
8. Complementing IQ with EQ: connecting EU law to social psychology

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1. INTRODUCTION

The European Union (EU) started life in part as a response to the dark side of human nature that was on terrible display during both world wars – a dark side that was enabled and spurred on by several emotional drivers, including fear and hatred of the ‘other’ and almost blind loyalty to one’s own group, including extreme nationalism. Consequently, a deep distrust of ‘emotions’, and to a certain extent even human nature, was ingrained in the EU, and the legal order on which it rests. Part of the very *raison d’être* of the EU was to keep such primitive emotions and violent reflexes in check by ratio, rules and institutions.²

This approach has led to major achievements, including an unprecedented period of peace. And fact-based, rational action remains vital, especially in the face of crises such as climate change and geo-political instability. Yet, as the EU has become a truly political union that affects ever more morally and emotionally sensitive issues, it is necessary to rehabilitate and better integrate the emotional dimensions of human nature into the constitutional and legal framework of the EU.

For – as long recognized by great constitutional scholars from the past – any effective constitutional system must work with human nature, not try to go against it.³ The EU is no exception. Ultimately, the perceived legitimacy of the EU will be codetermined by features of human nature that have evolved over millions of years – features that will not change on any timescale relevant for European integration, no matter how logically convincing a Treaty provision or how coherent the reasoning of the Court of Justice of the European Union (CJEU).⁴ This does not mean that EU law should not guide or restrain human behaviour – but the overarching constitutional software of the EU must fit with the human hardware on which it operates.

Consequently, EU law needs to learn how to better align and connect with human emotions, and harness their positive sides, including their capacity to drive and legitimize collaboration. This instead of ignoring emotions or even implicitly rejecting them as irrelevant or simplistic emanations from the underbelly of citizenry. In addition to its impressive rational credentials,

¹ We thank Joost Van’t Hof for his excellent assistance.

² NB: Clearly this fear of base emotions also had an emotional component itself, whereas we now know that any the strong dichotomy between emotion and ratio is already in itself is not correct in itself, as in reality, the two are closely intertwined, which will be discussed in more detail below.

³ Famously J Madison, A Hamilton and J Jay, *The Federalist Papers* (Penguin 1987) 319: ‘But what is government itself but the greatest of all reflections on human nature.’

⁴ Cf also YN Harrari, *Sapiens* (Vintage 2011) and F Fukuyama, *The Origins of Political Order* (Profile Books 2011).

therefore, the EU needs to improve its emotional intelligence, and find a way to symbiotically connect the two.⁵

Clearly, this is a major challenge. But the good news is that today we have a much better stocked empirical toolkit than Aristotle, Montesquieu or Hamilton to understand human nature, including why and how individuals and groups collaborate. The current contribution discusses how we can connect these empirical insights to EU law. It focuses on one empirical field dedicated to understanding human behaviour in its social context: social psychology and the evolutionary insights it incorporates.

The theories and methods of social psychology provide key insights on, inter alia, how people identify themselves in relation to others or why they perceive certain authorities as legitimate. Unlike normative approaches, its empirical methods can provide causal explanations and identify the actual processes at work in individuals. In turn, this allows one to design concrete interventions to impact these processes and outcomes. This focus on individual processes, and the ability to determine causal relations, also gives social psychology an added value compared to political science and sociology.⁶ In contrast to sociology, moreover, psychology focuses on the *subjective* interpretation of objective factors by individuals. Understanding subjective interpretations, and their impact on behaviour, is important as it can help to understand why individuals may respond very differently to the same objective factors.

Insights from social psychology can be connected to EU law in many different ways. One can distinguish already between three different types of questions that can be asked. The first type asks how people *perceive* the EU and its legal norms, and why they do so. Legitimacy is one such perception. The creation of legitimacy is a key concern for institutions such as the EU, as public perceptions of fairness and feelings of trust are essential for a stable and sustainable society. This raises the question of how EU law influences the perception of EU legitimacy. For example, would a further shift towards qualified majority voting (QMV) in foreign policy or the EU budget, the imposition of stricter environmental norms or certain designs for binding EU redistribution mechanisms increase or decrease the perceived legitimacy of the EU? And if so, via which psychological processes?

A second type of question asks how the EU and EU law, as increasingly important social institutions, influence human behaviour. People's thoughts, feelings and behaviours are affected by their social context. As EU norms become increasingly visible and influential in people's daily lives, studies into human behaviour should consider this as a relevant, new context. For example, how do EU environmental norms affect the actual environmental attitudes and behaviours of people, and why?

A third type of question shifts the focus from the general public to organizational behaviours within EU bodies and to relevant national elites. These actors significantly impact the functioning of the EU. This makes insights from social psychology as to which psychological processes, including potential biases, influence their behaviour and decisions of great interest. Questions of this type include which psychological factors determine how EU or national

⁵ A Cuyvers, *Naar een symbiotisch constitutioneel recht voor de EU: de conceptuele, emotionele en juridische ruimte voor legitieme regionale samenwerking* (Inaugural Lecture Leiden, 2022).

⁶ Cf also E Grosfeld, A Cuyvers and D Scheepers, 'Towards Evidence-Based Legitimacy Interventions in EU Law: Challenges and Directions for Empirical Research' (2023) 19(2) *Utrecht Law Journal* 87.

civil servants, including judges, make decisions, and how these processes could be optimized. Mapping these organizational behaviours seems of particular interest with the increasing fear of an ‘EU bubble’ and a growing gap between EU elites and EU citizens.

All of these questions, and many others, illustrate the many potential benefits of incorporating insights and methods of social psychology into EU law. At the same time, social psychology is already an extensive field in its own right, making clear choices necessary. For that reason, in this contribution we focus on how people perceive the legitimacy of the EU and its legal norms, why they do so, and how these perceptions influence their feelings, attitudes and behaviours towards the EU and its norms.⁷ The methods and theories we discuss, however, can provide inspiration more generally for EU lawyers wanting to connect social psychology and EU law.

In light of these aims, this contribution is structured as follows. Section 2 introduces the field of social psychology as well as several core theories and methods of particular interest to EU law. Section 3 discusses how social psychology is already used in *national* legal research, and why, considering the special nature of EU law, such national research cannot be directly translated to the EU. Section 4 zooms in on two specific theories, moral foundations theory and social identity theory, which may be of particular interest to EU lawyers. Based on some of our exploratory research, section 5 provides several examples of how one may try to usefully translate psychological findings into the realm of EU law. Section 6 ends, with a general conclusion and a call for more collaboration between lawyers and psychologists to better connect the bridgeheads of normative and empirical research, which may, for ontological, epistemological and organizational reasons, never fully bridge the river dividing them, but may at least make crossing and collaborating a bit easier.

2. SOCIAL PSYCHOLOGY AND THE EVOLUTIONARY APPROACH TO HUMAN NATURE

2.1 General Scope and Aims of Social Psychology

Social psychology is the science of how people’s thoughts, feelings and behaviours are influenced by the actual, imagined or implied presence of others.⁸ Given that people are, fundamentally, social animals, social psychologists study how this social aspect of human nature can explain why people think what they think and do what they do. In contrast to personality psychology, which aims to identify individual differences which, in combination, make a person unique, social psychology examines social contextual factors explaining human behaviour. What is it that makes most of us react in a certain way in a certain situation? An additional focus is put on the underlying psychological *mechanisms* leading to behaviour, that

⁷ We build on L Dellmuth and B Schlipphak, ‘Legitimacy Beliefs Towards Global Governance Institutions: A Research Agenda’ (2020) 27(6) *Journal of European Public Policy* 931; J Tallberg and M Zürn, ‘The Legitimacy and Legitimation of International Organizations: Introduction and Framework’ (2019) 14(4) *The Review of International Organizations* 581.

