

Constitutionalization, not democratization: how to assess the legitimacy of international courts

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Abstract:

Several authors who address the legitimacy deficits of international courts (ICs) propose their 'democratization,' by which they often mean to increase their transparency, accountability or participation by various parties. There are other, better reasons to value transparency, accountability and participation concerning ICs than as building blocks of democracy, namely insofar as they contribute to valuable forms of constitutionalization of the global basic structure. More transparency, accountability or participation is often but not always beneficial. Moreover, they can be valuable even when such changes do not advance democracy of the kind worth having: widely dispersed institutionalized control in the form of elections based on prior public deliberation, whereby individuals can influence the rules that shape their lives. We should not assume that democracy is the touchstone for all legitimate modes of governance. Three related issues should be isolated to foster constructive discussions and sound extrapolation of normative premises for legitimacy familiar from domestic constitutional thought and political theory. We should distinguish between democratic institutions of decision-making, the normative principles that justify such institutions, and important features of such institutions that contribute to their justification, such as accountability, participation and transparency. It is only calls for the first of these – formalized institutions of decision-making - which should be considered democratization proper.

Introduction: The call for more democratic international courts

International courts and tribunals (ICs) are often said to suffer from various legitimacy deficits.¹ Several authors argue that part of the solution is to make them

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more democratic, by increasing their transparency, accountability, or participation by various audiences. The following discussion focusses on some of these recent insightful contributions, by Von Bogdandy and Venzke, Buchanan and Keohane, Gráinne De Búrca, and Nienke Grossman. The present article considers only the claims concerning democratization made within each of these rich accounts.

We should welcome reasoned use of normative standards to improve flawed institutions. A central methodological concern when bringing normative political theory to bear on ICs is how to best extrapolate established standards of justification. This chapter seeks to assess and improve on some such suggestions that seek to apply normative standards concerning *democracy*, standards originally developed to assess domestic institutions. A benefit of such borrowing is that these standards may be sufficiently independent of the existing international institutions to allow critical assessment.² Yet such innovative use of domestic standards must be appropriate for to the peculiar functions and capacities of various ICs, and how each is embedded – in different ways - in complex interdependence with other institutions within a multi-level political and legal order. Several attempts to extend standards of *democracy* to ICs are helpful but fall short in this regard.

The calls for infusion of more democratic values into ICs are mistaken, but understandable. Pleas for more legitimate ICs are especially likely given their increase in numbers, domain and impact on states and individuals. A wide range of ICs such as those of the WTO panels and human rights courts can bolster domestic democratic processes and rule of law.³ On the other hand, ICs also strike down or challenge domestic decisions that stem from bona fide democratic processes. Such charges have fueled protests against the European Court of Human Rights' criticism of the United Kingdom's denial of prisoners' voting rights,⁴ against the Inter-American Court of Human Rights' overruling of Uruguay's amnesty of former autocrats,⁵ and protests against investment arbitration rulings in Bolivia and Argentina.⁶

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² N. Grossman, 'The Normative Legitimacy of International Courts' 86 *Temple Law Review* (2013), 61-105, 29; L. Meyer & P. Sanklecha, *Legitimacy, Justice and Public International Law* (ed.^eds.), Cambridge University Press 2009), 19.

³ A. Buchanan & R. O. Keohane, 'The Legitimacy of Global Governance Institutions' 20 *Ethics and International Affairs* (2006), 405-437; A. Moravcsik, 'Is There a 'Democratic Deficit' in World Politics? A Framework for Analysis' 39 *Government and opposition* (2004), 336-363.

⁴ Hirst V. The United Kingdom (No. 2), Reports of Judgments and Decisions 74025/01 (European Court of Human Rights, Grand Chamber).

⁵ R. Gargarella, 'In Search of Democratic Justice: What Courts Should Not Do: Argentina, 1983-2002' 10 *Democratization* (2004), 181-197.

⁶ M. Waibel, ed. (2010). *The backlash against investment arbitration: Perceptions and reality*. Alphen aan den Rijn, Kluwer.

Historically, direct democratic control has seldom been an ideal for any court, domestic or international. With few exceptions, domestic judges are not directly democratically elected. A central rule of law standard is typically that the judiciary should enjoy independence from the legislative and executive branch. As for ICs, states often establish them precisely to obtain some degree of independence from domestic control – including majoritarian democratic influence. WTO panels are set up to ensure that states will do their share in securing common objectives such as freer trade, even contrary to domestic democratic pressure. ICSID investment tribunals and human rights courts help assure other bodies that the state will stand by its commitments, domestic democratic political pressure notwithstanding.⁷ Critics may argue that the concern of the founders to avoid democratic control over ICs is insufficient for the ICs' legitimacy today. Among the grounds for concern are the IC's dynamic interpretation of treaties and the cumbersome revision procedures.⁸ Hence several scholars arrive at a diagnosis that flaws of ICs stem from their low democratic quality, and the solution is their 'democratization.'

I shall argue that several insightful contributions that argue for the democratization of ICs often blur important distinctions relevant for institutional assessment and reform. Some conceptual distinctions will enhance the analysis, the standards and the prescriptions, and avoid misplaced criticism. Several of the proposed changes may be valuable, though they will not advance democratic institutions of the kind worth having: institutionalized levers in the form of elections based on prior public deliberation, whereby individuals can influence the rules they live by.

Three related issues should be kept distinct to foster constructive discussions and sound extrapolation of normative premises for legitimacy familiar from domestic constitutional thought and political theory. We should distinguish between democratic *institutions* of decision-making, the normative *principles* that justify such institutions, and important *features* of such institutions that contribute to their justification, such accountability, participation, or transparency. It is only calls for the first of these – institutions of decision-making - that is broadly consistent with scholarship on democracy, and which should be considered *democratization* proper.

The authors considered do not call for democratic legitimation of ICs according to the first sense of democracy - increasing direct or indirect electoral majoritarian control on the basis of prior deliberation. Their recommendations are rather about multipurpose 'building blocks' that are of great value but for several reasons that have little to do with such democratic electoral accountability.

These sound suggestions for institutional reform should not be based on a normative principle of democracy, but instead be justified from a global

⁷ Moravcsik, 2004.

⁸ Grossman 2013.

cosmopolitan constitutionalist perspective. The proposals should appeal not to democratic norms or values, but instead to the normative justification that *also* gives us reason to value domestic democratic institutions: The set of institutions we are forced to uphold must treat us all with the respect owed political equals.

To justify these claims, section 1 lays out some aspects of a normative theory of *global constitutionalism*. It does not assume democracy as a normative premise, but allows us to develop a theory of democracy, sketched in section 2. It brings normative theory to bear on ICs and other parts of international law by first identifying the reasons we have to value democratic rule, the rule of law and other standards often applied to domestic political and legal orders. Then these reasons are extended to develop standards that primarily apply to the 'global basic structure' as a whole, while other standards may apply to ICs as important components within that structure.

Sections 3-5 contrast several prominent contributions that seek to bring to bear democratic ideas – mainly normative standards or features - to regional and international institutions, and to ICs in particular. One upshot of these discussions is that to call these standards 'democratic' or aspects of 'democratization' fosters misunderstanding. The use of these terms by several of the authors canvassed is at odds with how these terms are ordinarily used. This is not to deny that several of the calls for institutional changes may be sensible and normatively well supported. The reform proposals may well enhance the legitimacy of ICs, but they seldom recommend standards or institutions that are unique to democratic modes of governance. The normative values justifying their proposals are not helpfully labelled 'democratic'; nor are the institutional arrangements they propose recognizably 'democratic' in the common sense of including both arenas for deliberation and participation and widely dispersed *institutional levers for collective decision-making* in the form of political voting rights. This is not to deny that 'democracy' or 'democratic values' is used in other ways by other authors; I shall argue that some such uses are misleading and hinder the formulation and arguments about normative standards of legitimacy.

