

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

Aida Torres Pérez*

I. Introduction

It has been suggested that globalization and the proliferation of international regimes have contributed to constrain the executive power, compromising state sovereignty. While some celebrate this result, others decry or deny it. This essay transcends the national/international dichotomy in exploring the impact of globalization upon the executive power. As such, the term “internationalization of lawmaking processes” refers broadly to the new context in which public decision-making takes place within multiple inter-, supra-, and trans-national spheres. Although from an overall perspective globalization constrains the power of the state as a whole, if one focuses on the state’s constituting branches, the internationalization of lawmaking processes has brought about a comparative empowerment of the executive, at the expense of the legislative policy-making autonomy.

The first section will show that, particularly since World War II, globalization and the proliferation of international law in several forms continues to challenge the traditional concept of sovereignty as the unlimited, ultimate, and indivisible power to rule over a bounded territory without external interferences.¹ Sovereignty is not merely lost and then acquired by distinct

* Constitutional Law Professor, Pompeu Fabra University (Barcelona); Yale Law School (JSD, 2006); Pompeu Fabra University (DEA in Public Law, 2003); Yale Law School (LL.M, 2002). I started writing this paper while I was in New Haven, where I benefited from informal conversations with Santiago Montt, Mariana Prado, and Laura Saldivia, whom I thank for their generous input. I finished writing in Barcelona, where I had the chance to discuss this draft with Marc Carrillo, Víctor Ferreres, Marisa Iglesias, Nico Krisch, Héctor López, Josep Lluís Martí, Alejandro Saiz, and Neus Torbisco. I thank them as well for their invaluable comments.

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

international regimes.² Rather, the state, in collaboration with other foreign authorities and private actors, needs to introduce new forms in the exercise of its functions. State power is fragmented and exercised in a plurality of spheres.

The second section will explore how, while state sovereignty is limited, executive action in the international sphere is transformed. The diversification of international lawmaking sources offers the executive new opportunities for action. Executives might participate in: international regulation of an increasing number of subjects; new and varied transnational networks; supranational organizations with lawmaking powers; and, ultimately, executives play a main role in implementing international norms within domestic legal orders. Eventually, these transformations may well enhance the executive's ability to shape national policy-making and regulate citizens' lives, while sidestepping the legislative.³ These new dynamics alter the domestic constitutional balance (without amending the constitutional text).⁴ It is important to understand the kinds of transformations underway to properly approach the contested legitimacy of the new order. Along these lines, I will conclude with some final thoughts without attempting to settle a longstanding debate, which we will surely take up again in Bogotá. The European Union (EU) is a paradigmatic example to illustrate these new dynamics. The conceptual framework suggested, however, may be applied to other areas as well.

II. Globalization and fragmentation of decision-making powers

² NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY. LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH* 95 (Oxford 1999).

³ Thomas Poguntke & Paul Webb, *The Presidentialization of Contemporary Democratic Politics: Evidence, Causes, and Consequences*, in *THE PRESIDENTIALIZATION OF POLITICS. A COMPARATIVE STUDY OF MODERN DEMOCRACIES* 336, 350 (Oxford University Press 2006).

⁴ According to Christian Walter, *Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law*, 44 *GERMAN YEARBOOK OF INTERNATIONAL LAW* 170, 193-196, constitutions need to be complemented with other documents to obtain a complete picture of the structure of public authority. As a consequence, constitutions are better seen as “partial constitutions,” since they no longer comprehensively regulate public authority exercised within the state.

Globalization, understood broadly as a set of processes transcending national borders, has led to growing interdependence⁵ in multiple fields such as economics, the environment, telecommunications, security, intellectual property rights, health... On some occasions, the response to this growing interdependence has been the creation of regulatory regimes or other forms of collaboration through international treaties or more informal transnational networks. I will focus on this aspect of globalization, which involves the internationalization of lawmaking processes.⁶

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

⁵ ROBERT KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 7-8 (Longman 2001).

⁶ To be sure, globalization might interchangeably refer to political, economic, and social processes that transcend national boundaries, as well as to the creation of international regimes and other forms of cooperation to regulate these processes (which is properly a response to globalization).

even human rights.⁷ Other organizations, such as the World Health Organization and the International Labor Organization, whether their decisions are strictly binding or not, have had an important impact not only upon state legal orders, but also, indirectly, upon the people.⁸

At the same time, more informally, transnational collaboration among government authorities has intensified, leading to the proliferation of the so-called “transnational government networks.”⁹ They might exist within the framework of international organizations, executive agreements, or develop spontaneously.¹⁰ For instance, these transnational networks encompass networks of trade ministers within the WTO as well as networks, such as the G8 or the Basel Committee, which, albeit not grounded on a treaty, have acquired certain stability. Within these networks, lawmaking powers are not attributed to any separate international body. Rather, they offer a framework for state authorities to cooperate and exercise their functions with foreign authorities. Often, codes of conduct, recommendations, or regulatory principles are issued, which, despite not being binding norms (*soft law*), could influence lawmaking processes within domestic legal systems.¹¹

In general, the creation of international regimes and the allocation of state functions at the international level have been justified through the argument that a state’s ability to effectively rule within its respective territory has been undermined as a consequence of mounting political and economic interdependence.¹² If states cannot comply with their functions and goals, this

⁷ Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 JOURNAL OF WORLD TRADE 167 (2001).

⁸ Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, 10 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 29, 35 (2003).

⁹ This phenomenon has been identified and thoroughly explored by Anne-Marie Slaughter in several articles and ultimately a book: ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton University Press 2004).

¹⁰ *Id.* at 45-49.

¹¹ See *Id.* at 168-195. Extensive empirical research in this area is still pending.

