The Democratic Legitimacy of International Courts: A Conceptual Framework

*Armin von Bogdandy**

Many international courts have developed into institutions of public authority; this begs the question of their legitimation. This Article addresses their democratic legitimation and argues that Articles 9-12 of the E.U. Treaty provide a promising blueprint for its conceptualization, fusing theories focused on representation, participation and deliberation. This fusion points the way towards conceiving and developing the democratic credentials of institutions beyond the state in general. Soft law used by international judges, their election, procedure and reasoning will appear in a new light.

Introduction

Many international courts have developed into institutions which exercise public authority.[1] They pursue shared aims, seek to overcome obstacles of cooperation,

---

* Max Planck Institute for Comparative Public Law and International Law. This Article develops thoughts presented in Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations*, 23 Eur. J. Int'l L. 315 (2012).

1 Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 Law & Contemp. Probs. 37 (2008); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 Eur. J. Int'l L. 73 (2009); Tullio Treves, *Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?*, *in* Developments of International Law in Treaty Making 587 (Rüdiger Wolfrum & Volker Röben eds., 2005); Bernhard Zangl, *Das Entstehen internationaler Rechtstaatlichkeit?* [*Emergence of International Rule of Law?*], *in* Transformationen des Staates? [Transformations of the State?] 123 (Stefan Leibfried & Michael Zürn eds., 2006).

and try to mend failures of collective action. Like few other institutions, they stand in the service of international law's promise of contributing to global justice. But this development comes at a price: as autonomous actors wielding public authority, their actions require a genuine mode of justification.[2] What is perhaps most difficult is their justification under the principle of democracy.[3]

This Article argues that Articles 9-12 of the Treaty on European Union (TEU[4]) provide a promising way to conceptualize and develop the democratic legitimation of international courts. To be sure, the current European Union is not a democratic showcase.[5] However, an innovative concept of democracy, neither utopian nor apologetic, has found its way into its founding treaty.[6] It could inform further theorizing on the democratic credentials not just of the Court of Justice of the European Union (CJEU), but of courts and tribunals beyond the state in general.[7]

This approach is likely to be criticized as Eurocentric, not least because it addresses the issue on the basis of the E.U. Treaty. This Article is, in fact, written from a European standpoint, situated in Germany in the year

---

2 *See* Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 Eur. J. Int'l L. 7 (2012). Viewed in this light, a principal-agent model seems insufficient as it fails to uncover the legitimacy problem, particularly if one focuses less on the International Court of Justice (ICJ) and more on stronger institutions such as the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), the World Trade Organization (WTO) Appellate Body, criminal tribunals or international investment tribunals. On the principal-agent model, see Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 Eur. J. Int'l Rel. 33, 36-44 (2008).

3 For other elements of justification, see Andreas Follesdal, *The Legitimacy Deficits of Human Rights Judiciary: Elements and Implications of a Normative Theory*, 14 Theoretical Inquiries L. 339 (2013).

4 Consolidated Version of the Treaty on European Union, Mar. 30, 2010, 2010 O.J. (C 83) [hereinafter TEU].

5 Yves Mény, *Can Europe Be Democratic? Is It Feasible? Is It Necessary? Is the Present Situation Sustainable?*, 34 Fordham Int'l L.J. 1287, 1301-03 (2011).

6 *Cf.* Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23 Eur. J. Int'l L. 335 (2012).

7 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 Exercise of Public Authority by International Institutions (Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann & Matthias Goldmann eds., 2010); International Judicial Lawmaking (Armin von Bogdandy & Ingo Venzke eds., 2012); both are partially available in 9 German L.J. 1375, 1909, 2013 (2008); and 12 German L.J. 979, 1341 (2011).

2013. 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 Article 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 with which the legal material is presented, and the analytical potential of the concepts it offers for the understanding and development of international law.

One might doubt whether those Articles in the TEU can be of any meaning for courts, not least because the CJEU is not specifically mentioned in those provisions, thereby perhaps giving rise to the assumption that these Articles only apply to political and administrative institutions. However, Article 9 of the TEU explicitly refers to *all* of the activities of the European Union. Since the CJEU is an institution of that organization (according to Article 13), it is beyond doubt that those Articles also apply to the exercise of judicial authority under the Treaties. The same logic underlies Articles 10 and 11 of the TEU that will be thoroughly discussed throughout this Article; they refer to *all* institutions of the European Union.

Some may also claim that an analysis of the CJEU is not relevant to other international courts, because the CJEU is far more powerful and developed than any international court or tribunal. The core argument supporting a comparison between the CJEU and international courts rests on the assumption that the CJEU, like many international courts, exercises public authority.[8] Since the exercise of any public authority begs the question of its democratic justification, this is the basis for comparison.