Finally, the proposals might well enhance the legitimacy of ICs, but for reasons unrelated to democracy: Transparency, accountability and participation may be of value even if they do not lead to more democratic governance of the ICs. Instead, I shall suggest that the reforms are better interpreted as calling for certain kinds of constitutionalization of the combination of international and domestic law which constitute our 'Global Basic Structure', and of ICs in particular.

The conclusion returns to consider the importance of distinguishing normative standards from institutions, and of separating democratic institutions from those that have value for other reasons as well – from a constitutionalist perspective.

1 Global Constitutionalism

The main functions of constitutions are to constitute institutions of governance: to establish and limit government power.⁹ Written and de facto constitutions typically do so by performing four tasks. They create institutions and curb them, channel their use by laying out their objectives, and specify rules for constitutional change.¹⁰ When authors speak of the 'constitutionalization' of international law, and of international courts in particular, their claims often relate to one or more of these tasks.

A global constitutionalist perspective as understood here includes three distinct elements that pertain to these four functions. I shall suggest that we get a better perspective on the legitimacy deficits of ICs and their resolution by taking global constitutionalism rather than democracy as the overarching framework of interpretation and assessment.

Firstly, this constitutionalist perspective is *global*, not *international*. The object of concern is the 'Global Basic Structure' (GBS) as a whole, which includes much international law and central features of the various domestic constitutional and legal orders.¹¹ Thus the primary unit of analysis is this multi-level legal order as a whole, rather than international or regional law and institutions in isolation from domestic legal systems.¹²

Secondly, the global constitutionalist perspective has a particular set of concerns, namely how the institutions of the GBS do and can maintain the four constitutional functions given the complex interdependence among the institutions – which themselves have varying normative legitimacy. Their interdependence raises important challenges to how they are best assessed and changed. To illustrate: consider discussions concerning the role of state consent to jurisdiction for international courts.¹³ From this constitutionalist perspective, this is a question about what reasons we have for holding such consent as a standard necessary condition for holding states to international legal obligations, or whether there are other criteria and sources for international law that states should be held to (Buchanan and Keohane 2006, 414). Such reflection enhances our assessment of other supplementary or alternative candidates for sources of international law, including 'dynamic treaty

⁹ e.g. Z. Elkins, et al., *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009).

¹⁰J. Elster, 'Constitution-Making in Eastern Europe: Rebuilding the Boat in the Sea' 71 *Public Administration* (1993), 167-217, A. Follesdal, *Drafting a European Constitution Challenges and Opportunities*, ConWEB Online - Constitutionalism Web Papers, University of Manchester School of Law. No 4(2002) <<http://follesdal.net/ms/Follesdal-2002-EU-constit-ecpr-2001.doc>>, visited on .

¹¹ A. Follesdal, 'The Distributive Justice of a Global Basic Structure: A Category Mistake?' 10 *Politics, Philosophy and Economics* (2011), 46-65.

¹² M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' 15 *European Journal of International Law* (2004), 907-931; M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State', in Jeffrey L. Dunoff & Joel P. Trachtman (ed.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge, Cambridge University Press, 2009) pp. 257-324.

¹³ Grossman 2013.

interpretation', state practice and customary rules - or a future global democratic legislature or general assembly. Another example concerns the role of many ICs as dispute resolution bodies: they may often have important roles in this regard even though some of the states they adjudicate for lack democratic credentials. How to design and assess such ICs are important and very challenging tasks.

The third premise is normative: *normative cosmopolitanism*, which provides standards for assessing such proposed creation of institutions and allocation of authority among them within the global basic structure. For our purposes here, mention of some central features suffices. The normative premise is broadly Kantian: The set of institutions must be justifiable to all subject to them, as political equals. What are the material requirements of institutions that are thus justifiable to all subjects? Leaving details aside, we may think of these as the requirements of normative cosmopolitanism of the GBS. I submit that the GBS as a whole must respect and promote important interests of each, including

- A) human rights that protect basic human interests against standard threats.¹⁴
- B) influence over institutions that shape their lives, and
- C) protection against domination – i.e. protection against being subject to the arbitrary discretion of others.

Note that this is *normative*, rather than *institutional* cosmopolitanism.¹⁵ Versions of institutional cosmopolitanism maintain that there should be more global institutions – such as a world parliament, or world courts in more sectors. For normative cosmopolitanism this remains an open but highly contested empirical question: it is not at all obvious that global institutions such as a global parliament, executive or court better satisfies this normative standard than more decentralized institutional structures. Kant famously denied this, due to the high risk of domination by a world government.¹⁶

A third feature is that the normative standards of normative cosmopolitanism apply to the GBS as a whole, rather than to every institution within it. Thus courts are usually required to interpret and adjudicate existing laws, rather than in every case make judgments that benefit the interests of all parties. It remains an open question whether and how judges – of ICs or at domestic courts – should appeal to normative cosmopolitanism when they interpret existing laws. Such distinctions about the subject of various normative standards are due to the complex division of labour among the institutions, specified by the domestic constitutions and the GBS.

¹⁴ Buchanan and Keohane 2006, 419; J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

¹⁵ or 'moral' rather than 'political' ,T. W. Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002).

¹⁶ I. Kant, 'Perpetual Peace: A Philosophical Sketch', in Hans Reiss (ed.), *Kant's Political Writings* (Cambridge, Cambridge University Press, 1796) pp. 93-130, 102; *ibid.* .

I submit that many authors share several aspects of global constitutionalism as laid out here. For instance, a typical feature of constitutionalisation is to curb or constrain the power of institutions relative to each other. This is central to two topics often described as the 'constitutionalization' of international courts. Firstly, that they have taken on functions that de facto curb the competence of national constitutional organs – i.e. performing the second of the four tasks typically specified by a constitution.¹⁷ Thus judicial review is a mechanism typical of constitutionalism, offering a case of 'non-electoral accountability'.¹⁸ Secondly, the impact of these ICs be it as mechanisms for dispute resolution or as review bodies, raises issues of the extent to which and how these ICs themselves should be curbed and channeled by constitution-like checks or procedural arrangements such as closer scrutiny and control.¹⁹ Three remarks help distinguish this perspective from other uses of 'constitution' and 'constitutionalization.' Firstly, note that this description of global constitutionalism does not include claims that particular normative standards – such as democratic accountability - must be in place for there to be a constitution at all. To the contrary, it seems most conducive for clear normative arguments to grant that authoritarian or non-democratic states, and arguably the global basic structure, may have a constitution, albeit with grave normative flaws. Note that other authors choose to use these terms differently, to include some (minimal) level of legitimacy in any constitution:

Our interest, however, as far as it concerns legitimacy to begin with, resides predominantly with the legitimacy of the rules and institutions that make up international law. In other words: *we will presume that the global constitutional order is legitimate, otherwise we would not refer to it as constitutional.* But that does not mean that all its institutions and rules are therefore legitimate.²⁰

Secondly, as this quote shows, some authors appear to hold that only legitimate constitutional orders merit the label 'constitutional.' This may be because they include in the definition of a constitution that it respects and promotes certain procedural or material values or standards – e.g. the rule of law, democratic self-governance, human rights protection or social security.²¹ In contrast, the global

¹⁷ G. Ulfstein, 'Institutions and Competence', in Jan Klabbbers, et al. (ed.), *The Constitutionalization of International Law* (Oxford, Oxford University Press, 2009) pp. 45-80, 50.

