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Jean Monnet Working Paper 02/11

Armin von Bogdandy

The European Lesson for International Democracy
The Significance of Articles 9 to 12 EU Treaty for International Organizations

NYU School of Law • New York, NY 10011
The Jean Monnet Working Paper Series can be found at
www.JeanMonnetProgram.org

ISSN 1087-2221 (print)
ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim

New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

THE EUROPEAN LESSON FOR INTERNATIONAL DEMOCRACY
THE SIGNIFICANCE OF ARTICLES 9 TO 12 EU TREATY FOR INTERNATIONAL ORGANIZATIONS

By Armin von Bogdandy [*]

Abstract

This text argues that Articles 9 to 12 of the EU Treaty provide a promising way to conceptualize and develop the democratic legitimation of international organizations. To be sure, the current European Union is not a democratic showcase. However, an innovative concept of democracy, neither utopian nor apologetic, has found its way into its founding treaty. It can point the way in conceiving and developing the democratic credentials not just of the EU, but of public authority beyond the state in general. Since comparison is a main avenue to insight, this piece will present those articles and show what lessons can be learnt for international organizations.

[*] I wish to thank Jochen von Bernstorff, Marie von Engelhardt, Marc Jacob, and Christian Wohlfahrt for their support.

A. Introduction

This text argues that Articles 9 to 12 of the Treaty on European Union[1] provide a promising way to conceptualize and develop the democratic legitimation of international organizations.[2] The core statement is: it is too early to sound swan songs on the future of democracy. The democratization of governance beyond the state can be coherently and plausibly conceived.

[1] **PROVISIONS ON DEMOCRATIC PRINCIPLES**

Article 9

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 10

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament.
Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 11

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit an appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.
The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

Article 12

National Parliaments contribute actively to the good functioning of the Union:
(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for the Protocol on the application of the principles of subsidiarity and proportionality;
(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;
(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;
(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;
(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

[2] This is but one facet of the broader discussion on the legitimacy of international law. On the more general debate, J. Brunnée and S. J. Toope, *Legitimacy and Legality in International Law* (2010); J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (2009); Reinisch, 'Securing the Accountability of International Organizations', in J. Klabbers (ed), *International Organizations* (2005) 535, at 538 *et seq.*; R. Wolfrum and V. Roeben (eds), *Legitimacy in International Law* (2008).

European social sciences, legal scholarship, political theory, and the European public in general have debated the issue of democracy in European integration for quite some time and to good result. To be sure, the current European Union is not a democratic showcase.[3] However, an innovative concept of democracy, neither utopian nor apologetic, has found its way into its founding treaty.[4] It can lead the way in conceiving and developing the democratic credentials not just of the EU, but of public authority beyond the state in general. Since comparison is a main avenue to insight, this article will present Articles 9 to 12 of the EU Treaty and show what can be learnt from them for international organizations.[5]

This approach is likely to be criticized as eurocentric, because international democracy might be a specific European concern, and because it addresses the issue on the basis of the EU Treaty. This piece is in fact written from a particular standpoint, situated in Germany in the year 2011. As such, it does not make categorical claims as to truth, nor does it consider alternative constructions to be false. Given the political, cultural, and ideological diversity in world society, any contribution that purports to be conceived as universal should be viewed with suspicion. This piece is meant as an intellectual contribution to the debate on global governance, in the context of which it will hopefully be contested. It claims to be scientific, yet not because it falsifies other claims, but because of its internal coherence, the circumspection in which the legal material is presented, and the analytical potential of the concepts it offers for the understanding and the development of international law.

One might doubt if those articles in the EU Treaty can be of any meaning for international organizations, since the EU is far more powerful and developed than any international organization. The core argument supporting comparison between the EU and international organizations rests on the assumption that the EU like many international organizations exercises

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3 Mény, 'Can Europe be Democratic? Is it Feasible? Is it Necessary? Is the Present Situation Sustainable?', 34 *Fordham Int'l Law J.* (2011) 1287, at 1301 *et seq*.

4 Similarly J. Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law* (in this volume).

5 This text is to be understood as part of a project that conceptualizes and develops international law along a public law paradigm, for details see the two volumes A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann and M. Goldmann (eds), *The Exercise of Public Authority by International Institutions* (2010); A. von Bogdandy and I. Venzke (eds), *Beyond Dispute* (2012); both partially available in German Law Journal Vol. 9 (2008) 1375, 1909 and 2013, Vol. 12 (2011) 979 and 1341.

public authority.[6] As the exercise of any public authority begs the question of its democratic justification, this is the basis of comparison. Of course, it would be extremely suspicious if this contribution arrived at the conclusion that international organizations need to emulate the EU in order to enhance their democratic credentials. That is not the objective of this paper. It aims at a basic conceptual framework for addressing the issue of democracy in international institutions. To advance the understanding, interpretation and development of individual organizations, this framework needs to be developed in light of their specificities.[7] Given their profound differences, this contribution remains at a high level of abstraction, with all the limitations this entails. In this spirit, it will sketch the difficult path from a political idea to positive law (B.), present the path-breaking conceptual innovation in EU law (C.), highlight the importance of parliamentary institutions (D.), stress the importance of further instruments of accountability and responsiveness (E.), and conclude with a look at the role of domestic institutions (F.).

B. Historical Sketches

I. The Road to Articles 9 – 12 EU Treaty

For many decades, European democracy was legally a non-issue, as international democracy remains for many scholars today. The focus of legal minds was rather on the rule of law. With regard to the latter, there was consensus *ab initio* that it should be applied *directly* to the acts of the supranational organs, i.e. that the Community needed its proper rule of law legitimacy. Mere *indirect* application, i.e. via the national officials participating in the European political process or implementing its result in the national sphere, was always considered insufficient.[8] By

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[6] This concept of authority rests on Barnett and Duvall, 'Power in global governance', in M. Barnett and R. Duvall (eds), *Power in Global Governance* (2005), 1. Barnett and Duval define power in very broad terms as "the production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate" (*ibid.*, at 8). This argument is fully developed in von Bogdandy, Dann and Goldmann, 'Developing the Publicness of International Public Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008) 1375.

[7] On the diversity J. Klabbers, *An Introduction to International Institutional Law* (2nd ed. 2009), at 6 *et seq*., 153 *et seq*.; H. Schermers and N. Blokker, *International Institutional Law* (3rd ed. 1995), § 58.