Of course, it would be extremely suspicious if this Article arrived at the conclusion that international institutions need to emulate E.U. institutions in order to enhance their democratic credentials. But that is not the objective of this Article. 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 courts, this framework needs to be developed in light of their specificities.[9] Given their profound differences,

---

8 This argument is fully developed in Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of International Public Law: Towards a Legal Framework for Global Governance Activities*, 9 German L.J. 1375 (2008).

9 On the diversity, see Jan Klabbers, An Introduction to International Institutional Law 6-12, 153-77 (2d ed. 2009); Henry G. Schermers & Niels M. Blokker,

this contribution remains at a high level of abstraction, with all the limitations that entails. In this spirit, it presents in Part I path-breaking conceptual moves — specifically regarding transnational citizenship. Part II highlights the importance of representation and parliamentary institutions, and Part III stresses the importance of further instruments of deliberation and responsiveness.

I. A Viable Idea of Democracy for International Courts

The concept of democracy is difficult, in particular with respect to non-state institutions. A number of concepts, at least, 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 European Union. This is particularly true for the theory which understands democracy as being the rule of "the people," a concept that is most important for many domestic courts since they often decide "in the name of the people" and thus invoke the authority of the democratic sovereign literally at the very beginning of their decisions.[10] This does not work for courts beyond the state. In fact, no supranational or international court states the basis of its authority in a similar fashion. Very much in line with this, the concept of "people" in E.U. law is reserved for the polities of the Member States.[11] This suggests that the principle of democracy within the context of the European Union must be concretized independently of the concept of "people."[12]

The notion of citizenship serves as a convincing alternative and informs the TEU's Article 9.[13] Notwithstanding unfortunate paternalistic overtones, this provision clearly stands in the tradition of republican equality under the individualistic paradigm that reaches back to Immanuel Kant and Thomas Hobbes. European democracy is to be conceived from the perspective of the individual citizens, as confirmed by Articles 10(2) and 14(2) of the TEU. In this sense, the case law of the CJEU which strengthens the rights of European citizenship fortifies a cornerstone of European democracy.[14]

International Institutional Law § 58 (3d ed. 1995).

10 On the formula "in the name of the people" in closer detail, see Jutta Limbach, Im Namen des Volkes [In the Name of the People] 108-13 (1999).

11 TEU, *supra* note 4, art. 1(2).

12 Deirdre M. Curtin, Postnational Democracy: The European Union in Search of a Political Philosophy 48-61 (1997).

13 J.H.H. Weiler, Ulrich R. Haltern & Franz C. Mayer, *European Democracy and Its Critique*, 18 W. Eur. Pol. 4, 20 (1995).

14 The case law on citizenship is perhaps the most innovative and courageous of the Court in recent years, *see* Case C-184/99, Grzelczyk v. Centre Public d'Aide

A first lesson from E.U. law for the international debate is that a concept of democracy that does not refer to a people is viable beyond the confines of the nation-state; it has been adopted by all E.U. Member States. On that basis, realizing a more legitimate global order does not require a global people, let alone a world state.[15] E.U. law suggests the development of transnational and possibly cosmopolitan forms of democracy. They are centered on the individual,[16] and aim at representation, participation and deliberation to feed the citizens' values, interests and convictions into international decisions.

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 on international courts. One could see it, similarly to constitutionalism, as a general paradigm for international law, simply as "a step too far"[17] and of no use for the understanding and development of international 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 1960s, Hans Peter Ipsen coined the concept of the market citizen as an influential legal concept.[18] It builds on individual rights granted by non-

---

Sociale d'Ottignies-Louvain-la-Neuve, 2001 E.C.R. I-6193; Case C-135/08, Rottmann v. Bayern, 2010 E.C.R. I-1449; Case C-34/09, Zambrano v. Office national de l'emploi, 2011 EUR-Lex CELEX LEXIS 62009 (Mar. 8, 2011).

15 For an account of the cosmopolitan model of democracy, see, for example, Cosmopolitan Democracy: An Agenda for a New World Order (Daniele Archibugi & David Held eds., 1995); Hauke Brunkhorst, Solidarität: Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft [Solidarity: From Friendship Amongst Citizens to a Global Legal Framework] 20 (2002); Daniele Archibugi, *Principi di democrazia cosmopolitica* [*Principles of Cosmopolitan Democracy*], *in* Diritti Umani e Democrazia Cosmopolitica [Human Rights and Cosmopolitan Democracy] 66, 98-105 (Daniele Archibugi & David Bettham eds., 1998).

