitment to be submitted to the exercise of authority is persistent in legitimacy theory.\textsuperscript{235}

An obvious criticism of the Hobbesian version is grounded in the idea that giving an initial consent to a governmental structure that provides legitimation for all subsequent exercises of authority lacks persuasiveness for the citizens who are born into an existing governmental structure.\textsuperscript{236} Theorists have abandoned this private understanding of a contract and have

\textsuperscript{233} Manent 1997, p. 92-102.
\textsuperscript{234} Pettit 2012, p. 151.
\textsuperscript{235} This idea has several versions that are well elaborated by Raz 1995, p. 356. Locke has developed the social contract theory, that was strongly criticized by Hume, in his essay ‘Of the Original Contract’ that proposed a justification of political authority, not based on consent but on its beneficial consequences. See for a concise presentation of the development of the idea of consent. See Peter 2010.
\textsuperscript{236} In a sophisticated manner Habermas criticizes consent theory, of which he is predominantly skeptical about the assumption that rational individuals, from the perspective of the first-person singular, close a contract. He considers this a false assumption, as a person will trade his or her unlimited autonomy for a system of generally coercive laws only under two conditions: ‘On the one hand, the parties would have to be capable of understanding what a social relationship based on the principle of reciprocity even means. The subjects of private law, who are at first only virtual present in the state of nature, have, prior to all association, not yet learned to “take the perspective of the other” and self-reflexively perceive themselves from the perspective of a second person. Only then could their own freedom appear to them not simply as a natural freedom that occasionally encounters factual resistance but as a freedom constituted through mutual recognition. In order to understand what a contract is and know how to use it, they must already have at their disposal the sociocognitive framework of perspective taking between counterparts, a framework they can acquire only in a social condition not yet available in the state of nature. On the other hand, the parties who agree on the terms of the contract they are about to conclude must be capable of distancing themselves in yet another way from their natural freedoms. They must be capable of assuming the social perspective of the first-person plural, a perspective always already tacitly assumed by Hobbes and his readers but withheld from subjects in the state of nature. On Hobbesian premises, these subjects may not assume the very standpoint from which each of them could first judge whether the reciprocity of coercion, which limits the scope of each’s free choice according to general laws, lies in the equal interest of all and hence can be willed by all the participants. In fact, we find that Hobbes does acknowledge in passing the kinds of moral grounds that thereby come into play; he does this in those places where he recurs to the Golden Rule – Quod tibi fieri non vis, alteri ne feceris – as a natural law.’ Habermas 1996, p. 92 referring to whatsoever you require that others should do to you, that do ye to them’. Hobbes 1991, p. 92, 117, 188. Habermas continues: ‘But morally impregnating the state of nature in this way contradicts the naturalism presupposed by the intended goal of Hobbes’s demonstration, namely, to ground the construction of a system of well-ordered egoism on the sole basis of the enlightened self-interest of any individual.’ Habermas 1996, p. 91-92, referring to Höffe 1987, p. 407.
replaced it by an explicit public understanding of a contract.\textsuperscript{237} Rousseau further developed the idea of a contrat social. He argued that the idea of a contract between individuals and the person who will reign over them as sovereign (common to the seventeenth century) should be replaced by the idea of a treaty of free individuals who mutually decide to form a community. This contract goes against absolutism and implies that the general will, manifested in rules,\textsuperscript{238} is identical to the wills of the subjects.\textsuperscript{239} According to this strategy, democracy refuses ‘to accept in principle any conception of the political good other than that generated by the people themselves’.\textsuperscript{240} Congruence of the collective and the individual will is ensured only if the individuals whose behavior it regulates create the social order.\textsuperscript{241} However, the commonly shared observation that individuals in society differ in terms of opinions about what constitutes the common good is often considered to weaken this ideal of a general will.

Notwithstanding the rich contribution to legitimacy theories, an isolated emphasis on consent for the democratic legitimacy of law can be criticized.\textsuperscript{242} On a more practical level, one can criticize consent theory for the fact that a direct conceptual link between consent and democracy can be questioned, as one can consent to monarchy just as easily. One could imagine that democracy and consent are linked because the participatory nature of democracy makes it appear as though people consent to the political process. However, it is hard to maintain that actions of legal subjects today can be understood as consent to the immense exercise of authority by current governments.\textsuperscript{243} Even if consent is given, it is doubtful that consent alone contributes significantly to democratic legitimacy. In this line, Raz argues that consent to a political authority is effective only if the authority satisfies an independent test of legitimacy.\textsuperscript{244}

\textsuperscript{237} See Locke 1988.

\textsuperscript{238} The condition that the laws should be made by the people, instead of by the crown or the elite, was assumed to be the best guarantee to realize a common interest. Rousseau inspired democratic theory in that he argued that the people function as the highest lawmaker. Lawmaking should be practiced by the entire people that formulates, almost spontaneously, the volonté générale, set by the raison humaine, in which private differences were not taken into account in the making of laws. The volonté générale was the sovereign. See Bertram 2012.

\textsuperscript{239} Kelsen 2007, p. 284.

\textsuperscript{240} Held 2006, p. 260. Locke and Rousseau’s ideas are often perceived as the basis of the view that legitimacy was to be linked to the will of the people, which were embraced by the American and French Revolutions. One of the central points of departure for the French revolutionaries was that laws should be made in the interest of the people. Although the guiding ideal for the French revolution is largely understood to be a democratic government, scholars have pointed towards the elitist characteristics of the ‘democratic’ reforms that came out as a result of that revolution. See Van Reijbrouck 2013. Van Reijbrouck explains that the monarch was indeed replaced, however not with a democratic government, but with a new elite.

\textsuperscript{241} Kelsen 2007, p. 285.

\textsuperscript{242} See for a rejection of consent as necessary or sufficient ground of legitimacy, Dworkin 2011, chapt. 14. The idea of consent has several versions that are well elaborated by Raz 1995 p. 356. See for a concise presentation of the development of the idea of consent. Peter 2010.

\textsuperscript{243} See Raz 1979, p. 239; for further discussion of the difference, Raz 1995, p 15 - 16, 23; Green 1989, p. 808.

\textsuperscript{244} Raz 1979, p. 355–369. See also Raz 1995, p. 215. Raz does allow that consent can have some impact on legitimacy. He believes that it can strengthen obligations to obey and that it can express a citizen’s trust for his government. Raz also thinks that there are limited cases in which consent can establish authority—cases where it is an ‘optional good’ for people to decide the matters in question themselves. The authority of the modern state does not fall into this category. See Raz 1989, p. 1183. Raz specifies the independent test (for the most part) by the normal justification thesis. See for an elaboration on Raz’s work in relation to legitimacy, Hershovitz 2003, p. 215.
Relying on consent as an exclusive means of participation can also be problematized because it seems to imply that power should be tamed by the consent of citizens. When the approval by legal subjects of the exercise of power is understood as a precondition for the democratic legitimacy of authority, one can say that in this classical view authority loses its independence because it becomes subject to the consent of legal subjects. Public empowerment in this sense means that the ruler is nothing more than the representative of the legal subjects or, to be more precise, the executor of the consent among the legal subjects. As stated above, such an approach to authority does not correspond with the reality of public authority, which is exercised by a select group of lawmakers. Besides, as mentioned briefly in the introduction to section 1.2, it would make the concept of legitimacy as such superfluous, as the need for legitimacy was primarily based on the necessity of legal subjects to trust the exercise of authority as they delegated the exercise of authority to others.

One often-suggested solution is the institutional aggregation of votes of individuals, after which the majority of votes decides what to do. To make decisions that are acceptable for a diverse group of individuals with diverse interests, such a decision-making process by majority rule offers a way out. Majority rule is considered neutral towards alternatives in decision-making and shows a commitment to expressing freedom and equality in the design of institutions and collective choices. However, there are also weaknesses attached to majority rule that can have severe effects on the democratic legitimacy of legislation. An obvious weakness is the danger of factions, of groups of individuals that form a power block, united by a common interest, that are adverse to the rights of other citizens. By pushing decisions through that are not shared by the remaining part of the community, these factions might negatively affect the ‘democraticness’ of consent through voting. Madison famously emphasizes this potential problem of consent and majority voting. His plea for a republic based on the representative system was seen as a means to ‘break and control the violence of faction’.

Indeed, in the current democratic political constellations, voting procedures for representatives can be understood as the most common manifestation of proactive participation. Also, the voting procedures in which these chosen representatives take part, which lead to decision-making concerning the establishment of specific laws, are a manifestation of proactive participation, albeit indirectly. Consent clearly emphasizes the importance of an actual say in decision-making procedures, whether that say is indirectly given by representatives, or directly by legal subjects when decisions (on laws) are established by, for example, referenda. We come back to the operationalized means of consent in chapter 2, section 2.2.

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245 Madison 1966.
246 Representation prevents, Madison argues, to a certain extent, the dangerous effects of factions, as ‘it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters’. Madison further argues: ‘Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength hand to act in unison with each other’. Madison 1966.
For the different reasons stated above, the proactive account of participation, based on consent giving, should be complemented by the participation of legal subjects through deliberation and control.

1.3.2 Deliberation
To correct some of the weaknesses of an isolated approach to democratic legitimacy based on consent, a procedural dimension to the concept of consent is added: deliberation. Law and other exercises of political authority are perceived as legitimate to the extent that they have been agreed in a process of deliberative opinion- and will-formation.\(^\text{247}\) A lawmaking authority should equalize the opportunities for individuals actively to take part in deliberative practices, which take place outside and inside formal lawmaking processes.\(^\text{248}\)

Deliberation refers to reason giving. The ideal of deliberative lawmaking is based on the thought that the content of the law should be determined by a collective rational endeavor.\(^\text{249}\) Deliberation, occurring both in the public sphere and in formal lawmaking, is considered to have epistemic value, improving the quality of information available for the participants of public deliberations and for the official lawmakers. To form a majority that is able and willing to consent to issues, individuals need to have at their disposal a public space to participate in discussions, to formulate terms, to express ideas and thoughts, to persuade others of the rationality of their proposal, and to exchange information.\(^\text{250}\)

Deliberation is based on the justifying principles that ‘an equal right to self-development can only be achieved in a participatory society, a society which fosters as a sense of political efficacy, nurtures a concern for collective problems and contributes to the formation of a knowledgeable citizenry capable of taking a sustained interest in the governing process’.\(^\text{251}\) Krisch demonstrates the complementary force of deliberations as a component of proactive participation based on consent.

‘A weakness of nondeliberative procedural accounts of legitimacy is the possibility that, by merely aggregating the stated preferences of voting parties, fair democratic procedures may lead to collective decisions that are incorrect or even abhorrent, according to any reasonable standard. (...) In the absence of deliberation, fair procedures might result in the tyranny of passionate majorities, themselves swayed by clever minorities. Deliberation is desirable, then, insofar as we generally favor informal and careful judgment over ill-informed and unreflective choices.’\(^\text{252}\)

\(^\text{247}\) Wheatley 2009, p. 229.
\(^\text{248}\) Again, there is no such a thing as a legal obligation to get involved. Individuals may decide that their interests are already well put forward by others. The fact that a democratic legitimate lawmaking process should provide opportunities does not equally mean that all individuals have the obligation to be part of a deliberative process. See Held 2006, p. 281: ‘Deliberative democracy presupposes, according to some of its leading advocates, that publicly upheld positions can meet the test that all significantly affected would assent to the, but it does not presuppose that all will or could necessarily engage in debate’ (see for example, Habermas 1996).
\(^\text{249}\) The condition of reasonableness is vital to recent accounts of deliberative democracy: ‘justification in terms of mutually acceptable reasons will be of no legitimating value if those being addressee deny at the outset the value of finding such reasons’. King 2003, p. 26.
\(^\text{250}\) Waldron 1999a, p. 92.
\(^\text{251}\) Held 2006, p. 262.
In other words, for the principles of equality and freedom to be respected, what is needed is a possibility to get one’s own political pronouncements across to the audience that one wants to reach. Enabling deliberations within a lawmaking process and outside a lawmaking process provides for these opportunities. Also in this account of participation, collective self-determination functions as the primary rationale: ‘citizens must think of themselves as authors of the law to which they are subject as addressees.’ Many democracy theorists see well-developed institutional deliberative lawmaking procedures as the most important manifestation of democratic legitimacy. Deliberation central to reaching consensus is transformative; it should be able to shape the beliefs and opinions of participants towards consensus. No participant may be held back in his or her participation by a risk of force or deception. Deliberations preceding the enactment of new rules should accord equal weight to the interests of all individuals within the jurisdictional community in a deliberative process, to be democratic. As Benhabib puts it, ‘[l]egitimacy in complex democratic societies must be thought to result from the free and unconstrained deliberation of all about matters of common concern.’

This not only refers a deliberative account of legitimacy to the need to create space for discussions and the exchange of ideas, but it also requires justification for the imposition of authoritative decisions by the lawmaking authority. We expect a democratic legislator to be successful in formulating political decisions, which avoid ‘primary bads’ (war, famine, economic or political collapse, epidemics, and genocide), for which reliable sources of information are needed. The justification of the lawmaker must appeal to evidence and arguments acceptable to reasonable citizens. The requirement that the preceding procedures can be justified ‘in terms of reasons acceptable to those burdened by exercises of political authority’ is considered to constrain the exercise of political authority.


255 Scholars seem to have enormous faith in the power of deliberation for democracy. Held states that the ‘development of deliberative democratic public space is important not because they can be straightforwardly adopted or ‘imported’ into all countries. It is important because they recognize the need to break vicious circles of limited or non-participation while also acknowledging that the question of informed participation is a central matter to the future of democracy’. Held 2006, p. 279-280. Cohen states for example that ‘[w]herever important decisions, or developments are occurring - be it scientific, corporate, media, or educational establishments – public spaces involving criticism, articulation of alternatives, and counter powers must be provided for and protected. This (…) is the sine qua non for trust and confidence in institutions to be maintainable and warranted.’ Cohen 1999, p. 216.
258 Solum 1988, p. 96.
261 Rawls states that the reasonableness of citizens depends on their desire to pursue their aims in ways that can be justified to other free and equal citizens. Rawls 1993, p. 48-62; King 2003, p. 26; Gutmann and Thompson 1996, ch 2. Something like the condition of reasonableness is vital to recent accounts of deliberative democracy: justification in terms of mutually acceptable reasons will be of no legitimating value if those being addressee deny at the outset the value of finding such reasons.
For adherents of deliberative democracy, the idea of democracy is tied not so much to the fate of government but rather to the discursive quality of collective decision-making. Habermas attributes epistemic authority to the ‘communicative community’. The foundational principle of democracy is considered to be the ‘force of the better argument’. The quality of the lawmaking process relies on a careful structure of policy deliberation, on the making of arguments, followed by responses and rebuttals, on the checking of facts and on the reviewing of claims, in the hope and belief that a deliberative process ultimately leads to a thoughtful conclusion. Public influence is converted into communicative power only after it has passed through the filters of institutionalized procedures of democratic will-formation into legitimate lawmaking. Not influence per se, but influence transformed into communicative power legitimates political decisions. The use of deliberative techniques underwrites the idea of a legal order, which is based on an ongoing, circular process of deliberation, participation, decision-making, determination, protests, and proposals for laws; even as rejection of laws, amendments, and continuing discourse. The quest of self-interest and the realization of self-government through deliberative practices in formal lawmaking processes should therefore be complemented by the public use of reason through deliberation.

The necessary complementarity of deliberation to consent and control, (which is subject of the next subsection), becomes clear when exposing some of the weaknesses of deliberation as legitimizing tool. There is a tension between the democratic ideal of deliberation and lawmaking in real life. There are primarily obstacles related to an equal representation of preferences. First, deliberative arrangements tend to attract people who have the skills, motivations, time, and money to participate. Although all participants should be equally able to propose topics or to question the assigned topic of a discussion – in other words, to have an equal say in agenda-setting – deliberation seems to be vulnerable to political pressure of the more politically equipped. It is questionable whether ‘the common good’, or the consensus that is created in the public sphere on what is supposed to be ‘the common good’, is really the product of a shared opinion.