[8] For the international level, this issue is most importantly discussed with respect to the Kadi judgment of the ECJ, Cases C-402/05 P and C-415/05 P, *Kadi et al. v. Council and Commission*, [2008] ECR I-6351, paras. 248 *et seq.*; Halberstam and Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', 46 *Common Market Law Review* (2009) 13; see also the special issue of the International Organizations Law Review: Klabbers, 'Kadi Justice at the Security Council?', 4 *International Organizations Law Review* (2008) 293; Wessel, 'The Kadi Case: Towards a More Substantive Hierarchy in International Law?', 5 *International Organizations Law Review* (2008) 323; Hinojosa Martínez, 'Bad Law for Good Reasons: The Contradictions of the Kadi Judgment', 5 *International Organizations Law Review* (2008) 339; van den Herik and Schrijver, 'Eroding the Primacy of the UN System of Collective Security: The

contrast, the postulate of democratic legitimation *proper* to the Community has been only a *political* request of European federalists. Until the 1990s, the view was held that supranational authority did not legally require a democratic legitimation of its own.[9] Then, a rapid development took place with two focal points: Union citizenship and the Union's organizational set-up.[10]

The development from political demand for an independent democratic legitimation to *legal* principle has been arduous. Tellingly, even the 1976 Act introducing the election of the representatives of the Parliament by direct universal suffrage does not yet contain the term "democracy".[11] Beginning in the 1980s, the European Court of Justice (ECJ) very cautiously started to use the concept of democracy as a legal principle.[12] The Treaty of Maastricht then employed this term, although it mentions its relevance for the supranational level only in the 5th recital of the Preamble.[13] With Article F EU Treaty in the Maastricht version of 1992, democracy found its way into a Treaty provision – yet not addressing the Union, but rather with a view to the Member States' political systems. The leap was not made until the Treaty of Amsterdam of 1997, Article 6 EU of which laid down that the principle of democracy also applies to the Union. This internal constitutional development is buttressed by external provisions. Of particular importance are Article 3 of the first Protocol to the European Convention on Human Rights in its interpretation by the European Court of Human Rights,[14] as well as – albeit less clearly – national provisions such as Article 23(1) German Basic Law.[15]

Judgment of the European Court of Justice in the Cases of Kadi and Al Barakaat', 5 *International Organizations Law Review* (2008) 329.

9 Randelzhofer, 'Zum behaupteten Demokratiedefizit der Europäischen Gemeinschaft', in P. Kirchhof and P. Hommelhoff (eds), *Der Staatenverbund der Europäischen Union* (1994) 39, at 40.

10 See in detail Dann, 'The Political Institutions', and Kadelbach, 'Union Citizenship', in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd rev. ed. 2010), 237 and 443 resp.

11 Act and decision concerning the election of the representatives of the Assembly by direct universal suffrage, OJ 1976 L 278/1.

12 The democratic principle serves predominantly to enable judicial review, Case 138/79, *Roquette Frères v. Council*, [1980] ECR 3333, para. 33; Case C-300/89, *Commission v. Council*, [1991] ECR I-2867, para. 20; Case C-392/95, *Parliament v. Council*, [1997] ECR I-3213, para. 14.

13 On the development of the European Union through successive treaties see Guerra Martins, 'European (Economic) Community', in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2008), online edition, available at www.mpepil.com (7 September 2011).

14 *Matthews v. UK*, ECtHR Grand Chamber (1999) Application No. 24833/94; Ress, 'Das Europäische Parlament als Gesetzgeber: Der Blickpunkt der EMRK', 2 *Zeitschrift für Europarechtliche Studien* (1999) 219, at 226.

15 On similar provisions in other constitutions, see Grabenwarter, 'National Constitutional Law Relating to the European Union', in von Bogdandy and Bast, *supra* note 10, 83.

Articles 9 to 12 EU Treaty (in the version of the Lisbon Treaty) need to be understood against this background.[16] These articles are based on the main positions advanced in what is a 20 years old debate, and succeed in bringing them into a forward looking synthesis, as will be shown in a moment. This synthesis has been elaborated in one of the most involved political processes that the European continent has ever seen, and its enactment has gone through very burdensome procedures, mostly constitutional amendment procedures. By that time, politicians and the public have been well aware of the importance of that Treaty, not least after the failure of the Constitutional Treaty of 2004. These provisions have also been the object of detailed judicial review.[17] Accordingly, there is much to be said for the view that the concept of democracy as laid down in these articles enjoys the consent of the vast majority of European citizens. Granted, this consent applies only to Europe; it does not provide these articles authority beyond the EU. What it does, however, is to put them forward as a basis for further thought, since they provide the first concept of democracy for non-state institutions that has been elaborated in such a complex mode and has succeeded in being democratically endorsed.

II. The International Debate

Developing thoughts on the basis of Articles 9 – 12 EU Treaty for the debate on international democracy is further warranted by the fact that the European debate can be seen as an offspring of the broader and older international debate.[18] Since the first decades of the 20th century, proposals were presented which aimed at some form of global representative assembly.[19] Most

[16] Schimmelfennig, 'Legitimate Rule in the European Union', 27 *Tübinger Arbeitspapiere zur Internationalen Politik und Friedensforschung* (1996), available at http://tobias-lib.uni-tuebingen.de/volltexte/2000/150 (10 August 2011); H. Bauer *et al.* (eds), *Demokratie in Europa* (2005); B. Kohler-Koch and B. Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (2007); and on the legal debate in historical retrospective: A. von Komorowski, *Demokratieprinzip und Europäische Union. Staatsverfassungsrechtliche Anforderungen an die demokratische Legitimation der EG-Normsetzung* (2010), at 155-168.

[17] Spanish Constitutional Court, Case Rs. 1/2004, Judgement of 13 December 2004; German Federal Constitutional Court, Judgement of 30 June 2009, BVerfGE 123, 267, 353; Czech Constituitional Court, Case Pl. ÚS 50/04, Judgement of 8 March 2006; Case Pl. ÚS 66/04, Judgement of 3 May 2006, para. 53; Case Pl. ÚS 19/08, Judgement of 22 November 2008, para. 97.

[18] Krajewski, 'International Organizations or Institutions, Democratic Legitimacy', in: Wolfrum, *supra* note 13 (8 September 2011).

[19] On the historical evolution of international parliamentary assemblies see Arndt, 'Parliamentary Assemblies, International', in: Wolfrum, *supra* note 13 (8 September 2011), at B.

important were theoretical proposals to establish a parliamentary assembly within the framework of the League of Nations, which never materialized.[20]

The fall of the Berlin wall gave renewed impetus to the debate on international democracy. First, given the apparent success of "Western" constitutional ideas, vocal authors started proposing democracy as a principle of international law to which the law and practice of states have to conform.[21] Second, the fall of the Berlin wall initiated an epoch of globalization and intense international activity. As international organizations became far more active, the conviction that their democratic legitimation was fully covered and secured by state consent began to erode. To the extent that they succeeded in establishing themselves as institutions of public authority that develop international law and that are involved in policy choices, functionalist narratives invoking common goals or values were increasingly challenged. They were no longer accepted as wholly satisfactory justifications for the activities of international organizations.[22] Abstract goals cannot justify concrete policy choices. As actors wielding public authority, their actions are increasingly seen as requiring a genuine mode of justification in light of the principle of democracy. Here lies the difference with respect to the earlier debate: whereas its proposals did not mainly address a possible legitimacy gap in international activity but rather aimed at furthering international federation, the contemporary proposals are propelled by the perception of some legitimatory insufficiency.