¹⁸ Terry Macdonald and Kate Macdonald. "Non-electoral accountability in global politics: Strengthening democratic control within the global garment industry." *European Journal of International Law* (2006)17(1): 89-119; cf Krisch 2006, 7.

¹⁹ J. Klabbbers, et al., *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009), 25.

²⁰ J. Klabbbers, 'Setting the Scene', in Jan Klabbbers, et al. (ed.), *The Constitutionalization of International Law* (Oxford, Oxford University Press, 2009) pp. , 37-38, my emphasis cf A. von Bogdandy & I. Venzke, "In Whose Name?' An Investigation of International Courts' Public Authority and Its Democratic Justification' *The European Journal of International Law* (2012), 7-41; J. Weiler, 'The Geology of International Law - Governance, Democracy and Legitimacy' 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2006), 547-562.

²¹ Klabbbers, Peters et al. 2009, p 347.

constitutionalist perspective laid out here holds that a constitution, and the GBS, may serve the four functions, yet the legal order may be normatively deeply illegitimate.

A third implication of this account is that not all forms of constitutionalization are normative improvements. There is not a monotonic relationship between any institutional changes and particular normative standards. One reason is that the impact of changes in some institutions may have untoward effects on the GBS as a whole; another reason is that some improvements require multiple institutional changes. Consider claims that the WTO system is becoming constitutionalized – whereby GATT norms are given priority over other international and national law. Some observers rightly point out that such 'partial constitutionalisation' may leave large segments of the population worse off.²²

From the perspective of global constitutionalism many calls to democratize ICs may be interpreted in one of two ways. Some may not want a multi-level system of checks and balances, but rather ensure that *every* influential international institution – such as ICs – has an internal composition, procedures and structure that ensures its long term pursuit of its objectives. Others may be read as recommending that ICs are *constitutionalized*, guided by normative cosmopolitan standards when determining how their objectives should be specified and how they should be checked. Few of the proposals call for democratization proper, in the central sense of increasing democratic decision making into the ICs.

Some may object to this use of 'democracy' as too narrow: that widespread institutional levers of control are not a necessary condition for calling an institution 'democratic.' We turn to this issue now.

2 A brief sketch of democratic theory

Three concepts of democracy

Many scholars and proponents of democratic rule use the term 'democracy' to refer to certain kinds of *institutions for decision making*. These institutions typically include majoritarian electoral control over the decision makers, as well as arenas for deliberation, opportunities for real party competition – and more. A central normative issue of the *legitimacy* of democratic institutions is why those who find themselves outvoted under such democratic rule have a moral obligation to defer to these decisions that they oppose. This understanding of democracy as centrally concerned with institutions that allow and foster majoritarian decision-making on the basis of prior public deliberation is standard among political scientists and

²² E.-U. Petersmann, 'Welthandelsrecht Als Freiheits- Und Verfassungsordnung' *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (2005), 543.

theorists.²³ Thus Brian Barry held that

By a democratic procedure I mean a method of determining the content of laws (and other legally binding decisions) such that the preferences of the citizens have some formal connection with the outcome in which each counts equally.²⁴

A democratic theorist more known for insistence on the need for public deliberation, Jürgen Habermas' account similarly includes elections in his understanding of democracy:

It is the formal vote and the actual opinion and will formation of individual voters that together connect the peripheral flows of political communication in civil society and the public sphere with the deliberative decision making of political institutions at the center, thus filtering them into the wider circuitry of deliberative politics.²⁵

A similar understanding is also prevalent among many legal scholars. Thus Weiler plausibly claims that

any functioning notion of democracy .. is based on the ... premise,... that a majority within a collectivity, a demos, has the authority to bind its individual members, even against their will.²⁶

This common use of the term 'democracy' should be distinguished from two further, different uses in the literature concerning the legitimacy of ICs.

The second usage occurs when authors blur the distinction between such institutions and the *normative standards* of legitimacy or justice used to assess them – such as normative cosmopolitanism mentioned above. Thus they write of "democratic principles for ... justification" (von Bogdandy and Venzke 2012), "basic premises of democratic theory" (von Bogdandy and Venzke 2012), or "the key values that underlie demands for democracy" (Buchanan and Keohane 2006, 417).

Defensible normative standards may well justify democratic decision-procedures over the alternatives. But these premises should not be labelled 'democratic' lest we conflate the premises and conclusions of important arguments.

A third phenomenon that is sometimes referred to as 'democratic' concerns

²³ However, it is not shared by all democratic theorists. For instance, John Dryzek in some publications appears to downplay the legal and institutional aspects of electoral control (J. Dryzek, *Deliberative Global Politics* (Oxford: Polity Press, 2006)), cf T. Christiano, 'Democratic Legitimacy and International Institutions', in Samantha Besson & John Tasioulas (ed.), *The Philosophy of International Law* (Oxford, Oxford University Press, 2010) pp.).

²⁴ B. Barry, 'Is Democracy Special?', in Brian Barry (ed.), *Democracy and Power* (Oxford, Oxford University Press, 1991) pp. 24-60, 25.

²⁵ J. Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research' 16 *Communication Theory* (2006), 411-426, 418.

²⁶ Weiler, 2006, 548.

certain *features* of democratic decision making institutions, such as accountability, participation, and transparency. The relationship is complex. Such features indeed appear crucial if democratic decision-making is to be a process based on deliberation, and which yields outcomes that are normatively justifiable. But these components are also valuable for reasons quite unrelated to democratic rule. A wide range of non-democratic institutional mechanisms provide accountability through checks or review procedures. Their effective functioning require *transparency* about the procedures and outcomes they hold accountable.

It is misleading to label such features as transparency and accountability 'democratic.' That adjective obscures the issues of why and when such features are normatively desired. Neither transparency of decision procedures nor the practice of judicial review become 'democratic' simply because judicial review requires *transparency* concerning how the executive has made a decision. This is not to deny that such review may enable *other* bodies, such as the legislature, to subject the executive to democratic account. Judicial review can thus facilitate the sorts of democratic decision making we have reason to value. But transparency should not be labelled a 'democratic' value.

We now consider several calls to 'democratize' ICs made by some of the convincing and thoughtful theories or perspectives of legitimacy of international law. The present article considers only claims concerning democratization made within each of these rich accounts, to consider what appear to be their sound conclusions and further challenges. The focus is on how each perspective seeks to extrapolate, translate or transpose 'democratic' norms and standards from similar discussions as regards the legitimacy of domestic law and courts to their international counterparts. Several contributors are clear that they provide *incomplete* accounts of standards of legitimacy. For instance, rule of law standards, human rights, or consistency are further necessary conditions. Few if any of the authors claim that these strands are mutually exclusive.²⁷

What is democracy, and why value it?

What is democratic rule, and what reasons are there to value such modes of collective decision-making? Several democratic theorists hold that a central value of democratic majoritarian rule is that it more reliably than alternatives serves to identify or create normatively acceptable decisions.

