

9-1-2006

Internationalization of Lawmaking Processes: Constraining or Empowering the Executive, The

Aida Torres Perez

Follow this and additional works at: <http://digitalcommons.law.utulsa.edu/tjcil>



Part of the [Law Commons](#)

Recommended Citation

Aida T. Perez, *Internationalization of Lawmaking Processes: Constraining or Empowering the Executive, The*, 14 *Tulsa J. Comp. & Int'l L.* 1 (2006).

Available at: <http://digitalcommons.law.utulsa.edu/tjcil/vol14/iss1/2>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Journal of Comparative and International Law by an authorized administrator of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.



THE INTERNATIONALIZATION OF LAWMAKING PROCESSES: CONSTRAINING OR EMPOWERING THE EXECUTIVE?

*Aida Torres Pérez**

I. INTRODUCTION

It has been suggested that globalization and the proliferation of international regimes have contributed to constrain executive power, compromising state sovereignty. While some celebrate this result, others decry or deny it. The executive needs to introduce new forms of action to face the challenges posed by globalization, transcending the national/international dichotomy. As such, the term “internationalization of lawmaking processes” refers broadly to the new context in which public decision-making takes place within multiple inter-, supra-, and trans-national spheres. This article will demonstrate that although from an overall perspective globalization constrains state power, if one focuses on the state’s constituting branches, the internationalization of lawmaking processes has brought about a comparative empowerment of the executive, at the expense of the legislative.

Therefore, the question posed in the title has a double answer: the internationalization of lawmaking processes constrains the power of the state as

* Constitutional Law Professor, Pompeu Fabra University (Barcelona); Yale Law School (JSD, 2006); Pompeu Fabra University (DEA in Public Law, 2003); Yale Law School (LL.M, 2002). This paper was originally presented in the 2006 SELA Conference (Bogotá, Colombia) and a Spanish version was published in SELA 2006: PODER EJECUTIVO (Roberto Saba ed., 2006). I am deeply grateful to Janet Levit and Laura Saldivia, co-panelists, and Owen Fiss, the moderator, for the close collaboration and illuminating insights, which made of this experience an intellectual pleasure. I owe a special debt to Jorge Contesse, Victor Ferreres, Marisa Iglesias, and Ezequiel Nino for their provocative thoughts and ongoing conversations, which improved my own understanding of the topic. I also thank Nico Krisch, Santiago Montt, Mariana Prado, Neus Torbisco and the participants in the conference for their invaluable comments.

a whole, while it transforms and enhances executive power. Accordingly, this article will identify a double parallel process consisting of de-centralization of state power among a plurality of spheres and re-centralization of power in the executive. As such, this argument develops in two main sections.

The first section will show how, as a result of globalization, public power is fragmented and the ability of sovereign states to freely design and implement public policies is constrained. Agreements reached or norms crafted within forums beyond the state are directly implemented in the state territory or shape domestic lawmaking. The law ultimately enforced derives from sources that are not exclusively national. These transformations challenge the traditional sovereignty paradigm, as the unlimited, ultimate, and indivisible power to govern over a bounded territory without external influences.¹ Sovereignty is not merely lost, but the state needs to introduce new forms in the exercise of its functions. As public functions are fragmented among multiple spheres, so is the state in its constitutive units. This article thus proceeds to explore the impact of the new dynamics upon the constitutional balance of powers.

The second section will examine the transformation and enhancement of executive power in this globalized context, in which international lawmaking is also transformed and diversified. The diversification of international lawmaking sources offers the executive new opportunities for action. In particular, this article will emphasize how the executive needs to adapt to new forms of lawmaking in multiple spheres, in collaboration with foreign authorities and private actors. The tendency is to recentralize power in the executive. To prove this claim, this article will examine three interrelated fields: regulation through international treaties and other forms of transnational collaboration, political decision-making within international organizations, and the implementation of international norms within domestic legal orders. Eventually, these transformations may well enhance the executive's ability to shape national policy-making and regulate citizens' lives, while sidestepping the legislative.²

Thus, these new dynamics alter the domestic institutional balance (without amending the constitutional text).³ It is important to understand the kinds of

1. See DEIETER GRIMM, *The Modern State: Continental Traditions*, in GUIDANCE, CONTROL AND EVALUATION IN THE PUBLIC SECTOR 89, 91-94 (Franz-Xaver Kaufmann et al. eds., 1986) (concerning the origins of the concept of sovereignty and the modern state).

2. PAUL WEBB & THOMAS POGUNTKE, *The Presidentialization of Contemporary Democratic Politics: Evidence, Causes, and Consequences*, in THE PRESIDENTIALIZATION OF POLITICS: A COMPARATIVE STUDY OF MODERN DEMOCRACIES 336, 350 (Thomas Poguntke & Paul Webb eds., 2006).

3. See also Christian Walter, *Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law*, 44 GERMAN YEARBOOK OF INTERNATIONAL LAW 170, 193-196 (noting that constitutions need to be complemented with other documents to obtain a complete picture of the structure of the public authority; as a

transformations underway to properly address the contested legitimacy of the new order. Along these lines, this article will reflect on the normative concerns arising from the standpoint of democracy. The article will suggest an account grounded on the ideal of institutional balance to explain and justify current practices and formulate institutional arrangements to improve the legitimacy of lawmaking processes developing within inter-, supra-, and trans-national spheres. The European Union (EU) is a paradigmatic example to illustrate these new dynamics. The conceptual framework suggested, however, may be applied to other areas as well.

II. GLOBALIZATION AND FRAGMENTATION OF DECISION-MAKING POWERS

Globalization, understood broadly as a set of processes transcending national borders, has led to growing interdependence⁴ in multiple fields such as economics, the environment, telecommunications, security, intellectual property rights, public health, and others. On some occasions, the response to this growing interdependence has been the creation of international regulatory regimes or other forms of collaboration through more informal transnational networks. This article will focus on this aspect of globalization, which involves the internationalization of lawmaking processes.⁵

Today, there is a broad range of international treaties and organizations, with different goals, institutions, and powers, all seeking to impact diverse areas from international trade to human rights. The most advanced example is the EU, whose main goal was creating a common market and furthering economic integration. EU powers have increased quantitatively and qualitatively, covering issues concerning citizens not only as economic actors, but also impinging on other spheres of their lives. The attribution of sovereign powers to EU institutions has constrained member states' decision-making powers not only in the trade and monetary domains, but also in a great variety of fields such as agriculture, fisheries, transportation, food safety, consumer protection, and immigration. In the economic realm as well, at a global scale, the World Trade Organization (WTO) aims to reduce barriers to international trade and eliminate discriminatory practices among the states. The agreements adopted within the WTO framework constrain national policies in relevant ways. Moreover, dispute

consequence, constitutions are better seen as "partial constitutions," since they no longer comprehensively regulate public authority exercised within the state).