So far, this discussion has had few results in the general law of international institutions. However, various initiatives by civil society and international legal and policy experts have developed proposals for enhancing the democratic accountability of international institutions through institutional reforms and new legal approaches to global governance. The international

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[20] H. Wehberg, *Grundprobleme de Völkerbundes* (1926), at 83-84; G. Scelle, *Une crise de la Société des Nations. La réforme du Conseil et l'entrée de l'Allemagne à Genève* (1927), at 137-147; see also C. Kissling, *Repräsentativ-parlamentarische Entwürfe globaler Demokratiegestaltung im Laufe der Zeit. Eine rechtspolitische Ideengeschichte* (2005), available at http://www.forhistiur.de/zitat/0502kissling.htm (10 August 2011).

[21] Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) 46; N. Petersen, *Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht* (2009); for a critique Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World', 35 *New York University Journal of International law and Politics* (2003) 471.

[22] See Christiano, 'Democratic Legitimacy and International Institutions', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 119; Venzke, 'International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law', 9 *German Law Journal* (2008) 1401; and the critique of the functionalist necessity theory in: Klabbers, *supra* note 7, at 32.

debate is roughly where Europe stood at the end of the 1980s, when majority voting in the Council fully kicked in and the Community developed an unprecedented regulatory breath. By now, there is widespread agreement that the democratic question has become pressing - however, there is also a great insecurity over how to address it, and still more, over how to respond to it. In such a situation, comparison is of particular use.[23]

C. A Viable Idea of Democracy for International Institutions

Upon first glance, it appears as if the fall of the Berlin Wall and the dissolution of the Soviet bloc settled all fundamental issues over the core contents of the principle of democracy.[24] There is broad consensus regarding the necessary requirements of a state in order to qualify as being democratic. International lawyers,[25] comparative lawyers[26] as well as political and constitutional theorists[27] agree upon some elements deemed necessary: governmental personnel must ultimately derive their power from citizen-based elections that are general, equal, free and periodic. Moreover, all public power has to be exercised in accordance with the rule of law and has to be restricted through a guaranteed possibility of a change in power.[28] Yet how should it be understood for public institutions beyond the state?

I. The Concept of the EU Treaty

The uncertainty over how to understand the concept of democracy may be traced to contrasting understandings concerning the subject of democracy. [29] One still has to distinguish an

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[23] Schönberger, 'Verwaltungsrechtsvergleichung: Eigenheiten, Methoden und Geschichte', in A. von Bogdandy, S. Cassese and P. M. Huber (eds), *Handbuch Ius Publicum Europaeum IV* (2011) 493 *et seq.*, making the point for the development of administrative law.

[24] The most visible expression of this belief is F. Fukuyama, *The End of History and the Last Man* (1993), at 133 *et seq*.

[25] See citations in note 21; see also M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (1993), at 435 *et seq*.

[26] N. Dorsen *et al*., *Comparative Constitutionalism* (2003), at 1267 *et seq*.; C. Grewe and H. Ruiz Fabri, *Droits Constitutionnels Européens* (1995), at 223 *et seq*.

[27] G. Sartori, *Demokratietheorie* (1992), at 33, 40 *et seq*.

[28] "Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has at its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person. Democracy, with its representative pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law." Charter of Paris for a New Europe, 30 *I. L. M.* (1991) 190, at 194.

[29] For a taxonomy of the different approaches see von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', 15 *European Journal of International Law* (2004) 885, at 899.

understanding of democracy which takes as its starting point the people or the nation as a macro-subject (the holistic concept of democracy) from one which designates affected individuals as its point of reference (the individualistic concept of democracy). Against this background, the first important contribution of Articles 9 – 12 EU Treaty becomes apparent. A number of concepts which are prominent in national legal discourses on the concretization of the democracy principle can be discarded for the purpose of understanding democracy as pertaining to the Union. This is particularly true for the theory which understands democracy as being the rule of "the people". The concept "people" is in fact reserved for the polities of the Member States: Article 1(2) EU Treaty. This suggests that the principle of democracy within the context of the Union must be concretized independently from the concept of "people".[30] The notion of citizenship serves as a convincing alternative and informs Article 9 EU Treaty.[31] Notwithstanding unfortunate paternalistic overtones, this provision clearly stands in the tradition of republican equality under the individualistic paradigm that reaches back to Kant and Hobbes. This individualistic understanding is confirmed by Title V of the Charter of Fundamental Rights of the European Union, which guarantees citizenship rights as individual rights. European democracy is to be conceived from the perspective of the individual citizens, as confirmed by Articles 10(2) and 14(2) EU Treaty. The jurisprudence of the ECJ, which strengthens the rights of European citizenship, fortifies a cornerstone of European democracy.[32]

Yet it would be a misunderstanding of the Union's principle of democracy to place *only* the individual Union citizen in the centre. The Union does not negate the democratic organization of citizens in and by the Member States. Thus, alongside the Union citizens, the Member States' democratically organized peoples are acting in the Union's decision-making process as organized associations. The Union's principle of democracy builds on these two elements: the current Treaties speak on the one hand of the peoples of the Member States, and on the other hand of the Union's citizens, insofar as the principle of democracy is at issue. The central

[30] D. Curtin, *Postnational Democracy: The European Union in Search of aPolitical Philosophy* (1997), at 48 *et seq*.

[31] Weiler, Haltern and Mayer, 'European Democracy and Its Critique', 18:3 *West European Politics* (1995) 4, at 20.

[32] The pertinent case law is perhaps the most innovative and courageous of the Court in recent years, see Case C-184/99, *Grzelczyk* [2001] ECR I-6193; Case C-135/08, *Rottmann* [2010] ECR I-0000; Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000. For the evolution of the Union Citizenship see Kadelbach, *supra* note 10, at 445 *et seq*.

elements which determine the Union's principle of democracy at this basic level are thus named. The Union rests on a *dual structure of democratic legitimation*: the totality of the Union's citizens *and* the peoples in the European Union as organized by their respective Member States' constitutions.[33] This conception can be seen clearly in Article 10(2) EU Treaty.