In addition, it is questionable whether one can indicate a clear decision-making moment in deliberative practices. Deliberative democracy struggles with the fact that regardless of the sometimes time-consuming process of deliberation, a lawmaking authority always has the last say about the proposed rules. The gap between the outcome of deliberation and the authority to make binding rules could remain substantial. Koskenniemi stresses the lack of any legal criterion that will determine when consensus has been reached. And even when it has been reached, the law will always possess resource for re-opening the debate, undoing the settlement, attaching the (‘unjust’) hegemony of the mainstream.

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263 Dingwerth 2007, p. 23.
264 Teubner 1989, p. 733.
267 For critique on the theory of deliberative democracy see, among others, Kuper 2004, chapter 2.
268 See Kuper 2004, chapter 2.
269 Bekkers and Edwards 2007, p. 53.
270 Koskenniemi 2006a, p. 598. As Koskenniemi states: ‘Consensus is after all, the end-point of a hegemonic process in which some agent or institutions has succeeded in making its position seem the universal or “neutral” position. There is no “centre”, no pragmatic meeting-point existing independently of arguments that see to make a position seem “central” or “pragmatic” while casting the contesting positions as “marginal” or “extreme”: all law is
consensus is not an absolute ‘given’ in a democratic society. It is, also in respect of deliberative practices, difficult to imagine one political ruler as the executor of the joint decisions of citizens.271 Just as one should constantly evaluate whether a political constellation can live up to the rationale of democratic legitimacy;272 the functioning and significance of deliberative practices should be under the constant scrutiny of democratic deliberation itself.273

1.3.3 Control

The ideal of proactive participation is mainly based on scholarly work developed in the nineteenth century that assumed a high degree of prior social cohesion and homogeneity as a necessary precondition for democratic constellations. However, one of the most pressing issues for democratic legitimacy theory is to conceptualize the means of democratic legitimation in a context of increasing heterogeneity, conflict, and group difference, of religious, racial, linguistic, tribal, regional, cultural, or other forms.274 One of the ways out that is often presented is a complementation of constitutive, proactive forms of participation, striving for consensus or consent, by means of reflective forms of participation that enables the annulment or adjustment of a certain law.

In most lawmaking processes it is accepted that the exercise of authority is separated from the individual legal subjects, which constitutes a gap between the exercise of lawmaking authority and the will of its legal subjects.275 Therefore, any approach to freedom that builds on the ideal of self-rule requires complementation by an approach to freedom that focuses on control of the exercise of authority. The emphasis on control can be traced back to the work of Montesquieu. Although Montesquieu was explicitly not a democrat,276 his theory focuses on the need for separating different types of exercises of authority, which constitutes opportunities for checks and balances. To protect the freedom of legal subjects, the authority of the lawmaker needs to be checked and balanced by the authority of the executive and the adjudicative branch. Here, the importance of rules about rule making, the so-called secondary rules,277 becomes evident. A focus on control and counter-balance shifts

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271 One could argue that because the citizens themselves cannot agree, they need men or women who have the power to impose decisions. Heyse 2003, p. 111-113.
274 Pildes 2009.
275 In that perspective, it is noted that current conceptions of representative democracies reject a Rousseauian conception of democracy. See Cohler, Miller, and Stone 1989; Schumpeter 2003. Schumpeter criticizes the will of the sovereign construction and the groundless merging of the ‘will’ and the ‘interests’. A general will can only be constructed when it is based on a common interest. We already indicated the existing controversies in society that weakens the idea of a general will. Schumpeter 2003, p. 5-11.
276 On Montesquieu’s view, the virtue required by a functioning democracy is not natural. It requires ‘a constant preference of public to private interest’ (4.5); it ‘limits ambition to the sole desire, to the sole happiness, of doing greater services to our country than the rest of our fellow citizens’ (5.3); and it ‘is a self-renunciation, which is ever arduous and painful’. (4.5). See Bok 2014.
277 See Hart 1997. Hart argued that law is a system of rules. Hart divided the system of rules into primary rules that concern the rules of conduct, and secondary rules, that addressed officials to manage these rules of conduct. These secondary rules facilitate the adjudication based on primary rules, the making and revising of primary rules. A crucial element of Hart’s theory was his ‘rule of recognition’ thesis: a customary practice of the officials that
from depending on power as the result of the gathering and acting of virtuous citizens as the basis of political community towards highlighting the necessity to define and delimit the political domain.278

An emphasis on control accepts a continuous disagreement existing between individuals who are part of the same political community. Control accepts a certain amount of discretion of the public authority to impose restrictions on us, provided that individuals have means at their disposal to control the exercise of authority, and most importantly, it accepts the fact that the exercise of authority needs to be bound by ‘multiple and cross-cutting forms of legitimate power to guard against arbitrary use.’279 Constitutive self-rule should therefore be mirrored and complemented by the reflective approach that emphasizes the idea that public authority, when violating the ideal of protecting the essential freedom of its people, must be halted.

To be of any importance to democratic legitimacy, control must be individualized, unconditioned, and efficacious. The opportunities of control must be shared equally amongst citizens; it must not be conditioned on the willingness of the government, and it must ensure that even unwelcome government intervention does not provide citizens with any evidence of an ‘alien will’ at work in their lives.280 Here it becomes clear that proactive participation strongly relies on control in order to be relevant for legal subjects to remain free from domination. There may be consent without control and control without consent.281 As Pettit explains, one may consent on the one side to a form of interference that one does not control. Once consent is given, one may have no means of calling off the arrangement to which one consented. At the limit – the well-known republican example – one may have consented to a slave contract that binds one indefinitely. On the other side, one may control a form of interference to which one never gave one’s consent.282

Control, though understood as being a reflective form of participation, mainly to distinguish it from consent and deliberation as constitutive manifestations of self-rule, can be best understood as being the third part of the circular activity that occurs when one speaks of democratically legitimate lawmaking. Control, in this respect, comes closest to the previously mentioned opportunity to transform. It works from the premise that there should identify certain acts and decisions as sources of law, based on procedures of validity grounded in secondary rules.

278 As Barnard states: ‘Self-declared commitments by governments, even in democracies, cannot in themselves be banked upon to ensure their own accountability on a continuous basis or at all. Pointing out to governments their lapses and their attempts to get away with evasions or cover-ups will likely cause their embarrassment, as it may embarrass theorists of democracy for whom democratic governments, in embodying the collective will, can be fully trusted to honour their obligations. Upholding the oneness to governors and governed, they therefore dismiss civic watchfulness, together with its implied underlying distrust, as being plainly undemocratic, very much in contrast to Rousseau, on whom they profess to rely.’ See Barnard 2001, p. 6.

279 Wapner 2002a, p. 156. Wapner illustrates his point by referring to the fact that in the modern era, Hobbes Locke, Rousseau, and others continually reflected upon how to constitute and maintain legitimate, authoritative political power. Almost across the board, each suggested that the answers lie in creating some form of constitutional or institutional constraint.


281 This phrase is borrowed from Pettit.

282 Pettit 2012, p. 147-153. Pettit illustrates his emphasis on control with the following example: ‘Suppose one is born into a society where by common convention parents propose marriage partners for their children. While one goes along with the system without ever having consented to it one may still exercise a good deal of control over it. One may be in control to the extent that you can opt out of the arrangement altogether, or short in opting out, can continue to turn down proposals until one’s parents propose an acceptable partner’. Pettit 2012, 157.
always be an opportunity to alter the laws, as a correction of and restraint on the public authority. It is not only important that government acts in line with the wishes of the people, but also that the people can always contest governmental exercise of authority and, accordingly, have the means to change the way they are governed.\textsuperscript{283} Freedom requires that individuals, while bound by laws that interfere with their natural freedom, remain independent of the will of the authority that imposes the laws. When restrictions such as laws reflect the will of the lawmakers autonomously and are alienated from individuals' will, we speak of domination. However, restrictions that interfere are not dominating when individuals control that lawmaking authority with terms and limits. A good example is a representative democratic system: although the people decide to delegate the decision-making power, this is a revocable grant of authority, subject to recovery by the people.\textsuperscript{284}

1.4 The distinctive relationship between democratic legitimacy, trust and distrust

Different aspects of participation have passed in review. These manifestations of participation fall into the cyclical distinction and balance between trust and distrust that is characteristic for democratic legitimacy. The fact that law gains democratic legitimacy because of the actual and equal opportunities for participation in the making of it, is based on trusting the political system in safeguarding the ‘democraticness’ of lawmaking processes. An underlying amount of trust in established government agencies in general is required.\textsuperscript{285} Especially in indirect lawmaking reducing proactive participation to voting for representatives requires a basic level of trust by legal subjects that the legislature is representative, is concerned with the common good, and that it takes shared norms and cultural values to orient its actions. Trust implies, apart from the special relationship of trust between legal subjects and government, a sacrifice of a constant opportunity to monitor.\textsuperscript{286} When one trusts someone else, one indeed forgoes the opportunity to influence decision-making directly, on the assumption that there are shared or convergent interests between legal subject and trustee.

Democratic legitimacy of law involves a rare feature of legitimacy: also feelings of distrust play a role in the acceptability of a law. The combinations of both distrust and trust in a conception of legitimacy may seem contradictory.\textsuperscript{287} One could conclude that the more that disagreement is visible and the more that one is aware of the illusion of one single sovereign legislator, the less one would be inclined to accept a law as democratically legitimate. However, the awareness of the very possibility of corrupting authority can be considered to be the main motivation for opting for a democratic system. A genuine distrust and fear of abuse of power explains a general trust in democracy as a ‘system’ that enables power to be controlled, limited, and distributed.\textsuperscript{288} From the beginning of democratic thought, the

\begin{itemize}
  \item\textsuperscript{283} Pettit 1997, p. 1.
  \item\textsuperscript{284} Pettit refers in this respect to ‘electoral control’. See Pettit 2012.
  \item\textsuperscript{285} Warren 1996, p. 46-60.
  \item\textsuperscript{286} Because, as Warren explains, when one is monitoring constantly, any division of labor is rendered useless.
  \item\textsuperscript{287} Warren 1999b, p. 328, referring to Mansbridge 1999, p. 351-353.
  \item\textsuperscript{288} Zürn speaks about a paradox in this respect in his talk of March 2014 given at Amsterdam, ACIL and ACELG. We would argue that it is no paradox, but an inherent aspect of democracy that builds upon relationships of trust and distrust on different levels. Zürn 2014
\end{itemize}
attractiveness of democracy emerged from the distrust of political and clerical authorities.\textsuperscript{289} It is precisely the institutional space democratic legitimate lawmaking offers for contestation and disagreement,\textsuperscript{290} for challenging the supposed relations of trust, while limiting the discretion of the public authority, and thus the potential harm caused by public authority,\textsuperscript{291} that makes a democratically legitimate system such an attractive and acceptable form of governing.\textsuperscript{292}

Democratic legitimacy requires a delicate balance of trust where matters are settled, and distrust as a fuel for monitoring decision-makers when they are not.\textsuperscript{293} To uphold or restore this delicate balance of trust and distrust, legislatures should be responsive to civic initiative and the engagement of collective actors in appropriate ways.\textsuperscript{294} Both trust and distrust in lawmakers presuppose public spaces in which the validity of resulting norms, but also the fairness of procedures themselves can be challenged, revised, redeemed, or reinforced through critique. When offering such spaces for critique and offering opportunities for revision, a normative theory of democratic legitimacy assumes that trust in the exercise of lawmaking authority can be maintained.\textsuperscript{295}

the political that trust is potentially desirable and productive, in contrast to secure situations of routine predictability within which the conditions of trust are fully secure, but for precisely this reason is less need for trust’. Warren 1999b, p. 313.

\textsuperscript{289} Warren refers to liberal innovations that were aimed at checking the discretionary powers implied in trust. Warren 1999a, p. 1, referring to Dunn 1988; Ely 1980.

\textsuperscript{290} Besson 2011a, p. 11-12.

\textsuperscript{291} Warren 1999a, p. 2.


\textsuperscript{293} Warren 1999c, p. 351-353.

\textsuperscript{294} Cohen 1999, p. 222-223.

\textsuperscript{295} Warren states that ‘[i]f justified trust could in some instances relieve the burdens of political decision-making for both individuals and institutions, then democratic decision-making in complex societies might become more robust’. Warren 1999a, p. 5.
2 Democratic legitimacy – a call for a dual evaluation

Chapter 1 spelled out some of the main features of democratic legitimacy. Democratic legitimacy is based on a conception of autonomy reflected in the many well-known credos such as ‘who is affected by the law should have a say in it’, or ‘government of the people, by the people, for the people’. In the case of lawmaking, however, one detects a strong division of labor in which instead of the participative ideal of ruling ‘by the people’, a specific group of persons deliberate about laws, and decide if, which, and when laws will be enacted. Although we explained in chapter 1 that the specific form of domination by law is not considered to affect the legal subject’s freedom when there are actual, equal, and continuous opportunities to participate, many questions remained unanswered, related to the concrete determination whether the exercise of legislative authority respects the underlying principles of democratic legitimacy. Chapter 2 discusses the necessary preconditions to enable legal subjects to remain free from domination instead of being ruled by authoritarian rulers. Besides, it discusses the operational aspects of participation in lawmaking. It argues that any assessment of the democratic legitimacy of law - as understood in chapter 1 – requires a dual evaluation: a twofold test.

Already, in the discussion on the balance between trust and distrust in chapter 1, the awareness emerged that trust in the basis of democratic considerations implies two levels of acceptability: first, trust in a particular administrative performance; and second, trust in ‘institutionalized political processes’ in general. The determination whether or not a law is democratically legitimate therefore involves two levels of analysis. This is what in this study is called the necessity of a dual evaluation for assessing the democratic legitimacy of law. Evidently, an assessment of the democratic legitimacy of a law implies an evaluation of the democratic operationalization of actual lawmaking processes, which in a broad sense refers to a more structural operationalization of the opportunities to participate such as by elections, and in a more narrow sense refers to a particular operationalization of specific opportunities to participate in specific lawmaking processes. The more narrow reading of operational aspects also refers to whether specific lawmakers have respected procedural democratic norms such as transparency, openness, responsiveness and accountability. Notwithstanding the fact that one single legislative decision can be made in a procedure that respects certain democratic norms, the recognition of the principles of democratic legitimacy – equality and freedom from domination – also requires that possibilities remain for legal subjects, after the enactment of a specific law, to democratically annul the decision to enact that law, to alter that decision, or even to decide collectively that it is better to adjust the procedures that have led to the decision, which are protected by institutional and social preconditions.

Therefore, an evaluation of the democratic legitimacy of a specific law is only relevant when one has assured oneself of the opportunity given by the overall political system to enact and revise laws in a democratically legitimate way. Discovering whether this is the case, requires an assessment of the democratic characteristics of the system in which the legislative process has taken place, the necessary preconditions. This is considered the

296 Warren 1999c, p. 351.
297 Our remark that democratic legitimacy requires preconditions is not new. Bohman has made a comparable observation, when he focuses on the primacy of the democratic minimum, which will be discussed in section 2.1.
When assessing democratic legitimacy’s necessary preconditions, one evaluates the superior framework of reference for lawmaking. This framework contains rules about how laws are made, how governors are chosen, and how public participation can be achieved. Democratic legitimacy’s necessary preconditions both enables any democratic legitimation of the making of a specific rule, and prevents that legislation, notwithstanding the fact that it might individually have been democratically enacted, becoming authoritarian in itself. After the assessment of the preconditions, one moves to the second evaluation: the operationalization of democratic norms and practices in a specific lawmaking practice. It is important to recognize the distinctiveness of the two levels of evaluation, while acknowledging their reciprocity and mutual dependence.

Section 2.1 discusses the preliminary evaluation of democratic legitimacy’s necessary preconditions. It discusses what is necessary in order to have a basic institutional and social infrastructure for any democratic legitimation of law. Chapter 2, section 2.1.4.

2.1 The necessary preconditions for democratic legitimacy

In discussing the essential principles of democratic legitimacy, the focus of the previous chapter was on rather abstract and fundamental principles of democracy. In this chapter, we move towards the evaluation of the democratic legitimacy of a specific law. We start with democratic legitimacy’s necessary preconditions. The necessary infrastructure for democratic legitimacy consists of institutional and social preconditions.

