



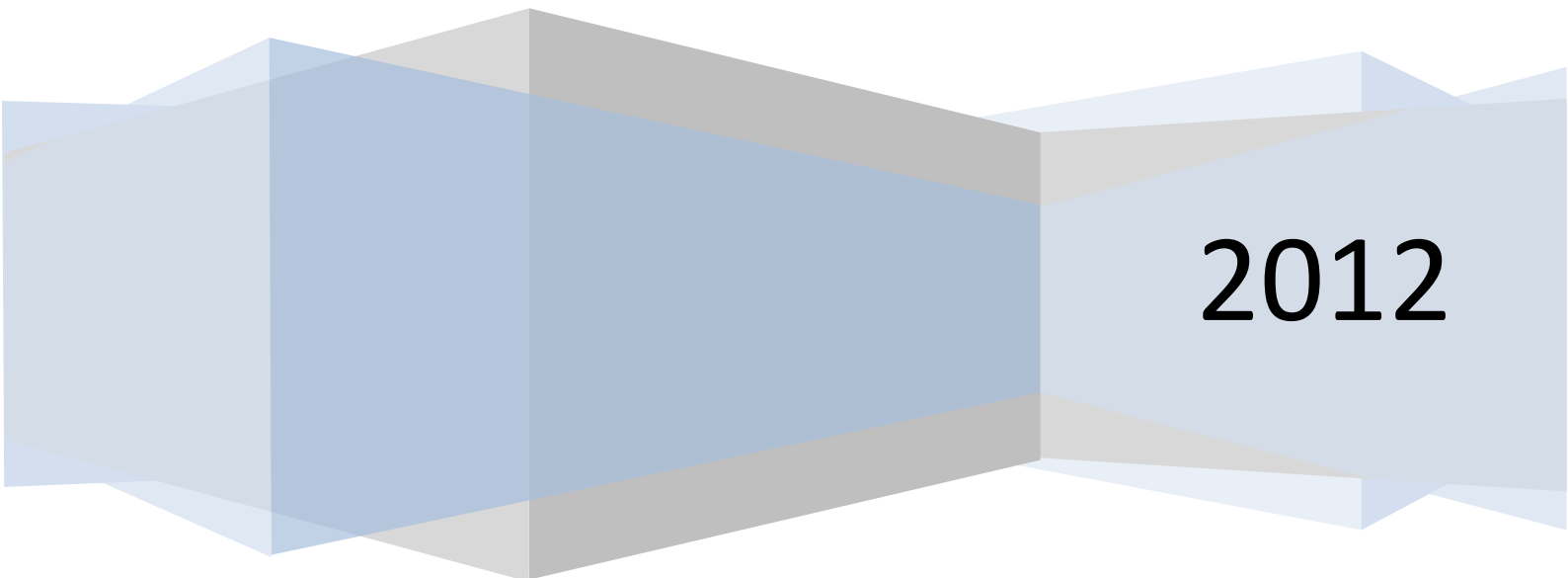
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COSMOPOLITAN DEMOCRACY: NEITHER A CATEGORY MISTAKE NOR A CATEGORICAL IMPERATIVE

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Cosmopolitan Democracy: neither a Category Mistake nor a Categorical Imperative

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Introduction

Under globalization, individuals' opportunities, life plans and choices are influenced not only by the political decisions of their own national governments, but also by various non-state actors.ⁱ Regional and international organisations set up by states themselves, and powerful private actors such as transnational corporations affect the opportunity space and choices of individuals directly. Other such actors have great indirect effects, by influencing the scope of decisions available to national governments, the expected results, and thus the strategies that states pursue – with large consequences for citizens.

Such globalization affect the value of even well functioning democracies who can no longer buffer their own citizens from the effects of actors outside their territorial borders – if they ever could (Ruggie 1982). Thus many are concerned about the global structures that frame the opportunities and choices of individuals: The rules and practices that specify the actors, the scope of decision they may take, and that influence their choices. Some actors such as states and interstate organizations are legally authorized to make binding decisions, at various territorial levels that often overlap such as the European Union, and UN bodies. Other actors such as transnational organisations, or regulatory networks are evidence of more diffuse forms of 'governance': they have *de facto* power to get things done, sometimes without legal competence to command compliance (Czempiel 1992; Rosenau 1992). 'Multilevel governance' (MLG) is sometimes used to refer to this complex of private and public actors at several territorial levels, who create, implement and change systems of rules that facilitate or hinder coordination and cooperation. MLG thus affect the resultant distribution of costs and benefits of interaction among themselves – including political actors such as states and their organisations, private corporations, and civil society organizations (Koenig-Archibugi and Zurn 2006).

