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the New Public Law: Legitimacy

Carol Harlow

LSE Law, Society and Economy Working Papers 19/2010

London School of Economics and Political Science

Law Department

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Carol Harlow*

Abstract: In the context of rule-making by transnational bodies, this paper explores the concept of legitimacy in the literature of law and political science. The European Union, the most institutionally developed form of transnational governance, with lawmaking structures in place that can be characterised as 'legislative', is throughout taken as paradigm. Section 2 discusses the view that legitimacy is largely a 'new' concept in public law and that lawyers tend to bypass questions of legitimacy with resort to better-known doctrines of sovereignty, primacy, human rights and the rule of law. Section 3 deals with consent, delegation and the 'output legitimacy' of efficiency and expertise, as the basis for legitimating the activities of transnational institutions. Section 4 turns to democracy, representative and popular, arguably the most potent legitimating device in modern times. Section 5 treats the case of the judiciary, responsible for formulating general principle and human rights standards but increasingly facing a multiplicity of national and transnational with complex and overlapping jurisdictions. The paper concludes that the many challenges for legal theorists and practitioners stemming from the rapid growth of norm-producing international bodies are more likely to be resolved by the application of ideas of legal pluralism than through the concept of legitimacy, central to political science but likely to remain peripheral to law.

* Law Department, London School of Economics and Political Science. This text is a presentation to the Conference of the European Group of Public Law which was held on the island of Spetses, Greece, between 10-12 September 2010 on the theme 'Concepts and Methods of Reasoning of the New Public Law' and is going to be published in (spring/printemps 2011) 23(1) *European Review of Public Law*. The author wishes also to thank Richard Rawlings and Jo Murkens for their help with early drafts.

INTRODUCTION

In the context of rule-making by transnational bodies, this paper explores the concept of legitimacy in the literature of law and political science. The European Union, the most institutionally developed form of transnational governance, with lawmaking structures in place that can be characterised as ‘legislative’, is throughout taken as paradigm. Section 2 discusses the view that legitimacy is largely a ‘new’ concept in public law and that lawyers tend to bypass questions of legitimacy with resort to better-known doctrines of sovereignty, primacy, human rights, and the rule of law. Section 3 deals with consent, delegation, and the ‘output legitimacy’ of efficiency and expertise, as the basis for legitimating the activities of transnational institutions. Section 4 turns to democracy, representative and popular, arguably the most potent legitimating device in modern times. Section 5 treats the case of the judiciary, responsible for formulating general principle and human rights standards but increasingly facing a multiplicity of national and transnational with complex and overlapping jurisdictions. The paper concludes that the many challenges for legal theorists and practitioners stemming from the rapid growth of norm-producing international bodies are more likely to be resolved by the application of ideas of legal pluralism than through the concept of legitimacy, central to political science but likely to remain peripheral to law.

1. A NEW LEGISLATION?

In the course of the twentieth century, western systems of governance have undergone many changes. Two world wars and economic depression in the inter-year period all contributed to the rise of an ‘administrative state’, administered by sizeable bureaucracies. The state has taken on new and considerable roles as a welfare state responsible for the administration of a wide range of public services. As state functions multiplied, so the machinery of governance became more complex, with functions downloaded to regional and local government, transferred to agencies, and outsourced to the private sector. The last decades of the twentieth century saw a rapid development of sophisticated communications technology, facilitating ‘on line’ service delivery and administration. This accentuated a bureaucratic style of administration functioning primarily through rules and rule-making. Administration, in Teubner’s ugly word, became ‘juridified’;¹ relationships between state and citizen, between officials, between the multiple levels and organisms of the state became increasingly impersonal and formulated in terms of law and rules. The outcome was a significant diffusion of

¹ G. Teubner, ‘Juridification: Concepts, Aspects, Limits, Solutions’ in G. Teubner (ed), *Juridification of Social Spheres* (de Gruyter, 1987).

normative power away from elected legislatures into the executive and administrative sphere.²

The title of this section, 'A New Legislation', implies that there is something novel about the contemporary legislative process; that the term 'legislation' has somehow lost its potency, and that the 'new' executive legislation no longer represents 'the will of the people', expressed by a sovereign legislature. I would dismiss this argument. The onward march of the administrative state has by no means had the effect of diminishing the flow of parliamentary legislation. To the contrary, it has grown ever more abundant, more technical, and more complex; to coin a phrase, legislation has become juridified and the formal hierarchy of legal norms remains in place. In common law countries, executive legislation remains a 'delegation'; elsewhere, executive lawmaking powers are recognised but strictly delimited. Whether legislatures really possess the tools to exercise the rights of scrutiny implicit in the notion of delegation is another question altogether but not, I think, one that should detain us here.

Nor is there anything very 'new' about imposing limitations on legislatures. Constitutionalism is not a new doctrine. It antedates democracy in the modern sense of universal suffrage and dates back at least as far as the French and American revolutions. In a majority of modern nation-states, more especially federal states, legislatures operate in the framework of a written constitution. Constitutional provisions may directly incorporate as law provisions of international law and international conventions. Again, as discussed in Section 5, many legislatures operate in the shadow of a constitutional court with power to invalidate legislation. And even where a national legislature is technically 'sovereign' in the sense that it cannot be legally fettered, the reality is very different. The point was made crystal clear by the nineteenth-century English constitutional writer, Professor A.V. Dicey, to whom the English doctrine of parliamentary sovereignty is often attributed. As Dicey observed, everyone knows 'as a matter of common sense that, whatever lawyers may say, the sovereign power of Parliament is not unlimited [...] If the doctrine of Parliamentary sovereignty involves the attribution of unrestricted power to Parliament, the dogma is no better than a legal fiction, and certainly is not worth the stress here laid upon it'.³ He went on to call a law enacted by the British Parliament to ban smoking in the streets of Paris 'pointless'.

The example takes us to the heart of the subject-matter of this paper. Today a decision to ban smoking in the streets of Paris might, if taken by the European Union (EU),⁴ be strictly legal inside France, though whether it would be

² P. Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s' (2004) 113 *Yale LJ* 1341, 1343.

³ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 9th ed by ECS Wade, 1959), 69-71. And see J. Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Oxford: Oxford University Press, 1999).

⁴ For convenience the term 'EU law' is used throughout this paper to cover what was previously EC law. Where it is necessary to distinguish EC and EU institutions, the term 'Community' is used. The term

enforceable is another matter. A directive imposing a pan-European ban on tobacco advertising was, for example, hotly contested by Germany in two cases before the European Court of Justice (ECJ). Germany won the first round; on publication of the Advocate General's Opinion in the second, Germany conceded and agreed to implement the directive. Twelve years later, when the time limit for transposition had expired, the German Bundesrat was still holding out against the necessary legislation.⁵ If, as is generally agreed, it is a characteristic of law that it is binding, why can this EU law not be enforced? Is its legitimacy perhaps in question?

The EU is a unique transnational regime possessing 'legislative' powers in the full sense of that term even if, significantly, member states have insisted on denying the magic term 'law' to its legislative output.⁶ It possesses a bicameral 'legislature', an indirectly elected Council representative of the member states, and a directly elected Parliament. A powerful Court, with some of the characteristics of a constitutional court, has with apparent success asserted the primacy of EU over national legislation.⁷ If the legislation of these bodies is contestable, what are the chances of other international bodies, whose institutions are more fragile and whose regimes are less state-like in character?

GLOBAL GOVERNANCE AND RULEMAKING

The late twentieth century saw the paraphernalia of the administrative state carried over into global space,⁸ first with an abundance of international institutions and bodies, latterly of regulatory systems, policy-making networks, and agencies. In an effort to encapsulate the diffuse activities of these assorted systems and networks, the terms 'governance' and 'new governance' have been coined.⁹ Increasingly these networks, typically composed of both private and public actors, are characterised as embryonic systems of 'global governance'. They too are, or are becoming, 'juridified' as the very same technologies employed to transform citizen / state relationships are called into play to overcome problems of space and

'Luxembourg Courts' refers to the Court of Justice (ECJ) and the Court of First Instance (CFI), now the General Court.

⁵ Directive 98/43/EC of 6 July 1998 on the advertising and sponsorship of tobacco products was annulled in Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419 and replaced by Directive 2003/33/EC, validated in Case C-380/03 *Germany v Parliament and Council* [2006] I-11573. On implementation, see *Deutsche Welle* online (24 June 2010).

⁶ Title V, ch 1, art 1 of the Draft Constitutional Treaty for the European Union proposed a new nomenclature of European laws and framework laws to replace the existing legal hierarchy of regulations and directives. Significantly, this was not replicated in the Treaty of Lisbon.

⁷ Case 26/62 *Van Gend en Loos v Nederlandse Administratie Belastingen* [1963] ECR 1; *Costa v ENEL* [1964] ECR 585; Case 106/77 *Ammistazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629. Pt 1, art 10 of the Draft Constitution would have confirmed the judge-made primacy principle but was replaced at Lisbon by provisions delineating respective competences (TFEU, title 1, arts 2-4).

⁸ Lindseth, n 2 above.

⁹ R. Rhodes, 'The New Governance: Governing without Government' (1996) 44 *Political Studies* 652.

distance. Would-be hierarchies of rules are coming into being; conventions, regulation, rules, and standards of questionable status and legitimacy.¹⁰

The rules made by international bodies are diverse in character but, aside from the exceptional case of the EU, few if any fall within the established meaning of ‘legislation’, a term that contains the idea of process: legislation is ‘the process of making laws’ or ‘the body of laws collectively’.¹¹ The implication is that legislation is ‘enacted’. The question then becomes whether the term is wide enough to embrace the various decisions and regulatory texts issued by international bodies to which the term ‘soft law’ is usually applied, indicating that it carries some legal force and may be enforced even if not strictly speaking enforceable.¹²

Resort to soft law in international policy-making is, it has been argued, a deliberate choice; the choice of ‘hard law’ in international relations strengthens the credibility of commitment but also restricts actors’ behaviour as well as, more significantly, their legal sovereignty.¹³ But ‘soft’ and ‘hard’ are in any event only points on a scale largely determined by enforceability, which may in turn depend, as in the case of tobacco advertising, on the legitimacy or perceived legitimacy of the rule-maker. And, just as policy- and decision-making capacity has moved beyond the state, so we have seen the development of transnational regulatory institutions of a type normally associated with constitutionalism: notably international human rights charters and strong regimes of judicial review.¹⁴ These regimes too promulgate rules in the form of human rights texts, principles, and judicially enforced standards. Perhaps then the term ‘new legislation’ has been coined to suggest a parallel with the new forms of ‘governance’ beginning to demand recognition in global space? As these increasingly impinge on national sovereignty, questions of legitimacy inevitably arise: are we seeing, as some Utopians predict, the rise of a cosmopolitan legal order,¹⁵ or global system of administrative law?¹⁶ More pessimistically, are we looking at the slow death of popular democracy and with it, the demise of legislative processes that truly represent ‘the will of the people’?¹⁷

¹⁰ R. Wessel and J. Wouters, ‘The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres’ in D. Curtin and A. Wille (eds), *Meaning and Practice of Accountability in the EU Multi-Level Context* (CONNEX Report Series No 07, 2008).

¹¹ The same is true of French: see G. Cornu, *Vocabulaire juridique* (Paris: PUF, 1987).

¹² See for a useful catalogue, K. Wellens and G. Borchardt, ‘Soft Law in European Community Law’ (1989) 14 *EL Rev* 267.

¹³ K. Abbott and D. Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421.

¹⁴ N. Walker, ‘Taking Constitutionalism Beyond the State’ (2008) 56 *Political Studies* 519. And see B. Ackerman, ‘The Rise of World Constitutionalism’ (1997) 83 *Virginia L Rev* 771; D. Chalmers, ‘Post-Nationalism and the Quest for Constitutional Substitutes’ (2000) 27 *J of Legal Studies* 178.

¹⁵ D. Archebugi and D. Held (eds), *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge: Polity Press, 1995).

¹⁶ S. Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’ (2005) 37 *New York University J of International Law & Politics* 663.

¹⁷ P. Cerny, ‘Globalization and the End of Democracy’ (1999) 36 *European Journal of Political Research* 1; R. Dahl, ‘Can International Organizations be Democratic? A Skeptic’s View’ in I. Shapiro and C. Hacker-Cordon (eds), *Democracy’s Edges* (Cambridge: Cambridge University Press, 1999).

THE CONCEPT OF LEGITIMACY

Legitimacy is, I shall suggest, ‘new’ to public law in the sense that it is neither a term of art nor in common usage amongst lawyers, who, I shall suggest in Section 2 of this paper, tend to bypass questions of legitimacy with resort to doctrines such as sovereignty and primacy. In Section 2 I have therefore tried to look more closely at this alien concept. Legitimacy is, however, a vast and amorphous subject on which economists, sociologists, political scientists and lawyers have propounded differing views in different conceptual vocabularies. I make no apology for trying to contain this vast literature and cut it down to manageable proportions. I have focused on law and political science, using the EU as my paradigm. The widening and deepening political reach of the EU in the years since 1992 has sparked off a fierce political debate over various aspects of legitimacy. The EU is also the form of transnational governance that is most institutionally developed and whose lawmaking has the greatest claim to be characterised as ‘legislation’. Across the world, the EU is therefore the object of scholarship. This has the advantage of bringing to the table contributions from scholars from a wide variety of disciplines, jurisdictions, cultures, and languages, writing in English. I have drawn unhesitatingly on this rich literature.