⁸ G Allport, ‘The Historical Background of Social Psychology’ in G Lindzey and E Aronson (eds), *Handbook of Social Psychology* (Random House 1985) 1–47.

is, the cognitive, motivational and emotional intermediate steps between a social contextual factor (such as the status of one's group) and a certain action (such as protest).

Studying these intermediate mechanisms is also precisely what differentiates social psychology from a field like sociology. Whereas sociology focuses on how *groups* and institutions within society function, social psychology investigates effects of the social environment on the *individual*. A core assumption here is that this behaviour cannot be fully understood through objective features of the social world (such as a certain level of inequality), but that the subjective interpretation of the situation ('this is unfair') and the emotions this elicits (such as anger) play a core role in predicting whether a person engages in certain behaviour (such as protesting or not). Thus, social psychologists are interested in how people make sense of a situation, and the emotions that a situation triggers, and how this subsequently shapes behavioural responses to the situation. Thoughts, feelings and behaviours are thereby closely connected to each other, as well as to the social context in which they occur.

This focus on the influence of others is rooted in how humans evolved as social animals. We are descended from social primates who depended on effective social collaboration in smaller groups to survive.⁹ For example, to make cooperation successful, people have expectations about what other people should do: about the role that they have and the behaviours that accompany that role. This is the origin of social norms and human morality.¹⁰ Another social psychological product of evolution is the tendency to think in terms of in- and out-groups, with generally positive biases about one's own group, and negative biases about other groups and their members.

Clearly, most of us no longer need to collaborate to kill a mammoth. Yet the social psychological processes shaped by these evolutionary challenges still partly determine our emotions and behaviours today. Consequently, even if the challenges have changed, humans remain profoundly influenced by the actual, imagined or implied presence of others, also when confronted with a construct such as the EU.

2.2 Social Psychological Tools: Theories and Methods

Social psychology thus seeks to identify universal psychological processes, and in particular the social and situational characteristics that determine these processes, as well as the behaviours that follow from it. The influence of the social world on people's behaviours can be studied by making empirical observations and translating these observations to theories. Systematic and objective observations can lead to the discovery of patterns, which, when rigorously tested, help to build robust theories. Social psychologists are concerned with building these theories and generating specific theory-deduced hypotheses to study. Ideally, new findings will be interpreted in light of existing theories to advance theoretical perspectives, or, when surprising, used to develop new theories.¹¹

⁹ Harrari (n 4) 28; Fukuyama (n 4); F de Waal, *Mama's Last Hug: Animal Emotions and What They Tell Us about Ourselves* (W.W. Norton & Company 2019).

¹⁰ M Tomasello and A Vaish, 'Origins of Human Cooperation and Morality' (2013) 64(1) *Annual Review of Psychology* 231.

¹¹ N Ellemers, 'Connecting the Dots: Mobilizing Theory to Reveal the Big Picture in Social Psychology (and Why We Should Do This)' (2013) 43(1) *European Journal of Social Psychology* 1.

The field of social psychology can therefore be understood as a network of large and small theories, some influential and widely applicable, some only relevant for very specific phenomena. As theories are continuously subject to change due to new empirical findings or reconsideration of old findings, many theories consist of sub-theories or refined versions. To empirically test these theories, social psychologists use a range of methods. The systematic analysis of human behaviour started almost 150 years ago, when Wilhelm Wundt opened the first psychology laboratory in Leipzig. Since then, the techniques available for observing, interpreting, and reporting human behaviour have grown enormously.¹²

One main technique is to simply ask people what they are thinking or feeling and why they are thinking or feeling this. A common instrument to do this systematically is the questionnaire. Either online or offline, individuals fill in a list of questions, often containing items that have been previously validated. Another method involves structured or semi-structured interviews or focus groups.

Self-report methods yield interesting insights into people's perceptions of their own behaviours, and offer one vital set of instruments. At the same time, self-reporting may not be the most accurate of methods as it is prone to self-report biases. For example, people may consciously decide to hide their thoughts because they want to behave in a socially desirable way. In these cases, people's explicit attitudes do not align with their implicit attitudes. Moreover, where open-ended questions or in-depth interviewing methods are used, researchers must interpret the answers given, injecting a level of subjectivity.

To avoid these biases, social psychologists can use techniques that provide more direct and objective observations of behaviour. One technique is to measure reaction times to stimuli, which could provide insights into people's more implicit attitudes. For example, in the implicit association test, people are presented with an attribute word (for example, 'science') and two target words (for example, 'men' and 'women') on the left and right side of a screen. By asking people to press as quickly as possible on a left or right key to categorize the attribute word as one of the target words, and by recording their reaction times, it is possible to measure people's implicit judgements which are not always identifiable in self-report tasks. In this case: does a person more strongly associate science with either men or women? Another example of direct technique is to track people's eye movements, allowing researchers to detect where people's attention goes to.

Social psychologists are also increasingly measuring behaviour through neurological and physiological indicators. For example, through functional magnetic resonance imaging (fMRI) techniques, it is possible to measure where in the brain the blood flows after people see a stimulus, allowing researchers to identify which areas of the brain are activated and used to process this stimulus. In addition, a wide variety of physiological measures (such as cardiac output, peripheral resistance, ventricular contractility, galvanic skin response, hormonal activity), either alone or in combination, can be used to measure physiological responses towards certain stimuli. Change in cardiac performance and blood pressure can indicate whether people respond with more positive stress ('challenge') or negative stress ('threat') to certain situations

¹² See for a very accessible introduction: K Van den Bos, *Empirical Legal Research: A Primer* (Edward Elgar Publishing 2020).

or stimuli. This has for example been used to explain when and why people feel threatened by social change.¹³

In sum, there is a wide range of techniques that enable insights into the cognitive, emotional and motivational processes underlying people's behaviours, including attitudes towards the EU. Since each technique has limitations, methodological pluralism is required to develop more reliable and fine-grained insights.¹⁴

3. APPLYING SOCIAL PSYCHOLOGICAL INSIGHTS TO LAW

3.1 Social Psychological Research in National Legal Scholarship

In the past decades, legal scholarship has witnessed an increase in the use of empirical, social scientific methods to complement traditional, doctrinal methods.¹⁵ Extra-legal, social insights are considered to improve the ways in which laws and legal institutions are designed, formulated and enforced.¹⁶ As these empirical insights provide knowledge that cannot be acquired through traditional legal research, it becomes possible to base legal decisions on evidence instead of hunches or normative assumptions.¹⁷

As part of this broader development, increasing attention is being paid to the application of social psychological insights to law. By understanding the causes of human behaviour, legal scholars and practitioners can more effectively decide on how human behaviour should be regulated through the law. Van den Bos identified two important lines of research within this interdisciplinary endeavour: research on objective legal decision-making and research on perceived justice in the legal system.¹⁸

The first line of research is referred to as 'legal psychology' and concerns the study of how legal actors, mostly professionals such as judges and prosecutors, make decisions within and outside the courtroom.¹⁹ The idea is that social psychology can help to improve objective legal decision-making and reduce biases and discrimination in legal processes. For example, research on anchoring, framing, hindsight bias and the representative heuristic has changed and improved the use of various legal practices, such as eyewitness testimonies, expert evidence in the courtroom and interrogation tactics.

The second line of research is referred to as 'the social psychology of justice judgements' and concerns the study of how people form justice judgements, including the impact of per-

¹³ D Scheepers and N Ellemers, 'Stress and the Stability of Social Systems: A Review of Neurophysiological Research' (2018) 29(1) *European Review of Social Psychology* 340.

¹⁴ Ellemers (n 11).