Many authors hold that since MLG wields such great influence, this complex of actors and the perplexing network of multilevel rules above the state must be assessed by standards of normative legitimacy. In particular, several authors - including many in this volume – argue for more specific requirements of democratic control. They hold that central decisions either about how to set up and change such

global structures of authority, and/or decisions by several major actors within them, should be under more *democratic control*. In particular, some non-state actors with de facto decision making authority should be subject to mechanisms of democratic accountability, either directly toward citizens, or mediated via their national representatives. And at least some of these decisions may be made by (qualified) majority vote, rather than by unanimity. Call such claims “More Democratic Multi-Level Governance” (MDMLG). For instance, defenders of ‘Cosmopolitan Democracy’ argue for more democratic relations among and beyond states (Archibugi and Held 1995. MDMLG may include one or more of the following:

- 1) Calls to create an assembly of democratic states (Held 1993, 41) with a fair representative system of decision making, whose voting rights are limited to highly representative states (Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti this volume, p. xxx). This institutional arrangement is inter-governmental, and is a ‘confederal’ element or feature of MLG, Christiano 2010 this volume xxx Follesdal 2010;)
- 2) A global parliament, directly elected by individuals globally. It might possibly have quite limited competences , with other responsibilities placed with regional and state level organizations. (Held 1993, 40, Marchetti 2008).
- 3) Empowerment of regional parliaments "as legitimate independent sources of regional and international law;" (Held 1993, 40). One example are the calls to strengthen the European Parliament to combat the ‘democratic deficit’ of the EU (Follesdal and Hix 2006; and Gould 2011, this volume xxx).
- 4) Democratic supervision, and/or accountability mechanisms over international bodies such as the EU, the UN, WHO etc, as well as various other non-state actors (Held 1993, 40; Macdonald 2008)

For the sake of the present discussions, I do not include some other proposals that may arguably also increase the legitimacy of MLG by means that are less clearly democratic in a fairly straightforward sense. For instance, some plausibly defend non-electoral accountability mechanisms, such as various consultation mechanism (Macdonald and Macdonald 2006; O'Brien, et al. 2000. Others defend the ‘judicialisation’ of world affairs through more effective legal and (quasi)judicial constraints on governments and international organizations (Introduction p xxx). Some such courts may in principle be legitimate, and possibly defended as part of

justifiable democratic governance (Follesdal 2009; pace Waldron Waldron 2006). Yet for purposes of the arguments pursued in this chapter, such consultation arrangements and checks by ‘non-accountable’ judges over democratically accountable legislators and executives are not included as part of MDMLG.

Combinations of these are of course possible, thus a ‘world federation’ as discussed in this volume (Introduction p xxx, Marchetti 2008) would consist of a multi-layered political legal order where citizens elected representatives directly to several bodies at national, regional and possibly global levels. There might also be benefits to have democratically accountable governments or parliaments participate not only at a global assembly of democratic states, but also at regional levels, such as the Council of the European Union. In contrast, ‘world government’ might describe a political order where most political authority is centralized, under democratic control, but without significant national and regional democratic bodies.

This chapter mainly considers and rebuts some of the objections raised against MDMLG, namely those that regard MDMLG as a fundamentally mistaken requirement – close to a category mistake. Thus Robert Dahl famously doubted the possibility of democracy beyond state borders, for instance of international organizations, due to concerns about the size of the electorate and resultant weak chains of accountability (Dahl 1999).

Section 1 lays out a brief defense of the legitimacy of democratic, majoritarian rule. Some of those who might favour MDMLG might find such defenses objectionable or at best unnecessary: Majoritarian democratic decision making might by some be regarded as close to a categorical imperative, a necessary, perhaps analytically true requirement independent of empirical considerations about its instrumental value to secure basic needs and otherwise achieve social justice. Thus some hold that legitimate modes of governance *must* be democratically decided. Symptomatically:

In our Western view, only democratic systems, advocating the values of liberty, equality and community, deserve the loyalty of the citizens. Hence, the notions legitimacy and democratic legitimacy must be considered as interchangeable ... (Lenaerts and Desomer 2002)

Waldron holds what might be regarded as a weaker version of this view, that majority rule among democratically elected representatives is one of the few principles for decision making processes that is practically consistent with fairness and equal respect for all (Waldron 2000, 114; and Dahl 1989, cf Held 1993, 26).

The central normative question of legitimacy of concern here is with what right the multifarious private and public authorities can expect subjects – states and individuals - to comply, even with decisions they have voted against as a minority against a majority. Answers rely on reflections about whether and under what conditions MLG can be justified to all subjects regarded as equal members of that complex legal, political and economic order they find themselves part of. The issue is thus whether such system of MLG must include substantial democratic controls in order to be defensible to all, and if so why. I explain why such arguments within institutional political theory are essentially comparative: we must consider the likely effects of alternative institutional schemes, eg with and without democratic accountability mechanisms.

Section 2 then presents and challenges some claims that deny that the present global MLG structure can be judged by standards of justice at all. Section 3 responds to challenges that MDMLG is not necessary – that democratic accountability is not needed, since alternative, non-democratic modes suffice. This section illustrates the kinds of empirical comparative claims that are required. The discussions draw in part on relevant discussions about the alleged need for a more democratic European Union regarded as an exemplar of an international organization or (quasi-federal) political order, voiced by Moravcsik and Majone. I also consider some of the weaknesses of alternatives to majoritarian electoral democracy, namely ‘networks’ and ‘participatory’ democratic arrangements. I again draw on literature concerning experiences within the EU, since several of these general arguments have been brought to bear and discussed in detail based on the experiences and experiments of European integration.

1: Democracy

Section 1 presents some key features and benefits of ‘majoritarian democracy’ as this term will be used here. This incomplete sketch only seeks to lay out some of the most salient features of relevance to the discussion at hand (Cf Follesdal and Hix 2006, Follesdal 2010?) . In particular, it is apparent in what sense this is an *institutional* normative theory which has institutions as its prime subject matter, and that seeks to assess alternative institutional arrangements against various defended normative standards. I also explore some implications for how to assess proposals for more democratic MLG. In particular, I am wary of committing the ‘Monotonicity Mistake.’ It is not true that every increase in one component of democratic rule - transparency, deliberation or representation - also renders a decision making system more *democratic*. The latter is a matter of how the institutions fit together, and how transparency, deliberation, representation and so forth must all be present, in certain

ways. We return below to consider how this approach challenges some claims that more inclusive networks etc enhance democratic values *simpliciter*.