Fulfillment of the necessary preconditions leads to the existence of a basic, minimalist infrastructure for realizing the democratic legitimation of law, which establishes a certain threshold. Above this threshold, governing systems might vary in the extent to which they...
enrich this basic level of guarantee for participation, in how they give content to participation in practice. When, after evaluation of the governing system at large, it turns out that the threshold of institutional and social preconditions is reached, a further investigation into the actual exercise of lawmaking authority is required to assess the operationalization of the principle of an actual, equal and continuous opportunity to participate in the making of law.\textsuperscript{302} However, beneath this threshold, one can be assured that the ruling authority does not act in line with the essential principles of democratic legitimacy, even without looking into the specificities of an actual legislative process.

Sub-section 2.1.1 discusses the necessary institutional preconditions for democratic legitimacy. It demonstrates the postulation that democratic legitimacy presupposes the concept of legal form. Legal form enables a political system that offers all legal subjects an equal and actual opportunity to exercise their capacity to initiate, to deliberate, to decide on laws, and to revise laws.\textsuperscript{303} It aims to demonstrate the importance of these minimal standards.\textsuperscript{304} Sub-section 2.1.2 focuses on the necessary social preconditions for democratic legitimacy.\textsuperscript{305} Both types of preconditions are complementary to each other, which is explained in sub-section 2.1.3.

2.1.1 Institutional preconditions – a formal commitment to participation

The discussed core principles of democratic legitimacy, equality and freedom,\textsuperscript{306} are highly unstable concepts.\textsuperscript{307} As discussed in chapter 1, communication between legal subjects that demonstrates their power to act and speak\textsuperscript{308} should be protected from any dominating distortions if one is striving for democratically legitimate laws. The question we are confronted with here is how a political constellation guarantees non-distorted communication and the opportunities for the exercise of political power by every legal subject equally.\textsuperscript{309}

In a democracy, a legal subject should have the guaranteed freedom to voice his or her opinions and to persuade others of the value of his or her opinions and to associate with them, but should also have the freedom to exert political impact on the final decisionmaking on law, so that a minority of today can become the majority of tomorrow.\textsuperscript{310} The core aim

\textsuperscript{302} Warren 2010, p. 47.
\textsuperscript{303} As Krisch points out, “[r]evisability is commonly seen as a key element of democratic orders, and its limitation (for example through constitutional norms with higher thresholds for amendment) is often seen as democratically suspect”. Krisch 2010, p. 273, referring to Bellamy 2007.
\textsuperscript{304} The discussion concerning institutional preconditions is an old one: the conditions a society need to achieve before a stable democracy could exist, is a traditional issue for modern theorists. Mazo summarizes: “The minimalist standards, which can be termed Schumpeterian/Huntingtonian/Przeworskian associates democracy with elections, while a more maximal standard, as advanced by post-modern theorists including feminists and other advocates of minority rights, requires democracy also to encompass political, and ultimately group, equality. Mazo 2005, p. 1.
\textsuperscript{305} Although the social preconditions are addressed here, in the research we predominantly focus on the institutional preconditions, and remain therefore close to a constitutional reading of democracy.
\textsuperscript{306} See chapter 1, section 1.2.2.
\textsuperscript{307} Habermas 1977, p. 8.
\textsuperscript{308} See chapter 1, section 1.2.1.
\textsuperscript{309} It is specifically Habermas’s emphasis on the legal side of democratic legitimation that informs this section. Habermas’s theory of communicative power, deliberation and consensus are, although it obviously informed the discussion on democratic legitimacy, admittedly less central to our account. As Habermas offers a persuasive account of the relation between the philosophy of law and political theory, his work is often cited.
\textsuperscript{310} Zoethout 1995, p. 301.
of democratic legitimacy’s necessary institutional preconditions is to protect these different manifestations of freedom, which concerns not only the mere fact that political power is initiated but also guarantees that political power has a real (and enforceable) effect on the exercise of public authority. The acceptability of the exercise of public authority is not only based on the fact that the exercisers of political power act in line with legal norms, which reminds us of the related concept of legality, but is based on the fact that they act in line with legal norms that protect our democratic values. These legal norms are considered to provide rights to legal subjects. On the one hand, one needs rights to enable individuals to participate equally in lawmaking. Political rights and judicial safeguards are considered a basic necessity in order for power to be translated into political power in a democratic way. On the other hand, one needs rights and judicial safeguards to fall back on when one is hindered in the exercise of the opportunity for equal participation in the making of law. One needs rights and judicial safeguards for warding off the possible problematic force of discretionary state authority.

The rights and judicial safeguards we speak of when discussing the necessary institutional preconditions themselves, and their function in enabling democratic legitimation, by principle, do not prescribe concrete, fixed, and substantive manifestations of participation, and they do not impose a certain type of democratic regime. Institutional preconditions leave the determinations of aims and organization of participation open for public discussion; such a participation in lawmaking can manifest itself directly and indirectly. The reason why institutional preconditions do not prescribe a specific form of participation is that, as discussed in chapter 1, the capacity to begin has a creative dimension: the capacity to initiate deliberation on democracy itself. Nevertheless, a political system should live up to the form of law to maintain its function as a political constellation in which laws can be democratically legitimized.

The form of law as a precondition for democratically legitimate law

The form of law is central to our conception of institutional preconditions and is indispensable to guard the principles of democratic legitimacy. Although the relationship between freedom and law is a relatively modern phenomenon, the basic premise dates

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311 Cohen 1999, p. 222.
312 See chapter 1, section 1.2.
313 Colon-Rios states that ‘only a regime that provides an outlet for constituent power to manifest from time to time can ever come to enjoy democratic legitimacy’. Colon-Rios 2012, p. ii. See also Bohman 2004a, p. 126.
314 Besson 2009b, p. 65 referring to Beitz 1983, p. 71. See also Bohman 2005, p. 102; Habermas 1977. Habermas expresses the need for institutional preconditions as follows: In societies organized around a state, political institutions, with reference to legal norms, ‘protect the susceptible structures of intersubjectivity against deformations if they are not themselves to deteriorate’. Habermas 1977, p. 8-9.
315 If a political foundational power would prescribe the content of a political regime, she would therefore destroy itself as democratic foundational power. However, the threat to do so is omnipresent.
316 Our conception of institutional preconditions follows Habermas, who states that ‘the principle of democracy can only appear as the heart of a system of rights’. Habermas 1996, p. 121.
317 As Weiler states ‘[i]t is to rules of law that we turn to define whether the practices of democracy have indeed been followed and, more generally, the Rule of Law, with its constraints on the arbitrary use of power, is considered an indispensable material element of modern democracy. An attempt to vindicate even verifiable expressions of popular will outside legally defined procedures is regarded by us as the rule of the mob, rather than democracy’. Weiler 2004, p. 549.
318 Skinner explains that only from the 17th century onwards political theory started to construe liberty as more than a privilege ‘allowed by the crown as a matter of grace’. Skinner 2003, p. 11.
back to the Digest of Roman law, which stated that ‘[i]f everyone in a civil association is either bond or free, than a civis or free subject must be someone who is not under the domination of someone else but is sui iuris, capable of acting in their own right’. 319 In this understanding, the relation between freedom and rights not only serves the liberal aim to ensure that every individual can pursue his or her own goals, but it also aims to give content to active citizenship, which is instrumental to the enjoyment of such a freedom. 320

The statement that rights and judicial safeguards play a crucial role in democratic legitimacy of law, is generally embraced in democracy theory. 321 Besides forms of discursive opinion and will formation, as discussed in chapter 1, freedom from domination requires decision-making procedures in accordance with political rights to enable the exercise of political autonomy. 322 The basic premise of an institutional framework consisting of rights and judicial safeguards is that it both arranges and secures ‘the capacity to begin’: the initiation of meaningful political activity, including the (indirect) making of authoritative decisions. 323 A sense of effective agency, which implies sharing of power, originates from collective deliberations and civic involvement. It is only by means of equal political participation, guaranteed by laws, that power can lead to democratic governing. There should be public resources both to enable legal subjects to act and speak in concert for public political purposes and to ensure them decisional status in lawmaking processes. 325 Institutional preconditions in the form of rights provide these public resources that enable and guarantee public discussion and simultaneously offer real political significance for it. 326

The emphasis on the necessity of institutional preconditions emanates from the general distrust in public authority, as discussed in chapter 1. The form of law should guarantee for individuals any unwanted domination by a stronger party, be it the state or other groups. 327 Institutional preconditions secure a public force field that assists in making individuals less vulnerable to domination. 328 Just as human beings can be characterized by their genuine inclination to initiate power, and to collectively push for transformation, there is, when a political constellation is generated, also a general proclivity towards the unjust use of power.

320 Our republican understanding of freedom both holds elements of ‘protective republicanism’, which primarily stresses ‘the instrumental value of political participation for the protection of citizens’ objectives and interests’, and ‘developmental republicanism, that emphasizes ‘the intrinsic value of participation for the enhancement of decision-making and the development of the citizenry’. Held 2006, p. 36-49.
323 See chapter 1, section 1.2.1.
324 Only when actors are able to associate to discuss and act do they together realize the potential of political power. Arendt 1958, p. 200.
325 Bohman 2004a, p. 126. The active engagement of citizens in the public realm needs to be translated into the exercise of effective political agency. Habermas 1996, p. 363.
326 Schumpeter states that democracy is, ‘that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote’. Schumpeter 1950, p. 250. See also Goossens 2003a, p. 13.
328 A critical note from Dahl should be added in this respect. Dahl could not find any proof in the available data that the Supreme Court of the United States protects minority rights. Shapiro underscores the importance of Dahl’s observation, concluding that ‘the heavy lifting is done by democracy, not constitutional courts. Authoritarian leaders ignore judges and courts with impunity, and adding courts to democracies has no appreciable effect on their protection of civic freedoms or minority rights. Yet curiously, we continue pressing for the creation of independent judiciaries to enforce bills of rights in new democracies’. Shapiro 2014.
Rights ensure that trust of legal subjects in the exercise of political authority is guaranteed insofar as ‘they provide individuals the opportunity to demand that violations of legitimate reciprocal expectations be sanctioned’.  

The constraint of abuse of power by institutional preconditions knows two different dimensions. The first dimension focuses on the most obvious abuse of power: authoritarian government, which does not respect the rule of law and the principle of self-rule of its people. In light of the government, the main premise of institutional preconditions is to legally limit abuse of the exercise of authority, by offering all legal subjects opportunities to participate in the exercise of authority. The legitimacy of law depends on observing these limitations. A legal system should ensure that such authoritarian practice is accountable, and, if necessary, can be corrected, to bring it back in line with democratic foundations through legal means. The idea of indispensable institutionalization to prevent domination of individuals is not new. The strong emphasis on the idea of an institutionalization of ‘power to the people’ in political theory is understandable in light of the fact that for most of history and in most political systems, the interests of most people have been ignored by the powerful or they have been treated as subjects for exploitation, misuse, or corruption. The focus on contracts, and specifically the focus on the social contract in eighteenth century philosophical thought, as briefly discussed in chapter 1, section 1.3.1, shows the assumed need for formalization of social commitments.

The second dimension of domination that can be constrained by the form of law is somewhat more complicated. It is recalled that ‘[d]omination is a matter of who is entitled to offer interpretations of the public good’. Because in a democratic constellation the people themselves ‘rule’, whether or not through representatives, a constraint of authority might entail a constraint of certain decisions of the majority of the people themselves. Although the principle of majority ruling is pre-eminently a fundamental principle of democratic decision-making, the rationale of democratic legitimacy also requires protection from domination by that same majority. If there are groups of individuals that unwillingly form a fixed, constant minority, and therefore do not have any opportunity to rule, one can equally speak of an obstruction of their freedom from domination. Part of the acceptability of democratically enacted law is based on the belief that minorities should have a realistic chance of entering into majority-constituting coalitions in the future. The division between

330 Madison indicated the core of the commitment of democracy to law: ‘In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence of the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions’. Hamilton and Madison 1987, p. 320.
331 Rousseau and Kant both emphasized the relationship between human rights and popular sovereignty. Habermas explains: ‘Rousseau starts with the constitution of civic autonomy and produces a fortiori an internal relation between popular sovereignty and human rights. Because the sovereign will of the people can express itself only in the language of general and abstract laws, it has directly inscribed in it the right of each person to equal liberties, which Kant took as a morally grounded human rights and thus put ahead of political will-formation. In Rousseau, then, the exercise of political autonomy no longer stands under the proviso of innate rights. Rather, the normative content of human rights enter in to the very more of carrying out popular sovereignty. The united will of the citizens is bound, through the medium of general and abstract laws, to a legislative procedure that excludes per se all nongeneralizable interests and only admit regulations that guarantee equal liberties for all.’ Habermas 1996, p. 101.
332 Bohman 2007c, p. 100. See chapter 1, section 1.3.2.
majority and minority groups should remain fluid and changeable.\textsuperscript{333} When there are groups that constitute permanent minorities, majority rule fails to be an incentive for these minorities to accept the legitimacy of the system on democratic grounds, as their right to self-rule is constantly obstructed. The opportunities for constraint of these unwanted types of domination\textsuperscript{334} is protected by certain legal institutions, such as supermajority rules, limits on the power of legislative bodies, or a bill of rights.\textsuperscript{335}

The reliance on these legal institutions originates from a strong belief in the interconnectedness between the notion of the rule of law and democratic law.\textsuperscript{336} The rule of law in part provides a minimal but indispensable standard for helping to determine the legitimate scope of state intervention in the sphere of individual rights.\textsuperscript{337} In the standard view, only norms that guarantee a minimum of certainty and determinacy within legal decision-making promote the principle of fair notice and contribute to achieving equality before the law. This is because these norms are general in character, relatively clear, public, prospective, and stable, and thereby helps guarantee control of power holders.\textsuperscript{338}

Adherence to rule of law principles renders the task of interpreting and regulating individual rights normatively acceptable. The interpretation and delineation of the scope of individual rights by state officials require legal regulation: for example, minimal basic rules for registering demonstrations or publishing newspapers. If officials are allowed to legalize basic rights in accordance with inconsistent, ambiguous, open-ended, or retroactive norms, 'excessive discretionary authority is likely to accrue to state authorities, and the sphere of individual liberty will suffer significant damage'.\textsuperscript{339} Institutional preconditions are therefore, in many democratic states, defined in a constitution, under which the values that enable a people to regulate government for its conformity to local terms of association and argument are reliably satisfied.\textsuperscript{340} The institutional character of legal preconditions and the unity and persistence necessary for rules to constitute a legal system are more than 'honorific

\textsuperscript{333} If there are groups constituting 'permanent minorities', and when there is a single dominant cleavage within society, majority rule is of no use for today’s losers and the incentive for them to accept the legitimacy of the system does not arise, or must be found in features of the system other than in democratic majority rule. Sadurski 2008, p. 46.

\textsuperscript{334} Institutional features of the political system should prevent any domination from happening, including domination by majority. Sadurski 2008, p. 46.

\textsuperscript{335} Guanieri 2003, p. 223.

\textsuperscript{336} Marks 2003, p. 2. The notion of the 'rule of law' has however also been widely contested in the history of legal though. See Bobbio 1987, p. 138-56; Neumann 1986.

\textsuperscript{337} The concept of the Rule of Law is this conception of the preconditions of democratic legitimacy understood in a way that is functional for democratic legitimacy. We do not engage in the Rule of Law characteristics apart from its inherent functions that do not specifically relate to democratic legitimacy. Our approach to Rule of Law in this respect corresponds to the French Rule of Law conception of État du Droit, as a means to vindicate fundamental rights through law. See Rosenfeld 2000, p. 1330-1334.

\textsuperscript{338} Marks 2003, p. 2. The notion of the 'rule of law' has however also been widely contested in the history of legal though. See Bobbio 1987, p. 138-56; Neumann 1986.