16 Samantha Besson, *Das Menschenrecht auf Demokratie — Eine moralische Verteidigung mit einer rechtlichen Nuance* [*The Human Right to Democracy — A Moral Defense with a Legal Nuance*], *in* Menschenrechte und Volkssouveränität in Europa: Gerichte als Vormund der Demokratie? [Human Rights and Sovereignty of the People in Europe: Courts as Guardians of Democracy?] 61, 72 (Gret Haller, Klaus Günther & Ulfrid Neumann eds., 2011).

17 In the context of WTO law, see Kalypso Nicolaidis & Robert Howse, *Legitimacy Through "Higher Law?" Why Constitutionalizing the WTO is a Step Too Far*, *in* 4 The Role of the Judge: Lessons for the WTO 307, 308-10 (Thomas Cottier, Petros Constantinos Mavroidis & Patrick Blatter eds., 2003).

18 Hans Peter Ipsen, Europäisches Gemeinschaftsrecht [European Community Law] 187-200, 250-54 (1972); *see also* Hans Peter Ipsen & Gert Nicolaysen,

state legal sources and upheld by supranational institutions. Thus, although I share Kalypso Nicolaidis and Robert Howse's skepticism on international constitutionalism,[19] citizenship can be conceived without constitutionalism.

In this light, transnational or cosmopolitan citizenship appears as a feasible legal concept, at least for some international courts. In particular, human rights have been developed as standards that protect the individual against any form of public authority.[20] Of great importance in this respect are the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR), whose role is to protect such rights on the initiative of individuals. There are also international arbitration tribunals that protect individual rights based on investment agreements on individual action, such as those under the International Centre for Settlement of Investment Disputes (ICSID). Moreover, some interstate litigation can be seen from the perspective of the affected individuals, as has been shown with respect to the World Trade Organization (WTO) dispute settlement procedure.[21] Not least, the International Court of Justice (ICJ), in a certain sense of the guardian of the *Ancien Régime*,[22] has developed an important human rights profile in recent years.[23]

Many see still further transformation. According to Christian Tomuschat, "[s]tates are no more than instruments whose inherent function is to serve the interests of their citizens as legally expressed in human rights,"[24] since "the State [is] a unit at the service of the human beings for whom it is responsible."[25]

Haager Kongreß für Europarecht und Bericht über die aktuelle Entwicklung des Gemeinschaftsrechts [*Hague Congress for European Law and Account of the Current Development of Community Law*], 17 Neue Juristische Wochenschrift 339, 340 (1964).

19 *See* von Bogdandy & Venzke, *supra* note 2, at 21-23.

20 See the path-breaking work of Bruno Simma & Philipp Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 Austl. Y.B. Int'l L. 82 (1988-1989).

21 Panel Report, *United States — Sections 301-310 of the Trade Act of 1974*, ¶ 7.72, WT/DS152/R (Dec. 22, 1999).

22 Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 Eur. J. Int'l L. 265, 289 (2009).

23 Bruno Simma, *Human Rights Before the International Court of Justice: Community Interest Coming to Life?*, *in* Coexistence, Cooperation and Solidarity 577, 598 (Holger P. Hestermeyer et al. eds., 2012).

24 Christian Tomuschat, International Law: Ensuring the Survival of Mankind on the Eve of a New Century 161-62 (1999); *accord* Antônio Augusto Cançado Trindade, International Law for Humankind: Towards a New Jus Gentium (I) 217-19 (2005).

25 Tomuschat, *supra* note 24, at 95.

Even proponents of a state-centric understanding of international law would not deny that contemporary international law goes far beyond what Kant thought essential for a *ius cosmopoliticum*.[26] If one reads these developments in light of the E.U. 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.[27]

A critique of this approach might state that it repackages and distorts a human rights approach into one of transnational and possibly cosmopolitan citizenship. It in fact makes good sense to distinguish between them. Many human rights approaches are focused on protecting the individual. The idea of transnational and possibly cosmopolitan citizenship builds on this, but goes a step further. As Jürgen Habermas's critique of Ipsen's concept of market citizenship rightly points out,[28] citizenship should be conceived today as entailing a dimension of political participation.[29] But even such elements of political participation exist in international law. Many international rights provide a space for political contestation and participation, such as Articles 19, 21, 25 of the International Covenant on Civil and Political Rights (ICCPR).[30]

To be sure, three legal elements essential to citizenship in the national context are missing: there is no legally defined group of citizens, no right of free movement, and there is no right to vote for international parliamentary assemblies.[31] But one needs to distinguish federal concepts of citizenship[32] from transnational or cosmopolitan concepts. Moreover, there is broad consensus that the thought on new forms of democratic politicization beyond the state should be open and experimental. For that reason, citizenship as a legal

---

26 Immanuel Kant, *Zum ewigen Frieden. Ein Philosophischer Entwurf* [*Perpetual Peace: A Philosophical Sketch*], *in* Kleinere Schriften zur Geschichtsphilosophie, Ethik und Politik [Essays on the Philosophy of History, Ethics, and Politics] 115, 125-39 (Karl Vorländer ed., 1964) (1795).