¹² Robert O. Keohane, *Sovereignty, Interdependence, and International Institutions*, in *IDEAS AND IDEALS: ESSAYS ON POLITICS IN HONOR OF STANLEY HOFFMANN* 91, 92 (Linda B. Miller & Michael Smith eds. 1993): “It is now a platitude that the ability of governments to attain their objectives through individual action has been undermined by

inability threatens their legitimacy. Consequently, effective regulation regarding specific subject matters requires a supranational form of action.¹³ Similarly, transnational networks allow governments to achieve through mutual cooperation what they previously achieved unilaterally within their respective territories.¹⁴

Regardless of the fact that coercive powers remain within the states, public power is fragmented in the sense that political decision-making takes place in a plurality of forums at inter-, supra-, and trans-national levels.¹⁵ These diverse forms of international decision-making very often influence or even shape the content of national policies and laws. Some national norms merely reproduce or develop norms or decisions taken within networks or international systems.¹⁶ Hence, the proliferation of international regulatory regimes (especially if international bodies are granted the power to enact binding law) constrains state power to formulate and implement public policies.¹⁷ Thus, the internationalization of lawmaking processes challenges sovereignty as “the political authority of a community that has the undisputable right to determine the framework of norms, regulations, and policies within a bounded territory, and to govern in consequence.”¹⁸

international political and economic interdependence”; Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STANFORD JOURNAL OF INTERNATIONAL LAW 283, 284 (2004).

¹³ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMPORARY PROBLEMS 15, 16 (2005).

¹⁴ Slaughter, *supra* note 12, at 285.

¹⁵ Jost Delbruck, *Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State*, 11 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 31, 39 (2004): “The concept of public authority is not restricted to the exercise of enforcement powers.”

¹⁶ Delbruck, *supra* note 8, at 35-36: “Domestic law that appears to be genuinely ‘homemade’ is actually nothing but a rubberstamped regulation worked out at the level of IGOs.” For example, in the EU, many national norms merely reproduce what was established in EU directives or refer to the text of the directive itself. Sue Arrowsmith, *Legal Techniques for implementing Directives: A Case Study of Public Procurement*, in LAWMAKING IN THE EUROPEAN UNION 491 (Paul Craig & Carol Harlow eds. 1998).

¹⁷ One might distinguish between sovereignty and autonomy. DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* 100 (Stanford University Press): “Sovereignty refers to the entitlement of a state to rule over a bounded territory, while autonomy denotes the actual power a nation-state possesses to articulate and achieve policy goals independently.” The argument here is that globalization and the proliferation of international regimes have an impact upon both.

¹⁸ DAVID HELD, *MODELOS DE DEMOCRACIA* 382 (Alianza 2002) [author’s translation].

It is worth noting that whether states participate in international regimes or refuse to engage in collective decision-making in the international sphere, sovereignty is challenged. In the latter case, however, the loss of control might be even greater because the states cannot effectively regulate in isolation processes developing beyond or interfering within national borders as a consequence of globalization. The global economy, which involves the internationalization of production, financial transactions, and trade, is the clearest example of how globalization undermines the ability of states to control their own (in this case economic) futures.¹⁹ Furthermore, the vacuum left tends to be occupied by private actors who develop transnational regulatory systems that could create policy externalities and thus incentives for broader policy coordination.²⁰ International law and other forms of transnational coordination offer tools to regulate these processes.

In this context, we can no longer understand sovereignty according to the modern conceptual paradigm of the nation-state, as bundling all public power within state boundaries. Public power is fragmented, and state functions are exercised in a plurality of forums beyond the state, in collaboration with other public authorities. This is not to say that states are disappearing and being replaced with supranational institutions. The states themselves, albeit not exclusively, promote the development of international law in its different forms.²¹ In the words of Saskia Sassen, “Rather than sovereignty eroding as a consequence of globalization and supranational

¹⁹ *Id.* at 383-385.

²⁰ One of the effects of globalization has been the blurring of the private/public distinction. The role of private actors in international lawmaking will be further analyzed by my colleagues on this panel. This raises particular problems for global governance. Slaughter, *supra* note 9, at 10: “We need global rules without centralized power but with government actors who can be held to account through a variety of political mechanism. These government actors can and should interact with a wide range of non-governmental organizations (NGOs), but their role in governance bears distinct and different responsibilities.”

²¹ SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 29 (Columbia University Press): “The state itself has been a key agent in the implementation of global processes, and it has emerged quite altered by this participation.”

organizations, it is being transformed.”²² At the birth of the modern state, there was a correspondence between sovereignty, as the scope of state power, and the national territory. As a result of the internationalization of lawmaking, the location of public power is partially shifted and reconstituted in other spheres.²³ The power of the state does not diminish in absolute terms. Rather, it is fragmented and re-located, and state functions are exercised in a different way. As a result, the boundaries of domestic policy-making are increasingly blurred, “transforming the conditions of political decision-making, changing the institutional and organizational context of national polities, altering the legal framework and administrative practices of governments.”²⁴

Globalization brings about transformations both of international law and the modern state. The scope and structures of international law change. International treaties regulate issues traditionally regulated at the domestic level.²⁵ The kinds of powers attributed to international organizations are strengthened. There is a trend toward a higher degree of institutionalization and coordination of international decision-making.²⁶ At the same time, cooperation is intensified as a result of the proliferation of more informal transnational networks. Also, actors involved in policy-making in the international sphere diversify. Within the executive, diplomatic delegations are replaced with a variety of ministers, as well as other second level officials and regulators from independent agencies appointed by governments. Furthermore, globalization enhances transnational regulation carried out by a variety of private actors,²⁷ and hybrid arrangements

²² *Id.* at 31.