4. ROBERT KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 7-8 (Longman ed., 2001).

5. To be sure, globalization might interchangeably refer to political, economic, and social processes transcending national boundaries, as well as to the creation of international regimes and other forms of cooperation to regulate these processes (which is properly a response to globalization).

resolution before the WTO Appellate Body, whose decisions are binding, not only impinges upon foreign trade, but also upon issues such as the environment, consumer protection, public health, national security, and even human rights.⁶ Other organizations, such as the World Health Organization and the International Labor Organization, whether their decisions are strictly binding or not, have had an important impact not only upon state legal orders, but also, indirectly, upon the people.⁷

More informally, transnational collaboration among government authorities has intensified, leading to the proliferation of the so-called "transnational government networks."⁸ These networks might exist within the framework of international organizations, executive agreements, or develop spontaneously.⁹ For example, they encompass networks of trade ministers within the WTO as well as networks, such as the G8 or the Basel Committee, which, albeit not grounded on a treaty, have acquired certain stability. Within these networks, lawmaking powers are not attributed to any separate international body. Rather, they offer a framework for state authorities to cooperate and exercise their functions in collaboration with foreign authorities. Often, codes of conduct, recommendations, or regulatory principles are issued, which, despite not being binding norms (*soft law*), may well influence lawmaking processes within domestic legal systems.¹⁰

In general, the creation of international regimes and the allocation of state functions at the international level have been justified through the argument that states' ability to effectively rule within their respective territories has been undermined as a consequence of mounting political and economic interdependence.¹¹ If states cannot comply with their functions and goals, this inability threatens their legitimacy. Hence, effective regulation regarding specific subject matters requires a supranational form of action.¹² Similarly,

6. Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 J. WORLD TRADE 167 (2001).

7. Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, 10 IND. J. GLOBAL LEGAL STUD. 29, 35 (2003).

8. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (identifying and thoroughly exploring this phenomenon, Anne-Marie Slaughter wrote several articles and ultimately a book).

9. *Id.* at 45-49.

10. See *id.* at 168-95 (pending still in this area is extensive empirical research).

11. ROBERT O. KEOHANE, *Sovereignty, Interdependence, and International Institutions*, in IDEAS AND IDEALS: ESSAYS ON POLITICS IN HONOR OF STANLEY HOFFMANN 91, 92 (Linda B. Miller & Michael Smith eds., 1993) (Asserting that "[i]t is now a platitude that the ability of governments to attain their objectives through individual action has been undermined by international political and economic interdependence."); see also Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 284 (2004).

12. Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 16 (2005).

transnational networks allow governments to achieve through mutual cooperation what they could previously achieve within their respective territories unilaterally.¹³

Although states retain coercive powers, public power is fragmented in the sense that political decision-making takes place in a plurality of forums at inter-, supra-, and trans-national levels.¹⁴ These diverse forms of international decision-making very often influence or even shape the content of national policies and laws. Some domestic norms merely reproduce or develop norms or decisions taken within networks or international systems.¹⁵ Hence, the proliferation of international regulatory regimes (especially if international bodies are granted the power to enact binding law) constrains state power to formulate and implement public policies.¹⁶ Thus, the internationalization of lawmaking processes challenges sovereignty as “the political authority within which has the right to determine the framework of rules, regulations, and policies within a given territory and to govern accordingly.”¹⁷

It is worth noting that whether states participate in international regimes or refuse to engage in collective decision-making in the international sphere, sovereignty is challenged. In the latter case, however, the loss of control might be even greater because the states cannot effectively regulate in isolation, processes developing beyond or interfering within national borders as a consequence of globalization. The global economy, which involves the internationalization of production, financial transactions, and trade, is the clearest example of how globalization undermines the ability of states to control their own (in this case economic) futures.¹⁸ Furthermore, the vacuum left tends to be occupied by private actors who develop transnational regulatory systems that could create policy externalities and thus incentives for broader policy

13. Slaughter, *supra* note 11, at 285.

14. Jost Delbruck, *Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State*, 11 *IND. J. GLOBAL LEGAL STUD.* 31, 39 (2004) (stating that “the concept of public authority is not restricted to the exercise of enforcement powers”).

15. Delbruck, *supra* note 7, at 35-36 (“[D]omestic law that appears to be genuinely ‘homemade’ is actually nothing but a rubberstamped regulation worked out at the level of IGOs.”). For example, in the EU, many national norms merely reproduce what was established in EU directives or refer to the text of the directive itself. SUE ARROWSMITH, *Legal Techniques for implementing Directives: A Case Study of Public Procurement*, in *LAWMAKING IN THE EUROPEAN UNION* 491 (Paul Craig & Carol Harlow eds., 1998).

16. DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* 100 (1995) (Distinguishing between sovereignty and autonomy because “sovereignty refers to the entitlement of a state to rule over a bounded territory, while autonomy denotes the actual power a nation-state possesses to articulate and achieve policy goals independently.” While arguing as well that globalization and the proliferation of international regimes have an impact upon both.).

17. DAVID HELD, *MODELS OF DEMOCRACY* 342 (2d ed. 1996).

18. *Id.* at 343-85.

coordination.¹⁹ International law and other forms of transnational coordination offer tools to regulate these processes.

In this context, we can no longer understand sovereignty according to the modern conceptual paradigm of the nation-state, as bundling all public power within state boundaries. Public power is fragmented, and state functions are exercised in a plurality of forums beyond the state, in collaboration with other public and private actors. This is not to say that states are disappearing and being replaced with supranational institutions. The states themselves, albeit not exclusively, promote the development of international law in its different forms.²⁰ In the words of Saskia Sassen, “rather than sovereignty eroding as a consequence of globalization and supranational organizations, it is being transformed.”²¹ At the birth of the modern state, there was a correspondence between sovereignty—as the scope of state power—and the national territory. As a result of the internationalization of lawmaking, the location of public power is partially shifted and reconstituted in other spheres.²² As a result, the boundaries of domestic policy-making are increasingly blurred, “transforming the conditions of political decision-making, changing the institutional and organizational context of national polities, altering the legal framework and administrative practices of governments.”²³

Globalization brings about transformations not only for the modern state, but also for international law. The scope and structures of international law change. International treaties regulate issues traditionally regulated at the domestic level.²⁴ The powers attributed to international organizations expand in scope and nature. There is a trend toward a higher degree of institutionalization and coordination of international decision-making.²⁵ At the same time,

19. One of the effects of globalization has been the blurring of the public/private distinction. The increasing role of private actors in international lawmaking raises particular problems for global governance. SLAUGHTER, *supra* note 8, at 10 (“[W]e need global rules without centralized power but with government actors who can be held to account through a variety of political mechanisms. These government actors can and should interact with a wide range of non-governmental organizations (NGOs), but their role in governance bears distinct and different responsibilities.”).

20. SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 29 (1996) (“The state itself has been a key agent in the implementation of global processes, and it has emerged quite altered by this participation.”).

21. *Id.* at 31.

22. *Id.* at 29-30 (“Sovereignty remains a feature of the system, but it is now located in a multiplicity of institutional arenas: the new emergent transnational private legal regimes, new supranational organizations (such as the WTO and the institutions of the European Union), and the various international human rights codes.”).

23. HELD, *supra* note 16, at 135.

24. *See infra* section A.

25. Walter, *supra* note 3, at 175-83; HELD, *supra* note 17, at 346-348; *see infra* section B.

cooperation is intensified as a result of the proliferation of more informal transnational networks. Also, actors involved in policy-making in these multiple spheres diversify. Within the executive, diplomatic delegations are replaced with a variety of ministers, as well as other second-level officials and regulators from independent agencies appointed by governments. Furthermore, globalization enhances transnational regulation carried out by a variety of private actors,²⁶ and hybrid arrangements between governmental and non-governmental actors.²⁷ As a result, the production of international law becomes decentralized.²⁸

At the same time, state powers are fragmented and exercised in several spheres. As public power is disaggregated, so is the state.²⁹ Instead of conceiving the state as an indivisible unit, if one focuses on the distinct state branches—executive, legislative, and judicial³⁰—it will be realized that disaggregating public functions among inter-, supra-, and trans-national spheres has enhanced executive power to the detriment of the legislative. Therefore, we are witnessing a twofold, only apparently paradoxical, process: de-centralization of state powers in a plurality of spheres and re-centralization of power in the executive.

III. TRANSFORMING AND ENHANCING EXECUTIVE POWER

Arguably, the executive has traditionally had a major role regarding international lawmaking. Nonetheless, it is important to realize how both international lawmaking and executive action have been transformed, eventually enhancing the executive's ability to shape national policy-making. Precisely because international lawmaking is no longer limited to international treaties negotiated by diplomatic missions, the internationalization of lawmaking processes offers new opportunities for executive action, if the executive is willing to engage in international collective decision-making. To demonstrate how executive action is transformed and executive power eventually enhanced vis-à-vis the legislative, three related fields will be considered: (a) collaboration through international regimes and transnational networks; (b) political decision-making within international organizations; and (c) subsequent implementation of international norms within domestic legal orders. The combined exploration of

26. Walter, *supra* note 3, at 186-87; Kingsbury, *supra* note 12, at 22-23.

27. Kingsbury, *supra* note 12, at 22.

28. Walter, *supra* note 3, at 188 (arguing that the international legal order becomes decentralized).

29. Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997) ("The state is not disappearing, it is disaggregating into its separate, functionally distinct parts.").

30. Although courts are essential for the transformation of the international legal order and state sovereignty, they are not discussed in this paper.

these processes reveals a picture of the state that distorts the constitutional balance of powers.

A. Collaboration through international regimes and transnational networks

Historically, treaty-making was a sovereign power of the monarch associated to the *ius belli*.³¹ As a result of liberal revolutions at the end of the eighteenth century, sovereignty was transferred from the monarch to the people. Thus, modern constitutions allocate the power to conclude international treaties to the executive (as the representative of the state), but tend to require the intervention of parliament (as representative of the sovereign people) for their ratification (or for establishing domestic binding force).³² From this perspective, parliamentary consent is essential to guarantee the democratic legitimacy of international treaties.

With regard to the ratification process, parliamentary approval might be required for all kinds of treaties or only for treaties regulating specific subjects, such as treaties concerning the state's integrity, activities of a military or commercial nature, imposing financial burdens, or treaties requiring the amendment of domestic law.³³ In some countries, the ratification of international treaties might not require explicit parliamentary approval.³⁴ In general, countries that do not require parliamentary approval for ratification tend to be dualist, which means that international treaties do not have binding force within the domestic legal order until they have been incorporated through national legislation. Hence, from the standpoint of constitutional structure, to commit the state internationally (and/or to grant treaties domestic binding force), parliamentary intervention is required. Therefore, in principle, this could be regarded as a shared power.

Notwithstanding these constitutional provisions, parliamentary intervention in the process of treaty ratification is very limited in nature. First of all, the executive is the one in charge of initiating negotiations. Generally, the power to

31. Peter Haggemacher, *Some Hints on the European Origins of Legislative Participation in the Treaty-making Function*, 67 CHI.-KENT L. REV. 313, 318 (1991).

32. One should distinguish between parliamentary approval regarding the ratification of international treaties from their "incorporation" in the domestic legal order. Parliamentary approval, when required, is a condition for ratification and thus for obliging the state internationally. Incorporation refers to the process whereby treaties acquire domestic binding force. The binding effect of treaties within the domestic legal order might require specific national legislation incorporating the treaty or not, according to domestic provisions. See Francis G. Jacobs, *Introduction*, in *THE EFFECT OF TREATIES IN DOMESTIC LAW* xxiii, xxiv-xxvi (Francis G. Jacobs & Shelley Roberts eds., 1987).

33. Parliamentary approval is required for specific subject matters in Belgium, France, Germany, and Spain, among others.

34. For instance, in the United Kingdom, the government may proceed to ratify international treaties, as long as there is no explicit parliamentary opposition.

conclude treaties has been attributed to the minister of foreign affairs, but other members of the executive are increasingly participating, in accordance to the type of agreement being negotiated. The drafting process is conducted through negotiations among governmental authorities behind closed doors. In contrast to the legislative process, the drafting of international treaties does not permit public scrutiny. On occasions, government consults parliament in an informal manner during the negotiations. This practice varies across countries.³⁵ Broadly, the negotiation stage is characterized by its secrecy and lack of transparency, which has been a recurrent criticism regarding the process for concluding and amending EU Treaties.³⁶

With regard to parliamentary approval, the parliamentary debate is generally not a thorough, substantive one. Access to information about the negotiations is invariably limited, so that little is known about the alternatives discussed.³⁷ Treaties are brought to parliament once they have been adopted at the international level. In practice, the “take it or leave it” option³⁸ profoundly limits parliamentary autonomy to substantially modify the terms of the treaty or reject it. Amendments are not allowed. Parliaments might qualify its consent by entering reservations or interpretive declarations.³⁹ This possibility is, however, limited by the terms of the treaty and general international law, which bans reservations “inconsistent with the object and purpose of the treaty.”⁴⁰ Thus, parliamentary approval might be conceived as a mere rubber stamp.⁴¹

Moreover, the substantive scope of international treaties has steadily expanded to sectors previously in the domain of domestic legal orders. Traditionally, international treaties were limited to issues of reciprocal interest to sovereign states (basically, military assistance and borders) or issues of an

35. See Stefan A. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT L. REV. 293, 303 (1991).

36. Lars Hoffmann, *The Convention on the Future of Europe - Thoughts on the Convention-Model*, 11 (N.Y. Univ. Sch. of Law Jean Monnet Ctr., Jean Monnet Working Paper No. 11/02, 2002), available at <http://www.jeanmonnetprogram.org/papers/02/021101.html> (last visited Dec. 18, 2006) (The Treaty Establishing a Constitution for Europe was drafted by a newly created “convention,” which included national and European parliamentary representatives. This convention drafted the texts that were later discussed by the representatives of the member states in the Intergovernmental Conference.).

37. Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 200 (1999).

38. *Id.* at 185-86; see also Jed Rubinfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2007-08 (2004).

39. Riesenfeld & Abbott, *supra* note 35, at 307.

40. Vienna Convention on the Law of Treaties art. 19(c), May 23, 1969, 1155 U.N.T.S. 331.

41. In those countries in which international treaties are hierarchically superior or cannot be derogated or amended by law, the executive may constrain the legislative capacity of present and future parliaments.

administrative, technical nature.⁴² At present, the increasing interdependence and complexity of economic, political, and social matters require international regulation and stable cooperation regarding subjects, such as consumer protection or fundamental rights, which were the domain of the legislative. As a result, the executive enhances its ability to shape national politics under its treaty-making power.

Besides international treaties, new forms of informal cooperation among national officials through a wide range of transnational networks have developed. Thus, the executive role is increasingly complex. It is no longer limited to negotiating international treaties with other governments. Executive officials now participate in transnational networks, for instance, to distill information, promote enforcement of national and international norms, or enhance regulatory harmonization regarding a broad range of issues.⁴³ It is worth noting that the main participants in these networks are a variety of governmental authorities, for example: presidents and prime ministers in G8 meetings; cabinet officials (and not only foreign ministers), such as ministers of agriculture, education, justice, economy, and labor, among others, within the Council of the Common Market (MERCOSUR), or the Council of Ministers (EU); and regulators, such as central bankers in the Basel Committee. Hence, also in this domain, parliaments are sidestepped. Anne-Marie Slaughter indicates the existence of some transnational legislative networks, but she admits that they are fewer and less effective.⁴⁴ Among the varied reasons for the reduced number and efficacy are the following: given the variety of interests represented, the issues dealt with, and the diversity of members, it is difficult to identify counterparts in other countries; parliamentary representatives lack the technical expertise in specific areas that promotes the development of government networks; and since their terms in office tend to be short, they have little incentive to establish long-term cooperation with foreign parliamentary representatives, whom also change frequently.⁴⁵

B. Decision-making within the framework of international organizations

An important transformation, particularly since World War II, has been the creation of international institutions with the power to adopt binding norms and decisions.⁴⁶ This transformation is particularly evident in the EU, where

42. See Walter, *supra* note 3, at 179-76.

43. SLAUGHTER, *supra* note 8, at 7, 51-61.

44. *Id.* at 104-05.

45. *Id.* at 105.

46. Examples of these institutions include the EU, the Andean Community, the World Health Organization, and the United Nations. Also, some treaties have set up courts to enforce treaty provisions or decisions emanating from the institutions that have been established. This is the

legislation emanating from EU institutions is directly applicable to citizens and supreme over national law. The transfer of legislative powers to international or supranational organizations has posed the greatest challenge to national sovereignty. According to the common view, the new international institutions are replacing the state. It should be noted, however, that the executive maintains the ability to act decisively in the supranational sphere, whereas the legislative is significantly weakened or lacks this capacity completely.

In the EU, national governments have an essential role regarding the composition of the main legislative institutions. The European Council, which defines the EU general political orientation, is comprised of the heads of state or government from the member states. The Council of Ministers, which is the main decision-making body, represents the interests of the member states. It is comprised of one minister from each state, which is usually the minister responsible for the subject under discussion, such as agriculture, transportation, social affairs, or justice. The COREPER, the Committee of Permanent Representatives of the member states, was set up to prepare the work of the Council. It is comprised of officials at a lower level than the ministers.

The EU Commission is the driving force in the legislative process since it has the right to propose draft legislation, and it embodies the community interest. Before the Nice Treaty (2001), its members were appointed by the state governments. At present, the Commission's appointment corresponds to the Council (in its composition as the heads of state or government) by a qualified majority voting. Nonetheless, this modification does not have much practical relevance, since the heads of state or government were those who appointed the commissioners before the Nice Treaty. Arguably, qualified majority voting could introduce a different dynamic. The Nice Treaty, however, establishes that the Council shall adopt the list of candidates "drawn up in accordance with the proposals made by each Member State."⁴⁷ Hence, ultimately, each national government can nominate one commissary. The ability to nominate them demonstrates the privileged position of national governments over parliaments.

The European Parliament is elected by European citizens and represents them. It has had a secondary role in the legislative process, but as a consequence of the extension of the co-decision procedure it has "come close to attaining co-

case, for instance, of the European Court of Justice in the EU, the European Court of Human Rights in the European Convention of Human Rights, or the Appellate Body in the WTO.

47. Treaty Establishing the European Union, Dec. 12, 2002, 2002 O.J. (C 325) 121 art. 214 [hereinafter EC Treaty]; TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 13 (2003) ("If it were really true that the Commissioners did not in some sense represent their states, there would be no reason why they should be appointed on the nomination of their own governments.").

equal status . . . with the Council"⁴⁸ regarding an increasing number of subjects. Moreover, the Commission, as a body, is subject to a vote of approval by the EU Parliament and the candidates are subject to hearings. The Parliament, however, cannot reject single candidates, which weakens its power of control.

The European Court of Justice (ECJ) judges are appointed by the common accord of the member states' governments and there is one judge per member state.⁴⁹ This is not to suggest that the ECJ acts according to state preferences, but to emphasize that governments appoint ECJ *judges*, without parliamentary intervention.

It is easily realized that national parliaments are invariably absent from the composition and functioning of EU institutions. Particularly since the 1980s, national parliaments have adopted a more active role. They have expressed a desire for greater intervention in community affairs,⁵⁰ but little has been done to realize this aspiration. The Maastricht Treaty (1992) included two declarations calling for greater dissemination of information to national parliaments from governments, and the creation of a Conference of National Parliaments (COSAC), which would be consulted regarding significant EU issues. The Amsterdam Treaty (1997) included a Protocol that timidly promoted the role of COSAC and insisted on the need for national governments to inform parliaments about Commission legislative drafts. These initiatives have not succeeded in effectively promoting the role of national parliaments in EU lawmaking processes.⁵¹

As a result of European integration, member states' powers to unilaterally formulate domestic policies in myriad fields are constrained (especially when unanimity in the Council is not required). EU institutions, however, are not bodies totally separate from the states. States do not disappear, but they instead subsist in the executives. The executives established the new institutional structure through treaties and continue to participate in EU institutions' functioning in different ways. What is more, within the Council, governments enjoy broader decision-making powers than they do domestically since they are not subject to the legislative.⁵² At the same time, national executives need to readapt to a new way of exercising their functions and must coordinate their action with foreign governments, through negotiation and dialogue. These sort of institutions, comprised of government members, such as the Council, might

48. Paul Craig, *The Nature of the Community: Integration, Democracy, and Legitimacy*, in *THE EVOLUTION OF EU LAW* 38 (Paul Craig & Gráinne de Búrca eds., 1999).

