International Studies in the Theory of Private Law

Transnational Governance and Constitutionalism

Edited by

Christian Joerges,
Inger-Johanne Sand
and Gunther Teubner

Transnational Governance and Constitutionalism

The term transnational governance designates non-traditional types of international and regional collaboration among both public and private actors. These legally-structured or less formal arrangements link economic, scientific and technological spheres with political and legal processes. They are challenging the type of governance which constitutional states were supposed to represent and ensure. They also provoke old questions: Who bears the responsibility for governance without a government? Can accountability be ensured? The term 'constitutionalism' is still widely identified with the state form of democratic governance. The book refers to this term as a yardstick to which contributors feel committed even where they plead for a reconceptualisation of constitutionalism or a discussion of its functional equivalents.

Transnational Governance and Constitutionalism

International Studies in the Theory of Private Law

This series of books edited by a distinguished international team of legal scholars aims to investigate the normative and theoretical foundations of the law governing relations between citizens. The context for such investigations of private law systems is set by important modern tendencies in systems of governance. The advent of the regulatory state marks the withdrawal of the state from direct control and management of social and economic activity, and the adoption instead of procedural regulation and co-regulatory strategies that promote the use of private law techniques of ordering and self-regulation in social and economic interactions between citizens. The tendency known as globalisation and the corresponding increases in cross-border trade produce the responses of transnational regulation of commerce and private governance regimes, and these new systems of governance challenge the hegemony of traditional national private law systems. Furthermore, these tendencies towards transnational governance regimes compel an interaction between different national legal traditions, with their differences in culture and philosophy as well as their differences based upon variations in market systems, which provokes questions not only about competing policy frameworks but also about the nature and adequacy of different kinds of legal reasoning itself.

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Foreword and Acknowledgements

The title of this book denotes a long-term agenda on which the editors have co-operated and continue to co-operate in different contexts. Christian Joerges's interest in the topic arose from analyses of legal and para-legal institutional developments in the field of risk regulation, particularly in the EU,[1] and of an interdisciplinary project on 'Compliance at National, European and WTO Levels of Governance'.[2] Inger-Johanne Sand has worked on the structural change of public administration and the relationships between national, supranational and international institutions, and on the impact of scientific governing and technological change on such institutions.[3] Gunther Teubner has, for a long time, followed the emergence of non-state legal phenomena[4] and their links with the failures and dilemmas of legal regulation.[5] One of the perspectives, here, is that technological change is a vital part of the ongoing change from government to governance, and thus creates a more polycontextual situation of governing. These research interests and their perspectives are certainly not identical, but they do converge in the concepts used in the title: The term *transnational governance* designates various and untraditional types of international and regional collaboration among both public and private actors. These legally-structured or less formal arrangements and the norms emerging within them cannot be described or understood in terms of the more traditional legal and political institutions and processes derived from the authorities of the nation-state and its sovereignty, not only because they encompass both public and non-governmental actors, but also because they link economic, scientific and technological spheres with political and legal processes.

Political scientists studying international relations tend to content themselves with non-normative analyses and explanations of these developments. Lawyers, however, cannot avoid this dimension. The emerging

[1] See Ch Joerges, R Dehousse (eds), *Good Governance in Europe's Integrated Market*, (Oxford, Oxford University Press, 2002).
[2] M Zürn, Ch Joerges (eds), *Governance and Law in Post-National Constellations: Compliance in Europe and Beyond*, (Cambridge, Cambridge UP, forthcoming).
[3] See IJ Sand, 'Understanding the New Forms of Governance: Mutually Interdependent, Reflexive, Destabilised and Competing Institutions', (1998) 4 *European Law Journal*, at 271–93 and (2001) 22 'The Legal Regulation of the environment and new technologies — in view of changing relations between law, politics and science', *Zeitschrift für Rechtssoziologie*, at 169–206.
[4] Intensively since G Teubner (ed), *Global Law Without A State*, (Dartmouth, Aldershot, 1997).
[5] Ever since 'Substantive and Reflexive Elements in Modern Law', (1983) 17 *Law and Society Review*, at 239–85.

structures of transnational governance are challenging the type of governance which constitutional states were supposed to represent and ensure. They have transcended the forms and limits of international and supranational law; the various international legal disciplines are used both to analyse and to legitimise. The third notion in our title is meant to recall that this task has not become obsolete. The new phenomena of transnational governance, so we claim, must not make us forget our old questions: Who bears the responsibility for governance without a government? Can accountability be ensured? What kind of 'output' are 'we the people' entitled to expect from the emerging transnational structures of governance? Do they deserve our recognition? To what forum can we bring our concerns? The term 'constitutionalism' is still widely identified with statal form of democratic governance and thus cannot simply be applied in transnational arenas. Nonetheless, we have retained this term because it represents a yardstick to which our project remains committed even where it pleads for a reconceptualisation of constitutionalism or a discussion of its functional equivalents.

The editors have worked on their agenda in both seminars and workshops at the European University Institute. Most of the contributions to this volume were first presented at a conference in Florence in December 2001, and have subsequently been discussed in various other contexts and revised through laborious processes. Hence, we are endebted to many colleagues for their help at the various stages of that project. Special thanks go to Peer Zumbansen, who helped us to get the project off the ground in Florence, and then patiently supported its course. Christian Joerges profited from his involvement in the *Sonderforschungsbereich Staatlichkeit im Wandel* (Centre for Research on the Transformation of the State) im Bremen, and the ongoing co-operation with of Josef Falke, Christine Godt, Stephan Leibfried and Michael Zürn. We would also like to thank the European University Institute for its funding of the project, Chris Engert for his wonderful editorial help and Marlies Becker for her superb organisational capacity.

'Transnational governance' is neither public nor private, nor purely international, supranational nor totally denationalised. It is neither arbitrary nor accidental that we present our inquiries into this phenomenon in the series of International Studies in the Theory of Private Law. Our project is about the erosion of traditional public law governance, and seeks for ways and means to defend the normative *propria* of law. It is this kind of challenge that the series seeks to address.

Christian Joerges, Inger-Johanne Sand, Gunther Teubner
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Part 1

Verba Docent: Theoretical Debates

Section I: Transnational Societal Constitutionalism: Two Perspectives

1

Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?

GUNTHER TEUBNER
FRANKFURT

I. A RIGHT OF ACCESS TO CYBERSPACE?

A GROUP OF globalisation critics are suing a commercial host provider of the Internet. They are appealing to the principle of free speech in order to enforce their alleged right of access judicially. The host provider, who offers content providers the possibility of setting up websites on its computers, had already been caught up in the tangles of state attorneys and private collective actions because some of the websites contained child pornography and Nazi propaganda. The decisive factor came with the decision of the Paris Tribunal de Grande Instance, Order of 20 November 2000, ordering Yahoo Inc., to bar French users access to auctions of Nazi objects.[1] The final blow came with the new trends towards public-private co-regulation, which exempt providers from liability when they co-operate with state agencies.[2]

[1] TGI Paris, Ordonnance de référé du 20 Nov. 2000 at: *http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm.* This decision confirmed the earlier ruling of 22 May 2000 ordering Yahoo! to block access to material that was judged illegal to display in France under Article R 645–1 du Code Pénal. See TGI Paris, Ordonnance de référé du 22 mai 2000 at *http://222.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm.*

[2] USA: 1990 Protection of Children from Sexual Predators Act, Section 42 USC § 13032; 1998 Digital Millennium Copyright Act, 17 USC 512 (C). Europe: Directive 2000/31.

The provider thereupon electronically barred access to all websites where it regarded the risk of criminal or civil actions as too high. The bar also affected political groups rated by the provider as politically radical or too close to violent protest campaigns. In a civil action, these groups are now seeking to compel the host provider to grant them access.

The case ties together into a single focal point a range of fundamental problems that the digitalisation of communication is throwing up anew. It is not just technical legal questions of compulsory contracting for private providers, the right of access to internet institutions, the validity and implementation of national norms in the transnational internet, or the third party effect of fundamental rights in cyberspace that are up for debate.[3] Rather, we are faced with the more fundamental question of a universal political right of access to digital communication. Ultimately, problems of exclusion from global communication processes are raised. In the background lurks the theoretical question of whether it follows from the evolutionary dynamics of functional differentiation that the various binary codes of the world systems are subordinate to the one difference of inclusion/exclusion.[4] Will inclusion/exclusion become the meta-code of the 21st century, mediating all other codes, but, at the same time, undermining functional differentiation itself and dominating other social-political problems through the exclusion of entire population groups?

From the many problems that our legal case raises, I wish to single out one question: how is constitutional theory to respond to the challenge arising from the three current major trends — digitalisation, privatisation and globalisation — for the inclusion/exclusion problem? This is how today's 'constitutional question' ought to be formulated, in contrast to the 18th and 19th century question of the constitution of nation-states. While that had to do with disciplining repressive political power by law, the point today is to discipline quite different social dynamics. This is, in the first place, another question for theory. Will constitutional theory manage to generalise its nation-state tradition in

[3] These issues, particularly problems of free speech on the internet, are discussed in B Frydman and I Rorive, 'Regulating Internet Content through Intermediaries in Europe and the USA', 23 *Zeitschrift für Rechtssoziologie* 2002, at 41–59; B Holznagel, 'Meinungsfreiheit oder Free Speech im Internet: Unterschiedliche Grenzen tolerierbarer Meinungsäußerungen in den USA und Deutschland', 9 *Archiv für Presserecht* 2002, at 128–33; B Holznagel, 'Responsibility for Harmful and Illegal Content as well as Free Speech on the Internet in the United States of America and Germany', in C Engel (ed), *Governance of Global Networks in the Light of Differing Local Values* (Baden–Baden, Nomos, 2000); DJ Goldstone, 'A Funny Thing Happened on the Way to the Cyber Forum: Public vs Private in Cyberspace Speech', 69 *Colorado Law Review* 1998, at 1–70.

[4] For inclusion/exclusion in global society, see N Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main, Suhrkamp, 1993), at 582 *et seq.*

contemporary terms and re-specify it? Can we, then, make the tradition of the nation-state constitution fruitful, while, at the same time, changing it to let it do justice to the new phenomena of digitalisation, privatisation and globalisation?[5]

II. REACTIONS IN CONSTITUTIONAL THEORY

Contemporary generalisation and re-specification — this is a problem at which several ambitious attempts to postulate a universal world constitution beyond the nation-state have laboured away in vain. This is true of legal efforts to see the United Nations' Charter as the constitutional law of the 'international community' put into force by a world sovereign and legitimising the exercise of global political power.[6] It is, however, also true of a number of philosophical endeavours in the Kantian tradition to conceive a universal world constitution where the introduction of new political institutions and procedures of global statehood is supposed to be used to set up a federative centre and forum of common world internal policy.[7] All attempts can be reproached for not generalising the traditional concept of the constitution sufficiently for today's circumstances, nor re-specifying it carefully enough, but, instead, uncritically transferring nation-state circumstances to world society. In particular, the changes that the concept of constitution would have to go through in relation to sovereignty, organised collectivity, hierarchies of decision, organised aggregation of interests and democratic legitimacy, if no equivalent of the state is to be found at world level, have not really been thought through.[8]

There is more realism in attempts to dissociate state and constitution clearly, and explicitly conceive of a global constitution without a world state. This innovative construction has most recently been exhaustively

[5] On the use of historical experience for the globalisation of law, see P Zumbansen, 'Spiegelungen von Staat und Gesellschaft: Governance-Erfahrungen in der Globalisierungsdebatte', in M Anderheiden, S Huster and S Kirste (ed), *Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Rechts: Vorträge der 8. Tagung des jungen Forums Rechtsphilosophie, 20. und 21. September 2000 in Heidelberg* (Stuttgart, Steiner, 2001).

[6] Explicitly, B Fassbender, 'The United Nations Charter as Constitution of the International Community', 37 *Columbia Journal of Transnational Law* 1998, at 529–619; P Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', 1 *Max Planck Yearbook of United Nations Law* 1997, at 1–33.

[7] O Höffe, *Königliche Völker: Zu Kants kosmopolitischer Rechts- und Friedenstheorie* (Frankfurt, Suhrkamp, 2001); J Habermas, *Die postnationale Konstellation: Politische Essays* (Frankfurt, Suhrkamp, 1998); J Rawls, 'The Law of Peoples' in S Shute and S Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures* (New York, Basic Books, 1993).

[8] A brilliant critique of the 'great normative phantasmogories' of a political world society is offered by A Schütz, 'The Twilight of the Global Polis: On Losing Paradigms, Environing Systems, and Observing World Society' in G Teubner (ed), *Global Law Without A State* (Aldershot, Dartmouth Gower, 1997).

deployed in the debate on the European constitution, but, at world level, too, the attempt is being made to track down constitutional elements in the current process of a form of international politics that has no central collective actor as the subject/object of a constitution.[9] In particular, the attempt to see the co-existence of nation-states as a segmental second-order differentiation of world politics and its interaction as a spontaneous order of a secondary nature, a 'world constitution of freedom', lend a world constitution re-specified in this way as a structural link between decentralised world politics and law quite a different shape.[10] Yet, here, too, the generalisation does not go far enough to do justice to the decentralisation of politics in world society. This sort of spontaneous constitution of states has, in particular, to contend with the problem of whether and how non-state actors and non-state regimes can be incorporated in the international process of constitutionalisation.

This shortcoming is, in turn, the starting point for positions that explicitly transform actors that are not traditionally recognised as the subjects of international law into constitutional subjects.[11] These actors are, on the one hand, international organisations, multi-national enterprises, international trade unions, interest groups and non-governmental organisations as participants in global decision-making, and, on the other, individuals, only hesitantly and marginally accepted as legal subjects, or as the bearers of fundamental and human rights, by international law.[12] Implicitly, such pluralist conceptions recognise that the processes of digitalisation and global networking are decisively carried out by non-state actors, whose existence a world constitution would also have to take into account. The question is, however, whether a merely personal extension of a constitutionalisation process is still adequate, and whether quite different structures and processes ought not to be included.

[9] On Europe, see Ch Joerges, Y Mény and JHH Weiler (eds) *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (Robert Schuman Centre, Firenze 2000); U Di Fabio, 'Eine europäische Charta', 55 *Juristenzeitung* 2000, at 737–43; A v Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform: Zur Gestalt der Europäischen Union nach Amsterdam* (Baden-Baden, Nomos, 1999); on the constitution of the international community, R Uerpmann, 'Internationales Verfassungsrecht', 56 *Juristenzeitung* 2001, at 565–73; C Tomuschat, 'Obligations Arising for States Without or Against Their Will', *Recueil des Cours* 1993, at 195–374.

[10] S Oeter, 'Internationale Organisation oder Weltföderation? Die organisierte Staatengemeinschaft und das Verlangen nach einer 'Verfassung der Freiheit', in H Brunkhorst (ed), *Globalisierung und Demokratie: Wirtschaft, Recht, Medien* (Frankfurt am Main, Suhrkamp, 2000).

[11] Important steps towards a constitutional pluralism at global level, in N Walker, 'The Idea of Constitutional Pluralism', 65 *Modern Law Review* 2002, at 317–59; C Walter, 'Constitutionalising (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law', 44 *German Yearbook of International Law* 2001, at 170–201.

[12] A Fischer-Lescano, 'Globalverfassung: Verfassung der Weltgesellschaft', 88 *Archiv für Rechts — und Sozialphilosophie* 2002, at 349–78.

Finally, yet a further step is taken by ideas of the horizontal effect of fundamental rights, no longer asserting fundamental rights-positions exclusively against political bodies, but also against social institutions, in particular vis-à-vis centres of economic power. Nation states are supposed to have corresponding protective obligations imposed upon them in order to combat threats to fundamental rights in areas remote from the state.[13] Even though this debate is only at its very beginnings in the international sphere, it indicates, in view of the massive human rights infringements by non-state actors, the necessity of an extension of constitutionalism beyond purely intergovernmental relations.[14]

III. THE THESIS: CONSTITUTIONALISATION WITHOUT THE STATE

These four concepts of a global constitution constitute quite dramatic extensions from the constitutional tradition, yet ultimately they cannot free themselves of the fascination of the nation-state architecture, and merely seek to compensate for its obvious inadequacies with all sorts of patches, add-ons, re-buildings, excavations and decorative façades — which, altogether, merely make the construction more complex, instead of building *ex novo*. But the design error already lies in the state-centring of the constitution.[15] For all their courage to rethink the constitution in a direction of political globality, in the light of an intergovernmental process, through the inclusion of actors in society, and in terms of the horizontal effects of fundamental rights, they nonetheless remain stuck at seeing the constitution as tied to state-political action.

At the same time, they are tied to a strange distinction, between the poles of which they continually oscillate.[16] While the constitution ought

[13] M Ruffert, Vorrang der Verfassung und Eigenständigkeit des Privatrechts: Eine verfassungsrechtliche Untersuchung zur Privatrechtswirkung des Grundgesetzes (Tübingen, Mohr Siebeck, 2001); HD Jarass, 'Die Grundrechte: Abwehrrechte und objektive Grundsatznormen. Objektive Grundrechtsgehalte, insbes. Schutzpflichten und privatrechtsgestaltende Wirkung' in P Badura and H Dreier (eds), *Festschrift 50 Jahre Bundesverfassungsgericht*, (Tübingen, Mohr Siebeck, 2001); K Preedy, 'Fundamental Rights and Private Acts: Horizontal Direct or Indirect Effect? — A Comment', *European Review of Private Law* 2000, at 125–33.

[14] For the European context, see D Schindler, *Die Kollision von Grundfreiheiten und Gemeinschaftsgrundrechten: Entwurf eines Kollisionsmodells unter Zusammenführung der Schutzpflichten- und Drittwirkungslehre*, (Berlin, Duncker-Humblot, 2001); A Clapham, Human Rights in the Private Sphere (Oxford, Oxford University Press, 1996); J Paust, 'Human Rights Responsibilities of Private Corporations', 35 *Vanderbilt Journal of Transnational Law* 2002, at 801–25; P Muchlinski, 'Human Rights and Multi-nationals: Is There a Problem?', 77 *International Affairs* 2001, at 31–48.

[15] N Walker (above n.11).

[16] For this argument, see N Luhmann, *Die Politik der Gesellschaft* (Frankfurt am Main, Suhrkamp, 2000) at 201, 207 & 217.

institutionally to confine itself to political processes, at the same time, it ought to constitute the whole of society. The political organisation of the state apparatus is supposed to represent the constitution for the nation. Indeed, this oscillation between the political and the societal is transferred to world society today. If one can only manage to constitutionalise the interaction of state-political institutions in international relations, then this ought to be enough to produce a constitution appropriate to world society. If this distinction was already problematical in the nation-state, then, in world society, it has, once and for all, been overtaken. But what is there in the blind-spot of the distinction? An all-embracing constitution for global society? A network of national and transnational constitutions? An autonomous legal constitution? Or what?

If, in seeking to illuminate the blind-spot, one abandons the state-centring of the constitution, then the real possibilities of constitutionalisation without the state become visible. For constitutional theorists, this amounts to breaking a taboo. For them, a constitution without a state is, at best, a utopia, and a poor one into the bargain.[17] But this formula is definitely not an abstract normative demand for remote, uncertain futures, but an assertion of a real trend that can be observed on a world-wide scale today. The thesis is: the emergence of a multiplicity of civil constitutions. The constitution of world society does not come about exclusively in the representative institutions of international politics, nor can it take place in a unitary global constitution which overlies all areas of society, but, instead, emerges incrementally in the constitutionalisation of a multiplicity of autonomous sub-systems of world society.[18]

The raging battles in the internet about cyber-anarchy, governmental regulation and commercialisation, front-rank constitutional policy conflicts, the chaotic course of which is gradually showing us the shape of nothing other than the organisational law of a digital constitution.[19] It is no coincidence that the famous/notorious *Declaration of the Independence of Cyberspace* uses the constitutional rhetoric of the founding fathers, telling the:

> 'Governments of the Industrial World, you weary giants of flesh and steel …, the global social space we are building to be naturally independent of the

[17] D Grimm, 'Braucht Europa eine Verfassung?', 50 *Juristenzeitung* 1995, at 581–91.
[18] International law scholars who come close to this position are N Walker (above n.11) and C Walter (above n.11) 188. It remains to be seen, however, whether they accept a radical legal pluralism which embraces the notion of constitutionalisation without the state, when it comes to 'private' governance regimes.
[19] The debate between L Lessig, *Code and Other Laws of Cyberspace* (New York, Basic Books, 1999) and D Johnson and D Post, 'The New 'Civic Virtue' of the Internet: A Complex System Model for the Governance of Cyberspace', *http://www.temple.edu/lawschool/dpost/Newcivicvirtue.html* 1998, is couched explicitly in constitutional terms.

> tyrannies you seek to impose on us. You have no moral right to rule us, nor do you possess any methods of enforcement we have true reason to fear.'[20]

One of the fundamental rights' problems of the digital constitution presents itself in our legal case. Whether a right to access vis-à-vis a host provider for the internet exists or not is to be decided on the basis of the inclusion principles of digital communication.[21] It is not the principles of an external political constitution (which one? The US-constitution? Another national constitution? A transnational constitution?), which aim at the accumulation of power and the formulation of policy, but the principles of an internet constitution proper, which aim at freedom of communication and freedom from electronic threats to it, that is the adequate *sedes materiae* of the digital constitutional norms. But these principles have still to be worked out and validated in the course of constitutionalising the internet.[22] The open question in our case is whether business operators, even stimulated by economic incentives in private-public co-regulation, should be entrusted with deciding on the limits of human rights.[23]

Extending the combat area, from Seattle to Genoa, what is taking place in the conference halls and on the street is fights over a constitution of the global economy, the outcome of which will give constitutional impetus to the World Bank, the IMF and the WTO. A constitution of the global health sector is taking shape in the fiery debates both inside and outside science on embryo research and reproductive medicine, and on the hunt for medically adequate equivalents for traditional state-related fundamental rights. And since the 11th of September 2001, attempts to institutionalise debates among world religions more strongly in legally constituted institutions of inter-religious dialogue have been multiplying.

IV. THREE TRENDS OF DEVELOPMENT

To shift the focus from the one political constitution of the nation-state to the many civil constitutions of world society, immediately raises the

[20] JP Barlow, *Cyberspace Declaration of Independence* (*http://www.eff.org.//Publications/John_Perry_Barlow, 2002).*

[21] The court decisions of *LG Bonn MMR 2000, 109* and *OLG Köln MMR 2001, 52*, dealing with the parallel problem of access to a chat room of a provider, attempt to develop legal principles of internet-access on the basis of a strange mixture of property and contract. K-H Ladeur, 'Rechtsfragen des Ausschlusses von Teilnehmern an Diskussionforen im Internet: Zur Absicherung von Kommunikationsfreiheit durch netzwerkgerechtes Privatrecht', 5 *Multimedia und Recht* 2002, at 787–92 explicitly asks for the development of a network-adequate private law.

[22] For an internet-adequate transformation of the constitutional right of free speech in ICANN-panels, see V Karavas and G Teubner, '*http://www.CompanyNameSucks:* Grundrechte gegenüber 'Privaten' im autonomen Recht des Internet?' in W Hoffmann-Riem and K-H Ladeur (eds), *Innovationsoffene Regulierung des Internet* (Baden-Baden, Nomos, 2003).

[23] Frydman and Rorive (above n.3) at 59.

question of what circumstances justify overthrowing the model of an exclusively political constitution that seems to have proven itself through the centuries. Very schematically and in a much abbreviated fashion, I wish to sketch out three secular trends which subvert state-centred constitutional thought and make societal constitutionalism at a global level empirically and normatively plausible.

Diagnosis I: Dilemma of Rationalisation

Here, the theory of societal constitutionalism developed by the American sociologist David Sciulli supplies initial starting points.[24] Starting from the dilemma of the rationalisation process of modernity analysed by Max Weber, he raises the question of what counter-forces may exist to counter a massive evolutionary drift which manifests itself in four thrusts: (1) fragmentation of logics of action, with consequences of highly advanced differentiation, pluralisation, and regional compartmentalisation of separate social spheres; (2) dominance of instrumental calculation as the sole rationality that meets with recognition across the domains; (3) comprehensive replacement of informal co-ordination by bureaucratic organisation; (4) increasing confinement in the 'iron cage of servitude to the future', especially in social spheres. This drift would inevitably end, society-wide, in a situation of intensive competition for positions of power and social influence, highly formalised social control, and political and social authoritarianism. Additionally, it has the nature of a dilemma, because every conscious attempt to achieve collective control over the drift itself becomes caught up in this logic and, in turn, only serves to strengthen the drift.[25]

The only social dynamic that has effectively worked against this evolutionary drift in the past and can offer resistance in the future is, according to Sciulli, to be found in the institutions of a 'societal constitutionalism':

> 'Only the presence of institutions of external procedural restraint (on inadvertent or systemic exercises of collective power) within a civil society can account for the possibility of a non-authoritarian social order under modern conditions.'[26]

[24] D Sciulli, *Theory of Societal Constitutionalism* (Cambridge, Cambridge University Press, 1992); see, also, D Sciulli, 'Corporate Power in Civil Society: An Application of Societal Constitutionalism', 2001; D Sciulli, 'The Critical Potential of the Common Law Tradition', 94 *Columbia Law Review* 1994, at 1076–124; D Sciulli, 'Foundations of Societal Constitutionalism: Principles from the Concepts of Communicative Action and Procedural Legality', 39 *British Journal of Sociology* 1988, at 377–407.
[25] D Sciulli 1992 (above n.24) at 56.
[26] D Sciulli 1992 (above n.24) at 81.

The decisive point is to institutionalise procedures (in the sense of rational choice) of non-rational norms that can empirically be identified in what he calls 'collegial formations', that is, in the specific organisational forms of the professions and other norm-producing and deliberative institutions:

> 'It is typically found not only within public and private research institutes, artistic and intellectual networks, and universities, but also within legislatures, courts and commissions, professional associations, and, for that matter, the research divisions of private and public corporations, the rule-making bodies of non-profit organizations, and even the directorates of public and private corporations.'[27]

The public policy consequence is to legitimate the autonomy of such collegial formations, guaranteeing it politically and underpinning it legally. Beyond the historically achieved guarantees of autonomy for religious spheres, institutions of collective bargaining and free associations, these guarantees should also apply to:

> 'deliberative bodies within modern civil societies as well as professional associations and sites in which professionals practice within corporations, universities, hospitals, artistic networks, and elsewhere.'[28]

This theory of societal constitutionalism had its forerunners in ideas about private government in the US, and about co-determination and other forms of democratisation of social sub-systems in Europe, exposing non-governmental formal organisations to constitutionalisation pressure.[29] Today, it can directly link up with post-Rawlsian approaches to deliberative theory of democracy which seek to identify democratic potential in social institutions, and to draw normative and institutional consequences.[30] The important thing here is that deliberative democratisation is not seen as being confined to political institutions but is explicitly considered in its extension to social actors in the national and the international context.[31] Even more important are the parallels to the

[27] D Sciulli 1992 (above n.24) at 80.
[28] D Sciulli 1992 (above n.24) at 208.
[29] P Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley, University of California Press, 1992), at 229 *et seq*.; P Selznick, *Law, Society and Industrial Justice* (New York, Russell Sage, 1969); J Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, Polity, 1992).
[30] MC Dorf and C Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267–473. J Cohen and C Sabel, 'Directly-Deliberative Polyarchy', 3 *European Law Journal* 1997, at 313–42.
[31] O Gerstenberg and C Sabel, 'Directly Deliberative Polyarchy: An Institutional Ideal for Europe?', 2002, at 289–341; J Cohen, 'Can Egalitarianism Survive Internationalisation?' in W Streeck (ed), *Internationale Wirtschaft, nationale Demokratie: Herausforderungen für die Demokratietheorie* (Frankfurt, Campus, 1998).

constitutional theory of systems sociology, which portrays a quite similar developmental dynamics of system expansion and its concomitant restraint. From a systemic viewpoint, the historical role of the constitution is not, especially when it comes to fundamental rights, exhausted in norming state organisation and individual legal rights, but consists primarily in guaranteeing the multiplicity of social differentiation against swamping tendencies.[32] Considered historically, constitutions emerge as a counterpart to the emergence of autonomous spheres of action typical for modern societies. As soon as expansionist tendencies arise in the political system, threatening to ruin the process of social differentiation itself, social conflicts come about, as a consequence of which fundamental rights, as social counter-institutions, are institutionalised precisely where social differentiation were threatened by the tendencies to self-destruction inherent in it. Individual conflicts between private citizens and the administrative bureaucracy at the same time serve to set up legally institutionalised guarantees of a self-restraint of politics.

There follows a general definition of constitutions in the process of modernisation. Polanyis' famous double movement — the implementation of the market and the setting up of a protective cladding of cultural institutions — finds its generalisation here to the extent that the dynamics corresponding to it also includes other expansive social systems.[33] In constitutionalisation the point is to liberate the potential of highly specialised dynamics by institutionalising it and, at the same time, to institutionalise mechanisms of self-restraint against its society-wide expansion. These expansive trends have manifested themselves in historically very diverse situations; previously, mainly in politics, but today more in the economy, science, technology and other social sectors. Strengthening the autonomy of spheres of action as a counter-movement to trends of de-differentiation seems to be the general response at work both in the traditional political constitutions and in the emerging civil constitutions. If it was the central task of political constitutions to uphold the autonomy

[32] The systemic reformulation of the institutional role of constitutional rights starts with N Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (Berlin, Duncker & Humblot, 1965). For an elaboration in different contexts, see K-H Ladeur, 'Helmut Ridders Konzeption der Meinungs — und Pressefreiheit in der Demokratie', 32 *Kritische Justiz* 1999, at 281–300; C Graber and G Teubner, 'Art and Money: Constitutional Rights in the Private Sphere', 18 *Oxford Journal of Legal Studies* 1998, at 61–74; D Grimm, 'Grundrechte und Privatrecht in der bürgerlichen Sozialordnung' in D Grimm (ed), *Recht und Staat in der bürgerlichen Gesellschaft* (Frankfurt am Main, Suhrkamp, 1987); H Willke, *Stand und Kritik der neueren Grundrechtstheorie: Schritte zu einer normativen Systemtheorie,* (Berlin, Duncker & Humblot, 1975).

[33] K Polanyi, *The Great Transformation: Politische und ökonomische Ursprünge von Gesellschaften und Wirtschaftssystemen*, (Frankfurt, Suhrkamp, 1995); for an interpretation of economic law in such a perspective, M Amstutz, *Evolutorisches Wirtschaftsrecht: Vorstudien zum Recht und seiner Methode in den Diskurskollisionen der Marktgesellschaft*, (Baden-Baden, Nomos, 2001).

of other spheres of action against the expansion of the polity, specifically in relation to political instrumentalisation, then, in today's civil constitutions, it is presumably to guarantee the chances of articulating so-called non-rational logics of action against the dominant social rationalisation trend, by conquering areas of autonomy for social reflection in long-lasting conflicts, and institutionalising them.[34]

But should not this specifically become the primary task of a genuinely political constitution of world society? It would seem that this deep-rooted prejudice will be very hard to remove. Yet effective shifts in the balance between politics and other social processes in the globalisation process are compelling the contemplation of a further decisive change to constitutionalisation.

Diagnosis II: Polycentric Globalisation

World society is coming about not under the leadership of international politics but, at most, in reaction to it, accompanied by the latter — as the globalisation of terrorism has recently shown. Nor can it be equated with economic globalisation, to the convulsions of which all other spheres of life can only respond. Instead, globalisation is a polycentric process in which simultaneously differing areas of life break through their regional bounds and each constitute autonomous global sectors for themselves.[35] Globalisation is a:

> 'multi-dimensional phenomenon involving diverse domains of activity and interaction, including the economic, political, technological, military,

[34] For this view on the constitutionalisation of private law, see G Teubner, 'Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?' in K-H Ladeur (ed), *Public Governance in the Age of Globalisation* (Aldershot, Ashgate, 2004) G Teubner, 'Contracting Worlds: Invoking Discourse Rights in Private Governance Regimes', 9 *Social and Legal Studies,* 2000, at 399–417; G Teubner, 'After Privatisation? The Many Autonomies of Private Law', at 51, *Current Legal Problems,* 1998, at 393–424. For further analyses in this direction, see G-P Calliess, 'Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law', 23 *Zeitschrift für Rechtssoziologie,* 2002, at 185–216; P Zumbansen, 'The Privatisation of Corporate Law? Corporate Governance Codes and Commercial Self-Regulation', 3 *Juridicum* 2002, at 32–40.

[35] This view of a polycentrical globalisation is shared by diverse camps of the debate: the neo-institutionalist theory of 'global culture', JW Meyer, J Boli, GM Thomas and FO Ramirez, 'World Society and the Nation-State', 103 *American Journal of Sociology* 1997, at 144–81; post-modern concepts of global legal pluralism, BdS Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York, Routledge, 1995); systems theory studies of differentiated global society, R Stichweh, *Die Weltgesellschaft: Soziologische Analysen* (Frankfurt am Main, Suhrkamp, 2000) and various versions of 'global civil society', K Günther and S Randeria, '*Recht, Kultur und Gesellschaft im Prozeß der Globalisierung*', (Bad Homburg, Reimers, 2001); M Shaw, '*Civil Society and Media in Global Crisis*', (London, Cassell, 1996).

> legal, cultural, and environmental domains. Each of these spheres involves different patterns of relations and activity.'[36]

The outcome is a multiplicity of independent global villages, each of which develops an intrinsic dynamic of its own as an autonomous area which cannot be controlled from the outside. Globalisation, then, does not mean simply global capitalism, but the worldwide realisation of functional differentiation.[37]

The decisive thing for our question is that the globalisation of politics, in comparison with other sub-systems has, relatively, lagged behind, and will no doubt continue to do so for the foreseeable future. In view of the notorious weaknesses of the institutions of the United Nations, world politics is, at bottom, still only international politics, that is, a system of interactions between autonomous nation-states into which international organisation are also gradually drawn, without replacing the world of nation-states or even being able to push it into second place. This asymmetry of fully-globalised sub-systems of society and merely internationalised politics takes the ground from under the above-mentioned situation where the political institutions with their own constitutions could, at the same time, also be the constitution for the whole of society. By continuing to employ the old concepts of a hierarchical political society in which the monarch was the head of society, the nation-state was still able to make it credible that the sub-system of politics, simultaneously through its state constitution, constituted the whole nation, even though the fragility of this construction was already plain. This is shown by the repeated emergence of ideas of an independent economic constitution, but also of other constitutions in social sub-sectors, along with concepts of the horizontal effect of fundamental rights in civil society, instead of their being merely ordered by the state.[38] For world society, however, such a claim can simply no longer be asserted. Seeing the United Nations as a world sovereign at work giving not only the UN organisations, but also international politics, and, indeed, even the non-governmental systems of world society, a constitution with a claim to bindingess, legitimacy and enforceability, as some international lawyers seek to do, is a mere illusion.

[36] D Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, (Cambridge, Polity Press, 1995), at 62.

[37] Explicitly, N Luhmann (above n.16) 220. See, also, M Albert, *Zur Politik der Weltgesellschaft: Identität und Recht im Kontext internationaler Vergesellschaftung* (Weilerswist, Velbrück, 2002); M Albert, 'Observing World Politics: Luhmann's System Theory of Society and International Relations', 28 *Millenium: Journal of International Studies* 1999, 239–65; H Brunkhorst, 'Ist die Solidarität der Bürgergesellschaft globalisierbar?', (2000), in H Brunkhorst (ed), *Globalisierung und Demokratie: Wirtschaft, Recht, Medien* at 282.

[38] On constitutional pluralism in general, see N Walker (above n.11); for the discussion of a global economic constitution, see P Behrens, 'Weltwirtschaftsverfassung', 19 *Jahrbuch für Neue Politische Ökonomie* 2000, 5–27.

The fact that, in contrast, a real constitutionalisation process is actually taking place in international politics and in international organisations in the narrower sense, as noted by many international lawyers, is not thereby to be disputed, but indeed to be emphasised.[39] The development of human rights which are applied worldwide vis-à-vis the powers of nation-states is the clearest evidence of this start. The decisive point, from our view, is that this only represents the constitutionalisation of international politics, a sub-constitution of world society among others, which can no longer use any *pars pro toto* claim.[40] This takes the ground away from under politics-centred constitutional thinking. If one then looks for other constitutional elements in world society, one has to look for them in the separate global sub-systems outside politics. The on-going constitutionalisation of international politics has no monopoly over constitutionalising world society. Thus, a kind of constitutional competition is set into motion by the autonomisation of global sub-constitutions.[41]

Diagnosis III: Creeping Constitutionalisation

Accordingly, if it is true that international politics can, at best, pursue its own constitutionalisation, but not that of the whole world society, and if it is further true that the evolutionary drift of global rationalisation processes necessitates the guaranteeing of spheres of autonomy for reflection, then, the question arises as to whether the sectors of global society actually possess the potential for constitutions of their own.[42]

The point, here, is to establish an important connection between juridification and constitutionalisation. By necessity, every process of juridification simultaneously contains latent constitutional norms. In the words of a constitutional lawyer:

> 'Not every polity has a written constitution, but every polity has constitutional norms. These norms must at least constitute the main actors, and contain certain procedural rules. Theoretically, a constitution could content itself with setting up one law-making organ, and regulating how that organ is to decide the laws.'[43]

[39] For a recent comprehensive analysis, see N Walker (above n.11); A Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte im postmodernen ius gentium* (Weilerswist, Velbrück, 2004), Ch. 5 and 6.
[40] Succinctly, A Fischer-Lescano, 'Globalverfassung: Verfassung der Weltgesellschaft', 88 *Archiv für Rechts — und Sozialphilosophie* 2002, at 349–78.
[41] N Walker (above n.11).
[42] For an excellent analysis of legal globalism in a systemic perspective, see S Oeter, 'International Law and General Systems Theory', 44 *German Yearbook of International Law* 2001, at 72–95.
[43] R Uerpmann, 'Internationales Verfassungsrecht', 56 *Juristenzeitung* 2001, at 565–73, and 566. Similarly, C Tomuschat (above n.9), at 217.

Ultimately, this establishes the constitutional quality of any emergence of a legal system, which leads directly to the thorny issues of the non-foundational foundations of law, around which the major legal theories of our time circle. The technical problems that present themselves here are known as follows: the self-justification of law, resulting paradoxes that block the process of law; the practical 'solutions' of these paradoxes, which also always remain problematical, through the autological qualities of constitutionalisation. These qualities have been played out in ever new variations, by Kelsen, in the relationship of the basic norm to the highest constitutional norms, by Hart, in the theory of secondary rules and the ultimate rule of recognition, by Luhmann, in the relationship between legal paradox and constitution, and by Derrida, in the paradoxical violence that is the non-foundational foundation of law.[44] The point is continually to understand the paradoxical process in which any creating of law always already presupposes the rudimentary elements of its own constitution, and, at the same time, constitutes these only through their implementation.