27 *See* Jan Klabbers, Anne Peters & Geir Ulfstein, The Constitutionalization of International Law 153-262 (2009).

28 Jürgen Habermas, Die postnationale Konstellation: Politische Essays [The Postnational Constellation: Political Essays] 91, 142-56 (1998).

29 Klabbers, Peters & Ulfstein, *supra* note 27, at 300; Günther Haller, *Einführung* [*Introduction*] to Menschenrechte und Volkssouveränität in Europa: Gerichte als Vormund der Demokratie?, *supra* note 16, at 11, 23.

30 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

31 For the importance of these elements, see Christoph Schönberger, Unionsbürger [Citizens of the European Union] 489-508 (2005).

32 Christoph Schönberger, *European Citizenship as Federal Citizenship*, 19 Eur. Rev. Pub. L. 61 (2007).

concept should not be made dependent on the legal creation of a group and direct elections,[33] but, more abstractly, on mechanisms of inclusion.[34]

According to such a refined understanding, transnational and possibly cosmopolitan citizenship can be used as a legal concept to analyze, interpret and develop the law of international institutions in general and of courts in particular, as well as for constructions of their justification. The idea enshrined in Article 9 of the TEU — the equal treatment of all E.U. citizens by its institutions — can be used to address the public authority of international courts through the prism of citizens. It can inform the handling of procedural law and judicial lawmaking; it can serve as a vanishing point for doctrinal reconstruction.[35] With respect to the legitimation of international judicial decisions, the core point is that such constructions should not be based on the abstract subject of international law state entities, but rather with reference to the eventually affected individuals, individuals which are not just seen as private, but also as political subjects.

This concept of transnational citizenship does not aim at substituting for states.[36] It is rather meant to be an essential supplement. In fact, another insight from the European Union sphere is the dual structure of democratic legitimation. If the E.U. 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 to replace 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 E.U. Council of Ministers), exemplifies that different bases for legitimation can not only coexist, but also be mutually supportive. The democratic legitimation of supra- and international institutions needs to be conceived as composite and "multilevel."

---

33 A seminal work in this context is Amartya Sen, The Idea of Justice 321-37, 408-15 (2009). Its use in international relations is now firmly established, *see, e.g.*, Michael Zürn, *Vier Modelle einer globalen Ordnung in kosmopolitischer Absicht* [*Four Models of a Global Order with Cosmopolitan Intentions*], 1 Politische Vierteljahresschrift [Pol. Q.] 78 (2011) (showing that cosmopolitan convictions and dispositions are shared by large parts of the world population).

34 Habermas, *supra* note 6.

35 It is to be stressed that developing an abstract theoretical thought into more concrete doctrinal construction needs to be carefully linked to the specificities of any specific institution, such as the competences of the court, the law that it is called to apply, the requirements for standing or the specific procedures.

36 This would go against the thrust of contemporary international law, Kate Parlett, The Individual in the International Legal System 372 (2011).

This "multilevel-ness" 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.[37] This idea of Westminster democracy is almost impossible to reconcile with a developed dual structure of democratic legitimation, as can already be deduced from states which are federal (Belgium, Canada, Germany, and the United States). Hence the rule of the majority cannot be the defining element of democracy in international settings. Democracy there can be conceptualized far better by theories centered on the search for broad consensus.[38]

Accordingly, the democratic legitimation of international public authority should build on the domestic democratic mechanisms.[39] Democracy at the international level is more likely to succeed if it *supplements* (but does not *supplant*) democratic legitimacy generated within domestic procedures. The democratic legitimation of new forms of authority beyond states should furthermore be linked to the existing legitimation of democratic states.[40] This meets the concern of Kant that global authority might turn despotic and crush diversity.[41] For international courts, this implies their intrinsic dependence on legitimation generated within domestic procedures. This insight should inform interpretation, for example through doctrines such as the margin of appreciation, subsidiary, proportionality or complementarity.