49. EC Treaty art. 221.

50. Philip Norton, *National Parliaments and the European Union: Where to from Here?*, in *LAWMAKING IN THE EU* 209, 211 (Paul Craig & Carol Harlow eds., 1998).

51. *Id.* at 212.

52. ARACELI MANGAS MARTÍN, *DERECHO COMUNITARIO EUROPEO Y DERECHO ESPAÑOL* 187 (2d ed. 1987).

be seen as an extension of executive power at the international level, or at least as providing a framework for supranational decision-making by executives. International executive action should be regarded in connection with domestic functions, instead of occurring in a separate sphere.⁵³ As a consequence, the traditional dichotomy between the national and international spheres tends to blur. In sum, executives participate in lawmaking processes at the supranational level and thus shape domestic policies, while national legislatures are essentially left aside.⁵⁴

C. Implementing international norms within domestic legal orders

Broadly speaking, international treaties or other norms emanating from international organizations might be directly applicable (*self-executing*) or not (*non-self-executing*) within domestic legal orders. The latter, but sometimes the former too, require implementing national norms. Such implementation might leave a margin of discretion to national authorities. Thus, it is important to decide which institution is in charge of implementing international norms.

With the implementation of EU law, the member states' duty of collaboration is combined with the principle of institutional and procedural autonomy. As such, EU law does not prescribe the bodies and proceedings for implementing EU legislation. Thus, the states will proceed according to domestic constitutional provisions. Yet, the implementation of EU law tips the institutional balance in favor of the executive.

The main EU norms are regulations and directives. EU regulations are essentially legislative acts creating rights and obligations for EU citizens. Usually, EU regulations need no further implementation. Sometimes, however, enforcement measures are needed, such as when a regulation explicitly calls for enforcement, or the terms of the regulation are rather vague. On the contrary, directives are not directly applicable within domestic legal systems.⁵⁵ They are binding as to results to be achieved, but leave to the national authorities the

53. SLAUGHTER, *supra* note 8, at 223.

54. Thomas Poguntke, *A Presidentializing Party State? The Federal Republic of Germany*, in *THE PRESIDENTIALIZATION OF POLITICS: A COMPARATIVE STUDY OF MODERN DEMOCRACIES* 63, 68-69 (Thomas Poguntke & Paul Webb eds., 2005) (Regarding Germany, Poguntke explains how the shift of powers to the EU has "introduced a significant 'executive bias' into the process of national policy formulation. When the chancellor (or a government minister) comes back from a European or international summit, they are usually in no position to negotiate the results with their parliamentary majority. . . . What has been agreed between representatives of national governments can hardly be unravelled by national parliaments.").

55. However, the ECJ has admitted that some directives are applicable under certain circumstances. See Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337; see also Case 158/80, *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v. Hauptzollamt Kiel*, 1980 E.C.R. 1805.

choice of form and method to achieve. Hence, it is for each state to decide whether the legislative or the executive should transpose EU directives.

In practice, since the general regulation of specific subject matters is contained in EU norms, the most common form of action turns out to be implementation by the executive. With regard to EU regulations, given their degree of detail and direct applicability, the executive is usually in charge of issuing implementing norms, in case they are needed. With regard to directives, in opposition to conventional wisdom, for example in Spain, a surprisingly high number of directives are transposed by means of executive regulations⁵⁶ (*real decretos u órdenes ministeriales*). Since Spain's accession to the EU, only an approximate 15% of all transposing norms are statutes.⁵⁷ Moreover, transposing laws very often merely reproduce directive provisions.

Concurrently, some scholars argue that the legislative process is not advisable for the everyday implementation of EU law⁵⁸ for several reasons: legislative procedures are slow and complex; it is pointless reopening the political debate; amendments are not permitted; and the sovereign nature of the legislative is "hardly compatible with a function subordinated to the principles, goals, and context of EU norms."⁵⁹ In contrast, executive decision-making procedures are thought to be better fitted to the application of EU law, since they are simpler, faster, and more efficient.⁶⁰ Furthermore, governments were involved, as members of the Council, in the drafting of the EU legislation being implemented.⁶¹

Additionally, in several member states, parliaments have generally authorized governments to enact norms with force of law to implement EU law. In the United Kingdom, for instance, the same statute that incorporated EU law

56. "EU regulations," which are legislative norms emanating from EU institutions, should not be confused with "executive regulations," which are norms issued by national executives within domestic systems.

57. *Subdirección General de Asuntos Legales Comunitarios de la Secretaría de Estado para la Unión Europea, Ministerio de Asuntos Exteriores y de Cooperación*, March 13, 2006. According to data provided by the *General Secretary of the European Commission*, March 30, 2006, in Spain, the percentage of directives transposed by statute is 12.9%. Note that these figures are not measuring exactly the same, and that the percentage of directives transposed by statute might be lower than the percentage of transposing norms that are statutes because the same directive might be transposed by more than one legislative act. All the colleagues I told about these figures were struck by these low percentages.

58. MANGAS MARTÍN, *supra* note 52, at 185; Vjijm Bekkers et al., *Going Dutch: Problems and Policies concerning the Implementation of EU Legislation in the Netherlands*, in *LAWMAKING IN THE EUROPEAN UNION* 454, 459 (Paul Craig & Carol Harlow eds., 1998).

59. ARACELI MANGAS MARTÍN & DIEGO J. LIÑÁN NOGUERAS, *INSTITUCIONES Y DERECHO DE LA UNIÓN EUROPEA* 502 (2005) [authors' translation].

60. MARTÍN, *supra* note 52, at 192; Vjijm Bekkers et al., *supra* note 58, at 459, 465.

61. MARTÍN, *supra* note 52, at 192.

within the domestic legal order, the European Communities Act 1972, authorized government to enact norms “as might be made by Act of Parliament.”⁶² In Spain, such general legislative delegations are banned by article 82 of the Constitution, but legislative delegations for implementing EU law are admitted within the constitutional limits. Finally, “decree-laws,” which allow government to enact norms with force of law in case of “extraordinary and urgent necessity,” could be used, for example, when the deadline to transpose directives is about to elapse, thus avoiding the violation of EU law.