Another lesson is that democracy beyond the state does not substitute, but complements domestic forms; it is best conceived as "multilevel". This entails a further important element. Many theories of democracy put the rule of the majority and the fight between competing parties at the very heart of their understanding.[34] This idea of Westminster democracy is almost impossible to reconcile with a developed dual structure of democratic legitimation; this can already be deduced from states which are federal (Belgium, Canada, Germany, the U.S.). Hence the rule of the majority cannot be the defining element of democracy in international settings. Democracy there can far better be conceptualized by theories centered on the search for broad consensus.[35]

This issue of consensus leads to the question: what is it all about? Some authors understand European democracy as a way of political self-determination.[36] As a matter of fact, the Union can be interpreted as an institution protecting Europeans from American, Chinese or Russian hegemony. But this does not satisfy the notion of political self-determination. The notion of self-determination can then be understood, firstly, in the sense of *individual* self-determination. To interpret the complex procedures of the Union in this sense, however, exceeds conventional imagination, or at least that of the present author. Furthermore, such an understanding might encourage intolerance with the tendency to exclude renegades. The alternative is to interpret democracy as *collective* self-determination. This appears viable in a nation-state on the basis of a strong concept of nation. It is, however, not transposable to the European level, since exactly such a collective, such a form of political unity, such a "We" is missing. The consequence of this

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[33] Concerning the model of dual legitimation see Oeter, 'Federalism and Democracy', and Dann, 'The Political Institutions', in von Bogdandy and Bast, *supra* note 10, 55 and 237 resp.; A. Peters, *Elemente einer Theorie der Verfassung Europas* (2001), at 209, 219; further Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1990) 2403, at 2470 *et seq*.

[34] Seminal Schönberger, 'Die Europäische Union zwischen „Demokratiedefizit" und Bundesstaatsverbot', 48 *Der Staat* (2009) 535, at 550.

[35] For an overview see M. G. Schmidt, *Demokratietheorien* (4th ed. 2008), at 306 *et seq*.

[36] Lord, 'Parliamentary Representation in a Decentered Polity', in Kohler-Koch and Rittberger, *supra* note 16, 160; C. Möllers, *Gewaltengliederung* (2005), at 28 *et seq.*; and, most prominently, J. Habermas, *Between Facts and Norms* (reprint 2008), at 90 and 315 *et seq.* and *passim*.

conception can therefore only be to perceive the Union as currently not capable of democracy. Although this conclusion can certainly be argued theoretically, it is useless for legal doctrine since it is unable to give meaning to a term of positive law, the "democracy" of Article 2 EU Treaty. Europeans who endorsed the Treaty hold a different understanding. Article 9 EU Treaty, read together with Articles 10 to 12 EU Treaty, suggests that the cornerstones of European democracy are civic equality and representation, supplemented with participation, deliberation, and control.

II. Lessons for International Organizations

A first lesson from European law for the international debate is that democracy is conceptually possible beyond the confines of the nation state and without a "people". It shows, moreover, that this conceptual move can convince huge majorities. Hence, realizing a more legitimate global order does not require a global people, let alone a world state.[37] European law indicates the development of transnational and possibly cosmopolitan forms of democracy. They are centered on the individual[38] and aim at representation, participation and deliberation to feed the citizens' values, interests and convictions into international decisions, but not at grand schemes such as self-government.

Even if such a concept of transnational and possibly cosmopolitan citizenship is theoretically and politically viable, one might doubt if it is meaningful in the context of legal thought. One could see it simply as a step too far and of no use for the understanding and development of the law as it stands today. Without a doubt, no legal text enshrines transnational or cosmopolitan citizenship. But this is not a prerequisite for legal concepts. A comparison with European integration is once more revealing. In the early sixties, Hans Peter Ipsen coined the concept of the market citizen as an influential legal concept.[39] It builds on individual rights granted by non-

[37] For an account of the cosmopolitan model of democracy see, for example, Archibugi, 'Principi di democrazia cosmopolita', in D. Archibugi and D. Bettham (eds), *Diritti Umani e Democrazia Cosmopolita* (1998) 66, at 99 *et seq*.; D. Archibugi and D. Held (eds), *Cosmopolitan Democracy. An Agenda for a New World Order* (1995); H. Brunkhorst, *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (2002), at 20.

[38] Besson, 'Das Menschenrecht auf Demokratie – Eine moralische Verteidigung mit einer rechtlichen Nuance', in G. Haller, K. Günther and U. Neumann (eds), *Menschenrechte und Volkssouveränität in Europa. Gerichte als Vormund der Demokratie?* (2011) 61, at 72.

[39] Ipsen and Nicolaysen, 'Haager Kongreß für Europarecht und Bericht über die aktuelle Entwicklung des Gemeinschaftsrechts', 17 *Neue Juristische Wochenschrift* (1964) 339, at 340; H. P. Ipsen, *Europäisches Gemeinschaftsrecht* (1972), at 187 *et seq*.

state legal sources and upheld by supranational institutions. In this light, transnational or cosmopolitan citizenship appears as a feasible legal concept. In particular, human rights have been developed as standards that protect the individual against any form of public authority.[40] Even a proponent of a state-centric understanding of international law will not deny that contemporary international law goes far beyond what Kant thought essential for a *Ius cosmpoliticum.*[41] Many see even further transformation. Christian Tomuschat, for example, states: "States are no more than instruments whose inherent function it is to serve the interests of their citizens as legally expressed in human rights",[42] "the State [is] a unit at the service of the human beings for whom it is responsible."[43] If one reads these developments in light of the EU experience, elements of a transnational and possibly cosmopolitan citizenship can be found in the law as it stands; it is not a utopian idea alien to the current legal world.[44]

A critique of this approach might state that it transforms any human rights approach into one of transnational and possibly cosmopolitan citizenship. It makes in fact good sense to distinguish. Most human rights approaches are focussed on protecting the individual. The idea of transnational and possibly cosmopolitan citizenship builds on this, but goes a step further. As Habermas's critique of Ipsen's concept of market citizenship rightly points out,[45] citizenship should be conceived today as entailing a dimension of political participation.[46] But even such elements exist in international law. Many international rights provide a space for political contestation and participation, such as Articles 19, 21, 25 ICCPR. Certainly, two elements dear to citizenship in the national context are missing: there is no defined group of citizens, no right of free movement, and there is no right to vote for international parliamentary assemblies.[47] But one

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40 Path breaking Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles', 12 *Australian Yearbook of International Law* (1992) 82.

41 Kant, 'Zum ewigen Frieden. Ein Philosophischer Entwurf', in K. Vorländer (ed), *Kleinere Schriften zur Geschichtsphilosophie, Ethik und Politik* (1964) 125 *et seq*.

42 Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law', 281 *Recueil des cours* (1999) at 161 *et seq*; A. Cancado Trindade, *International Law for Humankind* (2010), at 213 *et seq*.

43 Tomuschat, *supra* note 42, at 95.

44 In more detail A. Peters, in Klabbers, Peters and Ulfstein, *supra* note 2, at 153 *et seq*.

45 J. Habermas, *Die postnationale Konstellation* (1998), at 91, 142 *et seq*.

46 Haller, 'Einführung', in Haller, Günther and Neumann, *supra* note 38, at 11, 23; A. Peters, in Klabbers, Peters and Ulfstein, *supra* note 2, at 300.