²³ *Id.* at 29-30: “Sovereignty remains a feature of the system, but it is now located in a multiplicity of institutional arenas: the new emergent transnational private legal regimes, new supranational organizations (such as the WTO and the institutions of the European Union), and the various international human rights codes.”

²⁴ Held, *supra* note 17, at 135.

²⁵ See *infra* section A

²⁶ Walter, *supra* note 4, at 175-183; Held, *supra* note 18, at 386-388. See *infra* section B.

²⁷ Walter, *supra* note 4, at 186-187; Kingsbury, Krisch & Stewart, *supra* note 13, at 22-23.

between governmental and non-governmental actors.²⁸ As a result, the production of international law becomes decentralized.²⁹

At the same time, state powers are fragmented and exercised in several spheres. As public power is disaggregated, so is the state.³⁰ Instead of conceiving the state as an indivisible unit, if one focuses on the distinct state branches —executive, legislative and judicial³¹—, it will be realized that the disaggregation of public functions among inter-, supra-, and trans-national spheres has strengthened executive power to the detriment of the legislative. Therefore, we are witnessing a twofold, only apparently paradoxical, process: de-centralization of state powers in a plurality of spheres and re-centralization of power in the executive.

III. Transforming and expanding the scope of executive power

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

²⁸ Kingsbury, Krisch & Stewart, *supra* note 13, at 22.

²⁹ Walter, *supra* note 4, at 188, arguing that the international legal order becomes decentralized.

³⁰ Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFFAIRS 183, 184 (1997): "The state is not disappearing, it is disaggregating into its separate, functionally distinct parts."

³¹ Although courts are essential for the transformation of the international legal order and state sovereignty, they are not discussed in this paper.

implementation of international norms within the domestic legal order. The combined exploration of these processes reveals a picture of the state that distorts the constitutional balance of powers.

A. The creation of international regimes and transnational networks

Historically, treaty-making was a sovereign power of the monarch associated to the *ius belli*.³² As a result of liberal revolutions at the end of the eighteenth century, sovereignty was transferred from the monarch to the people. Thus, modern constitutions allocate the power to conclude international treaties to the executive (as the representative of the state), but tend to require the intervention of parliament (as representative of a sovereign people) for their ratification (or to establish domestic binding force).³³ From this perspective, parliamentary consent is essential to guarantee the democratic legitimacy of international treaties.

With regard to the ratification process, parliamentary approval might be required for all kinds of treaties or only for treaties regulating specific subjects, such as treaties concerning the state's integrity, the imposition of a financial burden, activities of a military or commercial nature, or treaties requiring the amendment of domestic law.³⁴ Also, in some countries, the ratification of international treaties might not require explicit parliamentary approval.³⁵ In general, countries that do not require parliamentary approval during the ratification process tend to be dualist, which means that international treaties do not have binding force within the

³² Peter Haggemacher, *Some Hints on the European Origins of Legislative Participation in the Treaty-making Function*, 67 CHICAGO-KENT LAW REVIEW 313, 318 (1991).

³³ One should distinguish between parliamentary approval regarding the ratification of international treaties from their "incorporation" in the domestic legal order. Parliamentary approval, when required, is a condition for ratification and thus for obliging the state internationally. Incorporation refers to the process whereby treaties acquire domestic binding force. The binding effect of treaties within the domestic legal order might require specific national legislation incorporating the treaty or not, according to domestic provisions. See Francis G. Jacobs, *Introduction*, in THE EFFECT OF TREATIES IN DOMESTIC LAW xxiii, xxiv-xxvi (Francis G. Jacobs & Shelley Roberts eds. 1987).

³⁴ Parliamentary approval is required for specific subject matters in Belgium, France, Germany, and Spain, among others.

³⁵ For instance, in the United Kingdom, the government may proceed to ratify international treaties, as long as there is no explicit parliamentary opposition.

domestic legal order until they have been incorporated through national legislation. Hence, from the standpoint of the constitutional structure, to commit the state internationally (and/or to grant treaties domestic binding force), parliamentary intervention is required. Therefore, this might be regarded as a shared power.

Notwithstanding these constitutional provisions, parliamentary intervention in the process of treaty ratification is very limited in nature. First of all, the executive is the one in charge of initiating negotiations. Generally, the power to conclude treaties has been attributed to the minister of foreign affairs, but other members of the executive are increasingly participating, according to the type of agreement being negotiated. The drafting process is conducted through negotiations among governmental authorities behind closed doors. In contrast to the legislative process, the drafting of international treaties does not permit public scrutiny. On occasions, government consults parliament in an informal manner during the negotiations. This practice varies across countries.³⁶ The negotiation stage is characterized by its secrecy and lack of transparency, which has been a recurrent criticism regarding the process for concluding and amending EU Treaties.³⁷

With regard to parliamentary approval, the parliamentary debate is generally not a thorough, substantive one. Access to information about the negotiations is invariably limited, so that little is known about the alternatives discussed.³⁸ Treaties are brought to parliament once

³⁶ See Stefan A. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHICAGO-KENT LAW REVIEW 293, 303 (1991).

³⁷ Lars Hoffmann, *The Convention on the Future of Europe - Thoughts on the Convention-Model*, Jean Monnet Working Paper 11/02, 11 (New York School of Law 2002). The EU Charter of Fundamental Rights (2000) and the EU Constitution (2004) were drafted by a newly created “convention,” which included national and European parliamentary representatives. This convention drafted the texts that were later discussed by the representatives of the member states in the Intergovernmental Conference.