Sections 3 and 4 are concerned with the tools of legitimation or ‘legitimation devices’. In Section 3, I look at consent and delegation as bases for legitimacy and on so-called ‘output legitimacy’, based on efficiency and expertise. Section 4 treats democracy both representative and popular, arguably the most potent legitimating device in modern times. The paper focuses specially on: the legitimacy of representatives; of direct democracy; of private powers and of the judicial process. I have reserved the case of the judiciary, responsible for formulating general principle and human rights standards, for separate treatment in Section 5. Here I look also, in the context of a well-known dispute over UN rule-making, at the controversial question whether lawmaking by transnational courts is sufficiently legitimate to claim ‘primacy’ when it impinges on national legal orders. Section 6 contains my conclusions, which outline a case for legal pluralism.

2. THINKING ABOUT LEGITIMACY

LAWYERS AND LEGITIMACY

Lawyers, I have suggested, are not entirely comfortable with the concept of legitimacy, which falls on the edge of the parameters of legal thought. They tend to define legitimacy purely in terms of legality, a positivist preference legitimated by the *Oxford English Dictionary*, where legitimacy is defined as ‘conformity with the law or to rules’. In this way lawyers side-step the concept of legitimacy by

assuming that what is 'legal' is necessarily legitimate.¹⁸ This is not the end of the question, however. Legality is a fluid and contestable concept by no means coterminous with legislation. Some of the most acrimonious disputes in modern administrative law concern the legitimacy of judicial attempts to pack into the notion not only general principles of law as articulated by courts but also human rights principles.

It is not of course my argument that lawyers never concern themselves with legitimacy; this paper shows indeed that, increasingly, they do just that. The point I am making is that lawyers have traditionally conducted their debate in different and more familiar language: sovereignty,¹⁹ primacy, constitutionality, competence, and jurisdiction are all concepts used in legal debate to side-step questions of legitimacy. Yet wrapped up in even the simplest normative concept of legal sovereignty is a sense of unease that lawyers have somehow missed the boat. This is captured to perfection in Dicey's famous paradox of the Parliament that can in principle pass a law legalising the killing of all blue-eyed babies but would never in practice do so because of the good sense of parliamentarians.²⁰ The awkward division between legal and political sovereignty to which Dicey resorted fails notably to convince: the override of democratic legitimacy (political sovereignty) leaves the blue-eyed babies to the mercy of politicians, who have often proved to be malignant; in a constitutionalist scenario (legal sovereignty), their fate lies in the hands of an unelected, unaccountable judiciary.²¹ And which twin is the elder?²² Small wonder when lawyers blur the edges of the sovereignty doctrine by adding the rider that, to command obedience, the state must be a *rechtsstaat* in the sense of a state that observes the rule of law; indeed Dicey himself fell back on this solution.

But debates about the rule of law pose an identical dilemma.²³ Legality is a core requirement of the rule of law but the bare assertion that government must act 'legally' (ruler and ruled must alike observe the law) is customarily extended by a raft of procedural requirements. Legislative sovereignty is limited by the proviso that the law must be clear; that there must be no retrospective legislation, especially in criminal matters. Government is required to follow proper

¹⁸ A similar ambiguity exists in French: see Cornu, n 11 above. And see J. Gribnau, 'The Legitimacy of the Judiciary' (2002) 6(4) *Electronic Journal of Comparative Law*.

¹⁹ But J. Murkens, "'We Want our Identity Back' – The Revival of National Sovereignty in the German Federal Constitutional Court's Decision on the Lisbon Treaty' (2010) *Public Law* 530, noting (at 534) that the *Lisbon* decision uses the term 'sovereignty' 49 times, remarks (at 538) on the absence of the term from classic German constitutional discourse: 'Sovereignty has never been part of the object-language of the system.'

²⁰ Dicey, n 3 above, 81.

²¹ The discussion by J. Hart Ely, *Democracy and Distrust, A Theory of Judicial Review* (Boston: Harvard University Press, 1980) has not been bettered.

²² The debate on sovereignty can be traced to the work of Hans Kelsen and Carl Schmitt: see D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Clarendon Press, 1997).

²³ P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467; C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European J of International Law* 187.

procedures and adopt ‘fair’ adjudicative procedures. Equality of access to the judicial process must be provided; and so on. Modern interpretations of the rule of law may go further in seeking to furnish the rule of law with a moral dimension; insisting, for example, that the machinery of governance be democratic.²⁴ Substantive definitions go further still, insisting that the *rechtsstaat* stand to its international law obligations or reading into the concept references to human rights law.²⁵ Here, for the first time, the fate of blue-eyed babies seems to be addressed.

Debates of this kind among lawyers generally sidestep the notion of legitimacy. But if we accept the commonly-held view of legitimacy as involving arguments about the justification for and obedience to authority, then legality and legitimacy, semantically related concepts, have much in common with the rule of law. These are not purely political or purely legal questions. Formal questions of legality, sovereignty, and primacy, largely procedural in character, lie at one end of a scale; at the other end, lie questions of substance and values. To quote de Búrca:

In most western political systems, the power of the state is legitimated through the democratic process, in that government is supposedly based on the consent of the governed, who broadly support the values on which the state is founded. Thus legitimacy has both a social aspect, in terms of being rooted in popular consent, and a normative aspect, in terms of the underlying values on which such consent is based.²⁶

Jachtenfuchs, who does not attempt definition, identifies three broad notions of legitimacy in the modern literature:

Shared values

Jachtenfuchs’ first category deals with legitimacy as based on ‘consensus of shared values’, a position he associates particularly with lawyers, perhaps because it is ‘reflected in the catalogue of fundamental rights and values contained in many Western constitutions’,²⁷ and both constitutions and human rights texts tend to be drafted by or at least with the aid of lawyers. This enables lawyers to skirt the notion of legitimacy by replacing it with the potent symbolism of human rights. In just this way, the three most powerful legitimating devices of our times are linked as ‘mutually reinforcing’ in the UN Outcome Document of 2005,²⁸ which

²⁴ A. Von Bogdandy, ‘A Disputed Idea Becomes Law: Remarks on European Democracy as a Legal Principle’ in B. Kohler-Koch and B. Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Lanham: Rowman & Littlefield, 2007).

²⁵ Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67.

²⁶ G. de Búrca, ‘The Quest for Legitimacy in the European Union’ (1996) 59 *Modern Law Review* 349.

²⁷ M. Jachtenfuchs, ‘Theoretical Perspectives on European Governance’ (1995) 1 *European Law Journal* 113, 126.

²⁸ UN Doc A/RES/60/1 (24 Oct 2005). And see Judge R. Higgins, ‘The ICJ, the UN System and the Rule of Law’ (2007) 4 *Justice Journal* 41.

commits states to ‘actively protecting and promoting all human rights, the rule of law and democracy’. The governing Treaty of the European Union states similarly that ‘[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’. It contains a commitment to respect the fundamental rights guaranteed by the European Convention (ECHR), which the Union is now committed to sign. Significantly too, the EU in one of its many quests for legitimacy has produced a home-grown Charter of Fundamental Rights (ECFR).²⁹

Equally, the idea of value legitimacy may lead to the notion of legitimation through common cultural norms. Lindseth, for example, deplors the way in which the translation of the ‘bureaucratic administrative state’ from national to supranational space has undercut the implicit public trust in public officials provided at national level by history, shared identity, and values that constitute the ‘cultural underpinning of the modern administrative state’.³⁰ In its *Maastricht* judgment,³¹ the German Federal Constitutional Court (BVerfG), consulted over the compatibility of the Maastricht Treaty with German constitutional law, asserted its competence to review the legal instruments of European institutions for *ultra vires*. This statement, articulated in the legal language of competence (*kompetenz-kompetenz*), threatened the self-conferred legitimacy of the ECJ as uniquely competent to determine the legality of acts of the EU institutions.³² More controversial was the Court’s ‘No-Demos theory’ of legitimacy based on the idea of a culturally homogenous German *volk*.³³ But these are ideas with wide popular appeal. The Bundesrat responded to the *Maastricht* decision by legislating to ‘curtail the influence of European law upon the German legal system whenever it demands changes which the national system of checks upon constitutional amendments could not condone’. It also strengthened the position of the political institutions by requiring parliamentary approval for transfers that require alteration to the Basic Law.

In its *Lisbon* judgment,³⁴ the focus of the Court was on two rather different legitimacy questions: Are there internal limits to the sovereign powers that can be transferred to the EU? And does the democracy deficit in the EU mean that there

²⁹ G. de Búrca, ‘The Drafting of the European Union Charter of Fundamental Rights’ (2000) 25 *EL Rev* 126. The ECFR is ‘recognised’ by art 6 of the TEU as amended at Lisbon, subject to a proviso that it shall not extend the competences of the EU and to an opt-out by Poland and the UK.

³⁰ P. Lindseth, ‘Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community’ (1999) 99 *Columbia Law Review* 628, 648-651.

³¹ BVerfGE 89, 155; M. Kumm, ‘Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice’ (1999) 36 *CML Rev* 356.

³² Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199. Though see now the Opinion of A.G. Cruz Villalón in Case C-173/09 *Elchinov v Natsionalna zdatnoosiguriteina kasa* (10 June 2010).

³³ Sourced, explained, and savagely critiqued by J. Weiler, ‘Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision’ (1995) 1 *European Law Journal* 219.

³⁴ BVerfG, 2 BvE 2/08 (June 30 2009). The ruling was that German legislation empowering ratification of the Treaty was possible if the implementation law was rewritten.

are inherent limits to further European integration?³⁵ Again, the BverfG ruled that integration was not boundless but limited by the Constitution and by identity: only the German people could take the step of joining a federal state; German institutions could not ‘abandon the right to self-determination of its people’.³⁶ This time, however, the overtly ethnic reasoning that had attracted criticism was suppressed and the BverfG chose to answer the questions primarily in terms of democratic legitimacy, saying:

The right to vote is the citizens’ most important individually assertable right to democratic participation guaranteed by the Basic Law; to protect which the Bundestag and Federal Government must be in a position to exert a decisive influence on European decision-making procedure.³⁷

It moved on, however, to include some contentious remarks about democracy with hints of a deeper culture-based argument. According to the BverfG democracy requires that the member states of the EU ‘retain sufficient space for the political formation of the economic, cultural and social circumstances of life’ and for political decisions that ‘particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament’.³⁸ A core of enumerated sovereign powers should also be retained.³⁹ In a decision based squarely on legitimacy, the BverfG has confirmed its position on the ultimately subordinate position of the EU legal order and, as we shall see in Section 5, re-opened the earlier *kompetenz kompetenz* debate.

Loyalty and obedience

The second category of writing recognised by Jachtenfuchs is functionalist and relativist, measurable in terms of the ‘loyalty of the citizens with respect to the decisions of the political system’. This position too is easily acceptable to lawyers, accustomed to a positivist definition of law as ‘habitual obedience’ to the will of a sovereign. Loyalty may either be assumed, as with the so called ‘permissive consensus’ used for decades to justify rapid evolution of the European enterprise, or measured by political scientists, using techniques such as opinion polling.

Typically, lawyers do not set out to assess legitimacy through empirical research, an understandable lack of interest and capability that is nonetheless a deficiency. But an alternative test of political opinion can be made by referenda,

³⁵ Murkens, n 19 above, 531.

³⁶ *ibid*, 532.

³⁷ Lisbon decision at [246].

³⁸ *ibid* at [249].

³⁹ *ibid* at [249] and [252]-[260]. This part of the ruling has been criticised by Murkens, n 19 above, and by C. Tomuschat, ‘The Ruling of the German Constitutional Court on the ‘Treaty of Lisbon’ (2009) 10(8) *German LJ* 1259. For a defence, see F. Schorkopf, ‘The European Union as An Association of Sovereign States: Karlsruhe’s Ruling on the ‘Treaty of Lisbon’ (2009) 10(8) *German LJ* 1220.

acceptable to lawyers as a familiar piece of constitutional machinery. Negative outcomes of referenda necessary for the ratification of amendments to the EU Treaties cast doubt on the reality of the ‘permissive consensus.’ Danish rejection of the 1992 Maastricht Treaty brought to the surface the existence of a serious ‘mass-élite gap’, with national élites substantially more sympathetic to Europeanisation than the general population.⁴⁰ The response from the European Commission was a frenzy of legitimation strategies, considered below. Likewise rejection in 2005 of the Draft Constitutional Treaty by French, Dutch, and Irish voters raised serious concerns for the legitimacy of the Union, suggesting that, if popular opinion had been tested elsewhere, a resounding ‘No’ might have resulted. Subsequent reversal by re-run referenda did little to bolster the Union’s legitimacy; indeed, the legitimacy of the referendum itself as a legitimating device was called into question by repeated assertions that voters had not understood what was at stake, charge that only emphasised the ‘mass-élite gap’.