47 For the importance of these elements see C. Schönberger, *Unionsbürger* (2005), at 489 *et seq.*

needs to distinguish federal concepts of citizenship[48] from transnational or cosmopolitan concepts. Moreover, there is broad consensus that the thought on such new forms of democratic politization should be open and experimental. For that reason, citizenship as a legal thought should not be made dependent on the legal creation of a group and direct elections,[49] but, more abstactly, on forms of inclusion.[50] Following the example of European Union law, transnational and possibly cosmopolitan citizenship can be used as legal concepts to analyze, interpret and develop the law of international organizations, as well as for constructions of justification. This does not aim at substituting states,[51] but it can be an essential supplement.

In fact, another lesson is to build on the dual structure of democratic legitimation. If the EU experience is of any use, democratic procedures at the international level are more likely to work if they are set out to supplement rather than substitute the democratic legitimation that is produced by domestic procedures. The experience of the European Union, where democratic legitimation is derived from direct elections by equal citizens (via the European Parliament) and indirectly through the peoples of the Member States (via the European Council and Council), exemplifies that different bases for legitimation can not only coexist, but can be mutually supportive. The democratic legitimation of supra- and international institutions needs to be conceived as composite and "multilevel".

Accordingly, the democratic legitimation of international public authority can be improved by better parliamentary control of the executive and perhaps national referenda on matters negotiated in international fora.[52] Secondly, legitimation can be derived more directly through institutional reforms at the international level, either through the establishment of international institutions of a parliamentary nature (see below), or through new forms of civic participation at

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48 Dazu näher Schönberger, 'European Citizenship as Federal Citizenship', 19 *ERPL/REDP* (2007) 61.

49 Seminal A. Sen, *The Idea of Justice* (2009), at 321 *et seq*.; Groß, 'Postnationale Demokratie', 2 *Rechtswissenschaft* (2011) 125, at 135 *et seq*. Its use in international relations is now firmly established, see Zürn, 'Vier Modelle einer globalen Ordnung in kosmopolitischer Absicht', 1 *Politische Vierteljahresschrift* (2011) 78. He shows that cosmopolitan convictions and dispositions are shared by large parts of the world population.

50 In detail Habermas, *supra* note 4.

51 This would go against the thrust of contemporary international law, K. Parlett, *The Individual in the International Legal System* (2011), at 372.

52 Wolfrum, 'Kontrolle der auswärtigen Gewalt', 56 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1997) 38 *et seq.*, 45 *et seq.* and 61 *et seq*.; furthermore Hailbronner, 'Kontrolle der auswärtigen Gewalt', *id*., 7 *et seq*.; Groß, *supra* note 49, at 143.

the global level (see below).[53] At the heart of the latter approaches lie understandings of democracy focusing on participation and deliberation. In this context, enabling the participation of non-governmental organizations (NGOs) as exponents of international civil society is often advanced as possible compensation for the detachment of international processes from national parliamentary control.[54] Pragmatic reforms are therefore geared towards the development of decision-making systems of international organizations, which facilitate the participation of civil actors in international procedures and emphasize the need for transparent and accountable exercise of public authority in international politics. On the basis of Article 9 EU Treaty the idea of a transnational and possibly cosmopolitan citizenship can be conceived in a way to provide meaningful suggestions for interpretation and institutional change.

D. Democratic Representation in Supra- and International Settings

I. The Idea of Representation in Article 10 EU Treaty

The world owes to the Federalist Papers the idea that the principle of democracy finds its most important expression in representative institutions;[55] Article 10(1) EU Treaty builds on this. Almost twenty years of discussion have revealed that parliamentarianism is without an alternative for the EU but has to be adapted to its specific needs. In accordance with the basic premise of dual legitimation, elections provide two lines of democratic legitimation. These lines are institutionally represented by the European Parliament, which is based on elections by the totality of the Union's citizens, and by the Council and the European Council, whose legitimation is based on the Member States' democratically organized peoples: see Article 10(2) EU Treaty. In the current constitutional situation, the line of legitimation from the national parliaments is clearly dominant, as shown in particular by Article 48 EU Treaty and by the

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53 Kadelbach, 'Die parlamentarische Kontrolle des Regierungshandelns bei der Beschlußfassung in internationalen Organisationen', in R. Geiger (ed), *Neue Probleme der parlamentarischen Legitimation im Bereich der auswärtigen Gewalt* (2003) 41, at 53 and 56 *et seq.*; for an overview of the relevant international practice see Schermers and Blokker, supra note 7, at para. 558 *et seq.*; Lindemann, 'Parliamentary Assemblies, International', in R. Bernhardt (ed), *Encyclopedia of Public International Law*, vol. III 2, 1997, 892-898; Walter, 'Parliamentary Assemblies, International, Addendum', in *id*., 898-904.

54 Of particular interest in recent years has been civil actors' access to the WTO Dispute Settlement mechanism: see Mavroidis, 'Amicus Curiae Briefs before the WTO: Much Ado about Nothing', in: A. von Bogdandy *et al.* (eds), *Liber Amicorum Claus-Dieter Ehlermann* (2002) 317 *et seq.*; and Steger, 'Amicus Curiae: Participant or Friend? The WTO and NAFTA Experience', *id*., 419 *et seq.*; Ascensio, 'L'amicus curiae devant les juridictions internationales', 105 *Revue générale de droit international public* (2001) 897. On the role of NGOs in more detail see part E.

55 For a recent reconstruction B. Brunhöber, *Die Erfindung „demokratischer Repräsentation" in den Federalist Papers* (2010), at 114 *et seq.*

preponderance of the Council and the European Council in the Union's procedures. Viewed in this light, one understands the Treaty of Lisbon as positing requirements for national parliaments in Article 12 EU Treaty.

The implications of this scheme are enormous. A transnational parliament can confer democratic legitimation although it does not represent a people or a nation and does not fully live up to the principle of electoral equality.[56] Moreover, a *governmental* institution is also able to do so. This contrasts sharply with national constitutional law. Even in federal constitutions, the representative institutions of sub-national governments are rarely acknowledged to have a role in conferring democratic legitimation.[57] The idea of a *unitary* people is too strong. By contrast, European executive federalism has its own democratic significance in light of the Union's democracy principle.[58]

II. Representation in International Organizations

The recent intellectual revival of concepts of global parliamentarism can – as was the case in the EU – be interpreted as a reaction to the perceived limits of democratic legitimation derived solely from the representation of Member States in international organizations.[59] In comparison to the EU, however, the legitimation question is even more acute in international organizations, as many governmental representatives fulfil their roles in the organization on behalf of autocratic regimes which do not represent their peoples.[60] In any event, executive decision-making in intergovernmental organizations is increasingly criticized in light of its scarce democratic input.[61]

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[56] On this latter point, in a critique of the Lisbon judgment of the German Federal Constitutional Court see Schönberger, *supra* note 34, at 548 *et seq*.