Article 9 of the TEU not only indicates the democratic subject, but also the core idea of democracy. Above all, it does not define democracy through the idea of political self-determination. Read in conjunction with the TEU's Articles 10-12, it rather suggests that the cornerstones of European democracy are civic equality and representation, coupled with participation, deliberation, and control. This understanding of democracy is far more conducive to a

---

37 See, for example, the seminal work of Christoph Schönberger, *Die Europäische Union zwischen "Demokratiedefizit" und Bundesstaatsverbot* [*The European Union Between "Democratic Deficit" and the Prohibition of a Federal State*], 48 Der Staat [State] 535, 550 (2009).

38 For an overview, see Manfred G. Schmidt, Demokratietheorien [Democratic Theories] 306-18 (4th ed. 2008).

39 Klabbers, Peters & Ulfstein, *supra* note 27, at 271-96.

40 Jürgen Habermas, *Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft* [*Constitutionalization of International Law and Problems of Legitimacy of a Legally Formed Global Society*], *in* Rechtsphilosophie im 21. Jahrhundert [Legal Philosophy in the 21st Century] 360, 362 (Winfried Brugger, Ulfrid Neumman & Stephan Kirste eds., 2008).

41 Kant, *supra* note 26, at 128-29.

constructive theory of courts than an understanding focused on political self-determination which often has little patience for such legal institutions.[42]

II. Democratic Representation in Supra- and International Settings

The world owes to the *Federalist Papers* the idea that the principle of democracy finds its most important expression in representative institutions;[43] Article 10(1) of the TEU builds on this. Almost twenty years of discussion have revealed that parliamentarianism is without an alternative for the European Union, but has to be adapted to its specific needs.

Although the concept of representation has many different meanings,[44] most understandings are in convergence that courts should not be considered as representative institutions. Even though many judges are elected and might not be reelected if their electors have lost trust in them, even though many of their decisions have political implications, even though they should consider societal convictions and interests when engaging in lawmaking, they do not qualify as representative institutions.[45] The main reasons are the requirements of independence and impartiality, both essential for the functionality and legitimacy of any court. Such independence and impartiality do not allow for political responsibility, which is the core element of democratic representation.

---

42 Richard Bellamy, *Die demokratische Verfassung* [*Democratic Constitution*], *in* Menschenrechte und Volkssouveränität in Europa: Gerichte als Vormund der Demokratie?, *supra* note 16, at 103, 109-10; *see* Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004); Eric A. Posner, The Perils of Global Legalism 227 (2009).

43 For a recent reconstruction of the *Federalist Papers*, see Beatrice Brunhöber, Die Erfindung "demokratischer Repräsentation" in den Federalist Papers [The Invention of "Democratic Representation" in the Federalist Papers] 114-237 (2010).

44 Hasso Hofmann, Repräsentation: Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert [Representation: Studies on the Etymology of the Term and Concept from Antiquity Until the 19th Century] 1-28 (4th ed. 2003).

45 Emmanuelle Jouannet, *Actualité des questions d'indépendance et d'impartialité des juridictions internationales: la consolidation d'un tiers pouvoir international?* [*Topicality of the Questions of Independence and Impartiality of International Jurisdictions: The Consolidation of a Third International Power?*], *in* Indépendance et impartialité des juges internationaux [Independence and Impartiality of International Judges] 271, 283-90 (Hélène R. Fabri & Jean-Marc Sorel eds., 2010).

But even if courts are not institutions of democratic representation, the issue is important for courts. This is indicated by the central function of representative institutions for the democratic legitimacy of courts in the domestic context. Under most constitutions and theories, the principle of democracy requires that it is for representative institutions to set courts up, to finance them, to legitimate the appointment of judges and to enact the law that they should apply.[46] This suggests that international courts also need the democratic legitimation generated by representative institutions. This is confirmed by Article 10(1) of the TEU, according to which the functioning of the European Union without any qualification is based on representative democracy; that includes the CJEU. Hence, the activities of international courts need to be justified under the idea of democratic representation.

Article 10 of the TEU encapsulates an innovative understanding of democratic representation. 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 E.U. Council of Ministers and the European Council, whose legitimation is based on the Member States' democratically organized peoples.[47]

These stipulations can be applied to the international level. They confirm at first traditional understandings of the democratic legitimation of international courts. The institutions as such, just like the law they are called to apply, are mostly enshrined in international agreements whose democratic legitimation flows from the internal procedure of ratification, which usually involves the domestic parliament.[48] This remains important under Article 10 of the TEU. At the same time, it flows from Article 10 that given the developed authority of many international courts, it seems appropriate to look for further sources of democratic legitimation.[49]

---

46 Andreas Voßkuhle, Rechtsschutz gegen den Richter: Zur Integration der Dritten Gewalt in das verfassungsrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 Abs. 4 GG [Legal Protection Against the Judge: On the Integration of the Third Power into the System of Constitutional Control on the Basis of Article 19(4) of the Basic Law for the Federal Republic of Germany] 47-50, 63-64 (1993).