Legitimacy through deliberation

Consideration of a third category of ‘reconstructive legitimacy’ or legitimacy as the ‘precarious result of a specific process of arguing, which cannot be substituted by other mechanisms’,⁴¹ attributed by Jachtenfuchs to Habermas and his followers, is best left to Section 4.

LEGITIMACY: A PORTMANTEAU WORD

To Jachtenfuchs, legitimacy is in any event little more than ‘a floating signifier’ of limited utility. It is in truth a ‘portmanteau word’, empty of hard content, fluid, capable of bearing variant meanings, both contingent and contestable. Democracy is often, for example, treated as the sole and all-embracing symbol of legitimacy and is, as we shall see in Section 3, the most potent of modern legitimating devices, but this leaves open a wide range of options (from representative, through deliberative, to popular and participatory democracy), each of which may arguably stand as benchmark of legitimacy. And the term opens up a range of further legitimacy questions, notably whether some forms of democracy are more legitimate than others and whether ‘output legitimacy’ can override ‘input legitimacy’?⁴² These questions are addressed in Sections 3 and 4. Again, we could say that judicial process is generally agreed to be the most legitimate machinery for resolving disputes – but does this not depend on the sort of dispute? Most courts acknowledge a doctrine of the ‘political question’ and until very recently the

⁴⁰ T. Flockhart, ‘The Gap between Danish Mass and Elite Attitudes to Europeanization’ (2005) 43 *Journal of Common Market Studies* (JCMS) 251; P. Svensson, ‘The Danish Yes to Maastricht and the EC Referendum of May 1993’ (1994) 17 *Scandinavian Political Studies* 69; G. Ivaldi, ‘Beyond France’s 2005 Referendum on the European Constitutional Treaty: Second-Order Model, Anti-Establishment Attitudes and the End of the Alternative Europe Utopia’ (2006) 29 *West European Politics* 47.

⁴¹ Jachtenfuchs, n 27 above, 127.

⁴² Selected from B. Kohler-Koch and B. Rittberger, ‘Charting Crowded Territory: Debating the Democratic Legitimacy of the European Union’ in Kohler-Koch and Rittberger, n 24 above, 2.

French Constitutional Council was a political committee rather than a court.⁴³ Again, as we shall see in Section 5, the centuries-old dispute over the legitimacy of judicial lawmaking and policymaking has, in this era of international adjudication, by no means died down.

A further important question tends to be overlooked: ‘Legitimate in whose eyes?’ Fowler, writing about perceptions of Enlargement, suggests that leaders both in the EU and in candidate states had sought in their rhetoric ‘to keep the linkage between EU membership and post-communist transformation as tight as possible. For both, the connection offer[ed] a means of legitimizing enlargement, since the development of stable and wealthier democracies in [Eastern Europe] is in the interests of all [...] This means that the leaders pursuing enlargement are accountable to, and must be legitimate for, separate publics’.⁴⁴

SELF-LEGITIMATION

Barker draws a distinction between the *quality* of legitimacy, rooted in shared values, and ‘the activity of legitimation’.⁴⁵ What to Barker characterises governments, and by extension transnational bodies engaged in the activity of governance, is not the possession of legitimacy but the claiming of it; legitimation is, as Barker argues, essentially a narcissistic exercise. His answer to the question ‘What are governments doing when they spend time, resources and energy legitimating themselves?’ is that they are laying claim to ‘that particular species of prestige which attaches to government’.⁴⁶ The point is exemplified in events surrounding the European Constitutional Treaty. Supposedly designed to heighten EU legitimacy and promote public participation in its political institutions, a European Constitution seemed at first to have popular support.⁴⁷ The Convention that followed was claimed by some to be ‘an unprecedented mobilisation of pervasive and widely shared convictions of the European peoples’, united in a ‘constitutional moment’.⁴⁸ In actual fact, it was an event of low visibility and salience to the people of Europe, a handful of whom participated, were represented, or later consulted in referenda. The negative outcomes to ratification

⁴³ M. de-S-O-PE. Lasser, *Judicial Transformations, The Rights Revolution in the Courts of Europe* (Oxford: Oxford University Press, 2009), 33-35, and on the constitutional reforms of 2008, 301-303.

⁴⁴ B. Fowler, ‘Legitimacy and Accountability in EU Enlargement: Political Perspectives from the Candidate States’ in A. Arnall and D. Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press, 2002), 428. For an empirical study of views on enlargement, see J. Thomassen (ed), *The Legitimacy of the European Union after Enlargement* (Oxford: Oxford University Press, 2009).

⁴⁵ R. Barker, *Legitimizing Identities, the Self-Presentations of Rulers and Subjects* (Cambridge: Cambridge University Press, 2001), 2.

⁴⁶ *ibid.*, 4.

⁴⁷ C. Skach, ‘We the Peoples? Constitutionalizing the European Union’ (2005) 43 *JCMS* 149, cites the Eurobarometer (No 60, 88 and No 61, 12) as showing support for a Constitution from over 60 per cent of EU citizens.

⁴⁸ K. Lenaerts and D. Gerard, ‘The Structure of the Union according to the Constitution for Europe: The Emperor is Getting Dressed’ (2004) 29 *EL Rev* 289, 290, 291.

took the Euro-élite by surprise and threatened their prestige and power in their own eyes. This had immediately to be rectified, as it partly was by successful ratification of the Lisbon Treaties through re-run referenda. For international institutions, which suffer typically from a democracy deficit and lack the classical support structures of the nation-state, legitimation is a particularly important exercise. At one and the same time, actors in an international process need to draw for purposes of legitimation on the legitimacy of the nation-state, and to persuade themselves of the legitimacy of their own enterprise.

3. OUTPUT LEGITIMACY AND DELEGATION

Although we must concede to democracy the paramount place as the most potent legitimation device in our times, we also need to recognise that, at supranational level, the concepts of consent and delegation are important. The many international conventions, covenants, and treaties to which states sign up are often analysed in contractual terms and legitimated by the belief that entry is consensual. Participants in the process leading up to an international agreement may, however, see the outcome very differently. States may sign up to covenants as largely aspirational: they embody shared norms and understandings to which states hope in time to conform but sign up to in the expectation that for the time being they will be *stricto sensu* unenforceable. They may read international agreements as ‘soft law’,⁴⁹ enforceable only through persuasion, imitation, and internalisation, the main remedies against defaulters being peer pressure and ‘naming and shaming’.⁵⁰ This is much like the ‘soft governance’ tactics of the ‘Open Method of Coordination’,⁵¹ of which the Commission revealingly remarks in its on line glossary: ‘Under this intergovernmental method, the Member States are evaluated by one another (peer pressure), with the Commission’s role being limited to surveillance. The European Parliament and the Court of Justice play virtually no part in the OMC process.’

Economists see the choice of soft law as deliberate and self-interested, a point not always accepted by lawyers.⁵² But if, as frequently occurs, a court or adjudicative agency – such as a dispute panel of the WTO – intervenes to ‘harden’ soft law, it risks finding that its ruling is unenforceable, with a consequential threat to its legitimacy. Equally, however, *not* to enforce soft law may pose a threat to the legitimacy of an adjudicative body. Faced with this dilemma, courts have developed sophisticated legitimation strategies, discussed below in Section 4.

⁴⁹ See K. Abbott and D. Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421.

⁵⁰ M. Bovens, ‘Analysing and Assessing Public Accountability. A Conceptual Framework’ in Curtin and Wille, n 10 above, 161-164.

⁵¹ See D. Trubek and L. Trubek, ‘Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination’ (2005) 11 *European Law Journal* 343.

⁵² See J. Klabbbers, ‘The Undesirability of Soft Law’ (1998) 36 *Nordic J of International Law* 381.

Contrariwise, the risk of finding a Convention treated as ‘hard law’ may discourage states from signing up to future treaties, as occurred with the Doha round of the WTO or the Copenhagen climate change conference, or at the very least deter them from adhering to adjudicatory clauses, as the United States notoriously did in respect of the International Criminal Court or the member states of the Community did in 1992 by ousting the jurisdiction of the ECJ when establishing the ‘Third Pillar’.⁵³ Whether or in what circumstances Conventions and soft law more generally are or should be enforceable are, I suspect, key questions puzzling lawyers.

For Pollack, delegation is always rooted ultimately in democracy and democratic institutions, while, vice versa, ‘the very concept of parliamentary democracy is predicated on the successful management of a chain of delegation’.⁵⁴ Delegation may be implicit - European political regimes have a long tradition of executive responsibility for foreign affairs – or may require further legitimation in the form of ratification by the national parliament or, in the case of the EU Treaties, through formal member state ratification, which may in turn require popular ratification by referendum. Pollack notes, however, the increasing significance of additional stages of delegation with transnational implications: (i) from legislators or governments to private actors, who deliver public services on behalf of the government or – as we might want to add – are entrusted with rulemaking powers; (ii) from legislators to non-majoritarian institutions ‘deliberately selected as alternatives to ordinary government regulation in areas such as monetary policy, utilities, telecommunications or financial regulation’; and (iii) from legislators and governments to EU institutions. When such practices impinge on national sovereignty, disputes over democratic legitimacy are frequently provoked.

Stone Sweet and Thatcher explain delegation in terms of principal / agent theory.⁵⁵ Agents ‘govern by exercising delegated powers’,⁵⁶ and initially principals are in control ‘in the strict sense that the precise terms of the agent’s remit are a matter of institutional design, and the authority to constitute or not to constitute agents falls within the principals’ jurisdiction’. Agents are, however, notably prone to ‘mission creep’ and much inclined to exceed the boundaries of their delegated authority. Precisely what authority has been delegated may then prove extremely controversial – one good reason why German constitutional lawyers in particular would prefer EU competences to be specifically listed in an EU Constitution.⁵⁷ In

⁵³ By TEU, arts 46 and 35, now replaced in the Lisbon Treaty, which gives plenary jurisdiction to the ECJ subject to the proviso contained in TFEU, art 276.

⁵⁴ M. Pollack, ‘Learning from the Americanists (Again): Theory and Method in the Study of Delegation’ (2002) 25 *W European Politics* 200, 215.

⁵⁵ A. Stone Sweet and M. Thatcher, ‘Theory and Practice of Delegation to Non-Majoritarian Institutions’ (2002) 25 *W European Politics* 1, 3.

⁵⁶ *ibid.*

⁵⁷ C. Dorau and P. Jacobi, ‘The Debate over a “European Constitution”: Is it Solely a German Concern?’ (2000) 6 *European Public Law* 413.

principal / agent terms, re-delegation is possible though possibly unwise, but a body of administrative law principle surrounds the vexed question of sub-delegation. The widely recognised principle of *delegatus non potest delegare* was the subject of a celebrated ruling in the *Meroni* decision of the ECJ,⁵⁸ where the ECJ gave approval to delegations of ‘clearly defined executive powers’ but disallowed delegation of ‘discretionary power’. The ECJ has also ruled firmly against delegation of legislative power.⁵⁹

International delegation is the ‘grant of authority by two or more states to an international body to make decisions or take actions’;⁶⁰ functions commonly delegated include agenda-setting, policymaking, research, and advice but increasingly extend to legislative, adjudicatory, and regulatory powers. There is no set pattern for delegation and no set model of delegatee; adjudicative functions are not, for example, necessarily delegated to judges; they may go to agencies or over the public / private border to arbitrators. Both regulatory and adjudicative functions are frequently delegated to private parties or non-governmental organisations (NGOs) in the hope that this ‘may increase the impartiality of such processes and thus enhance the overall effectiveness of the agreement’⁶¹ – a tactic that might easily misfire. NGOs are not necessarily disinterested; indeed, it is likely to be in the interests of small states and NGOs, which have fought long and hard for policy-change, to tie the more powerful political actors down to their bargain. Again, NGOs are not necessarily in the best position to acquire the information necessary for effective monitoring or powerful enough to enforce – one reason why they are chosen as delegatee!

INPUT AND OUTPUT LEGITIMACY

Scharpf’s theory of ‘input’ and ‘output’ legitimacy, which treats the EU like a regulatory agency, provides a plausible account of non-democratic legitimacy, drawn from Lincoln’s iconic contrast between government *for* the people and government *by* the people.⁶² Briefly, his argument runs:

[D]emocratic self-determination [...] requires that choices made by the given political system be driven by the authentic preferences of the citizens [...] But democratic self-determination also demands that those exercising political power are able to achieve a high degree of effectiveness in meeting the expectations of the governed [...] Consequently, input legitimacy must be seen

⁵⁸ Case 9/56 *Meroni v High Authority* [1957/8] ECR 133.