¹⁵ J Monahan and L Walker, 'Twenty-Five Years of Social Science in Law' (2011) 35(1) *Law and Human Behavior* 72.

¹⁶ P Langbroek et al., 'Methodology of Legal Research: Challenges and Opportunities' (2017) 13(3) *Utrecht Law Review* 1.

¹⁷ T Tyler, 'Methodology in Legal Research' (2017) 13(3) *Utrecht Law Review* 130.

¹⁸ K van den Bos, 'Social Psychology and Law: Basic Principles in Legal Contexts' in P van Lange, E Tory Higgins and A Kruglanski (eds), *Social Psychology: Handbook of Basic Principles* (Guilford Press 2022).

¹⁹ *ibid.*

ceived procedural justice on such judgements.²⁰ This literature focuses not only on people inside the courtroom and their perceptions of whether justice is enacted, such as criminal case litigants, but also on people outside the courtroom who are more indirect subjects of the law.

3.2 Extending Social Psychology to the EU Level

The abovementioned themes, however, have been mostly studied in the context of national legal systems. This makes sense considering that national law tends to be the most visible to individuals. If individuals interact with the law, or with legal actors like courts, this is most likely at the national and not the international level.

Of course, EU law has developed into an autonomous legal order, which involves and affects individuals to a much higher extent than ‘normal’ international law. Features such as direct effect and primacy mean that EU citizens can effectively rely on, or be confronted with, EU law at the national level. EU law, moreover, has expanded into almost all societally relevant domains, including migration and social policy. EU law, therefore, forms part of the national legal order and is much more visible than regular international law.

At the same time, EU law remains fundamentally different from national law in ways that are relevant for the application of social psychology. For instance, compared to national law, EU law and decision-making is still much further removed from individuals. This also applies to the CJEU, due to the very restrictive standing requirements for an action for annulment and the extremely limited chance of a preliminary reference by a national court.²¹ Most of the time, therefore, the ‘face’ of EU law will be a national body, or it may not even be apparent to a citizen that the law being applied has an EU pedigree.

In light of these and many other relevant differences, one has to be careful when translating existing research on the national level to the EU. To start with, some of the more established applications of social psychology to national law are less relevant for the EU context, for example when it comes to procedural justice and justice judgements. In addition, the new field of the social psychology of EU law requires new insights, theories and methods that are adapted to the multilevel nature of the EU. The following sections contribute to this aim.

4. APPLICATION AND EXAMPLES: A DEEP DIVE IN TWO THEORIES

This section elaborates on two ‘grand theories’ within social psychology which may offer particularly interesting insights into the processes which underlie people’s legitimacy perceptions of the EU and its legal norms: moral foundations theory and social identity theory.

²⁰ *ibid.*

²¹ In 2021, for example, there were 567 preliminary references. Though legally highly significant, this number pales in comparison to the number of judicial decisions taken by all national courts in the EU yearly. See the yearly report of the CJEU, *Annual Report 2021: Judicial Activity* (European Union 2022).

4.1 Moral Foundations Theory and the Evolutionary Roots of What We Find Right and Wrong

Morality is a vital social mechanism for effective collaboration.²² Morality is also closely connected to law and legal discourse, as evidenced inter alia by the perennial discussion on whether morality is, or should be, an integral part of the law.²³ Crucially for our purposes, the perceived morality of institutions and legal norms affects their legitimacy. Legal authorities draw part of their legitimacy from ‘value alignment’, which refers to the extent to which the values these authorities endorse align with the personal values of individuals.²⁴ Measuring to what extent individuals perceive EU values and norms to match their own can, therefore, provide valuable input for the formulation of EU norms, including the legal operationalization of the foundational values that underlie them.²⁵

Social psychology studies morality empirically. One particularly interesting theory in this context is moral foundations theory (MFT).²⁶ This theory provides an evolutionary explanation for the development of more or less universal moral foundations, but also for the (often heated) moral disagreements between people. How is it that so many individuals across the globe actually share certain moral judgements but at the same time may so sharply disagree on others? And how is it that they do so on a moral spectrum that (in most cases) still allows them to understand each other?²⁷

Moral judgements are usually formed at a subconscious level, and therefore generally do not rely on conscious, rational decision-making.²⁸ Instead, they are based on immediate *emo-*

²² N Ellemers, S Pagliaro and M Barreto, ‘Morality and behavioural regulation in groups: A social identity approach’ (2013) 24(1) *European Review of Social Psychology* 160, 160; N Ellemers, J van der Toorn, Y Paunov and T van Leeuwen, ‘The Psychology of Morality: A Review and Analysis of Empirical Studies Published from 1940 through 2017’ (2019) 23(4) *Personality and Social Psychology Review* 1.

²³ Cf for instance: H Hart, *The Concept of Law* (3rd edn, OUP 2012); J Raz, *The Morality of Freedom* (Clarendon Press 1998); or R Dworkin, *Taking Rights Seriously* (Duckworth 1978).

²⁴ T Tyler and E Lind, ‘A Relational Model of Authority in Groups’ (1992) 25 *Advances in Experimental Social Psychology* 115; T Tyler, ‘The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities’ (1997) 1(4) *Personality and Social Psychology Review* 323; T Tyler and J Jackson, ‘Future Challenges in the Study of Legitimacy and Criminal Justice’ in J Tankebe and A Liebling (eds), *Legitimacy and Criminal Justice: An International Exploration* (OUP 2013) 83–104; Jackson et al, ‘Empirical Legitimacy as Two Connected Psychological States’ in G Meško and J Tankebe (eds), *Trust and Legitimacy in Criminal Justice: European Perspectives* (Springer 2015) 137–160.

²⁵ In the case of a *supranational* authority like the EU, prior research suggests that values such as democracy and transparency might especially be relevant. See L Dellmuth et al, ‘Institutional Sources of Legitimacy for International Organisations: Beyond Procedure versus Performance’ (2019) 45(4) *Review of International Studies* 627.

²⁶ J Haidt, *The Righteous Mind* (Penguin 2012); J Haidt, ‘The New Synthesis in Moral Psychology’ (2007) 316(5827) *Science* 998.

²⁷ J Graham et al, ‘Moral Foundations Theory: The Pragmatic Validity of Moral Pluralism’ (2013) 47 *Advances in Experimental Social Psychology* 55.

²⁸ Cf for instance: D Westen, *The Political Brain* (Publics Affairs 2007); J Haidt, ‘The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment’ (2001) 108(4) *Psychological Review* 814.

tional responses, which are then justified by *post hoc* rationalizations.²⁹ MFT argues that these moral emotional responses are based on at least six moral foundations, which underpin the moral judgements of individuals. These moral foundations come in pairs of opposites, and are care/harm, fairness/cheating, loyalty/betrayal, authority/subversion, sanctity/degradation and liberty/degradation. Each of these moral foundations has a separate evolutionary foundation, meaning it offered a different selective benefit for procreation.

For example, the care/harm foundation underpins our moral appreciation of people who take care of each other, as well as our moral rejection of people who harm others. Consider the deep and immediate moral revulsion for someone who harms a helpless baby, or the feeling of moral approval when a person protects a weaker party from a bully. MFT finds the evolutionary roots for the care/harm foundation inter alia in the evolutionary benefit of caring for vulnerable group members, particularly young offspring.³⁰ Groups that care for each other also tend to function better, granting their members a higher chance of procreating.

The loyalty/betrayal foundation underpins moral appreciation for loyalty shown to one's own group, as well as the moral outrage felt when someone betrays this group (Judas!). Of course, 'the group' is a social construct itself, and can be many different things, including your tribe, country, sports club, religion or fellow Trump-voters. Such in-group loyalty offers evolutionary advantages as well, allowing for more effective and stable collaboration within groups.