Consider a fairly standard description of democracy, agreeable to a broad range of democratic theorists.²⁸ Virtually all modern political systems that are called

²⁷ cf. J. E. Nijman & A. Nollkaemper, 'Beyond the Divide', in Andre Nollkaemper & Janne Elisabeth Nijman (ed.), *New Perspectives on the Divide between National and International Law* (Oxford, Oxford University Press, 2007) pp. ; C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' 17 *European Journal of International Law* (2006), 187-214, 194.

²⁸ cf. R. A. Dahl, *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1971), Barry, 1991, T. Christiano, 'An Instrumental Argument for a Human Right to Democracy' 39 *Philosophy and Public*

'democratic' have a set of *institutionally established procedures*. They

- regulate competition for control over political authority
- on the basis of deliberation
- where nearly all adult citizens are permitted to participate in
- an electoral mechanism where their expressed preferences over alternative candidates determine the outcome,
- in such ways that the government is responsive to the majority or to as many as possible.

There are several normative reasons offered for favouring democratic decision-making of alternatives.²⁹ A distinction between 'effective power' and 'procedural control' elaborated by Amartya Sen helps distinguish and relate the normative standards to democratic and other institutions on the other.

We should differentiate between which effective power individuals have, from the sort of institutional control they enjoy. A person has effective power in this sense insofar as a certain outcome is brought about *because* it is in the person's interest:

Precisely who exercises the control may be less important than the ability to achieve what we would have chosen. If the streets are cleared of the muggers because we would choose not to be mugged, our freedom is being well served, even though we have not been given control over the choice of whether to be mugged or not.³⁰

An individual may enjoy such effective power by means of a trustee, or by legal regulations. In contrast to enjoying such effective power, the person has *procedural control* when she actually has institutional levers to bring about what she prefers, "actively doing the choosing in the procedure of decision and execution."³¹ What characterises a democracy is that almost all adult individuals have such procedural controls in the form of freedom of expression and association, voting rights etc.

The normative standards of normative cosmopolitanism outlined above helps rank mechanisms that ensure all individuals' effective power over the outcomes. In the domestic setting, such mechanisms are the stuff of a constitution. They may include legal human rights and various constitutional checks and balances such as judicial review - and democratic decision making. Note that a set of institutions as specified by a constitution that satisfies people's interests reasonably well will not necessarily suffice for such forms of effective power to be 'rule by the people' (Erman, 2010; Rostboll, 2008: 45-77). Democratic rule requires some *procedural controls*

Affairs (2011), 142-176, A. Follesdal & S. Hix, 'Why There Is a Democratic Deficit in the Eu: A Response to Majone and Moravcsik' 44 *Journal of Common Market Studies* (2006), 533-62.

²⁹ For an overview, cf T. Christiano, 'Democracy' Accessed December 29, 2016 *Stanford Encyclopedia of Philosophy* (2006), .

³⁰ A. K. Sen, 'Well-Being, Agency and Freedom' 82 *Journal of Philosophy* (1985), 169-221, 210.

³¹ Sen 1985.

which ensure that individuals are agents. When we claim that the normative case for democratic procedural control is comparative, this means that among sets of institutions, those that include democratic mechanisms provide individuals with more effective power of the kind worth having than alternative sets of institutions.

One argument for majoritarian democracy is that under certain conditions, such democratic accountability mechanisms ensure that the decisions can be trusted to be *more* reliably responsive to the interests of every citizen than are other collective decision making arrangements.³²

Disagreements exist concerning which interests of individuals should be protected and promoted to a certain extent. There appear to be at least three distinct reasons to value democratic decision-making institutions.³³

Firstly, these procedural controls are *intrinsically* justified insofar as they distribute equal shares of political influence among individuals.

Secondly, democratic levers are instrumentally justified to the extent that they secure several other interests, including the interest in non-domination: to not be subject to the arbitrary will of others;³⁴ and the interest in protection of basic human interests by means of human rights.³⁵

Thirdly, democracy is instrumentally justified insofar as it secures a more just distribution of *other* goods under certain conditions than do non-democratic procedures.³⁶ Majority rule ensures an equitable distribution of benefits if the benefits and burdens of the various decisions are roughly equal in weight, and where the chances of being in the majority are roughly equal.³⁷

Note that other institutions than democratic rule may secure nondomination and distributive justice – in particular, human rights constraints may safeguard against domination and constrain the distribution of benefits.

Which institutions and features are properly regarded as part of democratic institutions? Several institutional features and conditions must be in place at least to a minimum degree if democratic institutions are to be better than alternative decision procedures. We can identify some such features and conditions by considering why

³² B. Barry, *Theories of Justice* (Berkeley: University of California Press, 1989), J. Habermas, *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1996), T. M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), Christiano, 2011, P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997), P. Pettit, 'Democracy: Electoral and Contestatory', in Ian Shapiro & Stephen Macedo (ed.), *Designing Democratic Institutions* (New York, New York University Press, 2000) pp. 104-44.

³³ E. Erman & A. Follesdal, 'Multiple Citizenship: Normative Ideals and Institutional Challenges' 15 *Critical Review of International Social and Political Philosophy* (2012), 279-302.

³⁴ Q. Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998), Pettit, 1997 ; I. Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003).

³⁵ Christiano, 2011.

³⁶ A. K. Sen & J. Dréze, *Hunger and Public Action* Oxford University Press, 1990).

³⁷ Barry, 'Is Democracy Special?', 1991.

and when democratic institutions provide normatively desirable outcomes. Only under some conditions can we expect democratic institutions to provide a more equal distribution of influence over the shaping of common institutions, and of the political decision-making within them. In effect, democratic rule secures this by real *competitive elections on the basis of public deliberation*. This includes “genuine competition by decision-makers for the votes of those who are actually affected by their decisions.”³⁸ On this view competitive elections are a necessary and crucial condition to make policies and elected officials responsive to the preferences of citizens.³⁹

This view must not be confused with the claim that competitive elections are a *sufficient* condition to call the system democratic, and to value it. That would be a 'fallacy of electoralism'.⁴⁰ In particular, *arenas for public deliberation* are necessary to shape these preferences. It must also be possible for an opposition to form against the current leadership elites and policy status quo.⁴¹ Constitutionally protected *active opposition parties* and *free media* that can scrutinize their claims are crucial for fact finding, agenda setting and assessments of the effectiveness of alternative policies. Several scholars will include further civil and political rights, and require a minimum of rule of law as conditions for when democratic procedural control will promote decisions in accordance with the requirements of normative cosmopolitanism. This account thus agrees with Buchanan and Keohane, that

Democracy worth aspiring to is more than elections; it includes a complex web of institutions, including a free press and media, an active civil society, and institutions to check abuses of power by administrative agencies and elected officials.⁴²

Consider, in particular, the important functions that domestic, independent courts serve on this account.

A judiciary serves several valuable roles on this account, roles that require that the judiciary is not under direct majoritarian democratic control. The following arguments are familiar within a constitutional perspective. An independent judiciary is justified within a complex system of governance with a separation of powers and various checks and balances – where other bodies such as the democratically elected legislature in turn is justified as part of such a larger complex basic structure. A court helps adjudicate according to the democratically decided legislation, and is crucial to ensure several of the scope conditions that give

³⁸ Shapiro, 2003 , 7; cf Dahl, 1971 .

³⁹ G. B. Powell, *Elections as Instruments of Democracy: Majoritarian and Proportional Visions* (New Haven: Yale University Press, 2000).