³⁸ Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICHIGAN LAW REVIEW 167, 200 (1999).

they have been adopted at the international level. In practice, the “take it or leave it” option³⁹ profoundly limits parliamentary autonomy to substantially modify the terms of the treaty or reject it. Amendments are not allowed. Parliaments might qualify its consent by entering reservations or interpretive declarations.⁴⁰ This possibility is, however, limited by the terms of the treaty and general international law, which bans reservations “inconsistent with the object and purpose of the treaty.”⁴¹ Thus, parliamentary approval is sometimes conceived as a mere rubber stamp.⁴²

Moreover, the substantive scope of international treaties has steadily expanded to sectors previously the preserve of national legal orders. Traditionally, international treaties were limited to issues of reciprocal interest to sovereign states (basically, military assistance and borders) or issues of an administrative, technical nature.⁴³ At present, the increasing interdependence and complexity of economic, political, and social problems require international regulation and stable cooperation regarding subjects, such as consumer protection or fundamental rights, which were the domain of the legislative. As a result, the executive enhances its ability to shape national politics under its treaty-making power.

Besides international treaties, new forms of informal cooperation among national officials through a great variety of transnational networks have developed. Thus, the executive role is increasingly complex. It is no longer limited to negotiating international treaties with other governments. Executive officials now participate in transnational networks to distill information, promote enforcement of national and international norms, and enhance regulatory

³⁹ *Id.* at 185-186; Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 NEW YORK UNIVERSITY LAW REVIEW 1971, 2007-2008 (2004).

⁴⁰ Riesenfeld & Abbott, *supra* note 36, at 307.

⁴¹ Article 19 (c) Vienna Convention.

⁴² In those countries in which international treaties are hierarchically superior or cannot be derogated or amended by law, the executive may constrain in this way the legislative capacity of (present and future) parliaments.

⁴³ See Walter, *supra* note 4, at 29.

harmonization regarding a broad range of issues.⁴⁴ It is worth noting that the main participants in these networks are a variety of governmental authorities, including presidents and prime ministers in G8 meetings; cabinet officials (and not only foreign ministers), such as ministers of agriculture, education, justice, economy, and labor, among others, within the Council of the Common Market (MERCOSUR), or the Council of Ministers (EU); and regulators, such as central bankers in the Basel Committee. Hence, also in this domain, parliaments are sidestepped. Anne-Marie Slaughter indicates the existence of some transnational legislative networks, but she admits that they are fewer and less effective.⁴⁵ Among the varied reasons for the reduced number and efficacy are the following: given the variety of interests represented, the issues dealt with, and the diversity of members, it is difficult to identify counterparts in other countries; parliamentary representatives lack the technical expertise in specific areas that promotes the development of government networks; and since their terms in office tend to be short, they have little incentive to establish long-term cooperation with foreign parliamentary representatives, who also change frequently.⁴⁶

B. Decision-making within the framework of international organizations

An important transformation, particularly since World War II, has been the creation of international institutions with the power to adopt binding norms and decisions.⁴⁷ This transformation is particularly evident in the EU, where legislation emanating from EU institutions is directly applicable to citizens and supreme over national law. The transfer of powers to this kind of regime has posed the greatest challenge to national sovereignty. Although,

⁴⁴ Slaughter, *supra* note 9, at 7, 51-61.

⁴⁵ *Id.* at 104-105.

⁴⁶ *Id.* at 105.

⁴⁷ For example, in the European Union, the Andean Community, the World Health Organization, or the United Nations. Also, some treaties have set up courts to enforce treaty provisions or the decisions emanating from the institutions that have been established. This is the case, for instance, of the ECJ in the EU, the European Court of Human Rights in the European Convention of Human Rights, or the Appellate Body in the WTO.

according to the common view, the new institutions replace the state, the executive maintains the ability to act decisively in the supranational sphere, whereas the legislative is significantly weakened or lacks this capacity completely.

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

The EU Commission is the driving force in the legislative process since it has the right to propose draft legislation, and it embodies the community interest. Before the Nice Treaty (2001), its members were appointed by state governments. At present, the Commission's appointment corresponds to Council (in its composition as the heads of state or government) by a qualified majority voting. Nonetheless, this modification does not have much practical relevance, since the Council members are those who appointed the commissioners before. Arguably, qualified majority voting might introduce a different dynamic. The Treaty, however, establishes that the Council shall adopt the list of persons whom it intends to appoint "drawn up in accordance with the proposals made by each member state."⁴⁸ Hence, ultimately, each national government can

⁴⁸ Article 214.2 EC Treaty. TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 13 (Oxford 2003): "If it were really true that the Commissioners did not in some sense represent their states, there would be no reason why they should be appointed on the nomination of their own governments."

nominate one commissary. The ability to nominate them demonstrates the privileged position of national governments as opposed to parliaments.

The European Parliament is elected by European citizens and represents them. It has had a secondary role in the legislative process, but as a consequence of the extension of the co-decision procedure it has “come close to attaining co-equal status . . . with the Council”⁴⁹ regarding an increasing number of subjects. Moreover, the Commission, as a body, is subject to a vote of approval by the EU Parliament and the candidates are subject to hearings. The Parliament, however, cannot reject single candidates, which weakens its power of control.

The European Court of Justice (ECJ) judges are appointed by the common accord of the governments of the member states and there is one judge per member state.⁵⁰ This is not to suggest that the ECJ acts according to state preferences, but to emphasize that governments appoint ECJ judges, without parliamentary intervention.

It is easily realized that national parliaments are invariably absent from the composition and functioning of EU institutions. Particularly since the eighties, national parliaments have adopted a more active role. They have expressed a desire for greater intervention in community affairs,⁵¹ but little has been done to realize this aspiration. The Maastricht Treaty (1992) included two declarations calling for a greater dissemination of information to national parliaments by governments; and the creation of a Conference of National Parliaments (COSAC), which would be consulted regarding significant EU issues. The Amsterdam Treaty (1997) included a Protocol that timidly promoted the role of COSAC and the need for national governments to inform

⁴⁹ Paul Craig, *The Nature of the Community: Integration, Democracy, and Legitimacy*, in THE EVOLUTION OF EU LAW 38 (Paul Craig & Gráinne de Búrca eds. 1999).