47 *See* TEU, *supra* note 4, art. 10(2).

48 An exception to this can be illustrated by the U.N. Tribunals for the former Yugoslavia and Rwanda that were established through S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), *available at* http://www.un.org/Depts/german/sr/sr_93/sr827.html; and S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), *available at* and http://www.un.org/Depts/german/sr/sr_94/sr955.pdf.

49 In detail, see von Bogdandy & Venzke, *supra* note 2, at 24-38.

In fact, this insight is not new to the international level. The recent intellectual revival of concepts of global parliamentarianism can — as was the case in the European Union — be interpreted as a reaction to the perceived limits of democratic legitimation derived solely from the representation of Member States in international organizations.[50] Calls for international parliamentary bodies in the international legal debate are by no means unprecedented. The first differentiated debates can be traced back to the time of World War I 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.[51] The idea of international parliamentarianism has an important pedigree and is alive and well.

Guided by Article 10 of the TEU, one can discern a number of potentially representative institutions within international organizations. The most important example is the directly elected European Parliament — so far, a unique institution.[52] There are, however, a number of assemblies staffed with 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.[53] Sectoral examples of this kind of international parliamentarianism can be found in the parliamentary assemblies of existing international organizations, such

---

50 Robert A. Dahl, *Can International Organizations Be Democratic? A Skeptic's View*, *in* Democracy's Edges 19 (Ian Shapiro & Casiano Hacker Cordón eds., 1999).

51 Georges Scelle, Une crise de la Société des Nations: La réforme du Conseil et l'entrée de l'Allemagne à Genève [A Crisis of the League of Nations: The Reform of the Council and Germany's Accession to Geneva] 137-47 (1927); Hans Wehberg, Grundprobleme des Völkerbundes [Fundamental Problems of the League of Nations] 83-84 (1926); *see also* Claudia Kissling, Repräsentativ-parlamentarische Entwürfe globaler Demokratiegestaltung im Laufe der Zeit: Eine rechtspolitische Ideengeschichte [Representative and Parliamentary Drafts for the Creation of a Global Democracy over the Years: A History of Juridical-Political Thought] (2005), *available at* http://www.forhistiur.de/zitat/0502kissling.htm.

52 *See* Kissling, *supra* note 51; Richard Falk & Andrew L. Strauss, *On the Creation of a Global People's Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 Stan. J. Int'l L. 191 (2000).

53 Scelle, *supra* note 51, at 137-47; Felix Arndt, *International Parliamentary Assemblies*, Max Planck Encyclopedia of Public International Law, http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e525&recno=16&letter=P (Rüdiger Wolfrum ed., last updated Oct. 2007).

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.[54] They can have a role in the financing of courts or the election of judges, but they can also enact soft law which has gained quite some importance for international courts.[55]

But these institutions have their own shortcomings: They are not directly elected; they do not respect the principle of political equality; they have very limited competences; and they are largely unknown to the public. In short, how can they convey additional democratic legitimation? This question leads to open ground with preciously few certainties. Some will see direct elections as indispensable for having representative institutions. However, such a stipulation is perhaps all too easy and in the end not very convincing. That much follows from the history of the thought of democratic representation,[56] as well as from the contemporary structure of transnational public spheres. Domestic democratic processes are difficult to reproduce beyond the state.[57] This argument that direct elections are not essential for democratic representation is confirmed by Article 10(2) of the TEU: it considers the Council of Ministers and the European Council as institutions of democratic representation. If the European peoples consider such institutions as being democratically representative, to suggest that institutions of a parliamentary nature which are staffed with persons elected by domestic parliaments cannot have a representative function seems unfounded.

---

54 For an analysis of the debate on the introduction of sectoral parliaments, see Markus Krajewski, *Legitimizing Global Economic Governance Through Transnational Parliamentarization: The Parliamentary Dimensions of the WTO and the World Bank* (U. Erlangen-Nuremberg L. Sch. TranState, Working Paper No. 136, 2010), *available at* http://www.europarl.europa.eu/document/activities/cont/201012/20101207ATT07754/20101207ATT07754EN.pdf.