The literature on how to define democracy shows great variance. The editors identify certain common features that fit well with the concerns addressed in this chapter: a system of governance that is responsive and accountable to the preferences of citizens; majority rule, and the direct participation of citizens in appointing the rulers. (Introduction, p xxx and xxx).

For the purposes of assessing some criticisms against MDMLG, we must specify the term ‘democracy’ slightly more, to refer to a set of institutionally established procedures that regulate competition for control over political authority. Democratic arrangements permit all or most adult citizens who live their lives within certain social institutions participate in an electoral mechanism whereby their expressed preferences over alternative candidates, established on the basis of public deliberation, determine the contents of these institutions. The mechanisms are such that the government is accountable to, and thereby responsive to, all those subject to it. Several contested issues in this brief description merit more attention, and receive so in other contributions of this volume. In particular, *who* are to be included: all those ‘with a stake in them’ – i.e. causally affected by the institutions, or only those who in some sense shares in upholding these institutions, and are cognizant of this shared political identity? And must these decisions about the boundaries of the demos themselves be made democratically? (Marchetti, this volume).ⁱⁱ For our limited purposes, central features of democratic rule are

- *Control by elected, party based, democratically accountable representatives* over governing functions; and

- *Public debates in the public sphere*, involving civil society, that require policy makers to account for their decisions and the outcomes (Follesdal and Hix 2006).

I submit that a satisfactory argument for such democratic decision making is that – *under certain conditions* - democratic rule is over time more reliably responsive to the best interests of the members of the political order than any alternative institutional arrangements and more trustworthy in this regard.ⁱⁱⁱ Currently, these conditions are not sufficiently secured at levels above the state, and arguably not very well in all states.

All those who are subject to the use of public power should partake in its control, for at least two reasons: Individuals have an interest in a share in such control to reduce the risk of domination; and dispersed control of this kind is instrumentally valuable to ensure informed policy choices that best secure the interests of all in a justifiably

balanced way.^{iv} To ensure these objectives, and to assure citizens of this, several conditions must be in place – which is not yet the case for MLG.

Representation of those who are affected is a fundamental premise for why democratic rule is more legitimate than other arrangements: in the absence of voice and voting power, the interests of some affected subjects might well go unnoticed.

The decision structures must be sufficiently *transparent*, and it must be possible to place responsibility with sufficient clarity. In the European Union, - not to mention the multilevel global political, legal and economic structures – the governance arrangements are far too opaque.

Furthermore, *party contestation* is important for democratic processes to foster *deliberation* that is central to voters' opinion formation, and to ensure informed, efficacious and cost effective policy choices. Contestation can provide credible monitoring, and helps voters determine the effectiveness of chosen policies compared to the alternatives. This is important to assure voters that the authorities reliably govern fairly and effectively. Such awareness in turn gives incentives to politicians, that they are responsive to voters over time, and to ensure that political parties search for topics that they may make salient for media and voters. Thus competition is crucial to maintain elected officials' responsiveness to voters' preferences. At present, conditions for such valuable democratic contestation are not acceptable, in the EU or at the global level. There are few opposition parties, and little in the way of civil society or media scrutiny to judge the authorities' agenda and performance, offering plausible alternatives and the like.

Responsiveness to the best interests of citizens is ensured by democratic accountability only if the information flow is not controlled by the present power holders. Critical media and independent research can alleviate the information asymmetry between the power holders and voters (cf Macdonald p xxx [Transparency in the exercise of public power..]). Without electoral competition and with little media scrutiny these mechanisms are unlikely to be fully effective at the European and global levels. The relative dearth of public arenas for political discussion makes it difficult to mobilize political opposition.

The upshot of these arguments is modest: I have only sketched argument strategies for a comparative claim to prefer democratic arrangements over alternatives, under certain circumstances. While we have good reason to value mechanisms of democratic accountability in general, the case seems weaker in the EU at present, and certainly even worse for other parts of MLG.

To summarize: we have good reasons to value transparency, accountability, representation, deliberation, and good outcomes as features of democratic rule.

Transparency is *inter alia* necessary to enable subjects and opposition parties to determine whether public authorities actually act as promised, or that any deviations are appropriate.

Accountability is valuable both in the sense of subjects being able to receive an account from the authorities about their decisions, and the ability of subjects to replace those who hold office if alternative candidates appear better. These features help align the incentives of the rulers with the considered preferences of citizens.

Representation in the decision making bodies is important to ensure that decisions is as informed as possible, and takes fairly into account the impact on as many affected parties as possible.

Deliberation is important both for subjects' preference formation – about what they have reason to believe should be the objectives of the political order - and to discern what are the most plausible ways and means to achieve them with acceptable tradeoffs.

Good outcomes are somewhat more likely from democratic institutions than from alternative institutional arrangements insofar as deliberation and the socialising functions of political parties affects the preferences of citizens, both toward a better understanding of their own best interests, and toward a more other-regarding and fair ranking of alternative policy options.