[57] A. Hanebeck, *Der demokratische Bundesstaat des Grundgesetzes* (2004), at 199 *et seq.*, 279 *et seq.* and 312 *et seq*.

[58] In detail see Oeter, 'Federalism and Democracy' and Dann, 'The Political Institutions' in von Bogdandy and Bast, *supra* note 10, 55 and 237 resp.

[59] Dahl, 'Can International Organizations be Democratic? A Skeptics View', in I. Shapiro and C. Hacker Cordón (eds), *Democracy's Edges* (1999) 19.

[60] Nye Jr., 'Globalization's Democratic Defecit - How to Make International Institutions More Accountable', 80 *Foreign Affairs* (2001) 2, at 3. On autocratic regimes in this context see also Pettit, 'Legitimate International Institutions: A Neo-Republican Perspective', in Besson and Tasioulas, *supra* note 22, 139, at 152 *et seq*.

[61] Patomäki, 'Rethinking Global Parliament: Beyond the Indeterminacy of International Law', 13 *Widener Law Review* (2006-2007) 375.

Calls for international parliamentary bodies in the international legal debate are by no means a new phenomenon. The first differentiated debates can be traced back to the time of the First World War and the interwar period, during which a number of renowned international lawyers proposed to create global parliamentary bodies in order to add a further layer of legitimation to international decision-making processes.[62]

Hitherto, two basic conceptions have dominated the debates about the composition of such international parliamentary bodies. According to the first model, a global parliament is supposed to consist of representatives from national parliaments. The Inter-Parliamentary Union (IPU) is often seen as a potential precursor to such a form of transnational parliamentary assembly – a universal parliament of parliaments.[63] Sectoral examples of this kind of international parliamentarism can be found in the parliamentary assemblies of existing international organizations, such as the Parliamentary Assembly of the Council of Europe, the MERCOSUR Parliament, the Pan-African Parliament of the African Union, the ASEAN Inter-Parliamentary Assembly, or the parliamentary assemblies of NATO, the Council of Europe, and the OSCE.[64] In this version of international parliamentarism, national elections remain the source of democratic legitimation.

Here, the source of legitimation is ultimately identical to that claimed by national governmental representatives when acting within international institutions.[65] To what extent can they provide additional democratic legitimation? The elements to answer this questions are laid down in Article 11 EU Treaty. If such assemblies operate in a transparent and deliberative way embedded in and responsive to the affected publics, the argument can be made that they can generate democratic legitimation proper. This finds a cautious expression in the election of judges to the ECtHR by the Parliamentary Assembly of the Council of Europe.[66] Ever since 1998, interviews

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62 The Development at the international level and in particular, *supra* note 20.

63 Arndt, *supra* note 19; Scelle, *supra* note 20, at 137-147.

64 For an analysis of the debate on the introduction of sectoral parliaments at the WTO and the World Bank see Krajewski, 'Legitimizing Global Economic Governance through Transnational Parliamentarization: The Parliamentary Dimensions of the WTO and the World Bank', 136 *TranState Working Papers* (2010), available at http://www.europarl.europa.eu/document/activities/cont/201012/20101207ATT07754/20101207ATT07754EN.pdf (8 September 2011).

65 The position of representatives of national parliaments in the national "chain of legitimation", however, is a privileged one, since they are the ones who have been directly elected to represent the citizens of the national polis.

66 Art. 22 ECHR. See J. Frowein, Art. 22, in J. Frowein and W. Peukert, *EMRK-Kommentar* (2009), para. 2.

with candidates by a sub-committee also bear the potential of nourishing the development of a public that further increases the legitimatory momentum. This procedural element has for example triggered a positive politicization of the election process when the assembly rejected a Member State's list of candidates because it did not include any female candidate.[67]

The second scenario envisages a parliamentary body consisting of members who either represent civil society organizations, or are directly elected in innovative global election procedures by individual human beings. This form of assembly, of which the European Parliament is so far the only existing – albeit regional – emanation, certainly is the more ambitious one. It was re-launched in the mid 1990s, around the 50th anniversary of the United Nations, in various political circles.[68] As to the international legal debate, Richard Falk and Andrew Strauss in 2000 called for a "Global Peoples Assembly" with directly elected representatives.[69] In their view, the elections for the assembly could as a first step be organized on an informal basis by a coalition of NGOs and like-minded states, without the blessing of the state-dominated system of international law. Once the established global assembly had assumed an influential political role in world politics, it could be legally institutionalized on the basis of a multilateral treaty.

In order to counter the argument that a global parliament would either be dominated by few populous countries or grow to an unworkable size, many different apportionment formulae have been developed since the late 1990s. Most of them rely on the size of the population of a particular country and use complex mathematical calculations and the principle of degressive proportionality. Thus, they advance solutions to the problem of representation of all citizens of the planet without marginalizing or excluding any region or country of the world. Since a number of the apportionment models under discussion manage to mitigate this problem to some extent, they make democratic representation through a global parliament at least theoretically

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67 Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights, ECtHR Grand Chamber, 12 February 2008. Also note that some statutes try to address the disproportionately weak representation of women explicitly, see, e.g., Art. 36(8)(a)(iii) ICC-Statute.

68 Kissling, *supra* note 20.

69 Falk and Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty', 36 *Stanford Journal of International Law* (2000) 191.

possible.[70] According to one of the models proposed by the NGO "Committee for a Democratic UN", which takes the world's nation states as a starting point for a (degressive) proportional apportionment, the global parliament thus created would consist of 365 members, of whom China would have 86 representatives, the United States 21, Germany 7, and Tuvalu 2.[71]

The question of what the functions and competences of such a global parliament should look like seems to have attracted somewhat less attention than the question of its legitimizing value. Proposals range from full scale global legislation to watchdog and veto functions for (other) organs. One of the more innovative proposals constructs a role for a global parliament in deciding controversial legal issues, such as conflicts between international human rights law and international economic law.[72] The question remains what proposals can gain the necessary political momentum eventually to add a further layer of legitimation to international institutions. Following the tradition of progressive internationalism, some experimentalism should be welcomed. Granted, there is no certainty as to how to increase democratic representation within international organizations. For that reason, soft law instruments should be used in order to test ideas and stop experiments which, after testing, fail to convince. The provisions in Articles 9 – 12 EU Treaty however show on which conceptual basis and in which direction experiments should be undertaken.

E. Beyond Representation: Transparency, Participation, Deliberation

I. Participatory and Deliberative Democracy According to Article 11 EU Treaty

Democracy needs representation, but goes beyond it. This insight is reflected in Article 11 EU Treaty.[73] Of particular significance are transparency, the participation of those affected,

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70 With an overview of different models for the apportionment of seats in such a body see Bummel, Committee for a Democratic U.N., Background Paper #1, October 2008.