⁵⁹ Case 98/80 *Romano v Institut National d’Assurance Maladie-Invalidité* [1981] ECR 1241; Joined cases C-154, 155/04 R (*Alliance for Natural Health*) v *Health Secretary* [2005] ECR I-6541. Case 133/06 *European Parliament v Council* [2008] ECR I-3189 deals with delegation to the Commission prior to enactment of TFEU, Arts 290 and 291.

⁶⁰ C. Bradley and J. Kelley, ‘The Concept of International Delegation’ (2008) 71 *Law and Contemporary Problems* 1.

⁶¹ B. Koremenos, ‘When, What and Why Do States Choose to Delegate?’ (2008) 71 *Law and Contemporary Problems* 151, 153.

⁶² F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999).

as one important element in assessing the legitimacy of the European Union, but it should be assessed in combination with an unavoidable appreciation of the virtues of output legitimacy [...] And it is therefore quite proper to identify a road to legitimacy paved by the ability of the Union to deliver responses to problems that would be insoluble or even simply less effectively solved by individual states.⁶³

But Scharpf's acknowledgement that 'the plausibility of participatory rhetoric suffers as the distance between the persons directly affected and their representatives expands' is decidedly double-edged: it can be read as Scharpf himself reads it to justify non-majoritarian modes of governance because they 'effectively promote the common welfare'; on the other hand, it can be used to underpin the legitimacy of representative governments at national level and undercut the legitimacy of transnational institutions.

'BETTER REGULATION'

Output legitimacy arguments extend to rulemaking procedures. Transnational regulation is typically of a highly technical nature, dealing with the global regulation of technical activities or with risk regulation of food safety or hazardous substances. This strengthens the case for expertise. But already by the early 1990s, as the effects of the Single European Act were felt in a flood of harmonising regulation, much concern was expressed over the quality of European regulation,⁶⁴ seen as a contributing factor in popular dissatisfaction with the European enterprise. Unpacking this notion, we find a different 'mass-élite gap': an élite composed of businessmen and politicians concerned for output legitimacy in the form of 'smart regulation'; and popular discontent based on deficiencies of input legitimacy, more especially the lack of transparency and open government. The Council demanded improvement and, with legitimacy very much in mind, the Commission engaged with both problems: the democracy deficit, discussed below, and the wider movement for 'Better Regulation'. This culminated with an influential report, again critical of textual quality, and the Commission's 'Better Regulation Initiative' in 2005.⁶⁵

At the same time, the Commission demanded implementing powers equivalent to national provisions for executive / delegated legislation to cope with

⁶³ A. Menon and S. Weatherill, 'Legitimacy, Accountability and Delegation in the European Union' in A. Arnall and D. Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press, 2002), 113-116.

⁶⁴ Edinburgh Resolution (11/12 December 1992); Council Resolution, OJ 1993 C166/1; T. Burns, 'Better Lawmaking? An Evaluation of Law Reform in the European Community' in P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (Dordrecht: Kluwer International, 1998). And see *Report of Independent Experts on Legislative and Administrative Simplification*, Com. Sec(95) 1379 (2 August 1995).

⁶⁵ For later developments, see A. Alemanno, 'The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission's Walls or the Way Forward?' (2009) 15 *European Law Journal* 382.

implementation of the Single Market. The Council met this demand by a delegated power to make ‘implementing regulations’ but only under the supervision of a network of management and regulatory committees: the notorious comitology, which provides expert advice on scientific and technical content, and national civil servants to advise on national implementation. This is, in other words, output legitimacy, underpinned by the argument for effectiveness and expertise.

The same arguments justified ‘Lamfalussy procedures’, used to speed up the legislative process in the central area of banking and financial services. In practice Lamfalussy transferred to EU level highly criticisable legislative procedures widely used by national legislatures: framework legislation voted on by Council and EP using the normal co-decision procedure, fleshed out in implementing measures proposed by the Commission under the nominal supervision of regulatory committees largely composed of experts from member states. In 2005 indeed, a Commission commentator noted a trade-off in output legitimacy – better quality of legislation and acceleration of the legislative process – as against deficiencies in input legitimacy – stressing the need to strengthen political accountability and foster greater understanding of the Lamfalussy process.⁶⁶ In terms of input legitimacy, comitology and Lamfalussy procedure are both criticisable for moving EU regulation away from representative democracy and towards governance by technocrats. The determined campaign fought by the European Parliament on the moral high ground of representative democracy to wrest control of implementing regulation from the unelected comitology should perhaps therefore be read not merely an inter-institutional power struggle but also as a step towards democratic legitimation.⁶⁷ The hard-won successes may now be offset, however, by a formal power in the Lisbon Treaty vesting in the Commission a power to make delegated legislation in the generally understood sense of that term.⁶⁸

SUB-DELEGATION AND AGENCIFICATION

Whether European agencies should be treated merely as a sub-delegation of regulatory powers vested in the European Commission (as *Meroni* indicates) or as a

⁶⁶ A. Schaub, ‘The Lamfalussy Process Four Years On’ (2005) 13 *Journal of Financial Regulation and Compliance* 110.

⁶⁷ Starting with the Council’s Comitology Decision of 18 July 1987, attacked by the European Parliament unsuccessfully in Case 302/87 *Parliament v Council* (Comitology) [1988] ECR 5615, but successfully in Case 70/88 *European Parliament v Council* (Chernobyl) [1990] ECR I-2041. On subsequent developments, see K. Bradley, ‘Comitology and the Courts: Tales of the Unexpected’ in H. Hofmann and A. Türk (eds), *EU Administrative Governance* (Cheltenham: Edward Elgar, 2006); M. Szapiro, ‘Comitology: The Ongoing Reform’ in H. Hofmann and A. Türk (eds), *Legal Challenges in EU Administrative Law* (Cheltenham: Edward Elgar, 2009).

⁶⁸ TFEU, arts 290 and 291 deal respectively with delegated and implementing legislation, but the future of comitology after Lisbon is not yet clear. See European Commission, *Proposal for a Regulation of the European Parliament and of the Council Laying Down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission’s Exercise of Implementing Powers*, COM(2010) 83 final 2010/0051 (COD); Commission Communication, *Implementation of Article 290 of the Treaty on the Functioning of the European Union*, COM(2009) 673 final (9 December 2009).

novel transnational form of ‘network’ governance,⁶⁹ is a very moot point. In either case, their legitimacy is in issue. The emergence of Euro-agencies is usually explained as either a delegation of administrative responsibilities by member states at a point when delegation to Community institutions was unpopular, or as a way for the Union to move (with or without consent) onto member states’ legislative territory. The proffered justification for their existence was usually, however, the need for expertise or effective decision-making.⁷⁰ Agencies, like regulators, are credited with the ability to draw on highly technical know-how and to act as a meeting-point for sectoral actors: for example, environmental experts will, it is thought, cluster round, draw information from, and contribute information to an international environmental agency, rendering it a centre of expertise. This objective should be reflected in appointments. But as agencies have slowly moved from their information-gathering role to gain some executive and regulatory powers, they are increasingly assessed by the benchmark of representative democracy. Questions are asked over agency independence and autonomy and appointments to management boards, and committees are closely watched. Concern over accountability has also risen steadily.⁷¹ More judicial flexibility and better ‘trade-offs’ between efficiency and effectiveness (output values) and democratic participation and control (input values) are generally thought to be necessary.⁷²

To Shapiro, this ongoing struggle between technocracy and democracy is virtually impossible to resolve:

Precisely because what is being regulated is technologically complex and rapidly changing, regulators must have high technical skills themselves. One cannot regulate what one does not understand. It has become widely recognised, however, that by virtue of the very specialisation of knowledge required for the achievement of high technological skills, experts are themselves special interest groups whose perspectives and self-interests render them nonrepresentative [sic] of the demos as a whole.⁷³

⁶⁹ E. Chiti, ‘An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies’ (2009) 46 *CML Rev* 1395.

⁷⁰ R. Dehousse, ‘Regulation by Networks in the EC: The Role of European Agencies’ (1997) 4 *Journal of European Public Policy* 225.

⁷¹ D. Curtin, ‘Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability’ in D. Geradin, et al (eds), *Regulation Through Agencies in the EU. A New Paradigm for European Governance* (Cheltenham: Edward Elgar, 2005); M. Busuioc, ‘Accountability, Control and Independence: The Case of European Agencies’ (2009) 15 *European Law Journal* 599.

⁷² W. Wessels, ‘The Modern West European State and the European Union: Democracy Erosion or a New Kind of Polity?’ in S. Andersen and K. Eliassen (eds), *The European Union: How Democratic Is It?* (London: Sage, 1996); *European agencies – The Way Forward*, COM(2009) 503 final; S. Griller and A. Orator, ‘Everything Under Control? The “Way Forward” for European Agencies in the Footsteps of the Meroni Doctrine’ (2010) 35 *EL Rev* 3.

⁷³ M. Shapiro, “‘Deliberative,’ “‘Independent’ Technocracy v. Democratic Politics: Will the Globe Echo the EU?” (2005) 68 *Law and Contemporary Problems* 341, 342-343.

Shapiro is sceptical of technocrats. He has queried the legitimacy of European agencies,⁷⁴ and has expressed concern over the validity of ‘network’ systems of governance, in which ‘elected and nonelected government officers, nongovernmental organizations, political parties, interest groups, policy entrepreneurs, all participate’ with a consequential diminution in the controls traditionally exercised by classical systems of constitutional and administrative law.⁷⁵

It is, however, Lindseth who has advanced the most complete theory of legitimacy based on the delegation principle.⁷⁶ For Lindseth, the EU is a transnational manifestation of the ‘administrative state’ which, during the late nineteenth and twentieth centuries, gained ascendancy in the nation-state, drawing ‘mediated legitimacy’ from a ‘reconciliation of delegation and administrative governance with the principles of representative government developed over the course of the nineteenth century’.⁷⁷ The current system of ‘Europeanized administrative governance’, however, challenges and even threatens the principles of ‘mediated legitimacy’:

European governance [...] should be understood not as *sui generis* but as a new stage in the diffusion and fragmentation of regulatory power away from the constituted bodies of representative government on the national level, to an administrative sphere that now operates both within and beyond the state. Europeanized administrative governance, because of its very density and complexity, often escapes direct political control. But it has not escaped the demands of mediated legitimacy [...] The growth of national parliamentary scrutiny [...] as well as the development of a national jurisprudence of *Kompetenz-Kompetenz* combined with deference [...] are in this sense elements of the same process. They demonstrate the extent to which European public law has increasingly organized itself around the legitimating structures of the post-war constitutional settlement of administrative governance.⁷⁸

We are seeing a slippage of which public lawyers are traditionally wary: an expansion and rapid accretion of power by transnational bodies, facilitating a parallel shift of power from legislature to executive and bureaucracy at both national and transnational levels.⁷⁹ In this framework, public lawyers, economists, and political scientists face a common task: a quest at one level for democratic and constitutional underpinnings for European integration – in other words for

⁷⁴ M. Shapiro, ‘The Problems of Independent Agencies in the United States and European Union’ (1997) 4 *Journal of European Public Policy* 276.

⁷⁵ M. Shapiro, ‘Administrative Law Unbounded’ (2001) 8 *Indiana Journal of Global Legal Studies* 369; C. Harlow, ‘Deconstructing Governance’ (2004) 23 *Yearbook of European Law* 57.

⁷⁶ P. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford: Oxford University Press, 2010).

⁷⁷ *ibid*, 89.

⁷⁸ *ibid*, 251.

⁷⁹ D. Wincott, ‘Does the European Union Pervert Democracy? Questions of Democracy in New Constitutionalist Thought on the Future of Europe’ (1998) 4 *European Law Journal* 41.

democratic legitimacy - and at another, a more practical and pragmatic struggle for control and accountability of transnational administrative governance through courts and other machinery of administrative law.

4. DEMOCRATIC LEGITIMATION

LEGITIMACY AND ACCOUNTABILITY

Problems are posed for legitimacy by the absence of authoritative representative institutions in international affairs. As Scharpf observes of the EU, ‘while negative integration was advanced, as it were, behind the back of political processes by the Commission and the Court, measures of positive integration require explicit political legitimisation’.⁸⁰ Delegation, implied consent, and ‘permissive consensus’ were sufficient legitimating tools only so long as decisions taken at European level were perceived as specialised, technical, and of low political salience; once this stage was exceeded, the quest for legitimacy was on.

Writing about accountability, Grant and Keohane make a similar point, suggesting a growing preference for democracy and its institutions.⁸¹ The older ‘delegation’ or ‘élite’ model of accountability sat comfortably with the prevailing pattern of inter-governmental relationships conducted through élite diplomacy and, more particularly, with the model of élite delegation that prevailed in the early days of the European Communities.⁸² It was then entirely appropriate that the power to hold actors to account was delegated to agents: in the case of the Communities, to the Court of Justice and Commission, in which was vested the discretionary power to bring infringement proceedings against member states (in the use of which the Court showed remarkable reluctance to call the Commission to account).⁸³ Gradually this model has been replaced by ‘participatory’ models of accountability reflecting alternative conceptions of legitimacy. Replicating a greater emphasis on individuals in international affairs, born no doubt of the human rights movement, this participatory model highlights *popular* democracy. For representative and parliamentary democracy, where accountability is exacted through a parliamentary process, a ‘stakeholder model’ of popular democracy is substituted whereby ‘the performance of power-wielders is evaluated by those

⁸⁰ F. Scharpf, ‘Negative and Positive Integration in the Political Economy of European Welfare States’ in G. Marks et al (eds), *Governance in the European Union* (London: Sage, 1996), 19.