Two reminders are appropriate. It should be clear that increased 'transparency', 'deliberation', or 'participation' is not always conducive to reduce domination or increase responsiveness to individuals' best interests, and trust that this is the case – the main arguments in favor of democracy. Such assumptions are understandable, but I submit that this would be based on a 'Monotonicity Mistake.' To illustrate: to include some more groups into the decision making processes and proceed on the basis of mutual consent among them, may certainly yield benefits, more responsiveness to their interests, and enhance their trust. Yet such partial inclusion may also cause damages familiar from cartels and corporatist arrangements. Goods may well be created and shared among those around the table, while any negative 'externalities' may be ignored or willfully imposed on those not invited in. Thus any beneficial effects from increased participation, or democratic responsiveness to the best interests of subjects, depends crucially on how the mechanisms of democratic

politics works in practice.

Secondly, the hesitation expressed on behalf of democratic rule under present sub-optimal circumstances does not entail that non-democratic modes of governance fare any better, under these or other conditions. Note that this comparative perspective is central to the normative arguments I entertain: The case in favour of democratic rule is only that it better secures these objectives, under certain circumstances, than *alternative* modes of decision making.

2: “More Democratic Multilevel Governance is not Possible”

We now turn to consider whether about specifically democratic decision making institutions *can* be included at levels above the state. Democratic rule of the kind worth promoting and obeying are sometimes said to not be possible. The conditions for securing transparency, accountability, representation, deliberation, and good outcomes cannot be brought in place. Consider two separate kinds of arguments.

Some have ruled out the possibility of a sufficiently well functioning European or global level democracy because there is insufficient in the way of a common identity for substantial solidarity, and bleak prospects for public forums for the requisite transparency and deliberation to secure good outcomes. Thus some lament the alleged present lack of a European or global ‘demos’ in the sense of no shared political identity, nor opportunities for it to develop (Grimm 1995). I submit that many authors have pointed out that such pessimism is unfounded, at least in the long run. Firstly, there are already pockets of public debate about matters of global distributive justice (cf. Marchetti p xxx; Macdonald p xxx [Transparency in the exercise of public power]). Secondly, the requisite public debates and forums need not occur *prior to* political contestation, but may develop, for instance when media and then the greater public respond to increased competition among parties. Thus central conditions for well-functioning democratic arrangements may well develop as a result of the workings of such – democratic - institutions of governance. Consider the prospects of European level democracy: there are signs of increased party organization and competition in European Parliament, and some scholars observe policy contestation within the Council of Ministers (Hix 2008). Thirdly, insofar as regional and global democratic decisions are limited to certain issues, the need for deliberation and arenas therefore may be similarly limited. The more all-encompassing agenda of national parliaments of yore, and the wide ranging public debates surrounding them – at least in more nostalgic descriptions – is thus not even required as an ideal.

The second objection against the possibility of effective MDMLG may seem to follow from the arguments of several authors addressing MLG. Not only does the low impact of MLG institutions mitigate against any worry about them, but their low impact would also seem to imply that democratic decision making at levels above the state would have little if any effects. There are at least two versions of such arguments.

Samuel Freeman claims that a global basic structure, insofar as it exists, is secondary and supervenient upon sovereign states. The role of commercial treaties is mainly to determine which nation's laws apply. Trade agreements also largely take as given people's existing domestic 'property, economic, and political system' (18). Any global regulators and courts enjoy whatever power they have only as grants by the political acts of different peoples.^v A global basic structure is thus "nothing more than 'the basic structure of the Society of Peoples'" (2006, 17):

For example, the so-called "international property law" that exists is trivial in its extent, and it is simply the result of treaties, and is attuned to and builds on domestic property laws. It is not the product of an international legal body recognized as having original legislative powers and legal jurisdiction independent of treaties among peoples. (footnote 14)

On this view, it is only states, rather than international regulations, that warrant normative assessment – not only for their domestic decisions, but also for the decisions they make about the rules of MLG. Against this view, I submit that Freeman's sense of 'supervenience' seems irrelevant for whether MLG should be the subject of normative standards. The fact that states are the main authors of international rules does not seem to affect the central concern, namely that insofar as the global basic structure *does* affect peoples' lives profoundly, these choices by domestic governments do structure and regulate the everyday lives of foreigners. Large components of these structures are created and maintained largely by domestic authorities, but this does not reduce their impact on foreigners, nor does their origin in treaties exempt them from normative assessment. An implication should thus rather be that the present MLG structures should be changed so as to ensure foreigners voice, and possibly a vote, in the domestic democratic decision making structures. This might be secured by letting some legislators in each jurisdiction be elected by affected persons outside the jurisdiction itself Koenig-

Archibugi 2010).

Moreover, the actual design - both the procedures and the results - of international institutions is to a large extent *not* controlled by state governments. Many crucial details are instead the result of private parties engaged in 'private governance' that leave governments with neither choice, exit nor voice (e.g. Hall and Biersteker 2002; Ruggie 2004; Follesdal, et al. 2008). Thus, the democratic control that there may be over (some) governments is insufficient to alleviate the normative concerns.

A second version of the claim that democratic institutions should not be expected to have any significant impact on the output of MLG, because international regulations have very small impact, might draw on arguments such as those of Christiano in this volume [xxx]. Christiano compares international legal regulations to those of a state. About the former, he holds that "They play a fairly small role in the lives of people throughout the world. ... They do not enter into the systems of property and exchange in domestic societies except in very abstract ways." [page xxx] Indeed,

"the system of international trade does not reach nearly as deeply into people's lives as most domestic systems of trade and exchange. Furthermore, the capacity of international institutions to regulate the flow of trade is still quite small. " [xxx, check final version and page!]