71 *Id*., Annex, Model A. According to Model B of the Annex, if the criterion of a particular nation's contribution to the UN budget were to be added to the population-based formula, China would have 48 representatives, the US 57, Germany 22 and Tuvalu 2. In both models, the majority of the members of the assembly would come from democratic states. On the issue of democratic equality see Schönberger, *supra* note 34.

72 Patomäki, *supra* note 61.

73 In detail Mendes, 'Participation and the Role of Law After Lisbon: A Legal View on Article 11 TEU', 48 *Common Market Law Review* (2011) 1769.

deliberation and flexibility.[74] Participation and deliberation can inform the elaboration of decisions in a variety of ways. The transparency of public action, that is its comprehensibility and the possibility of attributing accountability, is essential. European constitutional law places itself at the forefront of constitutional development when it requires that decisions be "taken as openly as possible", i.e. transparently. The specifically democratic meaning of transparency in European law is confirmed by Article 11(1) and (2) EU Treaty.

Transparency requires knowledge of the motives. From the beginning, what was once called Community law has enshrined a duty to provide reasons even for legislative acts (Article 296 TFEU), something which is hardly known in national legal orders. This duty was first conceived primarily from the perspective of the rule of law,[75] yet its relevance for the principle of democracy has meanwhile come to enjoy general acknowledgement.[76] Access to documents, laid down in primary law in Article 15 TFEU and Article 42 Charter of Fundamental Rights of the European Union, is also of great importance to the realization of transparency. It has further become the subject of a considerable body of case law.[77] Another aspect is the openness of the Council's voting record on legislative measures: Article 16(8) EU Treaty.[78]

The second complex concerns forms of political participation beyond elections. Popular consultations appear to be an obvious instrument, and referenda have occasionally been used to legitimize national decisions on European issues (such as accession to the Union or the ratification of amending Treaties). Extending such instruments to the European level has been proposed for some time.[79] The restrictively designed citizens' initiative of the Treaty of Lisbon (Article 11(4) EU Treaty) falls short of this, but nevertheless shows some potential.[80]

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[74] Concepts of participatory and deliberative democracy have by now entered the mainstream of democratic thought, see Schmidt, *supra* note 35; Sen, *supra* note 49; A. Peters, in Klabbers, Peters and Ulfstein, *supra* note 2, at 268 *et seq*.; seminal Curtin, *supra* note 30, at 53 *et seq*.

[75] H. Scheffler, *Die Pflicht zur Begründung von Maßnahmen nach den europäischen Gemeinschaftsverträgen* (1974), at 44 *et seq.* and 66 *et seq.*

[76] Case C-64/05 P, *Sweden v. Commission*, [2007] ECR I-11389, paras. 54 and 64.

[77] Heliskoski and Leino, 'Darkness at the Break of Noon', 43 *Common Market Law Review* (2006) 735.

[78] C. Sobotta, *Transparenz in den Rechtsetzungsverfahren der Europäischen Union* (2001), at 144 *et seq.* and 198 *et seq.*

[79] Abromeit, 'Ein Vorschlag zur Demokratisierung des europäischen Entscheidungssystems', 39 *Politische Vierteljahresschrift* (1998) 80; J. Habermas, *Ach, Europa* (2008), at 105.

[80] Epiney, 'Europäische Verfassung und Legitimation durch die Unionsbürger', in S. Kadelbach (ed), *Europäische Verfassung und direkte Demokratie* (2006) 33, at 46 *et seq.*

Whereas the Union has no experience with popular consultations, it has a lot of experience in allowing individual interests to intervene in the political process. Article 11(2) EU Treaty is based on an understanding that such participation of interested and affected parties might be a further avenue to realizing the democratic principle.[81]. However, the principle of political equality must be respected and participation has to be designed so as to avoid political gridlock or the so-called agency capture by strong, organized groups.

Moreover, making the Union more flexible is of democratic relevance.[82] It allows a democratic national majority to be respected without, however, permitting this national majority, which is a European minority, to frustrate the will of the European majority. However, there are difficult questions relating to competitive equality in the internal market as well as to guaranteeing democratic transparency in an ever more complex decision-making process.[83] Also, the possibility of leaving the Union, as foreseen in Article 50 EU Treaty, serves the democratic principle, since it upholds the prospect of national self-determination in the event that the dominance of the Union should appear to be by illegitimate heteronomy.[84]

II. Participation and Deliberation in International Organizations

Developing similar strategies for the enhancement of democratic legitimation beyond elections has been the subject of much debate at the international level in recent years.[85] This is due to a common understanding that operative parliamentarian institutions are very difficult to achieve on a global scale, while the question of the democratic legitimation of public authority exercised by transnational actors demands a response.[86]

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[81] Kohler-Koch, 'The Organization of Interests and Democracy', in Kohler-Koch and Rittberger, *supra* note 16, 255.

[82] Thym, 'Supranationale Ungleichzeitigkeit im Recht der europäischen Integration', 5 *Europarecht* (2006) 637.

[83] Wouters, 'Constitutional Limits of Differentiation', in B. de Witte *et al.* (eds), *The Many Faces of Differentiation in EU Law* (2001) 299, at 301.

[84] Louis, 'Le droit de retrait de l'Union européenne', 42 *Cahiers de Droit Européen* (2006) 293.

[85] For a sample of different visions for implementing global democracy see Archibugi *et al.*, 'Global Democracy: A Symposium on a New Political Hope', 32 *New Political Science* (2010) 83.

[86] Macdonald and Marchetti, 'Symposium on Global Democracy, Introduction', 24 *Ethics & International Affairs* (2010) 13; Chesterman, 'Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law', 14 *Global Governance* (2008) 39, at 50.

Such strategies are being advanced most visibly by the Global Administrative Law (GAL) project. It conceptualizes global governance as regulatory administration, which can be organized and shaped by principles of an administrative law character.[87] This strand of thinking rests on the assumption that administrations can build their proper democratic legitimation beyond the one conveyed by the legal foundations of its institution and operation. The answer to the pertinent question of how to reign in regulatory administration, whether exercised through formal international organizations, hybrid or private arrangements, is thus sought in a "law of transparency, participation, review, and above all accountability in global governance".[88] While administrative law cannot fully compensate for the lack of a direct, electoral chain of legitimation in international decision-making, establishing procedures that ensure transparency, knowledge of motives, and the participation of affected individuals is thought to promote accountable and hence democratic governance at the supranational level.[89] This conceptual framework allows for tapping extensively into the European experience. In this light, the EU, the OECD, the WHO, and the WTO are conceived akin to US regulatory agencies.

The comprehensive discourse about enhancing the legitimation of the exercise of public authority beyond the nation state provides a rich repertory of concepts and principles, wherein transparency and participation can be considered key factors for alleviating the perceived democratic deficit and holding international institutions to account.[90] Transparency is fundamental to informed civic participation as a potential source of legitimation, as it means providing access to information and opening up decision-making processes and procedures to public scrutiny.[91] Many international organizations have already responded to the mounting

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[87] Kingsbury *et al.,* 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 1; S. Cassese *et al.* (eds), *Global Administrative Law: Cases, Materials, Issues* (2nd ed. 2008).