Therefore, with regard to the implementation of EU law, the legislative is commonly bypassed by the executive, which alters the interplay between legislative/executive acts. The dominant scholarly opinion in Spain rejects “independent” executive regulations, which are those not developing previous legislative acts.⁶³ As a consequence of EU integration, however, the executive may enact independent regulations (directly implementing EU law). Formally, these regulations are not independent from EU “legislation.” Yet, from the standpoint of the democratic principle, these regulations are independent from norms enacted by the body democratically representing the people.

In addition, constitutions might “reserve” specific subjects to the legislative, such as consumer protection or internal trade according to the Spanish constitution. This means that parliament has the exclusive right to legislate on the “reserved” areas. The executive may only intervene to merely complement legislative acts when expressly authorized by parliament. When reserved subjects are transferred to the EU, parliament’s autonomy is significantly (or totally) constrained. The legislative is not directly replaced with the executive, but with EU institutions. Yet, as argued before, the executive participates in the Council.

On the whole, with regard to subjects allocated to the EU, parliaments are bypassed in their main legislative function.⁶⁴ First, the general regulation of a wide range of subjects (whether under parliamentary reserve or not) takes place at the EU level, in which executives have the ability to act through the Council. Second, within the domestic legal order, EU law is primarily implemented through executive regulations. Thus, once specific subjects are transferred to the EU, the executive enhances its decision-making powers over these subjects.

62. John A. Usher, *The Legal Framework for Implementation in the United Kingdom*, in *IMPLEMENTING EC LAW IN THE UNITED KINGDOM: STRUCTURES FOR INDIRECT RULE* 98 (Terence Daintith ed., 1995); see MARTÍN, *supra* note 52, at 194-96 (for other countries that adopted general legislative delegations).

63. GARCÍA DE ENTERRÍA, *I CURSO DE DERECHO ADMINISTRATIVO* 214-17 (2004) (“Regulations cannot be independent from statutes, for the simple reason that the creation of objective norms for the citizens cannot be independent from the Law in the modern state” [author’s translation].).

64. LUCIANO PAREJO ALFONSO, *DERECHO ADMINISTRATIVO* 202 (2003).

On a different note, the new functions stemming from European integration have led to the reorganization of domestic administrative structures. The national will expressed at the international level is shaped within the public administration, which also carries out a main role regarding implementation. As a result, the national administration tends to expand. In the words of Luciano Parejo, "Supranational integration constitutes a main factor for the transformation of the administration and national administrative law. The reason is clear[:] it extends the function of national public administrations, turning them into indirect administrations of the community-European sphere."⁶⁵ In Spain, EU integration has had an important impact upon administrative organization. The Secretary of State for the EU, within the Ministry of Foreign Affairs, was set up to "coordinate the action of the Spanish administration within the Community institutions." The Secretary of State for the EU encompasses the General Secretary for the EU, the General Directorate for Integration and Coordination of Economic and General Affairs, and the General Directorate for Coordinating the Internal Market and other Community Policies. Each of these units is divided into several sub-general directorates. Moreover, other units and specialized bodies have proliferated within the several ministries to develop functions related to specific supranational policies affecting their respective fields. Inter-ministerial commissions have also been created to coordinate the several ministries.

IV. THE CONTESTED LEGITIMACY OF THE INTERNATIONALIZATION OF LAWMAKING PROCESSES

The mounting concentration of power in the executive, vis-à-vis the legislative, within domestic legal orders has long been a subject of concern.⁶⁶ This tendency has only been exacerbated as a consequence of the internationalization of lawmaking processes. The development of full-fledged international regulatory regimes covering myriad subjects and the intense collaboration through transnational networks heavily influence or even shape domestic policy-making and ultimately the regulation of citizens' everyday lives. Hence, the declining role of national parliaments is troublesome from the standpoint of the democratic legitimacy of the new lawmaking processes and legal outcomes. Critics condemn the distortion of the domestic balance of interests and policy-making processes.

65. *Id.* at 204 [author's translation].

66. PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 169 (2003) ("Executives tend to be dominant in most modern domestic polities The idea that national parliaments really control the emergence or content of legislative norms no longer comports with reality."); see also Martin Shapiro, *Implementation, Discretion and Rules*, in *COMPLIANCE ENFORCEMENT EUR. COMMUNITY L.* 27 (J. A. E. Vervaele ed., 1999).

One might think that in presidential systems, as opposed to parliamentary systems, the decline of national parliaments and the parallel enhancement of executive power do not threaten democratic values, since presidents are directly elected by the people.⁶⁷ It should be noted that without taking into account other features of these systems, the mere difference regarding direct election does not seem to be enough to support this claim. While presidents might have a stronger representative claim than prime ministers in parliamentary systems; parliamentary systems offer parliaments important mechanisms to claim political responsibility on the prime minister,⁶⁸ which could be used to monitor international executive action. For example, in the worst case scenario, the censorship motion allows parliaments to vote prime ministers out of office for political reasons. Furthermore, presidents tend to be institutionally stronger than prime ministers (and in many instances they have shown a tendency to abuse mechanisms available to them, such as decree-laws).⁶⁹ Thus, the general trend toward enhancement of executive power due to globalization could be escalated in presidential systems. Since there are always two sides to these arguments, it is difficult to broadly sustain that the enhancement of executive power is less problematic in presidential systems from the standpoint of democracy.

In addition, the fact that both parliament and president are directly elected does not mean they have the same claim to democratic representation, basically for reasons of composition, decision-making processes, and accountability. Parliaments encompass majorities and minorities, and the legislative process secures that the plurality of interests will be taken into account. Despite the fact that legislative practice is far from ideal, the requirements of deliberation, publicity, and transparency favor mutual accommodation of conflicting interests and public control by the electorate. Since more and more issues are decided at the international level, legislative autonomy and parliamentary control over the executive have been undermined. Although it might well be that democratic theory does not dictate the terms in which power is shared, it requires securing a system of checks and balances. If the internationalization of lawmaking processes increasingly tips the balance in favor the executive (acting beyond the state), at least, this should raise some flags from the vantage of representative democracy.⁷⁰ This is not an end point, but just a departure point for reflection. As this article will argue, new forms of international lawmaking are not

67. As Owen Fiss suggested in his remarks to this panel.

68. After all, in parliamentary systems, parliaments elect prime ministers and the confidence given to prime ministers in the nomination act needs to be maintained throughout their mandate.

69. Angelina Cheibub Figueiredo & Fernando Limongi, *Constitutional Change, Legislative Performance and Institutional Consolidation*, 1 BRAZ. REV. SOC. SCI. 73 (2000).

70. Rubinfeld, *supra* note 38, at 2009 (“The fact that the President chiefly manages US foreign relations exacerbates, rather than relieves, American constitutional anxieties about the ability of treaties to override the ordinary legislative process.”).

undemocratic or illegitimate, but one needs to acknowledge the concerns arising from the representative democratic model and recast the sources of legitimacy. From this perspective, one should then proceed to rethink the institutional design.