⁴⁰ T. Karl, 'Imposing Consent? Electoralism Versus Democratization in El Salvador', in Paul Brake & Eduardo Silva (ed.), *Elections and Democratization in Latin America, 1980-1985* (San Diego, Centre for Iberian and Latin American Studies, University of California at San Diego, 1986) pp. .

⁴¹ Dahl, 1971 .

⁴² Buchanan & Keohane, 2006, 417.

us reason to value majoritarian decision procedures. A court also monitors the executive to ensure that the democratically decided decisions are actually carried out. An independent court is also important to uphold a wide range of procedures to ensure the rule of law. Likewise, a court can protect freedom of association and expression, especially for those who oppose the current majority in power. Independent courts are also important to ensure that the majoritarian decisions do not violate the human rights of anyone. This is a perennial risk of majority rule, either due to oversight by the majority or ill will. A further important role of independent courts is to provide public assurance of these requirements, so that the public are assured that the executive, administration and legislature do in fact govern consistent with rule of law standards and human rights.

These comments indicate that the sort of democratic decision making worthy of respect requires more than electoral competition. However, this does not detract from the fact that there is broad overlapping agreement among a wide range of democratic theories that electoral competition is a *necessary* condition for democracy.⁴³

Against this background, two ways to bring democratic theory to bear on the GBS in general, and to ICs in particular, appear flawed. Recall that we must consider how the system *as a whole* secures conditions for democratic decision making, and secure checks and balances to reduce the risk of domination and abuse of power. So several institutions must clearly be transparent, and allow participation by affected parties – such as courts, administrative bodies, etc. - may have to secure transparency and participation, and provide arenas for deliberation. However, not every institution within the GBS needs to be democratically accountable or otherwise express 'democratic values.' In particular, such standards do not easily apply to ICs, given that domestic courts by design are not held to democratic standards. Such a case would have to be made, otherwise proponents may commit a “fallacy of composition”, the belief that what holds for some element of the GBS must also hold for it as a whole. For instance, a theory may value democratic forms of governance for both intrinsic and instrumental reasons, yet deny that *every* institution should make decisions by unconstrained majority rule after suitable deliberation. To the contrary, we should heed Philip Pettit's warning against theories of democracy that associate democracy exclusively with the rule of the collective people:

If the role of democracy is to empower all and only the common, recognizable interests of people, then a very bad way of pursuing that role will be to give over control of government to anything like unconstrained, majority rule.⁴⁴

'Undemocratic' ICs may thus be a valuable part of a legitimate GBS, if that

⁴³ J. A. Schumpeter, *Capitalism, Socialism and Democracy* (London: Allen and Unwin, 1976), P. Schmitter & T. L. Karl, 'What Democracy Is ... And What It Is Not' 2 *Journal of Democracy* (1991), 75-88.

⁴⁴ Pettit, 'Democracy: Electoral and Contestatory', 2000.

structure as a whole is sufficiently controlled by democratic mechanisms to be legitimate, i.e. it is justifiable toward all affected parties as equals. In particular, ICs may well be legitimate bodies for resolving international disputes even though they are not closely controlled by international or national democratic bodies.

Those who seek to apply democratic theory directly to ICs may still argue that given the lack of a well-functioning GBS with well-developed checks and balances, and in the absence of a global legislature, standards drawn from democratic theory - such as majoritarian accountability - should inform each of the institutions more directly - and in particular, ICs. Such a move still seems unjustified from the point of view of the democratic theory sketched above, on at least two counts. There is firstly no fundamental presumption for democratic decision making standards - these institutions are instead justified by empirical claims about the benefits wrought by democratic rule, as measured by the normative standards of normative cosmopolitanism. Secondly, even that case for democratic rule is constrained: it only holds within a system of checks and balances, constrained by institutions that protect human rights etc. A quite different and slightly more plausible claim may be to hold that the standards of normative cosmopolitanism may be brought more directly to bear on the design and procedures of ICs, absent a stable and well developed division of powers within the present GBS. However, this is also a strategy wrought with problems, including the following.

The second mistake is a 'fallacy of accumulation.' A constitutionalist perspective does not assume that any increase in democratic accountability, transparency or other standard of legitimacy, in any part of the GBS, also increases the overall normative legitimacy of the global basic structure. Such a *fallacy of accumulation* ignores the complex interplay among institutions. Accountability, authorization and human rights are important aspects of any theory of legitimate democratic global governance, but they are component parts of a conceptual and normative package.⁴⁵ For instance, the quality of *democratic* decisions is not automatically enhanced as soon as one or more of these standards are more satisfied. There are two kinds of problems. Firstly, there is no monotonic relationship between an increase in any of these features and an increase in normative justifiability of the institution they are part of. Increased participation, say, may make the institutions neither more justifiable nor more democratic. Indeed, an increase in one such feature may render the decision procedures *less* legitimate. To move from a dictatorship to include some of those affected in the decision making - but not all - may render the situation worse for those excluded. Thus corporatist arrangements may have untoward effect insofar as only some parties will enjoy actual participation and influence, ignoring or intentionally imposing externalities upon the others.⁴⁶

Secondly, we must distinguish between enhancing legitimacy and enhancing

⁴⁵ Erman & Follesdal, 2012.

⁴⁶ P. C. Schmitter, 'Still the Century of Corporatism?' 36 *Review of Political Studies* (1974), 85-131.

democratic legitimacy. To illustrate: there are numerous valuable ways for authorities and agents to be held accountable in politics, by various agents and by various standards.⁴⁷ Such checks may be very important to grant individuals *effective power*. Yet increased accountability of a legislature toward an IC, valuable and legitimacy-enhancing as it may be, need not increase *democratic* accountability or legitimacy.⁴⁸

The upshot of this presentation of democratic theory is that there is broad – but not universal – agreement among democratic theorists that something reminiscent of competitive elections or majority rule seem central and possibly necessary (but of course not jointly sufficient) conditions for labelling a decision making procedure 'democratic,' and that features such as accountability and transparency need not be tied to democratic rule for them to have great value. We now turn to consider the claims for democratization of ICs by several important contributions.

3 Democracy: Decision making institutions, not normative principles of justification

We now turn to consider several valuable contributions about how to enhance the legitimacy of ICs. Several authors argue that discussions of the legitimacy of international law must draw on arguments concerning domestic public authorities, wherein democracy is a central requirement. Thus von Bogdandy and Venzke explicitly call for more democratic accountability of ICs. A central issue is “in whose name” international authorities – such as ICs – govern:

the central problem in the justification of international courts: in domestic contexts of functioning democracies judicial law-making is embedded in a responsive political system whereas the international level is marked by the absence of a functionally equivalent system. (von Bogdandy and Venzke 2012 19)

One of von Bogdandy and Venzke contributions is to lay out several of the ‘functions’ of ICs, which underscore the need to consider their legitimacy anew and with great care:

we identify three more functions beyond dispute settlement. International courts stabilize normative expectations, which include the reassertion of international law’s validity and its enforcement; they develop normative

⁴⁷ M. Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (Cambridge: Cambridge University Press, 1998).