[88] See the website of the Global Administrative Law Project, concept and working definition, http://www.iilj.org/GAL/GALworkingdefinition.asp (24 August 2011). Global Administrative Law is seen as "encompassing the legal mechanisms, principles, and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make."

[89] Esty, 'Good Governance at the Supranational Scale. Globalizing Administrative Law', 115 *The Yale Law Journal* (2006) 1490, at 1495. Also: Chesterman, *supra* note 86.

[90] See, for example, Nye, *supra* note 60; Grigorescu, 'Transparency of Intergovernmental Organizations: The Roles of Member States, International Bureaucracies and Nongovernmental Organizations', 51 *International Studies Quarterly* (2007) 625.

[91] Esty, *supra* note 89, at 1530.

criticism of secretiveness by adopting disclosure policies.[92] Recently, the World Bank released a revised policy on access to information which was developed in close collaboration with civil society organizations, established clear request mechanisms, and opened up new categories of routinely disclosed information to the general public.[93]

In this context, the idea of representation of affected interests of individuals in or vis à vis international institutions through NGOs has become an important strand in conceptualizing more legitimate rule-making and enforcement at the international level. Two political developments in the 1990s triggered the conceptual focus on NGO participation. Firstly, the successful role of NGOs in international treaty making, for instance in the Ottawa process to ban landmines and in the elaboration of the Rome Statute, and secondly, the critical role NGO networks assumed in organizing protests against political projects run by international economic institutions, such as the OECD in the context of the multilateral investment treaty project and the WTO.[94] Based on these developments, the power of a globally operating civil society to politicize international institutions has been identified by many authors as a potential source of democratic legitimation,[95] be it through processes of scandalization[96] or through more participatory forms of involvement of civil society in global institutions.[97] The democratic potential of both approaches has its own limits, as many authors have pointed out. Globally organized and media driven protests against particular political events do not as such create a sustainable global public sphere,[98] and the involvement of NGOs in deliberative institutional settings does not as such

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92 Alasdair Roberts questions that a true "transparency revolution" has taken place, where conventions of diplomatic confidentiality still persist in access to information policies. Roberts, 'A Partial Revolution: The Diplomatic Ethos and Transparency in Intergovernmental Organizations', 64 *Public Administration Review* (2004) 410, at 411.

93 World Bank, *Toward Greater Transparency through Access to Information. The World Bank's Disclosure Policy* (2009).

94 G. Metzges, *NGO-Kampagnen und ihr Einfluss auf internationale Verhandlungen. Das Multilateral Agreement on Investment (MAI) und die 1997 OECD Anti-Bribery Convention im Vergleich* (2006).

95 Zürn, 'Global Governance as an Emergent Political Order –The Role of Transnational Non-Governmental Organizations', in G. F. Schuppert (ed), *Global governance and the role of non-state actors* (2006) 31.

96 Brunkhorst, 'Globalizing Democracy without a State', 31 *Millennium - Journal of International Studies* (2002) 675.

97 Dorf and Sabel, 'A Constitution of Democratic Constitutionalism', 98 *Columbia Law Review* (1998) 267; Schmalz-Bruns, 'Deliberativer Supranationalismus. Demokratisches Regieren jenseits des Nationalstaates', 6 *Zeitschrift für Internationale Beziehungen* (1999) 185.

98 Kettner and Schneider, 'Öffentlichkeit und entgrenzter politischer Handlungsraum: Der Traum von der „Weltöffentlichkeit" und die Lehren des europäischen Publizitätsproblems', in H. Brunkhorst and M. Kettner (eds), *Globalisierung und Demokratie. Wirtschaft, Recht, Medien* (2000) 369.

create democratically legitimated political decisions of global institutions.[99] Despite their beneficial role in potentially making international politics more transparent, pluralistic and politically accountable, the democratic potential of NGO participation is limited by the glaring dominance of Western NGOs in international fora, their own problems of democratic accountability, and the strategic and power-oriented institutional contexts in which they operate.[100] Keeping this in mind, many of the innovations developed within the EU might serve to increase the democratic credentials of international organizations. The difficulties form part of reality. Yet, this should not obscure the fact that here exists significant potential for democratic legitimation; this being the lesson of Article 11 EU Treaty, contrary to a widespread opinion especially in international law scholarship.[101]

F. Outlook

International public authority – global governance – is a real phenomenon in need of democratic thought. This article argues that the debate on global governance can learn from the path to democracy taken within the European Union, by its focus on citizenship, representation, participation, deliberation in a multilevel setting established by democratic states. Once again: the EU is not a democratic showcase. In fact, one of the merits of Articles 9 to 12 EU Treaty is to provide yardsticks to critically assess much of EU activity. Though their legal impact is circumscribed by special rules, their spirit can inspire critique and the development of democracy in these new settings.

It is this spirit and the basic concepts of Articles 9 to 12 EU Treaty that this contribution brings to the debate on international organizations, and not any specific legal or institutional solution. Any such proposal would require to be closely attuned to the law and practice of the organization in case. Further, any transposition would need to reflect the specificities of the European Union, such as the principles of direct effect and supremacy, the principle of vertical and horizontal

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[99] Scheuermann, 'Democratic Experimentalism or Capitalist Synchronisation? Critical Reflections on Directly-Deliberative Polyarchy', 17 *Canadian Journal of Law and Jurisprudence* (2004) 101.

[100] For an analysis of the preconditions of enhanced democratic legitimation by strengthening the awareness for international regulation in national public spheres through NGO involvement at the global level see von Bernstorff, 'Zivilgesellschaftliche Partizipation in Internationalen Organisationen: Form globaler Demokratie oder Baustein westlicher Expertenherrschaft?', in H. Brunkhorst (ed), *Demokratie in der Weltgesellschaft, 18 Soziale Welt (Sonderband)* (2009) 277.

[101] So only Tomuschat, *supra* note 42, 155 *et seq*.

constitutional compatibility (Articles 2, 7, 48 EU Treaty), the essentially uniform political system of the EU, a judiciary endowed with strong competences, and the largely parliamentary legislature. All of this, in short: a federal unity, cannot be traced beyond the Union.[102] Accordingly, the European lesson cannot aim at democratization in the particular European way. Rather, as with any great lesson, it hopes to bring about innovations the teacher had never thought of.

[102] For the federal characteristics R. Schütze, *From Dual to Cooperative Federalism* (2009); Schönberger, *supra* note 47, at 39 *et seq.* and *passim*; for the uniqueness Benvenisti, Kadelbach, Keller, Marauhn, Nolte, Oeter, Paulus, Peters, de Wet and Zimmermann, 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2007) 585-824.