To counteract the declining role of the legislative power, some have proposed enhancing parliamentary participation in the international sphere. A world (or international-regional) parliament, however, is not such a viable option, among other reasons, because it is dubious whether at that level exists (or might exist) the kind of collective national identity (*demos*) that representative democracy requires as grounding the legitimate functioning of democratic systems.⁷¹ As most analysts agree, even the EU, with a high degree of integration, still lacks a European *demos*. Consequently, the democratic deficit cannot simply be solved by granting more powers to the European Parliament.⁷² A European collective identity, however, could evolve in the future.⁷³ In any event, to understand the European *demos* as replicating national identity would be not only quite unfeasible, but not even desirable.⁷⁴ Thus, instead of discussing whether an inter-national *demos* exists or might exist in the future, it seems more promising to overcome the traditional way of thinking about the *demos*. Instead, the idea of community should be reformulated on the basis of other elements that might promote common identity and solidarity among diverse peoples to legitimize collective decision-making.⁷⁵ In addition, there are other operational drawbacks to a world parliament, such as the difficulties for effective representation when representatives are too remote from the citizenry. Also, the variety of forms and contexts of international lawmaking might require diverse forms of legitimacy, other than the purely representative. Finally, the skepticism towards this option is also grounded on efficacy concerns, since executive action—being more flexible, fast, and technical—can better respond to the needs of globalization.

71. The *demos* (or the “people”) justifies that minorities are bound by decisions taken by a majority. I am not suggesting that within each state there is a perfectly homogeneous and uniform *demos*. I only mean to emphasize that the liberal representative democratic model presupposes this. If the *demos* idea is already problematic within state borders, it is much more dubious at the international level. My concern in this paper is targeted to the international level, but it is important to question and reformulate this paradigm at both levels. Jorge Contesse and Ezequiel Nino challenged me on this issue.

72. Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L.J. 282, 291-97 (1995).

73. See Jürgen Habermas, Remarks on Dieter Grimm’s ‘*Does Europe need a Constitution?*’, 1 EUR. L.J. 303, 305-07 (1995).

74. JOSEPH H. H. WEILER, THE CONSTITUTION OF EUROPE 341 (1999) (“It would be . . . ironic if the ethos which rejected the boundary abuse of the nation-state gave birth to a polity with the same potential for abuse.”).

75. Along these lines, Habermas, *supra* note 73, at 305-07, insists on the need to develop communication channels and a European sphere of public debate.

Slaughter suggested that since the ideal of representative democracy is going to remain, it is vital to develop transnational legislative networks.⁷⁶ According to this scholar, such networks would contribute to solving problems regarding the distortion of national political processes.⁷⁷ Given the structural reasons indicated before, however, such networks could hardly reach the level of effectiveness of government networks. Furthermore, even if parliamentary representatives participated and possibly contributed to the legitimacy of lawmaking processes in the international sphere, the popular will would, nonetheless, be distorted because national parliamentary representatives would need to collaborate with foreign representatives, who represent other popular wills. Therefore, the challenge to representative democracy cannot be solved by merely developing parallel legislative networks.

The most effective function for national parliaments, sometimes underrated in this context, is monitoring the executive through internal mechanisms, which should be strengthened (or created anew) regarding international executive action. The several members of the executive develop their functions in the national and international spheres in such a way that their responsibilities should be recast to include both. Hence, parliaments' abilities to participate and monitor governmental international action should be enhanced, given the increasing influence of international lawmaking upon the domestic legal order. Along these lines, for example, ministers in the EU could be subject to a "mandate" so that they shall follow in the Council of Ministers the positions previously approved by the national parliament.⁷⁸ Also, national parliaments could be consulted or even given the power to nominate members to the EU Commission.

Under the conceptual framework of representative democracy, the problem resides in globalization itself, as a denationalization process, and ultimately in the breakdown of the national sovereignty paradigm. The model of democratic legitimacy on the basis of popular consent presupposes a self-governing people who determine their own future within the territorial boundaries of the state.⁷⁹ As a consequence of globalization, however, not all power exercised within the state derives strictly from national sources.⁸⁰ Lawmaking takes place in a

76. Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1073 (2003).

77. SLAUGHTER, *supra* note 8, at 238.

78. *See supra* note 50, at 216 (such as in Denmark).

79. *See HELD, supra* note 17 (without focusing on national boundaries, the ideal model of representative democracy has already been questioned from both a descriptive and a normative standpoint, and alternative models of democracy have been advanced, for instance: pluralist, competitive elitist, or neocorporatist).

80. Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1, 16 (1993).

plurality of centers beyond the state.⁸¹ The fact that these processes do not fulfill the classic democratic model does not mean that international law or other forms of transnational decision-making are illegitimate. A concept of legitimacy that presupposes the unity of state-power-nation cannot be transferred to the international sphere. Instead, it is necessary to rethink the sources of legitimacy in light of new problems and institutions in a globalized world.

From the standpoint of political philosophy, several scholars have formulated alternative democratic models applicable to the international sphere:⁸² deliberative democracy,⁸³ cosmopolitan democracy,⁸⁴ and horizontal democracy,⁸⁵ among others. From different perspectives, decision-makers' accountability⁸⁶ is regarded as essential in guaranteeing the legitimacy of international lawmaking.⁸⁷ Along these lines, some insist on the need to establish mechanisms to secure transparency⁸⁸ and participation⁸⁹ in decision-making processes beyond the state.⁹⁰ Judicial review, whether national or international, is also an important mechanism of control.⁹¹ In addition, specialized technical knowledge (*expertise*), and more prominently, the

81. David Held, *Democracy and the New International Order*, in COSMOPOLITAN DEMOCRACY 96, 99 (Daniele Archibugi & David Held eds., 1995) (“[N]ational communities by no means make and determine decisions and policies exclusively for themselves, and governments by no means determine what is right or appropriate exclusively for their own citizens.”).

82. *Id.* at 96-97 (“While we cannot do without democracy, it is increasingly bankrupt in its traditional shape and, thus, needs fundamental reform, in the short and long terms.”).

83. DEIRDRE CURTIN, *POSTNATIONAL DEMOCRACY: THE EUROPEAN UNION IN SEARCH OF A POLITICAL PHILOSOPHY* (1997); Jens Steffek, *The Legitimation of International Governance: A Discourse Approach*, 9 EUR. J. INT'L REL. 249, 271 (2003).

84. Held, *supra* note 81, at 106-17.

85. Slaughter, *supra* note 76, at 1071-73.

86. Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUDIES 347 (2001); Delbruck, *supra* note 7, at 42.