The purity/degradation foundation derives from the evolutionary need for us omnivores to avoid hazardous foods, pathogens and parasites. The emotion of disgust helps us to do so, for example by feeling revulsion for rotting food. The moral foundation of purity extrapolates this appreciation of cleanliness and purity to more abstract categories. Think for example of moral purity as extolled in religion, including in concepts of virginity and fasting, or the idea of the body as a temple that should remain pure, making vaccination a *moral* question for some. Degradation then leads to moral outrage against those who desecrate pure or sacred constructs, including flags, national myths, or revered principles such as liberty, equality or primacy.

MFT argues that all human beings share these moral foundations. This helps explain why our individual moral judgements are often similar enough to understand each other, and why people across countries and cultures can share certain moral judgements. Crucially, however, each individual attaches different relative weight to the different moral foundations. Haidt compares this to taste buds. All humans in principle have the same taste buds, and can taste sweet, bitter, sour, salty and umami. Yet we differ in our relative appreciation of flavours.³¹

These different moral palettes can lead to moral disagreement. Take the example of refugees. From the care/harm perspective, helping vulnerable people in need may be seen as a moral good. From the loyalty/betrayal foundation, giving scarce resources to 'others' is an immoral betrayal of the interests of your own group. Similarly, burning a flag does not harm another individual, yet may also be felt as a morally disgusting act that desecrates a pure and vital symbol.

²⁹ Also see the work of Kahneman summarised in D Kahneman, *Thinking, Fast and Slow* (Penguin 2012).

³⁰ Haidt (n 26) 154 and 156.

³¹ Cf D Bartels, 'Principled Moral Sentiment and the Flexibility of Moral Judgment and Decision-Making' (2008) 108(381) *Cognition* 381.

MFT classifies the moral foundations into two main categories. On the one hand, there are the ‘individualizing’ moral foundations of care and fairness. These focus on protecting the *individual*. On the other hand, the ‘binding’ moral foundations, including ‘ingroup loyalty’, ‘respect for authority’ and ‘purity’, focus on protecting the *group* instead of the individual.

Interestingly, a significant body of research, albeit largely in the US, has found that political liberals primarily rely on the individualizing foundations, whereas political conservatives endorse all moral foundations more equally.³² This difference can explain and predict multiple moral disagreements between these groups, including on abortion, the death penalty, the right to carry arms, euthanasia, global warming or preference for international cooperation versus isolationism.³³

MFT is relevant for EU legitimacy as moral disagreement can reduce legitimacy. Consequently, where citizens feel that the EU does not share or respect their moral convictions, this may undermine the legitimacy of the EU. For example, it seems that the Leave campaign in the UK, contrary to Remain, effectively managed to appeal to all moral foundations, which may have persuaded more conservative voters to vote for leave.³⁴ Considering the relatively narrow margin underlying Brexit, a perception that the EU sufficiently respects all moral foundations might have made a significant impact.

In light of the relation between morality and legitimacy, it is therefore interesting to measure how citizens perceive the moral foundations of the EU, and what the effects on perceived legitimacy are when citizens perceive that the EU shares or does not share their own moral worldview. The question then becomes if one should tweak the perceived moral foundations of EU law, and if this is even possible within the larger system of EU law.

4.2 Social Identity Theory

Social identity theory (SIT) can be considered as an overarching perspective on the importance of groups for human behaviour.³⁵ The theory describes some basic principles that can be applied to a wide range of social phenomena.³⁶ It starts from the notion that people derive part of their identity from group membership. That is, in addition to a personal identity, part of one’s identity is based on group memberships that people share with others. These

³² J Haidt and J Graham, ‘When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May Not Recognize’ (2007) 20(1) *Social Justice Research* 98; J Graham, J Haidt and B Nosek, ‘Liberals and Conservatives Rely on Different Sets of Moral Foundations’ (2009) 96(5) *Journal of Personality and Social Psychology* 1029.

³³ Haidt (n 26) chapter 7.

³⁴ D Smith, ‘Shaping the Modern World with a Stone-Age Brain: The Brexit Referendum and the Moral Foundations Theory’ (2019) 7(2) *Journal of Social and Political Psychology* 863.

³⁵ R Brown, ‘The Social Identity Approach: Appraising the Tajfellian Legacy’ (2020) 59(1) *British Journal of Social Psychology* 5.

³⁶ See generally H Tajfel and JC Turner, ‘An Integrative Theory of Intergroup Conflict’ in W Austin and S Worchel (eds), *The Social Psychology of Intergroup Relations* (Brooks/Cole 1979) 33–47; N Ellemers and SA Haslam, ‘Social Identity Theory’ in P Van Lange, A Kruglanski and T Higgins (eds), *Handbook of Theories of Social Psychology* (Sage 2012) 379–98; D Scheepers and N Ellemers, ‘Social Identity Theory’ in K Sassenberg and M Vliek (eds), *Social Psychology in Action: Evidence-based Interventions from Theory to Practice* (Springer 2019) 129–43.

group memberships can be acquired by birth (for example, being a woman) or by choice (for example, being a football supporter or a scientist). Depending on which group membership is activated or salient in a certain situation, these ‘social identities’ have a large influence on how people see the world and how they think, feel and behave.³⁷ Research has shown, for example, that protecting one’s *national* identity is a particularly deeply rooted intuition.³⁸

Social identity, however, is complex and dynamic. People do not just have one, fixed identity. Instead, we have multiple (nested) group memberships which may become more or less salient at a certain moment as a function of contextual factors.³⁹ In addition, different social identities do not necessarily conflict or exclude each other. New identities can be added, and existing identities can be connected to overarching, superordinate groups. A UK national can be Liverpudlian, English, British, and perhaps still European as well. There are different ways in which a new identity can be integrated with existing identities.⁴⁰ One way is through ‘dual identification’. Essentially, this involves a simultaneous identification where subgroup identities are not de-emphasized but rather recognized and valued within the superordinate group. If dual identification is achieved, this generates positive social identities.⁴¹ Applied to the EU, this would mean finding a way to positively integrate existing national identities with some kind of a common EU identity.

Social identities are particularly relevant because they influence human behaviour, including perceptions of legitimacy. One particularly strong motivation in group contexts is the desire to achieve and maintain a positive social identity. People will strive to affirm a positive social identity and one way of doing this is by comparing their groups’ traits and behaviours to other groups. These comparisons can be on the basis of how competent the groups are in achieving desired outcomes, how friendly they are or how moral they are. Research has shown that in defining their social identities, people care more about the morality of their group than about its competence or friendliness, closely connecting morality and social identity.

Furthermore, studies have shown that people strive not just for a positive social identity, but also for a *positively distinctive* social identity. When group boundaries dissolve and

³⁷ L Dellmuth, ‘Individual Sources of Legitimacy Beliefs: Theory and Data’ in J Tallberg, I Bäckstrand and J Scholte (eds), *Legitimacy in Global Governance: Sources, Processes, and Consequences* (OUP 2018) 37–55; Dellmuth et al, ‘The Elite–Citizen Gap in International Organization Legitimacy’ (2022) 116(1) *American Political Science Review* 283; Dellmuth and Schlipphak (n 7).

³⁸ G Feldman, ‘Personal Values and Moral Foundations: Examining Relations and Joint Prediction of Moral Variables’ (2020) 12(5) *Social Psychological and Personality Science* 676.

³⁹ H Tajfel and J Turner, ‘An Integrative Theory of Intergroup Conflict’ in W Austin and S Worchel (eds), *The Social Psychology of Intergroup Relations* (Brooks/Cole Publishing 1979) 33–48.