⁴⁸ R. W. Grant & R. O. Keohane, 'Accountability and Abuses of Power in World Politics' 99 *American Political Science Review* (2005), 29-43; Buchanan & Keohane, 2006.

expectations and thus make law; and they control and legitimate the authority exercised by others.⁴⁹

The legitimacy of ICs is especially challenged when they – unavoidably - interpret international instruments and in effect make law. They take this task away from "political-legislative bodies – the most important source of democratic legitimation." A first response is to weaken this charge. States have knowingly agreed to treaties that the ICs will interpret according to the Vienna convention on the law of treaties.⁵⁰ Indeed, several of these treaties were intentionally agreed as 'incomplete contracts,' charging the IC with the task of filling in gaps too demanding or cumbersome for states to negotiate.⁵¹ Pauwelyn and Elsig 2012 Still, a legitimation challenge remains. Von Bogdandy and Venzke claim that it is insufficient for ICs to be embedded among other institutions that are legitimate:

Nor can they draw sufficient legitimacy from the fact that they form part of the legitimation of public authority exercised by other institutions, be it states or international bureaucracies.

Their solution is that ICs should be related to a "principle of democracy":

how does the power of international courts relate to the principle of democracy? In other words, how can the rule of international courts be justified *in accordance with basic premises of democratic theory*?⁵²

A multi-dimensional view of international adjudication shows that international courts have overall become institutions that exercise public authority and demand a modus of justification *that lives up to basic premises of democratic legitimacy*.⁵³

What is the 'democratic principle' and 'premises' they insist must be drawn upon to justify ICs?

all aspects of judicial activity need a convincing justification in light of the principle of democracy. Democratic justification is ineluctable for the exercise of any public authority.⁵⁴

⁴⁹ A. von Bogdandy & I. Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' 26 *Leiden Journal of International Law* (2013), 49-72, 50.

⁵⁰ United Nations, Vienna Convention on the Law of Treaties (ed. ^eds.), United Nations Treaty Series, vol. 1155, p. 331 1969).

⁵¹ J. Pauwelyn & M. Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals', in Jeffrey L. Dunoff & Mark A. Pollack (ed.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* 2012) pp. 445-473

⁵² A. v. Bogdandy & I. Venzke, *In Whose Name? On the Functions, Authority, and Legitimacy of International Courts* (Oxford: Oxford University Press, 2014), my emphasis.

⁵³ von Bogdandy & Venzke, 201350, my emphasis.

⁵⁴ A. Von Bogdandy & I. Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking' 12 *German Law Journal* (2011), 1341-1370, 1343

This reference to democracy seems best understood as a normative standard of justification, and not democracy as procedural control over decision making. They seek to explore

how this judicial lawmaking *can be linked* to the values, interests, and opinions of those whom it governs, i.e. its *democratic* credentials.⁵⁵

They assume one particular normative theory, reminiscent of normative cosmopolitanism:

In the Kantian tradition, and this is the best one we have, there is philosophically only one answer to the question: the starting point of *democratic justifications* are the individuals whose freedom shape the judgments, *however indirect and mediated this may be*. In this vein, international adjudication in the postnational constellation should be guided by the idea of world citizenship.⁵⁶

This normative principle of justification should not be labelled 'democratic'. In particular, their specific proposals for institutional reform are not geared toward institutional mechanisms of democratic decision making on the basis of public deliberation:

it is not our intention to bring the noise and heat of quarrelling political parties into the dignified hearing chambers and shielded deliberation rooms of international courts, to transform them somehow into political assemblies.⁵⁷

Instead, they point to ways that ICs may provide and strengthen democracy-promoting institutions, such as arenas that ensure transparency of reason-giving, and inclusion of affected parties. On occasion they do insist on what appears to be democratic decision making:

the democratic politicization of a legal order is of such eminent importance for the concept of a constitution that we reject any conception that wholly dispenses with democratic politicization.⁵⁸

Note that the case these authors make for the value of democratic institutions is incomplete. They claim without much evidence that democratic control is 'ineluctable' or inescapable:

History cautions that not too much confidence should be placed even on the benevolent and enlightened ruler – democracy as a normative foundation is ineluctable.⁵⁹

⁵⁵ A. von Bogdandy & I. Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' 12 *ibid.* (2011), 979-1004, 980, my emphasis.

⁵⁶ von Bogdandy & Venzke, 2012.

⁵⁷ *Ibid.*

⁵⁸ von Bogdandy and Venzke 2012, 23.

⁵⁹ von Bogdandy and Venzke 2012, 26.

The bad track record of the alternatives is not sufficient, their claim notwithstanding. One reason to be wary is that the benefits of the authors' favoured democratic theory, that of Habermas, is difficult to assess. They note that Habermas

underlines that domestic constitutional orders have built democratic processes of forming public opinion and political will that are hard to reproduce (if ever) at the supranational level.⁶⁰

Unfortunately, the quality of deliberative processes required by Habermas' theory is extremely difficult to produce and secure also at the domestic level.

I submit that von Bogdandy and Venzke's case for democratic mechanisms of accountability *as applied to ICs* remain unconvincing. This is not to deny the need for checks against domination by rulers – but democratic accountability mechanisms of this kind are not the obviously best and only solution to enhance the legitimacy of ICs. It is not at all clear how the suggestions of von Bogdandy and Venzke will bring a standard of democratic accountability mechanisms to bear on such ICs. Indeed the authors agree that there are reasons to be wary of such democratic accountability when it comes to certain ICs. I submit that the case for democratic accountability mechanisms may be weak for a wide range of ICs, for instance human rights courts and investment tribunals, which are explicitly set up to tie the hands of politicians – including those that are democratically accountable. Thus many critics of investment tribunals do not complain that they lack democratic control, but that the tribunals tie the hands of democratically accountable politicians in ways that undermine rather than promote the general welfare.⁶¹

Von Bogdandy and Venzke elaborate in helpful ways how ICs are often asked to make, and make, contested decisions including dispute settlement and law development with direct and indirect distributive implications among individuals. Moreover, several ICs have multiple, sometimes competing, objectives, and the objectives of different ICs compete without a common arbiter.⁶²

There are different ways of resolving such fragmentation. In all such cases, decisions could be otherwise, and often with repercussions beyond the immediate parties to the dispute. No doubt such contestable impact is one important reason why some powerful international organizations and their courts – such as the European Union - should be under better democratic control.⁶³ The

⁶⁰ von Bogdandy and Venzke 2012,

⁶¹ S. Hindelang & M. Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford: Oxford University Press, 2016), S. Schill, *The Multilateralization of International Investment Law* (ed. eds.), 2009).

⁶² von Bogdandy & Venzke, 201226.

⁶³ Follesdal & Hix, 2006.

authors are right in expressing concern that such authority is somewhat unchecked and to ask how this can be alleviated. However, I submit that the authors move too quickly from normative standards – their Kantian premises of justification among political equals – to the claim that the institutions that must be established should primarily be those that strengthen transparency, inclusion etc. *because* these serve to enhance institutional democratic decision making over ICs.

Against this argument, I submit that the strengthening of such institutions need not make the overall structure neither more democratic nor more legitimate. Furthermore, it remains an open question whether these changes should be valued because they enable some more democratic control on the basis of public deliberation, or because transparency and other features are necessary for better checks, review and balances. The latter is not justified because they enhance the levers of democratic decision making, but because their overall impact on the GBS within a constitutional perspective best promotes the normative standard of normative cosmopolitanism. Rather than call for more democratization, the latter appears a more fruitful approach: to explore how the multi-level system of institutions can curb, check and guide ICs as part of a legitimate constitutionalization of the GBS.