Christiano concludes that this differential impact of international and domestic institutions *weaken* normative claims to have the basic structure under democratic control. Other authors draw more extensive conclusions, partly because it is only states that can provide assurance of general compliance with institutions. Thus Thomas Nagel holds that "The kind of all-encompassing collective practice or institution that is capable of being just in the primary sense can exist only under sovereign government." (Nagel 2005, 116) So, while there are global humanitarian duties to alleviate global poverty, this is not a matter of justice.

Against these claims, I submit several objections. a) Many will agree with Amartya Sen and others (Sen 2001), that in our interconnected world, it is nearly impossible to disentangle the impact of domestic and that of international or global institutions, e.g. concerning the economy. Witness, for instance, the current financial crisis that has hit almost all states – but with different impact in Canada, Iceland and even among the different states of the European Union, partly due to domestic decisions

(ref). b) We should challenge the empirical assumption: the impact of the *existing* combination of domestic and international institutions is immense for some individuals, though not so for others – though this impact is certainly less *visible* for some than for others (Buchanan 2000; Pevnick 2008). The fact that even morally concerned citizens in many states do not *observe* the impact of the rules of MLG on ‘distant’ people, and especially that citizens in countries who benefit disproportionately from such rules do not see this, certainly does not settle the issue. To the contrary, the opacity of this impact should counsel further transparency, wrought by monitoring, for instance stimulated by democratic contestation. In domestic settings these functions are typically provided by media and opposition parties, - which form yet another reason for democracy or some functional equivalent trust-building measures, also at the global level.

Finally, d) The fact that governance mechanisms currently cannot do much to regulate and sanction the multilevel regulatory order does not yield the conclusion that institutions *cannot* be changed purposively, and hence cannot be assessed by normative standards (cf Abizadeh 2007). Arguably, this ‘governance gap’ Ruggie 2003 should instead urge us to call for improvements to the decision making structures for MLG.

3 “More Democratic Multilevel Governance is not Necessary”

This section considers three arguments to the effect that while it might be possible to establish and maintain more democratic forms of MLG, this is not normatively required. The discussions generalize somewhat from the alleged need for a more democratic European Union regarded as an exemplar of an international organization or (quasi-federal) political order.

Unnecessary due to Little Impact

One extension of some of the arguments considered above is that while MDMLG might be possible, MLG has so little impact on individuals that democratic control is unnecessary. Some such arguments with regard to the European Union illustrate the point and weaknesses of such claims.

Andrew Moravcsik has argued on several occasions why the EU does not need to be democratic (Moravcsik 2002). The formal competences of the EU are limited in scope, and they are neither important enough for Europeans nor sufficiently salient for them to warrant democratic scrutiny.

In response, we should note that what matters is not only the limited legal authority

of the EU – or by extension, the limited authority of international organizations and the system of MLG in general. Instead, we must consider the impact of this allocation of decision making authority on individuals, especially in light of the effects of possible alternatives (cf. Follesdal and Hix 2006).

Moravcsik and others are surely right that the impact of domestic, regional and international rules is *partly* an effect of the rules of international law. Important factors that affect the content of such rules are, of course, state consent, states' interests, and the relative bargaining power of states. While some states can shape trade, patent and financial regimes to favour their interests somehow defined, many other states are often merely regime takers. And lax regimes – for international human rights protection, labour standards etc., - are as much a result of states' decisions as the quite strict regimes concerning patents and trade (Ruggie 2003). Thus the claim that international institutions only affect a 'thin' set of issues does not seem plausible: we must also consider their indirect impact and the impact of the intended absence of demanding rules.

With regard to claims that such concerns are not salient among citizens, recall the role of democratic political contestation for bringing important issues to public attention. It thus seems ill founded to dismiss calls for democracy at the European level on the basis that the EU only deals with issues that are not salient to the citizenry (Moravcsik 2002, 615). Salience of a policy issue is partly a result of democratic contestation. Without political parties seeking votes, there will be less incentives to articulate alternative policy choices, and therefore less public attention by the media. Thus the implication of a lack of salience is not that democratic governance mechanisms are unnecessary. To the contrary, the present lack of salience concerning important policy choices within the structures of MLG is a further reason for democratic control thereof.

“Unnecessary because States Consent”

A second line of argument why democratic arrangements for MLG may be thought unnecessary draws on the perceived strong role of states. Since sovereign states voluntarily agree to the various international regulations that constitute NMG, these regulations leave all signatories at least as well off as they were before. The treaties are thus 'Pareto improvements,' and it is argued that these do not raise concerns about distributive justice and democratic rule. This is because contestation and decision making with majority rule largely concern how to distribute benefits and burdens among winners -- and losers, of which there are none for the case of MLG,

or so this argument goes.

Giandomenico Majone has made such claims in favour of allowing the 'democratic deficit' of the EU to continue (Majone 1998, 122-23). This case is especially relevant since it brings out some of the complexities of the creation and effects of MLG, and the role of comparative assessments of institutions.