⁸¹ R. Grant and R. Keohane, ‘Accountability and Abuses of Power in World Politics’ (2005) 99 *American Political Science Review* 1.

⁸² See P. Craig, ‘Democracy and Rule-Making within the EC: An Empirical and Normative Assessment’ in Craig and Harlow, n 64 above.

⁸³ C. Harlow and R. Rawlings, ‘Accountability and Law Enforcement: The Centralised EU Infringement Procedure’ (2006) 31 *EL Rev* 447; F. Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56 *Modern Law Review* 19.

who are affected by their actions'. We should bear in mind that the delegation and participatory models are not mutually exclusive. Democratic systems of governance all rely on delegates such as courts, auditors, and ombudsmen to ensure accountability, and these institutions were indeed directly imported into the EU 'because they were considered to have improved democracy'.⁸⁴ In any event, Grant and Keohane warn against too great an emphasis on models; it is more important, they believe, to search for and look objectively at the *actual performance* of accountability machinery in use in international affairs.⁸⁵

We should not, however, dismiss this discussion as a digression. First and foremost, it reflects the growing dominance of democratic values in the western world and widespread belief in the 'functional necessity to base complex social order on democratic procedures'.⁸⁶ It draws attention also to the importance of accountability at every level of public affairs.⁸⁷ Thus for Fisher accountability is 'the ultimate principle for the new age of governance in which the exercise of power has transcended the boundaries of the nation state. It is a pliable concept that can seemingly adapt to novel modes of governing while at the same time ensuring such modes are legitimate'.⁸⁸ To put this differently, accountability has climbed so far up the 'good governance' ladder as to claim a place as a legitimation device in its own right.

REPRESENTATIVE DEMOCRACY AS DELEGATION

Because it may 'disturb the constitutionally mandated distribution of authority [...] or even warrant constitutional amendments', delegation of legislative power is especially troubling to lawyers.⁸⁹ Upward 'delegation' – or more accurately 'transfer' – of legislative power to Community level after the passage of the Single European Act in 1985 was therefore disturbing. It was not the *legitimacy* of the European Parliament that was in question – it was after all directly elected – but the limited role it played and the prominence of the Council in the EU lawmaking process. The next step at the theoretical level was therefore to construct a 'two-tier' structure of democratic legitimacy in which the Council stood as it were on

⁸⁴ P. Magnette, et al, 'Conclusion: Diffuse Democracy in the European Union: The Pathologies of Delegation' in P. Magnette, et al (eds) (Special Issue: The Diffusion of Democracy – Emerging Forms and Norms of Democratic Control in the European Union) (2003) 10 *Journal of European Public Policy* 834, 837.

⁸⁵ Accountability can be audited through the work of NGOs: see R. Lloyd, 'Promoting Global Accountability: The Experiences of the Global Accountability Project' (2008) 14 *Global Governance* 273 and more theoretically, C. Lord, *A Democratic Audit of the European Union* (Basingstoke: Palgrave Macmillan, 2004); D. Held and A. McGrew (eds), *Global Governance and Public Accountability* (Oxford: Blackwell, 2005).

⁸⁶ K. Eder and H-J. Trenz, 'Prerequisites of Transnational Democracy and Mechanisms for Sustaining It: The Case of the European Union' in Kohler-Koch and Rittberger (eds), n 24 above, 165.

⁸⁷ M. Bovens, *The Quest for Responsibility, Accountability and Citizenship in Complex Organisations* (Cambridge: Cambridge University Press, 1998); R. Mulgan, *Holding Power to Account, Accountability in Modern Democracies* (Basingstoke: Palgrave Macmillan, 2003); C. Harlow, *Accountability in the European Union* (Oxford: Oxford University Press, 2002).

⁸⁸ E. Fisher, 'The European Union in the Age of Accountability' (2004) 24 *OJLS* 495.

⁸⁹ C. Bradley and J. Kelley, 'The Concept of International Delegation' (2008) 71 *Law and Contemporary Problems* 1, 10-11.

the shoulders of elected national parliaments⁹⁰ – no more, in reality, than Pollak’s theory of delegation (above). This dual level system of representative democracy is now enshrined in TEU Article 10.

In reality, however, there had been a steady erosion of national parliamentary power, not replaced in practice by the expanding power of the EP.⁹¹ Indeed, whether national parliaments can hope to play a role substantial enough to act as a legitimisation device in EU lawmaking must remain an open question – at least until their new watchdog role in an early warning system for ‘subsidiarity compliance’ by the Union legislators can be assessed.⁹² And even the steady progression of power in the lawmaking process to the point where the EP becomes in the Lisbon Treaty the ‘ordinary’ EU lawmaking procedure (TFEU Article 289) has done little to satisfy critics of the ‘democracy deficit’. On balance the EP remains a remote and unloved institution, characterised by incapacity in self-promotion,⁹³ and a consistently low turn-out in European elections which, thirty years after the institution of direct elections, mainly operate as ‘second-order national contests’ fought on national issues.⁹⁴ There is little here to assuage the doubts of those who see the EU as a post-parliamentary system of governance, which will remain deficient in legitimacy until it evolves into a ‘political system in which rulers are held accountable for their policies and actions in the public realm by citizens, and where competing elites offer alternative programmes and vie for popular support’.⁹⁵ The inference must surely be that EU legislation should not be treated as automatically legitimated by the fact of its formal ‘legality’. At odds with the convenient doctrine of legal primacy propounded by the ECJ, this proposition is picked up in the final section.

DIRECT DEMOCRACY

Perhaps it was the manifest difficulty of replicating representative democracy outside the bounds of the nation-state that led to its presentation as a ‘thin’ and elitist form of democracy; perhaps it was part of a world-wide movement for

⁹⁰ R. Gustavsson, ‘The European Union: 1996 and Beyond – a Personal View from the Side-Line’ in Andersen and Eliassen, n 72 above, 222.

⁹¹ J. Lodge, ‘The European Parliament’ in Andersen and Eliassen, *ibid.*

⁹² For the post-Lisbon settlement, see TFEU, art 5(3) and TEU, protocol 1 on the role of national parliaments in the European Union. And see K. Auel and A. Benz, ‘Expanding National Parliamentary Control: Does it Enhance European Democracy?’ in Kohler-Koch and Rittberger, n 24 above; I. Cooper, ‘The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the European Union’ (2006) 44 *JCMS* 281; P. Kiiver, ‘European Treaty Reform and the National Parliaments: Towards a New Assessment of Parliament-friendly Treaty Provisions’ in J. Wouters, et al (eds), *European Constitutionalism beyond Lisbon* (Antwerp: Intersentia, 2009).

⁹³ P. Anderson and A. McLeod, ‘The Communication Deficit of the European Parliament’ (2004) 42 *JCMS* 897.

⁹⁴ S. Hix, et al, ‘Fifty Years On: Research on the European Parliament’ (Special Issue: The European Parliament at Fifty) (2003) 41(2) *JCMS* 194, a valuable literature survey. Public support for the EP has been measured by M. Gabel, ‘Public Support for the European Parliament’ (2003) 41 *JCMS* 289.

⁹⁵ S. Andersen and E. Eliassen, ‘The European Union and the Erosion of Parliamentary Democracy: A Study of Post-parliamentary Governance’ in Andersen and Eliassen (eds), n 72 above, 4.

popular participation, today reflected in TEU Article 10(3) of the Lisbon Treaty, which enshrines rights to transparency, subsidiarity, and ‘citizen participation’. However this may be, ideas of participatory democracy and deliberative democracy began to take root and theorists advanced the idea of the EU as a ‘directly-deliberative polyarchy’ or:

attractive kind of radical, participatory democracy with problem-solving capacities [...] unavailable to representative systems. In directly-deliberative polyarchy, collective decisions are made through public deliberation in arenas open to citizens who use public services, or who are otherwise regulated by public decisions [...] Ideally [...] directly-deliberative polyarchy combines the advantages of local learning and self-government with the advantages (and discipline) of wider social learning and heightened political accountability that result when the outcomes of many concurrent experiments are pooled to permit public scrutiny of the effectiveness of strategies and leaders.⁹⁶

All very well. But is this Athenian notion really an answer to problems with representative democracy? And is it of any interest to lawyers? Closa links the idea of deliberative democracy to legal constitutionalist theory,⁹⁷ contrasting the normal process of treaty change, based on an inter-governmental conference and conducted by member state representatives, with the ‘deliberative process’ used at the Constitutional Convention involving participation from the EP, from national parliaments and civil society organisations (CSOs). This deliberative constitution-making, Closa argues, ‘thickened’ the legitimacy of the Constitution – though not enough, apparently, to legitimate it in the eyes of real people.

CITIZEN PARTICIPATION AND PRIVATE SECTOR RULEMAKING

Direct democracy as a legitimation device is in reality no less problematic than representative democracy. How are ‘the people’ to participate? In international affairs, the answer lies usually in NGOs. But just how representative are these unelected groups in practice?⁹⁸ And why should they be considered more representative than elected assemblies and parliaments? How is the wider public to be consulted? Somewhat vaguely, Eder and Trenz recommend ‘good

⁹⁶ J. Cohen and C. Sabel, ‘Directly Deliberative Polyarchy’ (1997) 3 *European Law Journal* 313, 314; O. Gerstenberg and C. Sabel, ‘Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?’ in C. Joerges and R. Dehousse (eds), *Good Governance in Europe’s Integrated Market* (Oxford: Oxford University Press, 2002). C. Joerges, ‘Deliberative Supranationalism: Two Defences’ (2002) 8 *European Law Journal* 135, re-treads this debate in the light of a German-language debate on the nature of ‘deliberative supranationalism’. And see C. Joerges, ‘Democracy and European Integration: A Legacy of Tensions, a Re-Conceptualisation and Recent True Conflicts’ (EUI WP LAW 2007/25).

⁹⁷ C. Closa, ‘Deliberative Constitutional Politics and the Turn Towards a Norms-based Legitimacy of the EU Constitution’ (2005) 11 *European Law Journal* 411.

⁹⁸ See D. Curtin, ‘Private Interest Representation or Civil Society Deliberation? A Contemporary Dilemma for European Union Governance’ (2003) 12 *Social & Legal Studies* 56; B. Kohler-Koch, ‘Civil Society and EU democracy: “Astroturf” Representation’ (2010) 17 *Journal of European Public Policy* 100.

governance' principles established by an 'enlightened administration' to strengthen 'elements that increase the visibility of the people's presence and participation in the multilevel governance system'. They have to admit, however, that 'representative or direct links back to the people have remained, so far, rather weak or purely symbolic'.⁹⁹

In a striking instance of self-legitimation, the Commission tried to engage with these ideas.¹⁰⁰ Its *White Paper on European Governance* listed five central 'good governance' principles that might help to bring EU public administration closer to its people: openness and participation, accountability, effectiveness, and coherence in policymaking.¹⁰¹ These are now fleshed out in a code of conduct; a principle of public on-line consultation has been established; and a register of potential consultees is maintained and publicly available on-line.¹⁰² The European Ombudsman, though not the courts, has required the Commission to stand by its consultation promises.¹⁰³ It should be noted, however, that there are no *general* 'notice-and-comment' rights in EU rule-making procedures,¹⁰⁴ and in sharp contrast to the statutory duty to give reasons (TFEU Art 296), no duty to consult other than sector-specific statutory duties. These are omissions which, to European administrative lawyers raised in systems where administrative procedures are codified, must seem surprising. The courts have also been slow to protect consultation rights; a good beginning was made with the *Metro* and *BEUC* jurisprudence,¹⁰⁵ which confirmed standing to sue for groups consulted by the Commission on a voluntary basis, but only the solitary *UEAPME* case (below) deals with participatory rights in rulemaking. This is truly an open area for a 'new public law'.¹⁰⁶

UEAPME concerned the drafting of a social policy directive, a procedure requiring two differing rounds of statutory consultation, after which an agreement between the social partners is concluded.¹⁰⁷ *UEAPME* was a small union,

⁹⁹ K. Eder and H.-J. Trenez, 'Prerequisites of Transnational Democracy and Mechanisms for Sustaining It' in Kohler-Koch and Rittberger, n 24 above, 168.

¹⁰⁰ C. Sabel and J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 *European Law Journal* 271; D. Trubek and L. Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' (2007) 13 *Columbia Journal of European Law* 639.

¹⁰¹ European Commission, *White Paper on European Governance*, COM (2001) 428 (25 July 2001).