⁴⁰ Amiot et al, ‘Integration of Social Identities in the Self: Toward a Cognitive Developmental Model’ (2007) 11 *Personality and Social Psychology Review* 364.

⁴¹ R Crisp and M Hewstone, ‘Multiple Social Categorization’ (2007) 39 *Advances in Experimental Social Psychology* 163; Dovidio et al, ‘Another View of “We”: Majority and Minority Group Perspectives on a Common Ingroup Identity’ (2007) 18(1) *European Review of Social Psychology* 296; B Hornsey and J Hogg, ‘Assimilation and Diversity: An Integrative Model of Subgroup Relations’ (2020) 4 *Personality and Social Psychology Review* 143; K Schmid et al, ‘Antecedents and Consequences of Social Identity Complexity: Intergroup Contact, Distinctiveness Threat, and Outgroup Attitudes’ (2009) 35(8) *Personality and Social Psychology Bulletin* 1085.

groups seem to become more merged, group members typically experience this as threatening. Sometimes the motive of distinctiveness is even stronger than the motivation for a positive social identity.⁴² In sum, group members are motivated to defend their distinct group boundaries, which is of particular relevance for the process of EU integration.

When the group's distinctiveness, competence, friendliness or, most importantly, morality is questioned, people will experience a threat to their social identity, which motivates them to counter the threat and improve their self-esteem. To that end, they engage in various 'identity management strategies'. For example, people can decide to withdraw from the group and become part of another, more positive, group. However, this is not always possible. An alternative strategy is to compare the in-group on another dimension or to compare the in-group to groups that are even worse off. If the identity threat results from being poor, for example, one can relieve threat by focusing on the group's morality or by focusing on another group that is even poorer.

The identity concerns that people have and the identity management strategies that they pursue depend on (1) how committed they are to the group and (2) characteristics of the broader social context, such as the legitimacy and stability of the group's position.⁴³ When a group has an illegitimate but seemingly changeable (unstable) low status, group members become more willing to collectively work for status improvement; when the group's position is legitimate and stable, more individual identity management strategies are typically used, such as comparing the group on an alternative dimension or to another group. This is just one illustration of the principles of SIT. More generally, the basic principles of SIT can explain a wide range of social phenomena, including EU-related behaviours. Social identity theory therefore seems an important and promising theory to improve the emotional intelligence and legitimacy of EU law.⁴⁴

5. ESTABLISHING BRIDGEHEADS: SPANNING THE NORM-FACT DIVIDE

How to connect social psychological theories or research results to EU law? Say you find that some citizens perceive EU law as leaning too much on the care/harm foundation, or as threatening national identities. How to translate these findings into the domain of law, or into actual recommendations for institutional design, legislation or case law?

Such translations face significant challenges, some of a very fundamental nature, some more practical. This section first sets out some of the key challenges facing researchers who want to bridge the divide between law and social psychology. Subsequently, it discusses some examples of how we have tried to deal with these challenges.

⁴² P Mlicki and N Ellemers, 'Being Different or Being Better? National Stereotypes and Identifications of Polish and Dutch Students' (1996) 26(1) *European Journal of Social Psychology* 97.

⁴³ N Ellemers et al, 'Self and Social Identity' (2002) 53(1) *Annual Review of Psychology* 161.

⁴⁴ Cuyvers (n 5); R Rohrschneider, 'The Relationship Between National Identity and European Union Evaluations, 1993–2017' (2019) 20(3) *European Union Politics* 384, 384.

5.1 The Fact–Norm Divide

The first, and most fundamental challenge is the notorious fact–norm divide.⁴⁵ As an empirical discipline, social psychology tries to establish empirical facts. Do individuals, for example, attach more value to their national or EU identity? Law, on the other hand, is a normative discipline. Law itself is a social construct, not a natural phenomenon. Therefore, there is no one, objective method that can tell you what the law is, or should be. Instead, the relevant social groups create the law by agreeing on what it is.⁴⁶ Positions on law, therefore, tend to ultimately rely on normative positions about what the law, or the society it helps to structure, should be.

Because of this fundamental difference between empirical facts and legal norms, one cannot simply translate empirical findings into legal claims. For example, just because a majority of citizens believes that the EU does not have the competence to redistribute money between Member States, does not mean that this is legally correct. Similarly, even if a majority of EU citizens were to strongly rely on the moral foundation of purity, this would not mean that the law is, or should be, based on this moral foundation as well. Of course this divide works both ways: normative convictions, no matter how strong, can never change empirical facts, no matter how hard some people may wish this to be different.

Considering its fundamental nature, there is no ‘solution’ to the fact–norm divide. At the same time, this divide does not mean that empirical insights cannot play a useful role in formulating and applying legal norms or designing legal processes and institutions. For example, where legal norms aim for a certain effect, one can empirically explore if these norms achieve this effect, or if different norms would achieve this effect better. Alternatively, one can assess if certain changes to institutional design, procedures or the substantive content of norms would lead to higher legitimacy or support, and if so, why. The examples below illustrate some ways in which we have tried to bridge the fact–norm divide. Yet any attempt to do so also runs into a further challenge: the internal logic and coherence of the law.

5.2 Law as a System: The Inherent Logic and Structure of the Law

A sufficient level of internal logic, coherence and structure forms part of the very nature of law.⁴⁷ Legal arguments must therefore fit into the broader system and logic of the law and the relevant legal order(s). Partially for this reason, legal orders are usually based on a system of general principles that provide structural integrity, avoid arbitrariness and place limits on what the law can do. Fundamental rights, for example, form part of these limits, as do rules on competence and fundamental principles as equality, legal certainty or *stare decisis*.

The limits imposed by the system and the internal logic and consistency of the legal order can be especially stringent in the EU.⁴⁸ The EU is relatively dependent on the effectiveness of its legal system for its functioning. To ensure effectiveness, the CJEU has developed an array

⁴⁵ Cf also I Giesen, ‘The Use and Incorporation of Extralegal Insights in Legal Reasoning’ (2015) 11(1) Utrecht Law Review 1, 1.

⁴⁶ Hart, *The Concept of Law* (n 23).

⁴⁷ Cf L Fuller, *The Morality of Law* (2nd ed Yale University Press 1969).

⁴⁸ See for a discussion A Cuyvers, ‘The Legal Space for Structural Differentiation in the EU: Reciprocity, Interconnectedness and Effectiveness as Sources of Constitutional Rigidity’ (2022) 7(3) European Papers 1165; J Wouters, ‘Constitutional Limits to Differentiation: The Principle of

of legal principles, including the primacy of EU law, direct effect, sincere cooperation, the rule of law, non-discrimination and equal treatment, the fundamental status of EU citizenship and the overarching principle of the effectiveness of EU law.⁴⁹ What is more, particularly in response to the rule of law crisis, the CJEU is increasingly operationalizing the values of the EU into binding legal limits.⁵⁰ Jointly, these principles create a certain level of legal rigidity in the EU system, especially as these principles form part of primary law.

Consequently, the translation of empirical insights into EU law can only take place within the legal space that these foundational principles, and the internal logic and coherence of the EU legal order, leave. Or alternatively, empirical insights should first be used to tweak these foundational principles so as to leave more space. But here one runs into the challenge that the EU legal order is a coherent system in which these foundational principles and other norms relate to, and depend on, each other. This limits, for example, the options for changing the interpretation or application of the principle of equal treatment for EU citizens solely for the purpose of EU redistribution, social security or sporting competitions, even if it becomes clear that empirically citizens feel very different about equal treatment in these fields. Similarly, it is legally extremely difficult to limit the doctrine of supremacy of EU law in some areas only, such as migration.