⁵⁰ Article 221 EC Treaty.

⁵¹ Philip Norton, *National Parliaments and the European Union: Where to from Here*, in LAWMAKING IN THE EU 209, 211 (Paul Craig & Carol Harlow eds. 1998).

parliaments about Commission legislative drafts. These initiatives have not succeeded in effectively promoting the role of national parliaments in EU lawmaking processes.⁵²

As a result of European integration, member states' powers to unilaterally formulate domestic policies in myriad fields are constrained (especially when unanimity in the Council is not required). EU institutions, however, are not bodies totally separate from the states. States do not disappear, but they instead subsist in the executives. The executives established the new institutional structure through treaties and continued to participate in EU institutions' functioning in different ways. What is more, within the Council, governments enjoy broader decision-making powers than they do domestically since they are not subject to the legislative.⁵³ At the same time, national executives need to readapt to a new way of exercising its functions and must coordinate their action with foreign governments, through negotiation and dialogue. This sort of institutions comprised of government members, such as the Council, might be seen as an extension of the executive power at the international level, or at least as providing a framework for supranational decision-making by executives. The traditional dichotomy between the national and international spheres cannot be sustained. International executive action should be seen in connection with domestic functions, instead of occurring in a separate sphere.⁵⁴ In sum, executives participate in lawmaking processes at the supranational level, shaping domestic policies, while national legislatures are essentially left aside.⁵⁵

C. Implementing international norms within the domestic legal order

⁵² Norton, *supra* note 51, at 212.

⁵³ ARACELI MANGAS MARTÍN, DERECHO COMUNITARIO EUROPEO Y DERECHO ESPAÑOL 187 (Tecnos 1987).

⁵⁴ Slaughter, *supra* note 9, at 223.

⁵⁵ Thomas Poguntke, *A Presidentializing Party State? The Federal Republic of Germany*, in THE PRESIDENTIALIZATION OF POLITICS. A COMPARATIVE STUDY OF MODERN DEMOCRACIES 63, 68-69 (Thomas Poguntke & Paul Webb eds. 2006). Regarding Germany, Poguntke explains how the shift of powers to the EU has "introduced a significant 'executive bias' into the process of national policy formulation. When the chancellor (or a government minister) comes back from a European or international summit, they are usually in no position to negotiate the results with their parliamentary majority. . . . What has been agreed between representatives of national governments can hardly be unraveled by national parliaments."

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

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

The main EU norms are regulations and directives. EU regulations are essentially legislative acts creating rights and obligations for EU citizens. Usually, EU regulations need no further implementation. Sometimes, however, enforcement measures are needed, such as when a regulation explicitly calls for enforcement, or the terms of the regulation are rather vague. On the contrary, directives are not directly applicable within domestic legal systems.⁵⁶ They are binding "as to the result to be achieved," but leave to the national authorities "the choice of form and methods." Hence, it is for each state to decide whether the legislative or the executive should transpose EU directives.

In practice, since the general regulation of specific subject matters is contained in EU norms, the most common form of action turns out to be implementation by the executive. With regard to EU regulations, given their degree of detail and direct applicability, the executive is

⁵⁶ The ECJ has admitted that they are under certain circumstances: *Yvonne van Duyn v. Home Office*, C-41/74; *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v. Hauptzollamt Kiel*, C-158/80.

usually in charge of issuing implementing norms, in case they are needed. With regard to directives, in opposition to conventional wisdom, in Spain, for example, a surprisingly high number of directives are transposed by means of executive regulations⁵⁷ (*real decretos u órdenes ministeriales*). Since Spain's accession to the EU, only an approximate 15% of all its transposing norms are statutes.⁵⁸ Moreover, transposing laws very often merely reproduce directive provisions.

Concurrently, some scholars argue that the legislative process is not advisable for the everyday implementation of EU law⁵⁹ for several reasons: legislative procedures are slow and complex; it is pointless reopening the political debate; amendments are not permitted; and the sovereign nature of the legislative is "hardly compatible with a function subordinated to the principles, goals, and context of EU norms."⁶⁰ In contrast, executive decision-making procedures are thought to be better fitted to the application of EU law, since they are simpler, faster, and more efficient.⁶¹ Furthermore, governments were involved, as members of the Council, in the drafting of the EU legislation being implemented.⁶²

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

⁵⁷ "EU regulations," which are legislative norms emanating from EU institutions, should not be confused with "executive regulations," which are norms issued by national executives within domestic systems.

⁵⁸ *Subdirección General de Asuntos Legales Comunitarios de la Secretaría de Estado para la Unión Europea, Ministerio de Asuntos Exteriores y de Cooperación*, 13-3-2006. According to data provided by the *General Secretary of the European Commission*, 30-3-2006, in Spain, the percentage of directives transposed by statutes is 12.9%. Note that these figures are not measuring exactly the same: the percentage of directives transposed by statute is not the same as the percentage of transposing norms that are statutes. All the colleagues I told about these figures were surprised by these low percentages.

⁵⁹ Mangas Martín, *supra* note 53, at 185; Tom Burns, *Going Dutch: Problems and Policies concerning the Implementation of EU Legislation in the Netherlands*, in *LAWMAKING IN THE EUROPEAN UNION* 454, 459 (Paul Craig & Carol Harlow eds. 1998).