In our context, the need, now, is no longer to confine the problematical relationship between juridification and constitutionalisation to the political community. Grotius' famous proposition *ubi societas ibi ius* has to be reformulated in the conditions of the functional differentiation of the planet in such a way that, wherever autonomous social sectors develop, autonomous law is simultaneously produced, at a relative distance from politics. Law-making also takes place outside the classical sources of international law, in agreements between global players, in private market regulation by multi-national concerns, internal regulations of international organisations, inter-organisational negotiating systems, world-wide standardisation processes that come about partly in markets, and partly in processes of negotiation among organisations.[45]

> 'Regulations and norms are produced not only by negotiations between states, but also by new semi-public, quasi-private or private actors which respond to the needs of a global market. In between states and private

[44] H Kelsen, 'General Theory of Law and State' (Cambridge Mass, Harvard University Press, 1946), 116; HLA Hart, *The Concept of Law* (Oxford, Clarendon, 1961), at 77.; N Luhmann, 'Two Sides of the State Founded on Law' in N Luhmann (ed), *Political Theory in the Welfare State* (Berlin, de Gruyter, 1990); J Derrida, *Otobiographies: L'enseignements de Nietzsche et la politique du nom propre* (Paris, Galilée, 1984); J Derrida, 'Force of Law: The Mystical Foundation of Authority', 11 *Cardozo Law Review* 1990, at 919–1046.

[45] M Albert, *Zur Politik der Weltgesellschaft: Identität und Recht im Kontext internationaler Vergesellschaftung* (Weilerswist, Velbrück, 2002); J Robe, 'Multi-national Enterprises: The Constitution of a Pluralistic Legal Order', in G Teubner (ed), *Global Law Without A State* (Aldershot, Dartmouth Gower, 1997); BdS Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York, Routledge, 1995).

> entities, self-regulating authorities have multiplied, blurring the distinction between the public sphere of sovereignty and the private domain of particular interests.'[46]

In addition, legal norms are not only produced within conflict regulation by national and international official courts, but also within non-political social dispute-settling bodies, international organisations, arbitration courts, mediating bodies, ethical committees and treaty systems. If it is true that the dominant sources of global law are now to be found at the peripheries of law, at the boundaries with other sectors of world society, and no longer in the existing centres of law-making — national parliaments, global legislative institutions and inter-governmental agreements — then, this simultaneously also means that norms of constitutional quality are always being produced there.

Thus, the new phenomena of global juridification imply the possibility that constitutionalisation processes, too, may be played out outside national and political institutions.[47] One should hasten to add that this does not mean that every sector of society now produces its constitutional norms solely under its own auspices. Just as the global juridification of social sub-sectors always shows a proportionate mixture of autonomous and heteronomous law-making, the emergence of global civil constitutions is also a process in which external and internal factors combine.[48] The legal system is always involved, since these processes come about simultaneously within the social subsystem and on the periphery of law. And to a greater or lesser extent, international politics does play a part in the formation of global subconstitutions, by irritating these through political constitutional intervention. How in detail the mixing proportion between external political and autonomous social constitutionalisation takes shape is ultimately a difficult empirical and normative question that depends on unique historical situations. But to the extent that autonomous global law rests upon its own resources, and international organisations, non-governmental organisations, the media, multinational groups, global law firms, professional associations and global arbitration courts push the global law-making process forward, autonomous rule-production is also decisively involved in forming their sectorial constitutions.

[46] J Guéhenno, 'From Territorial Communities to Communities of Choice: Implications for Democracy', in W Streeck (ed), *Internationale Wirtschaft, nationale Demokratie: Herausforderungen für die Demokratietheorie* (Frankfurt am Main, Campus, 1998), at 141.

[47] N Walker (above n.11).

[48] This needs to be stressed to avoid misunderstanding legal pluralism. Economic international law is a mixture of economic and political law-making which is empirically variable. See G Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in G Teubner (ed), *Global Law Without A State* (Aldershot, Dartmouth Gower, 1997).

Ultimately, a remarkable latency phenomenon can be seen here. Civil constitutions will not be produced by some sort of big bang, a spectacular revolutionary act of the constituent assembly on the American or French model. Nor do the global regimes of the economy, research, health, education, the professions have a single great original text embodied as a codification in a special constitutional document. Instead, civil constitutions are formed in underground evolutionary processes of long duration in which the juridification of social sectors also incrementally develops constitutional norms, although they remain as it were embedded in the whole set of legal norms. In the nation-state, the glare of the political constitution has been so blinding that the individual constitutions of the civil sectors have not been visible, or at best, have appeared as part of political constitutions. And, on the global scale, too, they are equally present, albeit only latently, and, remarkable as it may seem, invisible to the naked eye.

As so often, much can be learned hereto from the special case of Britain. Though, on the continent, the prejudice is readily cultivated that Britain has no constitution at all, or that it is, at least, constitutionally underdeveloped, the constitutional qualities of the British polity and the common law have, in the light of Dicey's analyses, repeatedly been clearly worked out.[49] Its substantive qualities in relation to state organisation and fundamental rights, in particular, their protective intensity, can stand any comparison with continental constitutions. The point is social institutionalisation, not the formal existence of a Constituent Assembly, a constitutional document, norms of explicitly constitutional quality, or a court specialised in constitutional questions. *Mutatis mutandis*, this is also true of the civil constitutions of global society. Thus, actualising the latency of constitutional elements would also imply normatively reflecting the de facto course of constitutionalisation, and being in a position to influence its direction.

V. BASIC FEATURES OF CIVIL CONSTITUTIONS. EXAMPLE: A DIGITAL CONSTITUTION

What basic features must be present in order to demonstrate constitutional elements in the various global sectors?[50] Here, the political constitution of the nation-state may serve as the great historical model for civil constitutions, as a stock of historical experience, of procedures, terms, principles, and norms, is available as an analogy for the present situation.

[49] A Dicey, *An Introduction to the Study of the Law of the Constitution* (London, MacMillan, 1964).

[50] See the analysis by N Walker (above n.11); C Walter (above n.11) 188.

Yet, these analogies must be handled with extreme caution, since they can be over-hastily transposed, ignoring the specific features of globalised social sectors.

This is already true of the quantitative extent of constitutionalisation. It is very variable. Nowhere is it written that the comprehensive juridification that covers the whole political process with a dense fabric of constitutional norms has to be repeated in the constitutions of social sub-sectors — one need only think of research or art. Many of their fundamental principles — epistemology or artistic styles — resist any constitutionalisation, while only a limited range — freedom of research and freedom of art — can be brought into legal form. As was stated at the outset, there is always a need for careful generalisation and simultaneous re-specification of the constitutional phenomena. Generalisation means separating the constitutional concept from certain peculiarities of the political system and, in particular, of the state apparatus, something which is, however, extremely delicate in view of the close interpenetration of constitutional and political aspects. Thus, re-specification is a no less delicate matter, since the peculiarities of the sub-system, its specific operations, structures, media, codes and programmes require a far-reaching rethinking of constitutional institutions.

To make this clear from one constitutional problem of global research: how can freedom of research against economic influences be constitutionally protected? Too close an analogy between political and economic power would adequately generalise and re-specify neither the medium that threatens the fundamental right, nor the appropriate sanctions. The criterion cannot simply be, as politically-inspired considerations continually suggest, the social power of economic actors. Instead, the criterion must be the threat that comes from the specific communicative medium of the expansive social system. Thus, freedom of research is endangered not by the repressive power structures of multi-nationals, against which powerless individuals protest. Instead, the new and more subtle dangers for freedom of research are derived particularly from structural corruption through the medium of money. Research dependency on the market denotes the new situation of seduction by economic incentives which clearly cannot be counter-acted by constitutional guarantees of fundamental rights as a protected sphere of autonomy. Posing the question of how to generalise and how to re-specify the constitutional problem and possible responses suggests a more effective constitutional guarantee, namely, to multiply the monetary sources of dependency of research. A constitutional guarantee would make sure that, out of the many dependencies, a single new independence would arise. Drive out the devil with Beelzebub! If the constitution of global science were able not just to make a norm of the multiplicity of differing mutually-competing funding sources for research, but also de facto to guarantee them, then, this would

have an effect on the autonomy of science that need not be shy of the comparison with the effect of traditional subjective rights against political interference.[51]

First Feature: Structural Coupling between Sub-system and Law

Civil constitutions are neither mere legal texts nor are they the de facto structures of social systems.[52] Elements of a civil constitution, in their strictest sense, can only be spoken of once an interplay of autonomous social processes, on the one hand, and autonomous legal processes, on the other, comes about. Or, to put this into the language of systems theory, if long-term structural linkages of sub-system specific structures and legal norms are set up.[53] Only here, can one find the remarkable duplication of the constitutional phenomenon. Structural linkage excludes the widespread perception of a single constitution embracing both legal system and social system. A constitution is always bridging two real on-going processes: from the viewpoint of law, it is the production of legal norms, which is interwoven with the fundamental structures of the social systems; from the viewpoint of the constituted social system, it is the production of fundamental structures of the social system which, at the same time, inform the law and are, in turn, made into norms by the law.[54] The important effect of structural linkage is that it restrains both — the legal process and the social process — in their possibilities of influence. The possibility of one system being swamped by the other is blocked, its respective autonomy enabled, and mutual irritation concentrated upon narrowly delimited and openly institutionalised paths of influence.

The constitution is, to the extent that it is institutionalised as a coupling between two spheres of meaning, thereby responding to a problem that arises in all autonomous norm-building in society: the problem of structural corruption. Thus, the much disputed question of today of whether, how and by what actors the internet is to be regulated, has to do precisely with this.[55] National regulation tends to fail due to implementation problems raised by the transnational nature of digital communication. In

[51] For freedom of science in this perspective, see T Kealy, 'It's Us Against Them', *The Guardian,* May 1997, at 7; for the freedom of art, C Graber and G Teubner (above n.32).
[52] Behrens (above n.38).
[53] On the concept of structural coupling of law to other social systems, see G Teubner, 'Idiosyncratic Production Regimes: Co-evolution of Economic and Legal Institutions in the Varieties of Capitalism', in J Ziman (ed), *The Evolution of Cultural Entities: Proceedings of the British Academy* (Oxford, Oxford University Press, 2002); N Luhmann (above n.4), at 440.
[54] N Luhmann (above n.44).
[55] B Holznagel, 'Sectors and Strategies of Global Communications Regulation', 23 *Zeitschrift für Rechtssoziologie* 2002, at 3–23; Committee to Study Global Networks and Local Values,

contrast, internet regulation, desired by all good men today, through legitimate international law-making, in turn, risks failure due to the difficulties in reaching intergovernmental consensus. This does not, of course, exclude the possibility of continuing to try both, in part, even with success. Yet, the de facto difficulties with both forms of regulation entail that self-regulation of the internet as an autonomous system takes on more value dramatically. Thus, observers of internet regulation speak of a 'trend toward self-regulation'.[56] The internet's self-made law profits not just from the problems with the other two forms of regulation, but additionally from the technical advantages which the code's architecture offers for highly efficient regulation. Thanks to electronic means of constraint, it can largely do without regulation controlled by socio-legal expectations, but the electronic means are, in turn, controlled by meta-legal norms.[57] Thus, the trend clearly goes in the direction of hybrid regulatory regimes.[58] Here, autonomous *lex electronica*, in parallel to the autonomous *lex mercatoria* of autonomous economic law, plays an important role. The arbitration panels of ICANN, which decide on the basis of the autonomous non-national legal norm of §12a of the ICANN policy on domain-issuing, legally bindingly and with electronic enforcement, are a conspicuous part of autonomous digital law-making.[59] And, in an exact parallel with global economic law, *lex electronica* brings with it the problem of structural corruption, that is, the massive and unfiltered influence of 'private' interests on law-making. It is here that the constitutional question of the internet arises.[60]

Here, the chances and limits of a digital constitution must be realistically assessed if the political constitutions that have responded to the problem of the structural corruption of law by politics are to be used as a model.[61] The diffuse dependency of pre-modern law on political pressures, on political terror, and on positions of social and economic power, was given the dual answer by institutions of structural coupling which

Global Networks and Local Values: A Comparative Look at Germany and the United States (Washington DC, National Academy Press, 2001); L Lessig (above n.19); D Post (above n.19).

[56] B Holznagel and Werle (above n.55), at 18; J Goldsmith, 'The Internet, Conflicts of Regulation and International Harmonization', in C Engel (ed), *Governance of Global Networks in the Light of Differing Local Values,* (Baden-Baden, Nomos, 2000).
[57] L Lessig (above n.19), at 43.
[58] H Farrell, 'Hybrid Institutions and the Law: Outlaw Arrangements or Interface Solutions', 23 *Zeitschrift für Rechtssoziologie* 2002, at 25–40.
[59] Jv Bernstorff, in this volume; D Lehmkuhl, 'The Resolution of Domain Names *vs* Trademark Conflicts: A Case Study on Regulation Beyond the Nation State, and Related Problems', 23 *Zeitschrift für Rechtssoziologie* 2002, at 61–78; E Thornburg, 'Going Private: Technology, Due Process and Internet Dispute Resolution', 34 *University of California Davis Law Review* 2000, at 151–220.
[60] See the critique by D Lehmkuhl (above n.59), at 67; M Geist, 'Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP', 2001.
[61] Luhmann (above n.4), at 468.

could not, of course, remove corruption, but could, nonetheless, reduce it effectively: by illegalisation of corrupting influences on the one hand, and increase of legitimate irritability on the other. For the parallel problems of the corruption of law by the economy, it was not the political constitution that gave corresponding answers, but the economic constitution proper that took on a similar function, through the private law institutions of property and contract. The venality of the legal conflict resolution itself was strictly ruled out, and the economic irritations of law were channelled through the mechanism of contract and property. At the same time, this made it possible to reserve ultimate regulation of contract and property to law and politics.[62] A realistic answer to the problems of the structural corruption of cyberlaw ought similarly to come only from the internet's own constitution, as long as it manages to bring about a functioning structural coupling between fundamental digital structures and legal norms. Whether, and to what extent, this sort of constitution of its own is issued politically from outside, whether unilaterally by the US government or by international agreement, or whether it takes shape as an internal self-organising process of the internet, through institutions like ICANN, internal arbitration courts, standardisation organisations such as the World Wide Web Consortium or the Internet Engineering Task Force, and digital civil movements, is quite a different question.[63] It does not, however, change anything about the need for a separate digital constitution for an effective structural link between law and digital communications.

Second Feature: Hierarchy of Norms — Constitutional versus Ordinary Law

Structural coupling of social system and law is a necessary condition for a civil constitution, but not a sufficient one. This is because there are myriads of mutual irritations that do not, however, take on constitutional qualities. This defeats a concept of civil constitution which would be formulated in parallel with the concept of economic constitution, defined as the '*totality* of the legal rules binding for the economies in society'.[64] In addition to the quality of the legal norm and to its structural coupling with a social system, a specific autological relationship, a hierarchialisation between norms of 'higher' constitutional quality and norms of 'lower' quality of ordinary law must exist.

In the first place, there are rules of self-production, that is, constitutional norms that meet the paradoxical requirement of regulating the

[62] Luhmann (above n.4), at 452.
[63] For these options, see Farrell (above n.58).
[64] ME Streit, *Theorie der Wirtschaftspolitik* (Düsseldorf, Werner, 1991), at 24.

lawful production of legal norms, but, at the same time, also regulate their own production, or, instead, refer to a revolutionary act of violence, a social contract, divine foundation or some other foundation myth. Here, Herbert Hart's conception has been particularly influential: he defines law by the existence of a constitutional difference between primary norms (the control of conduct) and secondary norms (the production of law). However, he is thereby running into the problem of an infinite regression of metameta-norms, which is broken off through the arbitrariness of an ultimate rule of recognition.[65] The challenge for a civil constitution lies in identifying separate self-production rules that overcome the narrow focus of the politics-centred law-producing exercise. If even the political constitutional tradition had difficulties with the quality as a legal norm of genuine judge-made law, of international law, of private contracts, private organisational norms and customary law, because, in these cases, the 'official' secondary norms which, in positivised constitutions, refer to parliamentary legislation failed, the problems multiply in the case of autonomous legal systems in the expanses of world society. There have been 30 years of vigorous debates in the case of *lex mercatoria*;[66] and, in the case of *lex electronica*, it is only gradually starting to heat up.[67] The discussion gets hotter once people realise that secondary norms give an answer not just to the cognitive question of 'What is valid law?', but also to the more intricate normative question of 'Who are the legitimate actors and what are the legitimate procedures for producing law?'.

What are the secondary norms that define the transformation of *netiquette*, ie internet good manners (no spamming etc) into digital customary law with universal validity claims? What constitutional empowerment can the standardisation organisations of the internet be based on when they proclaim rules of digital communication and simultaneously implement them in internet architecture? What rules of recognition guide the private internet courts of arbitration that decide domain disputes with a claim to legal bindingness and enforce them directly by electronic means once a brief period for appeal to national courts is over? What secondary norms govern the legal quality of *click wrap rules*, general terms of business

[65] Hart (above n.44), at 77.

[66] For this debate, see K Berger, 'Understanding International Commercial Arbitration', in Centre of Transnational Law (ed), *Understanding International Commercial Arbitration* (Münster, Quadis, 2000); D Lehmkuhl, 'Commercial Arbitration — A Case of Private Transnational Self-Governance?', *Preprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter,* 2000; G Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in G Teubner (ed), *Global Law Without A State* (Aldershot, Dartmouth Gower, 1997); U Stein, *Lex mercatoria: Realität und Theorie* (Frankfurt, Klostermann, 1995).

[67] D Lehmkuhl (above n.59); Geist (above n.59); AM Froomkin, 'Semi-private International Rule-making: Lessons Learned from the WIPO Domain Name Process', 2000.

of internet providers and host providers, which, as in our harmless legal case, decide bindingly as to access to legal institutions? Constitutionalists are taking too much of an easy way out when they dismiss all this as legal fantasies of over-excited Harvard professors. A realistic view will recognise that, in the course of such self-organised legal practises, which, because of the necessary textualisation of digital communication, are highly formalised, constitutional secondary norms emerge, which are able to overcome the validity paradox of self-created digital law and decide selectively on the juridification of social norms.

Third Feature: Judicial Review of Norms

A hierarchy of norms means not just rules for self-production, but also for self-review of law. The law itself declares legally enacted norms unlawful if they are substantively in contradiction with higher level constitutional norms. In highly developed political constitutions, this has, as we know, led to the differentiation between constitutional jurisdiction and ordinary jurisdiction, and between constitutional law and ordinary law. If, now, such explicit differentiation cannot be found in the various social subsectors, does this mean that there are no hierarchies of norms, or that no review of norms takes place? Judicial review of standard business contracts, of private standards of due diligence, of standardisation by private associations, of arbitration court decisions in both the national and the international sphere, are examples of a de facto constitutional review of non-legislative law. One ought not to be deceived by the antiquated private law review formulae of 'good morals', and 'good faith', which the ordinary courts use, as to the fact that here, substantively, it is 'ordre public', ie the fit between 'private' norms and constitutional norms, especially human rights, that is being decided. Yet, a closer look shows that they are being measured not by the political constitution of the state, but by a constitution of their own. The resolve is simultaneously a judicial liberation and a judicial constraint on the dynamics of a system-specific rationality. The institutional dimension of constitutional rights is invoked in private domains of society.[68] Social norms on the periphery of the legal system are, in general, accepted at the centre of the law, but a process of judicial review of law fends off corrupting elements stemming from the shortcomings of the external source of law measured against the standards of due process and the rule of law. At the same time, however, the law

[68] For the institutional dimension of constitutional rights in the private sector, see O Gerstenberg, 'Privatrecht, Verfassung und die Grenzen judizieller Selbstregulierung', 74 *Archiv für Rechts- und Sozialphilosophie. Beiheft* 1999, at 141–56; K-H Ladeur (above n.32); C Graber and G Teubner (above n.32).

acknowledges the intrinsic rationality of the external law-making processes, translates these into the quality of legal norms, and thereby brings about a considerable social upgrading of them.

In its relationship to politics, judicial constitutional review of legislation has presented the model that, so far, exists only rudimentarily in relation to other sub-systems. In what respect does the law have to adjust to the intrinsic rationality of the other sub-systems, and to what extent must influences that corrupt the law be warded off? The constitutional review of political legislation has developed extensive review techniques that neutralise party-political decisions, translate result-oriented 'policies' into universal legal principles, fit political decisions into legal doctrine in accordance with legal criteria of consistency, and, in the worst case, pronounce legislative acts to be unconstitutional. On the other hand, constitutional law has liberated the intrinsic logic of politics by 'politicising' the law itself: teleological interpretation, policy orientation, balancing of interests, impact assessment and result-orientation are indicators for an adaptation of law to the rationality of politics.[69]

Where, however, are the analogous combinations of liberation and constraint formed in relation to non-political sectors of society when non-legislative law-making mechanisms are at work here? Evidently, the review criteria and adjustment mechanisms of the political constitution must be replaced by those of its own constitution. Global technological standards require different legal review, different criteria, different procedures, from, say, international general terms of trade or global codes of conduct of international professional associations.

The internet is concerned with the (in)famous 'code', the digital incorporation of behavioural norms in the architecture of cyberspace.[70] Its liberation and constraint is the general theme of the digital constitution, in parallel with the liberation and constraint of the phenomenon of power in the political constitution. In order to develop legal standards for the 'code', one needs to analyse the specific risks of the cyberspace architecture. What specific dangers does the 'code' entail for individual autonomy? How does the code impact on the autonomy of social institutions? And the legal control standards need to be reconstructed specifically for the architecture of the internet. What kind of legal meta-rules have to be developed in order to secure individual and institutional autonomy against the 'code'.

It is not primarily a matter of abuse of digital power, but the constitutional consequences of the structural differences between 'code' and law.

[69] See G Teubner (above n.34).
[70] L Lessig (above n.19); JL Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules Through Technology', 76 *Texas Law Review* 1998, at 553–84.

Within its reach of application, the 'code' fundamentally transforms the normative order of cyberspace. It is no longer the appellative character of legal rules, but electronic constraints that directly regulate the communication in the internet.

The first relevant issue is the self-enforcing character of the code. In the predominantly instrumentalist perspective of internet-lawyers, this seems to be the great advantage of the 'code',[71] but, in a constitutional perspective, it becomes a nightmare for principles of legality. Traditional law is based on an institutional, procedural and personal separation of law-making, law-application and law-enforcement. This is also true, to a certain degree, for law-making in the private sector. The strange effect of digitalisation is a kind of nuclear fusion of these three elements, which means the loss of an important constitutional separation of power.

A second issue is the trias of regulation of conduct, construction of expectations, and resolution of conflict.[72] Traditional law cannot be reduced to one of these aspects but realises them all, albeit within separate institutions, normative cultures and principles of legality. There is a (hidden) constitutional dimension in this separation. Again, the digital embodiment of normativity in the 'code' reduces these different aspects just to one, to the aspect of electronic regulation of conduct. This entails a loss of space of autonomy.

The third issue is the calculability of normativity. In traditional law, formalisation was rather limited. The (in)famous effects of legal formalism have been relatively harmless in comparison with the effects of the 'code', which allows for a hitherto unknown formalisation of rules. The strict binary relation 0 — 1 which, in the real world, was limited to the legal code in the strict sense of legal/illegal, is now extended in the virtual world to the legal programmes, to the whole ensemble of substantive and procedural structures that condition the application of the binary code. This excludes any space for interpretation. Normative expectations which traditionally could be manipulated, adapted, and changed, are now transformed into rigid cognitive expectations of inclusion/exclusion of communication. In its day-to-day application, the code lacks the subtle learning abilities of law. The micro-variation of rules through new facts and new values is excluded. Arguments do not play any role in the range of code-application. They are concentrated in the programming of the code, but lose their power in the permanent activities of rule interpretation, application and implementation. Thus, informality, as an important countervailing force to the formality of law, is reduced to zero. The code

[71] In this instrumentalist perspective of law, there is no great difference between the two protagonists of law and internet, L Lessig (above n.19) on the one hand, and D Johnson and D Post (above n.19) on the other.
[72] N Luhmann (above n.4), at 124.

knows of no exception to the rules, no principles of equity, no way to ignore the rules, no informal change from rule-bound communication to political bargaining or the everyday life abolition of rules. No wonder that such a loss of 'reasonable illegality' in the cyberworld nurtures the myth of the hacker, who, with his power to break the code, becomes the Robin Hood of cyberspace.

If these are code-specific risks for individual and institutional autonomy, then, it becomes clear that certain policy proposals for the internet do indeed have constitutional quality. The open-source movement which demands transparency of the code for any software programme is constitutionally as relevant as the principle of narrow tailoring which should be developed into a code-specific variation of the constitutional proportionality principle which needs to be respected in the private regime of the internet.[73] Judicial review and other public controls of the meta-rules of the code gain an importance which is — due to the code-specific risk — even higher than the judicial controls of standard contracts and the rules of private organisations. And competition law needs to develop non-economic criteria for the legal structure of information 'markets' in order to allow for a high variety of code-regulations.[74]

Fourth Feature: Dual Constitution of Organised and Spontaneous Sectors

If political constitutional law has de facto to regulate two great areas of politics — the organisational law of the state and the citizens' fundamental rights — how is this to be appropriately generalised and specified? My suggestion is that the point is always the making of norms for a formally organised sector and a spontaneous sector within a sub-system, and, in particular, the precarious relationship between them.[75] The democratic character of a constitution seems to depend on whether a dualism of formally organised rationality and informal spontaneity can be successfully institutionalised as a dynamic interplay without the primacy of one or the other. In politics, the point is mutual control by the formally organised sector of political parties and state administration on the one hand, and the spontaneous sector of the electorate, interest groups and public opinion on the other. This is continued in globalisation, in the relationship between the spontaneous sector of international relations and of

[73] L Lessig, *The Future of Ideas*, (New York, Random House, 2001), at 49; J Boyle, 'Fencing Off Ideas', *Daedalus*, 2002, at 13–25; Y Benkler, 'Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain', (Conference Paper, 2001) at: *http://james-boyle.com*.
[74] For these arguments, see L Lessig (above n.19), at 43.
[75] For this argument, see G Teubner (above n.34).

international organisations under other auspices. In the economy, the relationship of tension between the market-constituted spontaneous sector and the organisational sector constituted in enterprises is certainly established—especially, after the most recent globalisation thrust. In world-wide research, too, there seem to be tendencies towards a development of a global spontaneous sector as against formalised research organisations. In the education, the world-wide competition of universities seems to be taking on the role of a spontaneous sector. In all these sectors, the constitutional challenge would be to underpin the duality of social autonomy in the sub-systems, that is, the control-dynamics of the spontaneous sector and the organised sector, in normative fashion, too.

In cyberspace, we again see similar developments. Lessig fears a development of the internet towards an intolerable density of control by a coalition of economic and political interests.[76] Whereas, in its anarchical beginnings, the internet was built up on the principles of the inclusion of all, of anonymity, freedom from control and heterarchy, today, the politically and economically motivated tendencies towards the emergence of so-called intranets, ie closed networks, based on exclusion, control, hierarchy, and strict goal-orientation, are growing stronger. The same development can, however, also be interpreted differently, namely, as an internal differentiation of cyberspace into an anarchical spontaneous sector (internet) and various highly organised special sectors (intranet). The parallel with other social systems where a mutual control relationship between the formally organised sector and the spontaneous sector which has grown up is clear. Politically, the point would not be, as Lessig *et al* think, to combat a development to cyber-corporatism, but to stabilise and institutionally guarantee the spontaneous/organised difference as such. The constitution of the internet would distinguish between spontaneous public sectors (similar to the fundamental rights section of the constitution, or to constitutional law of the market) and the highly formalised organised sectors (resembling the law of organisation of the state, or company law), stabilised both in their intrinsic logic, and see its main task as being to build up mutual control by them.

Translated by Iain L Fraser

[76] L Lessig (above n.19).

2

Constitutionalism or Legal Theory: Comments on Gunther Teubner

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I. CONSTITUTIONALISATION OF AUTONOMOUS SUB-SYSTEMS OF WORLD SOCIETY

TEUBNER STARTS WITH the thesis that various 'global sectors' are simultaneously currently experiencing processes of juridification and constitutionalisation. This proposition has direct ties to earlier ideas concerning transnational legal pluralism.[1] The continental European positivist conception of legal validity being dependent on the will (and command) of a political body is replaced by a concept of self-reference. The legal system produces law not only by taking up irritations from state legislation but also by acting on impulses from non-political environments. In legal pluralism, the spontaneous emergence of law even becomes the rule, whereas legislation by state authorities appears to be an exception, an external intervention from outside the legal system. In other words, Teubner neglects the idea of a pre-eminence of state law and argues for recognising that the law can be self-producing and is paradoxically founded in itself. This is not meant merely as a challenge to legal theory, for example as a challenge to Hart's theory of the ultimate rule of recognition.[2] Rather, Teubner shares the view that the legal system solves its foundational paradox pragmatically and has already developed to the point where one can meaningfully speak of a 'world legal system'.[3] In other words, the idea is that an autonomous network of legal communications has arisen that produces

[1] See G Teubner (ed), *Global Law without a State*, (Aldershot, Dartmouth Gower, 1997).
[2] See HLA Hart, The Concept of Law, (Oxford, Clarendon, 1961), at 97–120.
[3] H Coing, *Zur Geschichte des Privatrechtsystems*, (Frankfurt am Main, Suhrkamp, 1962), at 28; see, more generally, N Luhmann, *Das Recht der Gesellschaft*, (Frankfurt am Main, Suhrkamp, 1993), at 571–86.

its inventory of norms primarily from a plurality of transnational processes of rule-making. The legal system refers to various processes of self-organisation and self-coordination on the global level, for example the incremental forming of conventions (eg *lex mercatoria*), the reception of internal standards set by networks of companies, organisations and regulatory agencies (eg world-wide standardisation processes), rules emerging out of market relations (eg contracts between global players) and so on. However, Teubner's paper discussed here not only wants to demonstrate that such rules enjoy *de jure* 'normative' quality; a situation along the lines of a constitutional pluralism beyond the nation-state is moving forward. The thesis is that we are witnessing 'the constitutionalisation of a multiplicity of autonomous subsystems of world society', the emergence of a 'multiplicity of civil constitutions'.

II. THE WEAK CONCEPTION OF SOCIETAL CONSTITUTIONALISM

Teubner touches on an ambiguous usage of constitutionalism. In the final analysis it operates with two different conceptions of 'societal constitutionalism', which I call the strong and weak conceptions. In its weak version, the paper observes factual processes of institutionalising 'constitutional *elements*' in 'global sectors'; it appeals to the fact that 'every process of juridification also contains latent constitutional normings'. Teubner argues that the internet may serve as an example for such a constitutionalising process. Similar to Lawrence Lessig,[4] he understands most of the legal questions that the internet gives rise to as constitutional questions. Thus he sees the project of answering these questions as processes concerning the construction of constitutional norms and institutions. To illustrate this thesis, Teubner uses *Cubby v Compuserve* and claims that this case could be interpreted as an example where different political groups argue about access to Compuserve's websites. Underlying this case, it is said, is the 'more fundamental question of a universal political right of access to digital communication'.

If one interprets Teubner's considerations within the framework of a weak conception of societal constitutionalism one can by and large agree with his thesis of simultaneous juridification and constitutionalisation. Recourse to arguments of various national constitutional cultures, which represent 'a stock of historical experience, of procedures, terms, principles, and norms', is productive even for a new global law that relies more heavily than state law on mechanisms of spontaneous law-making. In this case, the new phenomena do not so much touch on the constitution as

[4] L Lessig, *Code and Other Laws of Cyberspace*, (New York, Basic Books, 1999); and L Lessig, *The Future of Ideas*, (New York, Basic Books, 2001), with an accent on 'innovation'.

such, but rather take recourse to *individual* politico-institutional and legal elements of the various national constitutional orders. From this perspective, the national constitutions would be tapped to solve legal problems at the transnational level by applying national constitutional elements to the new phenomena in a way appropriate to transnational network like structures.[5] For example, most observers agree on the increasing importance of technical standards and thus the related forms of standardisation and rule-making being produced by the internet ('*lex informatica*').[6] The increasing importance of technical standards produces new types of path dependencies for technological developments that cannot be accepted in view of the public interest in a technologically open internet. The normative idea that the permissible areas of interaction between 'digital communication structures' and their environments must be limited by 'fundamental legal norms' is justified against this background. The development of secondary norms, of meta-rules of rule-making, can also contribute to this. Certain legal questions concerning access to the internet, as they arose in the *Cubby v Compuserve* case, for instance, may also be better legally structured by recourse to the national constitutional elements, for example by recourse to differences evolved in print media (eg publishing v distributing) or to components of the American Supreme Court's 'fairness doctrine'.

III. THE STRONG CONCEPTION OF SOCIETAL CONSTITUTIONALISM

I am much more sceptical of the strong version of societal constitutionalism. The strong version wants to give the constitutional concept in the areas of global phenomena a similarly prominent rank as it had once occupied in the nation-state context. The goal of this concept is to put social organisations under a 'constitutionalising pressure' and secure 'the multiplicity of social differentiation against swamping tendencies.' Teubner believes that modern society is characterised by an increasing tendency towards 'instrumental calculation' and 'bureaucratic organisation'. This justifies overlapping the constitution with a self-reflexive property. Against this background, societal constitutionalism is given the task of preserving 'the chances of articulating so-called non-rational logics of action against the dominant social rationalisation trend'. A critique of this

[5] See K-H Ladeur, 'Die rechtswissenschaftliche Methodendiskussion und die Bewältigung des gesellschaftlichen Wandels', (2000) *RabelZ*, Vol. 64, at 98–103; and K-H Ladeur, 'Towards a Legal Theory of Supranationality — The Viability of the Network Concept', 1997 *European Law Journal*, Vol. 3, at 33–54.

[6] J Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules through Technology', 1998 *Texas Law Review*, No. 76, at 553–84.

strong version of societal constitutionalism assumes certain fundamental considerations and reflections regarding the modern conception of a constitution which I can only outline here.

As Teubner himself admits, it is extremely difficult to separate the concept of a constitution from its close relationship with certain characteristics of the nation-state. Yet the project is predicated precisely on the possibility of separating both aspects. The idea of a constitution, which has its origins in Roman and canonical law, has been tied to the nation-state since the 18th century insofar as it takes as its basis the creation of a stable political order through a positive act of will, that is, a will that severs itself from the fetters and limitations of tradition and becomes effective in a 'revolutionary' way. As James Tully puts it:

> 'A modern constitution is an act whereby a people frees itself (or themselves) from custom and imposes a new form of association on itself by an act of will, reason and agreement.'[7]

Even if the radical voluntarism of the modern constitutional concept, deriving the constitution from a single will of a sovereign nation, is basically a product of the French revolution (in particular: the radical wing of the French constitutional movement influenced by Rousseau[8]), it is beyond question that some notion of *political* unity belongs to the modern concept of a constitution. This is even the case in the liberal tradition of modern political thought, as a quick glance at the theory of representation, a core component of modern constitutionalism, may show. 'A Multitude of men made *One* Person,' Thomas Hobbes states,

> 'when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the *Unity* of the Representer, not the Unity of the Represented, that maketh the Person One.'[9]

After the consolidation of the sovereign state and the Westphalian system, the reference point of this *political* conception of unity is shifting from the unity of Hobbes' artificial person to the unity of representing a *territory* with clear and well-defined borders. In the French revolution this conception of political unity within a defined geographic region served as the constitutional basis for the political form of existence of a group of people. The latter are conceived less as individual people, but rather as

[7] J Tully, *Strange multiplicity*, (Cambridge, Cambridge University Press, 1997), at 60.
[8] KM Baker, 'Verfassung', in: F Furet/M Ozouf (eds), *Kritisches Wörterbuch der Französischen Revolution*, Vol. 2, (Frankfurt am Main, Suhrkamp, 1996), at 896–919.
[9] T Hobbes, *Leviathan* (1651), Richard Tuck (ed), (Cambridge, Cambridge University Press, 1996), at 114.

members of a population, as bearers of natural and cultural commonalities. As bearers of such commonalities, a nation, for example, is able to constitute a political body and its representation by one 'representer' (for example, the will of a parliamentary majority). Seen from the perspective of sociology or system theory, the constitutional concept assumes a political or regional concept of society. In this the modern constitutional concept continues in the Aristotelian 'politeia' tradition, yet also transforms the assumption of a natural, god-given order through the idea of a transparent, controllable and politically viable order. This means that the 'modern' constitutional concept is in reality only half modern: from the beginning it oscillated between the political system as a spatial order and society as a trans-spatial concept. For this reason constitutionalism has never been able to find a stable basis for its identity beyond its self-given role as a constitutional document.[10]

The notion of political unity within the constitutional concept has led many authors to accentuate the close relationship between constitutional and religious thought. Particularly in more or less free floating theories of the politically constituted community, as one finds for example with Rousseau or later with Carl Schmitt, one must speak of a religious nature of the politico-legal authorisation of sovereignty. Nevertheless, an explanation that presents the modern constitutional concept as a secular variant of a religious community is only satisfactory if it takes into consideration the fact that both the idea of a common territory as well as the idea of a single political (founding) will have their origins in the Enlightenment's formal natural law. Yet social philosophy's rule of reason, in turn, is itself unthinkable without the rationalism of modernity, and modern rationality is in the first instance the result of a break with the heteronymous ordering and rationality principles of ancient Europe, which was replaced by the autonomous geometric world view of the modern mathematical natural sciences of Galileo, Descartes, Hobbes and Newton.[11] Thus the world of theory and also the world of constitutional philosophy and constitutional theory became the object of a 'mathematical blueprint'.[12] Constitutional thought is therefore bound by a deductive-axiomatic system of thought. One can now only speak of a constitution if one speaks of a system, and a system is only given

> 'when the relationship between the individual pieces of knowledge is without gaps and can be presented in the form of deductions from certain

[10] See N Luhmann, *Die Politik der Gesellschaft*, (Frankfurt am Main, Suhrkamp, 1993), at 392.
[11] F Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd edn (Göttingen, Vandenhoeck & Ruprecht, 1967), at 249–80.
[12] M Heidegger, *Die Frage nach dem Ding* (1935/36), 3rd edn (Tübingen, Mohr Siebeck, 1987), at 42–92 & 69; on these relationships, see, also, above n.11 at 255.