4 The subject of normative assessment: every institution, or the GBS?

Allan Buchanan and Robert Keohane have elaborated a sophisticated conception of legitimacy for international governance institutions, including ICs.⁶⁴ Three standards should apply to every institution, and guide their reform:

First, global governance institutions should enjoy the ongoing consent of democratic states. That is, the democratic accountability channel must function reasonably well. Second, these institutions should satisfy the substantive criteria of minimal moral acceptability, comparative benefit, and institutional integrity. Third, they should possess the epistemic virtues needed to make credible judgments about whether the three substantive criteria are satisfied and to achieve the ongoing contestation and critical revision of their goals, their terms of accountability, and ultimately their role in a division of labor for the pursuit of global justice, through their interaction with effective external epistemic agents.⁶⁵

The 'minimal moral acceptability' criteria include respect for "the least controversial human rights." These three standards combined are a *global* standard in at least two senses. They should be brought to bear on *every* global governance institution: "it

⁶⁴ Buchanan & Keohane, 2006, 406 and elsewhere.

⁶⁵ Ibid. , 432-33.

might be hard at present to justify a more extensive set of rights that *all* such institutions are bound to respect.”⁶⁶ And the set of standards is crafted so as to reduce contestation based on *disagreements across the globe* on standards of justice and the role of each institution. Thus every institution must respect only “the least controversial human rights.”

This approach draws together several plausible insights. Yet some comments and comparisons with global constitutionalism are appropriate.

Keohane and Buchanan claim that every IC - as every other global governance institution part of the GBS - should be held to the same three standards. However, there is some inconsistency about this even in the quote, which acknowledges the 'division of labour' among the institutions. From a global constitutionalist perspective, we observe that each institution has different legal competences and different impact in a multi-level, complex interdependent web of institutions. It would thus seem plausible that appropriate criteria of legitimacy for international human rights courts may require compliance with more demanding human rights norms, but more independence from democratically elected domestic authorities, than, say, standards for WTO bodies or investment tribunals, given the nature of the different problems they are set up to address. Indeed, human rights ICs may prevent many human rights violations even if they are only partially complied with and thus score low on 'institutional integrity', whilst the WTO regime may fail to resolve the collective action problems it was set up for if it is not generally complied with. Thus the standards need not be the same – not even among ICs.

Moving to the relationship between their theory and democracy, Buchanan and Keohane claim that this is

a middle ground *between* an increasingly discredited conception of legitimacy that conflates legitimacy with international legality understood as state consent, on the one hand, and the unrealistic view that legitimacy for these institutions requires *the same democratic standards* that are now applied to states, on the other.⁶⁷

In what sense is this complex standard such a 'middle ground'? It is no doubt a third way to conceptualize and defend standards. But it is hardly 'in the middle' between the two others: the former appears to regard states as the ultimate units of normative concern whose consent bind; whilst the latter maintains that individuals' interests are better secured through democratic competitive, deliberative decision making procedures than by other means. The authors hold that

⁶⁶ Ibid, 420.

⁶⁷ ibid, 405, my emphasis.

Although the standard should not make authorization by a global democracy a necessary condition of legitimacy, it should nonetheless promote the key *values* that underlie demands for democracy.⁶⁸

What are these *values* of democracy? One interpretation is that they are the normative premises that justify democracy, e.g. those of normative cosmopolitanism. Such normative standards of mutual justifiability supports electoral democracy with majority rule in the domestic setting, - supported and constrained by a web of other institutions regulated by a constitution, as sketched in section 2 above. Yet this is hardly a 'middle ground.' I submit it is rather regarded as a 'common ground', which indicates why we have reason to value state consent – under some conditions – and democratic institutions for decision making – under some conditions. This interpretation fits Buchanan's and Keohane's plausible general strategy for non-ideal circumstances:

Although the standard should not make authorization by a global democracy a necessary condition of legitimacy, it should nonetheless *promote the key values* that underlie demands for democracy.⁶⁹

The upshot is thus that their plausible proposals have little to do with strengthening democratic decision making institutions directly, but are based on normative premises such as those of global constitutionalism which also support democratic rule.

A third point concerns a problematic assumption of incrementalism: they hold that

Our three substantive conditions are best thought of as what Rawls calls “counting principles”: the more of them an institution satisfies, and the higher the degree to which it satisfies them, the stronger its claim to legitimacy.⁷⁰

This particular claim suffers from two weaknesses. Firstly, it commits the *fallacy of accumulation*. More opportunities for some parties to contest and critically revise the treaties or the procedures of an IC need not improve their normative quality – rather, this may skew the decisions unfairly. Secondly, not all increases in "institutional integrity" will assure an increase in the legitimacy of the institution, not to mention the set of institutions of the GBS as a whole. That depends crucially on the normative justifiability of the objectives of the treaty. If the objectives of the IC are normatively unsound, an increase in its 'effectiveness' does not ensure increased legitimacy. Consider controversies concerning the patent directive for important medicines. Unless those patent rights allow the poor access to medicines, an IC that ensures secures stricter compliance and hence 'institutional integrity' may well render the

⁶⁸ *ibid*, 417, my emphasis.

⁶⁹ *ibid*, 417.

⁷⁰ Buchanan & Keohane, 2006, 424.

regime less legitimate.⁷¹ From a global constitutionalist perspective the complex interdependence of ICs and other international organizations thus merit caution, as does the normative assessment of the system.

5 Democratic institutions of decision making - or features and building blocks thereof.

Gráinne De Búrca and Nienke Grossman share a presumption for democratic legitimacy as an important condition for legitimate modes of governance and government. De Búrca labels non-democratic institutional arrangements for global governance as 'compensatory'.⁷² A better strategy, she argues, is to extend democracy, to

try to identify its conceptual 'building blocks' with a view to thinking about the possible design of legitimate democracy-oriented governance processes beyond and between states.⁷³

She recommends a 'democracy-striving' approach:

This approach is built on one particular building-block of democracy, which is the fullest possible participation and representation of those affected, with a view to ensuring the public-oriented nature of the norms and policies made.⁷⁴

Nienke Grossman argues for a similar strategy to increase participation. Under conditions where individuals are subject to ICs engaged in law making, these bodies should satisfy what she regards as a requirement of democracy:

... one of the most fundamental "building block[s] of democracy" — participation by those affected. Participation in the conduct of public affairs is an integral part of democracy.⁷⁵

Note that this interpretation of democracy is difficult to categorize as requiring *majoritarian procedural control* on the basis of public deliberation. It rather seems to focus on one feature of such democratic rule, namely participation or influence. Grossman's interpretation of participation includes some forms of consultation by the IC, but not an institutional lever which subjects may use to force a change in policies e.g. by replacing office holders.

Under conditions where domestic democratic decision making is impossible, Grossman argues that several 'building blocks' of democracy should

⁷¹ Médecins Sans Frontières, 'Will the Lifeline of Affordable Medicines for Poor Countries Be Cut? Consequences of Medicine Patenting in India' (2005), 2005.

⁷² G. De Búrca, 'Developing Democracy Beyond the State' 46 *Columbia Journal of Transnational Law* (2008), 221-, 121 pp.

⁷³ *ibid*, 222.

⁷⁴ *Ibid* 221.