⁶⁰ ARACELI MANGAS MARTÍN & DIEGO J. LIÑÁN NOGUERAS, *INSTITUCIONES Y DERECHO DE LA UNIÓN EUROPEA* 502 (Tecnos 2005).

⁶¹ Mangas Martín, *supra* note 53, at 192; Burns, *supra* note 59, at 459, 465.

⁶² Mangas Martín, *supra* note 53, at 192.

system, the *European Communities Act* 1972, authorized the government to enact norms “as might be made by Act of Parliament.”⁶³ In Spain, such general legislative delegations are banned by article 82 Constitution, but legislative delegations for implementing EU law are admitted within the constitutional limits. Finally, “decree-laws,” which allow government to enact norms with force of law in case of “extraordinary and urgent necessity,” might be used, for example, when the deadline to transpose directives is about to elapse, thus avoiding violation of EU law.

Therefore, with regard to the implementation of EU law, the legislative is commonly bypassed by the executive, which alters the interaction between legislative/executive acts. The dominant scholarly opinion in Spain rejects “independent” executive regulations, which are those not developing previous legislative acts.⁶⁴ As a consequence of EU integration, however, the executive may enact independent regulations (directly implementing EU law). Formally, these regulations are not independent from “EU law.” Yet, from the standpoint of the democratic principle, these regulations are independent from norms enacted by the body democratically representing the people.

In addition, constitutions might “reserve” specific subjects to the legislative, such as consumer protection or internal trade according to the Spanish constitution. This means that parliament has the exclusive right to legislate on the “reserved” areas. The executive may only intervene to merely complement legislative acts when expressly authorized by parliament. When reserved subjects are transferred to the EU, parliament’s autonomy is significantly (or totally)

⁶³ John A. Usher, *The Legal Framework for Implementation in the United Kingdom*, in IMPLEMENTING EC LAW IN THE UNITED KINGDOM: STRUCTURES FOR INDIRECT RULE (Terence Daintith ed. 1995). For other countries that adopted general legislative delegations see Mangas Martín, *supra* note 53, at 194-196.

⁶⁴ GARCÍA DE ENTERRÍA, I CURSO DE DERECHO ADMINISTRATIVO 214-217 (Civitas 2004): “Regulations cannot be independent from statutes, for the simple reason that the creation of objective norms for the citizens cannot be independent from the Law in the modern state.”[author’s translation]

constrained. The legislative is not directly replaced with the executive, but with EU institutions. Yet, as argued before, the executive is represented in the Council.

On the whole, with regard to subjects allocated to the EU, parliaments are bypassed in their main legislative function.⁶⁵ First, the general regulation of a wide range of subjects (whether under parliamentary reserve or not) takes place at the EU level, in which executives have the ability to act through the Council. Second, within the domestic legal order, EU law is primarily implemented through executive regulations. Thus, once specific subjects are transferred to the EU, executive decision-making powers over those subjects are enhanced.

On a different note, the new functions stemming from integration have led to the reorganization of domestic administrative structures. The formation of the national will expressed at the international level takes place within the public administration, which also carries out a main role regarding implementation. As a result, the same administration tends to expand. In the words of Luciano Parejo, “Supranational integration constitutes a main factor for the transformation of the administration and national administrative law. The reason is clear[:]. . . it extends the function of national public administrations, turning them into indirect administrations of the community-European sphere.”⁶⁶ In Spain, EU integration has had an impact upon administrative organization. The Secretary of State for the EU, within the Ministry of Foreign Affairs, was set up to “coordinate the action of the Spanish administration within the Community institutions.” The Secretary of State for the EU encompasses the General Secretary for the EU, the General Directorate for Integration and Coordination of Economic and General Affairs, and the General Directorate for Coordinating the Internal Market and other Community Policies. Each of these units is divided into several sub-general directorates. Moreover, other

⁶⁵ LUCIANO PAREJO ALFONSO, *DERECHO ADMINISTRATIVO 202* (Ariel 2003).

⁶⁶ *Id.* at 204 [author’s translation].

units and specialized bodies have proliferated within the several ministries to develop functions related to specific supranational policies affecting their respective fields. Also, inter-ministerial commissions have been set to coordinate the several ministries.

Finally, although space limitations prohibit development of this issue, it is worth noting that in states of a federal-type, such as Spain, the implementation of international obligations might be an occasion for surmounting the domestic allocation of powers in favor of the central government. Although the Spanish constitutional court has held that the implementation of EU law cannot be a mechanism for surreptitiously altering the allocation of powers between the central government and the autonomous communities, the principle of state responsibility for EU law compliance might lead to the expansion of the central government's scope regarding specific issues.⁶⁷

IV. Conclusion

The mounting concentration of power in the executive, vis-à-vis the legislative, within domestic legal orders has long been a subject of concern.⁶⁸ This tendency has only been exacerbated as a consequence of the internationalization of lawmaking processes. On the one hand, internationalization de-concentrates public power among the multiplicity of inter-, supra-, and trans-national spheres; and, on the other hand, it re-concentrates power in the executive. As a result, the unitary conception of the state and the domestic constitutional balance of powers are altered. The development of full-fledged international regulatory regimes covering myriad subjects and the intense collaboration through transnational networks heavily influence or even

⁶⁷ LUÍS MARÍA DÍEZ PICAZO, *CONSTITUCIONALISMO DE LA UNIÓN EUROPEA* 191-193 (Civitas 2002).