\textsuperscript{340} As Bobbio states, authority should be exercised 'within limits derived from the constitutional recognition of the so-called 'inviolable' rights of the individual'. Bobbio 1987, p. 25.Although our emphasis on rights and judicial review is closely linked to the discussion on whether democracy as a way of governing requires a constitution, we do not further touch upon this in this research. For a scholarly opinion that constitutional norms do not exist unless they are in some way protected by a written document, see Rubenfeld 1998.
decoration’. 341 Only when rights of individuals are anchored, and when appropriate safeguards (to be enforced by an independent judiciary) exist, can these rights actually be invoked to enforce participation in the formation and decision-making as to the type of law that will be enacted. 342

Here a tension between institutional safeguards and democracy reveals itself. Should not everything, including the rights that protect the principle of freedom, be subjected to the political power of the people to give them the opportunity to change, adjust, or abandon them? 343 This tension concerns the limits of self-rule and directly involves judgments concerning the hierarchy of ideals in political constellations (a democratic ideal or a rule of law ideal). 344 One can readily detect a difficulty in interpreting what issues are essentially related to political equality and justice that require the status of being excluded from democratic decision-making. 345 The idea that protection of freedom might require a limitation of collective decision-making is obviously justifiable in some cases, but there should be an awareness of the fact that the exercise of excluding specific matters from democratic deliberation and decision-making, to protect the rule of law and democratic principles, constitutes an inherently slippery slope towards domination that requires constant public scrutiny. Notwithstanding the importance of fundamental discussions on what issues should remain unaffected by democratic scrutiny, 346 this inherent tension to democracy theory does not affect the basic starting point of our conception of democratic legitimacy: when committed to the democratic legitimacy of law, a political constellation should offer every legal subject an actual, equal, and continuous opportunity to participate in lawmaking, including decision-making power, which is guaranteed by political rights and judicial safeguards.

**Political rights and judicial safeguards**

Political rights form the core of institutional preconditions. Habermas introduces four categories of political rights that protect the ‘basic rights that result from the politically autonomous elaboration of the right to the greatest equal individual liberties’. 347 Firstly, there is the right to have the status of a member in a society under law, to be able to enjoy basic political rights. Here we are confronted with a fundamental and preliminary organizational issue of democracy, concerning the delineation of the political community.

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341 This term is borrowed from Waldron who clarifies political scientist attitudes towards formality of lawmaking processes such as parliamentary approval. Waldron 1999a, p. 29.

342 Barnard mentions in this regard that ‘democratic legitimacy demands liberal limitations, and that self-rule by the people therefore rests on self-limitation by their governments.’ Barnard 2001, p. 185.

343 Waldron well expresses the political tension: ‘Granted that there is nothing illogical in assigning disputes about the rights associated with democracy to a majoritarian procedure, what guarantee do we have that such rights would be respected? How can rights be secure if they are at the mercy of majority decision? How is respect for rights consistent with a process that appears to place no a priori limits on procedural outcomes? Do the conclusions to which we have been driven not leave everything up for grabs?’ Waldron 1999a, p. 303.

344 As Michelman states, the dilemma is ‘how law and rights can be both the free creations of citizens and, at the same time, the normative givens that constitute and underwrite a political process capable of creating constitutive law’ Michelman 1988, p. 1505.

345 Nieuwenhuis discusses in this respect the existence and possible delineation of the ‘very essence’ or ‘core’ of a right. See Nieuwenhuis 2012.


347 Habermas 1996, p. 122-123.
Who is the demos, and who defines the boundaries of the demos? Without being able to take a conclusive stance on this complex issue, this study follows Arendt, who states that a political community is generated by the activity of collective political power itself and is not limited per se by cultural or nationalistic elements.

Secondly, these basic rights need to be actionable and guaranteed. Rights are required that ‘regulate the relationships among freely associated citizens, prior to any legally organized state authority from whose encroachments citizens would have to protect themselves’. In order for individuals to become creators of the laws that regulate them, there is a need of ‘basic rights to equal opportunities to participate in processes of opinion- and will formation in which citizens exercise their political autonomy and through which they generate legitimate law’. These basic political rights are linked with the existential capacity to speak and act, as discussed in chapter 1, section 1.2.1. They refer to the right for legal subjects to express an opinion or interests, the right to gather, and the right to co-decide on the laws that govern them. Legal subjects have different instruments to represent and express their opinions and interests, among others through a diversity of independent associations and movements. This familiar set of basic political rights consequently leads to other obligations of a political constellation, for example the guarantee that views can be widely disseminated so that ‘individuals have the means of informing themselves of how to advance their interests and convictions’.

The mere existence of political rights that protect individuals’ capacity to act and speak in concert for public political purposes, and to enable that their power can actually transform into political impact on the decision making on law is not enough. In order for rights to have more than a symbolic meaning, the rights bearers should be able to enforce these rights.

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348 See Archibugi and Held 1998.
349 The suitability of Arendt’s understanding of political power for our concept of democratic legitimacy is clear as that aims to be not inherently limited by nation-state boundaries. We do not consider ethnicity, nationality, religion or ideology as a precondition for forming a political community. We sympathize with the conviction of the Greek colonists that ‘wherever you go, you will be a polis’. The rationale of this verb covers the belief that everywhere new settlements can copy the same set-up of political associations. Arendt, with her focus on speech and act, deliberatively refrains from any suggestion that ethnic identity is a decisive factor for the formation of a political community. Being a citizen is in Arendts’ account, in that respect, a neutral identity. See d’Entreves 2008.
This is in line with Besson, Habermas and Buchanan. Besson states, with regard to the threshold of the existence of a community for democratic legitimacy to have a meaning beyond the border, that ‘all it takes often is some kind of ‘we-feeling’, a form of solidarity among different ‘stakeholders’. Besson 2009b, p. 69. According to Habermas, today signs of political fragmentation betray the first breaches in this facade of the ‘nation’. Against traditional images of multicultural dialogue, Habermas proposes ‘the dynamic image of an ongoing construction of new models of belonging, new subcultures and lifestyles, a process kept in motion through intercultural contact and multiethnic connections’. Habermas 2001, p. 71-75. See Waldron 1995, p. 105. This strengthens a trend toward individualization and the emergence of ‘cosmopolitan identities’, already evident in the post-industrial societies. Habermas, Besson, and Buchanan would not agree on applying the same standard of democratic legitimacy to both national and international law. See for Buchanan’s position: Buchanan 2004, p. 253. We will discuss the positions of Habermas and Besson in this respect in chapter 6, section 6.3.1.
350 Habermas 1996, p. 122-123.
351 Pettit speaks in this respect of ‘contestatory citizenship’, as one of the two different dimensions of democracy. Pettit 2012, p. 105-144.
352 As Habermas states with regard to legal institutionalization of various forms of communication and the implementation of democratic procedures: ‘These are meant to guarantee that all formally and procedurally correct outcomes enjoy a presumption of legitimacy. Rights of equal participation for each person thus result from a symmetrical juridification of the communicative freedom of all citizens’. Habermas 1996, p. 127. See also Christiano 1996, p. 85-86.
Along with the correlative membership rights, guaranteed legal remedies are required, which are instructive for understanding what the scope is of these rights. Individuals enforce their political rights by having a right to ‘fair access to public agencies and courts’. To secure democratic legitimation, there should be judicial overview ‘with the task of detecting violations and with the authority to overrule any other branch that commits them, including the legislature’. The judiciary may restrain domination by politicians and prevent them from acting outside the law. Specific procedural rules, for example concerning lifetime appointments or non-political methods of selecting judges, aim to ensure independence of the judiciary from legislators. The independence of judges in this respect is not understood to depoliticize judicial review, but is considered necessary to refrain the judiciary itself from forming a dominating actor. Judicial overview can constrain the power of majorities to protect the rights of minorities, but it is nevertheless perceived as a pro-democratic institution.

Rights and judicial overview are institutions that societies may harness to secure the essential principles of democracy: freedom from domination and equality. Therefore, as mentioned above, rights and judicial safeguards have an instrumental rather than an intrinsic meaning for democracy. There is a certain paradoxical complexity involved in an account of institutional preconditions. Rights are seen as a criterion for democratic legitimation but equally demand leaving the completion of the substance of these preconditions to the relevant political community. This paradox is represented by the observation that these preconditions should be ‘more or less’ static. The necessity of having political rights and judicial safeguards is static, as without them no democratic legitimation of law is possible. However, the individual substance of these institutional preconditions is to a certain extent dynamic. It depends for the interpretation and delineation of institutional preconditions on any democratically enacted legislature of a specific political constellation. The content of political rights cannot be understood to be absolute or pre-determined. It is up to the people themselves, whether or not they are represented by a political legislature, to construe and frame these basic rights.

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353 Diamond 2003, p. 35.
354 Waldron 1999a, p. 212.
355 As Eisgruber states, ‘judicial power is justifiable because judges are pro-democratic representatives of the people, not because their professional expertise enables them to decide political questions in an apolitical way’. Eisgruber 2002-2003, p. 1733. The controversial question of how the protection of rights enforced by courts can be reconciled with democratic legitimacy is outside the limits of this research. However, it remains complicated to justify the role of judges as interpreters of the law, as ‘judicial constitutional convention is not equivalent – indeed, it is contrary – to actual democracy’. Michelman 1988, p. 1537.
356 Eisgruber 2002-2003, p. 1733. Pettit adheres this view. Other criticize this approach for being elitist, as when the resolution of political disagreements is done by judges, most probably favours individuals who are technically, and legally capable to pursue action through courts.
357 As Sunstein states, ‘[i]n my view, the central goal of a constitution is to create the preconditions for a well-functioning democratic order, one in which citizens are genuinely able to govern themselves.’ Sunstein 2001, p. 6.
358 The approach of Eisgruber is followed in this respect. Eisgruber 2002-2003, p. 1737.
359 As Waldron has made clear, rights ‘divide us in fierce and intractable controversies’ about their detailed application, about the nature of justice and the hierarchy between rights, about the consequences of calling something a right. See Waldron 1999a, p. 11-12, p. 209-313.
360 In the words of Waldron, we do not aim to ‘put that canon beyond the scope of ordinary political debate and revision’. Waldron 1999a, p. 212.
Nothwithstanding this theoretical freedom for individuals to give content to these rights, the specific manifestation of participation as the right of citizens to take part in the government through periodic and free election is in Western democracies generally taken as the starting point for the operationalization of democratic principles.\(^{362}\) A democratic government often refers to a representative system of governing, consisting of different institutions such as the judiciary, the executive, and the legislature, which obtains legitimacy by the way it is democratically organized. However, institutional preconditions understood as basic political rights are not in principle conceptually intertwined with specific and familiar democratic manifestations such as, for example, elections.\(^{363}\) As mentioned earlier, political rights are understood in a broad, fundamental way, including, but not limited to, political rights such as freedom of speech, freedom of association, and freedom of the press.\(^{364}\)

The allowance of some dynamic elements into the more or less static touchstone of institutional preconditions is justified by the fact that the mere existence of these institutional preconditions does not free them from scrutiny. Institutional preconditions can also be usurped and used as an instrument of domination.\(^{365}\) The interpretation of these rights, notwithstanding their ‘basic’ procedural appearance and function, has many moral aspects.\(^{366}\) The actual performance of rights and judicial safeguards by courts needs constant inquiry to test whether they live up to their task: to protect people from authoritarian governance.\(^{367}\) They too must discharge their functions under the effective and equally shared control of individuals over how they perform.\(^{368}\)

2.1.2 Social preconditions – an informal commitment to participation

Social preconditions substantiate the framework that is set up by institutional preconditions. Social preconditions refer to the evaluation of the very possibility of initiating power by legal

\(^{362}\) See subsequent section 2.2 on the operational aspects of democratic legitimacy.

\(^{363}\) As Habermas states, ‘In fact, when citizens interpret the system of rights in a manner congruent with their situation, they merely explicate the performative meaning of precisely the enterprise they took up as soon as they decided to legitimately regulate their common life through positive law. An enterprise of this sort presupposes no more than the concept of legal form and an intuitive understanding of the discourse principle.’ Habermas 1996, p. 128-129. See also Bohman 2005, p. 103.

\(^{364}\) Our account gives a minimal presentation of the rights needed, and stresses in the first place the need of political rights, without giving full closure of what these rights should entail. We follow Waldron who states that ‘a concern for individual rights may lie in the foundations of a theory, leaving it an open question what those foundations entail at the level of political or constitutional construction’. Waldron 1999a, p. 215. See also Besson 2009b, p. 65; Diamond 2003, p. 35.

\(^{365}\) A particular abuse of a fundamental right, could result in the prohibition of enjoying that same right. See for example the exploration of Nieuwenhuis on the prohibition to associations. See Nieuwenhuis 2015.

\(^{366}\) Waldron reminds us of the struggles for universal suffrage and democracy, by women, African American, workers. ‘They did not do them simply for the sake of a vote on interstitial issues of policy that had no compelling moral dimension. They fought for the franchise because they believed that controversies about the fundamental ordering of their society – factory and hours legislation, property rights, free speech, police powers, temperance, campaign reform – were controversies for them to sort out, respectfully and on a basis of equality, because they were the people who would be affected by the outcome.’ Waldron 1999a, p. 15-16. See also Walker 2010, p. 218-220.

\(^{367}\) In this way, the often-criticized trust of Pettit in a court-based system of constitutional checks and balances is somewhat circumvented, following Bellamy who focuses therefore primarily on political representation. See Bellamy 2007.

\(^{368}\) Pettit 2008, p. 5; Bohman 2005. As explained by Bohman, a capacity to initiate deliberation is ‘the achievement of a democratic arrangement sufficient for citizens to exercise their creative powers to reshape democracy according to the demands of justice’. Bohman 2005, p. 101.
subjects, for their gathering and acting together. They refer to the existence of a democratic culture in a political constellation, the way citizenship can be experienced, how public deliberations take place, and to what extent associations can be formed. Evidently, the determination of whether a specific political order has fulfilled the social preconditions of a well-functioning public sphere and a democratic culture is more difficult. When discussing the social precondition of a public sphere, we should bear in mind Dahl’s warning for democracy theory that ‘no actual system could be expected to satisfy the criteria perfectly, constellations could be judged more democratic or less, and to that extent [sic] better or worse, according [to] how nearly they meet the criteria’. Therefore this section limits itself to an exploration of the general characteristics of social preconditions. It focuses on the social precondition of a public sphere and the interrelated aspect of the existence of a civil society.

A public sphere
Political activity takes place in an infinite variety of public spaces of action, often referred to as the public sphere. The composition of the public sphere is inherently fluid and dynamic. As Habermas theorizes, the public sphere distinguishes itself ‘through a communication structure that refers neither to the functions nor to the contents of everyday communication but to the social space generated in communicative action’. The premise of a sphere devoid of pre-determined content is crucial, as it should function as a forum for the exchange of opinions and for opinion formation. The public sphere is constantly ‘filled’ with individuals who act and speak in concert with each other. Action can take place in town meetings, civil and voluntary organizations, recreational clubs, schools, workplaces, at public events and in street life, and so on. The specific characteristics of these activities differ, which is clear when one contrasts gatherings at bars, demonstrations, and meetings of workers’ councils, but they have in common that all could be considered to contribute to a public space for people to meet up and discuss political and social matters.

In order for a public sphere to function as a social precondition for the democratic legitimacy of law, it should offer legal subjects a space for free discursive contestation and debate, openness of access, and opportunities to voice their opinions equally. Legal subjects need such a public space to respond to the role of a citizen of a legal order in which they can actually and equally influence and impact upon decision-making. The publicity of the public sphere enables the formation of a ‘representative opinion’. A personal opinion.

369 As explained in chapter 1, section 1.2.1, Arendt’s conception of power is followed in this respect.
370 As Waldron states: ‘As the fate of scores of ‘constitutions’ around the world shows, paper declarations are worth little if not accompanied by the appropriate political culture of liberty’. Waldron 1999a, p. 311.
373 This conception of public sphere is influenced by Arendt’s account of power.
375 Pitkin summarizes this Aristotelian tradition regarding the relationship between the public sphere and the rationale of democratic legitimacy as follows; ‘[T]he distinctive promise of political freedom remains the possibility of genuine collective action, an entire community consciously and jointly sharing its policy, its way of life. (...) A family or other private association can inculcate principles of justice shared in a community, but only in public citizenship can we jointly take charge of an responsibility for those principles.’ Pitkin, 1981, p. 327, p. 344-345.
376 As Arendt states, ‘[p]olitical thought is representative. I form an opinion by considering a given issue from different viewpoints, by making present to my mind the standpoints of those who are absent; that is, I represent
can only become a representative opinion when confronted with other perspectives, and when individuals have enriched their standpoints with those of others. Confrontation with the opinions of others enables the consideration of a specific issue from different standpoints. A well-functioning public space is pluralist by nature, offering a space to various types of groups and associations that pursue different, possibly contradictory interest. The collectivity and public nature of deliberations in a public sphere offers the possibility of persuasion, of forming the opinions of others.