¹⁰² Commission Communication, *The Commission and Non-governmental Organisations: Building a Stronger Partnership*, COM(2000) 11 final; *General Principles and Minimum Standards for Consulting Non-Institutional Interested Parties*, COM(2002) 277; *Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, COM (2002) 704 final. And see European Commission, *White Paper on a European Communication Policy*, COM(2006) 35 final.

¹⁰³ European Ombudsman, Case 3617/2006/JF.

¹⁰⁴ F. Bignami, 'The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology' (1999) 40 *Harvard International Law Journal* 451.

¹⁰⁵ Respectively, Case C-75/84 *Metro SB- Grossmarkete GmbH & Co v Commission* (No 2) [1986] ECR 3021; C170/89 *Bureau Europeen des Unions des Consommateurs (BEUC) v Commission* [1991] ECR I-5709.

¹⁰⁶ See further C. Harlow and R. Rawlings, 'National Administrative Procedures in a European Perspective: Pathways to a Slow Convergence?' (2010) *Italian Journal of Administrative Law* (online) (forthcoming).

¹⁰⁷ Case T-135/96 *UEAPME v Council* [1998] ECR II-2335. The citation is from [88] and [89].

consulted by the Commission in the preliminary round of consultation but excluded from the formal stage. The relevance of the case to the subject matter of this paper lies in the CFI's discussion of 'representativity'. Parliamentary participation, said the Court, 'reflected the fundamental democratic principle that the people must share in the exercise of power through a representative assembly', but this rulemaking procedure bypassed the 'classic procedures provided for under the Treaty for the preparation of legislation, which entail the participation of the European Parliament' (the Community method). The CFI continued on a cautionary note:

[T]he principle of democracy on which the Union is founded requires – in the absence of the participation of the European Parliament in the legislative process – that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level. In order to make sure that that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative.

The lawmaking format adopted in EU social policy has been dismissed as 'quasi-corporatist',¹⁰⁸ but it is defensible as an attempt to bring 'stakeholders' into the rulemaking process at participatory democracy. There is also a tight principal / agent relationship, in which the balance of power is weighted towards the Commission – by no means always the case where rulemaking functions are delegated to the private sector.

A provision of the Lisbon Treaty purports to increase the role of citizens in lawmaking. Under TEU, Article 11(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 any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

This provision has not yet been tested.¹⁰⁹

¹⁰⁸ L. Betten, 'The Democratic Deficit of Participatory Democracy in Community Social Policy' (1998) 23 *EL Rev* 20; S. Smismans, *Law, Legitimacy and European Governance. Functional Participation in Social Regulation* (Oxford: Oxford University Press, 2004); 'New Modes of Governance and the Participatory Myth' (European Governance Papers, No N-06-01, 2006).

¹⁰⁹ For the Commission's proposed operating principles see European Commission, *Green Paper on a European Citizens' Initiative*, COM(2009) 622 final. A compromise with the EP is about to be agreed: Euractiv (5 December, 2010).

PRIVATE 'LAWMAKERS'

Self-regulation by professional bodies, which is normally consensual in character though public, statutory elements may also be involved, is not of course new. Globalisation has, however, accentuated the delegation process. Teubner's pioneering work on 'private lawmaking' in the form of a *lex mercatoria*, created by and for international commercial actors, is too well-known to require amplification here.¹¹⁰ The *codex alimentarius* is a joint project of the UN FAO and WHO, administered by an independent Commission, which operates much like an international agency with the support of a wide international membership. Regular revisions of the Codex are undertaken by a body composed of national delegations led by senior officials but which include representatives of industry, consumers' organisations, and academics. The Codex is not law; it is merely a collection of standards, codes of practice, guidelines and [...] principles that set out policy in certain key areas - a classic example of soft law. It is nonetheless extremely influential in guiding policy-makers and steering private industry.

The European Commission has noted a trend to standards that are *less* prescriptive and more general in character. Schepel on the other hand describes 'private transnationalism' as *more* intensive than regulation in traditionally public law areas.¹¹¹ Whether this is a general tendency in international regulation or echoes a trend from 'hard' to 'soft' law and governance or merely replicates the Commission's own preferences it is hard to say. This is very much an area for experts.

5. COURTS AND LEGITIMATION

All adjudication by courts involves a delegation although, inside the nation-state, this truth may be to a large extent obscured by the prevalence of separation of powers theory. So dominant is the imagery of the independent and neutral judge who acts as a barrier between the citizen and an all-powerful executive, and the myth of law's autonomy that we tend to forget that judges are often directly appointed by government and that justice is a public service like any other. Judges play an important political role, though their participation in policy- and lawmaking is controversial. Over the centuries it has attracted a multiplicity of legitimation devices: the declaratory theory of law, the objectivity theory of

¹¹⁰ G. Teubner, 'Global Bukowina: Legal Pluralism in World Society' in G. Teubner (ed), *Global Law Without a State* (Aldershot: Dartmouth, 1996); G. Teubner, 'Economic Globalization and the Emergence of *lex mercatoria*' (2002) 5 *European Journal of Social Theory* 199. See also A. Stone Sweet, 'The New Lex Mercatoria and Transnational Governance' (2006) 13 *Journal of European Public Policy* 627.

¹¹¹ H. Schepel, *European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards* (EUI WP LAW, no 91/12, 1991); C. Joerges, et al, *European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards* (EUI WP LAW, nos 91/10-14, 1991).

classical legal positivism, the Dworkinian theory of principled adjudication, and so on. The vast literature need not detain us.

Courts have a general legitimacy to adjudicate and are also endowed with more specific functional legitimacy: the functions of constitutional courts, for example, differ from those of criminal courts. But ‘sovereignty trade-offs’ are always involved in delegation to courts. There is the ever-present risk that the agent will outrun the principal; ‘judicial rulings can shift the meaning of law in ways that can be politically irreversible [...] [and] if judicial actors play their intended roles, judges will at times disagree with, rule against, or render interpretations that run counter to what the makers and the enforcers of the law might have wanted, and what the democratic majority might prefer’.¹¹²

Again, constitutional review can invalidate legislation, a tangible transfer of sovereignty. It is, according to Alter, both a ‘self-binding’ commitment on the part of the legislature and an ‘other-binding’ choice, which will ‘bind future legislative actors and units within the political system to the constitutional bargain’.¹¹³ A process of ‘constitutionalisation’ places legislators under the authority of ‘an expansive, continuously evolving constitutional law, and the judiciary’s participation in law making processes is becoming more overt and assertive’.¹¹⁴ It has indeed been argued with some cogency that constitutional review powers transform the nature of parliamentary governance, converting constitutional judges from delegates or agents into ‘trustees, exercising fiduciary responsibilities’.¹¹⁵ Outside the state the risks are multiplied. The state risks reputation (legitimacy) in submitting itself to international scrutiny and criticism from those with whom it shares no political identity; it risks sovereignty in subjecting itself to an international jurisdiction that may impinge directly on its freedom. Yet states constantly sign up to international adjudication packages with non-state actor access and a compulsory jurisdiction. Why do states delegate authority to courts? And what is the position when they try to withdraw it?

LEGITIMATION THROUGH CONSENT

Let us dispose quickly of the least demanding theory: consensual delegation. The International Court of Justice (ICJ) was, for example, set up by the UN to ‘settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies’. Its existence derives from a nineteenth-century practice of inserting arbitration clauses into treaties and gradual discontent with the need to appoint *ad hoc* arbitration panels. It draws for its legitimacy on the traditional understanding of adjudication as the ‘decision or award of an impartial

¹¹² K. Alter, ‘Delegating to International Courts: Self-Binding vs. Other-Binding Delegation’ (2008) 71 *Law and Contemporary Problems* 37, 39.

¹¹³ *ibid.*, 49.

¹¹⁴ *ibid.*

¹¹⁵ A. Stone Sweet, ‘Constitutional Courts and Parliamentary Democracy’ (2002) 25 *W European Politics* 77.

third party' and of courts as impartial adjudicators. Significantly, the 1945 San Francisco Conference on which the structure of the ICJ is based, decided *against* compulsory jurisdiction. The ICJ is still competent to entertain a dispute only if the States concerned have accepted its jurisdiction and decide to submit a claim; significantly too, the ICJ is open only to state-parties.¹¹⁶

Much the same is true of the arrangements for dispute settlement established by the WTO in the Uruguay Round of the GATT negotiations, which have not yet reached the elevated status of 'court'. The Dispute Settlement Understanding (Annex 2 of the WTO Agreement) contains a right for signatories to ask, if a dispute cannot be resolved through negotiation, for an investigation by a panel with an automatic right of appeal to the Appellate Body. Legitimacy is lent to the rulings by the requirement that they be adopted automatically, unless a consensus of opinion goes against the ruling. With a view to emphasising their court-like structure, the tribunals have adopted procedures. Yet their authority remains questionable, with the ECJ showing a particular disinclination to lend support by treating WTO regulation and rulings as directly applicable inside the EU.¹¹⁷ And Read suggests a general tendency to step back from the rule of law as a legitimisation strategy for international trade agreements in the face of a 'growing feeling in many countries, both developed and developing, that the WTO is "usurping" the democratic process by enforcing externally imposed rules on sovereign states':

In the face of substantial domestic opposition to the transfer of national sovereignty to agreements such as the WTO [...] governments may be faced with a crisis of credibility. At its mildest, this might lead to the adoption of a policy of non-compliance while possible outright rejection of the WTO could mean a reversion to unilateralism with its attendant problems.¹¹⁸

This is, to Koskenniemi and Leino, an inevitable consequence of attempts by the dispute panels to assert their jurisdiction:

[T]he more extensive the jurisdiction of WTO bodies, the more other tribunals and implementation organs will overlap with them [...] The fast and potentially powerful character of the WTO system constitutes a strong

¹¹⁶ J. Ladefoged Mortensen, 'The World Trade Organisation and the European Union' in K. Jorgensen (ed), *The European Union and International Organizations* (London: Routledge, 2009).

¹¹⁷ Settled jurisprudence stemming from Case C-149/96 *Portugal v Council* [1999] ECR I-8395; Case C-122/00 *Omega Air and Others* [2002] ECR I-2569; Case C-377/02 *Léon Van Parys v Belgische Interventie-en Restitutiebureau* [2005] ECR I-4685. On the relationship between the EU and international organisations, see L. Azoulay, 'The *Acquis* of the European Union and International Organisations' (2005) 11 *European Law Journal* 196.

¹¹⁸ R. Read, 'Trade Dispute Settlement Mechanisms: The WTO Dispute Settlement Understanding in the Wake of the GATT' in J. Cameron and K. Campbell (eds), *Dispute Resolution in the World Trade Organisation* (London: CMP Publishing, 1998), 45-46. See also S. Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2005) 37 *New York University Journal of International Law & Politics* 663.

incentive for using it, thus firmly expanding the influence of interests represented by WTO organs. On the other hand, the legitimacy deficit of the WTO together with its treatment of non-trade concerns as potential protectionist devices undermines the dispute-settlement system.¹¹⁹

Arguably, the legitimation strategy of the WTO dispute settlement machinery is misfiring. In an effort to boost its legitimacy with recourse to the classical attributes of a legal order whose decisions are binding, it has risked undermining the legitimacy of the very treaty on which its own legitimacy, indeed, its very existence depends.

HUMAN RIGHTS AND LEGITIMACY

What legitimation strategies are open to courts with a novel transnational jurisdiction, faced with an indeterminate role, in an unreliable political situation outside the traditional support structures of a nation-state? Slaughter has argued that judges, more especially judges in constitutional courts, operate in self-supporting horizontal networks, which meet regularly to discuss problems.¹²⁰ There is a vibrant judicial dialogue, and an increasingly globalised language of constitutional rights has developed on which courts can draw to boost legitimacy. Standards and principles, such as the German doctrine of proportionality testing, are passed from one system to another until in time they come to be seen as ‘the common European standard’¹²¹ and ultimately perhaps even a ‘global constitutional principle’.¹²² In these networks, regional human rights courts, including the European Court of Human Rights (ECtHR), are important players.

In its initial phases, the ECtHR relied to a great extent on consensus and the consent of the member states of the Council of Europe to establish its legitimacy – as indeed it still to a certain extent does:

At first, the idea of a court issuing binding judgments may have seemed utopian. But governments that perhaps never imagined having to listen to a collection of “foreign” judges, have come to do just that. In the short space of a few decades, legal accountability has become the norm. And this

¹¹⁹ M. Koskeniemi and P. Leino, ‘Fragmentation of International Law. Postmodern Anxieties?’ (2002) 15 *Leiden Journal of International Law* 553, 574.

¹²⁰ A-M. Slaughter, *A New World Order* (New Jersey: Princeton University Press, 2004), ch 2. And see R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitution* (Oxford: Oxford University Press, 2006).