Majone holds that an EU dominated by elected representatives would hinder the objectives of the EU, which he holds is precisely to secure such Pareto improvements. Democratic decision making threatens this objective, since the politicization and conflicts concerning regulatory policy-making will turn the regulatory task into one of redistribution *rather than* stay with securing Pareto improvements. (Majone 1998, Majone 2001). Against Majone's argument, and by extension, similar objections concerning MDMLG, I submit that such arguments fail to address the kinds of regulations that the EU and MLG provide.

The issues facing the EU – and MLG – are hardly ever how to identify and reach the one unique Pareto improving bargaining solution among the parties (Follesdal and Hix 2006). To the contrary, a) global regimes – as well as individual EU policies – very often cause benefits to some and burdens to others; compared to alternative regimes. After all, many of the signatory states are not democratic, and even in democratic states, the majority may overrule individuals who may suffer from the interstate agreements. b) Very often, Pareto improvements also have distributive effects both within and between states, as to *who receives which benefits*. Finally, c) very often rule makers face a choice among several rules, all of which are Pareto improvements. When this is the case, their choice has distributive effects.

The upshot is that even in the cases where rules of MLG are Pareto improvements, there are a host of distributive issues that must be decided, will be decided – but which often go unnoticed. Indeed, this concern seems central to the agenda of 'anti-globalist' movement: the aim is not to end globalisation, but to ensure that the benefits and burdens of globalisation are less unfairly distributed (Sen 2001, Ruggie 2003). An important issue is therefore to identify and implement decision making procedures that can assess and decide the rules of MLG as to how to benefit the best interests of all to a defensible extent, and to secure rules that engender a fair division of benefits of cooperation. Domestically, democratic rule has better success rate on this count than other decision making procedures that have been tried.

“Unnecessary because ‘Participatory Bodies’ and ‘Networks’ Suffice”

One argument against MDMLG holds that networks and other forms of participatory

decision making arenas suffice; indeed some hold that these are exemplars of MDMLG, because they exemplify some sort of deliberation among some parties 'represented' around the table - claims that I am inclined to deny. The experiences and discussions concerning such arrangements in the EU may again be helpful.

The European Union has had extensive experience with what is called 'New Modes of Governance,' including regulatory networks. These networks recommend the substantive contents of regulations, even though they are outside the ordinary legislative arenas. They typically involve both private and public actors for specific sectors, and are not directly accountable, since the participants cannot be voted out of office. The literature offers several arguments why we might sometimes favor them over democratic arrangements (Majone 1996). Such networks are sometimes said to be legitimate since they secure 'output' effectively, and – if they are 'well balanced' – they are more likely to do so than democratic arrangements, even without 'input' from voters (Heretier 1999). This is because the networks command more expertise, can open up policy making opportunities for more actors, and may respond more speedily (cf Follesdal 2010?).

Another favoured strategy to gain legitimacy for EU decision making is somewhat related: to include affected parties to allow their participation on issues that concern them. Thus the European Commission issued a *White Paper on Governance* that argued for more participatory mechanisms (European Commission 2001). This appears laudable, especially given the general perception that the Commission is excessively favourable to business and organized interests (Streeck and Schmitter 1991). The central rationale for representation of various social groups seems to build on a conception of participatory governance, that policies are more responsive and will be seen as more legitimate by involving those affected.

What are we to make of these modes of multi-level governance? Networks and private actors often have more expertise, and may respond more speedily than when public actors seek to act alone. But such decision making arrangements have several weaknesses. In the absence of transparency and oversight, citizens may have little reason to trust that expertise and efficiency is in fact ensured. The networks and participatory arenas may certainly help socialize participants, and hence foster solidarity and mutual concern among them. This may be one desired effect of their deliberations. Yet, this may be less attractive insofar as the members of the NMG do not represent all affected parties, and insofar as the deliberations are not open to public scrutiny. This is thus a possible 'Monotonicity Mistake.' For instance, their opacity and non-representativeness increase the risk that externalities at best will be ignored and possibly callously planned and imposed – and the risk may fuel public mistrust even of well-functioning networks.

Equitable policies are only likely to emerge if the representation is equitable, among those stakeholders whose needs are in conflict. And the representatives must understand their role as ensuring the common good, however understood, rather than only serving as delegates for their own constituency (Bellamy, et al. 2010, Follesdal 2010?). In the EU there are few if any mechanisms to ensure that the Commission or other EU bodies include representatives of all affected parties to the networks and ‘participatory’ arrangements, nor are there mechanisms in place that make their selection and decisions trustworthy. Similar concerns apply with even greater force to other parts of the global MLG structure -

With regard to *transparency* and *accountability*, we may note that all multi-level arrangements are complex. However, these networks and participatory arrangements are typically issue or sector specific, and this adds to the complexity – and creates several additional problems. Who should count as affected parties and be included as a stakeholder? Who should identify and adjudicate conflicts between the various regulations that emanate from partly overlapping regulatory networks in different issues (Hooge and Marks 2001)?

With regard to identifying the appropriate objectives and standards, it might be thought that they are likely to emerge on the basis of constructive debate among the participants within networks or participatory arrangements. So we return to the question of who should have the authority to decide on membership, and how to guard against skewed bargaining power and cooptation, so that the agreements actually reflect and balance all affected interests. Moreover, it is unclear whether citizens can have reason to trust that these networks or deliberating bodies do in fact secure outcomes that are sufficiently responsive to the best interests of citizens. Empirical findings give reason to doubt whether the set of deliberators is sufficiently representative, and the quality of the debate sufficiently ‘deliberative.’ (Smismans 2008).