87. Kingsbury, Krisch, & Stewart, *supra* note 12, at 17 (authors approach legitimacy problems arising from globalization from the perspective of “global administrative law,” defined as “comprising the mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.”).

88. SLAUGHTER, *supra* note 8, at 235-37 (noting that transparency might be problematic from the standpoint of efficiency, since one of the advantages of transnational networks is their flexibility and informality).

89. See Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 9 IND. J. GLOBAL LEGAL STUD. 369, 374 (2001) (“While the ticket to participation in governance is knowledge and/or passion, both knowledge and passion generate perspectives that are not those of the rest of us.”).

90. Kingsbury, Krisch & Stewart, *supra* note 12, at 34-39.

91. *Id.* at 40.

effectiveness of international regulation to achieve specific goals could contribute to legitimacy from the standpoint of the outcome (*output legitimacy*).⁹² Legitimacy might be derived from several combined sources. Given the diversity of international organizations and transnational networks, the problems of legitimacy and the adequate strategies to face them might vary.⁹³ To conclude, I suggest an account grounded on the ideal of institutional balance to explain and justify current practices and formulate institutional arrangements to improve the legitimacy of lawmaking processes developing within inter-, supra-, and trans-national spheres.

The processes of decentralization of state power and recentralization in the executive are not just a necessary evil we should embrace simply because of improved effectiveness. Rather, an institutional balance account might provide the grounds for legitimacy. Accordingly, we should promote institutional arrangements capable of coping with the internationalization of lawmaking processes from the perspective of the checks and balances ideal as a source of legitimacy.

Hence, decentralizing lawmaking powers among a plurality of spheres should be welcome normatively. This contributes to overcoming the risks inherent in unlimited national sovereignty⁹⁴ by promoting collaboration and mutual control among state authorities and other actors within several decision-making sites. As such, the underlying motive spurring integration in Europe was to constrain the potential excesses of sovereign (even democratic) states by creating a supranational community with lawmaking powers.⁹⁵

At the same time, in this context, power is recentralized in the executive, to the detriment of the legislative. Setting a stable institutional framework would allow promoting the participation of several institutions, which need to collaborate in collective decision-making, and creating mechanisms of checks and balances among them. The pervasive criticism of the EU as democratically illegitimate emerges from comparing the EU with a conceptual model of representative democracy that cannot be transferred to the international sphere and does not even exist within the domestic sphere in its ideal version.⁹⁶ Some have suggested that if the EU is compared to the actual functioning of member

92. Delbruck, *supra* note 7, at 42-43.

93. *Id.* at 43.

94. Paul Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 264 (2004) ("A regime of nation-states was a regime at war or anticipating the possibility of war.").

95. Weiler, *supra* note 74, at 341 ("A central plank of the project of European integration may be seen, then, as an attempt to control the excesses of the modern nation-state in Europe, especially, but not only, its propensity to violent conflict . . .").

96. See CRAIG & DE BÚRCA, *supra* note 66 at 169-70; MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 24 (1966) (The same tendency toward executive aggrandizement exists within modern domestic polities.).

states' democracies, the democratic deficit criticism fades away.⁹⁷ Furthermore, admittedly, globalization creates pressures and incentives to develop forms of international collective regulation. If compared with the alternative of an heterogeneous group of international agreements exclusively dominated by the executive, the establishment of a stable institutional framework, such as the EU, offers more advantages not only from an efficiency standpoint (avoiding transaction and negotiation costs), but also from a legitimacy standpoint.⁹⁸ Decision-making processes become more transparent, and it is then possible to mandate the participation of diverse institutions representing varied interests. EU lawmaking procedures are founded on the twofold legitimacy of state governments represented in the Council and citizens in the European Parliament. The Commission contributes to the institutional balance in representation of the community interest.⁹⁹ Thus, a plurality of institutions (checking each other) must collaborate in supranational lawmaking.¹⁰⁰ Furthermore, the ECJ guarantees that EU institutions do not exceed their powers and that EU norms respect fundamental rights. The role of national parliaments, however, is still unsatisfactory. Yet, with the alternative of a web of *ad hoc* international agreements national parliaments could be totally ignored, with little hope to improve their position. In addition, the EU is a system of multilevel governance, in which the implementation of EU law requires the collaboration of all national authorities. Hence, within the EU institutional framework, there are important mechanisms of power distribution and control, both horizontally (among EU institutions) and vertically (between the EU and the member states). This is not to mean that EU institutional arrangements are totally satisfactory, but the creation of an institutional framework for supranational lawmaking contributes to ground the legal outcomes' legitimacy.

97. Andrew Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603, 621 ("When judged by the practices of existing nation-states and in the context of a multi-level system, there is little evidence that the EU suffers from a fundamental democratic deficit." This argument, however, does not necessarily lead to deny the democratic deficit, but emphasizes that it is not privative of the international sphere. Emphatically, this argument makes us aware that sometimes we ask more from international institutions than from domestic institutions from the standpoint of democracy.).

98. CRAIG & DE BÚRCA, *supra* note 66, at 170.

99. Craig, *supra* note 48, at 38-40.

100. *Id.* at 40 ("The very structure of decision-making under the co-decision procedure forces the players to re-evaluate their preferences in the light of the opinions expressed by the other participants.").

V. CONCLUSION: AN "INSTITUTIONAL BALANCE" ACCOUNT

Internationalization of lawmaking processes de-concentrates public power among a multiplicity of inter-, supra-, and trans-national spheres, on the one hand; and it re-concentrates power in the executive, on the other hand. As a result, the unitary conception of the state and the domestic constitutional balance of powers are altered. These transformations respond to the needs of globalization, but they might be troublesome from the standpoint of representative democracy. The legitimacy of the exercise of public power through new forms of international decision-making should be grounded in a model of checks and balances. From this standpoint, the plurality of spheres of international lawmaking rightly promotes collaboration and mutual control among state authorities and other actors. The parallel enhancement of executive power might be disciplined through institutional arrangements targeted to monitor its power. Within the domestic order, the mechanisms of control in the hands of national parliaments should be strengthened, since executive action beyond the state has an increasing impact upon national public policies. Regarding the international order, given its particular features and limitations, decision-making processes should be designed to secure mutual checks and balances among institutions representing diverse interests. Along these lines, the development of an institutional framework for lawmaking would promote transparency and participation of several institutions in a deliberative process in search for the common good. More thought needs to be devoted to what institutions and in representation of what interests we should aspire in these multiple spheres. As such, institutional balance as a mechanism to enhance participation and deliberation among institutions representing diverse interests and values in search for the common good may well be associated to a deliberative notion of democracy.¹⁰¹ Ultimately, the new conflicts and tensions stemming from the internationalization of lawmaking processes call for our political imagination to formulate models of legitimacy that permit the reconciliation of democracy with a plurality of decision-making sites at the inter-, supra-, and trans-national levels.

101. *Id.* at 36-42.