55 Broniowski v. Poland, 2005-IX Eur. Ct. H.R. (regarding the Council of Europe); Greens v. United Kingdom, ¶¶ 44-45, 2010 Eur. Ct. H.R., http://hudoc.echr.coe.int/webservices/content/pdf/001-101853?TID=ezkuzygrtr (regarding Committee of Ministers); Case of Parti Nationaliste Basque — Organisation Régionale d'Iparralde v. France ¶¶ 16-18, 29-32, 45, 2007-II Eur. Ct. H.R. (regarding the Committee of Ministers, Venice Commission, and the Parliamentary Assembly); Sejdić v. Bosnia and Herzegovina, ¶¶ 17, 21-22, 48-49 2009 Eur. Ct. H.R., http://hudoc.echr.coe.int/webservices/content/pdf/001-96491?TID=igauxmghdq (regarding the Venice Commission).

56 Hofmann, *supra* note 44.

57 Jürgen Habermas, Der gespaltene Westen [The Divided West] 137-42 (2004).

A tentative answer to these concerns can be found in Article 11 of the TEU. It suggests that if such assemblies operate in a transparent and deliberative way, embedded in and responsive to the affected publics, they can generate democratic legitimation proper. This idea might also underlie the election of judges to the ECtHR by the Parliamentary Assembly of the Council of Europe. Ever since 1998, interviews with candidates by a subcommittee also potentially nourish the development of a public that further increases the legitimating 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.[58]

At this point, however, qualifications are urgently called for because this train of thought threatens to become all too apologetic. A path between apology and utopia can be traced by qualifying the broad concept of representation as laid out in Article 10(2) of the TEU with participatory and deliberative elements.[59] The position holding that such elements are essential for an adequate understanding of democracy has gained wide recognition in recent decades, not as a substitute, but as an essential complement.[60] This understanding underlies Title II of the TEU. Article 11 of the TEU, for example, calls for furthering public debates, open, transparent and regular dialogues, as well as public hearings. If institutions which are only indirectly legitimated by elections elaborate their decisions in procedures which are participatory and dialogical, it can generate democratic legitimacy. This can be relevant to the institution as such, the election of judges, as well as the enactment of secondary law and soft law to which courts refer in their decisions.[61]

This last point is particularly relevant for international courts. If a court wants to justify a decision by referring to a soft law instrument, it needs to assess the deliberative quality of the procedure by which this act has been elaborated. An important indicator of that quality can be its transparency, its embedding in broader political discussions, or the participation of NGOs.[62]

---

58 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, Advisory Opinion, 2008 Eur. Ct. H.R. Grand Chamber (Feb. 12, 2008). Also note that some statutes try to address the disproportionately weak representation of women explicitly, *see, e.g.*, Rome Statute of the International Criminal Court, art. 36(8)(a)(iii), July 17, 1998, 2187 U.N.T.S. 90.

59 Klabbers, Peters & Ulfstein, *supra* note 27, at 268-71; Schmidt, *supra* note 38, at 236-53.

60 Schmidt, *supra* note 38, at 237-40; Sen, *supra* note 33, at 326.

61 Milan Kuhli & Klaus Günther, *Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals*, 12 German L.J. 1261, 1267-74 (2011).

62 Klabbers, Peters & Ulfstein, *supra* note 27, at 315-18.

Hence, democratic quality is not a given *a priori* property that comes with the creation of such an institution. Instead, it follows from its qualified operation: it is something to be achieved through hard work.

III. How Courts Can Generate Democratic Legitimacy

Democracy needs representation, but goes beyond it. This insight is reflected in Article 11 of the TEU.[63] Of particular significance are transparency, the participation of those affected, deliberation and flexibility.[64] 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 is in the vanguard of constitutional development when it requires that decisions be "taken as openly as possible,"[65] i.e., transparently. The specifically democratic meaning of transparency in European law is confirmed by Articles 11(1) and 11(2) of the TEU. Developing similar strategies for the enhancement of democratic legitimation has been the subject of much debate at the international level in recent years.[66] This is due to a common understanding that operative parliamentarian institutions are very difficult to realize on a global scale, while the question of the democratic legitimation of public authority exercised by transnational actors nonetheless demands a response.[67]

The principles of Article 11 of the TEU are general and hence apply, like those of Articles 9 and 10 of the TEU, to *all* supranational institutions, including the European judiciary. The election of judges, the procedure and the reasoning are to be construed and developed in their light. Transparency, participation and deliberation, the core elements of Article 11 of the TEU, are of crucial importance for international courts as they indicate strategies

---

63 In detail, see Joana Mendes, *Participation and the Role of Law After Lisbon: A Legal View on Article 11 TEU*, 48 Common Mkt. L. Rev. 1849 (2011).

64 Concepts of participatory and deliberative democracy have by now entered the mainstream of democratic thought, *see* Curtin, *supra* note 12, at 53-61; Klabbers, Peters & Ulfstein, *supra* note 27, at 268-71; Schmidt, *supra* note 38; Sen, *supra* note 33.