Although the words we use to present the activities in the public sphere, such as dialogue, the exchange of opinions, transformation of ideas, and representative opinions, sound non-aggressive and mild, opposition and conflicts of opinion are fundamental elements in maintaining a well-functioning public sphere. Opposition is also a crucial element of lawmaking itself. The indeterminate character of law necessitates a dialogic, critical, transformative practice. Those situated not at the center but at the margins of society especially tend to use their political power to undertake political action to disrupt a commonly accepted determination of a legal rule. Michelman hereby emphasizes the role of opposition in our democratic ideal: ‘So the suggestion is that the pursuit of political freedom through law depends on “our” constant reach for inclusion of the other, of the hitherto excluded – which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups.’ The emphasis on public discussion of contentious opinions and the importance of taking these opinions into account in order to form a better opinion, or to reach a better conclusion, is in line with a classical version of pluralist democracy, in which political power is dispersed over numerous interest groups. A public sphere provides a forum for the expression and confrontation of these different views and interests in public debate.

Our understanding of social preconditions is conceptually limited to the existence of a public sphere to enable the initiation of political power. However, a public sphere can only be considered as a precondition for democratic legitimacy when it is ‘well-functioning’, when it provides an open space where legal subjects can make actual use of it for social action. One confirmation of such a ‘well-functioning’ public sphere is the existence of a vibrant civil society.

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378 As Arendt puts it: encounter is necessary so to make public opinion ‘flooded and made transparent by the full light of human comprehension’, Arendt 1968, p. 242.
380 When a legal subject interacts with others in deliberations it might lead others to ‘believe or vote or choose as he does’. Dworkin 2000, p. 191.
383 See for example Dahl 1956. As one of the representative scholars of pluralist democracy theory, De Tocqueville, explained, ‘stimulating competition, [could be used] to discover the arguments most likely to make an impression on the majority’. De Tocqueville 1945, vol 1, part II, Chapter 3.
Civil society

In this sub-section we focus on the users of the public sphere, the actors of political power.\footnote{Notwithstanding the fact that the existence of such actors is an important manifestation of democratic legitimacy, civil society itself cannot be understood as a precondition.} Given the subject of our main object of inquiry, we focus specifically on the voluntary formation of individuals into non-governmental organizations. The different voluntary formations of individuals that together make use of the opportunities to publicly discuss and debate public matters are broadly described as civil society. Civil society exists out of a large plurality of independent groups initiating political power, mobilizing and empowering individuals to use the freedom to speak and act.\footnote{According to scholars such as Weber, Schumpeter, Moore, Skocpol, and Berger, the sphere outside the formal, parliamentary sphere is thought to provide a considerable autonomous peasantry that produces a middle class that remains firm towards the ruling authority and provide the recourses for independent groups. See Lipset 1994, p. 2, referring to Weber 1906; Schumpeter 1950; Skocpol 1979; Berger 1986; Berger 1992, p. 7-17. As Moore noted, ‘[n]o bourgeois, no democracy’. Moore 1966. p. 418.}

Civil society is, just as the public sphere itself, inherently dynamic. It is a body of associational activity subject to constant transformations, which consists of well-known formalized voluntary associations, such as unions and political parties, and many informal networks, small collective initiatives, and more.\footnote{Cohen emphasizes the importance of recognizing both dimensions: ‘civil society as a dynamic, innovative source for thematizing new concerns, articulating new projects, and generating new values and new collective identities; and civil society as institutionalized civic autonomy.’ Cohen 1999, p. 215.} The concept of ‘civil society’ covers all relatively free and independent social and political organizations, such as groups representing particular interests, research institutions, political groups, the media, churches, and academic institutions, including NGOs.

The emphasis on the position of civil society actors as manifestations of a public sphere can be traced back to an image of the political constellation as a ‘democratic triangle’,\footnote{Zijderveld 1997, pp. 11-24. State, market and civil society are therefore the constituent parts of the democratic triangle, and none of the three has in theory any primacy. On the contrary, ideal typical the key features of each element should be in perfect balance without any domination in order to secure the optimal functioning of their key features. Lavish state intervention might lead to undermining the free market and an erosion of the sense of mediating structures in society. Too many market might lead to a society in which ‘the law of the strongest’ becomes the standards, and in which mutual solidarity and solidarity should make room for a type of individualism that is carried to the extreme. Too many ‘civil society’ finally can lead to unconditionally group conformism, which is no place for individual initiative and where legislation is seen as an unnecessary infringement on internal community relations.} illustrating the position of civil society next to market and state apparatus. In simplified terms, the core task of the state within this triangle consists of organizing society by developing robust legislation that defines the rights and duties of citizens. The core task of the market consists of generating mutual competition and trade activity to provide material security and prosperity. The core task of civil society consists of the development of meaning and meaningful institutions, based on which legal subjects derive their individual and collective identity.\footnote{This understanding of civil society implies a separation between the different actors and their functions that does not correspond to the many quite intimate relationships that have existed between state and market, and between state and civil society since early times, at least in Continental Europe. Nonprofits have from early times on been involved in the public services. In addition, there is a long corporatist tradition, involving representative associations such as trade unions and employers’ associations in economic and social policymaking. It has not been uncommon to delegate major aspects of political decision-making and even supervision over implementation to such actors. Brandsen, Van de Donk and Putters 2005, p. 757, referring to Kooiman 2003.}

The reliance on civil society as a separate democratic force is
illustrative for many different political ideals, such as the involvement of citizens in public affairs, the enlargement of social self-government at the expense of politics, limiting commercial influences, and the strengthening of community and tolerance. The opportunities of collectivity that are offered by civil society organizations are seen as a crucial aspect for balancing the authority to rule. The general idea is expressed by Lipset: ‘[i]f citizens do not belong to politically relevant groups, if they are atomized, the controllers of the central power apparatus will completely dominate the society.’

Also in the work of theorists on the relationship of civil society organizations with democratic legitimacy, traces of the two-facedness of democratic legitimacy are found: trust versus distrust, and self-rule versus control. While one group of theorists primarily focuses on privileging the private sphere to prevent unwanted state intervention and sees a crucial role for civil society actors functioning as a beacon between ‘the private’ and ‘the public’, other theorists specifically privilege the public, the collective enterprise, and theorize civil society actors as a means to engage in governmental activity by persons in their private capacity.

The importance of civil society for the well functioning of a public sphere can be traced back to cynicism and distrust towards the willingness of public authority to act in line with the wishes of its legal subjects. In some theories on the role of civil society, of which the work of Locke is exemplary, the importance of civil society lies in the capacity to protect the private sphere of citizens from state intervention and the persistent threat of governmental misuse of prerogatives. The main aim of the organization of individuals in voluntary groups is to protect individual property rights against the authority of the government. Although the emphasis of different theorists switches between an emphasis on self-rule through government rather than self-rule protected from governmental interference, the recurring central theme is the ways and means that individuals are enabled to organize a counterforce to state power.

Habermas’s emphasis on the requirement of ‘publicness’ can be read as an effort to steer a course between the two ends of privileging collectivity and privileging private interests. With his focus on gatherings of the ‘bourgeoisie’ that facilitated debates on political matters, Habermas was primarily inspired by the opportunities of the public sphere to create ‘as a matter of private initiative the sort of actors and community capable of effecting normative authority outside of or in contradistinction to public office’. A public sphere consisting of civil society actors enables individuals, whether united or not, to subject state policies and officials to the inspection of reason. However, the importance of public debate and public expression also refers to the capacities to participate proactively in the making of norms, as

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390 Lipset, Trow, and Coleman 1956, p. 15.
391 Theoretical work on the connection between civil society and democratic legitimacy is inventoried by, among others, Woodward, Seligman, Pierik and Gordon. Their work is used for this introduction into the relationship between democracy theory and civil society.
392 Although Locke relied also on a conception of trust, that specific trust was meant to restrict the power of the government: Locke wrote that society turns power over to its governors, “whom society hath set over it self, with this express or tacit Trust, That it shall be imployed for their good, and the preseruation of their Property.” Locke 1988, p. 381. See Pierik and Gordon 2010, p. 4 referring to Clarke 2000.
394 Habermas 1989, p. 70.
these practices develop a rational basis for law.\textsuperscript{396} The ideal of a balance between what governmental officials do and what citizens themselves undertake requires for its effectuation a strong civil society to inform and sustain democracy.\textsuperscript{397}

A focus on civil society actors can also be traced back to the ideal that these organizations activate and facilitate individuals in their personal development into political actors. Associational life can instigate the spread and internalization of democratic values.\textsuperscript{398} Associations are assumed to help establish and nurture a type of citizenship.\textsuperscript{399} Civil society actors facilitate individuals to internalize civic virtues, to deliberate and discuss, to initiate the creation of new norms related to the common good, to act in concert to achieve democratically enacted change, and to democratically decide on the formation of laws.\textsuperscript{400} In the context that civil society organizations offer, individuals learn how to negotiate, listen to each other, formulate answers to public issues, and develop tolerance to different backgrounds and interests.\textsuperscript{401}

Trust in the exercise of public authority is based on the conviction that that exercise is eventually based on the collective, communicative political action of these individuals.\textsuperscript{402} The premise that all legal subjects equally partake in the exercise of public authority focuses on empowerment of these legal subjects, to enable bottom-up influence in political decision-making. In this reading, instead of warding off governmental intrusion, private associations should spend their time and energy on complementing the state enterprise to facilitate ‘a just and moral social and political life’.\textsuperscript{403}

The opportunity of participation in voluntary associations is often presented as the essential precondition of democracy. Putnam states, in line with Lipset who was quoted earlier, that ‘people don’t participate because they are not mobilized, and not mobilized they can never savor the fruits of participation’.\textsuperscript{404} Associational activity activates and facilitates a pluralist citizenry. It allows individuals to express their interests and demands to government even when they develop a minority view. Civil society, within the limits of an individual state, creates conditions for opinion forming which might lead to impact on

\textsuperscript{396} Woodward 2010, p. 74, referring to Kaldor 2003a, p. 25-26. Woodward argues that Kant inspired Habermas. Kant focused on the individual and its moral autonomy that required the freedom to make public use of one’s reason. This would lead to a ‘community of ends’. Kant theorized a democratic constellation as a representative government, in the first place characterized by separation of powers, and checks and balances. He deliberately limited the representatives to the minimal numbers necessary, possibly to offer ‘considerable room, and perhaps obligation, for the responsible engagement of the public sphere by persons in their private capacity’. The position of Kant towards civil society is well introduced in Pierik and Gordon 2010, p. 5.

\textsuperscript{397} Charnovitz 2003, p. 46.

\textsuperscript{398} Omelicheva 2009, p.115, referring to Waldron 1999a, p. 6.

\textsuperscript{399} As Putnam state, they ‘instill in their member habits of cooperation and public spiritness, as well as the practical skill necessary to partake in public life’. Putnam 2000, p. 337.

\textsuperscript{400} This ‘more liberal’ connectedness between civil society and democratic legitimacy can also be traced back the work of as Gramsci, Tocqueville, Huntington, and Putnam.

\textsuperscript{401} Omelicheva 2009, p.115, referring to Waldron 1999a, p. 6.

\textsuperscript{402} As Seligman puts it; speaking principally with respect to Rousseau, this ‘idea is at the heart of the civic virtue tradition where a community of virtue is one where the social good is defined solely by the subjugation of the private self to the public realm.’ Seligman 1995, p. 204.

\textsuperscript{403} Hegel develops this perception of the role of civil society. Hegel elaborated on Kant’s theory, understanding freedom as allowing the realization of morality. Contrary to scholars as Locke and Hume, Hegel understood political commitments as the highest order, primarily pointed towards the prevention of war, superior to any private activity. Kaldor 2003a, p. 27.

\textsuperscript{404} Putnam 2000, p. 337. Institutional preconditions are considered as only one side of the equation.
decision-making processes and, in this way, builds harmony and hegemony. From this perspective, every governmental system requires a strong civil society to inform and sustain the democratic legitimacy of law.

2.1.3 Complementarity of social and institutional preconditions

Social and institutional preconditions reflect different sides of the basic infrastructure necessary for realizing the democratic legitimacy of law. Both preconditions are mutually dependent. On the one hand, institutional preconditions protect an equal and actual share in governance, which, in Dworkin’s words, focuses on ‘the difference he can make, just on his own, by voting for or choosing one decision rather than another’. On the other hand, social preconditions concern the provision of a public space for individuals to engage in political activity outside formal lawmaking. Such a space creates equal opportunities for legal subjects to form their opinions, to ‘place questions on the public agenda, and to express reasons for affirming one outcome rather than another’. A public sphere of democratic engagement is necessary to substantiate, and therefore complement, the formally ensured transformation of power into political impact on the decision-making on law. Notwithstanding the fact that in comparison with formal decision-making, informal social practices cannot have the same predictable impact on decision-making on law, their indirect political effects on the exercise of legislative authority can be considerable.

The way social and institutional preconditions are complementary already anticipates the more operational aspects of democratic legitimate law that will be further discussed in the subsequent section. The operational aspects of democratic legitimate law might differ per legal constellation. What they have in common though is that these operational aspects, such as democratic rules about elections and accountability, ensure that exercisers of public authority cannot escape the opinions of their legal subjects. Taking into account a plurality of opinions increases the formal deliberative practices and the consequential rationality of a decision on what the law should entail. Lawmakers gain their input for a law by the operation of institutionalized processes of law formation, such as in parliament, where

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405 See for an overview, Keane 1988.
406 Charnovitz 2003, p. 46. In addition, Tocqueville argued that associations serve as a bulwark against the tyranny of the majority, and combat the political or moral indifference that facilitates despotism. See Tocqueville 2004, p. 218, 590. To quote Tocqueville, ‘[a] government, by itself, is equally incapable of refreshing the circulation of feelings and ideas among a great people, as it is of controlling every industrial undertaking’. Tocqueville 2004, vol II, chapter 5, 501-510.
407 One cannot reduce democracy to rights, majority rule, and elections. A huge amount of literature has sought to formulate missing dimensions of democracy. The notion ‘dimensions’ we borrowed from Eisgruber 2002-2003, p. 1723. Rosenfeld has argued that institutional preconditions should be valued for taking the first step towards democratic legitimation, while acknowledging that we should rethink means to accommodate pluralism. Rosenfeld 2000, p. 1351. See also Weiler 2004, p. 561.
408 Dworkin 2000, p. 191.
409 See Dahl 1989, p. 221.
410 Waldron 1999c, p. 354. Also Cohen states that ‘[a] civil culture of ‘generalized trust’ and social solidarity, peopled by citizens willing and able to cooperate in joint ventures, is equally an important precondition of system legitimacy’. Cohen 1999, p. 217.
411 Heyse 2003, p. 115. As Cohen states, ‘(…), discursively generated public opinion is meant to influence the debates within political and legal publics proper (legislatures and constitutional courts) and to bring under informal control the actions and decisions of rules and lawmakers (the principle of responsiveness), while remaining autonomous of censorship and manipulation by state officials’. Cohen 1999, p. 216.
412 See chapter 1, section 1.3.2.
organized interests are included in the lawmaking process through political parties. A lawmaking authority should also consider the perspectives put forward outside this formal scope.413 Besides, the output of the exercised legislative authority can count on the acceptance or resistance of legal subjects. As discussed, the role of opposition and conflict is part of the emancipatory power of legal subjects and goes back to the roots of democracy.414 Social preconditions create a space for competing perspectives on law to develop.415