Even leaving the unanimity requirement for treaty change aside, therefore, any attempt to translate empirical findings into EU law must respect the system and coherence of EU law, including the web of interconnected principles that underpin the EU legal order. If any empirical insights lead to suggesting changes in the very system or underpinning principles, moreover, such suggestions can only be legally implemented if it provides a holistic solution, that will fit the overarching EU legal order and will sufficiently safeguard its coherence and effectiveness.

5.3 Concepts, Terms and Cross-disciplinary Conversations

Law and social psychology use different concepts and terminology. What is more, legal terms can have a rather technical meaning, which can be far removed from the ordinary meaning of terms, such as the concept of proportionality in EU law. Before using certain terms or constructs to connect social psychological findings to EU law it is therefore important to carefully check if the constructs used have a sufficiently equivalent meaning.

Equality' in B de Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 301–47, 301.

⁴⁹ See among many other examples CJEU Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107; Joined cases C-402/05 P and C-415/05 P *Kadi* [2008] ECLI:EU:C:2008:461, Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:158, CJEU Case C-896/19 *Repubblica* [2021] ECLI:EU:C:2021:311; and Cases C-156/21 *Hungary v Parliament and Council* [2022] ECLI:EU:C:2022:97; and C-157/21 *Poland v Parliament and Council* [2022] ECLI:EU:C:2022:98.

⁵⁰ See inter alia CJEU Case C-64/16 *Associação Sindical dos Juizes Portugueses* [2018] ECLI:EU:C:2018:117, Case C-896/19 *Repubblica* ECLI:EU:C:2021:311, and Case C-791/19 *Commissie v Poland* [2021] ECLI:EU:C:2021:596, and for discussion: L Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) (20) 8 German Law Journal 1182, 1182.

In addition, in most cases a researcher will not have a truly interdisciplinary skill set that masters both EU law and social psychology. In turn, this makes collaboration between researchers from different disciplines necessary. Since each discipline relies on constructs and (implicit) assumptions that may not be clear to researchers from a different discipline, this creates the risk of misunderstanding and miscommunication. This risk only increases where researchers frame their questions and ideas in the concepts and terminology of their own discipline.

One way to reduce the risk of such misunderstandings is to start from a real-world problem, and to first describe this problem in non-technical terms. So instead of saying you will study the legality and legitimacy of NextGenEU, including EU redistribution and solidarity, you can agree to study how citizens react if the EU first collects a certain amount of money, and then gives this money to certain other Member States or individuals.⁵¹ Such a non-disciplinary framing of a real-world problem allows the development of more specific disciplinary research questions, including empirical ones. For example, does it matter for the opinion of citizens if the EU collects the money directly or via the Member States? Or does it matter if the money is handed out directly by EU institutions, or via the Member States? Once empirical answers to these questions have been found, using for example a mix of questionnaires and lab experiments, one can look how these insights can be integrated into EU law. For example, how can they be used to design EU redistribution mechanisms that will be perceived as more legitimate while staying within EU competences and the EU legal principles that govern this field? Effective cross-disciplinary collaboration, therefore, often starts from finding a real-world problem and describing it in non-technical terms.

5.4 The Line between Evidence-informed Law, Communication and Marketing

As indicated, in social psychology the concept of legitimacy has mainly been approached as a perception. Whether individuals perceive the EU or EU norms as legitimate, moreover, can be determined by many factors, many of them distinctly non-legal or not even EU-related.⁵² In fact, as for some reason most individuals rarely peruse the Official Journal, for most individuals the precise formulation of EU norms may not even have a direct impact on perceived EU legitimacy at all. Instead, the legitimacy of EU norms may be more directly impacted by the *communication* that does reach citizens, or the way such information is ultimately translated into different cues by national media and/or politics. In addition, completely non-EU related issues, such as trust in the national government, or even one's current mood state, may have a significant impact on EU legitimacy.

This oft-indirect impact of EU law raises the fundamental question if, to increase the legitimacy of the EU, one should just ignore law and rather focus on communication and other ways of influencing the opinion of citizens. In turn, this raises the question if social psychological

⁵¹ We gratefully take this example from the PhD project of C Reijgwart, 'Evolution-informed law: squaring EU redistribution with human nature' (Leiden Law School).

⁵² CFP Haack et al, 'Legitimacy-as-feeling: How Affect Leads to Vertical Legitimacy Spillovers in Transnational Governance' (2013) 51(4) *Journal of Management Studies* 634; E Voeten, 'Public Opinion and the Legitimacy of International Courts' (2013) 14(2) *Theoretical Inquiries in Law* 411.

research on legitimacy might ‘only’ lead to more effective marketing, instead of actually better, evidence-informed law? And if this is the case, should academics be involved?

To counter this risk, two elements are crucial in our analysis and proposition. First, the scientific aim of social psychological and interdisciplinary legal research is to understand how legitimacy really works. As with all knowledge, the outcomes of this research might also be used for nefarious or dubious purposes. This does not, however, diminish or remove the scientific nature and relevance of this research. Second, we believe that communication and other cues about the EU should be based on the truth. If empirical insights can be used to create evidence-informed law that, within the limits of the law, is perceived as more legitimate by citizens once they are correctly informed, then this is something worth achieving. The next step then is to make sure that these legal improvements are indeed well communicated to citizens, so that they can have their desired effects. For this reason, improving EU law, based on social psychological insights in ways that can increase legitimacy, is both valuable in itself and valuable instrumentally.

5.5 Examples and Legal Applications

To further concretize the points made above, in the remainder of this section we briefly discuss three examples of how we have tried to usefully connect EU law with social psychology. The first example uses MFT to explore EU legitimacy. The second example concerns SIT. The third and final example demonstrates how a more social psychological and evolutionary perspective can lead to another approach to vital but contested constructs such as sovereignty.

5.5.1 Moral value alignment and the legitimacy of EU law

As discussed, people base their moral judgements on different moral foundations, and perceived moral disagreement may lead to lower legitimacy. Considering these findings, we examined whether EU citizens, particularly those with more binding or conservative moral values, felt less moral alignment with the EU, and, if so, if this negatively affected their perceived EU legitimacy.

To examine this, we conducted an online survey in Finland, France, Germany, Italy, the Netherlands, and Poland via the online participant platform Prolific ($N = 1,136$).⁵³ The survey measured the personal values of the participants and how they perceived the values of the EU. Value alignment between the EU and the participant was operationalized as overlap between personal values and perceived EU values. Subsequently, the questionnaire measured how each participant perceived the legitimacy of the EU, operationalized as institutional trust and felt duty to obey.⁵⁴

Statistical analysis demonstrated that perceived individualizing values of the EU were a significant positive predictor of perceived CJEU legitimacy. This indicated that the perceived legitimacy of the EU became higher when participants perceived the EU to endorse

⁵³ E Grosfeld, D Scheepers and A Cuyvers, ‘Value Alignment and Public Perceived Legitimacy of the European Union and the Court of Justice’ (2022) 12 *Frontiers in Psychology* 1.

⁵⁴ Based inter alia on J Sunshine and T Tyler, ‘The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing’ (2003) 37(3) *Law & Society Review* 513; J Jackson et al, ‘Why Do People Comply with the Law?’ (2012) 52(6) *British Journal of Criminology* 1051, resulting in a scale of nine items.

individualizing values. In addition, when participants with binding values perceived the EU to only weakly represent binding values, this had a significantly negative effect on perceived legitimacy of the EU. However, when participants with binding values perceived that the EU strongly represented binding values, this related positively to the perceived legitimacy of the EU.

Consequently, this study showed that the EU was perceived as more legitimate when participants perceived the EU to endorse ‘their’ personal values. In addition, EU perceived legitimacy decreased when participants with binding (conservative) values thought the EU did *not* endorse their personal values. With all the caveats that come with a single study, these findings might indicate a value alignment effect, at least for binding values.