> axioms, in other words, the individual statements are able to be deductively derived as logical results from certain basic assumptions'.[13]

In my view, this is the reason why the constitutional concept gets caught in the mire of a logic of identity even if the moment of foundation, the generation of sovereignty, is not accentuated. This is true for its liberal reading, focusing, as does English constitutionalism, on a balance between tradition (monarchy) and reason (parliament). But it is also true for any systematic approach: The balance between political and social forces always poses the question of commonalities of all forces relating to the political unity. In any case, social philosophy assumes, at least in some liberal variants, the unity of politics and law. It applies this unity to a politically defined authority, to an artificial person who rules a commonwealth. 'Security' and 'freedom' no longer exist in this commonwealth as they do in the state of nature, but must be created. In Thomas Hobbes' Leviathan this idea of unity manifests itself in an authorisation of a sovereign will by law, but, as Hobbes stresses, can be represented only by *one* will, the sovereign will of the common power, embodied in the king.[14] Although somewhat simplified, one can nonetheless say that the constitutional concept since the French revolution, as seen from the perspective of the legal system, is to bind the social construction of order to the principles, rules and conventions of a national area of law. With the coming of age of the print medium this implies a successively increasing importance of constitutional rules and institutions in American, English, French and German texts on constitutionalism, in (constitutional) documents and other forms of publications. Finally, beyond publications, the constitutional concept can exercise different degrees of pressure on politics, law and other communication networks. For example, this influence is seen early in the English political system,[15] but not in the legal system because the influence of social philosophy remained weak[16] as other communications media, the oral (local) tradition of common law dominated.

This discrepancy between the logic of identity, which the constitutional concept assumes for its idea of political unity, and the differences to the real world, which the constitution recognises in its section on civil rights

[13] H Coing, *Zur Geschichte des Privatrechtsystems*, (Frankfurt am Main, Suhrkamp, 1962), at 9 (my translation).

[14] 'The only way to erect … a Common Power … is, to confer all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will.' T Hobbes, *Leviathan* (1651), R Tuck (ed), (Cambridge, Cambridge University Press, 1996), at 120.

[15] D Grimm, *Die Zukunft der Verfassung*, (Frankfurt am Main, Suhrkamp, 1991), at 51, 52, 104 & 105.

[16] GJ Postema, *Bentham and the Common Law Tradition*, (Oxford, Oxford University Press, 1986), at 263–67.

and liberties, led to the failure of the French revolution. The tension between the advantages of trade and human rights, on the one hand, and a single political will, on the other, resolved in the radical constitutional movement in favour of an alleged homogeneous civic virtue, ended in a reign of terror legitimated by messianism.[17] The divergence between unity and diversity in constitutionalism became even greater with the emergence of parties, associations and social organisations since the industrialisation of the 19th century. In course of the 20th century this discrepancy changed the constitution into a politico-strategic manoeuvring instrument by very different social and political groups. On the threshold of the 21st century constitutions are still exported all over the world, but their binding force has become more dubious than ever in the Western countries, as can be perceived, for instance, from the fact that constitutional questions overwhelmingly tend to become virulent in connection with media events (presidential elections, EU-constitutional conventions, staged constitutional conflicts for political 'existential questions', etc). In recent French political philosophy the symbolic and religious value of the idea of political unity in the modern constitutional concept is once again emphasised.[18] Accordingly, an important function of the constitutional concept is to symbolise a simplified, compact order in a world that, in reality, is complex and amorphous. The constitutional concept as a simplified 'unity formula' would then have an independent meaning, but would also represent only a mediated reality, so to speak. It would no longer be about a 'representation of the real', but rather about 'the reality of a representation, its effectiveness and efficiency'.[19] Yet even if one argues in this manner one cannot escape the fact that the embodiment of identity, the reality of a representation, has so far only been effectual in the nation-state and its various myths of unity. The 20th century experiences with this 'unity myth' hardly suggest a continuation of this mythology. Consequently, a liberal reading of the constitutional concept's myth of the unity of the constitution has to be rejected: instead a spontaneous self-coordination of individual interests must be chosen as the starting point, legally anchored in individual liberties (human rights) and the cognitive 'social capital' contained therein.[20] The constitutional concept then remains as an (imaginary) reference point for a nation-state-like past, retained in texts on constitutional theory and the various attempts to

[17] See above n.8 at 918 & 919; see also F Furet, *Das Ende der Illusion*, (München/Zürich, Piper, 1995), at 49.
[18] For a critical position, see M Hirsch, 'Der Staat als Kirche', in G-P Callies, M Mahlmann (eds), *Der Staat der Zukunft*, (Stuttgart, Steiner, 2002), at 155–71.
[19] J-L Nancy, *Etre singulier pluriel*, (Paris, Galilee, 1996), at 79 (my translation).
[20] For such a perspective, see K-H Ladeur, *Negative Freiheitsrechte und gesellschaftliche Selbstorganisation*, (Tübingen, Mohr Siebeck, 2000), at 21–46.

harmonise civil law forms of self-coordination (civil rights) and public interest (politics), material to which a weak conception of societal constitutionalism could and should turn.

Teubner himself indicates such a perspective and he even claims that the 'oscillation between the political and the social' is problematic for traditional constitutionalism. However, instead of assigning the constitutional concept a peripheral role in a weak conception for the new phenomena of global networking, he opts for the construction of 'structural coupling', a theoretical component of systems theory. By this operation Teubner hopes to be able to free constitutionalism from the 'fascination of the nation-state architecture', the state-cantering of all constitutionalism, and generalise the constitutional concept by adding the term 'civil'. Yet this cannot work even as a theoretical operation and is therefore also doomed to failure in practice. Again, I can only outline my objections.

For Luhmann the rise of constitutions expresses a very *specific* coupling, namely the link between law and politics since the American Declaration of Independence.[21] The constitutional concept forces systems theory to qualify its starting point 'system'. The notion of the legal system's autonomy must be expanded by politics (and vice versa) via the concept of 'structural coupling'. According to this conception, however, both functional systems remain autonomous, operatively closed, continually self-producing and reproducing different systems. They function exclusively within their own system, whereas the information exchange between law and politics is only possible within a very narrow band where reciprocal irritations may occur. This does not exclude, but instead includes the fact that reciprocal irritations can have enormous consequences for the dynamics of the respective system: the 'coupling mechanisms' can create a 'structural drift' that leads to a memory of a unique history of constitutionalism in each of the different systems which can only be explained by the coupling mechanism *between* the systems. Teubner himself cites constitutional review of legislation as an example for the causal effects of such a connection: on the one hand, political decisions are partially neutralised in favour of legal principles and consistency, on the other hand, the legal system is forced to take over the language of politics in its results-oriented weighing of interests. This is in fact the case in the jurisdiction of the German Constitutional Court *(Bundesverfassungsgericht)*; another example for this would be the jurisdiction of the ECJ. However, despite structural couplings, it is clear that from the perspective of systems theory, modern society is no longer conceivable — as for example the Greek polis — as a *political* unity. Unity can now only be conceived (formally) as a communicatively networked global

[21] N Luhmann, *Das Recht der Gesellschaft*, (Frankfurt am Main, Suhrkamp, 1993), at 470.

society and (substantively) as an ensemble of functionally differentiated autonomous global systems. This also has consequences for the self-description of law and its boundaries: only the law can produce and reproduce its own boundaries. System theory thus adopts (and modifies) the idea, developed by the jurisprudence around 1800, of a completely positive and philosophically systematic law,[22] in other words, a law that, independently from non-legal, external influences, is able to produce and renew its own unity as a 'system' (even if, at first, this is within the framework of the nation-state).

Teubner's ideas on transnational constitutional pluralism are built upon this model of autonomous global communications systems. There are, to be sure, some differences in the accents regarding the possibility of a 'globalisation of the political system', but otherwise Teubners own theoretical considerations are consistent with the Luhmannian theory of differentiation. And this is the point where a lack of consistency in the idea of societal constitutionalism occurs. Teubner wants to separate the constitutional concept from its traditional moorings in politics — to free the constitutional concept from its focus on 'seeing the constitution as tied to state-political action' — precisely because the notion of a 'world constitutional law' has limited effectiveness. However, it remains unclear how modern constitutionalism can be detached from its nation-state moorings without robbing it of its uniqueness and, therefore, making it impossible to establish an agreement on the content of the concept.

The first objection can be formulated within the framework of system theory itself: if the constitution is the product of a *specific* coupling since the second half of the 18th century, the constitutional concept cannot simply be detached from its counterpart politics and reattached to other subsystems such as the economy, science or the internet. If politics is deleted from the structural coupling 'constitution', there remains only law. How various coupling effects with other systems is to once again create the constitution is mysterious, for example how law and economics becomes an economic constitution, law and science a scientific constitution, or law and the internet a digital constitution. The already precarious unity of the constitutional concept in system theory would finally dissolve into a myriad of 'structural couplings' and the constitutional concept would mutate from a specific structural coupling (the coupling of law and politics) into a highly variable relational concept of different possibilities of couplings. Of course, it is conceivable that world society is moving towards this direction. But the objection remains, however, that it is not conceivable within system theory that 'structural couplings' sometimes spring up

[22] F Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd edn (Göttingen, Vandenhoeck & Ruprecht, 1967), at 370–71.

here, sometimes there. From the perspective of system theory, a 'multiplicity of civil constitutions' is simply not possible; at any rate, not without a loss of internal consistency. A plurality of couplings would make it impossible to determine which 'autonomous global subsystem' the constitution's autonomy is anchored in: instead of politics *and* the law now in the law *and* the economy, the law *and* science, the law *and* the internet, or everywhere or only in the law?

Nor can a more precise determination of 'civil constitutions' be won by the addition of such descriptions as 'structural coupling subsystem/law', 'norm hierarchy', 'judicial review' or 'dual constitution of organised and spontaneous spheres'. Above all, such a procedure cannot resolve the question of what constitutes the unity of these criteria. According to the traditional constitutional concept, the common basis of all the components of a constitution — civil rights, democratic procedures, political institutions — lies in the relation between these components and the nation-state. The constitutional concept can function under this condition: in the context of the nation-state, the difference, for example, between the constitutional characteristics of federal judicial power (government structure) and civil rights (society) can be traced back to the unity of a single constitutional concept. This 'unity' is, of course, a self-produced context, a myth, in the medium of language/writing. Yet this self-description has been able to make itself plausible as a real or at least *symbolically real* concept for over two hundred years. It must be recalled, however, that the environment was congenial: the existence and 'dominion' of the nation-state. The more the nation-state's contours were eroded internally by its transformation into the welfare state in the 20th century and the more its importance is further relativised externally by 'globalisation' in the 21st century, the less clear and relevant the concepts tied to the nation-state become. This applies also and particularly to the constitutional concept; in any case, Teubner needs to demonstrate that the 'global sectors' which are to serve as the new point of reference for a 'multiplicity of civil constitutions' have similarly stable, unity inducing qualities as the nation-state once did. There may be an example for this, but the internet is not it. The internet is not an 'autonomous communications system', that is, a form with clear boundaries, but rather a new type of communications *medium*[23] based on a digital code[24] by means of which all other communications media (language, pictures and sound) can be integrated. The internet is thus a new 'trans-medium' which, in principle,

[23] N Luhmann, *Die Gesellschaft der Gesellschaft*, Vol 1, (Frankfurt am Main, Suhrkamp, 1993), at 309 & 310; see, also, E Esposito, *Soziales Vergessen*, (Frankfurt am Main, Suhrkamp, 2002), at 287–303.

[24] On the consequences, see M Sandbothe, *Pragmatische Medienphilosophie*, (Weilerswist, Velbrück, 2001), at 182–205.

has no boundaries. That is what makes the internet such an interesting object of study. It is likely that the internet will restructure the functional systems' media characteristics and thus also change the modern society's concept of differentiation. From this insight the thesis that there will not be a 'digital constitution', just as there has never been a legally relevant 'language constitution', can be developed. More generally formulated: the network of networks which will arise as a result of the internet takes the rug out from under the assumption of autonomous sub*systems*; a strong conception of 'civil constitutions' has nothing to latch onto.

If this analysis is correct, then the consistency of societal constitutionalism can only be founded on the basis of political philosophy. Its basis would then be the good intention to mobilise the constitutional concept for the institutionalisation of *self-enlightening* potential. With Teubner, the motive of reducing the constitutional concept to its self-reflexive 'political' characteristics with the help of the term 'civil' is not as prominent as it is with certain adherents of the 'civil society' or as it is in Jürgen Habermas' political philosophy. Yet similarly to Habermas, where the vigilant citizenry, under the protection of the 'autonomous public' lays siege to state power,[25] Teubner's concern is for a world-wide protection of 'autonomy spaces' that secure the opportunities of expression for so-called non-rational logics against the dominant social trend towards rationalism. This consideration is also explicitly associated with a post-Rawlsian approach to a theory of 'deliberative democracy' that is not limited to politics. Yet already the concept of the societal constitutionalism is revealing in this context: its meaning feeds, in the end, from a negative fixation on the myths of the nation-state. The use of the term 'constitution' permits ascribing a normative 'added value' to the new phenomena of global networks, but in reality this alleged 'added value' only conceals the high volatility and vagueness of such concepts as 'the digital constitution'.[26] In the end, the constitutional concept only functions as a store to keep a transfigured memory of democracy's creation myths alive. All this indicates that the constitution today can only be maintained — if at all — as a weak concept. For the new phenomena beyond the nation-state, the alternative to a state-centred constitutional theory can only lie in rejecting constitutional theory and replacing it with legal theory.

[25] J Habermas, *Faktizität und Geltung*, (Frankfurt am Main, Suhrkamp, 1992), at 435–67.
[26] The vagueness of the constitutional concept is also criticised by Rainer Wahl, 'Konstitutionalisierung — Leitbegriff oder Allerweltsbegriff?', in: CE Eberle (ed), *Der Wandel des Staates vor den Herausforderungen der Gegenwart*, (München, Beck, 2002), at 191–207.

3

Polycontextuality as an Alternative to Constitutionalism

INGER-JOHANNE SAND
OSLO

I. INTRODUCTION: WHAT CAN THE FUNCTION OF CONSTITUTIONALISM BE IN A MORE TRANSNATIONAL SOCIETY?

CONSTITUTIONALISM HAS BEEN an inherent and interwoven part of modern legal systems, as well as of the concept, the traditions and the definitions of the modern nation-state. Constitutions have been the link between the nation-state and the institutions of law. Constitutionalism implies and requires a boundedness in space, both institutionally and normatively, as well as the idea that some norms have a more superior status which can only be transgressed by very specific procedures. Hierarchies have, thus, also become a defining part of the national legal systems. This implies not only a preference, but also defines a demand for coherence and continuance in law. It creates a set of procedures on a higher or a more binding level, and creates certain legal obligations among the citizens, or between institutions and citizens. The presumed territorial boundaries will also imply the parallel existence of cultural, social and linguistic contexts and boundaries, and their systematic reflection into the legal system. The more specific ideas of what is legally-binding may, however, vary. It may pertain to ideas of originality, but also to notions of ideological and social change.[1] Parliaments or courts may be the final arbiters. The existence of constitutions does, however, also imply the ability to make exceptions.[2] Total continuance would not be possible. This is the paradox of constitutions: they are both stable and indeterminate.

[1] See MP Maduro, 'Europe and the Constitution: What if this is as good as it gets?' in: JHH Weiler, M Wind (eds) *European Constitutionalism beyond the State* (Cambridge, Cambridge University Press, 2002).
[2] See G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, Stanford University Press, 1998), at 15.

By their boundaries, constitutions have enabled an internal richness, complexity and interplay of norms within an institutional and a meaning-based *boundary*. The constitutionality and the boundedness have, on the one hand, applied to the stabilising of specific normative principles, and, on the other, to the stabilising of both the institutions and the social and cultural contexts of nation-states (including notions of fairness).[3] The simultaneous existence of cultural, social, linguistic, political and legal boundaries have led to mutual interaction and repercussions between these various dynamics, and to their stabilisation. The cultural context of the nation-states have silently repercussed into the interpretation of the legal texts. The price for the richness within the boundaries has, however, been a formidable emphasis on hierarchy and coherence in the national legal systems.

Global and transnational dynamics have become increasingly vital for the economy, in the sciences, in most knowledge-based areas, in the arts, and in mass-media, etc. The marketplace is increasingly being economically and legally institutionalised as global or regional. Telecommunication and information technologies have had enormous repercussions in many fields. Environmental and climate change is increasingly perceived as predominantly transboundary and global, and the problems of such change are perceived as being to some degree acute.[4] The number of international treaties is increasing, as is their range and significance. The question, then, is what the consequences of this will be for *constitutionalism,* the forms of law which have been part of this (coherence), and the democratic traditions of law as seen in the form and tradition of the nation-states. Politically, legally and institutionally, a form of multi-level governance system has emerged with changing and more open relations among the various levels.[5] Interdependence is probably a more precise and to-the-point description than parallel autonomies. The question is how or whether constitutionalism and the sense of boundaries, coherence and basic norms can survive, change or re-emerge in the form of functional equivalents in a more complex dynamic. The idea of this article is to discuss the new international and transnational contexts of governing and law. It will be proposed that a wider scope of cross-disciplinary politico-legal and socio-legal theories will be needed for an understanding of these changes.

[3] See JHH Weiler, 'To be a European Citizen: Eros and Civilisation', in *The Constitution of Europe*, (Cambridge, Cambridge University Press, 1999) at 324.
[4] See U Beck, *Risk Society*, (London, Sage, 1992), and 'Risk Society and the Provident State' in: Lash, Szerszynski and Wynne (eds) *Risk, Environment and Modernity*, (London, Sage, 1996) at 27; N Luhmann, 'Risiko und Gefahr' in *Soziologische Aufklärung* 5, (Opladen, Westdeutscher Verlag, 1990).
[5] See G Teubner, 'Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory', in this volume.

II. NATIONAL AND INSTITUTIONAL UNITIES VS SOCIAL DIFFERENTIATION

Constitutionalism and the various institutions and procedures of the nation-states have contributed to the relative institutional and contextual stability of modern societies, as well as to their evolutionary dynamics. A distinctly different dynamic of modernity is the functional differentiation and specialisation of the different spheres and social systems of society, already observed by Weber, which result in both general social systems such as law, politics and economics, and more diverse, local and systematically differentiated social discourses. This has evolved from within, but has also increasingly exceeded and changed institutional (and national) boundaries. Theories of functional differentiation emphasise modern society as consisting of several distinctly different systems, or spheres, of communication, such as law, politics, economy, science, mass-media, religion, etc and of a multiplicity of social discourses.[6] Thus, *society* is not a communicative and normative unity which can be fully represented by one sovereign or parliamentary body. Distinctly different ways of communicating about and organising society have emerged from different social functions, social fields, disciplinary or knowledge-based areas, and the various rationalities at work there. They have emerged autonomously and are normatively distinct. They interact, combine and influence each other, but there is no centre within or among them.[7]

Modernity as we know it, has evolved from the social and communicative wealth which the functional and communicative *differentiation* and specialisation have allowed for, combined with the relative stability of the democratic and legal institutions of the nation-states and their focus on *boundedness*. The processes both of communicative and normative differentiation, and of specialisation, and the resulting disembeddedness, fragmentation and lack of normative unity, may, most pointedly, characterise modernity.[8] The political and legal institutions of the nation-state based on ideas of democracy, sovereignty, boundedness and rule-of-law have however, also been vital elements in the operative evolution of modernity.[9] The dynamics of the general communicative processes of science, economy,

[6] See M Weber, *Wirtschaft und Gesellschaft*, 5th edn (Tübingen, Mohr, 1980), part VII, ch.5 and 8; N Luhmann, *The Differentiation of Society*, (New York, Columbia University Press, 1982), *Soziale Systeme*, (Frankfurt am M, Suhrkamp, 1984), and *Gesellschaft der Gesellschaft*, (Frankfurt am M, Suhrkamp, 1997); J Habermas, 'Postscript', in *Beyond Facts and Norms*, (Cambridge, Polity Press, 1996) at 447; and G Teubner, 'De Collisione Discursum', (1996) 17 *Cardozo Law Review*, at 901.

[7] See G Teubner, 'Social Regulation through Reflexive Law', in Z Bankowski (ed) *Law as an Autopoietic System*, (Oxford, Blackwell, 1993) at 64.

[8] See A Giddens, *Consequences of Modernity*, (Stanford, Stanford University Press, 1990); N Luhmann, above n.6; G Teubner, above n.5 and n.6.

[9] See J Bartelson. *The Critique of the State*, (Cambridge, Cambridge University Press, 2001).

and politics, etc and of the institutions based on nation-state boundaries are clearly different, but the dynamics of social differentiation and boundedness can also be said to be supplementary. Political and constitutional theories may have emphasised the unity and the boundaries of the nation-state. Theories of social and communicative differentiation may offer a theoretical supplement in the study of politics and law by their focus on the dynamics of differentiation.[10] The general communicative systems of science, economy, politics, and law, etc are becoming increasingly vital in the analysis of the processes of globalisation vis-à-vis the more bounded institutional processes of law and politics.[11]

The application of the concepts of *governance* and *the transnational* have emerged as part of, and as responses to, a more comprehensive discourse on what governing may be.[12] The literature discussing these concepts and what they designate, is by now numerous, diverse and fragmented, and has not formed any consistent tradition. What the concepts do have in common is an emphasis on governing as a *comprehensive* and *complex* field which applies a broad range of techniques of governing, combinations of institutional levels and a variety of actors, both public and private.[13] An argument which will be forwarded in this article is that our definitions of governing are changing, and that the theories of social differentiation might help illuminate this. First of all, the *variations* of governing may be seen in the emphasis on *the different stages of preparing, creating, implementing and adjudicating* law. Preparatory, implementing and adjudicating stages may be as important and path-creating as legislative decisions. This may be particularly relevant when legislation is discretionary and based on general standards. Indeed, the work of the judicial branch in the EC/EU is illustrative of this, as are the Dispute Settlement bodies of the WTO and the work of private standardisation committees. Secondly, there is an increased focus on *the variety of techniques of governing* being extended from law and politics to include also *economic, scientific, technological, mass-medial, and ethical* techniques, among others, which illustrates

[10] See N Luhmann, *Theories of Distinction*, (Stanford, Stanford University Press, 2002).
[11] See N Luhmann, above n.4.
[12] See M Jachtenfuchs and B Kohler-Koch, *The transformation of governance in the European Union*, (manuscript, 1998); see, also, J Kooiman, 'Social-Political Governance: Introduction' in *Modern Governance: New Government-Society Interactions*, (London, Sage, 1993); Ch Joerges, 'The Law in the Process of Constitutionalising Europe', in: ARENA Report 2002/6 *Democratic and European Governance — Toward a new political order in Europe*; JHH Weiler, 'European Democracy and its Critics: polity and system', in *The Constitution of Europe*, (Cambridge, Cambridge University Press, 1999) at 264 *et seq*; Ph Schmitter, 'What is there to be legitimised in the European Union … and how might this be accomplished', paper to the symposium *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, European University Institute-Robert Schumann Centre/ NYU School of Law-Jean Monnet Center, 2002; W Twining, *Globalisation & Legal Theory*, (London, Butterworths, 2000).
[13] See M Jachtenfuchs and B Kohler-Koch, *ibid*, 1998; Ph Schmitter, *ibid*, 2002.

the change of focus from politico-legal institutions to the increasing significance of a variety of communicative functions or techniques.[14] The argument here would be that the neo-liberal markets, scientific knowledge and the new information technologies have infrastructural and governing functions which are either on a par with or challenge the politico-legal systems. A third type of variation might be the increasing significance of *the various (institutional) levels of governing*, such as *the international, supranational and transnational* levels (regionally and globally), as well as the *national and local* levels, and how these combine, interact and interdepend.[15] A fourth aspect is *the variation and dispersion in types of actors*. There is an increased focus on not only public and sovereign actors and their representatives on the international and transnational arenas, but also on corporate, non-governmental, professional, expert and civil society type of actors.[16] Policy fields and goals may be run more by experts, bureaucrats and activists than by formal institutions and their decision-making. Executive and administrative bodies act with significant delegated authority. A fifth aspect of the changes is *the diversity and continuous change of patterns of interaction and relations* among the actors. National, international, supranational and transnational processes and competences are interdependent, combined and overlap more than autonomous and clearly hierarchically related processes and competences. The specific types of interdependence vary, both formally and informally. The related actors are both co-operative and in competition. They rely on and use each other (formally), co-ordinate actions, as well as compete and create conflicts. Nation-states are still vital players, but they have also handed over or delegated significant parts of their competences to international and supranational organisations, or to more autonomous boards of experts. *Sovereignty*, and, as a consequence, *constitutionality*, too, have become dispersed.

III. GOVERNANCE AND THE TRANSNATIONAL: A NEED OF NEW THEORIES AND CONCEPTS

Both the terms 'governance' and 'transnational' refer to an increasing *variation* in the functions of governing, and to the *diversity* of institutional levels and actors included. Their application so far is marked more by the demand for new concepts which transgress previous and existing

[14] See N Luhmann, above n.6.
[15] See JHH Weiler, 'The Transformation of Europe' and 'European Democracy and its critics: polity and system' in *The Constitution of Europe*, (Cambridge, Cambridge University Press, 1999) at 10 and 264; Ch Joerges, 'Deliberative Supranationalism — Two Defences', (2002) 8 *European Law Journal*, at 133.
[16] See M Jachtenfuchs and B Kohler-Koch, above n.12; G Teubner, above n.5.

traditions than by clarity or consensus of meaning. They are concepts 'in-process'.

Governance has been used by several writers and actors to accomodate the need for a broader concept of what 'governing' is, and as something which goes beyond the meaning of 'government'. Philippe Schmitter has defined it as follows:

> 'Governance is a method/mechanism for dealing with a broad range of problems/conflicts in which actors regularly arrive at mutually satisfactory and binding decisions by negotiating and deliberating with each other and co-operating in the implementation of these decisions'.[17]

Here, the concept is deemed to have been born in the context of the work of the World Bank in the third world with the aim of designating development as a broader concept and also emphasising the role of the private sector. Schmitter defines the concept as typically designating non-profit, semi-public, semi-voluntary organisations. Compared with other contributions, this seems to be too narrow. Others use a more open definition which also include public authorities and private corporations. Beate Kohler-Koch and Markus Jachtenfuchs have defined it as follows:

> 'Policy-analysis, economics and international relation theory have slowly come to an understanding that governance is about coordinating multiple players in a complex setting of mutual dependence.',
>
> and with a reference to Jan Kooiman:
>
> 'Governing … includes all these activities of social, political and administrative actors that can be seen as purposeful efforts to guide, steer, control or manage … societies … '.[18]

The emphasis is on *co-ordination, collaboration and networks* among several actors, both public and private, and not on the decisions of the single actor. The argument is that political and legal decision-making must be seen in the context of the complexity of its tasks, its preconditions and its pretexts, as well as the complicating factors of implementation. All policies have to deal with the co-ordination of economic, scientific, technological, social and administrative factors, among others. The actors involved include experts, professionals, public authorities, NGOs, and corporations, etc. The emphasis is on seeing the decision-making as part of *a more comprehensive and varied process.*

The term 'good governance', as applied to the EU Commissions White Paper on Governance (July 2001), is part of the realisation that governing

[17] See Ph Schmitter, above n.12, at 7.
[18] See M Jachtenfuchs and B Kohler-Koch, above n.12; see J Kooiman, above n.12, at 1–9.

as well by governments is a multi-faceted process: — rule-of-law, transparency, participation, quality and efficiency. Accountable parliamentarism and democracy are vital, but not enough. Further forms of participation and inclusive processes are also required. Here, governance is used in the meaning of the extended and well-connected administration and executive branch. The underlying concern in the examples referred to above is the emphasis on the interaction between different social functions and different actors.

The decision-making of sovereign states is important, but also increasingly dependent on international, supranational and transnational structures. Jachtenfuchs and Kohler-Koch emphasise the impact of the increasing internationalisation — or transnationalisation — of both the general communicative systems and discourses in the authors discussion of the transformation of statehood and the emerging structures of transnational governance.[19] Niklas Luhmanns sociological theory of the functional differentiation of modern society may also have something to offer as a supplement to the institutional emphasis in political and legal theories.[20] In Luhmann's theories, modern societies are seen as emerging via the generalised functional and communicative systems which transverse society (irrespective of territorial and institutional boundaries) and place an emphasis on the systems of economy, politics, law, sciences, the mass-media, religion, art, and love, etc. None of the communicative systems are privileged or seen as the centre of society. They are simultaneously characterised by both normative autonomy and complex relations and their interdependencies. The general communicative systems function across territorial and institutional boundaries. Focussing on these enable us to see the analysis of governance from a different perspective.

The transnational level has emerged with the supranational level as concepts which designate the increasing intensity and variation of forms of international communication and activities. The international level emphasises intergovernmental relations.[21] Transnational and infranational relations are applied on delegated and decentralised types of cooperation either among private actors or among state and non-state actors, but only when the former are not using supreme sovereign power. The transnational level has been used in the EC/EU to designate the coordinative, but not legally-binding, work of comitology committees. The work of standardisation organisations might be another example of this. Transnational governance may also apply to the networking among scientists, professionals, corporations and non-governmental organisations.

[19] See M Jachtenfuchs and B Kohler-Koch, above n.12.
[20] See N Luhmann, above n.6, 1982 and 1984.
[21] See above n.12; Ch Joerges and I-J Sand 'Constitutionalism and Transnational Governance', typescript Florence, 2001.

'Transnational governance' supplements, rather than replaces, the concepts of government, nation-states, their sovereignty and institutions. Its conceptualisation is a response to the need for a more comprehensive definition of governing. When the techniques of governing are extended, they should also be subjected to a discussion of their normative, procedural, democratic and constitutional legal dimensions and consequences.

IV. GLOBAL AND TRANSNATIONAL (FACTUAL) DYNAMICS

The increasingly global dynamics of the markets and of the new technologies as well as other knowledge-based communication systems have significant consequences for the abilities as well as the legitimacy of the nation-states as regulators and problem-solvers. Local and national actions and decisions are also increasingly having extra-territorial effects, by way of trade and environmental changes, which cannot be solved locally, factually and/or legitimately. The following global or transnational dynamics will be emphasised in this context: the increasing free, global trade of goods, services and also financial capital has contributed to significant and complex interdependencies across boundaries, and also to a variety of side-effects. Scientific and knowledge-based communications have a particular potential for simultaneous global dissemination across national and institutional boundaries. They are typically seen as as universal, rather than as primarily culturally embedded, communications. Telecommunication and information technologies have increasingly enabled comprehensive and efficient global communicative dynamics. Environmental, ecological and climate changes are increasingly occurring across boundaries and are creating a variety of complex interdependencies among nation-states, regions and other actors. Lastly, one could also argue that the discourse of international human rights has not only legal, but also cultural and symbolic effects.

Among these different types of dynamics, we can observe synergies which can lead to further transnational dynamics. The combination of the globalisation of markets, international treaties, telecommunication technologies, as well as other new technologies such as bio-technology and genetics, may lead to more intensive and comprehensive global dynamics in several fields than previously existed.[22] The result is complex forms of interdependencies among economic, scientific and social dynamics, which, to some extent, may result in de facto forms of 'regulation', and in rendering politico-legal regulations more vulnerable and potentially inefficient.

[22] See A Giddens, *Runaway World: How Globalism is Reshaping our Lives*, (London, Profile Books, 1999); U Beck, *What is Globalism*, (Cambridge, Polity Press, 2000); G Teubner, above n.5.

(1) Global trade — in its current forms — creates a web of economic, resource, social, environmental and cultural interdependencies. Trade is initially an economic activity, but it is also enabled by political decisions and legal treaties. Trade across national and geographical boundaries could be seen as a coupling between economic activities and ideologies, political decisions and legal treaties where the latter contribute both to the institutionalisation and the increased efficiency of trade. The free-trade treaties have probably been instrumental in enabling both the current comprehensive global trade and the growth of transnational corporations. The economic, legal and technological global dynamics have, on the one hand, contributed to enabling finance capital and production technologies to be diffuse themselves more easily and faster than previously, irrespective of boundaries. On the other hand, this has also enabled the changing of production sites and the possibilities of 'shopping' around for cheap labour and less strenuous regulatory regimes. Global capitalism may have contributed to a global dissemination of knowledge and technologies, but, in many cases, it has also led to the reinforcing of economic inequality and assymetric patterns of distribution. However, global trade, today, is not just technical and economic. It also has huge cultural implications in the form of exports of trademarks, lifestyles, the exchange of culturally patterned science and technologies, etc — which also create transnational cultural dynamics.

Extensive global trade may result in both transportation-induced environmental problems and in global distributions of production sites, and thus export pollution and negative environmental consequences. By 'exporting' production sites, western countries may also export part of their environmental problems. Global trade thus creates not only transnational dynamics, but also complex webs of extra-territorial effects of decisions made both in the public and private sectors.

(2) Another vital part of what may be called transnational (and global) communications and dynamics is *science, knowledge and technologies* and the discourses related to these. Science-based and knowledge-based discourses have become vital and predominant in many areas of society, and, to some extent, also take the place of both interest-based politics and regulatory law. Science is one of the general social and communicative functions, and is vital in the transformation of modern societies.[23] The general code of science is true/not true and deemed to have a universal quality. Whereas law (legal/not legal) and politics (power/not power) are closely connected to specific (or local) cultural contexts, languages and institutions, science has been regarded as being more universal and contextually autonomous. Science is more unbounded by institutions and sovereign

[23] See N Luhmann, above n.6, 1981, and 1984.

communication, and is thus more easily transmittable and transversal across cultural and territorial boundaries.

Significant parts of the communication in politics, public institutions and private organisations are, today, based on various types of scientific or other knowledge-based discourses.[24] Competition policy, environmental regulations, food security, educational and pedagogic policies, etc, are all increasingly and, to a large extent, based on scientifically deduced knowledge. When scientifically-based communication becomes hugely influential on politics, this will also change the criteria for, and the character of, the latter. In some areas, science and knowledge-based discourses may even be said to be taking over the regulative functions of law and politics. The uses of standardisation, both in the EU and internationally, not to mention the functioning of the *Codex Alimentarius*, all illustrate this.[25] Standards are vital in themselves; they also precondition law in many ways, and are an efficient means for the transnationalisation of law.[26]

At the same time, new technologies are also increasingly structuring society and shaping our lives in significant ways. The two main examples are communication and information technologies on the one hand, and bio-technology and genetics on the other. They have all been vital in the transformation of both modern society and its institutions, including both the nation-state and the public-private divide. The new information and communication technologies (ICT) have decisively contributed to the increasingly efficient transboundary and transnational dissemination of knowledge and science. They have created cross-boundary, non-institutionalised and extremely flexible communications. The internet has come to be probably more independent of public and sovereign authorities than any other media of communication created. It has enabled indiscriminate intensive communication among all types of actors, civil society organisations, corporations, informal groups, and single individuals, etc. One may argue that they currently contribute more to institutional change than legal and political decision-making do.

Bio-technology and genetic technology have, in a very short time, presented us with totally new knowledge and new sets of questions in terms of how to create life, how to deal with both serious diseases and

[24] See A Giddens, above n.8; N Rose, *Powers of Freedom: Reframing political Thought*, (Cambridge, Cambridge University Press, 1999); see, also, A Born and NA Andersen, 'Complexity and Change', (2000) 13 *System Practice and Action Research*; IJ Sand, 'The Legal Regulation of the environment and new technologies — in view of changing relations between law, politics and science', (2001) 22 *Zeitschrift für Rechtssoziologie*, 169.

[25] See A Herwig, 'Transnational Governance Regimes for Foodstuffs and Genetic Engineering', in this volume.

[26] See H Schepel, 'Constitutionalising Private Governance Regimes', in this volume.

the situations of terminal illness, genetic engineering, etc.[27] Indeed, genetic knowledge may change our conceptions of ourselves in drastic ways. Having human qualities more closely mapped out as genetic may influence human relations in ways which it is difficult to foresee. These technologies are communicated transnationally, even though this occurs unevenly. The application of these technologies may have radical consequences and may, simultaneously and abruptly, pose complex social, political, legal and ethical questions to parts of the world which are very different culturally. Regulatory solutions may be transmitted efficiently. The implementation of free-trade treaties may contribute to the more efficient diffusion of such controversial, risk technologies and regulatory regimes without conceding time for their cultural elaboration.

The relevance of this for transnational governance is, first of all, that the creation of new knowledge and technologies can be seen *as a* de facto *form of governance and regulation* in itself.[28] The experts and their processes have both become vital preconditions for, or part of, political, legal, and also many private, processes and institutions, and they also create institutionalised procedures of their own. Science and knowledge are both preconditions for, and forms of, governance in themselves. The use of standards is one example. Environmental and health protection under the free-trade treaties is based on the idea that it must be possible to prove scientifically which situations, substances, etc, are hazardous or not. The new telecommunication and information technologies have created new forms of communicative infrastructures which may be seen as new types of civil society. They change our notions of what is public and private. The new bio-technology and genetic technology have a significant impact on how we think in vital areas of human health, in questions of life and death and in environmental politics.

In the era of the democratic nation-states, law and politics as communicative systems have been vital means for *the creation of meaning* across social and institutional boundaries. It may be argued that knowledge and scientifically-based discourses are taking over parts of the normative functions of law.[29] Scientific knowledge or practices are often the agents or the reflectors of social change. They are also the carriers of vital norms of society. Science and knowledge-based discourses may be changing, or taking over, the role of normative expectations in our adjustment to continuous change and complexity.

[27] See G Agamben, above n.2; F Fukuyama, *Our Posthuman Future*, (New York, Farrar, Straus and Giroux, 2002); IJ Sand, above n.24.
[28] See N Luhmann, 'Demands on Politics', in *Risk: A Sociological Theory*, (Berlin, de Gruyter, 1993); see, also, G Teubner, above n.5.
[29] N Luhmann, *ibid*.

(3) Environmental and climate change and their causes may be among the most direct forms of transnational dynamics.[30] First of all, there are global and transnational biological dynamics at work irrespective of human actions. Secondly, human actions have significantly contributed to further both environmental and climate changes. The industrial society and the risk society have resulted in both very comprehensive and increasingly intensive exploitation of natural resources, application of chemicals, etc. The various effects on the environment are very diverse, and the intensive, spiralling processes of both extra-territorial and global effects abound, thus underlining the transnational and accumulative character of such change, in the face of which purely national regulations are clearly insufficient. Thirdly, one could argue that the increasing emphasis on global trade contributes to increasing industrialisation and environmental hazards and to their transnational and global character. Global distribution of production and trade underlines the common and transnational *responsibility* for environmental hazards and thus also for protection. Natural resources are also exported and distributed worldwide. This should underline the notion of such resources, and of the keeping of bio-diversity as a common global heritage and thus as a common responsibility. Environmental and climate change are, to a large extent, extra-territorial and parts of global and transnational dynamics. The application of new bio-technology and genetic technology may have comprehensive environmental consequences. The spreading of these (such as in genetically modified organisms) to different biospheres more or less simultaneously may have consequences which are difficult or impossible to foresee or control.[31] This may also provoke different culturally and politically reactions in various parts of the world.