Vice versa, institutional preconditions complement social preconditions. Although power initiated in the public sphere creates itself spontaneously, it cannot on its own institutionalize its norms or orientations into law. The effect of legal subject’s capacity to act and speak in concert for public political purposes depends on the way their power is translated into democratic impact.416 To assure that exercisers of lawmaking authority act in line with democratic principles of freedom and equality, legal subjects should have rights and judicial safeguards to fall back on to ensure the translation of this power into decisionmaking power concerning the formulation and enactment of a specific law.417 Institutional preconditions, facilitated by operational rules and norms of procedure, assure that, as Dahl argues, each legal subject’s ‘judgment will be counted as equal in weight to the judgments of other citizens at the decisive stage of collective decision-making’, which is fundamental for any form of democratic legitimate law.418

The circular interactions between the exercisers of public authority and legal subjects, guaranteed by political rights and judicial safeguards and a well-functioning public sphere, enable the translation from power and influence into political impact on the formation of a law. The complementarity of preconditions is committed to the democratic promise of effective participation in the deliberation and decision-making on a specific legal rule, which serves as a protection of the principle of freedom.419 Social preconditions, such as a democratic culture and a public sphere enable arenas of potentially transformative dialogue,420 and consequently self-emancipatory activity of individuals, which political impact of this activity is guaranteed by institutional preconditions.421

2.2 The operational aspects of democratic legitimacy

As discussed in chapter 1, the exercise of public authority can be democratically legitimized when the political constellation in which the legislative activity occurs offers every subject an actual, equal, and continuous opportunity to participate in lawmaking that might lead to a political change in a specific law or even in the characteristics of a specific institutional

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415 Specifically deviating voices should be included, according to Young. ‘It is easy enough to have a harmonious and expeditious decision-making process if the dominant voices do not take seriously those opinions, analyses, perspectives, and arguments that they regard as extreme, dangerous to their interests, or overly contentious.’ Young 2002, p. 67.
416 Schumpeter 2003, p. 10.
418 See Dahl 1989, p. 221.
420 Michelman 1988, p. 1531.
421 Hirsch remarks that a public sphere and civil society have flowered in many Western states precisely because of their interplay with a centralized system of state institutions. Hirsch 2003, p. 249.
As the previous section demonstrated, an evaluation of the democratic legitimacy of law requires first an evaluation of the institutional and social preconditions to determine whether in general any exercise of public authority can be democratically legitimized. If a system has successfully passed the first evaluation, one is assured that the exercise of authority can be more or less democratically legitimate, more or less in line with the essential principles of democratic legitimacy. To what extent it is democratically legitimate can be assessed in the second level of evaluation: that of a law’s democratic legitimacy’s operational aspects.

The two levels of evaluation of the way the essential principles of democratic legitimacy are operationalized differ in terms of abstraction. Whereas democratic legitimacy’s necessary preconditions require an evaluation of the characteristics of the overall political constellation in which laws are enacted, democratic legitimacy’s operational aspects requires an evaluation of the participatory characteristics of a specific legislative process. As discussed earlier, any evaluation of the democratic legitimacy of a particular rule is secondary to the evaluation of a governmental constellation with respect to the self-organization and the political emancipation of society. An evaluation of the democratic legitimacy of a particular rule presupposes a political constellation that offers its people an open society, a society that does not impede activism or critical reflection. Democratic legitimacy’s operational aspects therefore depend on democratic legitimacy’s necessary preconditions.

Notwithstanding the dependence on democratic legitimacy’s necessary preconditions, democratic legitimacy as such only has relevance for daily legislative practices when an evaluation of the exercise of authority succeeds in ‘showing how the authority of legislation could be linked practically to certain conditions of legislating the circumstances of modern life’. The reasoning that to be free from domination everyone should have equal, actual, and continuous opportunities to participate in lawmaking requires concrete, operational instruments. Democratic legitimacy’s operational aspects concern the practicalities of how political rights are enforced in lawmaking processes. A specific lawmaking process should facilitate proactive participation, deliberation, and control to ensure that the authority is exercised on the people’s terms.

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422 The democratic legitimacy’s necessary preconditions have a creative and constitutive dimension: they enable the capacity to initiate deliberation on manifestations of democracy itself. In order to be able to apply the standard of democratic legitimacy, a regime must provide, ensure and guarantee a channel for constituent power to manifest once and again. See Colón-Ríos 2012.

423 Our procedural perspective on democratic legitimacy allows us to take as a starting point the particular features of the procedure through which the law came into being, based on the premise stated by Waldron, that ‘people who really care about justice and rights may nevertheless disagree about what they entail’. Waldron 1999a, p. 306. Because of the awareness of the empirical fact that any given political society is characterized by a plurality of value and belief systems, chapter 1 conceptualized democratic legitimacy in a procedural way.


425 Waldron 1999a, p. 33.

426 As indicated in the introduction, no comprehensive account of all means to democratic legitimation is given, though for illustrative reasons some might pass in review. With ‘means’ we refer, among others, to voting for legislatures, assembling, taking part in demonstrations, signing petitions, addressing representatives directly, participate actively and passively in political parties, participating in and donating money to cause- and interest groups. Instead we focus on three broad, general categories of operational translations of the main purpose of democratic legitimacy.

427 The qualification ‘deeper’ can be used here, because the level of democratic legitimacy’s operational aspects is relative. See Dahl 1979, p. 105.

428 Habermas 2001, p. 110.
of lawmaking, one assesses the different operational manifestations of participation, ranging from elections, recalls, referenda, majority voting, or different types and fora of deliberation and control. Democratic legitimacy’s operational aspects include procedural norms such as transparency, responsiveness, accountability, and inclusiveness. Contrary to the static evaluation of democratic legitimacy’s necessary preconditions, democratic legitimacy’s operational aspects can be approached as a matter of degree.

This section briefly reviews the characteristics of democratic legitimacy’s operational aspects. Section 2.2.1 sketches general characteristics of a domestic lawmaking process to show the different time frames in which the ideal of participation might be operationalized. Section 2.2.2 discusses some operational aspects of participation related to the three types of participation discussed in section 1.3 of chapter 1: consent, deliberation, and control. Section 2.2.3 briefly discusses some general principles that function as guidelines for lawmaking authorities to facilitate participation.

2.2.1 An introduction to general characteristics of lawmaking processes

Lawmaking is a public exercise of authority that concerns preparation, discussion, formulation, and finally decision-making which leads to the enactment of a rule that should guide the behavior of its subject. These processes incorporate both political processes and legal procedures; they include the discussion on, as well as the passing of, the law.

To sketch some general characteristics of lawmaking processes, domestic lawmaking in representative democracies functions as a framework of reference. In general, most democracies organize primary lawmaking by representatives, which can be initiated by representatives or executives. Subordinate lawmaking is often delegated to the executives. In all these different lawmaking procedures and phases, plenary debates are organized in which different actors, including individuals, private actors, and civil society organizations get a chance to submit their views to the formal legislators. Many political constellations have laid down rules of parliamentary procedure and appreciate the informal norms that regulate these processes. Besides deliberating, persuading, and voting, they also entail making compromises, bargaining, coalition building, and lobbying. Strictly speaking, as long as a piece of legislation remains under the consideration of the legislature it is not considered law, though it may be broadly referred to as lawmaking.

Different opportunities for participation are integrated into lawmaking processes. How many opportunities there are to participate, the intensity of participation, and the types of participation depend on the institutional framework of a specific lawmaking process, which obviously differ per country, governance level, and legal rule. This section reshapes and reduces these empirical complexities of legislative procedures to a simplified sketch of lawmaking. The purpose of this section is to illustrate the context of the inquiry into the...
contours of democratic legitimacy’s operational aspects and manifestations. It has no instructive purpose, nor does it intend to draw a template for any legislative procedure.\textsuperscript{433}

In line with rule of law principles an adequate legal basis is required to empower the government to make binding regulation.\textsuperscript{434} Lawmaking refers to practices that ‘constitute a legislature and empower it to lay down the law and to subject the immemorial practices of primary morality to the rational procedure of deliberate change’.\textsuperscript{435} Often a constitutive document, which attributes legislative power to the legislature, contains rules about who is empowered to make laws, and according to what procedure. We generally speak of the ‘legislature’ when referring to the formally recognized actors involved in legislative processes.\textsuperscript{436} A legislature\textsuperscript{437} is a body of individuals forming a decision-making organization that has the power to pass, revoke, and revise laws. Lawmaking refers to practices that ‘constitute a legislature and empower it to lay down the law and to subject the immemorial practices of primary morality to the rational procedure of deliberate change’.\textsuperscript{435} Often a constitutive document, which attributes legislative power to the legislature, contains rules about who is empowered to make laws, and according to what procedure. We generally speak of the ‘legislature’ when referring to the formally recognized actors involved in legislative processes.\textsuperscript{436} A legislature\textsuperscript{437} is a body of individuals forming a decision-making organization that has the power to pass, revoke, and revise laws. A diversity of actors, from individual members and political parties, to committees and interest groups, is involved in legislative processes. However, formally, the term ‘legislature’ refers to one or more deliberative assemblies that discuss and vote upon bills. These assemblies are normally known as chambers or houses.\textsuperscript{438}

Representative democracies are characterized by the main principle that the parliament, consisting of representatives of the people, has the primacy to set rules, which means that the most important and impactful rules should be enacted by the parliament.\textsuperscript{439} Legislatures are in this respect considered the principal policy makers. In this capacity they observe and steer governing actions. Many governmental decisions, ranging from economic, environmental, and social regulation, to individual and collective rights,\textsuperscript{440} require legislative approval. Amending constitutions, thus altering the structure of government or the distribution of power among its officers; ratifying treaties; declarations of war or states of emergency initiated by executives; and approving appointments of high officials to executive, judicial, or independent offices: all these governmental acts can only achieve legal setting positions by political parties. Caray 2009. See Cox 2006. What one can say in general about lawmaking, without looking into individual characteristics of particular political constellations, is obviously limited. See for a discussion on the tensions of comparative research and legislation, Florijn 1993.

\textsuperscript{433} This research refrains from contemplating on the merits of borrowing legal concepts from one legal system to another. See for a skeptical view: Weiler and Trachtman 1996-1997, p. 355: ‘The dangers of ‘borrowing’ from one legal system to another are famous: the law of any polity is a construct embedded in a specific social and political culture and its transmutation to other polities is not easily achieved.’

\textsuperscript{434} The legality principle is mentioned in relation to democratic legitimacy in chapter 1, section 1.1.2.

\textsuperscript{435} Waldron 1999b, p. 20. We called this in chapter 1 the ‘transformative power’ of individuals.

\textsuperscript{436} We separate power of the legislative branch from the judicial branch that has formal power to interpret legislation, and from power of the executive branch that can act only within the powers and limits set by law, in line with the traditional rule of law framework. Suggestions for further reading on Rule of Law: Raz 2009; Tamanaha 2004; Przeworski and María Maravall 2003.

\textsuperscript{437} The most common names for national legislatures are ‘parliament’, ‘assembly’ or ‘congress’, although these terms have more specific meanings. Laver 2009.

\textsuperscript{438} Different political constellations know different numbers of ‘chambers’. A legislature with only one house is a unicameral legislature, while a bicameral legislature possesses two separate chambers, usually described as an ‘upper house’ and a ‘lower house’. These chambers exercise different tasks and have different powers. The selection of their members also differs. See for an introduction to bicameralism: Uhr 2009; Cutrone and McCarty 2009.

\textsuperscript{439} The primacy of the legislature is well expressed by Locke: ‘In all Cases, whilst the Government subsists, the Legislative is the Supream Power … and all other Powers in any Members or parts of het Society [are] derived from and subordinate to it.’ Locke 1988, 367-369, para 150.

\textsuperscript{440} Caray 2009.
force when approved by the legislature. Furthermore, legislatures normally have the
exclusive authority to revise budgets.

The bulk of rule-making of an administrative nature, however, is enacted with lesser
democratic legitimacy. Often the broad principles and outlines of a law are set out in
statutes. These statutes delegate authority to the executive branch to introduce legislation
that works out the details of the statutes. Delegated legislation can be revised easily
compared to primary legislation. Legislatures therefore delegate issues that may need to be
fine-tuned through experience. The executive authority makes rules to implement and
administer the requirements set by primary legislation. These types of rules made by the
executive power are called subordinate legislation.

Usually, the process whereby a ‘bill’ becomes an ‘act’ is prescribed in constitutional or
administrative legislation. Once a social problem is identified, it can be decided that new or
amended legislation is the proper response to solve it. Members of the legislature or officials
who are part of the executive power often initiate a legislative procedure.441 If members of
parliament pass a draft bill, it is often based on the right of initiative. Lawmaking entails
different phases: an initiation phase, a preparation phase, a consultation phase,
deliberation, enactment, publication, and the phase in which a rule enters into force.

Together with the proposal for a new act, an explanatory memorandum explaining the
purpose of the proposed law can be filed. The bill can be placed in the hands of special
committees that prepare the consideration of the bill in writing. The policy decisions
concerning new laws are frequently complex. They may depend on technical information
that can be marshalled and deciphered only by experts, or they may entail trade-offs among
competing demands that interact in non-obvious ways. Notwithstanding the
professionalization of representatives into policy-making specialists, legislatures also hold
informational potential beyond the sum of the individual efforts of their members through
the division and specialization of analytical labor.442 Legislatures are often set up to
encourage division and specialization through a set of committees with policy-specific
jurisdictions. These committees are charged with supporting the development and review
of policy proposals in their domains, such as economics, foreign affairs, security, agriculture,
labor, and so forth, and drawing on the expertise of their members and staff to make
recommendations to the full assembly.

During these preparatory phases, civil society organizations and other interest groups
are often allowed to react to the bill. The legislature or the executive may invite
organizations to submit comments or may organize a public hearing in which organizations
can give their reactions. Observations made by the relevant committees might instigate the
government to allow further changes to the bill.

After committees have adequately prepared the bill, a plenary debate takes place, during
which members of the legislature may propose amendments.443 A public hearing can take
place in different rounds, in which members of parliament have the opportunity to question

441 As part of the executive, officials of a ministry make a proposal at the request of a minister. The minister in
question defends that proposal in the cabinet. If the Cabinet agrees to the submission, it can be required that the
proposal is submitted to an external council that will assess the congruence of the proposal with the broader
legal, constitutional, system. The opinion of the advisory body may be reason for the government to change
something or to respond.
442 Caray 2009.
443 Plenary time is essential to passing legislation. See Cox 2009, under 2.
the bill, and the one who initiated the bill can defend it, whether a co-member of parliament or the minister. These discussions are often referred to as deliberations, of which the length of the speaking terms is determined by procedural rules. The legislature is expected to consider a diversity of standpoints. The ‘publicness’ of legislative deliberations is an important element to be able to subject these deliberations to monitoring by outside actors. By forcing debate into an open setting, legislatures can limit the admissible arguments on behalf of interests or policy positions to those that can be defended in public, and the represented are able to hold their representatives to account.444

At the end of the public hearing, after the debate has been completed, legislators vote upon the bill.445 Rules of procedure often provide for voting requirements that prescribe an absolute majority of votes, or in some cases a two-thirds majority vote, but may also require a supermajority in some cases. The final phase of legislative procedure concerns the legal status of an act, which is normally reached by a signature or some other token of consent by the head of state. After the approval of a new law, rule of law principles require publication of the law. The process of enactment is separate from commencement. A royal decree or a separate law normally regulates the entry into force of a law.

As stated and explained in the previous section, to be conducive to achieving any political transformation and to ‘become consolidated and embodied in political institutions which secure those very forms of life that are centered in reciprocal speech’,446 power should be able to flow back and forth from informal sites of deliberation occurring in the public sphere to formal sites of deliberation as discussed above, such as parliaments, and chambers for hearing.447 However, in practice, the democratic ideal of power sharing by the people equally is not very obvious in every legislative process. Daily legislative operations are characterized by routine procedures. Bureaucracies prepare laws and process applications, parliaments pass laws and budgets, party headquarters conduct election campaigns, and interest groups exert influence on administrations.