One way to correct for some of these flaws, is to resort to familiar arrangements of democratic accountability that would take on responsibilities precisely for inclusion, transparency, etc. Such ‘nesting’ of regulatory networks and arenas of consultation may render such non-democratic modes of governance much more acceptable. Indeed, such ‘nested’ networks or participatory arenas, within democratic procedures, might allow more creative and informed problem solving by non-

accountable bodies. The membership would then be decided by democratic authorities concerned to have a 'balanced' set of participants. The proposals that emerge from these processes would in turn be ultimately decided by accountable authorities, who would also have to address conflicts, spillovers and any externalities. This way, networks and participatory arrangements would presumably also be subject to much more public scrutiny than at present, by media and by competing political parties. In short, the output from these 'nested' networks and participatory arrangements would not replace and silence broader public debate, democratic deliberation and contestation, but rather enhance them. This would help render the multi-level structures of governance more trustworthy.

To conclude this discussion of objections that MDMLG is unnecessary: I have responded in ways that should make clear that democratic arrangements need not be seen as a categorical imperative, independent of empirical arguments. Instead, we have reasons to believe that the decisions made in MLG are of the kind that requires responsible trade offs based on acute awareness of the impact on all affected parties. Alternatives to democratic rule may be even less trusted to be sufficiently responsive to the best interests of all those subject to these decisions.

Conclusion

The present reflections have sought to lay out the case for a modest claim, namely to rebut some of the objections raised against a more democratic multilevel system of governance. The conclusion is that we still seem to have good reason to argue that the constitutionalisation of public international law and other forms of multi-level regulation should include, in some way or other, mechanisms of democratic accountability, directly toward citizens or mediated via their national representatives.

I have sought to defend this claim against two sorts of views. Some authors regard this as an impossible requirement: the MLG structure cannot be so governed. Other authors agree that such democratic accountability might be established, at least in the medium range, but they object that it does not seem necessary, in light of the small effects of MLG on individuals' lives. In response, I have laid out a brief account of a case for democratic institutions, based on comparative assessments with regard to decision making at the national level: that under some conditions, alternatives to democracy are less likely to trustworthy remain responsive to the best interests of affected persons over time. Whether democratic arrangements are preferable to the best institutional alternatives also at the global level is in part an empirical matter. It seems clear that such questions cannot simply be dismissed as category mistakes

about the impact of, and possible control over, our global multi-level system of governance.

References

- Abizadeh, Arash 2007. 'Cooperation, Pervasive Impact, and Coercion: On the Scope (Not Site) of Distributive Justice.' *Philosophy and Public Affairs* 35: 318-58.
- Archibugi, Daniele, and David Held eds. 1995. *Cosmopolitan Democracy: An Agenda for a New World Order*. Cambridge: Polity Press.
- Beitz, Charles R. 1989. *Political Equality*. Princeton, N.J.: Princeton University Press.
- Bellamy, Richard, Dario Castiglione, Andreas Follesdal, and Albert Weale 2010. "Evaluating Trustworthiness, Representation and Political Accountability in New Modes of Governance." In *To Appear*.
- Buchanan, Allen 2000. 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World.' *Ethics* 110, no. 4: 697-721.
- Christiano, Thomas 2010. "Democratic Legitimacy and International Institutions." In *Global Democracy*, edited by Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti. Cambridge: Cambridge University Press.
- Czempiel, Ernst-Otto 1992. "Governance and Democratization." In *Governance without Government: Order and Change in World Politics*, edited by James N. Rosenau and Ernst-Otto Czempiel, 250-71. Cambridge: Cambridge University Press.
- Dahl, Robert A. 1999. "Can International Organizations Be Democratic? A Skeptic's View." In *Democracy's Edges*, edited by Ian Shapiro and Casiano Hacker-Cordon, 19-36. Cambridge: Cambridge University Press.
- — — 1989. *Democracy and Its Critics*. New Haven, Conn.: Yale University Press.
- Dryzek, John 2006. *Deliberative Global Politics*. Oxford: Polity Press.
- European Commission 2001. *European Governance: A White Paper*, Com (2001) 428. Brussels.
- Follesdal, Andreas. "Federalism." Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/federalism/>.
- — — 2010? 'The Legitimacy Challenges for New Modes of Governance: Trustworthy Responsiveness.' *Government and Opposition*.
- — — 2009. 'The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights.' *Journal of Social Philosophy* 40, no. 4: 595-607.
- Follesdal, Andreas, and Simon Hix 2006. 'Why There Is a Democratic Deficit in the Eu: A Response to Majone and Moravcsik.' *Journal of Common Market Studies* 44, no. 3: 533-62.