This finding can be particularly relevant to understand Euroscepticism among more conservative voters, say in the UK, Poland or Hungary. For them, the perceived legitimacy of the EU may be improved by better representing the more binding moral values they endorse, instead of focusing largely on stressing the more individualizing (liberal) values. The legal question then of course becomes whether such ‘moral inclusivity’ is legally possible (aside from normatively desirable). In addition, the question becomes if EU perceived legitimacy would not decrease more among individuals who prefer individualizing values if the legal norms of the EU were to better reflect binding moral values.

To test this, we are currently doing follow-up studies using a different empirical method: vignette studies. In a vignette study, participants are either placed in a control condition or an experimental condition, that is, a variation of the control condition, so that one can study the effect of this variation. As variations, we have drafted different formulations of the EU norm of primacy. One set of these formulations only *reformulates* the norm of primacy, but does so in a way that particularly aligns with one of the moral foundations. For example, this set explains how primacy is needed to ensure respect for authority or because it is fair. Another set of variations goes one step further, and actually tweaks the legal substance or scope of primacy itself to better align with a specific moral foundation (rebalancing of the norm), yet they do so in a way that still fits, to a sufficient degree, within the overarching system of EU law. To try to ensure the legal correctness of our reformulations as much as possible, we have submitted these reformulations to a panel of five external experts in EU law. Subsequently, using an online survey, these vignettes will be tested on a representative sample of participants, who will also be asked to fill in items on their own moral values and their perceived perception of EU legitimacy. We can then assess if our reformulations of EU norms will have an impact on the perceived legitimacy of the EU.

Clearly, many questions and challenges remain, but we hope that this can be one way to actually incorporate insights from MFT into EU law. For where moral values can be measured, should we not at least take such empirical findings into account when deciding on the legal content, formulation and justification of EU law?

5.5.2 SIT and the role of national and dual identity

Our second example concerns SIT, and the effect of national identity on EU legitimacy. Nationality is one of the most important group memberships of EU citizens.⁵⁵ One might

⁵⁵ M Scharfbillig et al, *Values and Identities: A Policymaker’s Guide* (Publications Office of the European Union 2021); D Sindic, ‘Psychological Citizenship and National Identity’ (2011) 21(3) *Journal of Community & Applied Social Psychology* 202.

therefore expect that a strong national identity is negatively correlated with EU legitimacy.⁵⁶ In turn, this would imply that, to increase the perceived legitimacy of the EU, one needs to move people towards an EU identity, or at least ‘soften’ their national identity.

A survey study we did, however, suggests something quite different, with interesting legal and constitutional consequences.⁵⁷ In this study we measured the national identification of participants with the ten-item social identity scale.⁵⁸ Moreover, using a similar scale, we also measured EU identification. Dual identification (that is, a simultaneous identification with both the nation and the EU), was measured in two ways. One item was: ‘I feel I belong to both [nationality] people and people in the EU’, which was answered using a Likert scale ranging from 1 (*not at all*) to 7 (*very much*). In addition to this continuous measure, we also used the so-called Moreno question used in the Standard Eurobarometer to measure dual identity. This question only allows for four discrete answer categories: [*nationality*] *only*; [*nationality*] *and European*; *European and* [*nationality*]; and *European only*. In addition, the study used 12 items to measure threat to national power and sociocultural identity. The perceived legitimacy of the EU was measured with nine items covering institutional trust and felt duty to obey.

Interestingly, we first of all found that a strong national identity in itself did *not* reduce perceived EU legitimacy.⁵⁹ In fact, people with a strong national identity also perceived a higher legitimacy of the EU. This changed, however, when people with a strong national identity experienced threat to their nation. When they perceived such a threat, these individuals experienced a relatively strong *reduction* in perceived legitimacy of the EU. People with a strong national identity, therefore, seem to be more sensitive to perceived threats from the EU, and respond relatively strongly to such threats.⁶⁰ Moreover, we also found an interesting, albeit small, ‘buffering effect’ of dual identity (a simultaneous identification with the nation and the EU). Even for people who only showed a rather modest level of dual identification, the impact of threat was reduced. This could imply that one only needs a relatively modest form of dual identity to ‘protect’ the perceived legitimacy of the EU against threats to one’s nation.

⁵⁶ Cf also eg N Clark and R Rohrschneider, ‘The Relationship Between National Identity and European Union Evaluations, 1993–2017’ (2019) 20(3) *European Union Politics* 384; L McLaren, ‘Explaining Mass-level Euroscepticism: Identity, Interests, and Institutional Distrust’ (2007) 42(2–3) *Acta Politica* 233.

⁵⁷ E Grosfeld, D Scheepers, A Cuyvers and N Ellemers, ‘The Integration of Subgroups at the Supranational Level: The Relation Between Social Identity, National Threat, and Perceived Legitimacy of the EU’ (2022) 10(2) *Journal of Social and Political Psychology* 607, 607. NB this study used the same survey as under 5.1.1., yet was based on different analyses and different parts of the survey.

⁵⁸ N Ellemers et al, ‘Self-Categorisation, Commitment to the Group and Group Self-Esteem as Related But Distinct Aspects of Social Identity’ (1999) 29(2–3) *European Journal of Social Psychology* 371.

⁵⁹ This in contrast to exclusive national identifiers, which had the lowest legitimacy: see also N Clark and R Rohrschneider, ‘The Relationship Between National Identity and European Union Evaluations’ (n 56); L Hooghe and G Marks, ‘Calculation, Community and Cues: Public Opinion on European Integration’ (2005) 6(4) *European Union Politics* 419; McLaren (n 56).

⁶⁰ Cf also V Swami et al, ‘To Brexit or Not to Brexit: The Roles of Islamophobia, Conspiracist Beliefs, and Integrated Threat in Voting Intentions for the United Kingdom European Union Membership Referendum’ (2018) 109(1) *British Journal of Psychology* 156, 156.

These findings demonstrate how social psychological methods and theories can have added value, and provide interesting and relevant connections to EU law. More specifically, the more detailed items and scales used in social psychology questionnaires provide for a more fine-grained measuring tool, *inter alia* compared to the Eurobarometer, which measures dual identity solely with a single, more overall question. This Eurobarometer approach has significant drawbacks, *inter alia* because it assumes a tension between national and EU identity and fails to capture varying strengths of both identities.⁶¹ Research shows that, when national identity is assessed with continuous measures as we did, the relation between national identity and supportive attitudes towards the EU turns out to be more complex.⁶²

The negative impact of threat on perceived legitimacy, moreover, triggers the question of how EU norms might be tweaked to be less threatening or even increase a sense of safety and security for national identities. Clearly this is a very complex question, and again one that needs to be answered in a way that fits with the underlying foundations of the EU legal order. But one might wonder if certain EU norms, decision-making procedures or institutional designs could be changed so as to reduce threat and increase security. For example, one could imagine that the CJEU develops its current, rather limited, interpretation of article 4(2) Treaty on European Union (TEU), so as to offer a more solid safe harbour to certain aspects of national identity.⁶³ Alternatively, the dual nature of EU citizenship, as already captured in *inter alia* article 20 Treaty on the Functioning of the European Union (TFEU), could be used to offer more protection to national identity, and stimulate the kind of dual identity that provides an effective buffer against perceived threat by the EU.⁶⁴

Here, in addition to vignettes, psychophysiological methods offer valuable options to objectively measure any threat induced by EU norms in a lab setting.⁶⁵ Such methods allow one to assess if certain EU norms indeed induce a sense of threat, and if alternative formulations, which are either reformulated or rebalanced, reduce this threat, or even turn this threat into a positive challenge. The perceived threat created by an EU norm can then be one factor to take into account when drafting or interpreting EU norms, especially where less threatening variations are available which fit within the normative system of EU law.