2.2.2 Operational aspects of participation
This section discusses some operational aspects of participation. We follow the three main categories of participation as spelled out in chapter 1: consent, deliberation and control. The operationalization of participation manifests itself in proactive ways, such as through voting for a representative in parliament; in continuous ways, such as through initiating debates

444 Caray 2009.
445 Procedural rules on voting differ per bill, and obviously per political constellation. Simple bills might be settled with a blank (final) report and can be directly (as formality) subject to voting. Having emphasized the bewildering variety of contemporary parliaments, extending to the name, size and functions of the legislatures, Norton pinpoints “one core-defining function” of all legislatures no matter how considerably they differ: ‘what such bodies have in common is that they are constitutionally designated institutions for giving assent to binding measures of public policy (…)". Norton 1990, p. 1.
446 See Habermas 1977.
447 Habermas argues in commenting on Cohen’s formulation of a model of deliberative democracy, that deliberative democratic process should not be perceived as engaging an integrated people making decisions for the entire society. Habermas 1996, p. 304-307. Habermas is in that respect consistent with Arendt’s reading of political power. She argues that political power is actualized in all those cases where action is undertaken for communicative purposes, and where speech is employed to disclose our intentions and to articulate our motives to others. Habermas however is also critical to some elements of Arendt’s account of political power. Habermas criticizes Arendt’s rigid dichotomies ‘between public and private, state and economy, freedom and welfare, political-practical activity and production — rigid dichotomies which modern bourgeois society and the modern state, however, escape.’ Habermas 1977, p. 14.
and participating in discussions on policy matters outside and inside formal lawmaking processes; and in reflective ways, by holding legislators to account.

First, related to the proactive form of participation by consent, one can state that there are various different participatory mechanisms that operationalize consent by the governed. There are mechanisms that give legal subjects a direct voice in lawmaking, such as citizen initiatives, co-decision procedures, and referendums.\textsuperscript{448} These forms of direct participation are often considered to politically empower individuals. There are different normative pleas for different direct participatory mechanisms. See Barber 1984; Norris 2001; Fountain 2001.\textsuperscript{449} There are obligatory or optional referendums, advisory or consulted referendums, and binding or non-binding referendums.\textsuperscript{449} Many states make use of direct participative mechanisms to correct the results of indirect participation, which brings us to the second and most dominant contemporary manifestation of the individual’s approval of the exercise of public authority: the electoral system.\textsuperscript{450}

The primacy of the chosen legislator is an indirect manifestation of the normative ideal that the people should govern themselves.\textsuperscript{451} Notwithstanding the many possible different ways of enacting rules, and the possible critique on the division of labor,\textsuperscript{452} in most legislative settings the larger society has elected representatives to make the rules and decide what rules govern their behavior.\textsuperscript{453} The electing of representatives seems to value the abstract idea of a legislature as a microcosm of the political community at large. For domestic democratic systems, this ideal is translated geographically, when representatives are elected on a constituency basis, and ideologically, in terms of party-political affiliations. It is often thought important that legislatures also represent a country’s mix of gender, ethnic, and class identities. Those are choices about the appropriate ways to ensure the equal representation of interests and perspectives and to relate the egalitarian foundations of democracy to the specific framing of policy and legislative debates.

Elections have a double function: they enable participation in and control over the exercise of authority. In this respect, an elaboration on elections belongs to the current section on the ways that consent is operationalized, as well as to the subsequent subsection on the operationalization of control. With a vote, one expresses one’s individual political preference. In the case of aggregative procedure, the ‘one man one vote’ principle, it is

\textsuperscript{448} These forms of direct participation are often considered to politically empower individuals. There are different normative pleas for different direct participatory mechanisms. See Barber 1984; Norris 2001; Fountain 2001.

\textsuperscript{449} See for further reading Qvortrup 2002.

\textsuperscript{450} Why representative democracy is commonly seen as the most favorable manifestation of self-rule is an interesting topic that nevertheless falls out of the scope of this research. As discussed in the introduction, this research does not take a normative stance on the preferability of different manifestations of participation. See for a plea for representative democracy, Meuwissen 1975.

\textsuperscript{451} Waldron summarizes the underlying ideal or our electoral representative legislators as follows: ‘[T]he representatives of the community come together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all, and they do so in a way that openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle among them.’ Waldron 1999b, p. 2.

\textsuperscript{452} See for a critique on electoral representative democracy, Van Reybrouck 2013.

\textsuperscript{453} In order to determine how consent giving should be facilitated, practically all states have opted for instituting electoral systems. According to Dahl, ‘[o]nly a handful of countries have failed to grant at least a ritualistic vote to their citizens and to hold at least nominal elections; even the most repressive dictators usually pay some lip service to day to the legitimate right of the people to participate in the government, that is, to participate in ‘governing’ though not in public contestation.’ Elections ‘play a direct role in the establishment and maintenance of governmental legitimacy (…) because elections are the means by which a vital element of popular consent is expressed and implemented’. Dahl 1971, p. 5. See also Gardner 1990-1991, p. 267.
assumed that taking into account every individual’s interests equally is assured. 454 In that case, democratic legitimacy relates directly to ‘an expression of majority will, making legitimacy a function of electoral successes’. 455 On the other hand, the attractiveness of voting systems is their clear-cut way of holding representatives to account. The electorate has the means to produce and to evict a government, through methods of acceptance and withdrawal of acceptance. 456 To give credit to the principle of self-rule, the authority to make rules is not permanently transferred to state organs; this is regulated in different instruments of authority. 457 Regular elections guarantee an evaluation of the exercise of authority and represent a constant renewal of legitimacy. 458 Ideally, elections have a transformative impact. 459 Representatives who are elected are bound by a limited term that ensures the opportunity for existential power to manifest itself at least once every four years. The fear of losing office may prevent governments acting beyond the wishes of the people. 460

Who will be elected, and how, are often considered to form the core of a democratic system: namely, in Schumpeterian terms, through the competition for leadership and the free competition for a free vote. 461 Participation of the people in this regard is limited to deciding who will decide for you, who will represent you in decision-making. Electoral representative democracies are normally characterized by the existence of political parties. Political parties differ from many other political institutions by virtue of being, most often, created external to the constitutional order. The role of political representatives is in essence dual. First, the representative mobilizes the power that is granted to him or her to make decisions. The choices of the electorate determine which parties and their candidates win legislative office. In some cases a single party forms a majority; in other cases it requires multiple parties to do so. In either case, the final step is how that majority governs, in terms of realizing (or reflecting) the wishes of the public that elected it, 462 to substantiate fundamental principle of democracy on which representative theory is based: each person

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454 See for an extensive elaboration of the relation between the principle of equality with majority voting, Sadurski 2008; Dworkin 2000. Dworkin has argued that one should make a distinction between the equality of impact and the equality of influence. Voting mechanisms confer an equality of impact to individuals or in the international legal order to states. The equality of impact, in Dworkin’s words, sees on ‘the difference he can make, just on his own, by voting for or choosing one decision rather than another’. The equality of influence, on the other hand, covers the possibility of one’s person to make a difference, not just by its own vote, but by leading others to ‘believe or vote or choose as he does’. Dworkin 2000, p.191.


456 Schumpeter 2003, p. 11.


458 However, elections ‘bear only a pragmatic connection to democracy, not a constitutive one’. The expression of agency takes many forms. Eigruber 2002-2003, p. 1731. Eigruber states that ‘elections are desirable institutions only insofar as they serve democratic goals, and, as we have already noticed, they will do so only imperfectly. That is not because voters are unintelligent, amoral, or in some other way incapable of governing themselves. The problem is that ‘voter’, like ‘juror’ or ‘legislator’ is a specific political office embedded in a network of political institutions. Like all such offices, it carries with it specific incentives’.

459 As Laver states, ‘if citizens want to change their government in a parliamentary government system then they do this by voting in parliamentary elections. Everything else about legislative politics in parliamentary government systems is ultimately an embellishment of this simple constitutional fact’. Laver 2009.

460 ‘The fear of losing office may be enough to prevent governments being completely carefree with power and money – after all, if the opposition were elected, that same power and money could be used against them’ Butler 2012, p. 86.

461 Schumpeter 2003, p. 11.

462 See Aldrich 2009.
ought to have (the possibility of) an equal say in the process of collective decision-making. Second, as part of the legislature, any representative is understood to represent the broader interests of society at large. In this respect political parties shape the beliefs and values of citizens and shape their electoral decisions.

There are many legal procedural norms that determine how participation in practice is manifested. Take for example legal norms concerning proportional representation, or other legal norms that regulate first-past-the-post elections, or norms that determine whether the executive-legislative relationship should be a ‘parliamentary’ or primarily based on ‘separated powers’. Also, the way law addresses the regulation, administration and financing of electoral systems and political parties influence the working of specific democratic systems. These norms strongly influence the practice and experience of the democratic legitimacy of law. In general, the necessary ‘thickness’ of participatory structures that characterize different lawmaking processes depends on the assumed impact of a rule on society. Most democratic constitutions prescribe majority rule by representatives for primary lawmaking activities. Often the most important decisions, such as changes in constitutions, require extraordinary majorities or several successive majorities. Amending a constitution normally involves ‘complex and laborious’ requirements, which are necessary to ensure a well-considered revisiting of fundamental norms worthy of protection by the constitution. However, a ministerial decision can be enacted by a relatively simple procedure. Laws apparently differ in what they require in terms of forms of proactive participation of legal subjects.

Second, in relation to deliberation, it is important to stress that the mere existence of opportunities for deliberation, as discussed in chapter 1 section 1.3.2, is not sufficient for the democratic legitimation of law. Whether or not deliberations are contributing to the democratic legitimacy of law depends in practice also on the way deliberations are operationalized. In general, there should be sufficient assurance that the procedures of the deliberation are neutral in relation to the different substantive viewpoints, in the sense that a procedure itself does not privilege any particular discussant or stance. A proper deliberation based on preferences defended in impartial terms requires that the lawmakers eliminate any barriers such as false or morally objectionable information. Besides, democratic legitimacy’s operational aspects depend on mechanisms that promote dialogue and debate. A commitment to deliberation includes, among the other things mentioned, the drafting of potential rules or policies with public notice and an opportunity for all interested parties to comment on the draft. Compliance with these requirements not only contributes to the legitimation of law from a procedural point of view, but also has instrumental value: when lawmaking authority takes into account procedural elements related to deliberation it increases the likelihood that substantive agreement among individuals will be reached.

As mentioned in section 2.1.2, a flow from power to lawmaking authority is enabled by the capacity of (groups of) legal subjects gathering in the informal, unspecialized public

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463 See for an entry on these issues concerning law and democracy, on macro and micro scale, Pildes 2009.
466 Sadurski 2008, p. 87.
sphere to autonomously identify issues and concerns. These associations might bring those issues and concerns to wider public attention; they might propose solutions for them, and, by shifting public opinion, they influence the operations of the formal political system. This flow of power requires facilitation by procedural norms such as responsiveness, transparency, and inclusiveness, to get across the input of legal subjects. Deliberation in this respect does not prescribe the involvement of all legal subjects in the process of democratic will formation. Individuals may decide that their interests are already being well put forward by others. More than the number of participants in the deliberation, ‘it’s the public forum function, through which public control, criticism and debate become possible’.

Third, control derives practical meaning when, in response to expressions of control, corrections can be made to the law. Therefore it is vital that the lawmaking authority be responsive to the exerted control and willing to revise its policy. In a representative democracy there are traditionally three different levels of democratic control operationalized. The people control the parliament, the parliament controls the government, and the government controls the bureaucracy. The major means of control can be divided into external-formal mechanisms and external-informal processes. The former relates to legislative instruments, such as legislative committees and parliamentary questions, but also to executive means, such as controls exercised by political executives over public agencies, and judicial or quasi-judicial processes, such as administrative courts and ombudsmen. The latter refers to public hearings, interest groups, opinion polls, and media scrutiny.

How control is tailored depends on the nature and the purpose of a specific law. Besides, the quality of control depends on the political and administrative climate of a lawmaking authority. Beck proposes the following ordering of different types of control. First, there is direction control, when political objectives are being analyzed, replaced, or adjusted. Direction control is a consequence of the strong belief in the right of the people to co-

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470 These norms will be briefly discussed in subsequent section 2.2.3.
471 The fact that a democratic legitimate lawmaking process should provide equal opportunities does not equally mean that all individuals have the obligation to be part of a deliberative process. See Dryzek 2001. See also Held 2006, p. 281: ‘Deliberative democracy presupposes, according to some of its leading advocates, that publicly upheld positions can meet the test that all significantly affected would assent to the, but it does not presuppose that all will or could necessarily engage in debate’ (see for example Habermas 1996).
474 The other, in this case less relevant, internal means of control mentioned by Haque are: 3. internal-formal means, including official rules, codes of conducts, official hierarchies, and performance reviews; and 4. internal-informal mechanisms, such as organizational culture, professional ethics, and peer pressure. Haque 2000, p. 606, see for further reading DeLeon 1998; Haque 1994; Heeks 1998.
475 When these conditions are fulfilled, control is elevated from a merely routine obligation to an instrument to make lawmaking more rational. The sociologist Beck calls this the cognitive function of control. Control knows also a social-integrative function. By enabling participation, the political authority diminishes the chance of opposition and protest actions against their lawmaking activities. Those who cannot relate to the actions of the lawmaking authority should be able to recognize the counter pressure from control with which they can identify. Control is effective when it can lead to sanctions, reconsidersations and consequences. When political authority is not controlled properly political apathy can occur, leading to a deteriorating relationship between the people and the political authority. Control is thus paramount to a democratic legitimate lawmaking authority. Beck 1987, p. 11-26.
legislate, whether through representatives or directly. It constitutes a so-called balance on the executive power. Beck complements direction control with the second type of control, which he calls legality control. Legality control provides a check on the policy activities on the basis of legal regulations and guidelines. Thirdly, Beck mentions success control. Success control takes place when the effectiveness of the law, policy, or instrument is controlled. Legality control and success control enable a check on executive power.476

The accountability norm is institutionalized to create a system of constant control of the people over the exercise of political authority.477 Each of the principals in the chain of delegation of an institution needs to control the exercise of the transferred powers. At the end of the line stand citizens who review the functioning of public authority and might sanction their political representatives by, for example, voting them out of office during the subsequent elections. As a result of the exercise of oversight, relevant information can be divulged.478 The public character of the account giving has the purpose to protect legal subjects against corruption, abuse of power, and other practices of inappropriate authoritative conduct. Public account-giving, therefore, is a necessary condition to uphold, guarantee, and operationalize any form of effective participation, by means of consent, deliberation, or control, as it provides to legal subjects the indispensable input for evaluating the performance of governance.479 Accountability is ‘constituted by two elements: mechanisms of transparency, for delineating public political roles; and mechanisms of disempowerment, for imposing sanctions that annul certain political resources that enable an actor to perform public political functions’.480

2.2.3 Procedural norms
In this section we briefly discuss the main procedural norms that facilitate the abovementioned forms of operationalizations of the principle of participation. These procedural norms bridge or adjust the gap between the governed and the governors.481 The norms, such as transparency, inclusiveness, and responsiveness that will briefly pass in review are all more or less interrelated, as they address the responsibility of the lawmaking authorities to comply with these norms as to enable effective participation of legal subjects.