- Follesdal, Andreas, Ramses Wessel, and Jan Wouters eds. 2008. *Multilevel Regulation and the Eu: The Interplay between Global, European and National Normative Processes*. Leiden: Martinus Nijhoff.
- Grimm, Dieter 1995. 'Does Europe Need a Constitution?' *European Law Journal* 1, no. 3: 282-302.
- Hall, Rodney Bruce, and Thomas J. Biersteker eds. 2002. *The Emergence of Private Authority in Global Governance*. New York: Cambridge University Press.
- Held, David 1993. "Democracy: From City-States to a Cosmopolitan Order? (First Published in *Political Studies* 1992, Vol 40, Issue 1, Pp 10-39)." In *Prospects for Democracy: North, South, East, West.*, edited by David Held, 13-52. Oxford: Polity Press.
- — — 1987. *Models of Democracy*. Cambridge: Polity.
- Heretier, Adrienne 1999. 'Elements of Democratic Legitimation in Europe: An Alternative Perspective.' *Journal of European Public Policy* 6, no. 2: 269-82.
- Hix, Simon 2008. *What's Wrong with the Eu and How to Fix It*. Oxford: Polity Press.
- Hooge, Liesbeth, and Gary Marks 2001. 'Unravelling the Central State, but How? Types of Multi-Level Governance.' *American Political Science Review* 97, no. 2: 233-43.
- Koenig-Archibugi, Mathias 2010. 'Fuzzy Citizenship in Global Society.' *Presented at Workshop on Global Political Justice, Monash University 22-23 June*.
- Koenig-Archibugi, Mathias, and Michael Zürn eds. 2006. *New Modes of Governance in the Global System: Exploring Publicness, Delegation and Inclusiveness*. Basingstoke: Palgrave Macmillan.
- Macdonald, Terry 2008. *Global Stakeholder Democracy: Power and Representation Beyond Liberal States*. Oxford: Oxford University Press.
- Macdonald, Terry, and Kate Macdonald 2006. 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry.' *European Journal of International Law* 17, no. 1: 89-119.
- Majone, Giandomenico 1998. 'Europe's 'Democratic Deficit': The Question of Standards.' *European Law Journal* 4, no. 1: 5-28.
- — — 1996. "A European Regulatory State?" In *European Union: Power and Policy-Making*, edited by Jeremy J. Richardson, 263-77. London: Routledge.
- — — 2001. "Regulatory Legitimacy in the United States and the European Union." In *The Federal Vision: Legitimacy and Levels of Governance in the Us and the Eu*, edited by Kalypso Nicolaidis and Robert Howse, 252-74. Oxford: Oxford University Press.
- — — 1998. "State, Market and Regulatory Competition: Lessons for the Integrating World Economy." In *Centralization or Fragmentation? Europe Facing the Challenges of Deepening, Diversity, and Democracy*, edited by Andrew Moravcsik, 94-123. New York: Council on Foreign Relations.

- Marchetti, Rafaele 2008. *Global Democracy: For and Against. Ethical Theory, Institutional Design, and Social Struggles*. . London: Routledge.
- Moravcsik, Andrew 2002. 'In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union.' *Journal of Common Market Studies* 40, no. 4: 603-24.
- Nagel, Thomas 2005. 'The Problem of Global Justice.' *Philosophy and public affairs* 33, no. 2: 113-47.
- O'Brien, Robert, Anne Marie Goetz, Jan Aart Scholte, and Marc Williams 2000. *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements*. Cambridge: Cambridge University Press.
- Pevnick, Ryan 2008. 'Political Coercion and the Scope of Distributive Justice.' *Political Studies* 56, no. 2008: 399-413.
- Rosenau, James N. 1992. "Governance, Order, and Change in World Politics." In *Governance without Government: Order and Change in World Politics*, edited by James N. Rosenau and Ernst-Otto Czempiel, 1-29. Cambridge: Cambridge University Press.
- Ruggie, John G. 1982. 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order.' *International Organization* 36.
- — — 2004. 'Reconstituting the Global Public Domain: Issues, Actors and Practices.' *European journal of international relations* 10: 499-531.
- — — 2003. "Taking Embedded Liberalism Global: The Corporate Connection." In *Taming Globalization*, edited by David Held and Mathias Koenig-Archibugi, 93-129. Cambridge: Cambridge University Press.
- Sen, Amartya K. 2001. 'A World of Extremes: Ten Theses on Globalization.' *Los Angeles Times*.
- Sen, Amartya K., and Jean Dréze 1990. *Hunger and Public Action*: Oxford University Press.
- Shapiro, Ian 1996. *Democracy's Place*. Ithaca: Cornell University Press.
- Smismans, Stijn 2008. 'New Modes of Governance and the Participatory Myth.' *West European Politics* 31, no. 5: 874-95.
- Streeck, Wolfgang, and Philippe C. Schmitter 1991. 'From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market.' *Politics and Society* 19, no. 2: 133-64.
- Waldron, Jeremy 2006. 'The Core of the Case against Judicial Review.' *The Yale Law Journal* 115: 1346-406.
- Weale, Albert 1999. *Democracy*. New York: St. Martin's Press.

ⁱ I am grateful for constructive comments from the editors, especially Raffaele Marchetti.

ⁱⁱ Note that this focus on formalized institutions is at odds with Dryzek's definition of 'transnational discursive democracy' (Dryzek 2006). It is also stricter than Macdonald's, in this volume, in that democratic institutions must not only be 'consistent with' principles of autonomy and equality, or ensure transparency.

ⁱⁱⁱ Cf. Beitz 1989, Shapiro 1996 Weale 1999, and Sen and Dréze 1990;

^{iv} Several authors offer other additional arguments, such as the need to respect political autonomy. I bracket these arguments, partly to avoid criticism of reliance on comprehensively liberal conceptions of the good life. Cf. Held 1987: 271.

^v Much may be said against these claims, e.g. about the creation of new international legal regimes which are hardly describable as trivial or a mere compilation or extension of domestic laws (Follesdal, et al. 2008).