¹²¹ A-M. Slaughter, ‘A Typology of Transjudicial Communication’ (1994) *University of Richmond Law Review* 100; J. Polakiewicz and J. Foltzer, ‘The ECHR in Domestic Law: The Impact of the Strasbourg Case-Law in States where Direct Effect is Given to the Convention’ (1991) 12 *Human Rights Law Journal* 125; C. McCrudden, ‘A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’ in K. O’Donovan and G. Rubin (eds), *Human Rights and Legal History, Essays in Honour of Brian Simpson* (Oxford: Oxford University Press, 2000).

¹²² A. Stone Sweet and J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 73.

transformation was won, in large part, through the sheer quality and integrity of reasoning evinced in the judgments of the Court and its predecessor the Commission.¹²³

But these are lawyers' explanations, which do not explain the willingness of states to accede to the Convention and right of individual petition; when the ECHR came into force in 1953, there were ten signatory states of which only three acknowledged a right of individual petition; today there are 47 signatory-members of the Council of Europe, all of whom have acceded, and accession to the right of individual petition is now compulsory for new members. More important, the Court has considerable success – albeit with notable exceptions – in seeing its judgments implemented; a very considerable achievement. As to *public* trust, there is little evidence other than the increasingly burdensome caseload.¹²⁴

The first priority of the ECtHR was to define the content of the Convention, drafted in very general terms, and set boundaries. Professor Wildhaker, a previous President of the ECtHR, suggests that this task had 'in most respects' been sufficiently achieved by 1998; from that point on, the Court began to be described as a 'quasi-constitutional court' in the dual sense of a court that 'acts in a manner similar to national supreme or constitutional courts, both in terms of the kind of cases received by way of constitutional complaint and the approach taken to resolve them' and 'an expression of a constitutionalised international law'.¹²⁵ On the other hand, the ex-President insists, the ECtHR has always been careful to avoid acting as a constitutional court of appeal or engaging in debates over primacy:

The functional similarity of handling constitutional complaints in national courts and of handling individual applications in the European Court might be misunderstood and twisted so as to provide an excuse to subordinate national courts to the European Court, thus eliminating the subsidiarity of the Convention and setting aside the "margin of appreciation" doctrine, all of which I would regret very much indeed.¹²⁶

The task is not easy, given the problem of cultural diversity and the consequent need to make room for 'value pluralism'. By and large the Court has adopted a 'light touch' approach, handling problems of cultural divergence through the

¹²³ J. Goldstone, 'Achievements and Challenges – Insights from the Strasbourg Experience for Other International Courts' (2009) *EHRLR* 603. This may or may not be true; the quality of legal reasoning has been criticised as 'unprincipled', notably by English courts.

¹²⁴ Between 1 January and 30 June 2010, the ECtHR completed 18,535 hearings with 238,600 pending applications; only five years earlier, 45,500 cases were disposed of judicially, with 56,800 pending before a judicial formation.

¹²⁵ S. Greer, 'Reflections of a Former President of the European Court of Human Rights' (2010) *EHRLR* 165, 167.

¹²⁶ *ibid*, 168.

doctrine of ‘margin of appreciation’, a ‘deference’ principle introduced to defuse issues of clashing legitimacies, which enables the ECtHR to respect the legitimacy of democratic legislatures and national cultures.¹²⁷ But the margin is flexible and its boundaries difficult to draw. If the Court defers too greatly, it imperils the unity and legitimacy of human rights – ‘an abdication of the Court’s responsibilities’.¹²⁸ If, on the other hand, the Court steps too far on to national terrain, national courts and governments, through their representation on the Committee of Ministers, are likely to protest and may even disobey.¹²⁹ This is not, of course, to suggest that disagreement over individual cases imperils the clear legitimacy of the Court of Human Rights.

LEGITIMATING THE COURT OF JUSTICE

The legitimation strategy of the ECJ looks very different. Originally the Court emerged much like an arbitrator, with jurisdiction founded on consent and privileged access for the member states at every stage of the proceedings. Judge Koopmans has indeed remarked that the Court set itself a mediatory function of bringing together the interests of the member states and resolving differences in their legal orders. It is not proposed to trace the steps taken by the Court in its rapid ascent to the commanding heights of the EU topography. They are very well-known and have inspired a voluminous literature,¹³⁰ and a convenient summary of the Court’s early litigation strategy is in any event available:

In the first stage, the main need was to create a legal infrastructure capable of making Community law operate directly in national legal orders and upon individuals. At the same time the Court had to establish its authority with respect to other Community and national institutions. Thus, the construction of an entire conceptual apparatus of procedural and institutional principles and rules was required.

A further step taken to enhance the effectiveness and legitimacy of Community law was the “subjectivisation” of the Treaties [...] The Treaties are not simply to be interpreted as an agreement between States, but as having been created for the “peoples of Europe” [...]

¹²⁷ H. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of Human Rights Jurisprudence* (Dordrecht: Martinus Nijhoff, 1996), 195-196.

¹²⁸ A. Torres Pérez, *Conflicts of Rights in the European Union, A Theory of Supranational Adjudication* (Oxford: Oxford University Press, 2009), 29-31.

¹²⁹ See for French examples, Lasser, n 43 above, ch 4. In the UK, the parliamentary Joint Committee on Human Rights monitors government implementation of ECtHR judgements, not always successfully: see eg *Hirst v United Kingdom* (2006) 42 EHHR 41, concerning prisoners’ right to vote, which has not yet been implemented. Currently, the ECtHR reports particular problems with Russia.

¹³⁰ See the admirable survey by A. Stone Sweet, ‘The European Court of Justice and the Judicialization of EU Governance’ (2010) *Yale Online Living Reviews in EU Governance*.

A further important element in securing the legitimacy and authority of both the European Court of Justice and EC law was the co-operation of national courts [...] The role played by national courts in requesting rulings from the ECJ and in applying these rulings provided ECJ decisions with the same authority of national court decisions and gave these decisions added values of both neutrality and of legitimacy in being “sanctioned” by a court of the State against which judgment had gone [...]

Finally, an equally important element in the constitutionalisation of the Treaties and the legitimacy of the Court and Community law was the Court’s co-ordination of its efforts and strategy with those of the European Commission.¹³¹

Member states were soon to find their Court was a wolf in sheep’s clothing.¹³² In a major role reversal, seen as a ‘juridical *coup d’état*’ that effectively ‘replaced the Member State’s blueprint of the legal system with its own’,¹³³ the ECJ took mastery of what it saw as ‘constitutional’ treaties, treating both member states and national courts as agents. How was this achieved? Significantly, the Court’s jurisprudence was redolent of the language of supremacy, primacy, and pooled sovereignty.¹³⁴ The impeccably presented judgments, couched in formalist language and legal reasoning, were designed from the start to establish its legitimacy in classical legal terms. As Shapiro put it, the Court’s anonymous judgments, which leave no room for dissent, presented the Community ‘as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology.’¹³⁵ In choosing this path, however, the ECJ was rendering itself vulnerable to charges of integrationism. Detractors accused the Court of meddling in politics and of bias against the member states,¹³⁶ while the influential Italian Judge Mancini spoke of integrationism as genetically programmed into the ECJ¹³⁷ – a position that not all its judges would necessarily adopt. Yet commentators broadly accepted that the ECJ has ‘with few

¹³¹ M. Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1997), 8-9.

¹³² See M. Shapiro, ‘The European Court of Justice’ in P. Craig and G. de Burca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press, 1999).

¹³³ A. Stone Sweet, ‘The Juridical Coup d’Etat and the Problem of Authority’ (2007) 8(10) *German Law Journal* 915, 924. And see K. Alter, ‘Who are the Masters of the Treaty? European Governments and the ECJ’ (1998) 52 *International Organizations* 121.

¹³⁴ See B. de Witte, ‘Sovereignty and European Integration: The Weight of Legal Tradition’ in A-M. Slaughter, et al (eds), *The European Courts and National Courts – Doctrine and Jurisprudence* (Oxford: Hart Publishing, 1998).

¹³⁵ M. Shapiro, ‘Comparative Law and Comparative Politics’ (1980) 53 *S. Californian Law Rev* 537, 538.

¹³⁶ Famously, H. Rasmussen, *On Law and Policy in the Court of Justice* (Dordrecht: Martinus Nijhoff, 1986).

¹³⁷ F. Mancini, ‘The Making of a Constitution for Europe’ (1989) 26 *CML Rev* 595; ‘Europe: The Case for Statehood’ (1998) 4 *European Law Journal* 29. Judge Mancini was at the Court from 1988-1999.

exceptions managed to hegemonize the EC interpretative community and to persuade, co-opt, and cajole most, if not all of other principal actors to accept the fundamentals of its doctrine and of its position as the final arbiter of constitutional determinations for the Community'. It has generally speaking been able, in Weiler's phrase, to 'satisfy its main interlocutors'.¹³⁸

Why national courts, without whose support the Court's integrationist jurisprudence could never have been implemented, should have allowed their legitimacy to have been borrowed in this way is a question without any definitive answer, the commonest explanation being that they themselves benefited from a general augmentation of judicial power.¹³⁹ We should not forget however that the ECJ has faced notable challenges to its legitimacy from national courts. The German Federal Constitutional Court in particular has expressed unwillingness to surrender its constitutional jurisdiction to a court seen as not entirely trustworthy in the matter of human rights,¹⁴⁰ and has asserted its own overriding competence (*kompetenz-kompetenz*) to exercise *ultra vires* review of ECJ decisions in order both to protect Germany's 'constitutional identity' and 'to preserve the viability of the legal order of the Community'.¹⁴¹ Recently, there have been signs of a new *kompetenz-kompetenz* dispute in a set of decisions concerning the European arrest warrant:¹⁴² from the Czech Constitutional Court, reasoning that it would be unconstitutional for EU legal norms to be 'in conflict with the principle of the democracy law-based state';¹⁴³ from Hungary, in a decision described as a 'warning' as to the limits of supremacy;¹⁴⁴ and from the Polish Constitutional Tribunal, with 'a clear refusal of supremacy' of the EU Treaty over the national Constitution' and the unequivocal statement that constitutional norms in the field of human rights 'indicate a minimum threshold, which may not be lowered or questioned as a result of the introduction of Community provisions'.¹⁴⁵

¹³⁸ J. Weiler, 'A Quiet Revolution – The European Court of Justice and its Interlocutors' (1994) 26 *Comparative Political Studies* 510, 517.

¹³⁹ K. Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' and A. Mattli and A.-M. Slaughter, 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints' in Slaughter et al (eds), n 134 above.

¹⁴⁰ The 'solange' judgments: *Internationale Handelsgesellschaft mbH*, BVerfGE 37, 271 (1974); Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; *Internationale Handelsgesellschaft mbH* (1986) 73 BVerfGE 339.

¹⁴¹ The *Lisbon Treaty* decision, BVerfG, 2 BvE 2/08 (30 June 2009) at [241]. See also the *Maastricht* decision, BvR 2134/92, 2 BvR 2159/92 (12 October 1993); *Honeywell 2* BvR 2661/06 (6 July 2010). See also *Carlsen and others v Rasmussen* UfR 800 (6 April 1988, Danish Supreme Court).

¹⁴² S. Siegel, *Courts and Compliance in the European Union: The European Arrest Warrant in National Constitutional Courts* (Jean Monnet WP 05/08, 2008).

¹⁴³ Czech Constitutional Court, Decision Pl US 50/04 Pl US 19/08.

¹⁴⁴ Decision 17/2004 (V.25) AB.IV.1; W. Sadurski, "'Solange, Chapter 3': Constitutional Courts in Central Europe' (2008) 14 *European Law Journal* 1, 9-18.

¹⁴⁵ Polish Constitutional Tribunal (27 April 2005 P/1/03) noted Leczykiewicz, (2006) 43 *CML Rev* 1181; K. Kowlaik-Banczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' (2005) 6(10) *German Law Journal* 1355.

So far the guard dogs have barked vociferously but refrained from biting.¹⁴⁶ But the reference in Shapiro's early article to a 'tight epistemic community of court, legal services and commentators' sounds a warning note. The Court has worked hard at relationships with national courts; it has a close relationship with the Commission;¹⁴⁷ otherwise its legitimization strategy is narrow, leaving important actors out of account. We know very little about the attitudes of national politicians, lawyers who do not specialise in EU law or the general public. In their empirical study, Gibson and Caldeira suggest that 'the Court has been insufficiently attentive to the need to communicate directly with the mass public [...] being content to try to borrow legitimacy from other political institutions'¹⁴⁸ – which all too often have little legitimacy to spare'. A reasonable response might be that this is not the role of a court, especially one as well-grounded institutionally as is the ECJ today.