Let us start with transparency. A lawmaking institution has an obligation to disseminate understanding widely so that ‘individuals have the means of informing themselves of how to advance their interests and convictions. (…) Hence, democratic institutions ought to be structured in such a way as to provide wide and roughly equal access to information relevant to democratic decision-making’.482 Citizens need information to make their vote well informed, to be able to control and contest governmental policies, to hold the executive

476 See Beck 1987.
477 Public accountability is seen as a conditio sine qua non for democratic governance. As Rossi states, ‘[t]he oversight and accountability rationale is paramount to the legitimacy of agency decisions.’ Rossi 1997, p. 182.
479 See Przeworski, Stokes, and Manin 1999. It is referred to as vertical accountability, based on hierarchic principles of Decey and Weber.
481 Aucoin and Heintzman 2000, p. 49-52.
482 Christiano 1996, p 85-86. One of the most reasonable related requirement for equal opportunity to participate is the equal access to information, as individuals should have the means to inform themselves in order to develop their opinions, which implies a very tall order for government, in that it should secure such an equal access. This claim is closely related on the equality of educational opportunity.
power accountable, and to take part in deliberations.483 As discussed in the previous section, the provision, sharing, and gaining of information is guaranteed in a democratic system by political rights that are part of the institutional preconditions of democratic legitimacy: by freedom of the press, freedom of assembly, and freedom of speech. However, the transparency norm mainly focuses on an open government, ensuring the transparency of official papers, proposals, and agendas, and could be perceived as a necessary condition for effective control, consent and deliberation.484

Related to the procedural norms of transparency is the democratic obligation for lawmakers to be responsive to the different comments put forward by the different actors that participate in the lawmaking process.485 Lawmakers should listen to these actors to make participation in lawmaking effective in terms of political impact on the decision-making on law. That might be by assuring impact of individuals upon the agenda setting, including the capacity to initiate public deliberation about a chosen subject.486 A closely related procedural norm is the principle of inclusiveness.487 Inclusiveness can be seen as a quantitative aspect of the scope of participation.488 In principle, a lawmaking process is inclusive if the interests, opinions, and social perspectives of all those affected are represented in the decision-making process.489 This refers to the ‘fundamental question of identifying the proper constituency or demos concerning a specific issue’.490

These procedural norms facilitate the earlier discussed central premise that a democratic society should remain open to change, to revisability. These norms can only be considered effective when coupled with the essential possibility of disempowerment when the lawmaking authority does not perform up to standards. The earlier mentioned instrument of accountability functions as a democratic norm that checks and addresses the level of responsiveness, transparency and inclusiveness of a lawmaking procedure. No less important is the preventive function of procedural norms. Public account-giving and transparency will discourage public officials from exploiting their delegated powers and will provide supervisors, whether interest groups, members of parliament, the media, or official controllers, with vital information for uncovering governmental neglect.491

Any consideration of democratic legitimacy’s operational aspects requires a case-by-case evaluation of the different participation mechanisms of a lawmaking process. This case-by-case evaluation should take into account the formalized processes of lawmaking, the evaluation of the opportunities to voice concerns by legal subjects, the information provided

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483 Esty points out the universal value of deliberation, by comparing political theory with a scientific model. The value of a deliberative model is for both processes huge, with the importance of give-and-take as a path to superior results of time. Esty 2007, p. 524

484 Procedures enacted by the lawmakers that openly ‘promote the advancing of data, testing of theories, scrutiny of assumptions, review of policy results, and the refinement of thinking based on experience’ are equally to be prized. Sandholtz and Stone Sweet 2004, p. 247.

485 Esty 2007, p. 524.

486 Sadurski 2008, p. 87.

487 Sadurski 2008, p. 87.


489 Dahl 1979, p. 97. Being subject to the rules and decisions of the association is an essential characteristic of membership; it is sufficient to distinguish members from non-members in that respect.


491 Another function of public accountability, that is less relevant for our exploration of democratic legitimacy’s operational aspects, is to improve functioning of governmental actors by enabling individual or institutional learning, as it provides new insights not only for the affected that might use that information to steer government, but also for public officials themselves.Aucoin and Heintzman 2000, p. 52-54.
by the lawmakers for legal subjects necessary to form any opinion on the subject matter. When public hearings are organized, one should look into the general intensity of participation, whether it is limited to merely observing or can participants put issues on the legislative agenda, and into the actual follow-up of lawmakers after the inputs of legal subjects are collected. Besides, one should evaluate what means of holding the lawmakers to account the legal subjects have at their disposal. In short, an investigation of democratic legitimacy’s operational aspects requires an assessment, first, of the procedures and norms that are in place to regulate participation in a lawmaking process, and second, of the available instruments and channels that the legal subjects can use to allow their concerns and ideas to be heard.

2.3 Democratic legitimacy’s critical potential

The general characteristic of democratic legitimacy seems apparent: whether discussing its rather abstract principles, or its more concrete manifestations, democratic legitimacy enables legal subjects to critically assess the laws by which they are governed, its lawmaking authority, and even the organization of the political constellation they are part of. As discussed in chapter 1, the distinctive feature of legitimacy is that it refers to the relationship between legal subjects and law. Legitimacy is the result of an evaluation of law by its legal subjects that measures its acceptability. Legitimacy refers to an attitude of the legal subject towards a law and towards the exercise of lawmaking authority, in contrast to concepts such as normativity, validity, or content. As is argued, the extensive consequences of law for the lives of the legal subjects and accordingly, the broad power of the lawmakers that create these rules, require a critical evaluation of its legitimacy. One considers the binding nature of law acceptable because it has come into being through a democratically legitimate procedure, with respect for the right of individuals to have an equal say.492

The specific appreciation for democratic lawmaking procedures is based on the principle of self-rule, of equal opportunities to participate. This normative position is based on the conviction that we have legitimate interests in participating in political life, and consequently in participating in lawmaking. The conception of democratic legitimacy that is central to this research takes a proceduralist approach to democratic legitimacy, which is, in principle, indifferent to the content of the resulting law.493 A move away from content is justified by the distinctive characteristics of a legal system. Law inherently affects all legal subjects, as opposed to other social norms that rule a small group of subjects that behave in a way congruent with the social norm. Due to the existing plurality of opinions concerning the determination of what is just and what is not, justifications of law based on its content are controversial by nature.494 A procedural perspective on democratic legitimacy is based on

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492 Waldron claims: ‘Once voted on in the legislature, [a law] is entitled to whatever respect this communitarian status confers on it, without regard to – indeed bracketing away from – the substantive merits of its content.’ Waldron 1999a, p. 102.

493 We deliberatively add ‘in principle’ as our procedural starting point has its own limitations, related to possible unwanted effects of democratically enacted laws that are inherently contradictory with our conception of justice. Waldron 1999a, p. 3-4.

494 Waldron 1999b, p. 23.
the assumption that democratic procedures are able to meet people’s respect for laws with which they may, sometimes substantively, disagree.495

A democratic mode of lawmaking guarantees that its procedures offer opportunities for participation to everyone, which requires toleration and explication of radical and public contradiction. 496 This is to enhance the chances that, even if there is substantive disagreement in terms of morality with the proposed legal answers to societal ordering problems, individuals might accept the proposed answers when, during the process of law formation, democratic principles are respected. 497 As disagreement and conflict are inevitable elements of the existence of large groups of individuals with heterogeneous interests, lawmaking unavoidably produces losers as well as winners. Democratic legitimacy provides the argumentative force to persuade losers to continue to play the political game: as Miller puts it, ‘to work within the system rather than to overthrow it’. The merit of democracy as a system is that it offers prospects that the next turn ‘may produce a different outcome with different winners and losers’.498 It is, more fundamentally, the reasonable prospect of having a next opportunity to get involved in lawmaking that might result in a change in the course of political events. Although the content and effect of a single legal rule may be contrary to one’s interests, one can still find acquiescence in obeying that rule and accepting the ruling authority because one is aware that a democratic system allows for another time to ‘win’.499

A basic test of whether a law is democratically legitimate is to assess whether legal subjects have a continuous say about both primary rules and secondary rules of procedure on how laws are enacted. A say in the formation of secondary rules is important as the practical implementation of the principles of democratic legitimacy also asks for constant re-evaluation.500 When a majority of the people finds any process-specific democratic legitimation insufficient, institutional preconditions guarantee the opportunity to change these procedural rules of participation.501 Such an awareness of the openness, revisability,
and fairness of the democratic system leads in general to trust in the political system, which makes possible a willingness to compromise one’s own stance in a specific case, notwithstanding one’s particular feeling of distrust in that case. Waldron explains the special authoritarian claim for obedience of law even if one disagrees with its substance: ‘The claims that law makes — on our attention, our respect and our compliance — are the claims of an existing (and developing) framework ordering our actions and interactions in circumstances in which we disagree with one another about how our actions and interactions should be ordered. I am not just referring to the disagreements (about alimony, accidents, overhanging boughs, etc.) that cause conflict among us and lead us to bring out competing claims to court for adjudication. I mean that law purports to adjudicate such conflicts (among its many other tasks) and claims authority for its adjudications on principles which are themselves controversial in society. And it does so in frank acknowledgement of that controversy about principle. That is why the peremptory tone of its claims upon us is not ‘Here’s a basis for dispute resolution which you should accept if you agree with it.’ It is rather: ‘Here’s a basis for dispute-resolution which you are to accept whether you agree with it or not.’ Waldron 1999a, p. 7.

These types of non-institutionally supported acts of political power aiming to transform are often called revolutions. Revolutions and popular uprisings are examples of actions that might be later determined as manifestations of ‘a capacity to begin’. The appreciation of and the classification of the result of a revolution is inherently a retrospective issue. Arendt 1958, p. 184; Skocpol 1979. See also Goldstone 1994; Sanderson 2005.

There are some basic exceptions, when democratic agency leads to an outcome that is incompatible with our constitutions and the principles of justice that are included in the constitutions. See for the classic tension between law-rule and self-rule, chapter 2, section 2.1.

Figure 2 - Democratic legitimacy's dual evaluation
Part I - Conclusions

As discussed in chapter 1, the collective term legitimacy refers to an evaluation of the attitude of legal subjects to the exercise of public authority. More specifically, it is about the acceptance by legal subjects of law. Their acceptance is understood to be beneficial, or generally understood to be essential for a well-functioning society, as the chances of compliance are considered higher when legal subjects accept the law. The account of democratic legitimacy central to our study, contrary to the sociological account of legitimacy, is based not on proved acceptance of law by legal subjects, but on a hypothetical acceptance by the ruled of the authority of the rule, or the rule-making institution. From a normative perspective, acceptability of law is considered necessary given the extensive consequences of law in the lives of legal subjects, and accordingly, the broad power of the lawmakers creating these rules. Such an emphasis on the legal subject’s attitude to law confirms the idea that there is a certain dependency of law on its legal subjects. When engaging in legitimacy quests, legal subjects are considered to remain in the driver’s seat; they are the ones that decide whether or not they can or should accept the authority by which they are ruled.

One of the dominant normative understandings of legitimacy is that law is acceptable when it is democratically enacted. One of the main reasons for this is that modern societies are characterized by a diversity of interests, and disagreements in people’s attempts to figure out what justice and the common good require. The foundation of democratic legitimacy rests on its ability to protect the individual’s freedom from domination in such a society characterized by the wide variety of opinions and values. One is considered free from domination when one has consented to law, and has the opportunity to participate equally in the creation of law. Laws are considered to interfere with legal subjects’ freedom only when the legal subjects are forced to be completely dependent on others’ will. When they enjoy guaranteed opportunities to participate in the making of the laws that govern them, legal subjects remain free from domination. In practice this means that all legal subjects should equally be able to exercise their capacity to initiate, deliberate, decide upon laws, and to revise laws.

Such a reference to self-rule might manifest itself in different ways. To sustain the protection of freedom from domination, manifestations of the opportunities for legal subjects to equally set the terms of their coexistence have been indicated in terms of proactive participation (consent) and reflective participation (control), in which deliberation, due to its dual nature (internal as part of formal decision-making processes and external as the activity of civil society), floats in between the two time-frames.

To live up to the promise of democratic legitimacy of law, there should, first, be the necessary preconditions in place. Necessary preconditions consist of institutional preconditions and social preconditions. Institutional preconditions refer to political rights and judicial safeguards. The importance of institutional preconditions for democratic legitimacy is based on a constant awareness that the concentrated power of leaders is inherently vulnerable to corruption, affecting the principle democratic starting point that the public should determine the law by which it is governed. Rights function to reduce vulnerabilities to exercises of public authority, by limiting its reach, and by enabling voluntaristic, solidarity, and public modes of political action, through deliberation and association, for example. The difference between institutional preconditions in light of democratic legitimacy and institutional preconditions in light of validity, as discussed in
chapter 1 under section 1.1.2, is that in a democratic legitimacy reading it is not the rules themselves that limit the government from acts of domination, but the individuals making use of the rules that offer political rights that guarantee means to facilitate the indication of and objection to any abuses of power. Social preconditions should be in place to create a democratic culture, which is necessary to actually make use of the legal structure. To fulfill their right to actual and equal participation, legal subjects interact and participate in processes of discussion, argument, and reflection, and formulate opinions on the suitability of resolutions to common issues at hand.

The necessity of the institutional and social preconditions is based on the distinctive relationship between democratic legitimacy, trust and distrust. Democratic legitimacy might include feelings of trust in democratic institutions with feelings of distrust in a particular exercise of political authority. The distinctiveness of a democratic constellation is that these feelings of distrust can be perceived as the engine for supporting, for ‘trusting’, a democratic system, on two different grounds. First, feelings of distrust and acceptability of authority can exist simultaneously. Legal subjects that distrust a specific act of authority because they do not agree with the outcome of a democratic lawmaking process might simultaneously ‘trust’ the general governing system because they are aware that in another ‘round’ of exercise of authority they might be happier with the outcome of a democratic lawmaking procedure. Second, on a more fundamental level, distrust in political authority fuels the awareness of the need for democratically legitimate lawmaking in general. It is often assumed that corrupting governmental authority has less chance of surviving when every individual of the political community has the right to participate. A dispersed, plural, and equally distributed authority to make law is assumed to free individuals from domination. The reason for the sustainability of continuous alternations of trust and distrust lies in the existence of these social and institutional preconditions. Trust in the political constellation, although alternated with distrust, is secured by the existence of preconditions, protecting the initiation and exercise of political power necessary for citizens to exert political influence.

When explaining democratic legitimacy’s necessary preconditions, certain preconceptions of a political constellation come to the surface. The very necessity of legitimacy of law implies that the exercise of authority to make law is separated from its legal subjects. This indicates that even when the people do not, all together and directly, partake in the making of laws, the resulting laws can still be democratically legitimate. A democratically legitimate law, established by representatives of the people is therefore assumed possible. Evaluating the legitimacy of a ‘system’ of institutional and social preconditions implies a form of governing where a specific branch exercises public authority and has final decision-making power to set laws and determine the content of those rules, which nevertheless still respects the democratic premise of ‘governing by the people’.

Once institutional and social preconditions are met, a political constellation can be democratically legitimized. The degree of democratic legitimation of a specific rule depends on the operational aspects of actual lawmaking procedures, whether or not that specific lawmaking procedure has operationalized the modes of participation as discussed above: consent, deliberation, and control, and has lived up to democratic practices such as accountability, transparency, responsiveness, and inclusiveness. Democratic legitimacy’s operational aspects ensure that lawmaking powers by officials are exercised on the people’s terms. Searching for lawmaking constructions that have sufficient democratic legitimizing value is a continuous critical activity: one must constantly consider whether the assumption
that a certain actor or procedure contributes to the realization of democratic principles is still correct.

In sum, democratic legitimacy is presented as an evaluation tool that allows one to assess whether the exercise of public authority respects the power of legal subjects collectively to act and speak and decide on the laws that govern them, free from domination, enabled and guaranteed by institutional and social preconditions, operationalized by different means of participation, and facilitated by procedural norms such as transparency and responsiveness. The discussed dual evaluation, of both preconditions and the operationalizational aspects of democratic legitimacy, offers us an analytical tool to assess the NGO democratic legitimacy thesis.

The previous exploration on democratic legitimacy as such did not pay a lot of attention yet to the central actor of the NGO democratic legitimacy thesis: the NGO. The NGO as such has made its appearance in a few instances. With regard to the institutional preconditions, the relevance of the right to associate was mentioned. When discussing the social preconditions, the importance of a public sphere and a democratic culture enabling actors to gather, discuss, and deliberate was highlighted. NGOs were considered as an example of the collectivity of all the different types of associated actors, called civil society. Interpretations of theorists concerning the relationship between civil society and democratic legitimacy have passed in review, ranging from interpretations that focus on opportunities for control of governmental power through self-governing by civil society actors, to interpretations based on the collective and rational will-formation by civil society, and interpretations based on civil society’s ability to let individuals develop the virtues of citizenship in an organized context that different associations offer. In a very brief instance, while sketching some general characteristics of legislative processes, we referred to the participation in lawmaking of interest groups to gather additional views on proposed legislation. Against this backdrop, Part II moves to a description of the NGO democratic legitimacy thesis.