V. LAW AND TRANSNATIONAL GOVERNANCE

Law is clearly being influenced and changed in a number of different ways by the actual processes of globalisation and transnationalisation. Because the actual processes of globalisation are diverse, the responses of law are diverse, too. 'International' law has become international, supranational and transnational law. *Trade, environmental protection and human rights* are areas which are increasingly regulated at all these levels. This implies that a variety of forms of law, institutions and degrees of legally-binding norms are being created. In some instances, there is co-ordination between the different levels of law, in other instances there is not. Under some treaties, there are courts and other conflict-resolution mechanisms,

[30] See U Beck, above n.4, 1992 and 1996; A Giddens, above n.22.
[31] See IJ Sand, above n.24.

under others there are not. In trade law, the interdependence of the legal and the economic systems has contributed to more efficient sanctions. The objects and themes of international, supranational and transnational regulation increasingly overlap those of national law. Internal areas which were previously seen as 'sovereign privilege', are now increasingly regulated internationally. Trade is deemed to be much more efficient if it is international and not bounded. Environmental change and hazards have emerged also extra-territorially and transnationally and have to be dealt with accordingly. Human rights are deemed both to be universal and the guarantee of human dignity. They are increasingly regarded as vital in that they should be superior to sovereign boundaries, at least ideologically. New technologies have partly undermined territorial boundaries and, at the same time, partly emerged as global, and are thus perceived to be common objects of regulation.

The emergence of a European supranational trade law, and the styles of dynamic interpretation which have been applied, has been the 'motor' for more institutionalised and systematic efficiency of (international) trade law. The practice of the ECJ has shown how to contribute to a legal and institutionalised liberal market-place which functions by way of highly consequential styles of interpretation across sovereign or cultural borders, which also included regional and global levels. Clearly, the practice of the ECJ has also been important for the WTO and its conflict resolution mechanisms.[32] The same practice has also contributed to a gradual extension of the material competences of EC law into areas of environmental, consumer, health and safety law, etc.[33] The price paid for these extensions has been to create as many objectively-oriented styles of argumentation as possible. Part of the solution for this more objectively-oriented style has been the inclusion of, and the referral to, standards set by industrial organisations. As a consequence, the protection of health, the environment and the work-place have occurred in reference to such standards. However, what has, so to speak, occurred between the lines is that industrial standards have changed from being seen as primarily technical to, at least in many instances, being seen as unavoidably political. Scientifically-based standards set in an industrial or technical context have been included as part of the legislative process. The result is that both trade law and parts of health and environmental regulations are predominantly set at supranational, international and transnational institutional levels. They are based on general principles of free or

[32] See JHH Weiler, 'Epilogue. Towards a Common Law of International Trade' in: JHH Weiler (ed) *The EU, the WTO and the NAFTA. Towards a Common Law of International Trade*, (Oxford, Oxford University Press, 2000a); and 'The Rule of Lawyers and the Ethos of Diplomats', Harvard Jean Monnet Working Paper no.9/2000b, at 10–11.
[33] See Ch Joerges, above n.12; above n.15.

non-discriminatory trade (initially formulated by economic dogma) and by objectively-oriented and scientific criteria.

Transnational law has emerged here in the form of (industrial) standards and the work of standardisation committees. Industrial organisations and their sub-committees are included in the processes of legislation. The co-ordination and decision-making of committees working under the EU Commission, particularly at the implementing stages, have also been labelled as transnational law or deliberative supranational law.[34] The work of the various committees in the EC system may have various transnational functions from the exchange and comparison of information and experience, mutual adjustments and decisions on the co-ordination of the implementation of EC law. 'The legal regime' of the European market has created a dynamic which has gone beyond its formal minimum and has created processes of comparison, learning, co-ordination and converging. A variety of actors are involved: industrial standardisation committees, experts, administrative and executive representatives from the Member States, and EC/EU (Commission) representatives.[35]

Weiler has argued that the dispute settlement mechanisms of the WTO have contributed to make the processes of conflict resolution more judicial and thus more open, transparent and conflict-oriented. It is no longer a question of consensus, but of 'getting it right' legally.[36] This implies a more open and eventually conflictual use of experts. The dependence of the WTO on criteria of scientific evidence to prove hazards, and its reliance on the *Codex Alimentarius* and its decisions mean that autonomous experts and their organisations have been given a significant position.

The EC/EU, NAFTA, GATT/WTO and other treaties have institutionalised the principle of free-trade to an unprecedented degree by the use of institutions, courts and conflict-resolution mechanisms. In comparison with the previous trade treaties, one of the vital differences is the emphasis on, or the almost constitutional character of, the principle of free competition and its more stringent and efficient implementation by the use of standards of non-discrimination and the absence of obstacles to trade. Exemptions for environmental or health protection are subjected to general comparisons under standards of non-discrimination, necessity, proportionality and scientific evidence (for hazards) — in stead of being accepted as based on political judgement. The close couplings between

[34] See Ch Joerges, 'Good Governance' through Comitology' in: Ch Joerges, E Vos (eds), *EU Committees: Social Regulation, Law and Politics*, (Oxford, Hart Publishing, 1999) at 311.
[35] See Ch Joerges, 'Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance', and J Neyer, 'The Comitology Challenge to Analytical Integration Theory', both in *ibid*, 1999, at 3 and 219.
[36] See JHH Weiler, above n.32, 2000a, and 2000b.

the economic, political and the legal systems have been decisive for the efficiency of the free-trade treaties.

The regulation of new technologies, including information and telecommunication, and bio-technology and genetic technology, may be seen more as international and transnational events than previous regulatory challenges. The internet is, in many ways, the ultimate object of transnational law. It exists as a common international and transnational infrastructure which is irrespective of national and constitutional boundaries. Private regimes of regulation based on the users of the net (the ICANN) have emerged along with the attempts at formal regulation by nation-states and other supranational and international authorities, as well as more spontaneous forms of regulation.[37] Clearly, there will be a structural and technical demand for harmonisation and compatibility. Lessons are learnt and norms are created transnationally.

Bio-technology and genetic technology are transnationally disseminated as knowledge and as industrial input. Due to the increasing degree of factual and technological interdependence across boundaries, the problems of applying and of regulating these technologies are instantaneously transnational and common. The free-trade treaties contribute to even more efficient transboundary distributions of the technologies. Both the complexity of the technologies and the ensuing problems of their application have meant that the expertise and the 'discourse' dealing with this are international and transnational. The application of these technologies does, however, raise environmental and ethical concerns which are not easily solved or settled. The environmental problems concern the possible uncontrollable spread of GMOs, and there is significant scientific disagreement and uncertainty as to the hazards and risks involved.[38] There are also serious ethical concerns of the application of the different forms of bio-technology and genetic technology, particularly in the medical field. The international and transnational regulation of these technologies is unavoidable and in demand. Adjudication both in the EC and the WTO may, directly and indirectly, contribute to regulation. However, the problems with this are at least two-fold. The present regulations are, in part, more directed by trade considerations than by environmental protection and ethics, and the latter concerns are neither easily dealt with nor easily regulated in cross-cultural regions or globally. Environmental and health risks and ethical problems are complex, and the reactions to them may clearly be culturally biased. The result may be both a lack of constructive diversity and a lack of cultural and democratic legitimacy.

[37] See J von Bernstorff, 'The Structural Limitations of Network Governance', in this volume.
[38] See O Perez, 'The Many Faces of the Trade-Environment Conflict', in this volume; IJ Sand, above n.24.

International regulations of bio-technology include the Bio-safety Treaty and the Convention on Bio-diversity, both of which lack sufficient sanctioning mechanisms. The area of medical treatment and research has evolved both internationally and transnationally for a long time. Diagnostic categories, schemes and standards for research, etc, are communicated and standardised transnationally and may, by now, be recognised as a (transnational) regulatory system of their own. The World Medical Association has developed the Helsinki Declaration on ethical principles of medical research, which focuses on informed consent and the establishment of norms for acceptable risks for humans who are the subject of research. This declaration is widely used by all authorities in the field.

Environmental and climate problems provide another transnational challenge. As described above, some environmental and climate problems are undeniably common and extra-territorial in ways which also necessitate common problem-solving. Additionally, it can be argued that the resources of the world are a common heritage, and that the bio-diversity of one region may, to some extent, be ecologically dependent on others.

There is no internationally comprehensive environmental treaty equivalent to the GATT and WTO treaties. Significant parts of the international environmental regulation are connected to, or result from, free-trade treaties. International environmental law is fragmented both materially and procedurally, and lacks efficient implementation and conflict resolution mechanisms. At present, there are environmental treaties concerning the protection of bio-diversity, climate change, ozone-depletion, biosafety, protection of the seas, air pollution, and more generally sustainability and precaution, and many more.

International human rights are also increasingly regarded as international and transnational norms which, to some extent, should also be legally accepted irrespective of, or beyond the scope of, national implementation. The symbolic value of international human rights may be significant, but the extent to which they are implemented vary significantly. The argumentation for the UN-based military intervention in Kosovo and Yugoslavia was based on the assumption that crimes against humanity had been committed, and that, in very severe cases, direct military action might be legitimated. The World Bank has started to apply and use the respect for and practice of human rights as indicators in their evaluations of countries. However, the extent to which they actually do this varies. The legal obligation for them to do so is also being discussed. Transnational corporations are also beginning to include human rights as both part of their internal practice and of their external demands to the countries that they invest in.

International treaties are also increasingly having a significant and comprehensive impact on the national legal systems. International courts

and conflict resolutions mechanisms have contributed further to the increasing efficiency of international law. The relations between the international, supranational and transnational levels are varied, and can best be described by interdependence and combinations, rather than by clear hierarchical orders. The nation-states use both their sovereign competences and the fact that they are part of new organisations which create new types of competence. One could argue that national and unitary constitutionalism has been either superseded or supplemented by new and diverse combinations of constitutional competences, international treaties, private law regimes, transnational decision-making and court decisions.[39] This can be seen as a new poly-centricity and poly-contextuality in law, where unity in the old sense does not exist, and where interdependence, diversity, fragmentation and legal conflicts have emerged more clearly as qualities of legal regimes.

VI. THEORETICAL APPROACHES TO THE PRESENT SITUATION

Political and constitutional theories presuppose and build on the existence of the modern state, its institutions and the various concepts used to describe it. This also includes normative presuppositions, explicit and implicit.[40] 'Sovereignty' and 'the state' are both descriptive and normative concepts. These concepts have also implied that modern states, with their institutions, competences and legitimate authority, have been the main actors in national and international public decision-making and problem-solving. When public authority has been used at international levels, it is presumed to have been derived from the authority of the nation-states or their representatives. Nation-states have been presumed to be problem-solving entities.

Both the increasingly global trade and the application of new technology have contributed to increasingly transnational dynamics in many fields: the economy, the sciences, production methods, labour-relations, environmental and climate change, culture, etc. In some cases, this has led to extra-territorial problems or to transnational technological or economic infrastructures which need to be dealt with across national boundaries. The global market-place and its side-effects are clearly objects for international and transnational regulation. In other cases, such as when complex and specialised technology is involved, transnational problem-solving adds to the diversity of both the regulatory scenario and the learning processes involved.

[39] See Ch Joerges and IJ Sand, above n.21.
[40] See J Bartelson, above n.9, at 5.

The application of complex and far-reaching knowledge and technology has contributed to changing the preconditions of nation-states as the legitimate entities of decision-making, problem-solving and governing dramatically. There are both problems of territorial competence and of the mere ability to solve complex problems on their own. Many of the most vital aspects of modern societies are, in effect, co-ordinated across boundaries via common knowledge and technology. Political and legal regulation will, to some extent, have to imitate this. The argument is not so much to deny the qualities of the nation-state and its governmental strategies, as to insist on seeing governing in a more comprehensive perspective, too. In the following, some of the political, normative and constitutional theories which have tried to contribute to the analysis of this situation in recent years will be discussed.

A. Democracy and Normative Constitutionalism

So far, it is primarily within the context of EU law that the problems of democracy and constitutions beyond the nation-state have been discussed, theoretically as well as politically. Within EU constitutional law, Joseph Weilers works are predominant. For Weiler, nationhood and constitutionalism are about more than the existence of a constitution which can be interpreted and applied within a positivist-legal tradition. Nationhood seems to come before constitutions and is attached to such primordial ideas as *belonging* and *originality*.[41] The 'belonging' to the nationhood transcends those of the family and the tribe. 'Belonging' is then defined as the existence of a common social place or framework to which we belong independently of achievements. 'To be accepted', however, also implies the obligation *to accept the others who also belong*. Nationhood is not identical with a common ethnicity, but, in Weiler´s conception, there is a recognition of the values of *a common space* and the potentials of this space for the *creation of identity*.[42]

The project of European integration is then seen as two-fold, partly an attempt to control the excesses of the nation-state, and partly to offer an alternative to the liberal vision of international law and society. It is about 'belonging', but at a level other than national. It is defined as a commitment to *the shared values* of the constituent documents of the union.[43] In Weilers view, this is interpreted as *commitments to a civic society which is wider than the national level*, and which transcends the cultural commonalities which are nationally defined. The Europeans are not seen as a new

[41] See JHH Weiler, above n.3, at 338.
[42] See JHH Weiler, above n.3, at 342.
[43] See JHH Weiler, above n.3, at 344.

demos, but as *co-existing multiple demoi* instead. A European specificity is still defined to include *the mutual social responsibility* and the ethos of the welfare state, as well as the human rights embodied in the European Convention on Human Rights.

Weiler regards the EU as a new polity, but he is open in his criticism of its democratic deficits. Indeed, the themes which he has criticised and shown scepticism include the comitology committees of the EU in a constitutional framework.[44] He upholds a separation between scientific and administrative arenas on the one hand, and the political and legal arenas on the other. Only the latter can be included as constitutional. He maintains that, in the end, any social problem or conflict must be solved on a political basis and by politically accountable and potentially constitutional institutions.[45] It is implied in this that expert participation and the use of scientifically-based argumentation cannot be seen as part of such a framework.

Although I am sympathetic to much of the argumentation here, I do, however, think that vital problems of the de facto governing of modern and complex societies are being excluded from the discussions. In my opinion, the emphasis on constitutionality makes it difficult to include sufficiently to what degree the market, the sciences and the experts have de facto become extremely vital parts of governing — both nationally and transnationally. The influence and participation of scientific expertise in both political and legal (constitutional) decision-making procedures seems so inevitable today that we also need to discuss more profoundly what their role is and should be, both cognitively and normatively.

B. The Neo-Liberal Direction

Another strategy in which to discuss and evaluate the current international and transnational constitutional and institutional changes is the neo-liberal approach. Here, a liberal market based on the principle of free competition implemented as efficiently as possible is seen as an unquestionable institution. It is presumed that economic theory and practice has verified liberal markets as the most economically efficient, and thus also creates an optimum of welfare. It is then presumed that liberal markets and the rights the rely on should be constitutionalised, and that any further debate on this is unnecessary. Economic efficiency is deemed to be sufficient for legitimacy.[46] Vital parts of the regulation of liberal markets

[44] See Ch Joerges, E Vos (eds), *EU Committees: Social Regulation, Law and Politics*, (Oxford, Hart Publishing, 1999).
[45] See JHH Weiler, 'Epilogue: 'Comitology' as Revolution' above n.3, 1999, at 344–9.
[46] See EU Petersmann, 'European and International Constitutional Law: Time for Promoting 'Cosmopolitan Democracy' in the WTO', in G de Burca, J Scott (eds), *The EU and the WTO:*

are seen as being more technical than political, and thus not always in need of parliamentary procedures. Here, the use of scientific expertise can largely be seen as technical and neutral. Being scientific, it relies on the quality of its own code. It is thus unnecessary to include it in a debate on what procedures to include as constitutional. This argument presumes the possibility of delimiting the technical regulation of markets from political regulations which need political and accountable procedures. It is also argued that such forms of regulation can function as forms of negative integration and do not implicitly lead to other more substantial (positive) forms of regulation.[47]

The first problem with this argumentation is the maintaining of free markets as a value-free, politically-neutral and technocratic arrangement. This view disregards the various problematical effects of free-trade and the complexity of how the different spheres of society influence each other. The next problem is the insistence that it is possible to have negative integration without positive integration. The implementation of both the EC/EU and the WTO have illustrated the complexities of this. In order to define and delimit free competition in an efficient way, the various forms of social and environmental regulation must be evaluated and compared in order to assess whether they are discriminatory or create obstacles to free trade. Thus, efficient free trade will also inevitably lead to forms of indirect social or environmental regulation. Economic regulation cannot take place in a vacuum, and, in most cases, it is also a simultaneous social or environmental regulation.

C. Deliberative Supra-Nationalism

In their project on comitology in the EC/EU, Christian Joerges and Jürgen Neyer have focused on the preparation and implementation of legislation in areas where experts or interest organisations participate in the process.[48] More directly, their research concerns how negotiations concerning regulation are carried out (a) in areas involving specialised and new knowledge, uncertainty in the application of such knowledge and complex balancing of substantially different factors, (b) in environments which include representation from several constitutional levels, in some

Legal and Constitutional Issues, (Oxford, Hart Publishing, 2001); G Majone, *Regulating Europe*, (London, Routledge, 1996).

[47] See F Scharpf, 'Negative and Positive Integration in the Political Economy of the European Welfare States', in G Marks (ed) *Governance in the European Union*, (London, Sage, 1996).
[48] See Ch Joerges, above n.34 and 35, and J Neyer, above n.35; see other contributions in the same volume; Ch Joerges, above n.15.

cases also private representatives or experts, and (c) where problems typically on the borderlines between politics, administration and expertise are dealt with.

As I read their research and articles, there is an emphasis in their descriptions and their evaluation on what we may call knowledge or the risk society with comprehensive use of new technology with the challenges of regulating technologically complex questions, and the possibilities of uncertain and significant risks, and, as a consequence, difficult ethical questions at times, too. The implication is that such complex matters may require additional or more qualitative methods or procedures than those which already exist within the more traditional governmental, constitutional and international institutions. The research has shown that, when confronted with 'new' and complex regulatory questions, the negotiating parties have accepted more open and deliberative methods, instead of traditional bargaining *quid-pro-quo* methods, in order to reach as good results as possible for the regulatory problems involved.

More specifically, it has been shown that the comitology committees of the EC/EU system negotiations have not only, nor primarily, been political or interest-balancing in the more traditional political sense, they have also been evaluated as being deliberative.

The significance of the regulatory and implementing decisions taken in inter-governmental or transnational committees which have been set up with representatives of the relevant Member States may be such that it may seem strange to exclude them from the territory of constitutionalism. On the other hand, it could be argued that it may be more constructive to distinguish between constitutionality and legitimacy at this stage. The research seems to show some positive qualities of comitology procedures which should be valued as contributing to the increased legitimacy of transnational procedures. Whether they are part of a constitutional framework is a more complicated and, to some extent, technical legal discussion which might be premature at this stage. The arguments remain that, within a public law and a constitutional framework, we need a more varied set of decision-making procedures in order to take care of all the different challenges emanating from the complexity of regulating late modern or risk societies.

D. Democratic Experimentalism and Deliberative Polyarchy

The same challenges as those discussed above as part of deliberative supranationalism have been discussed by Charles Sabel and Oliver Gerstenberg in a more explorative way under the labels of democratic

experimentalism and deliberative polyarchy.[49] In these contributions, the *universalist presumptions of sovereignty and its unity* are questioned, as well as the universality of language and meaning. Here, the *public* is put in the place of the universal notion of sovereignty. The public is then presumed to be an open and varied group with underlying notions of inherent pluralism. The areas/objects to be regulated are in continuous change, complex and fragmented. Thus, there is *a pervasiveness of uncertainty* in decision-making. As a result, the present complex and ever-changing societies can not evolve consensual and universal processes of meaning, at least, in many vital areas. Instead of consensus, there is *continuous learning processes and an acceptance of language as ambiguous*. There is an implicit criticism of the presumption that formal processes of sovereign institutions are seen as comprehensive and 'final', even if the majority may be slight.

It is further presumed that the predominance of 'change, complexity and uncertainty' must imply vital changes in the decision-making processes also at governmental or constitutional levels, both factually and legitimately. Complexity and uncertainty also necessitate more qualitative and comprehensive research and labour processes in order to investigate the problems and look into alternative regulatory solutions. In the place of universalist presumptions and procedures aiming at consensus, there are *learning processes, collaboration, comparisons and an acceptance of disagreements and ambiguity* in which 'meaning' is attempted in complex areas. *Acceptance of disagreements and conflicts* and a willingness to re-examine continuously all assumptions or decisions taken, seems vital. To avoid fragmentation, it seems vital to focus on procedural qualities such as transparency, publicity, objectivity and availability of information to the public.

In a knowledge-based and technology-based society, in contrast to a tradition-based society, identity and values will be more changeable and multi-faceted. Solidarity will also be formed on the basis of a more changeable and unstable society. The accumulation of new knowledge contribute as much to new uncertainties as to certainty. Stability in values is exchanged for an acceptance of continuous learning processes.[50] The institutional implication is to accept a more varied and polycontextual institutional framework of decision-making.

E. Functional and Communicative Differentiation: Consequences for Law and Politics

Many of the vital problems that society is trying to deal with are *multi-dimensional, complex* and, to some extent, *transnational* — in their origin,

[49] See Ch Sabel and O Gerstenberg, 'Directly Deliberative Polyarchy. An Institutional Ideal for Europe?', (manuscript, 2000); see, also, Ch Sabel and J Cohen, 'Democratic Experimentalism', (1998) 98 *Columbia Law Review*, at 267, and 'Sovereigny and Solidarity in the EU', (manuscript, 2001).

[50] See Ch Sabel and J Cohen, above n.49, 2001, at 23.

their causes and at the problem-solving stage. All these three qualities represent substantial challenges to our present political and legal decision-making systems. One of the main political projects today seems to be the establishment of liberal markets based on free competition with few boundaries. The combination of a liberal and efficient market, exemptions for health and the environment, a multi-cultural setting and a context of participating countries with enormous social and economic differences is an extremely complex and multi-dimensional project which will need equivalently multi-dimensional and polycontextual governing perspectives.[51] Another basic challenge today is the regulation of bio-technology and genetic technology. This is also a field with many dimensions and demands to be met: efficient forms of production, extremely specialised sciences, unpredictable future risks, liberal markets, ethical problems in a multi-cultural setting, etc. The most acute and complex problem is probably how to deal with the possibly extreme, but also very unpredictable, risks related to the use of bio-technology and genetic technology. Global environmental and climate change is a third such multiple challenge. The challenges include the definition of what environmental protection should include, what the acceptable levels of various types of pollution are, and the co-ordination of both of these across boundaries.

Modern societies are characterised as not being run from one centre or by one type of government, but instead by the existence of several parallel increasingly autonomous and complex communicative systems such as law, politics, economy, religion, science, etc. These systems are general and comprehensive, and they communicate in normatively different ways about the same themes. In the course of modernity, these systems have become increasingly autonomous and complex. The parallel existence of several comprehensive social systems means that they also observe and communicate about each other, and thus create different reality constructions.[52] They will interact, influence each other and inter-depend, but they are not placed hierarchically in relation to each other. In order to cope with the complexity of the interaction between the systems, they create what are called structural couplings between them as common arenas for the exchange of information.[53] Each system is complex and comprehensive. Unintended consequences and misunderstandings are created continuously. Such situations are labelled as hyper-complexity. Decisions are only 'final' within the meaning of each specific system. A legal decision may be considered unfair within the political system; a scientifically-based decision may also be difficult to communicate within

[51] See G Teubner, above n.5.
[52] See N Luhmann, above n.6, 1984, and 'What is Communication' in, *Theories of Distinction*, (Stanford, Stanford University Press, 2002).
[53] See G Teubner, above n.7.

the political system, and vice versa. The qualities of law and politics are found in their basis of democracy, rule-of-law, publicity and transparency, but also in their structural and operating inter-dependence and flexibility. They have, particularly in the welfare states, taken on almost any regulatory challenge because this has been the ethos of the welfare state. At the same time, there has been some sort of blindness to the complexity of the challenges which, step-by-step, have been taken on. Currently, the dynamics of liberal markets and the comprehensive use of scientific and knowledge-based expertise have become vital tools for the implementation of new policies. However, this increases the complexity which law and politics are faced with, and it challenges the whole 'top-down' approach of public bureaucracies. So far, these themes have been dealt with very insufficiently. The fact that this situation also has its dark side is remarked by Niklas Luhmann:

> 'The impossibility for the political system effectively to control other systems with an adequate grasp of consequences and limited risk, is inversely proportional to the facility with which such decisions can be put into force …'.[54]

Law and politics are becoming overburdened both at national and at regional and international levels. Their instruments and institutions are not able to grasp and deal with vital parts of the dynamics of the systems of economy and science. The more classical theories of law and politics have presupposed that politics can presume to handle any theme and any policy orientation, and that all such themes and policies are communicable or translateable into a common political language of social *interests*. The existing institutions of politics still imply a comprehensiveness even though they are obviously challenged by the relative autonomy of the economic and the scientific systems.

When considering the abilities and the qualities of law and politics, the following should also be emphasised: law and politics have relied on common cultural, linguistic and socio-economic frames of reference. There have been some common and relatively consensual reality descriptions and values which have formed a reference for the interpretation of the condensed language of law and politics. The interpretation and understanding of law and politics may be quite different in more cross-cultural and heterogeneous environments.

Thus, the increasing functional differentiation of society has led to serious challenges for the existing systems of law and politics. Partly, it has led to the increasing autonomy and complexity of other communicative systems, making them difficult to deal with for law and politics. Partly, it

[54] See N Luhmann, above n.28, at 145.

has led to a hypercomplexity in the relations between the systems and thus to serious problems for governing in general. Partly, it has led to increasingly regional or global dynamics in many fields, and thus to challenges for the nationally-based political and legal governing institutions and also for the nationally-based constitutions and their functions.

The result may be that the existing political and legal institutions and their constitutions have problems evolving further in their existing patterns. I would suggest that, in this situation, socio-legal and politico-legal theories are needed to understand these changes, their basis and their implications. They may be necessary for the rethinking of how political and legal institutions may function, or may be supplemented by other institutions.

Local and centralised political participation, scientific knowledge, ethical consideration, and economic knowledge may all be needed in the solving of such problems. Scientific expertise, local participation and ethical sensibilities are vital qualities in the attempts to solve or to deal with all these very comprehensive problem areas. They illustrate the need for a broader scope of what 'governing' and 'governance' can be — with regard to both the problem descriptions and the theoretical tools needed. Very clearly, there are serious democratic and legitimacy problems involved in the scenarios which have been labelled as 'governance' and 'transnational governance' here. Such discussions and analysis must, however, include a realistic view of the situation and its challenges.

Societies which are dominated by complex technologies and other forms of specialised knowledge, have already aquired additional forms of public decision-making other than the political and legal forms. They do, however, lack some of the qualities of democratic participation, transparency, publicity and accountability. Law and politics may, on the other hand, lack some of the necessary qualities of complexity. Part of the solution may lie in the more creative construction of structural couplings between these systems. Continuous learning processes, deliberation, comparisons, exchange of experiences, etc are formats which can be applied to the boundary areas between scientific research, local participation and the authority of politico-legal institutions. Constitutionality, sovereignty and authority are vital concepts, but the positions they hold will also be challenged. Thus, fragmentation, incoherence, pluralism and lack of co-ordination are probably unavoidable and should, as a consequence, be regarded as challenges.

4

Themis Sapiens: Comments on Inger-Johanne Sand

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'*SAPERE AUDE!* HAVE courage to make use of your own understanding! is thus the motto of Enlightenment.'[1] — The revolutionary formula of Immanuel Kant was not only a provocation for classical governance, which put in question the mystifications of the foundations of authority, it was also a provocation for the individual, who was at the centre of Kant's philosophy, which demanded the emancipation of the individual from this self-imposed dependence.

Two hundred years after the philosopher of the Enlightenment had answered the question posed by the Academy of Berlin, Niklas Luhmann published his treatise 'Social Systems'.[2] It was this, the autopoietic turn of the sociologist, which transferred the cognitive-biological findings of Humberto Maturana to social systems, and which was dedicated to sociological Enlightenment.[3] No less elaborate than Kant, Luhmann demystified the foundational myths of political governance, and his work challenges

[1] I Kant (1784), An Answer to the Question: What is Enlightenment?, in: I Kant, *Practical Philosophy*, (ed) M Gregor, (Cambridge, Cambridge University Press, 1996), at 11 (17).
[2] N Luhmann, *Soziale Systeme*, (Frankfurt am Main, Suhrkamp, 1984); (English edition: Social Systems, Stanford, Stanford University Press, 1995).
[3] See Luhmann's academic inauguration speech of 25/1/1967 ('Sociological Enlightenment') given at the Faculty of Law of the Wilhelms-University, Münster: 'The progress from the Enlightenment of rationality passing the demystifying Enlightenment to the sociological Enlightenment is a progress in problem-consciousness and in the distance of the Enlightenment to itself. That what once were the premises, the assumptions of a common possession of rationality and of foreseeable purposes of mankind, is confronted by the Enlightenment with immanent limitations. This is the process, where the enlightenment finds in the oscillation between the idea of a world and the actual experience of the world its immanent rule: that the complexity of the world is only ascertainable if it can be reduced. This rule empowers the Enlightenment to enlighten possibilities, premises and opportunities of a real Enlightenment.' In: N Luhmann, *Soziologische Aufklärung I. Aufsätze zur Theorie sozialer Systeme*, 4th edn, (Opladen, Westdeutscher Verlag, 1974), at 66 (86).

both individuals and governance through a description of the conditions of the possibility of a functionally differentiated society, a society that does not consist of individuals but of communicative systems, has no political centre but a polyarchical plurality of functional systems, and which is built on communicative hypercircles, autological operations and fundamental antinomies. But even though he conceived of the functional structures of consciousness and social systems in a parallel way, he regretted having to address the social systems with a *sapere aude*, as his interest was purely descriptive. This is why it is not surprising that he distanced[4] himself from Gunther Teubner's conceptualisations of a 'reflexive law' which implies that 'the law thinks'[5] and which normatively demands that 'the legal system identifies itself as an autopoietic system in a world of autopoietic systems and faces up to the consequences'.[6]

I

Inger-Johanne Sand shares the basis of the difference-theoretical concept of both Luhmann and Teubner. She describes society 'as consisting of several distinctly different systems or spheres of communication, such as law, politics, economy, science, mass-media, religion, etc. and of a multiplicity of social discourses.'[7] The problems of a functionally differentiated society in the age of globalisation are sketched as legal and political challenges arising from technical innovations which confront law and politics with problems which are 'multi-dimensional, complex and, to some extent, transnational' in 'their origin, their causes and at the problem-solving stage.'[8]

The question of an adequately complex reaction to the societal realities of multi-level governance, the diversification of actors and the forms of regulation is the theoretic-democratic constant of the discussion. Even though she strangely oscillates between different theoretical offers, Sand

[4] Luhmann recognised the theoretical stringency of the concept of reflexive law, but perceives the concept as 'encumbered with the intention of achieving a synthesis of theories belonging to 'critical-emancipatory' strings and to concepts of 'responsive dogmatic' and of sociological analysis of the 'legal system'.' In Niklas Luhmann, Einige Probleme mit 'reflexivem Recht' (1985) *Zeitschrift für Rechtssoziologie* 6, 1. (2). See the instructive comparison of critical-emancipatory and systemic legal concepts by Marcelo Neves, Zwischen Themis und Leviathan: *Eine Schwierige Beziehung. Eine Rekonstruktion des demokratischen Rechtsstaates in Auseinandersetzung mit Luhmann und Habermas*, (Baden-Baden 2000).

[5] G Teubner, How the Law Thinks: Toward a Constructivist Epistemology of Law (1989) *Law and Society Review* 23, 727.

[6] G Teubner, *Law as an Autopoietic System*, (Oxford, OUP, 1993), at 69.

[7] I-J Sand, 'Polycontextuality as an Alternative to Constitutionalism', in this volume.

[8] Sand (n.7), 62.

adds a dimension which she calls a 'variety of techniques of governing', which transcends the limits of the legal and political systems, and illustrates 'the change of focus from politico-legal institutions to the increasing significance of a variety of communicative functions or techniques'.[9] She also observes governing functions in non-political functional systems, 'on a par with, or challenging, the politico-legal systems'.[10] These decentralisations become — as is rightly accentuated — for scientific and technical innovations, increasingly important,[11] and affect the functionality of national constitutional states and 'nationally based political and legal governing institutions'.[12] Sand sees part of the solution 'in the more creative construction of structural couplings between these systems',[13] which could supplement traditional constitutional law. This remains nebulous, but touches the central problem: what should the reaction towards the dynamics of global autopoietic systems, and towards the clash of rationalities[14] in a world society that lacks a representative centre, be? Who should be addressed with the post-modern *sapere aude*?

Whereas, in the philosophy of the Enlightenment, the human-being itself, as 'the general symbol that equalised,'[15] was the centre of the normative cosmos, and whereas Kant gathered the necessary rules of human society from human rationality, post-modern theorists do not base their concepts on the destiny of single individuals.[16] Their analysis of the structure and problems of society primarily concentrate on the complexity and operability of societal communication processes: 'As only systems can be the media of Enlightenment, not the deliberatively discussing public.'[17] And thus, it is not the deliberation of rationality in free and equal discourses that enlightens, 'but only an effective improvement of the human potential to conceive and reduce complexity.'[18]

[9] Sand (n.7), 44.
[10] *ibid*.
[11] Sand (n.7), 48; see, also, IJ Sand, 'The Legal Regulation of the Environment and New Technologies — In view of changing Relations between Law, Politics and Science. The Case of Applied Genetic Technology' (2001) *Zeitschrift für Rechtssoziologie* 22, 126.
[12] Sand (n.7), 65.
[13] *ibid*.
[14] This is quite different from Huntington's vulgar-scientific 'clash of civilizations' (S Huntington, 'The Clash of Civilizations', *Foreign Affairs* 3/1993, 3); regarding discourse collisions: M Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, 3rd edn (Tübingen, Mohr & Siebeck, 1968), at 605; G Teubner, Altera pars audiatur: 'Law in the Collision of Discourses', in, R Rawlings (ed) *Law, Society and Economy*, (Oxford, Oxford University Press, 1997), at 150; Andreas Fischer-Lescano, 'Odious Debts und das Weltrecht', in: (2003) *Kritische Justiz*, 36, 223.
[15] Ernst Bloch, 'Naturrecht und menschliche Würde', *Werke Band* 6, 2nd edn, (Frankfurt am Main, Suhrkamp, 1991), at 79.
[16] Niklas Luhmann, 'Die Soziologie und der Mensch' in: *Soziologische Aufklärung* VI, (Opladen, Westdeutscher Verlag, 1995), at 274.
[17] Niklas Luhmann, 'Soziologische Aufklärung' in: Luhmann, *Soziologische Aufklärung I. Aufsätze zur Theorie sozialer Systeme*, 4th edn (Opladen, Westdeutscher Verlag, 1974), at 66 (77).
[18] Luhmann (n.17), 77; see, also, Niklas Luhmann, 'Quod Omnes Tangit: Remarks on Jürgen Habermas's Legal Theory' (1996) *Cardozo Law Review* 17, at 883.

Consequently, post-modern Enlightenment addresses communicative systems and the debate on globalisation draws the attention to the contingency of a specific systemic unity of decision making[19] — the unity of politics and law in the nation state.[20]

II

The requiem to the nation state is in vogue. Above all, these critics seem to suffer from the misconception that the state is identified with the monopoly on the use of force. The theocratic suggestion that the state was, at a hypothetically given time, in possession of political omnipotence is an exaggerated idea of the state's power. It is mainly in the sense of this *a priori* that those disguised as 'Enlighteners', who regularly claim that the state has lost power in the age of globalisation, misconceive the reality of the state, and fail to recognise that a state, as in Bodin's concept of sovereignty which is described as a real-existing status of power relationships, never existed.[21] In fact, the semantics of state involves a reduction of complexity that first intercepts the idea that the rule of law (Rechtsstaat, estado de derecho, l'état de droit) is the result of an association of politics and law, two different autopoietic functional systems that become structurally coupled in an autological operation.[22] On the inside of this coupling, the mutual irritation of politics and law is facilitated, constitutionally legalised, and, on the outside, the mutual irritation is, if possible, excluded, and, in all cases, illegalised: 'So, politics and the administration of justice are supposed to interact 'only constitutionally' — and not differently. Under the condition that other possibilities are excluded, […] the mutual influence can be enormously increased.'[23] Thus, as Sand also stresses,[24] constitutions are, at the level of the nation state, an extraordinarily successful form of coupling of law and politics; one that is based, on the one hand, on the capacity of the law to provide politics with a resource of legitimacy for collectively-binding decisions, and, on the other, based on the capacity of politics to secure collective attention for the legal system.

[19] Hermann Heller, *Staatslehre*, (Leiden: Sijthott, 1934), at 249.
[20] Niklas Luhmann, 'Verfassung als evolutionäre Errungenschaft', in, (1990) *Rechtshistorisches Journal* (9), at 176.
[21] Ulrich Preuß, Entmachtung des Staates, in: *Gosepath/Merle (eds), Weltrepublik: Globalisierung und Demokratie*, (München: Beck, 2002), at 99 (103).
[22] Jacques Derrida, *Otobiographies. L'enseignement de Nietzsche et la politique du nom propre*, (Paris Galilée 1984), at 16.
[23] Niklas Luhmann, 'Verfassung als evolutionäre Errungenschaft', (1990) *Rechtshistorisches Journal* (9), at 176 (205); compare N Luhmann, 'Politische Verfassungen im Kontext des Gesellschaftssystems', in: *Der Staat* 1973, at 1 and 165.
[24] Sand (n.7), at 61.

It is for this reason that the transnational discussion should not be about the substitution of national constitutions, but about a reflection on the basic functional principles of constitutionalism, and an adequately complex reaction to the challenges of transnationalisation and the fragmentation of law and politics. As regards the globalisation of the debate on constitutionalism in the field of multi-level public governance and the application of constitutional semantics towards non-state entities such as the UN, WTO, EU and the International Community, it can be summarised that, even at global level, law and politics formed each proper structural couplings of state, inter-state, supra-state and intra-organisational decision making entities.[25]

The analysis becomes more difficult if one takes what Sand calls the 'more creative construction of structural couplings'[26] between the functional systems into consideration. On the one hand, she remains very vague; she does not indicate precisely which structural couplings could be constructed more creatively, nor how it could be done nor by whom — she does not say how far nor whether this implies a constitutional problem at all, nor who should be addressed by the *sapere aude*.