⁶⁸ PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 169 (Oxford University Press): "Executives tend to be dominant in most modern domestic polities. . . . The idea that national parliaments really control the emergence or content of legislative norms no longer comports with reality"; Martin Shapiro, *Implementation, Discretion and Rules*, in *COMPLIANCE AND ENFORCEMENT OF EUROPEAN COMMUNITY LAW* 27 (J. A. E. Vervaele ed. 1999).

shape domestic policy-making and ultimately the regulation of citizens' everyday lives. Hence, the declining role of national parliaments, as representatives of society's diverse composition and interests, is troublesome from the standpoint of the democratic legitimacy of the new lawmaking processes and legal outcomes.⁶⁹ Although states retain coercive powers, the norms being enforced are drafted in a plurality of inter-, supra-, and trans-national sites. Critics condemn the distortion of the domestic balance of interests and national policy-making processes.

To counteract the declining role of the legislative, some have proposed enhancing parliamentary participation in the international sphere. A world (or international-regional) parliament, however, is not a viable option because, among other reasons, there is no collective identity (*demos*) capable of grounding a democratic regime beyond national borders. Even the EU, with a high degree of integration, still lacks a European *demos*.⁷⁰ Consequently, the democratic deficit cannot simply be solved by granting more powers to the European Parliament.⁷¹ Slaughter suggested that since the ideal of representative democracy is going to remain, it is vital to develop transnational legislative networks.⁷² According to this scholar, such networks would contribute to solving problems regarding the distortion of national political processes.⁷³ Given the structural reasons indicated before, however, such networks could hardly reach the level of effectiveness of government networks. Furthermore, even if parliamentary representatives participate and possibly contribute to the legitimacy of lawmaking processes in

⁶⁹ In presidential systems, both parliament and president are elected by the people. Still, there are differences regarding their respective claims to democratic representation. Parliament embraces majorities and minorities, and the legislative process guarantees that all interests will be taken into account. I will leave this discussion for Panel I. In any event, the direct election of the president does not seem to be sufficient to ground the legitimacy of all forms of international lawmaking from the standpoint of representative democracy.

⁷⁰ Some argue this might evolve in the future. See Jürgen Habermas, *Comment on the Paper by Dieter Grimm: Does Europe need a Constitution?*, 1 EUROPEAN LAW JOURNAL 303, 305-307 (1995).

⁷¹ Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUROPEAN LAW JOURNAL 282, 291-297 (1995).

⁷² Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1041, 1073 (2003).

⁷³ Slaughter, *supra* note 9, at 238.

the international sphere, the popular will would, nonetheless, be distorted because national parliamentary representatives would need to collaborate with foreign representatives, who represent other popular wills. Therefore, the challenge to representative democracy cannot be solved by merely developing parallel legislative networks.

The most effective function for national parliaments, sometimes underrated in this context, is monitoring the executive through internal mechanisms, which should be strengthened (or created anew) regarding executive international action. The several members of the executive develop their functions in the national and international spheres in such a way that their responsibilities should be reconceptualized to include both. Parliaments' abilities to participate and monitor governmental international action should be enhanced, given the increasing influence of international lawmaking upon the domestic legal order. Along these lines, for example, ministers in the EU could be subject to a "mandate" so that in the Council of Ministers they must adopt the position previously approved by the national parliament.⁷⁴ Also, national parliaments could be consulted or even given the power to nominate members to the Commission.

Under the conceptual framework of representative democracy, the problem resides in globalization itself, as a denationalization process, and ultimately in the breakdown of the national sovereignty paradigm. Democratic legitimacy on the basis of popular consent presupposes a self-governing people who determine their own future within the territorial boundaries of the state.⁷⁵ As a consequence of globalization, however, not all power exercised

⁷⁴ Such as in Denmark, Norton, *supra* note 51, at 216.

⁷⁵ Without focusing on national boundaries, the ideal model of representative democracy has already been questioned from both a descriptive and a normative standpoint, and alternative models of democracy have been advanced, for instance: pluralist, competitive elitist, or neocorporativist. See Held, *supra* note 18.

within the state derives strictly from national sources.⁷⁶ Lawmaking takes place in a plurality of centers beyond the state.⁷⁷ The fact that these processes do not fulfill the classic democratic model does not mean that international law or other forms of transnational decision-making are illegitimate. A concept of legitimacy that presupposes the unity of state-power-nation cannot be transferred to the international sphere. Instead, it is necessary to rethink the sources of legitimacy in light of new problems and institutions in a globalized world.

From the standpoint of political philosophy, several scholars have formulated alternative democratic models applicable to the international sphere:⁷⁸ deliberative democracy,⁷⁹ cosmopolitan democracy,⁸⁰ and horizontal democracy,⁸¹ among others. From different perspectives, decision-makers' accountability⁸² is regarded as essential in guaranteeing the legitimacy of international lawmaking.⁸³ Along these lines, some insist on the need to establish mechanisms to secure transparency⁸⁴ and participation⁸⁵ in decision-making processes beyond

⁷⁶ Neil MacCormick, *Beyond the Sovereign State*, 56 THE MODERN LAW REVIEW 1, 16 (1993)

⁷⁷ David Held, *Democracy and the New International Order*, in COSMOPOLITAN DEMOCRACY 96, 99 (Daniele Archibugi & David Held eds. 1995): "National communities by no means make and determine decisions and policies exclusively for themselves, and governments by no means determine what is right or appropriate exclusively for their own citizens."

⁷⁸ Held, *supra* note 77, at 96-97: "While we cannot do without democracy, it is increasingly bankrupt in its traditional shape and, thus, needs fundamental reform, in the short and long terms."

⁷⁹ DEIRDRE CURTIN, POSTNATIONAL DEMOCRACY. THE EUROPEAN UNION IN SEARCH OF A POLITICAL PHILOSOPHY (Kluwer 1997); Jens Steffek, *The Legitimation of International Governance: A Discourse Approach*, 9 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 249, 271 (2003).

⁸⁰ Held, *supra* note 77, at 106-117.

⁸¹ Slaughter, *supra* note 72, at 1071-1073.