Again, as Stone Sweet reminds us, the 'Masters of the Treaty' have not 're-contract[ed] their relationship with the Court, although they could have done so. Instead they adapted to the constitutionalisation, if at times only grudgingly, ratifying the transformation over time'.¹⁴⁹ Attempts made to curtail the Court's jurisdiction have been unsuccessful,¹⁵⁰ and the decision to strip the ECJ of competence in the controversial field of Justice and Home Affairs has been largely reversed at Lisbon.¹⁵¹ Member states have not succumbed to the temptation to use the appointment system, largely in the hands of member states, to 'pack' the court nor did they take the opportunity afforded by the Convention on the Constitutional Treaty to install a *tribunal des conflits* to rule on *kompetenz-kompetenz* issues.¹⁵² In short, the legitimacy of the ECJ is not in issue. It is widely respected inside and outside the legal profession. It is accepted as a partner by courts of the highest standing; it collects the calling cards (to coin a phrase) of every major court, national and international.

A NEW ERA: LEVEL PEGGING?

Complex problems posed by asset-freezing under the aegis of the UN Sanctions Committee in the context of the so-called 'war against terrorism' suggest, however, that courts may be entering a different and more complex era. A plethora of courts and judicial bodies with overlapping competences are beginning to stake

¹⁴⁶ See D. Doukas, 'The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty But Don't Do It Again!' (2009) 34 *EL Rev* 866.

¹⁴⁷ C. Harlow and R. Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach' in Curtin and Wille (eds), n 10 above, 290-299.

¹⁴⁸ J. Gibson and G. Caldeira, 'Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis' (1998) 28 *British Journal of Political Studies* 63, 91; 'The ECJ: A Question of Legitimacy' (1993) 14 *Zeitschrift für Rechtssoziologie* 204.

¹⁴⁹ Stone Sweet, n 133 above, 13; and see similarly Weiler, n 138 above, 142.

¹⁵⁰ J. Tallberg, 'Paths to Compliance: Enforcement, Management and the European Union' (2002) 56 *International Organization* 609.

¹⁵¹ See now TFEU, art 276.

¹⁵² For recent discussion, see Lindseth, n 76 above, 266-277.

out legitimacy claims in the transnational network, while private parties, alert to the possibilities, start to play the forum-shopping game. In *Kadi (no 1)*, an EU regulation legalising the freezing of Kadi's assets was made at the behest of the UN Sanctions Committee without due regard to due process principles. The CFI upheld the validity of the regulation, applying the doctrine of primacy of international law.¹⁵³ On appeal, the ECJ took a courageous step in the protection of human rights, ruling that respect for human rights was a condition of the lawfulness of EU acts, and that measures incompatible with respect for human rights were unacceptable in the EU:¹⁵⁴

[F]undamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.

The CFI was then faced with a set of similar cases. The *Organisation des Modjabedines des peuples d'Iran* (OMPI), a campaigning group originally set up to fight for the demise of the Shah of Persia's regime, if necessary by force, was on the list despite an absence of up-to-date evidence that it continued to advocate the use of force. OMPI's case had been heard and succeeded in the UK courts;¹⁵⁵ in the EU, however, it remained on the Council list. The CFI treated the UK fact-finding exercise with great respect, quoting the rulings at length: as 'the first decision of a competent judicial authority ruling on the lawfulness, in the light of the domestic law applicable', it was 'of considerable importance for the purposes of these proceedings'.¹⁵⁶ In short, there was a genuine attempt at dialogue by the CFI with the national courts.

OMPI had to return three times to the CFI after multiple Council re-listings, as did Kadi, after the Council, in response to the judgment in his first appeal, re-listed him. In a significant passage in its second judgment, the CFI recalled its own earlier ruling and reflected on doubts expressed by international lawyers concerning the correctness of the ECJ's appellate decision.¹⁵⁷ Asserting that it was not strictly bound by the ECJ's judgment, the CFI decided in the interests of comity not to call into question points of law decided by the ECJ in *Kadi (No 1)*; it was for the Court of

¹⁵³ Case T-306/01 *Ali Yusuf and others v Council and Commission* [2005] ECR II-3533.

¹⁵⁴ Case C-402/05 *Kadi v Council and Commission* [2008] ECR I-6351 noted Ziegler (2009) 9 *HRLR* 288.

¹⁵⁵ *Home Secretary v Lord Alton of Liverpool & Ors* [2008] EWCA Civ 443. The Home Secretary then delisted OMPI: see HC Deb 23 June 2008, vol 478, cols 98-118.

¹⁵⁶ Case T-256/07 *Organisation des Modjabedines des peuples d'Iran v Council* [2008] ECR II-3019 at [170]-[171]. There are two further OMPI cases: Case T-228/02 *Organisation des Modjabedines des peuples d'Iran v Council* [2006] ECR II-4665; Case T-284/08 *Organisation des Modjabedines des peuples d'Iran v Council* [2008] ECR II-3487.

¹⁵⁷ C. Tomuschat, in a note at (2006) 43 *CML Rev* 537, favours primacy; G. Nettesheim, at (2007) 44 *CML Rev* 567, takes a more relaxed, pluralist view.

Justice itself to address them in the context of future cases before it.¹⁵⁸ Pragmatically if illogically, the CFI was here combining a hint that it might have preferred adherence to a stricter international law doctrine of primacy with a pluralist but deferential attitude to the ECJ as EU constitutional court.

The earlier *Bosphorus Airways* case was notable for the politesse of the encounter between two courts whose relationships have not always been so harmonious.¹⁵⁹ The case dealt with the impounding of a plane by Ireland acting in conformity with a UN Sanctions Committee resolution. Almost cursorily, the ECJ, paying minimal regard as some would think to due process rights, ruled in favour of the Irish sequestration. But seised of the matter, the ECtHR simply deferred to this much-criticised ruling,¹⁶⁰ asserting in an interesting variant of the German ‘solange’ doctrine that EU law in this instance provided ‘equivalent protection’ to the Convention. The new UK Supreme Court, however, in the course of judgments invalidating executive orders made by the British government to implement UN requirements for asset-freezing,¹⁶¹ has recently invited the ECtHR to reconsider *Bosphorus Airways* in the light of *Kadi (No 1)*. The tentative invitation reflects its own ambiguous attitude to the doctrine of international law primacy. Its first adoption by British courts was hailed as a great step forward;¹⁶² the Supreme Court now possibly looks to Strasbourg for reconsideration.¹⁶³ And in another case the Supreme Court has recently claimed the last word against the ECtHR where it

[...] has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court.¹⁶⁴

This is not the place for discussion of the merits of these judgments. The point I wish to make here is only that the sheer number of courts now operating in global

¹⁵⁸ Case T-85/09 *Yassin Abdullah Kadi v Commission* (judgment of 30 Sep 2010) at [112]-[121].

¹⁵⁹ See Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and communication and others* [1996] ECR I-03953.

¹⁶⁰ App no 45036/98 "*Bosphorus Airways*" v *Ireland* (judgment of 30 June 2005). See C. Costello, ‘The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’ (2006) 6 *HRLR* 87; A. Dawes and B. Kunoy, ‘Plate Tectonics in Luxembourg: The *ménage à trois* Between EC Law, International Law and the European Convention on Human Rights Following the UN Sanctions Cases’ (2009) 46 *CML Rev* 73.

¹⁶¹ *HM Treasury v al-Ghabra and Youssef* [2010] UKSC 2 at [100]-[106] (Lord Phillips).

¹⁶² See House of Lords in *R (Al-Jedda) v Defence Secretary* [2007] UKHL 58.

¹⁶³ By disapproving (*Al-Jedda*), currently on the Strasbourg agenda, and overruling its own earlier jurisprudence in *Behrami and Saramati v France Germany and Norway* (2007) 45 *EHRR* 85.

¹⁶⁴ *R v Horncastle and Others* [2009] UKSC 14 at [11], Lord Phillips (President).

space with overlapping competences in respect of the same subject-matter dictates a flexible approach. Asset-freezing cases have, for example, been entertained by the two Luxembourg Courts, the Swiss Federal Constitutional Court, the Canadian Supreme Court, the UK House of Lords and Supreme Court, the ECtHR, and by US Courts. They have arrived at very different solutions. Faced with a world of uncertain and conflicting legal norms, judges may well yearn for the certainty of Kelsen's structured and ordered world; internationalists arguing for primacy may also express concern at the fragmenting of normative orders, risking a loss of control. But Slaughter's network of mutually supportive courts has turned to questioning, while Póitres Maduro argues that pluralism is healthy for courts. Competing claims to supremacy arm them with weapons that 'help to ensure mutual respect'. Since all the players have an interest in conflict-resolution, the risks of actual conflict 'provide incentives on each party to strive towards harmonious interpretation of the law. It encourages the Court of Justice to interpret European law in a manner that will be palatable to national courts, and, at the same time, discourages national courts from blindly insisting on the primacy of national rules'.¹⁶⁵ The same may be said of other transnational players.

6. THE CASE FOR PLURALISM

The lesson to be drawn is that there is no single and no simple answer to questions of legitimacy. Legitimacy, even when considered in an institutional context, is too abstract a concept to be truly helpful to lawyers. Legitimacy is always contingent and contestable; different circumstances require different answers; no one answer is sufficient. Much depends too on the eye of the beholder. Elites favour elite theories of delegated legitimacy based on effectiveness and expertise, in part reflecting their own elite status and, as this paper has suggested, are sometimes surprised to find that others feel differently. Representative democracy is untidy and often ineffective, yet it seems to claim a greater degree of public support. And is it really surprising to find academics inclined towards deliberation?

There is no one way either to explain or justify the many types of rule-making. There are no simple answers to the question whether governance through soft law is legitimate or even desirable; it may or may not be according to the circumstances; it is indeed questionable whether the question is worth asking. Highly technical rules, we might say, are best left to experts, public or private, bearing in mind always the need for participation and transparency. If they were made by a parliament, they would not be qualitatively better; would they necessarily be more legitimate? Public lawyers tend to feel that, if promulgated in

¹⁶⁵ M. Póitres Maduro, 'Europe and the Constitution: What If This Is As Good As It Gets' in J. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003).

the public sphere, rules need something further: perhaps the imprimatur of a principal with legitimacy, as with the Commission in EU social lawmaking, perhaps a stronger form of democratic legitimation. It is (rightly) felt, for example, that anti-terrorist legislation should not in principle be introduced by delegated legislation,¹⁶⁶ and legislative approval is almost always demanded for regulatory changes to human rights. For similar reasons, many people argue that judicial rulings in human rights cases should remain contingent, leaving the last word to democracy.¹⁶⁷

Legal pluralism means no more than the recognition of the existence and – more important – the legitimate existence, of multiple sources of law.¹⁶⁸ It means acknowledging that there is no ‘one-size-fits-all’ solution. Interest in legal and constitutional pluralism is by no means new,¹⁶⁹ but it has gained a new dynamism with the wide range of transnational organisations and bodies operating in global space with multiple claims to legitimacy. Simple hierarchies have undergone a process of demolition and the shadowy outlines of a new kind of horizontally-oriented map are becoming visible.¹⁷⁰ To legal pluralists, this new world order is a challenge in which the answers lie in ‘facing the institutional tensions on their merits’.¹⁷¹ But can legal pluralism provide better answers? To quote Nico Krisch:

If we accept the basic normative strength of the claims of the national, international and cosmopolitan groups to be constituencies of global regulatory governance, we should deny any of them formal primacy; they can all make a valid claim to hold global regulatory governance accountable. Their relative strength will then result not from a predetermined hierarchy, but from their influence, their allegiances and support, which will be determined in the political processes of a pluralist order. This has the added advantage of allowing for shifting weights of the different constituencies in the fluid process of constructing global governance; it opens up space for politics and for attempts at radical transformation that might be barred by rigid institutionalization and constitutionalization. Such an order might appear

¹⁶⁶ *HM Treasury v al-Ghabra and Youssef*, text at n 161 above.

¹⁶⁷ J. Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346.

¹⁶⁸ For more sophisticated definitions, see J. Griffiths, ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 1; R. de Lange, ‘Divergence, Fragmentation and Pluralism’ in H. Petersen and H. Zahlke (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth, 1994).

¹⁶⁹ See for a historical account, N. Barber, ‘Legal Pluralism and the European Union’ (2006) 12 *European Law Journal* 306; N. Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review* 317.

¹⁷⁰ F. Snyder, *Governing Economic Globalisation: Global Legal Pluralism and EU Law* (Oxford: Hart Publishing, 2002), 11. See also N. MacCormick, *Questioning Sovereignty, Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999); ‘Review Article – Questioning “Post-Sovereignty”’ (2004) 29 *EL Rev* 852; N. Walker (ed), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003).

¹⁷¹ M. Koskenniemi and P. Leino, ‘Fragmentation of International Law. Postmodern Anxieties?’ (2002) 15 *Leiden Journal of International Law* 553, 577. And see A. Fischer-Lescano and G. Teubner, ‘Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999; M. Craven, ‘Unity, Diversity and the Fragmentation of International Law’ (2003) 14 *Finnish Yearbook of International Law* 3.

unsatisfactory to those who have clear views on the single right constituency for particular issues. But it respects the fact that people have different views and make different choices; respect for this disagreement is, after all, respect for everybody's right to *self*-government, to equal participation in the design of the political order.¹⁷²

¹⁷² N. Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247, 274. These ideas are now enlarged in N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010).