Nevertheless, her point of reference is promising and a reaction to a dilemma of politics and law, that provoked Luhmann's dark warning that the democratic state of law of the past might, in the future, only be remembered as a 'mis-specification of the evolution of mankind'.[27] One of the reasons for this warning is, surely, that Luhmann perceived the democratic article of faith, that democracy is a form of governing

[25] For the constitution of the European Union, see A Peters, *Elemente einer Theorie der Verfassung Europas*, (Berlin: Bunker & Humblot, 2001), at 167; for WTO-Constitutionalism, see W Benedek, 'Die Konstitutionalisierung der Welthandelsordnung. Kompetenzen und Rechtsordnung der WTO', in: *Berichte der Deutschen Gesellschaft für Völkerrecht* 2001, forthcoming; for UN-Constitutionalism, see B Faßbender, 'The United Nations Charter as Constitution of the International Community', in: (1998) *Columbia Journal of Transnational Law* 37, at 529; P-M Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', in: *Max Planck Yearbook of United Nations Law* 1 (1997), at 1; for ICTY-Appeals Chamber, *The Prosecutor* vs *Dusko Tadic 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case-Number IT–94–1–AR72, 2.10.1995, in: (1996) *International Legal Materials*, 32 (42); for the constitution of the International Community, see Ch Tomuschat, International Law as the Constitution of Mankind, in: UN (ed), *International Law on the Eve of the Twenty-first Century views from the International Law Commission*, New York, United National Publication 1997, at 37; H Brunkhorst, *Solidarität, Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft*, (Frankfurt am Main, Suhrkamp, 2002), at 216.; A Fischer-Lescano, 'Globalverfassung: Verfassung der Weltgesellschaft', in: 2002 *Archiv für Rechts- und Sozialphilosophie*, at 349; A Fischer-Lescano, 'Globalverfassung: Los desaparecidos und das Paradox der Menschenrechte', in: (2002) *Zeitschrift für Rechtssoziologie* 23, at 217.

[26] Sand (n.7), 65; see, also, Sand, 'The Legal Regulation of the Environment and New Technologies — In view of changing Relations between Law, Politics and Science. The Case of Applied Genetic Technology', in: (2001) *Zeitschrift für Rechtssoziologie* 22, at 126, (204).

[27] N Luhmann, *Rechtssoziologie*, (2nd edn), (Opladen, Westdeutscher Verlag, 1983), at 339.

through the governed, as obsolete.[28] But the key to this danger being real is the observable, seemingly inexorable, process of the fragmentation of politics.

III

'Ce que vous appelez 'mondialisation' est une stratégie de dé-politisation au service d'intérêts politiques particuliers',[29] states Jacques Derrida in the 'Politiques de l'amité', and, as the globalisation radicalises the problematique of law and politics in the nation state, the problem, here, seems to be situated where what is conceived as hierarchy should be conceived as heterarchy. The nation state has not lost its power in these local political fragmentation processes — which is why the requiems for it are wrong — but has, instead, reacted by installing a decentralised network of private and public actors.[30]

National constitutional law tried to reformulate this by a horizontalisation of the concept of basic rights: private autonomy, the horizontal effect of human rights and private contractual questions become questions of political constitutional law. But what could only be conceptualised as being somehow forcible in the nation state,[31] now, at a global level, becomes a fundamental issue: the political content of private decisions cannot be reformulated in global law. International public law does not cover questions of the validity of contracts among private actors. At best, by means of the *ordre public* of international public law, contractual questions regarding the relationships between subjects of international law and private actors are covered.[32] Nevertheless, *lex*

[28] 'Especially, Carl Schmitt, who had an unchallenged sense for outdated concepts, held on to the term of representation and, from this point of view, judged constitutionally realised parliamentarism as a misdememeanour of the principle. Either identity or representation, and if representation, then representation of identity. Admittedly, this is a more adequate reformulation of the original principle, that therefore proves the obsolesce of this specific semantic of self-description of the political system.' (N Luhmann, *Die Politik der Gesellschaft*, (Frankfurt am Main, Suhrkamp, 2000), at 334).

[29] J Derrida, *Politiques de l'amité. L'oreille de Heidegger*, (Paris, Galilée, 1994), at 182.

[30] G Teubner, 'The 'State' of Private Networks: The Emerging Legal Regime of Polycorporatism in Germany' 1993 *Brigham Young University Law Review* 553.

[31] G Teubner, P Zumbansen, 'Alienating Justice: On the Social Surplus Value of the Twelfth Camel' in D Nelken and J Pribán (eds), *Consequences of Legal Autopoiesis*, (Aldershot, Dartmouth Gower, 2001).

[32] Regarding the *ordre public* in international public law, see Walter Kälin, 'Menschenrechtsverträge als Gewährleistung einer objektiven Ordnung', *Berichte der Deutschen Gesellschaft für Völkerrecht* 1994, at 9 (35); Rudolf Dolzer, 'Staatliche Zahlungsunfähigkeit: Zum Begriff und zu den Rechtsfolgen im Völkerrecht', in *Des Menschen Recht zwischen Freiheit und Verantwortung*, (ed) by Jürgen Jekewitz, (Berlin, Bunker & Humblot, 1989), at 550.

mercatoria, *lex informatica* and *lex sportiva* show that it is not just state actors that use the global social field in pursuit of particular interests; political interests that Derrida has rightly described as part of the semantics of globalisation. And so, the operations of the global networks of economics, science, religion, the military, etc, enhance the ability of collective public actors to act.[33]

Thus, globalisation is a genuine political process and should be perceived as a challenge that rouses the legal system to emancipate it from 'self-incurred dependence'[34] in the nation state, from statal fixation to the institution of the political system; as a challenge that forces the legal system to acknowledge the particular private politicisation tendencies beyond the state and the governing functions in other functional systems.[35] The legal system can thus contribute to the achievement of the classical emancipatory ideal by redefining both proximity and distance to transnational politics. As Jacques Derrida puts it:

> 'Politicisation, for example, is interminable even if it cannot and should not ever be total. To keep this from being a truism or a triviality, we must recognise in it the following consequence: each advance in politicisation obliges one to reconsider, and so to reinterpret the very foundations of law such as they had previously been calculated or delimited. This was true for example in the Declaration of the Rights of Man, in the abolition of slavery, in all the emancipatory battles that remain and will have to remain in progress, everywhere in the world, for men and for women. Nothing seems to me less outdated than the classical emancipatory ideal.'[36]

IV

There is no lack of theoretical models which tackle this emancipatory task. Particularly in moral-philosophical concepts, this regularly ends in a plea

[33] For example, in the case of Argentina, see A Fischer-Lescano, 'Sittenwidrige Schulden', *Blätter für deutsche und internationale Politik* 4/2003, at 404 *et seq*; A Fischer-Lescano, 'Odious Debts und das Weltrecht', *Kritische Justiz* 36, 2003, 223.

[34] 'Dependence [Unmündigkeit] is the inability to make use of one's own understanding without direction from another. This minority is self-incurred when its cause lies not in lack of understanding but in lack of resolution and courage to use it without direction from another.' (Kant (n.1), 53; M Gregor (n.1) translates 'Unmündigkeit' as 'Minority'. In my opinion, this seems to be much to the point as minority is a special form of dependence, but Kant's use of 'Unmündigkeit' goes beyond minority to a more general form of 'dependence'.)

[35] Sand n.7, at 44.

[36] J Derrida, 'Force of Law. The 'Mystical Foundation of Authority', in: D Cornell, M Rosenfeld, D Carlson (eds), *Deconstruction and the Possibility of Justice*, (New York, Routledge, 1992), at 3. (28).

for a Global State or a World Republic.[37] Otfried Höffe, for example, calls his concept of a globalisation of the institutions of federal republics and of philosophical classics a 'rapturous utopia'.[38] But how, one wants to ask, could it be possible that the institutional repertoire of the federal republics[39] enables the regulation of a world, in a way that is orientated towards fairness, human rights and global welfare? What is 'rapturous' if one thinks of achieving global democracy with the institutional means of a global Federal Republic of Germany?[40]

With regard to the politics of world society, we should abstain from jumping to conclusions. For world-state-centred constitutionalism regularly marginalises influential political actors of world society by failing to differentiate between the political system of world society and the politics of civil society.

Firstly, let us look at the political system of world society. Politics, represented in the institutions of states, the United Nations, the EU, the WTO, etc, is the big irritator[41] of its economical, legal, artificial, etc, societal environment. In this sense, one can even say that world society is also affected by a fundamental politicisation, as the political system, in, for example, the nation state, says 'l'état c'est moi',[42] and as politics, especially in the welfare state, has perfected this universally conceptualised self-construction, thus securing societal attention for itself:

> 'Increasingly, the welfare state confronts itself with problems that are presented as problems to be solved, meaning problems that are solvable […]. All in all, the welfare state is similar to the attempt to blow up the cows to get more milk. The founding paradox appears in a new form: the problems to be solved are not solvable, because they would, on the one hand, copy the

[37] Th. Mohrs, *Vom Weltstaat. Hobbes' Sozialphilosophie, Soziobiologie, Realpolitik*, (Berlin, Academic Verlag, 1995), at 337; Otfried Höffe, 'Some Kantian reflections on a world republic', in, (1998) *Kantian Review* 2, at 51; Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, (München, Beck, 1999); Critics against the concept of a World Republic: A Fischer-Lescano, 'Otfried Höffes Brave New World und die Globalisierungskatastrophe', in: *Archiv für Rechts- und Sozialphilosophie* 2/2003, 287.

[38] Otfried Höffe, *Kategorische Rechtsprinzipien*, (Frankfurt am Main, Suhrkamp, 1990), at 278.

[39] 'The World Parliament consists of representatives for States, the World States' Parliament, and of representatives for citizens, the World Federal Parliament [Welttag]. The first chamber, the States' Chamber, which is responsible to the World States' Parliament, is similar to the German Bundesrat or the North-American Senate; the second chamber, the Cosmopolitian Chamber — the World Federal Parliament — is similar to the German Bundestag or the North-American Congress.' (Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, (München, Beck, 1999), at 310.

[40] Klaus Günther, 'Alles richtig! Otfried Höffes Entwurf einer subsidiären und föderalen Weltrepublik auf der Basis des Allgemeinmenschlichen', in: *Rechtshistorisches Journal* 19 (2000), at 232 (235).

[41] To *order from noise* processes: N Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt am Main, Suhrkamp, 1997), at 65.

[42] *Idem* at 195, (197 and 319).

> functional differentiation of society into its political system, while, on the other hand, they would be based on the fact that the political system is only one sub-system of the general but functionally differentiated societal system.'[43]

'A great part of the tragedy of politics is already explained by this,'[44] — but the transnational role of the political system in world society remains open. This is because, in functionally differentiated world society, one can observe that the society is also 'observeable as fundamentally *juridified, fundamentally mediated, fundamentally educationalised, fundamentally medicalised, and fundamentally religious*,'[45] but that 'politics has conquered the air sovereignty of the field of collective, effective self-descriptions of society.'[46] This is immediately connected with its function that Luhmann describes as the 'preparation of the capacity for collectively-binding decisions'.[47] The crucial point of politics then lies in a concept of collectivity that is obviously different from society. Luhmann develops this difference between collectivity and society by saying:

> 'The evolution of the political system leads […] to the establishment of 'strange loops' […]. The general system established itself as a hypercircle, as a strange loop of strange loops and finds its unity here, which can no longer be represented at any point of the system. The control of the control — that is the system. The closure of the system takes place at the point where public individuals, who receives orders and are administratively subordinate, are metamorphosised into the *demos*; at this point. the *volonté de tous* metamorphosises itself into the *volonté générale*.'[48]

Thus, day by day politics does not deal with *societal*-binding decisions, but with *collectively*-binding operations and collectivity is only a political construction. The forms of politics that should not be underestimated are those which 'are situated outside the organisation of the state. They simulate the possibility of communication in addressable collectives — and these communications even adopt political forms if they have no chance of transformation to concrete decisions.'[49] These new transnational collectives render visible the contingences of political unities which have, since

[43] See above n.42, at 215; see, also, N Luhmann, *Political Theory in the Welfare State*, (Berlin, de Gruyter, 1990).
[44] Compare Luhmann (n.42), at 32.
[45] Armin Nassehi, 'Politik des Staates oder Politik der Gesellschaft? Kollektivität als Problemformel des Politischen', in: Hellmann/Schmalz-Bruns (eds), *Niklas Luhmanns politische Soziologie*, (Frankfurt am Main, Suhrkamp, 2002), at 38. (44).
[46] Nassehi (n.45), at 45.
[47] Luhmann (n.42), at 84.
[48] Luhmann (n.42), at 264.
[49] Nassehi (n.45), at 51.

ancient times, been made invisible by the fog of constitutional (and/or constitution-theoretical) homogeneity claims towards the object to be constituted, the *demos*. They point to the fact that social and functional dimensions of politics differentiate,[50] whereas, until now the function of politics has not been transferred to other actors in any remarkable way. The *global villages* follow their own rationalities and this is the dilemma:

> 'The separated differentiation of the various connective complexes of societal dynamics: on the one hand, the economical logic of effects, the translation of worlds to costs and the non-responsibility for collective consequences of own actions, and, on the other, the political logic of the connection of decisions to collective consequences, to the medium of power and obedience.'[51]

One possible form of a more creative use of structural couplings[52] could be not to react to the obvious clash of rationalities in world society, to the societal polytheism without an Olympus,[53] by simply substituting the political concept of *pars pro toto* by a *toto pro pars*, but by reflecting on strange loops. If politics does not manage to represent global societal rationality, and if it seems to be less and less the political system that puts the decisive consequences on societal reality, but other, non-state actors,[54] then it has to be guaranteed that, on the one hand, 'as far as possible, the autonomous system processes transport shared, proportional, reasonable, usual 'couplings' to own and others', further to general benefit and 'availability' ['Frommen']'[55] and, on the other hand, as far as possible the other function system processes transport shared, proportional, reasonable, usual 'couplings' to own and others', further to the specified benefit and 'availability' ['Frommen'].

[50] Nassehi (n.45), at 52.
[51] Nassehi (n.45), at 55.
[52] Sand (n.7), at 65.
[53] G Teubner, 'Altera pars audiatur: Law in the Collision of Discourses', in: R Rawlings (ed) *Law, Society and Economy*, (Oxford, Oxford University Press, 1997), at 150.
[54] See C Schreuer, The Waning of the Sovereign State: Towards a New Paradigm for International Law?, (1993) *European Journal of International Law* 4, at 447; A-M Slaughter, 'International Law and International Relations', (2000) *Recueil des Cours* 285, at 96; A Bianchi, 'Globalization of Human Rights: The Role of Non-state Actors', in: Teubner (ed) *Global Law without a state*, (Aldershot, Dartmouth Gower, 1997), at 179; K Günther/S Randeria, 'Recht, Kultur und Gesellschaft im Prozess der Globalisierung', Werner Reimers Stiftung, 'Suchprozesse für innovative Fragestellungen in der Wissenschaft', (Bad Homburg : Herner Reimers Shifting) 4 (2001).
[55] R Wiethölter, 'Zur Argumentation im Recht: Entscheidungsfolgen als Rechtsgründe?', in: Teubner (ed), *Entscheidungsfolgen als Rechtsgründe: Folgenorientiertes Argumentieren in rechtsvergleichender Sicht*, (Baden-Baden, Nomos, 1995), at 114.

V

But how can this be achieved? It seems to me that one possible interpretation of Sand would be this: by constitutionalising the politics of civil society, by working for a *world societal law*,[56] which has to provide,

> that, for example, the systemic games are to be played by those who have to play them, that, for example, problems (illnesses, conflicts) are to be solved by those who can solve them, and so on, and so on.[57]

This process of legal learning can now be applied to the dynamics of the evolution of expansive social systems, in order to deliberate, in this process of constitutionalisation, on the one hand, the potential of highly specialised dynamics by institutionalising them on a societal level, and institutionalise, on the other, mechanisms of self-restriction against their societal expansion which, in the end, turns against the functional differentiation itself.[58] This system-theoretical contribution to the theoretical democracy debate reflects the decentralisation of politics in world society by deliberating on the concept of legal limitation of the sovereign from statal fixation and by taking intra-systemic sovereignty problems seriously. Two problems become extremely pressing: (1) the problem of structural corruption, which means the massive unfiltered influence of private interests on legal formation processes, and (2) the question of the constitutional authorisation of the global villages.[59]

VI

Second order sociological observation addresses the contingencies of these political unities, such as 'the external difference between the political system and societal environment'.[60] If one then rearranges the observation of the principle of recursive collectivity from a social to a functional dimension, one can see that the institutions of politics could, up to now, survive by applying the tricky technique that their decisions rebind their own technology-deficit to the collective and that politics has perfected the

[56] M Amstutz, 'Zwischenwelten. Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht', in Joerges and Teubner (eds), *Rechtsverfassungsrecht*, (Baden-Baden, Nomos, 2003) 213.
[57] Wiethölter (n.55), at 114.
[58] G Teubner, 'Societal Constitutionalism', in this volume.
[59] Teubner (n.58), at 8.
[60] Luhmann (n.42), at 253.

strategy of elimination of risks of negation by generating a climate of general recognition created via the discrete use of the political threat-potential. But this functionality is only possible if politics can 'realise a visibility of the social field, in which it can be expected that those who are affected by political decisions obey these decisions or challenge them only politically'.[61] It is one of the ironies of politics that the

> 'formula of *democracy* […] as a central form of self-description for modern politics then provides that the affected can be stylised as decider. In this sense, democracy protects the powerful against the dependent rather then the reverse.'[62]

The political theory in the tradition of Niklas Luhmann opposes this understanding of the political system 'with as small a sociable basis as possible',[63] and prefers an emotionless procedural legitimacy to strong and sociable self-legitimacy.

> 'Or differently: Who would notice at all if there were no demos?'[64]

And the proposal of the constitutionalisation of the politics of civil society then takes the decisive step as it also confronts the internet-community, the 'global networks in economics, science, health system, education and professions,'[65] with the imposition of a functional collectivity and imposes not only the duty to provide decision-making procedures but also collective legitimacy on them. So, the politics of civil society is not an Anti-Empire politics of a diffused multitude inscribing itself creatively into the Empire,[66] and it is also not non-politics.

> 'On the contrary, the very reconstruction of social and economic (trans)actions as a global legal-process undermines its non-political character and is the basis of its re-politicisation. Yet, this will occur in new and unexpected ways.'[67]

Global law will not, therefore, be re-politicised by traditional political institutions, eg, of quasi-parliamentarian nature, 'but within the various

[61] Nassehi (n.45), at 47.
[62] Nassehi (n.45), at 47; see, also, Luhmann (n.42), at 334.
[63] Nassehi (n.45), at 50.
[64] Luhmann (n.42), at 366.
[65] Teubner (n.58), at 5; instructive regarding transnational forms of collectivity: P Schiff Berman, 'Globalization of Jurisdiction', (2002) *University of Pennsylvania Review* 151, 311. (472).
[66] See, for example, M Hardt, A Negri, *Empire*, (Cambridge, Cambridge University Press, 2000), at 61.
[67] G Teubner, 'Global Bukowina: Legal Pluralism in the World-Society', in: G Teubner (ed) *Global Law Without A State*, (Aldershot, Dartmouth Gower, 1997), 3. (4).

processes under which the law engages in 'structural coupling' with highly specialised discourses.'[68]

VII

The unity of the global public and private governance regimes lies in such a scenario in the global law of world society. The common normative task of guaranteeing the self-constitution of the individual, the social differentiation and the hitherto linked legal task of generalisation and respecification of originally state-centred constitutional law[69] reflects that politics cannot be reduced to politics, that the civil society also uses collective attributions, and that the societal environments have to be protected against these particular, function-oriented and expansive tendencies. In this respect, the distinction between public and private governance also loses differentiability, even if — otherwise the distinction would not be necessary — it finds its difference in the distinctive mode of association with collectives. The collectivity of public politics is sociable — with 'the corresponding background of solidarity, participation and community'.[70] The collectivity of private politics is a unsociable — with its corresponding background of partial functionality, exclusion and speciality.[71]

These are admittedly important differences,[72] but — and this is the normative moment of this conceptualisation — they must not make any difference with regard to the conditions of the possibility of self-constitution of the individuals and world societal differentiation. Thus, on the one hand, a legal limitation and constitutionalisation legally binds and forces self-constitutions, but, on the other, it gives legal dignity to their highly specified logics and, using this trick, obliges them towards the whole. In this way, the legal system can contribute important means to the societal creation of procedural legitimacy, providing norms for constitutions, procedures, organisations and competences, which other systems need as a condition of democratic self-organisation and self-regulation.[73] Such a

[68] Teubner, *idem*.
[69] G Teubner, 'Global private regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors in World Society?', in: K-H Ladeur (ed), *Public Governance in the Age of Globalization*, (Cambridge: Ashgate Publishing, 2003).
[70] Nassehi (n.45), 52.
[71] G Teubner, 'Contracting Worlds: Invoking Discourse Rights in Private Governance Regimes' (Annual Lecture Edinburgh 1997), in, (2000) *Social and Legal Studies* 9, at 399.
[72] The paradox of the unity of the difference is called Public-Private-Partnership. For hybrid forms of governance, see J Freeman, 'The Private Role in Public Governance', in: (2000) *New York University Law Review* 75, at 543; K-H Ladeur, 'The Changing Role of the Private in Public Governance. The Erosion of Hierarchy and the Rise of a New Administrative Law of Co-operation', EUI Working Paper Law (No. 2002/9) Florenz 2002; see, also, the self-description of UN-Secretary General Kofi Annan's 'Global Compact', *www.globalcompact.org*.
[73] G Teubner, 'Substantive and Reflexive Elements in Modern Law', in: (1983) *Law and Society Review* 17, at 239.

scenario demands a *sapere aude* from the legal discourse itself, and offers the opportunity to react towards the challenges to democratic governance that are emerging with (post)modernisation and globalisation hetero-regulating by self-regulating.[74] In this way, dangers could be transformed to emancipatory chances, without — and this is the actual provocation of this concept — having to fall back on the logics of formal democratic authority; yes, without — and this is the real worry that the catastrophe of globalisation presents — being able to fall back on these logics at all. *Sapere aude ius!* Have courage to make use of your own understanding! is thus the motto of post-modern Enlightenment.

[74] G Teubner, *idem*.

Section II: Two Competing Perspectives on the Legitimacy of Transnational Governance: International Relations Theory and Jurisprudence

5

Sources of Legitimacy Beyond the State: A View from International Relations

JENS STEFFEK
BREMEN

I. THE ARGUMENT

IN THE CURRENT debate about the constitutionalisation of international governance, perspectives from legal theory and political philosophy prevail. This contribution, in contrast, adopts a view from the academic discipline of international relations (IR). While sceptical about the prospects for representative democratic governance in European and world affairs, it underscores the legitimating potential of 'good functional governance' by international organisations, which appears to be underestimated by many political theorists. It seeks to enrich the conception of good functional governance by highlighting important normative conditions of due process and deliberative consensus-seeking. Consequently, the notion of supranational legitimacy espoused here is neither based on 'institutional performance' as in classic

functionalist approaches, nor on some sort of 'institutional isomorphism' that advocates of post-national parliaments or a world republic propose.

Such an approach to legitimacy beyond the state is clearly at odds with the prevalent view that international organisations in general, and the European Union in particular, suffer from a legitimacy crisis because of their democracy deficit.[1] There appears, indeed, a democracy deficit in the EU when we compare the Union's institutional structure to those of contemporary Western democracies. Yet, how decisive is this for the Union's perceived legitimacy? Survey evidence reveals that Europeans do, indeed, perceive the Union as being less democratic than their home countries. At the same time, however, the level of popular support for the EU and other international organisations is relatively high. In Section 3. I discuss this puzzle in more detail. I then set out to present an alternative approach to the legitimacy of international governance.

An important starting point of argumentation to this approach can be found in international legal scholarship. Some international lawyers have pointed out that numerous normative criteria need to be fulfilled if the rules of international law are to be accepted.[2] Actors feel bound by international legal rules because they accept the values that international co-operation pursues and the procedural principles according to which it works. I argue that there seem to be some criteria of good governance that are independent of the presence of democratic institutions, on the one hand, and of institutional performance in terms of material output, on the other. International governance is likely to be regarded as legitimate when it is directed towards the agreed values of the international community, and when it respects commonly shared procedural standards.

The international relations approach to legitimacy is empirically oriented, in the sense that it aims to provide an answer to the question of how people's legitimacy beliefs come about in practice. As I have argued in more detail elsewhere, legitimacy beliefs emerge from a process of rational communication.[3] In doing so, I rely on Max Weber's ideal-typical description of legal-rational legitimation. According to this model, political domination can only function when people accept the rational principles

[1] Since the ratification crisis of the Maastricht Treaty, the literature on the topic has been growing rapidly. For an early and still helpful review of the EU debate, see G de Búrca, 'The Quest for Legitimacy in the European Union', 59 *Modern Law Review* 349. For a recent restatement of the representative democracy topos, see C Lord and D Beetham, 'Legitimising the EU: Is there a 'Post-parliamentary Basis' for its Legitimation?', 39 *Journal of Common Market Studies* 443; L Siedentop, *Democracy in Europe* (London, Allen Lane, 2000).

[2] See T Franck, *The Power of Legitimacy among Nations* (Oxford, Oxford University Press, 1990) and *Fairness in International Law and Institutions* (Oxford, Clarendon Press, 1995). Similar D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' 93 *American Journal of International Law* At 596.

[3] See J Steffek, 'The Legitimation of International Governance: A Discourse Approach', 9 *European Journal of International Relations* (2003) 249.

and formalised procedures according to which it works. Unlike authors who have dismissed Weber's idea of legal-rational legitimation as technocratic or mechanistic, I highlight the deliberative potential of his approach. In my view, legal rational governance essentially means *the institutionalisation of rational communication about ends, means, and values*. Accordingly, the perceived legitimacy in the respective system of governance depends upon the success of this communicative process, resulting in conscious and rational adherence. Such a 'thin' conception of legitimacy is inherent in all discourse theories of legitimacy.[4] Unlike the classical approach to legitimation through a delegation of power to a government, discursive theories make the legitimation of governance ultimately dependent upon its potential for rational justification.[5]

In the Fourth Section, I illustrate my rather abstract theoretical approach with a recent case from European Union politics: the on-going debate about the *Growth and Stability Pact* and the perceived role of the Commission in it. I seek to demonstrate that the European Commission enjoys a perceived legitimacy that is based on its role as guardian and impartial administrator of the community interest. As a supranational organisation, its task is to implement agreed community values according to agreed, fair procedures. This role is appreciated in public discourses on European governance, even when the Commission's position is at odds with those of national governments. It can mobilise public support even in cases where, according to much of the democratic-deficit literature, peoples' loyalty should be with the democratically elected national government.

II. THE PHILOSOPHICAL AND THE SOCIOLOGICAL APPROACH TO THE LEGITIMACY OF SUPRANATIONAL GOVERNANCE

At the beginning of this chapter, I argued that something similar to a distinctive perspective of international relations as a discipline on the issue of legitimate global governance exists. This idea needs some clarification, in particular, in an inter-disciplinary context. When debating legitimate governance, political and legal theorists, on the one hand, and empirical

[4] See J Habermas, *Legitimation Crisis* (Oxford, Polity Press, 1988); B Manin, 'On Legitimacy and Political Deliberation', 15 *Political Theory* 339.

[5] J Simmons has pointed out the important distinction between legitimacy and justification. His point is that legitimacy concerns the general entitlement to decide, while justification concerns the normative reasons that can be mobilised in support of a single decision. Governance by international organisations does not feature anything like the general entitlement to decide on all matters. As the goals of functional governance are clearly defined and neatly limited, this distinction does not make much sense there. See J Simmons, 'Justification and Legitimacy', 109 *Ethics* 739.

social scientists, on the other, tend to make quite different assumptions about the subject of their study.[6] Theorists explore under what conditions the exercise of power *should be called 'legitimate'*. Which institutional safeguards should be established, which rights must be protected, which forms of governance can we approve of? Clearly, the most likely answer to these questions nowadays is the assertion that legitimate governance must be some form of 'democratic' governance.

The second tradition of thinking on legitimacy is empiricist. With the rise of empirical social science in the early 20th century, a remarkable turn occurred in the thinking about legitimacy. In particular, Max Weber detached the term from its philosophical legacy and conceptualised it as a social fact: legitimacy, in Weber's sense, is the phenomenon that a social order enjoys 'the prestige of being considered binding'.[7] Consequently, the social scientist investigates the empirical motivations for this belief; motives which citizens affected by the political regime have. Why do people accept and support governance or government in practice? This strand of thought is usually and correctly attributed to sociologists, but empirical motivations for legitimacy beliefs were investigated long before the rise of this discipline, notable examples being the writings of Machiavelli and Hume.[8]

Although social science does not hold the copyright on the empirical approach, we can distinguish ideal-typically between a philosophical and a sociological conception of legitimacy. In fact, legal and political theorists usually remain faithful to the former, and social scientists to the latter. While the philosopher seeks to deliver a normatively valid prescription, the social scientist is concerned with the social force of real peoples' motivation in real societies. Her analysis will, ideally, allow us to recognise regularities in behaviour and to formulate a 'scientific' theory aimed at the explanation of social life. With this fundamental distinction in mind, it is easier to understand why social scientist and philosophers so often talk about different things when they are, apparently, talking about the same thing: legitimacy.[9]

Within the tradition of social scientific analysis, the discipline of international relations in general, and this paper in particular, are committed to an empirical approach to supranational legitimacy. What is important to students of international relations is the role that legal and moral norms

[6] See D Beetham, *The Legitimation of Power* (Houndmills, Macmillan, 1991), Chapter 1.
[7] M Weber, *Economy and Society* (Berkeley, University of California Press, 1978), Vol. I, 31.
[8] See N Machiavelli, *The Prince* (New Haven, Yale University Press, 1997); D Hume, 'Of the Original Contract' in S Copley and A Edgar (eds), *David Hume: Selected Essays*, (Oxford, Oxford University Press, 1993).
[9] The different perspectives with regard to European governance are nicely presented in M Jachtenfuchs, 'Theoretical Perspectives on European Governance', 1 *European Law Review* 115.

play in the real behaviour of states and other political actors. Such an approach is sceptical about the validity of norms in international affairs, but not necessarily pessimistic.[10] The social scientist might be reminded by the philosophers that the legitimacy of governance must be distinguished duly from the mere acceptance of governance;[11] that international functional governance is a necessary arrangement that helps us solve political problems which can no longer be managed at the national level, but that this does not mean that it is normatively desirable.

Quite clearly, we cannot attain any normative prescription about how international governance should function ideally from a mere description of how it functions in practice. These are, indeed, different categories of analysis. However, it seems to me that also a prescriptive approach should take the real motivations of real actors into account if it is to claim to be relevant in giving practical advice to decision-makers. In order to arrive at a good prescription for the world, our description of the world should be accurate. Therefore, before elaborating on the legitimacy crisis or democracy deficit of the EU or of other international organisations, we should try to find some empirical evidence with regard to its existence and nature.

III. HOW IMPORTANT IS THE EU'S DEMOCRACY DEFICIT?

Many political theorists, as we have already said, tend to equate 'legitimate governance' *a priori* and almost automatically with 'democratic governance', according to the model of the liberal Western parliamentary republic. International governance is clearly different from this model because it does not provide for parliamentary structures to represent citizens in norm-setting processes or to control the implementation of these norms. Thus, some authors swiftly diagnose a striking democracy deficit of supranational governance and a concomitant legitimacy crisis. Yet, how relevant is this 'democracy deficit' for citizens' perception of international governance through international organisations? Do people really believe that governance beyond the nation state is not legitimate? If they do so, why do international organisations and informal regimes remain so stable and proliferate so rapidly?

Even authors who set out to explore the administrative character of governance in the European polity rarely ask for empirical mechanisms

[10] International relations theory is often mistakingly identified with one of its currents, the so-called 'realism'. This paradigm indeed denies any significant influence of norms in international affairs. However, since the end of the East-West confrontation, the influence of 'realism' has been constantly decreasing.

[11] On possible motivations for compliance with rules, see F Kratochwil, 'The force of prescriptions', 38 *International Organization* 685.

of legitimation but take a view on this polity from the perspective of the democracy paradigm.[12] As the democratic legitimacy problem is so self-evident, these authors set relatively narrow limits to their own perception of the world. Far from dismissing the normative model of modern representative democracy out of hand, I shall raise some doubt about the usefulness of transferring this paradigm to the supranational sphere. There is, firstly, the fact that not all power structures in a democratic state are legitimated democratically. Even within liberal Western democracies, citizens support many social institutions that are definitely undemocratic.[13] Secondly, there is a tendency to measure international governance against an ideal conception of democracy that has very little in common with the actual functioning of modern mass democracies.[14] In fact, many regulatory areas in which international organisations enjoy ample competencies are, in the national context, equally protected against direct influence from parliament and government.[15] Last, but not least, the empirical evidence that citizens perceive a pressing legitimacy deficit of international governance is ambiguous.

European citizens, for example, feel that the EU is less democratic than their home countries. Recent *Eurobarometer* surveys have shown that 58 per cent of interviewees were fully or fairly satisfied with the way 'democracy' worked in their home country, while only 44 per cent were fully or fairly satisfied with the state of 'democracy' in the European Union.[16] Interestingly, however, this perception does not seem to translate automatically into distrust. If trust is an indicator of the perceived legitimacy of an institution (and I think it is a reasonable one), international organisations fare quite well. On average, citizens' trust in the European Union is higher than trust in national governments. In 2001, 53 per cent of the interviewees affirmed that they trusted the European Union, as opposed to an average of 48 per cent who said they trusted their national governments.[17] In both cases, parliaments were regarded as more trustworthy than executive bodies.[18] The United Nations fared even better than both the EU and the

[12] See H Lindahl, 'Sovereignty and Representation in the European Union' in N Walker (ed) *Sovereignty in Transition* (Oxford, Hart Publishing, 2003).
[13] See Ph Schmitter, 'What Is There To Legitimize in the European Union…And How Might This Be Achieved?', New York University School of Law, Jean Monnet Working Paper No.6/2001.
[14] See G Majone, 'Europe's 'Democratic Deficit': The Question of Standards', 4 *European Law Journal* 5.
[15] See A Moravcsik, 'In Defense of the 'Democratic Deficit': Reassessing Legitimacy in the European Union', 40 *Journal of Common Market Studies* at 603.
[16] See European Commission, *Standard Eurobarometer 56* (Autumn 2001) Annex, Table 2.3a.
[17] See, *ibid*., Tables 1.7b and 3.5b.
[18] The European parliament achieved 58%, national parliaments 51%, the European Commission 50%; see, above n.16, Tables 1.7b, 1.7c, 3.6.

nation state, with 59 per cent of interviewees saying they trusted this international organisation.[19] Moreover, only in one country (the Netherlands) did the national government enjoy more confidence than both the EU and the UN.

To be sure, the questions of the *Eurobarometer* are quite general in nature, ie, they explore the overall level of support without really investigating the reasons for it. In addition, the history of the *Eurobarometer* shows that popular attitudes are volatile and change quickly over time.[20] As we have seen in the conceptual discussion above, support does not allow us to infer directly to the sources of perceived legitimacy. In order to find this out, a more detailed questionnaire with more specific questions asking for the motives of support would be desirable. Nevertheless, the evidence does not lend itself to the hypothesis that EU citizens generally distrust international institutions because these are less democratic than their home countries. Trust in international organisations seems to be based on other features.

Another common criticism of supranational governance is that its institutions do not provide a political forum for citizens' participation and political debate. How urgent is the need for more participation and dialogue in the case of the EU? Some answers can be found in the *Eurobarometer* survey that was conducted in the spring of 2001 with a view to the 'Future of Europe' debate.[21] Respondents were asked whether they would like to participate in a dialogue with the community institutions about EU politics and the future of Europe. Only 26 per cent of the interviewees said they were interested in such a dialogue, as opposed to 62 per cent who manifested disinterest.[22]

Again, we do not have sufficient figures at hand to compare the interest in political dialogue systematically between the supranational and the national level. Nevertheless, these survey results definitely do not support the hypothesis that the vast majority of Europeans feels an urgent need for more direct participation in European policy-making. Thus, the data strongly suggest that we should take other possible mechanisms of supranational legitimation into account. In the absence of conventional democratic institutions, there must be additional sources of public support for international organisations such as the European Union and the United Nations.

[19] See above n.16, Table 1.7c.
[20] Difficulties of seeing a clear empirical picture are also highlighted by T Risse and T Börzel, 'The Post-Nice Agenda of the European Union: What's the Problem, How to Deal With It and What To Avoid', European University Institute, Robert-Schuman-Centre for Advanced Studies, Policy Paper CR 2001/01.
[21] See European Commission, *Standard Eurobarometer* 55 (Spring 2001), Section 4.6.
[22] *Ibid*., Fig 4.9a, percentage lacking to 100 is 'no opinion on this'.

Some social scientists have suggested an answer to this puzzle, which could be subsumed under the heading of 'output'-legitimacy.[23] An institution's output is supposed to complement the democratic 'input'-legitimacy generated by the participation in, and control of, the polity by the citizens. Output is the performance of institutions. They supply goods and services that are perceived as advantages by the citizen. Hence, institutions are supported because of what they produce. This phenomenon could explain why people support institutions that, on all accounts, are undemocratic.[24]

Yet, although it is very plausible that support for organisations is somehow related to their performance and efficiency, this theory does not hold in all cases. For example, why do people think that the United Nations Organisation is a legitimate institution? The UN's democracy deficit in the input dimension is obvious, and its output in terms of tangible advantages for individuals is poor. Moreover, this organisation has, for decades, failed to fulfil the tasks assigned in its Charter, and yet it still enjoys a comfortable level of popular support. This, clearly, can have nothing to do with the UN's efficiency or efficacy in attaining global peace, welfare or social justice, but with the very principles according to which this institution works, and the accepted validity of the values that it is pursuing.

IV. AN 'INTERNATIONAL RELATIONS' APPROACH TO LEGITIMACY

If it is neither democratic input nor functional output, what else could account for the perceived legitimacy of international governance? And what could be an alternative to reasoning by analogy, that is, assuming that international governance would have to follow current state models in its institutional structure and legitimation strategy? The academic disciplines of international relations and international law provide some interesting starting points for such a discussion. For many years, these disciplines have endeavoured to deliver a description of the unprecedented character of governance beyond the nation state. They were genuinely concerned with the form and substance of the new form of power and authority that is emerging from multi-lateral international co-operation.

[23] See F Scharpf, 'Democratic Legitimacy Under Conditions of Regulatory Competition: Why Europe Differs From the United States', Juan March Institute, Working Paper 2000/145.

[24] The utility, if not inevitability, of problem-solving above the nation state has been highlighted for many years by functionalist authors from various disciplines. Classics are HP Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen, Mohr Siebeck, 1972); E Haas, *Beyond the nation-state: functionalism and international organizations* (Stanford, Stanford University Press, 1964).