⁸² Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 347 (2001); Delbruck, *supra* note 8, at 42.

⁸³ A group of scholars, Kingsbury, Krisch & Stewart, *supra* note 13, at 17, approach the legitimacy problems arising from globalization from the perspective of "global administrative law," defined as "comprising the mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make."

⁸⁴ Slaughter, *supra* note 9, at 235-237, noting that transparency might be problematic from the standpoint of efficiency, since one of the advantages of transnational networks is their flexibility and informality.

⁸⁵ International regimes and networks might favor the participation of a broad range of governmental and non-governmental actors. This broad participation also raises criticism. See Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 9 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 369, 374 (2001): "While the ticket to participation in governance is knowledge and/or passion, both knowledge and passion generate perspectives that are not those of the rest of us."

the state.⁸⁶ Judicial review, whether national or international, is also an important mechanism of control.⁸⁷ In addition, specialized technical knowledge (*expertise*) and, more importantly, the effectiveness of international regulation to achieve specific goals could contribute to legitimacy from the standpoint of the outcome (*output legitimacy*).⁸⁸ Hence, legitimacy might derive from different sources at the same time. Given the diversity of international organizations and transnational networks, the problems of legitimacy and the adequate strategies to face them might vary.⁸⁹

To conclude, the fragmentation of state power is not just an evil we should embrace simply because of improved effectiveness. Rather, decentralizing lawmaking powers among a plurality of spheres should be welcome normatively. This contributes to overcoming the risks inherent in unlimited national sovereignty⁹⁰ by creating mutual checks and balances among the several decision-making sites. As such, the underlying motive spurring integration in Europe was to constrain the potential excesses of sovereign (even democratic) states by creating a supranational community with lawmaking powers.⁹¹ The well-known criticism of the EU as democratically illegitimate emerges from comparing the EU with a conceptual model of representative democracy that cannot be transferred to the international sphere and does not even exist within the domestic sphere in its ideal version.⁹² Some have suggested that if the EU is compared to the actual functioning of member states' democracies, the democratic deficit

⁸⁶ Kingsbury, Krisch & Stewart, *supra* note 13, at 34-39.

⁸⁷ *Id.* at 40.

⁸⁸ Delbruck, *supra* note 8, at 42-43.

⁸⁹ *Id.* at 43.

⁹⁰ Paul Kahn, *The Question of Sovereignty*, 40 STANFORD JOURNAL OF INTERNATIONAL LAW 259, 264 (2004): "A regime of nation-states was a regime at war or anticipating the possibility of war."

⁹¹ JOSEPH H. H. WEILER, *THE CONSTITUTION OF EUROPE* 341 (Cambridge 1999): "A central plank of the project of European integration may be seen, then, as an attempt to control the excesses of the modern nation-state in Europe, especially, but not only, its propensity to violent conflict."

⁹² For instance, the ideal view of the legislative branch as reflecting on the popular will is already under criticism. Instead, the legislative is captured by interest groups. See MARTIN SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 24 (Prentice-Hall 1966). Also, the same tendency toward executive aggrandizement exists within modern domestic polities. Craig & de Búrca, *supra* note 68, at 169-170.

criticism is weakened, at least to the extent that it addresses only the EU.⁹³ Furthermore, admittedly, globalization creates pressures and incentives to develop forms of international collective regulation. If compared with the alternative of an heterogeneous group of international agreements exclusively dominated by the executive, the establishment of a stable institutional structure, such as the EU, offers more advantages not only from an efficiency standpoint (avoiding transaction and negotiation costs), but also from a legitimacy standpoint.⁹⁴ Decision-making processes become more visible, and it is then possible to mandate the intervention of diverse institutions representing varied interests. EU lawmaking procedures are founded on the twofold legitimacy of state governments represented in the Council and citizens in the European Parliament. The Commission contributes to an institutional balance in representation of the community interest.⁹⁵ Thus, a plurality of institutions (checking each other) must collaborate in supranational lawmaking.⁹⁶ Furthermore, the ECJ guarantees that EU institutions do not exceed their powers and that EU norms respect fundamental rights. The role of national parliaments, however, is still unsatisfactory. Yet, with the alternative of a web of *ad hoc* international agreements they could be totally ignored, with little hope to improve their position. In addition, the EU is a system of multilevel governance, in which the implementation of EU law requires the collaboration of all national authorities. Hence, within the EU institutional framework, there are important mechanisms of power distribution and control, both horizontally (among EU institutions) and vertically (between the EU and the member states). Institutional balance as a

⁹³ Andrew Moravcsik, *In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union*, 40 JOURNAL OF COMMON MARKET STUDIES 603, 621: "When judged by the practices of existing nation-states and in the context of a multi-level system, there is little evidence that the EU suffers from a fundamental democratic deficit." However, this argument does not necessarily lead to deny the democratic deficit, but emphasizes that it is not privative of the international sphere. If current practices within the states can be regarded as democratically legitimate, then the EU is not less democratic than the states.

⁹⁴ Craig & de Búrca, *supra* note 68, at 170.

⁹⁵ Craig, *supra* note 49, at 38-40.

⁹⁶ *Id.* at 40: "The very structure of decision-making under the co-decision procedure forces the players to re-evaluate their preferences in the light of the opinions expressed by the other participants."

mechanism to enhance deliberation among institutions representing a diversity of interests and values in the search for the common interest may well be associated to a deliberative notion of democracy.⁹⁷ Ultimately, the new conflicts and tensions stemming from the internationalization of lawmaking processes call for our political imagination to formulate models of legitimacy that permit the reconciliation of democracy with a plurality of decision-making forums at the inter-, supra-, and trans-national levels.

⁹⁷ *Id.* at 36-42.