⁷⁵ Grossman, 2013, 87.

nevertheless be implemented. She agrees with de Burca that among these building blocks is participation – which includes some form of procedural control:

Participation not only allows those affected to influence judicial processes, but it also provides opportunities to monitor what is taking place and to utilize mechanisms of control and accountability outside the courthouse. But how does one justify the application of this democratic principle to international institutions and to international courts in particular?⁷⁶

A standard objection to participation as an incremental ideal is the fallacy of accumulation: more participation may make the set of institutions normatively worse. Recall the risks of corporatist arrangements that include some powerful organizations in the decision procedures, which leave other affected parties even more disenfranchised and arguably worse off due to their exclusion. Grossman rebuts this concern concerning partial and skewed participation:

International courts can institutionalize safeguards to address these concerns. They can adopt approaches to limit the type of stakeholder who gets to participate. For example, courts could mandate that nonlitigants apply for some kind of consultative status or preauthorization before a particular dispute resolution system.⁷⁷

Two points of concern merit mention. Firstly, if the point is to ensure that the IC is more impartial or inclusive to reduce biases, it may well be counterproductive to let the IC itself be the gatekeeper. The risk remains that the IC will dismiss arguments that challenge its rulings.

Secondly, whilst broad participation may have many arguments in its favour, it is misleading to regard its role here as a building block of *democracy*. General if not universal formal opportunities for participation in the decision making process is clearly important for democratic decision making institutions. But the focus of de Burca and Grossman is not democratic decision making institutions. Rather, they – plausibly – argue that more participation may render certain non-democratic institutions such as ICs more legitimate. But that does not make the ICs' more democratic in the sense of majoritarian decision-making; nor is the only value of such increased participation due to its benefits for other democratic processes down the line.

The metaphor of building blocks is apt: there are many other reasons to urge participation that have little to do with democratic decision making. For instance, several constitutional mechanisms such as judicial review of the exercise of democratically accountable power only function insofar as those who may have suffered abuse can lodge complaints. Yet to label these features 'democratic' conveys

⁷⁶ Grossman 2013, 87.

⁷⁷ Grossman 2013, 93.

a view that the contribution of participation in democratic decision making is the general normative standard of justification. The global constitutionalist perspective begs to differ from de Burca's description of non-democratic institutional arrangements as 'compensatory.' A constitutionalist approach rejects this: institutions for democratic decision making are but one component of a complex set of institutions that must be assessed in combination.

6. Conclusion: Three Concepts of Democracy

In conclusion, recall the three different uses of 'democracy' by various authors who all urge 'democratic' reforms of ICs. None of the contributions have argued for democratization in the standard sense of institutions for majoritarian decision making on the basis of public deliberation. Their many reforms largely appear plausible, but it is misleading to label them 'democratization.' The central use of 'democracy' is as a description of an institutionalized decision process whereby the preference of the majority of the electorate determines the result, on the bases of deliberation, and competition among candidates. Many laments about 'the democratic deficit' of the EU concern precisely this: the lack of institutionalized direct and indirect controls by Union citizens over the regulations and policies of the EU. None of the authors canvassed above defend or elaborate on such decision making institutions that would somehow influence ICs.

A second use of 'democratic premises' is to label certain *institutional features* such as transparency, inclusive deliberative arenas, and accountability mechanisms. These are familiar *components* of well-functioning democratic governance structures. Separately, these components are insufficient for democracy as majoritarian control: For instance, transparency is not sufficient without ability to replace legislators or executives by voting. Rather, these components must fit together in intricate ways if they are to contribute to the sort of democratic decision making we have reason to value. Secondly, enhancement of any such component does not reliably enhance the democratic quality or the legitimacy of the global basic structure. Again, this is a matter of how the various institutions with their legal powers and real opportunity spaces interact. Thus, a global constitutionalist perspective or something equivalent is needed, to consider and assess precisely these issues of complex interdependence among several institutions.

Several of these components or building blocks are of value also for quite other reasons than their contribution to democratic majoritarian control. For instance, transparency is important for valuable - albeit non-democratic - checks and review mechanisms, and to provide public assurance about the authorities' good will. Thus there are several reasons to value participation by the broader public, dialogue among courts, and justification according to the standards of the profession

including the VCLT rules of interpretation.⁷⁸ The recommendations for participation, transparency and so forth are plausible, and suggest intriguing forms of checks, and arenas for participation and contestation. But these components are not first and foremost 'democratic,' even though they are used inter alia for democratic rule.

The third sense in which 'democracy' is used in some of these discussions is about the normative standard of *justifiability to all subjects*. This seems inter alia to be the concern when referring to 'democratic premises'⁷⁹ and 'the key values that underlie demands for democracy'.⁸⁰ On the global constitutionalist account the institutions of the global basic structure as a whole must be justifiable in this way: they must respect, protect and otherwise be *responsive to certain interests of all individuals* - at least as well as any institutional alternative. In this way individuals enjoy *effective power* in the sense defined by Sen: An institution may in principle be *justifiable* to a large extent to its subjects even if they exercise few and only indirect formal levers of influence – institutions need not be of democratic decision making in the *first* of these three senses. However, individuals' interest in affecting the institutions they are subject to seems to require some democratic institutions that exercise sufficient control over the complex, multi-level legal and political order.

Note that in the normative tradition developed by Kant and others, *justify-ability* is not enough: such a justification must at least also be publicly available. This requires some public account and justification of principles of legitimacy for the various institutions, and sufficient transparency about how these institutions work and their effects. Only then can the public determine whether the institutions are indeed *justify-able*. Whether all individuals as a matter accept such a justification is a separate matter. For this and other reasons increased transparency is of value *independently of whether there is effective democratic control*: transparency and public reason giving by authorities is necessary for a wide variety of checks and reviews.⁸¹

Global Constitutionalism of the kind sketched here agrees with the empirical claims that under certain conditions, mechanisms of deliberation combined with competitive elections may be more responsive to the interests of individuals than alternative decision procedures. But individuals may enjoy much effective power also without institutionalized procedural control in the form of democratic procedures. International human rights courts are examples: they are partly designed by contracting authoritarian states, staffed by judges some of whom are nominated by autocratic rulers. The norms are reformed by law-making judges – and still they may be justifiable in this sense: such court may help secure some such best interests

⁷⁸ von Bogdandy & Venzke, 2012, 14.

⁷⁹ *ibid.*

⁸⁰ Buchanan & Keohane, 2006, 417.

⁸¹ von Bogdandy and Venzke 2012, 27.

of individuals e.g. by limiting the scope for majoritarian legislation and executive rule.

The upshot of these considerations is that the authors considered do not call for *democratic* legitimation of ICs according to the first sense of democracy - increasing direct or indirect electoral majoritarian control. Their recommendations are rather about multipurpose 'building blocks' that are of great value but for several reasons that have little to do with democratic electoral accountability.

The authors surveyed appear to defend their recommendations by appeal to 'democratic values', namely by appeal to normative principles which give us reason to value democracy in domestic settings. I conclude that is not at all obvious that mechanisms of democratic accountability need to play stronger or more direct roles for ICs. Yet there appear to be good reasons to include such multipurpose 'building blocks' or features such as transparency, inclusion, public debate etc. However, neither the 'building blocks' nor the normative premises that support democracy should be labelled 'democratic'. Such conflation of important distinctions hinder well-reasoned extrapolation of normative standards from the domestic setting to the global basic structure.

Rather than justify these many sound contributions for institutional reform from a normative principle of democracy, we should base the arguments on the alternative approach laid out above. A global constitutionalist perspective helps address several of the contested issues concerning the four functions typically served by constitutions: to create and curb institutions, channel their use by laying out their objectives, and specify rules for changing the de facto constitution. These discussions should not be guided by appeals to democracy, but rather be based on the normative justification that also gives us reason to value democracy: the institutions we must defer to, must treat us all with the respect owed political equals.

A. Buchanan & R. O. Keohane, 'The Legitimacy of Global Governance Institutions' 20 *Ethics and International Affairs* (2006), 405-437

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