I submit that an appropriate enquiry into legitimacy beyond the state must start from such an accurate description of the specific form of power beyond the state. In his seminal treatise of social power, Max Weber argued that every form of domination [*Herrschaft*] in society actively seeks to create feelings of legitimacy.[25] He also found that the specific type of legitimacy that prevails in such a relationship depends upon the specific type of domination exerted. Consequently, we should take the specific nature of international governance into account when we seek to understand the specific type of legitimacy that international organisations enjoy. Thus, a promising starting-point for the re-construction of legitimacy conditions beyond the nation state could be the 'international regimes' literature.[26]

In the early 1980s, authors were in search of an adequate term to describe the emerging, more or less formalised forms of functional state co-operation in some political issue areas. They coined the term 'international regimes' defined as the 'principles, norms, rules, and decision-making procedures around which actor expectations converge'.[27] What is striking in this regime approach is that it regards norms almost as 'actors' in international governance.[28] Abstract prescriptions regulate state behaviour in that they make, with a certain degree of probability, choices predictable. Contrary to traditional legitimacy thinking that has focused on a government as a group of several persons in power, the regime approach concentrates on abstract arrangements of international governance that appear to be a mixture of norms and functional organisational structures.[29] These international functional organisations are created to serve values that states have identified as common. They are issue- or task-specific organisations.

This functionally differentiated and issue-specific form of governance is to be clearly distinguished from the model of domination within the modern nation state that created one single, centralised instance of decision-making, thus bundling the resources of coercive power, perceived

[25] 'But custom, personal advantage, purely affectual or ideal motives of solidarity, do not form a sufficiently reliable basis for a given domination. In addition, there is normally a further element, the belief in *legitimacy*. Experience shows that in no instance does domination voluntarily limit itself to the appeal to material, affectual or ideal motives as a basis for its continuance. In addition, every such system attempts to establish and to cultivate the belief in its legitimacy', M Weber n.7, Vol. I, at 213.

[26] See I Hurd, 'Legitimacy and Authority in International Politics', 53 *International Organization* at 379.

[27] S Krasner, 'Structural Causes and Regime Consequences: Regimes As Intervening Variables', 36 *International Organization* 1, at 1.

[28] See J Legro, 'Which Norms Matter? Revisiting the 'Failure' of Internationalism', 51 *International Organization* 31.

[29] See, as an overview of the regime debate, A Hasenclever *et al*. (eds) *Theories of International Regimes* (Cambridge, Cambridge University Press, 1997).

legitimacy, and legal supremacy in a certain territory.[30] In many fields, international functional regulation already determines state behaviour in a certain issue area to a great extent. These structures of international domination are multiple, issue-specific and by no means all-encompassing. Functional governance through international regimes is, by definition, limited governance.

The sum of international organisations and regimes is fragmented along functional lines, and this feature clearly distinguishes it from the territorial fragmentation of power exercised by nation states.[31] Some authors have coined the term 'New Medievalism' to describe this new configuration of authority in the international system.[32] If the result is similar to the world of the Middle Ages seems questionable. Authority, today, is not bifurcated as it was in the medieval world (spiritually and earthly), but is functionally split into numerous areas of issues and various, often competing, layers of governance with different geographical scope. In questions of trade policy, for example, WTO authority stands in a complex and complicated relationship with European and nation state authority.

In any event, the new fragmentation of authority in international affairs compromises the precedential character of the nation state as a model for legitimate governance. The alternative view from the international regime literature starts from the problem of rule compliance. The empirical puzzle that international relations scholars identify is the following: why and how can seemingly powerless, ultimately unenforceable rules create cohesion and conformity in an anarchical environment?[33] The proposition is that decision-makers at state level are moved by their conviction that an international rule deserves to be obeyed. The 'legitimacy' of a norm or rule in this context is its intrinsic force to elicit voluntary compliance with it.

The obvious lack of coercive capacities in the international system makes international domination much more dependent on voluntary compliance than governance taking place inside the state. The specific IR approach envisages a broad variety of non-coercive means to attain compliance with these rules.[34] By contrast, the question of why citizens obey

[30] See G Poggi, *The State: Its Nature, Development and Prospects* (Stanford, Stanford University Press, 1991) Chapter 2, and Lindahl n.12.
[31] See RBJ Walker, 'Sovereignty, Identity, Community: Reflections on the Horizons of Contemporary Political Practice' in RBJ Walker and S Mendlovitz (eds), *Contending Sovereignties: Redefining Political Community* (Boulder, CO, Lynne Rienner, 1990).
[32] See J Friedrichs, 'The Meaning of New Medievalism', 7 *European Journal of International Relations* at 475.
[33] H Koh, 'Review Essay: Why Do Nations Obey International Law?', 106 *Yale Law Journal* at 2599.
[34] See A Chayes and A Handler Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (Cambridge, Mass., Harvard University Press, 1995).

state law is often treated as a non-problem. In the presence of a state's coercive capacities, compliance is overdetermined. Thus, it is precisely the non-coercive character of international governance that has inspired international relations' thinking on the subject of legitimacy. Concomitantly, authors interested in the legitimacy of international norms have detached their notion of legitimacy completely from the traditional, 'personalised' conception of government. Rules and norms, not concrete actors, 'dominate' state behaviour and are in need of legitimacy.

Let us briefly summarise the characteristics of the international relations approach to legitimate governance beyond the state. I have argued, in this section, that the nature of legitimacy is dependent on the nature of domination structures. First of all, international domination is functionally fragmented and issue-specific. In the international governance context, 'domination' does not suggest (or require) a generalised ability to decide everything or to 'push through' any command as in the model of the modern state. Due to the lack of transnational coercive resources in the international system, international domination is even more dependent on the legitimacy beliefs on the part of the ruled over than most other forms. What, now, is the *specific type of legitimation* that prevails in international governance? I will argue, in the next section, that functional international organisations can be supposed to rely on legitimating strategies that much more resemble those of bureaucracies than those of state governments.

V. THE DISCOURSE OF LEGAL-RATIONAL LEGITIMATION

The modern bureaucracy that Weber describes is perceived as legitimate because it functions according to impersonal principles that are applied in an impersonal way. Much of the literature on Weber's approach has focused on the organisational characteristics of the modern bureaucracy. The aspect I want to examine in this context, however, is not the bureaucratic organisation as such, but the rational process of justification according to which it works. The mechanistic metaphor of the 'machinery' that Weber used, does not explain the legitimacy of bureaucracies, unless it takes the principles that determine bureaucratic rules and procedures into account. In other words, I argue that people will only support this administrative machinery if they agree to its aims and to the principles according to which it functions. They must accept the reasoning behind the machine.

A good deal of the organisational rationality of modern bureaucracies resides in the fact that all of their decisions are the outcome of reasoning. As Weber said

> '[t]he only decisive point for us is that, in principle, a system of *rationally debatable 'reasons'* stands behind every act of bureaucratic administration,

> namely, either subsumption under norms, or a weighing of ends and means.'[35]

Whilst an elected government is generally empowered to decide at its own discretion, a bureaucracy has the duty to provide reasons for every single administrative act. An elected government that cannot mobilise sufficient support for its policy might pay for its decisions at the next elections. To put it somewhat polemically, an elected government is generally entitled to stupidity. A bureaucracy, in contrast, must make sure that all its acts are rationally justified.[36]

As we can see from the quotation above, for Weber, an act of rational rule-making must not only be based on reasons, but must also have reasons that are 'rationally debatable'. This points to the fact that, prior to the specific reasons that one could employ in order to justify a rule or decision, lies the mechanism of *rational justification*. The idea of a rational debate implies that both the speaker and the hearer can meaningfully communicate about the reasons on which a certain decision is based. This mechanism now seems to be specifically modern in that it plays a minor role for the functioning of traditional or charismatic domination.[37]

What distinguishes modern rational legitimation from traditional ways of creating support for governance is the fact that reasons can and must be given for it to succeed. These reasons must be open to confirmation or negation in a justificatory discourse. Johannes Weiss has convincingly argued that the development of the ability to ask questions rationally and to give reasons rationally is the core feature of Weber's account of modernity.[38] In his view, the possibility of rational communication is the overarching frame that unites the numerous notions of rationality that occur in Weber's writings.[39] The rational communication of (and about) reasons is an indispensable precondition for many processes of social

[35] Weber n.7, Vol II, at 979, my emphasis.

[36] Its decisions are, nevertheless, subject to control. This control, however, is exercised by courts, not by the citizens themselves. Those can often demand a counter-check by a court when they are affected by decisions. Such a review process can only work within the boundaries of the formalised rational-legal discourse that is the language of both courts and administrations.

[37] Neither traditional, nor charismatic legitimation requires extensive communicative justification. A person who is emotionally fascinated by the charisma of a leader can hardly give sustained reasons for the effect the person exerts on him or her. The traditional authority of religion, mythos or charisma is rather felt than argued, and it draws its force precisely from the fact that it remains 'unquestioned' or even 'unquestionable'. In a similar vein, we have seen the functioning of the national myth as source of legitimation of power.

[38] See J Weiss, 'Rationalität als Kommunikabilität. Überlegungen zur Rolle von Rationalitätsunterstellungen in der Soziologie' in WM Sprondel and C Seyfarth (eds), *Max Weber und die Rationalisierung sozialen Handelns* (Stuttgart, Enke, 1981).

[39] On rationality in Weber, see R Brubaker, *The Limits of Rationality: an Essay on the Social and Moral Thought of Max Weber* (London, Allen & Unwin, 1984).

rationalisation, such as legalisation, bureaucratisation, ethical universalism and consequentialism.[40] The entire process of modernisation, it seems, is closely linked to the development of a communicative rationality.

Accordingly, 'reasoning' and 'giving reasons' become extremely important in the communicative process that legitimates modern governance. This account of modern legitimation through rational discourse which can already be found in the writings of Max Weber has been further developed by Jürgen Habermas.[41]

> 'Max Weber's concept of legitimate authority directs our attention to the connection between belief in the legitimacy of orders [*Ordnungen*] and their potential for justification on the one hand, and to their factual validity on the other.'[42]

For both Weber and Habermas, legitimacy is the conceptual place where facts and norms merge, where the de facto validity [*Geltung*] of a social order springs from a shared conviction about the normative validity of certain values [*Gültigkeit*].[43] Although Habermas is the most prominent author on the topic, the idea that legitimacy in modern societies originates from rational deliberation has been put forward by others as well. Bernard Manin, for one, arrived at the following conclusion: 'We must affirm, at the risk of contradicting a long tradition, that legitimate law is the *result of general deliberation*, and not the *expression of a general will*.'[44]

Thus, it seems that deliberation and legitimation of governance are intimately connected. Habermas and Manin suggested that general deliberation is, and should be, the foundation of all legitimate law in society. What does this mean for functional international governance? Firstly, international governance, seen as the sum of the organisations, norms and decisions within them, is the result of an explicit agreement among state representatives. Although international negotiations are not protected against non-argumentative influence grounded in relations of power, it can be said that these institutions usually emerge from a general consensus.[45] In fact, the negotiation of new international institutions usually

[40] Weiss n.38, at 48.
[41] Note that this assessment is at odds with Habermas' own interpretation of Weber. In the 'Theory of Communicative Action' (1984), Habermas develops his argument against Weber, who is portrayed as the proponent of strategic — rather than communicative — action. Such a reading of Weber is definitely too stark and polemical as it deliberately overlooks the initial stages of communicative rationality already inherent in Weber's works.
[42] J Habermas, *Legitimation crisis* (Oxford, Polity Press, 1988), 95.
[43] See J Habermas, *Communication and the Evolution of Society* (London, Heinemann Educational Books, 1979).
[44] Manin n. 4, at 352.
[45] According to Habermas' ideal speech situation, a deliberative setting would have to be protected against all means of influence but the persuasiveness of the better argument.

takes place under the structural condition of unanimity.[46] The institutions of international governance result from deliberation aimed at consensus-building. State representatives define the aims of a regime, as well as the principles and rules of its operation.

Secondly, this programme of functional co-operation is accordingly implemented by an international bureaucracy that precisely follows the same principles as modern bureaucracy inside the state. It is bound by the law and the procedural requirements of due process. The basic technique of rational-legal legitimation that underlies both the decision-making and the implementation of international governance is exactly the same: linking concrete rules to more abstract values and principles, most prominent among them the principles of equality and universality, by means of rational argumentation.

International governance will only be perceived as legitimate if state representatives, and its citizens, agree *that certain values should, or can only, be realised at an international level*. Thus, the question of which goods should be achieved by international co-operation and which should be left to the states' own policies is crucial.[47] If international co-operation in one issue area is widely viewed as necessary and is almost undisputed in principle, we can assume that legitimacy in the scope–dimension has emerged. Thus, one of the main dimensions of international legitimacy concerns the scope and limits of international governance.[48]

As we have seen so far, the process of justification of governance involves two elements. Firstly, there is rational communication among state representatives who are both founding and developing international organisations under the structural condition of consensus-seeking. Secondly, there is rational, justificatory communication from the international organisations, which are implementing this consensus, towards both state representatives and the wider public. From how this process has been outlined, it might, by now, appear to be an irreversible tendency towards a legitimation of international governance. However, it lies in the very nature of discursive legitimation that it is reversible and can be permanently challenged. In order to complete the picture of discursive legitimation, we need to add a third dimension to the communication process: public discourse.

[46] 'In a negotiating environment featuring a consensus rule, they [the negotiators, JS] must occupy themselves, for the most part, with considerations of equity on the understanding that institutional bargaining in international society can succeed only when all the major parties and interest groups come away with a sense that their primary concerns have been treated fairly', O Young, *International Governance: Protecting the Environment in a Stateless Society* (Ithaca, Cornell University Press, 1994), at 109.

[47] See R Sinnott, 'Policy, Subsidiarity, Legitimacy', in O Niedermayer and R Sinnott (eds.), *Public Opinion and Internationalized Governance* (Oxford, Oxford University Press, 1995).

[48] This aspect is highlighted, with reference to the EU, by D Beetham and C Lord, *Legitimacy and the European Union* (London, Longham, 1998).

Through public discourse, understood here mainly as media discourse, the stakeholders or addressees of governance challenge the justifications provided by the institutions of international governance themselves. For example, the anti-globalisation movement united in the so-called 'people of Seattle' is the most notable group of civil society that actively challenges the legitimacy of global governance. Protesters air their unease about what they perceive as the failures of international economic cooperation. They use street demonstrations in front of TV crews at prominent occasions in order to bring their concerns and their arguments to the public agenda.[49]

In this, they follow the strategy of the social movements of previous decades that preferred street demonstrations to parliamentary debate. They put their grievances into public debate first, and later, or only indirectly, into political institutions. In Western countries, the protesters deliberately chose this extra-parliamentary way, ie, although they also had traditional political institutions at their disposal. At the international level, that does not provide for parliamentary representation, protesters cannot but enter the public discourse in order to demand and propose a reform of international governance.

At this point, we can summarise the core features of the conception of legitimate governance presented here. It relies, firstly, on widespread rational assent to the aims and values that international functional regimes pursue, and to the notion of due process in the performance of their tasks. Secondly, this sort of legitimacy can only come about through a process of rational communication that conveys these values and principles. Thirdly, legitimacy can be challenged by the same means, that is, by questioning the values, principles and procedures of international governance, and thus undermining the consensus.

VI. ILLUSTRATING LEGITIMATE GOVERNANCE BEYOND THE STATE: AN EXAMPLE FROM EUROPEAN UNION POLITICS

I have argued so far that international governance mobilises popular support, and thus empirical legitimacy, through a justificatory discourse. Citizens rationally assent to the goals and means of international governance and the principles according to which it works. This is the empirical mechanism behind my initial claim that the quality of governance can contribute to its legitimacy. It also means that citizens might value governance arrangements for reasons other than their 'democratic structure' in the sense of parliamentary representation and control. Authors such as

[49] See R O'Brien *et al.*, *Contesting Global Governance: Multi-lateral Economic Institutions and Global Social Movements* (Cambridge, Cambridge University Press, 2000).

Giandomenico Majone, for example, have made the point that functional international governance has the advantage of being detached from the messy and often short-sighted business of everyday politics.[50] Functional organisations, be they within or beyond the state, are sheltered against the political pressure that comes with regular elections and direct democratic accountability. In European Union studies, for example, the quality of non-politicised functional governance has been used as an argument in favour of having a strong and independent Commission.[51]

In the last section of this paper, I wish to show by means of example that this vision of the Commission is present in European public discourse. It shall underline a strong perception that there is a specific value in having the Commission as a strong and independent actor in EU politics. It also illustrates the claim that functional governance is acclaimed not only for the 'output' that it achieves, but also for the principles according to which it works. The episode I have in mind dates from February 2002, and is about the controversy over an official reprimand for the German budgetary deficit that threatened the EU's 'Stability and Growth Pact'.[52]

In the Stability and Growth Pact, signed at the Intergovernmental Conference in Amsterdam in 1997, the members of the Monetary Union committed themselves to what they regarded as a sound fiscal policy. Their aim was to secure the convergence of monetary and budgetary performances in the Euro-zone. In order to control the adherence to this stability pact, national budgets were made subject to community surveillance.[53] In the case of non-compliance, financial sanctions can be applied but only after a cumbersome procedure. The disciplinary effects are to come about mainly through peer pressure. A key role in bringing pressure on governments falls to the Commission's monitoring of Member States' budgetary deficits and public debt.

In the event of a Member State accumulating a public debt close to sixty per cent of its annual GDP, or a budget deficit approaching three per cent, the Commission is supposed to initiate an early warning procedure.[54] If the Commission is 'of the opinion that there is a risk of an excessive deficit', it notifies the Council of Economic and Finance Ministers.[55] The

[50] See G Majone, *Regulating Europe* (London, Routledge, 1996).
[51] See T Christiansen, 'Legitimacy dilemmas of supranational governance: the European Commission between accountability and independence', European University Institute, Working Paper RSC 97/74.
[52] See M MacLaren, 'Der blaue Brief: A Case Study in the Nature of Law and Sanctions', 3 *German Law Journal*, at 4.
[53] See Art. 104 EC.
[54] See above n.53 and Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions.
[55] See above n.53, paragraph 3.

Council, then, examines the risk of an excessive deficit and decides by majority-vote about the continuation of the procedure. Whereas the Commission's part in this procedure is administrative in character, the Council decision is political in that it can 'decide after an overall assessment whether an excessive deficit exists'.[56] As the definition of an excessive deficit in the Growth and Stability Pact is neat, this provision has a somewhat bizarre flavour to it: political will can trump statistical evidence.

In early 2002, Germany was due for a warning as its budgetary deficit approached the three per cent limit set by the Stability Pact. On the basis of fiscal data and economic forecasts, the Commission, on the 30th of January, presented an opinion to the Council recommending that Germany, along with Portugal, be reprimanded for lack of fiscal discipline. The government in Berlin immediately started action to avoid a Council warning, although there was little doubt that key economic indicators supported the Commission's opinion.[57] Rallying for political support among other Member States, Germany (and concomitantly Portugal) managed to get around the reprimand in the Council of Ministers. ECOFIN quite ingeniously achieved this by not voting on the Commission's recommendation after Germany and Portugal made formal pledges to respect the three per cent limit.[58]

Although diplomats said they were satisfied with this compromise which saved both the Germans' and the Commissioners' face at the same time, public opinion was highly critical of this political horsetrading. German newspapers did not hail their country's victory over European bureaucrats — on the contrary. Many commentators were concerned that the Stability Pact had suffered a hard blow by making politically-motivated exceptions from the agreed standards.[59] Some explicitly demanded a strenghtening of the Commission in order to prevent it from being defeated by particular interests of influential Member States.[60]

In this context, the Commission was praised as the guardian of the 'community public interest' which was jeopardised by short-sighted

[56] See above n.53, paragraph 6.
[57] German Chancellor Gerhard Schröder cryptically insinuated that the Commission had 'other reasons' for being tough on Germany, but did not deliver any evidence for this.
[58] 2407th Council meeting —ECOFIN—, 12 February 2002, 'Statement by the Council on the budgetary situation in Germany', reproduced in EC press release 6108/02, 9. It concluded that '[i]n the light of these commitments by the German government, the Council considers that it has effectively responded to the concerns expressed in the Commission recommendation, and therefore the recommendation is not put to vote and the procedure is closed'. Both Germany and Portugal failed to keep their promise as their 2002 budget deficits resulted well beyond the 3% threshold.
[59] See 'Europa trauert', *Die Welt*, 13 February 2002, at 3, illustrated with a half-page death notice mourning the deceased Growth and Stability Pact.
[60] See 'Der Sieg des Hans Phyrrus', *Süddeutsche Zeitung*, 13 February 2002, at 4.

national political strategies. Although the Council's (non-)decision was regarded by the majority as a defeat of the Commission, some voices even argued that the episode would strengthen trust and confidence in the Commission.[61] Politicians had too openly violated the standards of fairness and due process by allowing favourable treatment for important Member States. In fact, precisely one year before this episode, Ireland had received a reprimand in a similar procedure because of its inflation policy.[62] Unlike Germany, tiny Ireland was not able to mobilise a sufficient majority in the Council to escape public shaming.

This episode illustrates the account of legitimate, functional governance beyond the state. International functional organisations safeguard values that states have commonly agreed upon, and they do so in a fair and impartial manner. In the case of Germany's *'blauer Brief'*, press comments revolved precisely around these two themes. This example also illustrates my claim that the legitimacy of international governance cannot be described merely in terms of democracy, nor in terms of output. As international lawyers have already argued, due process matters in supranational affairs. Not only specialists, but also the general public are prone to acknowledge this.

VII. THE LIMITS OF GOOD FUNCTIONAL GOVERNANCE

This paper has outlined an empirically oriented approach to the legitimacy of governance above the nation state. It has claimed that the merits of 'good functional governance' are the main legitimating source of inter- and supranationalism. I have tried to defend this approach from the technocracy reproach that is often made against theories that build on the beneficial effects of function.[63] I have shown that the 'functioning' of international governance, as such, is not the point. Its rules and decisions are only regarded as legitimate when they are made in an appropriate, fair way and when they are buttressed by reasons that can command assent.

With respect to the debate about the legitimacy of European Union governance, the theory of supranational legitimation outlined in this essay may contribute to our understanding of why European governance is successful although it is not based on traditional democratic procedures.

[61] See 'Leitartikel: Verrottete Europapolitik', *Financial Times Deutschland*, 13 February 2002, at 3.

[62] In the case of Ireland, ECOFIN applied the economic policy guidelines of the Growth and Stability Pact; see 2329th Council meeting —ECOFIN—, 12 February 2001, 'Ireland — Council Recommendations', reproduced in EC press release 5696/01.

[63] For the legitimation potential of efficiency, see S Lipset, 'The Social Requisites of Democracy Revisited', 59 *American Sociological Review* at 1.

It seems that European citizens are prone to appreciate a functional form of governance that serves a common purpose and respects procedural fairness standards. We have said above that the elements that create the legitimacy of international governance are a consensus on certain values and the rule-guidedness of the executive process that implements them. These are, at present, also the main legitimacy resources of the European Union.

Nevertheless, there seems to be some truth in the diagnosis that good functional governance alone might not be a sufficient source of legitimacy. This can be observed empirically. The European Union is actively trying to exploit other sources of adherence and support. One avenue taken is the attempt to win emotional support, to create a feeling of belonging on the part of its citizens. This empirical observation fits Max Weber's remark that forms of domination are based very often on a mixture of legitimating motives rather than on one individual ideal-type. International legitimacy, as outlined here, cannot draw on legitimacy from metaphysical symbols and foundational myths, on alleged providence or the political will of a nationally constituted *demos*.[64]

The ideal type of legitimate international governance that I have proposed in this essay relies exclusively on the sober power of reason and good arguments. As such, it cannot completely account for the working of a fully-fledged European polity that assumes more and more competencies and thus goes beyond the sectoral limits of international governance as I have defined it here.[65] The scope of the EU has always been large and it might soon have new dimensions added to it, some of which are crucial, such as an exclusive competency in foreign policy. And this acquisition and strengthening of new competencies in the EU enjoys popular support.[66]

In important respects, however, the European Union is undoubtedly becoming much more than an international functional organisation as described in this account. Some of the respective features are old, some are only evolving. The sheer amount of financial re-distribution that the EU effectuates is beyond any other examples of international governance. The retreat from the unanimity principle in decision-making is also problematical for institutions that ideally govern by consensus. If the EU becomes the centre of legislation for the Member States, the boundaries of rational-legal legitimacy will be transgressed. If the EU approaches the

[64] See L-E Cederman, 'Nationalism and Bounded Integration: What it Would Take to Construct a European Demos', 7 *European Journal of International Relations* at 139.
[65] See T Risse-Kappen, 'Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union', 34 *Journal of Common Market Studies* at 53.
[66] 71% of the Europeans think that foreign policy should be made by the EU, while only 22% prefer the national level. Source: *Eurobarometer* 56 (2001), Annex 4.1.

model of a generalised execution of political will, it will reach the limits of legitimation through rational justification. Only clearly bureaucratic institutions such as the Commission fall under the theory of international legitimacy as outlined in this article. For many other international organisations, it holds without qualifications.

VIII. CONCLUSION

In this chapter, I have approached the problem of legitimate international governance from the perspective of international relations, understood as empirical social science. I have argued that much of the existing literature on the democracy deficit in both European and global governance is not satisfactory. It has failed to present convincing empirical evidence to sustain the claim that, empirically, a lack of opportunities for democratic input are the core problem of European governance. This is often treated as self-evident, rather than as an open question, a conundrum to be carefully explored.

Starting from functionalist approaches in IR and the compliance research in international law, I have formulated an alternative to the prevailing view on international legitimacy problems. Thus, this contribution has brought together two strands of thinking on international governance. I have argued that considerations on the 'legitimacy of rules and principles of international governance' should complement functionalist approaches to international integration. What makes international governance acceptable to politicians and to citizens alike is not just the fact that it delivers solutions to problems. Popular support also depends upon features such as the rule of law, procedural fairness in rule-setting, and impartiality in rule application.

As for the empirical mechanism of mobilising support for international governance, I have suggested a discourse theory of international legitimation. The legitimation (and de-legitimation) of international governance takes place through a public discourse on the tasks and values of international politics, on its principles and procedures. I have presented some empirical evidence of such a legitimation discourse and the normative resources negotiated therein with respect to the perceived role of the European Commission in European budget policy. I have presented some evidence that the public expects a functional organisation like the European Commission to act on the basis of due process and impartiality. Protecting the commonly defined community interest against inter-state bargaining, it enjoys some sort of institutional legitimacy that is independent of democratic structure and functional performance.

According to the approach presented here, the legitimacy basis of international institutions is not a static 'endowment' which an organisation

might possess, but a discursive equilibrium that is always open to challenges. With regard to the constitutionalisation of governance beyond the state, this perspective has some important implications. Constitutionalisation should not be viewed as a trend towards institutional isomorphism, that is, the structures of supranational governance becoming more and more like the nation state and its institutions. The process of constitutionalisation will instead be shaped by the specific tasks and scope of social power that is evolving in the international system. Secondly, there is more to the empirical view on international governance than functionalism. Criteria such as procedural fairness and the rule of law beyond the state are empirical motives for citizens to support international governance and its organisations. Thus, there is something in between 'supranational democracy' and functional 'output legitimacy'.

6

No Legitimacy without Politics: Comments on Jens Steffek

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> We are then in a position of beings who are sane and sober when engaged in trivial business and who gamble like madmen when confronted with serious issues — retail sanity and wholesale madness.
>
> Leo Strauss, *Natural Right and History*

I. INTRODUCTION

JENS STEFFEK'S CHAPTER is an ingenious attempt at founding the legitimacy of the European Union on something other than the democratic principle. According to the author, the legitimacy of the Union and of its institutions stems from its capacity to produce outcomes that realise a set of basic values inscribed in the material constitution of Europe. To the extent that the Commission or the Council can show that their action complies with such principles, citizens should be satisfied. Under such a light, we realise that the alleged democratic deficit of the Union is, in reality, a fiction. Democratic critics of European governance would be blinded by the mechanical application to the Union of the theories of legitimacy built around national political systems. This is plainly inadequate, given that European governance is functional, not political. In this reply, I will defend a rather old line of critique, which can be summarised in a restatement of the democratic principle: there is no political legitimacy without democratic politics.[1] As the previous chapter proves, the appropriateness of such a principle is essentially controversial when

[1] In case there is any doubt, as suggested by the author of the paper being criticised, my understanding of democratic politics refers to the process of will-formation and decision-making based on the right of all those affected to participate by means of common action-norms.

one discusses the legitimacy of institutions beyond the (nation)state. But it will be argued that there are four main flaws in Steffek's train of reasoning. Firstly, I will challenge the claim that the functional approach to international governance refers to a purely *positive* conception of legitimacy; Steffek introduces an implicit bridge between positive and normative legitimacy through which normative standards creep back. Secondly, I will sustain that the characterisation of functional theories of legitimacy as *deliberative* is based on the confusion between *deliberation as a mode of action* and *deliberative democracy*. On such a basis, my claim is that Steffek's argument is either flawed or must be reconstructed as supporting an appeal for *critical democratic standards of legitimacy*. Thirdly, I will claim that *normative* conceptions of legitimacy are more *realistic* than *functional* ones. Functional accounts of the legitimacy of international and European institutions are ideal types that encounter serious difficulties when they have to deal with facts. Fourthly, I will contest the extent to which the model can be applied to the European Union; special attention will be given to the interpretation of a recent episode concerning the Growth and Stability Pact which was provided by the author.

If the old argument is correct, then the core of the political legitimacy of the Union must be democratic politics. Other sources of legitimacy can only be complementary. They must be integrated within a larger, wider, democratic political case. In this sense, this chapter can be interpreted not as denying the relevance of some of the concrete arguments made by the author, but as providing a different interpretation of the role to be played by such arguments.

II. IS THE APPROACH REALLY A POSITIVE ONE?

The author claims that a positive approach to legitimacy will allow us to find out the 'motives that citizens, or, in general, those affected by the regime, have'. This provides access to the real motivations of real actors. Only then will we be able to understand why people keep on complying spontaneously with norms established by international institutions, despite their *critical normative legitimacy deficit*.

It is not clear to me whether *motives* is what social scientists should be after, [2] and it is far from obvious that a non-intuitive way of determining

[2] But see Max Weber, *Economy and Society, Volume 1*. (Berkeley, University of California Press, 1978), at 4: 'Sociology — in the sense in which this highly ambiguous word is used here — is a science concerning itself with the *interpretive* understanding of social action and, thus, with the causal explanation of its course and consequences. We speak of 'action' in so far as the acting individual *attaches a subjective meaning to its behaviour* — be it overt or covert, omission or acquiescence'. See, also, Otta Weinberger, 'Facts and Facts Descriptions: A Logical and Methodological Reflection on a Basic Problem for the Social Sciences', in ND MacCormick and O Weinberger, *An Institutional Theory of Law*, (Dordrecht, Kluwer, 1985), at 77–92.

the motives of actors is to be found in the paper. For reasons of space, we might be allowed to leave these questions aside here. Instead, what must be said is that the author himself relies on something other than a mere positive conception of legitimacy. This is so to the extent that (1) the author implicitly reconnects positive and normative accounts of legitimacy, though he does not realise all the implications of this reconnection; (2) his conception of politics as a matter of aggregation of interests is combined with an understanding of bureaucracies as the advocates of the general interest, but gives no explanation of how these two premises are compatible.

Firstly, the author does not clearly differentiate the *positive* from the *normative* conceptions of legitimacy. While the author claims to be analysing the *beliefs* of individuals and the corresponding *compliance pull* stemming from them, he also considers the fact that international institutions act *deliberatively* as an essential factor which explains their legitimacy. Their positive legitimacy is thus connected to reason-giving ('people must accept the reasoning behind the machine'). But if this is so, then the author must assume an *implicit bridge* between positive and normative legitimacy. It could be that, under modern conditions, the only stable way of ensuring positive legitimacy is by means of institutions complying with critical normative standards; or some variant of this argument or a different argument. But, in any case, the author's claim that he belongs 'in the tradition of social scientific analysis (…) committed to an empirical approach to supranational legitimacy (…) an approach (…) [in which he remains] sceptical about the validity of norms in international affairs' is contradicted. More problematically, a proper differentiation of positive from normative conceptions of legitimacy opens the door to question of which *normative standards* are the relevant ones, and consequently, which are the ones compliance with which would result in positive legitimacy.

Secondly, the author postulates a conception of *politics* as a matter of aggregation of preferences that stands in stark contrast with his definition of bureaucratic action as deliberative. The conception of politics as a kind of *manipulated procedure of collective will-formation* underlies statements such as 'a democratic government is generally entitled to stupidity' or the claim that political intervention leads to the violation of 'standards of fairness and due process' concerning the application of the European Growth and Stability Pact. This implies conflating a particular (and unargued) vision of *positive political systems* with a *normative understanding of politics*, which is implicit in the idea of deliberative bureaucracies. But the real crux for the author is that he does not explain how come political processes are plagued by the undue influence of special interests, in contrast to bureaucratic institutions which proceed according to the cold logic of reason, in an impartial and beneficial way. Unless the *human* nature of politicians and bureaucrats is different, their different patterns of behaviour

need to be explained by reference to something else than a mere positive theory of legitimacy. If reference is made, for example, to institutional ethics, we are beyond *facts*, and deep into *norms*.

III. THE CORRECTNESS OF DELIBERATION OUTCOMES AND THE SCOPE OF PARTICIPATION IN THE DELIBERATION

The key words of a legitimate system of functional governance 'above the nation state' seem to be 'deliberative procedures', 'rational governance', 'rational communication about means, ends and values', 'reason-giving', etc. However, the author is not a partisan of deliberative or discoursive democracy as a critical normative standard; on the contrary, the chapter constitutes an attempt at decoupling deliberation from democracy. To put it briefly, his deliberative model refers to *deliberation as a mode of action*, not to *deliberative democracy*, which is a rather problematic move.

Steffek attributes a good deal of importance to the fact that *deliberation* has epistemic qualities, namely, that it is the procedure of decision-making that is more likely to select the correct outcomes. However, this claim can only be sustained if deliberation as a mode of action complies with the standards of *radical democratic participation*. This is so because deliberation as a mode of action does not ensure correctness by itself; *it is only deliberation coupled with extended participation* that tends to produce correctness.[3] The argument was already put forward by Condorcet in his theorem of democratic decision-making. The chances of a decision taken by majority-rule being correct increase as the size of the constituency of voters increases.[4] This is so provided that we can assume that each individual has more than the average likelihood of choosing the right solution.[5] In such regard, Nino's argument on the tendency of deliberation to increase individual competence needs to be taken into account. His basic intuition is that the institutional arrangements of deliberative democracy

[3] Carlos Santiago Nino, *The Constitution of Deliberative Democracy*, (New Haven and London, Yale University Press, 1996), at 129, and D Estlund, 'Beyond Fairness and Deliberation: The epistemic dimension of democratic authority', in J Bohman and J Roemer (eds), *Deliberative Democracy: Essays on Reason and Politics,* (Cambridge, MIT Press, 1997), at 173–204.

[4] JA Nicolas de Caritat, Marquis de Condorcet, *Esquisse d'un tableau historique des progrès de l'esprit humain*, (Paris, Flammarion, 1984).

[5] It has been counter-argued that we cannot be so sure of the actual competence of voters, that we do not know what the consequences of mutual influence are, and that the theorem assumes a binary structure of choices (though most political decisions are finally voted in such a format that they presuppose a process of selection that might have selected two wrong alternatives). All this notwithstanding, we do not need to resort to a strict version of Condorcet's argument. A somewhat watered-down version might do the trick. See D Estlund, above n.3, and 'The Insularity of the Reasonable: Why Political Liberalism must Admit the Truth', (1998) 108 *Ethics*, at 252–75.

are able to collect decentralised information and to incorporate it to the decision-making process. Thus, deliberation based on individuals having an equal right of participation has interesting *epistemic* properties. It increases the tendency for those who participate to select the right outcome. This is so to the extent that extensive participation exposes them to the relevant facts and arguments.[6] Without extended participation, the epistemic privilege vanishes.

Before concluding this point, one might observe that the author seems to rely on the growing literature that considers 'deliberation and rational justification' as sources of political legitimacy. A major contribution to this literature is the work on comitology within the European Union,[7] which is clearly anchored to *deliberation as a mode of action*, and not so much to *deliberative democracy*. However, it should be kept in mind that we should be very cautious when determining the conditions under which we can learn from the comitology example. On the one hand, comitology committees fit into the 'agency' model, to the extent that their mandate is to implement legislation. The distinction between deciding on common action-norms and implementing them might seem legalistic, but it is crucially anchored to a normative conception of democracy. On the other hand, comitology committees deal with expert knowledge. This is not the place to insert a digression on the difference between *empirical* and *political* knowledge, but there are crucial differences between the two. Participation is merely *instrumental* when aiming at factual empirical knowledge, while it is *internally connected* with knowledge when we want to establish what is politically correct.[8] In fact, the literature on comitology is perhaps better understood as an extremely valuable addition to the theory of democracy, which allows it to enter a ground that has not been properly dealt with as of yet. It is a major achievement, especially as expert knowledge can no longer simply be ignored by theories of democracy.[9] However, in my view, this does not mean that the literature on comitology should be seen as establishing a general model of democratic decision-making. To put it in the usual jargon, it points to a specialised grammar of law, not to a new grammar of law. Democracy's survival might, to a great extent, depend on how we deal with expert knowledge, but this, in itself, does not make it democracy per se.

[6] CS Nino, *The Ethics of Human Rights*, (Oxford, Oxford University Press, 1991), at 46 and above n.3, at 127.
[7] Ch Joerges and J Neyer, 'From Inter-governmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', (1997) *European Law Journal 3*, at. 273–99, and Ch Joerges and E Vos (eds), *EU Committees: Social Regulation, Law and Politics*, (Oxford-Portland, Hart Publishing, 1999).
[8] See J Habermas, 'La rationalité de l'entente', in *Verité et justification*, (Paris, Gallimard, 2001), at 43–77.
[9] See B Ackerman, 'The New Separation of Powers', (2000) *Harvard Law Review* 113, at 663–759.