65 TEU, *supra* note 4, art. 1.

66 For a sample of different visions for implementing global democracy, see Daniele Archibugi et al., *Global Democracy: A Symposium on a New Political Hope*, 32 New Pol. Sci. 83 (2010).

67 Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 Global Governance 39, 50 (2008); Terry Macdonald & Raffaele Marchetti, *Introduction*, 24 Ethics & Int'l Aff. 13 (2010).

through which they can build up proper democratic legitimacy. But how can they further democracy while at the same time neither calling into doubt the judge's monopoly over the judicial decision nor watering down a nuanced conception of democracy that demands effective participation in decision-making processes?

Conceptually, two features are particularly important for the democratic legitimacy of judicial decisions. The first concerns the justification of decisions with regard to the participants in the process. The parties to a dispute are involved in how the case is handled and the court is required to deal with the arguments that they introduce. This cooperative treatment of the matter in dispute is not confined to questions of fact or evidence, but — against the widespread understanding of the principle of *iura novit curia* — also extends to questions of law. The second feature places the judicial decision within the general context of justifying public authority. The open discussion of interests and competing positions is part of the social basis of democracy that feeds the democratic public as well as processes of social integration. Judgments of courts are part of this and may generate democratic potentials if only they are embedded in normative discourses. Both features raise the same demand for developing procedural law.

Article 11 of the TEU supports the argument that a court can strengthen its democratic legitimacy, for example through transparent reasoning, which amongst other things also implies discussing and treating precedents, those crucial decision-making tools of courts and tribunals, in a non-apodictic way.[68] Article 11 of the TEU strives for a deliberating European public that can assess the exercise of public authority by the supranational institutions as a crucial element of European democracy. This can also be applied to international courts. Transparent reasoning can be far better discussed and evaluated by academic and general publics than terse technical or cryptic reasoning.[69] Judicial decisions can feed or stifle such deliberation depending on their form and style of reasoning. Particularly important in this respect are principled arguments and clear statements on the aims pursued. This does not exclude a certain vagueness, not least with respect to the precise doctrinal justification and the application of the decision in later cases. Rather, such vagueness grants the courts flexibility and responsiveness concerning the debates triggered without endangering the consistency of the developing case law.

---

68 For an in-depth analysis and critique of the CJEU's precedent practice, see Marc Jacob, Unfinished Business: Precedent and Case-Based Reasoning in the European Court of Justice (Oct. 17, 2012) (unpublished PhD dissertation, Goethe-University, Frankfurt Main) (on file with the author).

69 Kuhli & Günther, *supra* note 61.

Article 11 also calls for political participation beyond elections. The citizen initiative mentioned in it is of little use for court decisions. More important is the participation of affected or interested parties in proceedings. Article 11(2) is based on an understanding that such participation of interested and affected parties might be a further avenue to realizing the democratic principle.[70] A dialogue of the court with the parties, third parties as well as *amicus curiae* briefs in the judicial proceeding can help a court to strengthen its democratic legitimacy.[71]

Of course, from these abstract principles one cannot deduce concrete suggestions how a court should interpret its procedural law. This leads to a final thought. As mentioned earlier, this Article tackles the issue at a very high level of abstraction. It will take further concretizing steps before its insights can be used for the interpretation, systematization and development of the law of a specific court. It is beyond question that the democratic principle needs to be applied respecting the specificities of any particular court. It is evident, for example, that there is a relevant difference under the democratic principle between the International Criminal Tribunal for the former Yugoslavia (ICTY), as set up by the Security Council, and the International Criminal Court (ICC), which is based on a treaty ratified by national parliaments. International investment tribunals, WTO panels, the WTO Appellate Body, the ECtHR or the IACtHR: each institution has differences that its reconstruction under the democratic principle needs to heed. Obligatory jurisdiction is likely to be more problematic than submission on a case-by-case basis. The differences are not only institutional, but also of a substantive nature. A criminal sentence, the delimitation of a maritime boundary, the development of human rights or the principle of nondiscrimination in international economic law, all present specificities which their democratic construction needs to be mindful of. The democratic principle should not result in a single fixed profile for all courts, but rather in a multidimensional theoretical matrix, i.e., a basic checklist of sorts. But it is likely that in the end any such successful matrix will contain the elements set out in Articles 9-12 of the TEU.

---

70 Beate Kohler-Koch, *The Organization of Interests and Democracy*, *in* Debating the Democratic Legitimacy of the European Union 255 (Beate Kohler-Koch & Berthold Rittberger eds., 2007).

71 In detail, see Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 German L.J. 1341 (2011).

Appendix: The Treaty on European Union

TITLE II

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.