⁶¹ M Bruter, 'Identity in the European Union – Problems of Measurement, Modelling and Paradoxical Patterns of Influence' (2008) 4(4) *Journal of Contemporary European Research* 273; M Guinjoan and T Rodon, 'A Scrutiny of the Linz-Moreno Question' (2015) 46(1) *Publius* 128.

⁶² H Boomgaarden, 'Mapping EU Attitudes: Conceptual and Empirical Dimensions of Euroscepticism and EU Support' (2011) 12(2) *European Union Politics* 241; S Carey, 'Undivided Loyalties: Is National identity an Obstacle to European Integration?' (2002) 3(4) *European Union Politics* 387.

⁶³ See also S Garben, 'Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers' (2020) 58(1) *Journal of Common Market Studies* 4, 41; M Wendel, 'Comparative Reasoning and the Making of a Common Constitutional Law: EU-Related Decisions of National Constitutional Courts in a Transnational Perspective' (2013) 11(3) *International Journal of Constitutional Law* 981, 981.

⁶⁴ Cuyvers (n 5).

⁶⁵ See for example D Scheepers, T Saguy, J Dovidio and S Gaertner, 'A Shared Dual Identity Promotes a Cardiovascular Challenge Response during Interethnic Interactions' (2014) 17(3) *Group Processes Interpersonal Relations* 324.

5.5.3 The emotional and evolutionary function of legal concepts

A third brief example concerns the emotional and evolutionary basis and function of certain legal constructs. Here we take the example of sovereignty.⁶⁶ Sovereignty is one of the most foundational and most contested constructs in constitutional law and theory.⁶⁷ Sovereignty is particularly challenging for the EU, which as a supranational organization is often perceived to undermine national sovereignty.⁶⁸ What is more, sovereignty is often closely associated with emotions such as nationalism, and hence part of the more primitive part of human nature that the EU should transcend.⁶⁹ Briefly put, this leads to an apparent clash between some of the most foundational norms of EU law, including supremacy, and one of the most fundamental norms of national constitutional law, being sovereignty of the people, the state, the nation, the constitution; of whatever blend of carriers is identified.⁷⁰

The clash between sovereignty and European integration may become less intractable, however, if one does not approach sovereignty merely as a rational construct, which by its conceptual nature has to be absolute, but also as an emotional construct which fulfils a basic evolutionary need for social animals: stability. Evolutionary biologists, including Frans de Waal with his ground-breaking study of chimpanzees, have shown that social animals have an emotional need for a stable, formal hierarchy.⁷¹ Precisely because actual power is fluid and context-dependent in complex social groups, a need arises for a more formal, abstract system of hierarchy that is relatively stable.⁷²

To meet this need, chimpanzees have developed a system of formal rank, which de Waal calls ‘frozen dominance relationships’.⁷³ Chimpanzees all have a certain formal rank in their group. This formal rank is inter alia recognized through ‘submissive greetings’.⁷⁴ These greet-

⁶⁶ A Cuyvers, ‘What Chimpanzees Can Teach the EU: Or Why the EU Should Embrace Sovereignty as Part of Human Nature’ (2021) 6(3) *European Papers* 1229.

⁶⁷ For a powerful introduction: F Hinsley, *Sovereignty* (Cambridge University Press 1986).

⁶⁸ See for some of the leading accounts: N McCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999); N Walker, ‘Late Sovereignty in the European Union’ in N Walker (ed), *Sovereignty in Transition* (Bloomsbury Publishing 2006) 3.

⁶⁹ See for further discussion also A Cuyvers, ‘The Confederal Come-back: Rediscovering the Confederal Form for a Transnational World’ (2013) 19(6) *European Law Journal* 711, 711.

⁷⁰ See for example the limits drawn by the German Constitutional Court, inter alia in para 224 of its Lissabon Urteil, BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) and BVerfGE, 2 BvR 859/15 (2020) *Weiss*, or the frontal attack by the Polish Constitutional Tribunal in case K 3/21 *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*.

⁷¹ F de Waal, *Chimpanzee Politics: Power and Sex among Apes* (Johns Hopkins University Press 2007).

⁷² See on the issue of hierarchy also R Sapolsky, ‘The Influence of Social Hierarchy on Primate Health’ (2005) 308(5722) *Science* 648; and D Scheepers and N Ellemers, ‘Stress and the Stability of Social Systems: A Review of Neurophysiological Research’ (2018) 29(1) *European Review of Social Psychology* 340.

⁷³ De Waal (n 71) 81–82.

⁷⁴ Such a greeting is ‘a sequence of short, panting grunts known as pant-grunting. While he utters such sounds the subordinate assumes a position whereby he looks up at the individual he is greeting. In most cases he makes a series of deep bows that are repeated so quickly one after the other that this action is known as bobbing.’ De Waal (n 71) 78.

ings are *solely* used as ‘a kind of ritualized confirmation of the dominance relationship’.⁷⁵ The key point here is that real social power and formal rank are not always in sync. In other words, the formal hierarchy can buffer a certain fluctuation in real power. Yet when the formal hierarchy breaks down fully, for example due to a challenge to the alpha male, stress and violent conflict skyrocket.⁷⁶

Clearly, great care should be taken when translating such findings to the EU context. Yet it can be argued that our different conceptions of sovereignty are in part simply more sophisticated attempts to meet this evolutionary and emotional need for a sufficiently stable hierarchy. If true, this means that sovereignty does not have to be as absolute, as most of the current conceptions claim. It only needs to be stable enough to meet the emotional need for stability.⁷⁷ In turn, this could create conceptual, legal and emotional space to reconcile sovereignty with EU integration, and other forms of far-reaching international collaboration. What is more, as with identity, if sovereignty is approached, at least in part, as an emotional construct, the methods of social psychology can be used to empirically assess which formulations of sovereignty, national or European, best fulfil this need. In this manner, approaching legal and constitutional constructs as fulfilling a certain evolutionary or psychological need may open up fresh perspectives on what otherwise appear to be conceptual and legal deadlocks.

6. CONCLUSION: EMBRACING EMOTIONS AND COLLABORATION

Social psychology and law are both concerned with human behaviour. And ultimately, the EU is a very large group of people trying to collaborate. EU law, and the constitutional system on which it is based, can therefore learn from the insights of social psychology on when people collaborate well, and why and when they do not. Adopting these insights will also help the EU to more wholly embrace the emotional side of human existence, instead of more instinctively distrusting emotions – for as a now intensely political project, the EU has to work with human nature, in addition to containing the darker and more dangerous parts of that nature.

Considering the fact–norm divide, and the many other challenges that divide EU law and social psychology, connecting both disciplines is not easy, and many lessons still have to be learned. Yet the potential rewards seem well worth the risk and effort. Connecting these disciplines, moreover, fits in the broader trend of better integrating empirical methods into law, and can benefit from the lessons learned in this broader endeavour. As a core method, we thereby specifically recommend personal collaboration between researchers from the different disciplines – collaboration based on real world problems, and driven by that most academic emotion of all: curiosity to find out how the world, including the EU, really works.

⁷⁵ *ibid* 79.

⁷⁶ *ibid* 82, and 111.

⁷⁷ If correct, this could also help to explain why so many different conceptions of sovereignty seem able to fulfil their function within different constitutional systems, as well as why even scholars often considered rather absolutist, including Bodin and Schmitt, in fact limit the actual power of the sovereign. See C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (G Schwab (tr), University of Chicago Press 2005) 5; J Franklin, *Bodin: On Sovereignty* (Cambridge University Press 2007).