IV. OTHER ALTERNATIVES TO FUNCTIONAL INSTITUTIONS?

One basic premise in the reasoning of the author is that several issues can no longer be 'managed at national level'. He further argues that the only institutional alternative is to assign the tasks to *international functional* institutions. This is implicitly affirmed in his criticisms of the 'anti-global movement'.[10] The claim that the critics of globalisation prefer to 'put their grievances into public debate' rather than to refer to 'political institutions' only makes sense if one assumes that the only relevant institutions are national political institutions.[11]

It might be the case that functional international decision-making is superior to national decision-making, if only because national institutions simply cannot deal with problems, the causes of which are beyond the reach of their territorial powers. However, this, in itself, is not *sufficient* to claim that functional international organisations would be the ones which perform best in terms of legitimacy; after all, one could always claim that, if national political institutions lack the capacity to solve problems due to the fact that the implications of the question at stake exceed the scope of their political power, one should be supportive of supranational *political* institutions capable of dealing with the problems which have become intractable at the national level.[12] The argument could be the following. As a result of technological innovations, such as the dramatic transformation of communications, but also as a result of legal changes, such as the dismantling of national controls over the movements of capital, we have increased the scope of our relationships. Politics is basically about deciding common action norms. Once we recognise that we are not alone in the

[10] *En passant*, it is rather inaccurate to claim that the critics of globalisation are against globalisation as such. The most representative and articulated critics of globalisation have joined under the slogan 'Another globalisation is possible', which renders clear that they are not against internationalism and universalism, but rather against certain institutions and developments, essentially the *economic institutions and rules* that govern economic globalisation. The organisation ATTAC has proposed the term 'alter-mondialiste'. On this, see A Sen, *Globalizzazione e Libertà*, (Milano, Mondadori, 2002) and J Stiglitz, *Globalisation and its Discontents*, (New York, Norton, 2002).

[11] If this is not the case, then the criticism is surely unfair. Critics of globalisation protest in the way that they do precisely because they cannot, to date, put their grievances before an international institution. In addition to this, it might be pointed out that some of the critics of globalisation *actually have addressed* the established or embryonic political institutions. Pascal Lamy, the current Commissioner of International Trade, describes, in his recent book, how his cabinet has worked in close collaboration with some critics of globalisation in initiatives such as 'Everything except weapons'. By keeping contacts open with non-governmental organisations, Lamy aimed at building societal support for his proposals. And these organisations actively put their grievances before national governments and also before the Commission. See Lamy, *L'Europe en Premier Ligne*, (Paris, Seuil, 2002).

[12] Or, alternatively, that one should leave the matters to sort themselves out, as *liberalists* would claim.

world, and that our actions have severe consequences upon others, we realise the existence of what have been called *the circumstances of politics*. The only way to claim our own autonomy, while simultaneously respecting that of others, is by agreeing on a set of norms to deal with conflicts and, hopefully, to co-ordinate action. If the scope of those affected by our action expands, the scope of politics should also become enlarged. The idea of global public goods, with reference to the environment, peace or security, reflects this transformation. This does not mean that all human actions have a global dimension. Consequently, what is required is not the absorption of all politics by the global level, but the adding of a new a new layer of politics which is contiguous to global common interests and public goods.

Thus, the existence of a community of interests is a fact, but one with extremely high normative salience. The democratic principle states that all those affected by common action norms should have the chance to participate in the deliberation and decision-making of the said norms. Deliberative democracy insists that we need to build up democratic procedures with deliberative properties. This requires not only enhancing publicity and transparency so as to ensure that the process is modelled by general practical reasoning, but also increasing the chances of actual participation of individuals, because only in this way the political autonomy of each individual is respected. This means that 'international governance' cannot become legitimate unless it becomes *participative*. A nostalgic longing for functional 'international governance' is the more obvious way of ignoring facts. This general principle can be implemented in different ways, depending on contextual factors. Participation can either be focused on a *supranational* sphere or through the overlapping of *national* spheres. The establishment of common conflict rules (continentally referred as rules of private international law) allows to combine national autonomy and supranational harmony. And, clearly, expert knowledge needs to be infused into political processes, something that requires consciousness of not only the difference between political and expert knowledge, as previously indicated, but also of the need to avoid experts deciding normative questions which can only be decided *politically*.

The riddle of a political, European, international alternative is, of course, that it renders the *democratic deficit* a serious problem, which is what Steffek is contesting.

V. FUNCTIONAL UNION? THE GROWTH AND STABILITY PACT

The final question to which I would like to call the attention of the reader is the extent to which Steffek's theory can be said to apply to the European Union.

The author seems to be divided on this issue. On the one hand, he makes the rather clear statement that his theory applies *only* to 'bureaucratic institutions such as the Commission'. Functional legitimacy is not sufficient to justify what has actually become a *separate level of government*. On the other hand, the author offers an interpretation of some of the *Eurobarometer* figures in order to show that there is no such thing as an acute *positive legitimacy deficit* in the European Union. Given that the statistics he refers to are not limited to the perception of the Commission, it is not completely clear whether the *scope proviso* is thoroughly adhered to in the chapter.

But let us focus on the concrete example provided by the author, a recent episode of the monitoring of the Growth and Stability Pact, more specifically, the Commission's decision to propose the issue of an 'early warning' to Germany and Portugal concerning the size of their public deficits. Steffek claims that this was a correct decision, a mere application of the 'sound fiscal policy' embedded in the Growth and Stability Pact. This appropriate *functional* decision ('there was little doubt' that the Commission acted correctly) was overturned by 'political horse-trading' which allowed Germany and Portugal to escape any sanction from the Council of Economy and Finance Ministers (ECOFIN). This resulted in an 'open' violation of 'the standards of fairness and due process', as it amounted to 'favourable treatment for important Member States', not granted to tiny 'Ireland' one year before in a similar setting.

According to the author, this case study illustrates the *superiority* of *functional decision-making*, to the extent that *deliberation as a mode of action* (embodied by the Commission) is far superior to (and more legitimate than) *political decision-making* (the Council). One basic reason is that the former is not contaminated by 'political' reasons. In his mind, the German/Portuguese affair also illustrates that functional governance is superior in terms of legitimacy to political governance, as the German media supported the Commission, not the German government or the Council of the European Union. *The people* sided with the Commission, even though it was less *democratically legitimate* than the Council.

However, this line of reasoning is flawed. Firstly, a comparison between the recommendation addressed to Ireland and the early warnings not addressed to Germany and Portugal is of limited value. It does not provide evidence of the claim that economic might allows you to escape sanctions under Economic and Monetary Union. The two cases are simply different. In the Irish case, the Commission was monitoring the extent to which Ireland was complying with the Broad Policy Guidelines, an essential instrument to ensure the economic convergence of the members of the Economic and Monetary Union. The Commission and the Council were faced with an *intentional budgetary decision*, namely, direct and indirect tax cuts and sizeable increases of public expenditure

in a country with an above-average rate of both growth and inflation; it questioned whether this *intentional* decision complied with the Broad Policy Guidelines, as such measures were clearly pro-cyclical, while the latter recommended anti-cyclical budgetary decisions.[13] The recommendation issued to Ireland was merely advisory, as there is no *legal* value attached to a negative judgment by the Commission or the Council with regard to national compliance with the Broad Policy Guidelines. In the latter case, the Commission and the Council were monitoring whether the public deficit of Germany and Portugal exceeded the level at which an early warning should have been issued by the Commission under the Growth and Stability Pact. The evolution of this macro-economic figure is, to a good extent, beyond the control of any national government, and, in economic terms, it is difficult to determine whether the excessive deficit is to be blamed on *national policies* or simply on the economic cycle. An early warning might have required recommending Germany and Portugal to take pro-cyclical measures, which might have worsened the performance of their already battered economies. Moreover, the implications of an early warning are more clearly defined than those of a Commission recommendation under the Broad Policy Guidelines. Even if an early warning is not in legally-binding, its issue has some weight if the reference rate of public deficit is actually exceeded and sanctions are considered.

Secondly, the Growth and Stability Pact is not an end in itself, but a means to achieve some of the basic goals of the European Union. This is something which is clearly obscured by the tendency to portray Economic and Monetary Union as mainly a monetary affair, and consequently, a matter of monetary credibility. But growth and economic stability are means to achieve other (more important) ends. Article 98 TEU clearly establishes a link between the conduct of economic policy under Economic and Monetary Union and the 'objectives of the Community as defined in Article 2', which, one might be allowed to observe, include

> 'a high level of employment and social protection, equality between men and women (…), a high level of protection and improvement of the quality

[13] See 'Council opinion on the updated stability programme of Ireland (1999–2002)'. OJ C 77, of 9.3.2001, page 2, '(…) [T]he Council considered the stimulatory nature of the budget for 2001 to pose a considerable risk to the benign outlook in terms of the growth and inflation foreseen in the updated programme for 2000. It took the view that this budget, the main measures of which were direct and indirect tax cuts and substantial increases in current expenditure, *was not consistent with the broad economic policy guidelines*'. Both the Commission and the Council were mildly pleased with the Irish response to the ECOFIN recommendation (see 'ECOFIN Council Conclusions on Ireland's compliance with the Recommendation of 12 February 2001 with a view to ending the inconsistency with the broad policy guidelines of economic policy' of 29 October 2001, SN 4404/01), although they insisted on the need of 'continued vigilance on the fiscal stance in Ireland given the experience of overheating'.

> of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States'.

The clear relationship between stability and employment is further stressed in the Regulations of the Growth and Stability Pact.[14] This explains why Article 104 TEC and Regulation 1466/97 foresee a two-step procedure for determining the existence of excessive deficits and for the issuing of early warnings.[15] The first step is to be taken by the Commission. Article 104 TEU, Section 2 assigns the Commission with the task of monitoring national accounts; Section 3 of the same article requires the Commission to prepare a report if a given Member State exceeds the reference deficit figure, or if there is a risk of the deficit figure being exceeded in the immediate future (this is the so-called *early warning* procedure).[16] The Economic and Monetary Committee, where representatives of the Commission, the Central Bank and the Member States sit, should be asked to produce an opinion on the issue. On such a basis, the Commission is expected to decide whether an excessive deficit exists or may occur (Section 5 of Article TEC 104). This is expected to be a technical judgement; the role of the Commission is to verify the statistical evidence and consider the causal links of the deficit position and their persistence over time (this is why Section 3 refers to the medium-term economic and budgetary position of the Member State as a relevant question to be taken into account by the Commission).[17] The second step is to be taken by the Council, which, according to Article 104 TEC, Section 6, shall make 'an overall assessment'. The reference to the 'overall assessment' clearly implies the need to consider not only the figures and their economic causes, but also to make a *political judgement*. This judgement should take the overall implications of the policy decisions to be adopted to keep the

[14] This is very clear in the Preamble of Regulation 1466/97. See paragraph 8, but also Article 8 (2) (b). On Regulation 1467/97, see the Preamble, paragraph 2 and 11.

[15] Article 104 TEC does not refer specifically to early warnings as such, but Section 3, second paragraph, states that: 'The Commission may also prepare a report if, notwithstanding the fulfilment of the requirements under the criteria, it is of the opinion that there is a risk of an excessive deficit in a Member State'. Article 6, Section 2 of Regulation 1466/67 refers to this explicitly as 'an early warning'.

[16] Article 1 of the Protocol on the excessive deficit procedure, annexed to the Treaty of Maastricht, establishes that the reference value is 3% of the government deficit to gross domestic product (GDP).

[17] Commissioner Solbes stressed the purely technical character of the Commission's judgement. See 'Schröder lanza una ofensiva contra la Comisión Europea para frenar la reprimenda por el déficit aleman', *El País*, 11 February 2002: 'There were more than enough *economic* arguments to issue an early warning'. In November 2001, Solbes stressed in the workshop 'Expansión y vulnerabilidad de la política económica española' that such provisions required taking into account whether the deficit was not due to a sudden shock. See 'La UE debatirá si cambia el pacto de Estabilidad por la crisis económica', *El País*, 27 November 2001.

national deficits within the parameters of the Growth and Stability Pact into account.[18]

This perspective allows us to reconsider the ECOFIN decision not to issue an early warning under a different perspective. If the judgements that the Commission and the Council are required to pass are of a different nature, one should not be surprised if their verdicts are different.[19] ECOFIN might have considered that there were very good reasons not to issue the early warning, as this might trigger economic decisions in Germany and Portugal which might have been detrimental to the achievement of other economic objectives. This might be why it approved the commitments[20] made by both the German and the Portuguese governments.[21]

Quod erat demonstrandum, or truly, not even Economic and Monetary Union is to be regarded as a matter of functional governance. Its actual conduct requires political judgements subject to political criteria.[22]

VI. CONCLUSION

In this chapter, it has been argued that no theory of legitimacy of the European Union can do without democratic standards. A critical reading

[18] On this, one can confront the text of the Broad Economic Guidelines approved in June 2002: '[A] trade-off may exist in adverse economic conditions between, on the one hand, budgetary consolidation to attain the medium-term positions and, on the other hand, *stabilisation of output fluctuations through the full-play of automatic stabilisers* (my italics)'. See 'Council Recommendation of 21 June 2002 on the Broad Guidelines of the Economic Policies of the Member States and the Communities', at 8, available at *http://register.consilium.eu.int/pdf/en/02/st10/10093en2.pdf*.

[19] Commissioner Solbes was not that surprised; he declared that 'The decision that ECOFIN has adopted was not the one we proposed, but ECOFIN *has the right to say yes or no*.' (my italics), in 'El Ecofin retira la censura a Alemania y abre la polémica sobre el pacto de estabilidad', *El País*, 13 February 2002.

[20] See 'Statement by the Council (ECOFIN) on the budgetary situation in Germany', 12 February 2002, SN 1382/1/02 REV 1, and 'Statement by the Council (ECOFIN) on the budgetary situation in Portugal', 12 February 2002, SN 1383/1/02 REV 1.

[21] To this, we have to add that, before the decision on Germany and Portugal, there had been some debate on the need to amend the Growth and Stability Pact. See 'La UE debatirá si cambia el pacto de Estabilidad por la crisis económica', *El País*, 27 November 2001.

[22] The recent episode concerning the excessive deficit of Germany, France and Portugal reinforces my point. True, the Council decided on 25 November 2003 to wait and see, instead of following the Commission's recommendation to act. It is also the case that the Commission decided to contest the legal validity of the Council decision before the Court of Justice. However, the Commission has not done so, on the basis that the Council could not decide as it did (quoting from the Commission's grounding of its claim: 'The Council had the possibility to reject Commission recommendations. It can do so in the light of its own evaluation of the objective economic factors, which form the basis of the decisions to be taken'. What the Commission contests is not that power but rather the poor grounding of the Council's decision: 'In that case, it had to set out clearly and unambiguously why, in the light of such objective economic factors, there is no need to adopt the decisions based on the Commission recommendations'. See 'Commission Sets Out Strategy for Economic Policy Coordination and Surveillance', IP release IP/04/35.

of Steffek's chapter confirms this point. His allegedly positive account of legitimacy turned out to refer implicitly to *normative critical standards of legitimacy*. Moreover, it was also argued that deliberation as a mode of action does not ensure the correctness of the decisions adopted; one might have some trust in deliberative processes leading to correct decisions if they proceed under conditions which guarantee the most extensive participation of all those affected by the decisions being adopted. Further, I argued that the need for critical normative standards is confirmed by a look at *facts*. Functional proceduralism is unlikely to result in positive legitimacy once transnational political mobilisation challenges the *functional* character of a given issue. More specifically, it was questioned whether it was appropriate to consider decisions such as the issuing of early warnings under the Growth and Stability Pact as purely functional matters of law. Given the negative answer to such a question, the claim that the legitimacy of the Commission can be derived from purely functional sources must also be contested.

At the end of the day, politics does not exist without conflict and contestation.[23] And legitimacy does not exist without democratic politics. But this is a blessing, not a curse. We might be about to rediscover that, again.

[23] Piero Gobetti, *La Rivoluzione Liberale*, (Einaudi, Torino, 1995).

Section III: Transnational Governance and Democracy: Social Philosophy, Political Science, Constitutional Theory

7

Europe at a Crossroads: Government or Transnational Governance?

ERIK ODDVAR ERIKSEN AND JOHN ERIK FOSSUM
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Abstract

ECONOMIC GLOBALISATION FOSTERS transnational systems of governance that are seen to threaten nationally based systems of democracy. These developments raise several questions, both of a theoretical and of an empirical nature. First, what are the prospects for *democratising* transnational governance structures? In other words can democracy be disassociated from *government*? Second, what is the role of the EU — is it a transnational governance system or a fledgling system of government? Addressing these questions will help shed light on the third and final concern, namely, what is the democratic quality of the EU? The focus is on selected institutional aspects of the EU pertaining to Comitology, courts, the European Parliament, and aspects of the process of constitution-making. Are these bodies representative of transnational governance, or of government? What are their contributions to democratising the EU?

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I. INTRODUCTION[1]

Economic globalisation poses problems for national democracy. Decisions are increasingly made in contexts well beyond national control, and the range of policy options available to national decision-makers is greatly narrowed. Corporations evade national jurisdictional control and taxation. Transnational networks, committees, special agencies, and other bodies make decisions and regulations with profound consequences for social interests — beyond popular control and sanction. Global private regimes increasingly produce law without any political authorisation. The de-nationalisation of politics threatens the core elements of liberal *government*, as sovereignty is fragmented and as vital conditions for efficient governance are no longer subject to national control. Political boundaries are becoming increasingly permeable. Less democracy — more market — is the overall implication of this scenario. Obvious manifestations of this trend are the WTO, NAFTA, and ASEAN Free Trade Area as well as other free market regimes.

Is this process global, and does it have system-wide implications? One way to think of this is to see it as a fundamental change of steering media, ie, market regulation replacing other types of regulatory mechanisms which are more directly related to democracy. The power of money supplants political power.[2] The nation-state was based on a mixture of market-facilitating and market-correcting measures. This entailed a significant element of *closure* to the world around it, a closure that could include the whole range of economic, political, legal and cultural dimensions. The present situation is one in which states are *opening themselves up* to a globalising world, along all these dimensions, but where the pattern of this opening is being shaped and conditioned by the logic of the market, as embedded in systems of *transnational governance.*

Globalisation, however, is a multi-faceted and even multidimensional process, which also generates and promotes countervailing forces to marketisation. Can the de-regulatory opening that we are now experiencing also be followed by a re-regulatory closure, which can re-establish democracy as sovereign popular rule? Is the EU one such case?

Whilst often couched as a result of economic globalisation and market-driven opening, the EU is a dynamic system and is presently undergoing

[1]Revised version of paper presented at the workshop on Constitutionalism and Transnational Governance, European University Institute, Florence, from 30 November to 1 December 2001. The authors thank the participants at the workshop and in particular Klaus Gunther for helpful suggestions to an earlier draft. Thanks are also due to Hauke Brunkhorst, who provided a set of very useful written suggestions to this chapter.

[2]'The regulatory power of collectively binding decisions operates according to a different logic than the regulatory mechanisms of the market. Power can be democratised; money cannot. Thus the possibilities for a democratic self-steering of society slip away as the regulation of social spheres is transferred from one medium to another.' (Habermas 2001:78).

deep changes — with regard to range and scope of operations, institutional apparatus, effects on Member States, and commitment to democracy and legitimacy. It is also based on representative principles. European *citizens* are directly represented in the European Parliament, whereas the Member States are represented in the European Council and the Council of the Union, and the regions are represented in the Committee of the Regions. The principles are, however, unequally institutionalised. The system in place favours the representation of the Member States over that of the citizens. But then, it is also a contractual arrangement made up of Member States, not an arrangement constituted by the people of Europe (Grimm 1991). However, since the massive opposition to the Maastricht Treaty in the early 1990s, the EU has put democracy and legitimacy high on its political agenda. The commitment to openness, accountability and transparency — the *standards* of good governance — has also been strengthened. So has also the commitment to human rights at the European level. Needless to say, the various measures that have been taken fall short of these principles. But such an overall assessment also depends on the standards, ie, whether they are realistic and defensible.

The EU is often couched as a system of transnational governance. First, is 'governance' democratic, or not? If not, does further democratisation of the EU require a transition to a *system of authoritative decision-making akin to government?* Second, does the EU already possess important system-traits akin to government? To phrase it differently, how far along the government path has the EU actually proceeded? Proper responses to these questions will shed light on the democratic quality of the EU (and the link between democracy and transnational governance). This chapter only provides a sketch of an answer, as a complete assessment would require an in-depth assessment of the government components versus the governance components of the legal-constitutional system (principles and practice), the system of institutions, and inter-institutional relationships (both horizontally and vertically).

In the next part, Part Two, we clarify the meaning of transnational governance and government, and derive a set of criteria through which to assess each. In Part Three, we discuss the role of a set of EU institutions in order to establish whether they comply with the basic requirements of transnational governance or with the criteria of government. The focus is on *Comitology, Courts, and the European Parliament.* In this analysis we have excluded the Council, which is the main legislator but is foremost an inter-governmental body, and the Commission, which is generally seen as the 'motor of integration'.

In Part Four, we analyse *the Charter of Fundamental Rights in the EU and the Constitutional Convention*. Our approach is to assess their role in institutional and procedural terms, ie, we assess the rules and norms of operation, and the manner in which they are organised, in order to clarify

their status with regard to the standards associated with rights-based government in the EU. Part Five holds the conclusion.

II. GOVERNMENT OR GOVERNANCE?

It is widely held that governing is no longer an act mainly undertaken by states. The claim is that states are increasingly supplanted, by networks and other arrangements, associated with transnational governance. The relationship between state and non-state actors in such networks is non-hierarchical, and decisions are often reached by deliberation rather than through intergovernmental bargaining and voting. Is this an alternative to representative government?

Conceptualising Government

Government refers to the political organisation of society, or in more narrow terms, to the institutional configuration of representative democracy and of the state. The *state* is a political institution and an organisational form, whose basic rationale is to establish and maintain order and security. To Weber the state is 'a human community that (successfully) claims *the monopoly of the legitimate use of physical force* within a given territory'. (Weber [1948] 1991: 78) In principle, the state is sovereign, and autonomous. It is in charge of its own agenda, and controls the territory through a hierarchical system of communication, command and control. Its sovereignty is encoded in international law; hence the world is divided into a *system* of states. As there is no legal authority above the sovereign state that can ensure compliance with international law, inter-state relations are marked by anarchy. The principle of state sovereignty presupposes that each state recognises the others' sovereignty, and that all states refrain from intervention in the affairs of other states. This system is generally referred to as the Westphalian Order.

Nation refers to a specific type of community based on a form of solidarity and a sense of community and we-feeling. A nation is an invented or even *imagined* community,[3] ie, some symbols and aspects of a community's past are highlighted at the behest of other: ' Only the symbolic construction of 'a people' makes the modern state into a nation-state.' (Habermas 2001: 64) The forging of a nation reflective of 'a people' is seen as an essential aspect of the cultural substrate that is required for people

[3] B Anderson underlines that the nation is an *imagined community*, 'because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.' (Anderson 1991: 6).

to regard each other as neighbours and fellow countrymen. The nation, due to its deeper ties of belonging and allegiance, makes possible the transformation of a collection of disjunctive individuals and groups into a collective capable of common action. A sense of solidarity and a common identity make for patriotism or 'love of country' and make up the 'non-majoritarian' sources of legitimacy.

Like every system of collective decision-making, a system of government has to respond to both efficiency and legitimacy requirements. It has to achieve results and to achieve them in a correct manner. In normative terms, these are very different sets of requirements, but they are, ultimately, co-dependent. Capability bereft of legitimacy is unstable and inefficient. Legitimacy without capability is futile. The nation-state provides a particular response to each criterion and to their interrelationship. Efficiency is territorially bounded in the sense that the scale and the scope of the state is the relevant parameter. Legitimacy is nationally constrained in that the laws and regulations are filtered through and assessed in relation to the ethical self-conception of the people as a nation, steeped in history, tradition and a way of life. The nation-state framework places constraints on legitimacy and efficiency because the ultimate authority to make binding laws rests with a territorially confined and culturally homogenised people. This makes it difficult to shift the boundaries of the citizenry; territorial borders cannot be altered by democratic means. In a democracy, the people cannot determine who the people are, ie, establish *viable* criteria for exclusion and inclusion.[4]

The limitations regarding capability and efficiency come to the fore as the nation-state is facing trans-border problems such as capital flight, large-scale population movements, pollution and the like. In a globalised context, the scope of social organisation no longer appears to coincide with national territorial boundaries. Increasingly, political bodies beyond the nation-state are required to cope with this new problematic scenario, but democracy has, up to now, relied on criteria that are derived from the nation. Consequently, there is need for a conception of democracy that is decoupled from the nation state model. Today, the process of globalisation is helping to bring forth the emergence of new forms of governance. What notions of legitimacy and capability are these based on, and do they represent democracy beyond the nation-state?

Transnational Governance: Pollyanna Only?

Three revolutions — in telecommunications, in transportation, and in the formation of global financial markets — have made capital and information

[4] The 'citizenry of a democracy cannot decide on the issues the citizens are to decide on.' (Offe 2000:182)

available everywhere, and made world-wide mass-media and cultural production possible (Held 1995). Financial and banking centres become fused into one integrated network. Executive power — both private and public — has increased, at the same time that the role of the state as a hierarchical and democratic collective decision-making body, imbued with territorial and social control, has weakened. Hence, liberal democracy is facing problems:

> For if state sovereignty is no longer conceived as indivisible but shared with international agencies; if states no longer have control over their own territories; and if territorial and political boundaries are increasingly permeable, the core principles of liberal democracy — that is self-governance, the demos, consent, representation, and popular sovereignty — are made distinctively problematic.
>
> (McGrew 1997:12)

These changes have systemic implications, as they not only signify the spread of the market economy world-wide, but also spur the development of a new international political order. At international level the establishment of the UN, the OSCE, the WTO, the World Bank, and the IMF is important. These bodies indicate that it is in the economic realm and in the area of human rights, that the pattern of institutionalisation of international law has proceeded the furthest.

The WTO is often touted as a further step in the process of globalisation through law, in the economic realm. It is a more formalised system of co-operation based on adjudicative resolution of disputes than its forerunner, the GATT. This international body of (quasi) law is further entrenched in regional associations which it helps sustain and is, in turn, sustained by. These are the NAFTA in North America, the ASEAN Free Trade Area in South-East Asia, and the EU in Europe. In Europe, the latter has become an important decision-making body, with unprecedented collective problem-solving and conflict-resolution functions. In addition, new governance structures made up of (I)NGOs, networks, social movements etc, contribute to the establishment of a trans-national civil society that provides new channels of influence and control. Hence the concept of *governance*, which is used to depict new forms of *transnational* decision-making.

Governance is not political rule through responsible institutions, such as parliament and bureaucracy — which amounts to *government* — but innovative practices of networks, or horizontal forms of interaction. It is a method for dealing with political controversies in which actors, political and non-political, arrive at mutually acceptable decisions by deliberating and negotiating with each other. Governance is based on a variety of different processes with different authority bases, and highlights the role of voluntary and non-profit organisations in joint decision-making

and implementation, and the semi-public character of modern political enterprise. Today, these structures span across boundaries; the boundaries are far more porous; and the actors are less tied to, as well as less dependent on, territory. Transnational governance is marked by a proliferation of organisations in which no single organising principle dominates.

> If the absence of an ultimate authority signified the presence of anarchy during the era of hegemonic leadership and superpower competition, such a characterisation of global affairs is all the more pertinent today.
>
> (Rosenau 1997:151)

One of the hallmarks of transnational governance is the shifting loci of authority, which may converge, overlap, or diverge. It also entails shifts in the relative salience of political, legal, economic and social factors.

The term governance is used to depict multiple and rapidly growing networks of international communication and transgovernmental regimes, new forms of diplomacy and transnational civil society. These may be regarded as series of experiments in democracy, as they constitute control mechanisms beyond government. Today, there is a remarkable expansion of collective power to handle new forms of risks and vulnerabilities. Numerous channels of influence help produce a wide range of steering mechanisms. These exist on different levels — some are sponsored by states, and others are not. Such mechanisms range from NGOs and social movements, to the Internet, cities, and micro regions (Rosenau 1998). New governing regimes based on various decentralised and cooperative solutions are emerging. They may be seen as being established to monitor the effectiveness of agreements:

> These regimes cannot directly control the effects of globalisation: they attempt to enable the normative constraints consistent with equality of effective freedom rather than with equal access to agency freedom over the levers of economic process.
>
> (Bohman 1999:509)

The term *transnational governance* is thus used to describe the emergence of new forms of legal and/or political collaboration of public and private actors at international and regional levels. Here, the terms governance and transnational, are conjoined to create a conceptual apparatus to caption the far more fluid post-Westphalian world, a world where territoriality and functionality do not cohere. No one possesses absolute power within these structures, and thus, Rosenau maintains, they may be functional equivalents to democracy due to the logic of checks and balances. Pluralism and dis-aggregation are seen as conducive to democracy in a multi-centred world of diverse non-governmental actors. However, in addition to the problem of the limited capacity to influence and change actual policies, there is the added problem of biased representation

and inequality. The legitimacy problem of (group) pluralism prevails. It is even more ' pollyanna' than polyarchy (Rosenau 1998:51). These private law regimes merely amount to *governance without democracy*, because there is little chance of equal access and public accountability. (Rosenau and Czempiel 1992, Eriksen 2002) But the pattern is uneven: more firm types of co-operation have emerged, as well.

The EU — A System in Motion

Globalisation entails the growing interconnectedness of states and of societies. These are tied together through a multitude of rapidly growing networks of communication, the emergence of *supra-national regimes*, and even a transnational civil society. On regional, international and global levels regimes have been created beyond the nation-state, and, at least partly, these have compensated for the national loss of governance capacity (Zürn 1998). The growth of international law, the institutionalisation of international courts and of supranational political institutions, point not only to world-wide interconnectedness but also to 'global' [or perhaps it would be better to say, regional] governance, of which the EU is the most prominent example. However, with regard to the EU, analysts disagree as to whether this is a system of transnational governance or a fledgling system of *government.*

The EU is now often described as a system of transnational governance, beyond inter-governmentalism and more complex than the somewhat simplistic version of supranationalism espoused by neofunctionalism. Recent scholarship conceives of the EU as a *system of multi-level governance*, which consists of multi-tiered, geographically overlapping structures of governmental and non-governmental élites.[5] Governing is no longer exclusively statal, and the relationship between state and non-state actors is non-hierarchical. '(T)he key governance function is "regulation" of social and political risk, instead of resource "redistribution"' (Hix 1998:39, cf Majone 1996). To depict the EU as a system of multi-level governance does not amount to advocating a coherent and uniform alternative theoretical position on the EU and the integration process. What has come to be known as the 'new governance agenda' is unified both in its rejection of the nation-state bias, and in its conception of the EU as a polity *sui generis*, although this is not unified in the conception of what the entity — the EU — really is, nor how it can be conceived of in theoretical terms.

There are indications that the EU has moved beyond an intergovernmental and even transnational system of governance. The 'direct

[5]This is also discussed in Eriksen and Fossum (2000). There is a large body of literature on this; see, for example, Wessels 1996: 63f; Marks 1993; Jachtenfuchs and Kohler-Koch (eds) 1996; Hooghe 1996; Scharpf 1996.

effect' principle of EC law, premised on the notion of EC law as 'higher' European law (that is measures within the first pillar) profoundly affects the Member States, and the European Court of Justice (ECJ) claims *Kompetenz-Kompetenz,* ie, the competence to amend its own competence. The supranational features of the EU have become more pronounced and European law is considered as binding.

Some analysts who work from a deliberative politics perspective depict the EU as a case of *deliberative supranationalism*, where this is a defining mode of transnational governance (Joerges and Neyer 1997, Cohen and Sabel 1997). This can make up for some of the defects in the democratic state. For one, a deliberative transnational system provides inclusiveness, accountability, and a range of new solutions to the problem of borders and the designation of people. On the one hand, trans-national deliberative bodies may raise the level of information and contribute to rational problem-solving because they include a range of different parties, and often adhere to arguing as a decision-making procedure, instead of voting and bargaining. To various degrees, such bodies — also to be conceived as epistemic communities — inject the logic of impartial justification and reason-giving into transnational bodies of governance. Deliberation contributes both to a more rational way of solving problems and to an increase in the epistemic quality of the reasons in a justification process (cf Bohman 1996:26f).

On the other hand, deliberation is not enough. When law is not laid down in an authoritative manner and made equally binding on every part, lack of commitment ensues. Law complements morality (Habermas 1996a; Apel 1998). When non-compliance is sanctioned, and the incentives for strategic action are taken away, actors may act in a moral manner, without having to face the danger of losing out. Actors comply more easily with interest regulating norms when they are subject to a higher authority that both legislates and sanctions non-compliance unilaterally. Thus, law is not only needed to pacify the state of nature between the sovereign states but also to set a civil society based on deliberation in motion. This is the reason why a post-national system of rule has to be based on law. The question is whether this also implies the adoption of those prescriptions that are associated with government rather than with governance. But can a system of popularly authorised rule — government — be constructed in such a way as to be freed of 'nationalistic' presuppositions? In other words, how can government be reconstructed from a deliberative perspective, and can it be disassociated from nation as well as state?

Reconceptualising 'Government'

If government presupposes a common pre-political identity embedded in a clearly defined demos, then, the EU does not qualify as such.

The question that the EU raises is whether a common form of allegiance and attachment can be fostered or nourished. In other words, how do modern multicultural societies hang together? The deliberative approach posits that allegiances can be created. A demos and a common will are not merely pre-political conditions and presuppositions of collective self-governance and democracy, they can be *forged* in inclusive communicative settings. The procedural arrangements of modern constitutional states can themselves bear the burden of legitimation, as people are involved in comprehensive opinion and will-formation processes.

Further, the deliberative approach provides a model for *how* allegiances are formed, in that it emphasises the role of political-legal integration. This notion of allegiance-formation is ultimately steeped in the constitutional order, which claims to be binding on all subjects, and to be approved by the various groups within society, each with its own particular and distinctive identity and value. Thus, constitutional democracies not only express certain values, or conceptions, of the good society, they also highlight the conception of society based on the rule of law. The basic requirements are respect for democracy, difference, pluralism, human rights, and vulnerable identities, etc. Different groups continue to live together and resolve conflicts because they agree on the basic rules and procedures that claim to secure fair treatment of the parties. In modern pluralist societies, only law can legitimately ensure *solidarity with strangers* (Habermas 1996b:1544).

The first requirement of government then is a democratic constitution with a bill of inalienable rights, and provisions that delimit the powers and competences of the various branches of government. The latter pertains to a division of powers and responsibilities, along both horizontal and vertical lines. The institutions undertake different functions, yet are ultimately co-dependent. A delineation of powers and responsibilities is needed, to protect their integrity, to prevent the accumulation of power, and to ensure co-operation.

Second, the constitution must be upheld by the successful operation of a set of institutions. These must be popularly elected bodies that can translate values into laws, and bodies that reliably implement the laws into decisions — subject to popular oversight and scrutiny. Institutions ensuring public deliberation and collective decision-making through bargaining and voting procedures are required. The legislative process also needs a legally-based overseer, a set of courts to protect the democratic process.

Third, is the requirement of representativeness. Representation contributes to refine and enlarge opinions, by passing them through the deliberate concern of chosen members of the demos. In larger, more complex, and pluralist settings, the representatives have to take different interests and perspectives into consideration, in order to justify particular

claims and reach more reasonable and legitimate decisions. Representation may be seen as a precondition for political rationality, as it secures institutional *fora* in which elected members of constituencies can peacefully and co-operatively seek alternatives, as well as solve problems and resolve conflicts on a broader basis (Sunstein 1988). Implicit in this notion of representation, then, is accountability, which entails all those who are potentially affected by decisions having their say and/or being able to dismiss incompetent leaders. The representatives do not only have to justify their decisions to their own electorate, but also to the representatives of other electorates.

The crux of government, then, is not state in its collectivistic, nationalistic reading, but democracy. A true republic presupposes democracy, but democracy does not presuppose the state. 'Verfassung und Demokratie sind rechtlich nicht an den Staat gebunden' (Brunkhorst 2002:223). A constitution embodies the concept of the right of the *demos*, ie, an inclusive communicative, will and action community of affected parties that mutually give one another rights to participate (Augustin 2000, Habermas 1996a). These insights have informed the development of the criteria we apply in our assessment of the prospects of government emanating in the EU.

III. THE EU — A GOVERNMENT IN THE MAKING?

To what degree does the EU exhibit traits of such a system of government? First we address Comitology, which is held to be the prime example of deliberative supranationalism.

Comitology as a New Political Order[6]

Literally hundreds of committees in the EU operate within the confines of the delegated authority of the Commission, as vested on it by Council Decision 87/373/EEC. They are vital in the process of shaping and adopting legislative acts.[7] These committees are made up of representatives of the Member States and are chaired by Commission officials. This system of committees has a strong transnational imprint. For one, it was designed

[6] The following parts on Comitology and the European Parliament draw on our article 'Democracy through strong publics in the European Union', *Journal of Common Market Studies*, Sept 2002.

[7] Strictly speaking Comitology pertains to the procedures for the excercise of the implementing powers conferred on the Commission set by Council Decision 87/373/EEC. However, on a broader reading Comitology 'covers the entire universe of Union Committees. Comitology is not a discreet phenomenon which occurs at the end of the decision making process.' (Weiler 1999b:340).

to constrain supranationalism, as it has been a vehicle for the Member States to exercise control and oversight. Further, the committee members are experts, representatives from affected interest groups, and national civil servants (who are usually selected by their respective national governments).[8] Its field of remit has expanded. Comitology initially covered such areas as agriculture, trade, and customs policies, but now also comprises research and development, environmental affairs and telecommunications, etc.

Comitology is networked governance rather than hierarchical government. But what is peculiar to Comitology — contrary to other international committees — is that these committees are involved in decision-making that is directly binding on domestic governments. This trait, combined with its deliberative style and the inclusion of many of the potentially affected parties, have prompted suggestions that Comitology may mark the inception of a new political order, akin to *deliberative supranationalism,* and which may also, potentially, 'repair' the democratic deficit. The Commission, which equips the EU with an administrative capacity, not found in international organisations, and the Community method of legislation, which confers the exclusive right of initiative on the Commission both give the system a strong supra-national imprint. The powers in the Union are not neatly divided, but the non-majoritarian features — the unusual number and range of decision-making procedures together with critical scrutiny and judicial review — contribute to institutional balance.

> The unusual nature of the EU's institutions and policy-making process reflects the tradeoffs being made between the need for the representation of national power, the demand that electorates have a voice through the European Parliament, and the necessity of providing administrative capacity without a traditional executive.
>
> (Sbragia 2002:396)

It may be that Comitology, when viewed in isolation, comes down to *administration without government* (Wessels 1999) or *technocratic deliberation* (Schmalz Brunz 1999). Open access and participation are limited, as is the scope for transparency and public accountability. However, in some respects Comitology can be seen to contribute to legitimate governance. Well-informed problem solving and efficient decision-making are vital parts of modern government. Expert-based decision-making is not on its

[8] The committees are of many kinds, but in functional terms there are scientific, interest, and policy-making/implementing committees, which are composed of independent experts, and representatives of interest groups and Member States. 'These committees thus operate both in the preparatory and in the implementing phase' (Vos 1999:22).

own illegitimate and a threat to democracy. The knowledge base of political decisions — hence their cognitive-instrumental quality — is of utmost importance to legitimacy (*cf* Bohman 1996:162). If the decisions are not good or correct, it does not matter how democratic the process has been. This is also the reason why *delegation* in modern complex societies is an integral part of the lawmaking process. Not everybody can participate, not everybody has the knowledge needed to handle intricate matters, and it is mainly the problem-solving capacity that is delegated. The problem with regard to the EU is that the agenda of Comitology (and of bureaucracies in general) consists of morally and ethically salient issues, as well. This has to do with the increasing degree of *risk regulation*. Comitology does not merely represent a-political, functional, administration of things. It also has to find viable answers to politically sensitive and normatively salient questions. Hence, the technocracy allegation.

Committees may be seen as a solution to the problem of overloaded political decision-making agencies, and as a solution to the problem of finding correct answers to risk decisions. Expert discourses increase the epistemic quality of decision-making. Answers to cognitive and normative complex questions cannot be found by mere voting or by bargaining over contested issues. Nor can such questions be solved in a valid manner by subsuming them under legal statutes. Neither extended participation, nor increased publicity, provide much help in reaching correct decisions in cognitively demanding cases. It is as nonsensical to hold a vote on the presence of mad-cow disease, as it is to bargain over the levels of dioxin in foodstuffs. These may actually take place, but bargaining is not the proper procedure for reaching decisions in these matters because we cannot know whether the bargains are right. Only truth-seeking or scientifically based discourse can ensure correct decisions in such cases.

In the Shadow of the Law

Comitology establishes a framework for co-operative problem solving by granting relative *decisional autonomy*, and by enabling discussion on different aspects of the cases at hand (Gehring 1999). Within this institutional architecture, innovation, rational problem-solving and ability to form agreements become the indicators of success. Analysts have revealed that participants undergo learning, explore rather than merely assert preferences and complement their loyalties — all of which are conducive to the formation of supranational identities and joint problem-solving (Neyer 1999; Joerges and Vos *et al* 1999; Egeberg 1999). Hence Committees are epistemic communities but are they also conducive to government?

The committees are subject to vociferous criticisms, due to the fact that they are not properly authorised and/or subject to public control. The EP

has been opposed to the Comitology decision,[9] due to the lack of transparency and due to the lack of procedures for recalling Comitology decisions. When assessed by means of a simple majoritarian model of democracy, Comitology is undemocratic, as it is neither subjected to strict national control nor to the control of the proper EU authorities. The problem is more complex when assessed by means of the deliberative model of democracy. This model considers equal access and public debate as the basic principles of popular sovereignty. The requirement is that, in a public debate, all political actions should be seen as emanating from the laws, which for their part must be consented to in a free debate in order to be legitimate.

The Committees are legal subjects and are constitutionally significant (Joerges 1999), but their legal competence is not to be understood in terms of a *delegation model* in which the actors merely act as agents of their constituencies. Authority is often not conferred upon decision-makers according to any strict mandate. However, it is not only the structure and composition of the Committees — the members and their competencies, the level of discretion, the role of scientific reasons — that contradict such a model. According to Article 152 para 2 of the EC Treaty,

> … the members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties. In the performance of these duties they shall neither seek nor take instructions from any government or from any other body.

Comitology echoes this as the members in the committees deliberate in the shadow of the law as '…any criticism of divergent views must use arguments which are compatible with European law…' (Joerges 1999:317).

To some extent this system does comply with the criteria of government, as it decides on the basis of a legal order, and there is the participation of the representatives of affected parties, although the pattern of participation is weakly developed in terms of accountability. After 1985, however, all the major interest groups were present in Brussels, and the context of negotiations in the Comitology nexus has become quite pluralistic, with many 'legitimate' participants. The Commission has also recently adopted a code of 'good administrative behaviour',[10] which is intended to secure equal treatment, objectivity, transparency, and the duty to justify decisions. A similar commitment, framed as ' The right to good administration' is included in The Charter of Fundamental Rights

[9] On Council decision see Annex 1 and 3 in Joerges and Vos, 1999. The latter repeals the Decision 87/373EEC. 'It expressly mentions the European Parliament without defining its institutional role.' (Joerges and Vos 1999:386).

[10] The Commision, on the 1 March 2000, adopted the White Paper on Administrative Reform: *http://europa.eu.int/comm/secretariat_general/code/index_en.htm.*

proclaimed in Nice 2000 (Article 41, Section 2) — as 'the obligation of the Administration to give reasons for its decisions', and is also asserted in the recently published Commission White Paper on European Governance (2001),[11] which underscores the need for close contact with civil society and accountability, etc.

Comitology may be seen as a system in which

> national and Community actors pool their respective sources of legitimacy — including their functional and technocratic reputation — to make the system acceptable to both the involved and concerned groups and to the population at large.
>
> (Wessels 1999:267)

Comitology is conducive to parties acting according to guidelines rather than according to mandates — informed by opinions and expertise rather than fixed interests and preferences. The dialogical structure of communication and the forging of solidarity between diverse actors point towards transnational, deliberative proceedings in which the co-operative process and the manner in which it is conducted bear the burden of legitimation.

On the one hand, Comitology, then, is an intrinsic part of a modern system of governance and one equipped to handle complex issues in a rational manner. It is efficient in its ability to adapt to new problems and exigencies in pluralist settings where clear-cut control and sanctioning mechanisms are lacking, as are pre-established solutions and self-evident rational answers. In such complex settings, preferences cannot only be stated but must also be justified by arguments — and arguments that can be supported by scientific evidence have the best chance of convincing the parties. On the other hand, the legal basis of the committee system speaks to the government model. Comitology is constitutional in so far as we can speak of a constitution in the EU, which we will address later. But it is unconstitutional in the sense that it does not respect the division of competencies as they are entrenched in the nation-state. Comitology is not subjected to properly authorised, external control. It is weak in terms of accountability and representativeness. However, the latter is also due to the inadequate entrenchment of an authoritative system of rule in the EU in general.

The European Parliament — A 'Government' Installer?

Parliaments constitute an essential part of government, as they 'represent the people'. The parliament, constrained by constitutional provisions and

[11] Brussels, 25.7.2001.Com(2001) 428.

public deliberation, is authorised to lay down the law and make it binding on everyone. Deliberation is intrinsic to the principle of representation that parliaments are based on. This can be stated as follows: 'no proposal can acquire the force of public decision unless it has obtained the consent of the majority after having been subjected to trial by discussion.' (Manin 1997:190)

The EP was at first a consultative body with very limited powers. It was made up mainly of representatives of national parliaments. In time, and in particular after the introduction of direct election of MEPs in 1979, the links to national parliaments have become severed and its decision-making powers have grown immensely. The EP's decision-making role is still considerably weaker than that of national parliaments. This is due largely to institutional reasons, such as the Pillar-structure of the Treaties. To illustrate, within pillars Two and Three, (CFSP and JHA) it is consulted, but does not have decision-making power. Within its realm of competence, however, the EP has become a co-legislator with the Council of the European Union in almost all policy areas, except agriculture. It has the right to approve of (and to reject) the Commission, as well as the right to censure it. It has also shown willingness (and some ability) to ' throw the scoundrels out' — one of the main indicators of parliamentary power.[12] The EP is thus also able to exert a measure of accountability.

As noted, the EU lacks a coherent constitutional doctrine pertaining to the division of competencies and to accountability. This can also be seen in the role of the EP. The EU is not a full-fledged parliamentary system. No cabinet emanates from it, and the Commission is more of an expert body than a politically-accountable government. The EP also has no formal role in the process of treaty-making/or change. Hence, in so far as the treaties make up a central part of the constitutional structure of the EU, the EP has no role to play in constitutional amendment, which is thus formally speaking an intergovernmental matter.

Having said that, the role and salience of the EP within the EU's decision-making structure has, in time, increased, and this is reflected in the inter-institutional relations and decision procedures. From a deliberative perspective, how much scope for arguing a decision-procedure permits before a vote has to be taken or another decision-making body (Council) can intervene and carry on with the proposal is also important. Co-decision has increasingly become the standard and gives Parliament more influence. It is also the decision procedure that requires the greatest amount of deliberation and *reason giving*. This procedure can also foster deliberative

[12] The EP unearthed the practices in the Commission that generated concerns with fraud and nepotism and set up the committee of independent experts to find out who was responsible.

virtues. It spurs co-operation, conciliation and anticipated reaction among all the three key decision-making bodies (Corbett *et al* 2000:188–9).

The EP is part of an institutional setting that is marked by a consensual style of politics (Lord 1998). One reason for the strong consensus orientation lies in its peculiar institutional make-up, in which a clear-cut division between government and opposition is absent. Thus, majorities can more easily form around a number of dimensions. Such a structure places a particular onus on the ability to persuade and *convince strangers* through reference to more generalised categories and arguments.

The EU is not based on the conventional notion of party democracy and the ensuing discipline that this injects into political debate. From a deliberative perspective, an open mandate and leverage in relation to party organisation is required for preferences to be changed and wills to be moulded in parliamentary fora. The institutional features of the EU and the EP listed here reveal that there is more scope for open deliberation in the EP than in a full-fledged party-based system.

The EP enjoys a great measure of autonomy in setting its own agenda (although as we have seen, not in determining its own institutional role within the EU). This right has been confirmed in several rulings by the ECJ. To fulfil its role the EP has developed a wide repertoire of means, such as debates, reports, hearings, and resolutions. These mechanisms produce arguments and justifications and convey information, and insert a deliberative style of politics. Thus, the EP is quite free to and actually does pursue those matters it deems important, as well as responds to concerns of citizens and social movements.

True representativeness hinges on the equal opportunity to express oneself by all those potentially affected by a norm or a decision. This includes the ability to do so in a language they are familiar with. The EP operates as a multilingual body — there are 11 working languages in the present EP (only the South African and Indian parliaments have a comparable linguistic diversity). The Political Groups in the EP are made up of representatives from different Member States. MEPs must thus actively interact with representatives from different language and cultural backgrounds. These interactions cut across national boundaries — they also serve to downplay national orientations. The net upshot may be to foster a body of representatives that is cognisant of cultural variation, is culturally self-reflective, and is compelled to argue in more universalistic terms.

The emergence of the EP within the institutional structure of the EU can be depicted as that of an increasingly institutionalised body of will-formation, equipped with legislative powers, that asserts standards of accountability and injects transparency. In overall terms and despite obvious progress, it is less developed in these functions than the parliaments in democratic states are. The EP is not part of a system wholly based on a

parliamentary model of democracy — nor is the EU based on a party model of democracy. It is partly due to this that the EP (and the EU) has been able to develop certain rather unique deliberative qualities. In representational terms it is also the only body that represents the entire populace of the EU. To what extent is it able to foster democracy in the EU?

The EP — Forger of Government-based Democracy?

The EP is not a full-fledged parliament in a legislative sense. It has, however, developed a particularly important surveillance role. It can usefully be termed an instance of *audit democracy* (Eriksen and Fossum 2002). The EU is an entity in the making and the EP takes stock of, and seeks to clarify, its constitutional status and essentials. The EP has, for a long time, propounded the need for a European constitution and has formulated several draft constitutions.[13] It has also actively and consistently sought to establish a set of clear and coherent constitutional principles on which to base the EU. Its position is that the legitimacy of the EU should be based on a dual principle of representation: the EU as a union of states and as a union of peoples (EP Background Information: 06–12–2000:1–2). In institutional terms, this entails an EP equal to the Council. To the EP, the democratic deficit of the EU is to a large extent a *parliamentary deficit* (Neunreither 1994:299). The EP is the entity with the greatest potential to become the foremost — but far from exclusive — embodiment of the peoples of Europe. It spells out general standards of legitimate governance and develops specific proposals, although its relative absence from the treaty-making process has, up until now, left it in the role of stock-taker.

The EP has also consistently taken stock of the status of human rights, both inside the EU and in other parts of the world (Alston and Weiler 1999:42–5; Corbett *et al* 2000:273–5).

The heightened role of the EP within the institutional structure of the EU — in itself and through the organisation and actions of the EP — has been important to the heightened commitment to democracy in the EU:

> The existence of a body of full-time representatives in Brussels, asking questions, knocking on doors, bringing the spotlight to shine in dark corners, in dialogue with their constituents back home, makes the EU system more open, transparent and democratic than otherwise would be the case.
>
> (Corbett et al 2000:6)

The EP is a weaker decision-making body, but its qualities as a deliberative body and a forum may surpass those of many national parliaments. In this and in other respects, the EP also helps spur *a European public sphere*.

[13] See the Spinelli Report 1984 and the Herman Report 1994.

The role of the EP in ensuring representativeness is somewhat hampered by the absence of truly European political parties. But in the last few years, parliamentarians have entered centre stage of what has now become a constitutional debate in Europe. New bodies have been established that may rectify the democratic deficiencies that were built into the traditional ones. Before addressing this, we analyse the ECJ, which like the EP, is a forger of a rights-based polity.

The ECJ — Constitutional Court or Transnational Regulator?

Courts are quintessential ingredients of every system of government. They institutionalise will-formation through interpretation, rule application, rule adoption and sanction. Thus, they uphold rule and control. It is widely held that much of the impetus for the European integration process is provided by the Courts and the legal system (Weiler 1999a, Frankenberg 2000). The initial legal system was derived from treaty-based law. In time this has emerged into a quasi-constitutional legal system based on a set of fundamental principles.

Not only is the Community a creature of the law, it also pursues its aims exclusively through a new body of law, Community law, which is independent, uniform in all the Member States of the Community, is separate from, yet superior to, national law, many of whose provisions are directly applicable in all the Member States. Like any true legal system, the Community legal system needs an effective system of *judicial safeguards* when Community law is challenged or must be applied. The Court of Justice, as the judicial institution of the Community, is the backbone of this system of safeguards. Its judges must ensure that Community law is not interpreted and applied differently in each Member State, that, as a shared legal system, it remains a Community system and that it is always identical for everyone in all circumstances. In order to fulfil this role, the Court of Justice has jurisdiction to hear disputes to which the Member States, the Community institutions, undertakings and individuals may be parties.[14]

The Court of Justice is made up of 15 judges and 8 advocates general. They are appointed 'by common accord of the governments of the Member States'. Their tenure in office is six years and is renewable. Their independence is to be beyond doubt and they must be of recognised competence. The President of the Court is selected by the jurors for a renewable term of three years. The President will direct the Court's work and preside over the hearings and deliberations. The Court is assisted in its task by 8 Advocates General. Their task is to 'deliver, in open court and

[14] *http://curia.eu.int/en/pres/jeu.htm.*

with complete impartiality and independence, opinions on the cases brought before the Court.' They are not prosecutors or similar types of officials.

The ECJ is a recognised adjudicator of legal disputes. This is due to the *doctrine of direct effect*, which positions laws made in Brussels on a par with those enacted by national parliaments, and to the *doctrine of supremacy*. The former means that European law is binding on every citizen regardless of national citizenship, while the latter still remains a contentious issue. The Court claims *Kompetenz-Kompetenz*.

However, the legal system of the EU is far less hierarchical than what is generally the case with nationally based orders. In institutional terms, one of the peculiar features of the EU is that ' (t)he national courts and the European Court are integrated … into a unitary system of judicial review.' (Weiler 1994:515) The system that has emerged is one in which courts at national level — in particular those at lower-level — have become parts of the sources of law that national judges draw on. One source of this convergence has been the role of the legal language itself; 'the language of reasoned interpretation, logical deduction, systemic and temporal coherence — the artefacts that national courts would partly rely on to enlist obedience within their own national orders.' (Weiler 1994:521) Albeit less hierarchical, there is nothing in the logic of legal reasoning or in the application and adoption of rules that sets this system apart from what we associate with government. But what does this relation of legal reasoning and government consist of, in more specific terms?

Courts are vital embodiments of procedurally regulated deliberation, in the sense of giving reasons and justifications. In institutional terms, the judicial procedures regulate the topics and the questions that may be brought up, the use of time, who the participants are, the distribution of roles, etc, and the judge as a presumed neutral third party, makes sure that the norms are interpreted correctly and complied with (cf Dworkin 1986). These procedures delimit the access of premises, they ensure unambiguous and binding results, and connect argumentation to decision-making and adjudication. Thus, the judicial procedures, compensate for the fallibility of communicative processes, and improve their incomplete or quasi-pure fairness of procedure (Alexy 1978:179, Habermas 1996a).

Courts establish rationales, as well as assess norms and rules, in terms of their legal and normative validity. There is a tension here between legality and legitimacy, as judges decide according to the code of legal/illegal, but cannot set the criteria for the code by themselves. The structure of legal reasoning relieves the judges of certain concerns and opens the way for inputs from other spheres of action (Luhmann 1995:338). Whilst the public reason-giving provided by Courts does provide those affected with a feedback mechanism and an intake through which to challenge, both the Court's rulings, as well as the norms and

justifications involved, the terms may be largely self-referential. The reasons provided by Courts in their rulings alert the public to what the Courts consider to be operative legal standards, but the structure of the legal system makes discourses prone to becoming self-referential and confined to norm-application.

This is one limitation of courts in general. The problem of the ECJ is that many of the laws upon which it rules are not made by the people. It is structurally limited in the sense that the norms that the judges are to act upon are not made by proper legislative authorities:

> Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European communities has fashioned a constitutional framework for a federal-type Europe.
>
> (Stein 1981:1, cited in Joerges 2001:5)

However, the ECJ has played a central role in fostering rights in the EU:

> In the seminal case of 1969 Stauder, the Court hinted at the unwritten general principle of fundamental rights protection as a basic foundation of Community law … [over time] the court has developed an incomplete but substantial bill of rights, although most of the time limited in its scope to economic actors. Its jurisprudence is clearly and openly founded on the European Convention of Human Rights, further refined and adapted by reference to the comparative analysis of national constitutional traditions.
>
> (Menéndez 2001:7, 10)

Through the increased emphasis on the promotion and entrenchment of *human rights*, it has fostered democratisation in the sense that the interests of the individual have been promoted both with regard to their private and public autonomies (although the rights offered to EU citizens do not ensure their formal status as the authors of the laws by which they are bound). This is consistent with the general orientation of the EU. Alston and Weiler note that

> a strong commitment to human rights is one of the principal characteristics of the European Union. … The European Court of Justice has long required the Community to respect fundamental rights …
>
> (Alston and Weiler 1999:6)

Article 7 of the Amsterdam Treaty stipulates that a Member State that violates human rights in a 'serious and persistent' way can have certain of its rights suspended. This thrust is driven partly by the convergence of legal systems at different levels of governance. The recently pronounced Charter of Fundamental Rights of the European Union — if it becomes binding — would be an example of such convergence of

national constitutional traditions, ECJ-law and ECHR-law.[15] But much of the law is made by the contracting partners, not by the people. The people do have rights but they have not decided upon them themselves.

The ECJ has contributed to strengthen the role of the EP within the institutional system of the EU. Its contribution to the strengthening of the supranational bodies of the EU is part of its larger role in constitutionalising the EU through securing political agreements, entrenching both procedural norms and citizens' rights, and strengthening the supranational component of the EU. However, like the EP, the ECJ is less directly included in Pillars II and III, which weakens their individual and joint role as governmental bodies. Two recent developments have taken us considerably closer to this latter model, although it is far too early to declare either as an unambiguous success. The first such development was the Charter of Fundamental Rights of the European Union and the second was the Convention on the Future of Europe.

IV. CONSTITUTIONALISING THE EU?

At the time of writing, half a year after the Convention on the Future of Europe was established,[15a] it is widely recognised that the EU is involved in constitution-making. What is more remarkable, looking back in time, is the paucity of debate on a European constitution up to now. This is even more remarkable when one considers that many analysts state that the EU already *has* a material constitution. It has also been quite commonplace amongst analysts to think of the lengthy and protracted process of treaty changes, as a constitution-making process. This process has had few of the traits associated with *government* and more traits associated with *governance* or even *interstate diplomacy* (cf Curtin 1993). The IGC method has been labelled an élitist, closed and diplomacy-driven type of process. A process consistent with the deliberative approach to government, as spelled out above, would have to be transparent, deliberative and widely representative. Since the main requirement of government is a constitution, it would have to have as its objective the framing of a proper constitution.

[15] The ECJ and national courts have contributed to spur a more fundamental academic and politico-legal debate on the role of the EU. One of the most prominent examples is the German Constitutional Court's Maastricht Treaty ruling. The principles of polity formation that this ruling presented have been widely debated — and the ruling has been important in spurring debate on the democratic deficit and legitimacy of the EU. The Charter of Fundamental Rights of the European Union, whose formal status is to be determined by 2004, could spark a similar type of debate.

[15a] For an assessment of the Convention and its Draft Treaty Establishing a Constitution for Europe, see Eriksen *et al* 2004.

The Charter — A European Bill of Rights?

The Charter was solemnly proclaimed at the Nice IGC Meeting in December 2000 (OJ 2000/C 364/01). It contained a comprehensive list of rights, including civil, political, social and economic rights (listed in 50 articles). They are meant to ensure the dignity of the person, to safeguard essential freedoms, to ensure equality, to foster solidarity, to provide a European citizenship, and to provide justice. The decision to seek to found the EU on a set of fundamental rights is part of the effort to forge a European constitution. Fundamental rights are also a vital pre-requisite for the fostering of citizens' attachment to the EU. However, the Charter suffers from several deficiencies here. For one, as it is based on existing rights, it relies on the *transnational* conception of citizenship that the EU touts as European citizenship. As Ulrich Preuss notes:

> Union citizenship is not so much a relation of the individual vis-à-vis Community institutions, but rather a particular legal status vis-à-vis national member states, which have to learn how to cope with the fact that persons who are physically and socially their citizens are acquiring a kind of legal citizenship by means of European citizenship without being their nationals.
>
> (Preuss 1998:147)

Further, the horizontal clauses in the Charter greatly restrict its scope of application, hence raising doubts as to whether it will apply to all those areas of life that are vital to the ensuring of democratic citizenship.

In formal terms the Charter is a political declaration, not a legally-binding document, although it has already become an indispensable part of the sources of legal interpretation of rights in the EU. (cf Menéndez 2002) The Charter was written *as if* it were binding and is made up of many of the existing provisions in the European Convention on Human Rights (ECHR), the Treaties (EU and other relevant international Treaties), and the constitutional traditions common to the Member States.[16]

The composition of the Charter Convention is also important. It was not only the first case of direct inclusion of parliamentarians in a process or decision of a constitutional nature, at the European level, but parliamentarians also made up the majority of the representatives (45 out of 62). This stands in marked contrast to IGC-based processes, which were the sole preserve of executive officials — up to the ratification stage where parliaments (and referenda) entered. The strong presence of parliamentarians greatly added to the legitimacy of this body.

[16] For more comprehensive assessments see Lenaerts and de Smijter 2001; Eriksen *et al* 2003; Menéndez 2002.

The Convention's deliberations were shaped by the fact that all the participants were legally trained. This may also have affected the outcome, in that it probably made it easier to reach agreement on a Charter essentially based on existing law.

The Charter *process* was distinctly different from the previous IGC processes. Whereas IGC processes were closed and secretive, the Charter process was open and set up as a deliberative process. The drafting process ran from December 1999 to October 2000, and the Charter was proclaimed in December 2000. The timeframe was therefore quite tight. The Convention held open hearings and received written submissions (a total of 1000 such). It almost unanimously adopted the Charter. No final vote was held but participants' accounts reveal that 60 out of 62 supported it. This process did to some extent contribute to the sparking of 'an authentically European–wide debate among the organisations of civil society.' The mobilising effect of this process, however, should not be overestimated but it certainly did compare favourably with the inter-governmental approach that had preceded Treaty changes before (de Schutter 2001).

This example testifies to a heightened reliance on rights as a key ingredient in ensuring legitimacy. It also underlines the credibility attached to deliberative bodies, when it comes to forging proposals and decisions of a constitutional nature. Such acts are committing, even in relation to future action. The Charter case has been widely deemed to have been so successful as to deserve repetition.

The Convention — Constitutionalising the EU?

The decision to establish a Convention on the Future of Europe was announced at the Laeken European Council in December 2001. The Laeken Council, in its Laeken Declaration acknowledged, for the first time, the *constitutional* character of the challenge facing the EU. The Declaration asked:

> What might the basic features of [a European] constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?
>
> (Laeken Declaration)

The Laeken Declaration also contained the open-ended mandate for the Convention, a list of 56 questions cast under six broad headings, as conceived by the Convention's Chairman, Valery Giscard d'Estaing:

> fundamental questions on Europe's role; the division of competence in the European Union; simplification of the Union's instruments; how the

> institutions work, and their democratic legitimacy; a single voice for Europe in international affairs; and finally, the approach to a Constitution for European citizens.
>
> (d'Estaing 2002 — SN 1565/02:10)

The Convention was asked to address a wide range of questions, ranging from core principles to rather mundane and technical or institution-specific questions. The Convention was given considerable leverage to develop its own interpretation of its mandate. The self-conception of the representatives and the way it is touted is that of a *constitutional convention*. The Chairman, in his opening remarks to the Convention, also said that there were great stakes involved:

> On one side, the yawning abyss of failure. On the other, strait is the gate to success … If we fail, we will add to the current confusion in the European project, which we know will not be able, following the current round of enlargement, to provide a system to manage our continent which is both effective and clear to the public. What has been created over fifty years will reach its limit, and be threatened with dislocation.
>
> (d'Estaing — SN 1565/02:02)

The Chairman thus underlined the need for the Convention to try to reach agreement on one single recommendation rather than merely spell out options for the IGC–2004 to consider, although there was no requirement for it to come up with one single option.

The Constitutional Convention largely duplicates the Charter Convention in terms of its composition (it is made up of a majority of parliamentarians (46 out of 66 voting members, and 26 out of 39 from the candidate countries)), with several notable exceptions. For one, it contains non-voting representatives from all the candidate countries. A separate Forum has been established for civil society organisations. The Convention started its deliberations in March 2002 and completed its work by June 2003.

It has recently been divided up in eleven working groups, each of which will deal with a set of the questions as spelled out in the Laeken Declaration. Concerns have been raised as to the transparency of these groups to the public, as to their ability to handle the constitutional dimension in a coherent and overarching manner, and as to the scope for deliberation given the overall time-frame of the duration of the Convention (Grevi 2002). The deadlines for the working groups were autumn 2002 (with the exception of Working Group XI on Social Europe, scheduled to report in January 2003), which would leave roughly six months' time of plenary deliberations to produce final results. This is not a very long time, given that the Convention only meets for a few days per month.

What Constitution?

The tension between governance and government permeates the Convention: its objective, structure, operations, and possible ramifications — in procedural and substantive terms. The Convention is intended to frame the debate by formulating one or several proposals. The Laeken Declaration did not commit the Convention to come up with a single coherent proposal, although Giscard d'Estaing has asserted that it ought to. Whether it succeeds in forging an agreement on a constitutional proposal does affect the prospect of forging a government-type constitution because, if the Convention fails to reach agreement on such a proposal, it is unlikely that the subsequent IGC will succeed in doing so. Why is this? The Convention is set up as a deliberative body, with a mandate, a time-frame, and a cast of actors capable of discussing matters of principle and having opinions and views moulded and shaped over time, hence institutionally speaking, it is equipped to handle the matter of forging a constitution. It is also composed of a majority of parliamentarians, many of whom, will presumably want an EU with stronger representative institutions, akin to the government version. Conversely, the IGC as an institution, is composed of decision-makers who are compelled to produce results within a very short time-frame. As the evidence has shown from countless IGCs, they have proven good for hammering out working agreements, through striking bargains. They are far less well-equipped to handle matters of *principle* and *of value*, and how such relate to practice.

Conversely, if the Convention does come up with a coherent proposal, the assumption is that this will carry sufficient weight and legitimacy to set the agenda for the IGC. This cannot be taken for granted, however, and hinges on what kind of legitimacy is attributed to the Convention. Relevant factors relate to its degree of independence from external influence, in particular pertaining to direct influence from the most salient actors, the big states and the Council. Here there is likely to be a trade-off between legitimacy and efficiency. On the one hand, the more independence it will have in relation to the most salient institutional players, the higher its legitimacy in the eyes of all stake-holders is likely to be. On the other, the better it reflects the core concerns of the Member States and the European Council, the key actors in the subsequent inter-governmental negotiating stage, the more likely its proposals are to win a favourable hearing during this IGC stage, ie, the higher its putative efficiency in decision-making terms is likely to be. The point is that each Member State at this stage has the power to veto any proposal that is set forth. This is not a simple trade-off, though, as a proposal that has gone through the Convention and won acceptance, or around which a consensus has been formed, is bound to carry considerable weight in the subsequent process.

The legitimacy of the Convention is not independent of its product. If it does reach agreement, the question is of what kind of constitution this will be — a constitutional treaty or a European Constitution? A constitutional treaty implies a proposal that relies on the existing institutional arrangement, including the ambiguous relationship between *governance* and *government* that permeates this. For instance, the deliberations in the Convention thus far reveal a willingness to develop some division of competences but not entrench these in a competence catalogue. There are also proposals to strengthen the transnational component of the EU, such as for instance the proposal made by Blair, Chirac, and Aznar for an extended tenure for the Council President, which is likely to strengthen the intergovernmental dimension of the EU. However, the Convention appears willing to make the Charter binding, which would be a step in the direction of *government*, in so far as the Charter qualifies as a constitutional bill of rights. But this is somewhat problematic, as the Charter has a number of built-in limitations. In its present state it would nudge the EU in the direction of *government*, albeit not the whole way, unless the citizenship provisions in the EU were altered so as to ensure European citizenship founded on private *and* public autonomy.

V. CONCLUSION

Informed by a deliberative perspective, this chapter has examined the government versus governance features of the EU. The pretext for such an examination was that national democracy is challenged by economic globalisation. Decisions are increasingly made in contexts beyond national control, and made subject to quite narrow and largely market-based criteria. But albeit less democracy — more market is often held as the inevitable outcome of this process, globalisation is a multifaceted process. There is a development of a multitude of networks of international communication, which are embedded in transgovernmental regimes, fairly open modes of diplomacy, and a burgeoning transnational — potentially even global — civil society. The institutionalisation of international courts and of supranational political institutions, point not only to world-wide interconnectedness but also to global governance, of which the EU is held to be the most prominent example.

However, this examination of certain selected institutional and constitutional features of the EU has shown that it is not merely a system of transnational governance, because it also holds important features akin to a government model. Drawing on a deliberative perspective, we identified three central criteria of government (constitution, institutional framework, and representation), and applied these to some central features of the EU.

The system of Comitology was chosen because it is the quintessential case of transnational governance. Its constitutional status is ambivalent. It is regulated by law, and the experts deliberate in the shadow of the law. Comitology was designed to help ensure the Member States a continued say in the EU, although it shapes preferences and identities and helps support further integration through its contribution to deliberative supranationalism. It does not comply with conventional conceptions of interest representation, as it is less formalised than, for instance, a system of societal corporatism is. But although it is less formalised, the operation of the entire system presupposes a set of institutions (the existence of the Member States). It also helps offload the EP as the site of interest representation because Comitology takes care of matters that require specialist expertise. The deliberative quality of Comitology makes this an important asset. Comitology is a means of handling complex issues of risk regulation that representative systems are inadequate to address. The conundrum facing the EU, as noted by Cohen and Sabel, is that this system has defects when compared to a formal constitutional arrangement, but to abolish it would entail a reduction of the effectiveness of the EU.

Courts have played a central role in the emergence of the EU. The problem with the ECJ is that many of the laws upon which it makes rulings are not made by the people. It is structurally limited in the sense that many of the norms which the judges are to act upon are not made by proper legislative authorities. However, the ECJ has also contributed to the promoting of democracy in the EU, through sustained action and support for the entrenchment and development of a body of fundamental rights, and through actions to strengthen other institutions which are supportive of democracy and democratisation. The courts have forged the peculiar non-hierarchical legal system of the EU, which thus diverges from that of government systems. However, there is nothing in the structure of legal reasoning to set the EU apart from the basic requirements of constitutional government. This suggests that the main question here is political, not legal. If the EU is endowed with a formal constitution the legal system can be adapted to this.

The EP falls short of the powers and prerogatives of parliaments in constitutional democratic states but has obtained stronger decision-making teeth in recent years. It cannot be assessed by conventional party-system standards — nor by conventional standards of representative government. The EP seeks to foster discussion, ensure rational and transparent decision-making, and promote the development of a more representative EU system. Although it has become an important legislator, its role in shaping the constitutional and institutional development of the EU is still deficient. However, recent changes have ushered in potentially important changes in the entire nature and status of the EU.

The main change is the ongoing process of constitution-making and constitutional debate, which was first attributed to the Charter Convention and is now attributed to the Constitutional Convention. The Charter Convention was important in several respects. For one, it brought the EU close to having a bill of rights. Further, it heralds an important change in the manner in which constitution-making is conducted. From having been the preserve of executive officials, operating in closed quarters, both the experience with the Charter Convention and the more recent decisions suggest a more open constitutional process. A more explicitly rights-oriented EU helps strengthen this trend, as rights empower citizens. The Constitutional Convention has promised to take this process a major step forward, although it still fails to escape the tension between governance and government. If the EU adheres to the system already in place, then it has to live with this tension with clear democratic implications. The question is how far it should move in the direction of government in order to satisfy both constitutional and democratic requirements on the one hand, and have the ability to handle the boundary-transcending problems that mark our contemporary age on the other. It is still too early to tell how this will ultimately be resolved in the EU. In this deliberative reconstruction, we have identified a number of features and processes in the EU that point in the direction of *government*.

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8

Law and Non-Law in the Constitutionalisation of Europe: Comments on Eriksen and Fossum

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I. INTRODUCTION: THE LIMITS TO MODERNITY?

'ECONOMIC GLOBALISATION POSES problems for national democracy'. Indeed, so it does. With their opening sentence Eriksen and Fossum capture easily the most prescient challenge to modern government in a nutshell. The EU, the WTO, NAFTA and ASEAN are, in their own way, crowning achievements of modernity. Each treaty-based body of law seems to have liberated us from the prosperity- and social-solidarity destroying parochialism of the national market by undermining stagnating national economic closure and unleashing unparalleled, albeit differentiated, global economic creativity. 'Rejoice': gone are the days when the social demands made by national polities were rendered a chimera by national economic stagnation!

Nonetheless, economic globalisation also carries with it a sting in its tail. Most accessible to us in terms of the 'democracy deficit' inherent to post-national economic organisation, the dilemma uncovered by economic globalisation is thus one of, how, on the one hand, we can stimulate sufficient economic growth to satisfy the social demands of modern society, while, on the other, maintaining an adequate link between the interventionist capacities of post-national law and the social expectations which we might once have assumed would have informed its intervention. 'Alack': what price global economic prosperity, if we can't direct it!

So far, so simple: either we fail to fulfil modernity's crowing promise (and existential fulcrum) of 'welfare/social citizenship for all',[1] since we

[1] The glue of 'factual' equality, which, in complementing civic and political equality, has held the modern state together. See, TH Marshall (1953) *Citizenship and Social Class* (London, Pluto

lack the creative economic resources; or, our 'modern' achievement remains incomplete in the face of failure to establish adequate democratic direction over prosperity-securing legal economic interventionism.

'Simple' dilemmas, however, often demand complex solutions, and this is nowhere more true than if we recast the paradox of economic globalisation in the explicit terms of legal theory. The prime player in the execution of ecconamic globalisation, of course, has been that greatest of all of modernity's counterfactuals, 'law'. The measure of the success of the law of the EU, WTO, NAFTA and ASEAN (where so ever such 'law' might educe from[2]), has been its ability to give true force to economic globalisation through the creation of enforceable post-national economic subjectivity. Political will and economic rationales for integration may, and do, wax and wane. The yardstick against which the enduring success of an international institution of economic integration will be measured, however, is the degree to which its law can give real-world potency to the powerhouse figure of the trans-national economic entrepreneur, can shape real-world contours for the workhorse character of the cross-border market citizen,[3] and can forge real-world personality for the shapeless mass of post-national consumers. Legally secured economic 'subjectivity' is the primary indicator of the density of globalisation, giving us a ranking of regional and global economic interdependency, in which the EU clearly outstrips all of its counterparts.

By this token, the economic globalisation dilemma boils then down to one of democracy versus law; one of the ability of nationally-defined polities to pursue their social citizenship demands within the stagnating constraints of national economies, versus the capacity of international, yet politically under-legitimised, law to provide global prosperity in the character of the global economic citizen.

Legal theory, however, reminds us that this dilemma, this conflict between law and politics, has two very distinct dimensions. Ultimately, we are primarily concerned here with processes of disassociation, disassociation between law and democracy, and between inspirational democracy and economic realities. However, seen from the specific point of legal theory, disjunction in our late modernity, divides into two distinct processes of functional and normative disassociation within the legal order itself.

Press, 1992); *cf* R Dahrendorf, *Der moderne soziale Konflikt*, (Stuttgart, Deutsche Verlagsanstalt, 1992).

[2] To dispense with all natural legal fiction, not one of these bodies of law has undisputed roots in political settlement.

[3] Encompassing workers, service-providers etc in the manner of Bismark's nationally-integrative *ökonomische Bürger*, WR Brubaker, *Citizenship and Nationhood in France and Germany*, (Cambridge, MA, Harvard University Press, 1992).

Functional disassociation: Taking the EU, along with Eriksen & Fossum, as our paradigmatic example, and assuming that the driving force behind EEC construction in the 1950s,[4] and even more so, its economic consolidation in the 1980s,[5] was the vital need to overcome national economic stagnation in order to fulfil solidarity-securing national social agendas, the focus of current concern with democratic legitimation is, then, an increasingly apparent disjunction between processes of social expectation formation within Europe and the interventionist capacities and actions of the law of the European economy.

To argue with Luhmann's categories,[6] European economic consolidation is accompanied by increased disjunction within an intermeshed triad of legal functions of 'expectation-building', 'conduct-control' and 'conflict-resolution'. Of course, each of these three legal functions was always ever served by its own specific legal institutions, as well as, by its own form of rule of law.[7] Nevertheless, as a simple matter of fact, modernity was characterised by the gathering together of all three legal functions under the umbrella of the national constitution, such that legal expectation building (institutionalised politics) informed and rationalised legal conduct-control and conflict-resolution (legal interventionism). By contrast, economic globalisation processes in general, and European integration in particular, have seen the three functions increasingly apportioned amongst different levels of government/governance within post-national, multi-level governance structures.[8] While social expectations remain a matter for national politics (institutionalised legal expectation-building), economic legal intervention (conduct control and conflict resolution) is largely carried through subject to the constraints of European and global treaties.

Normative disassociation: At a more removed, normative level, however, disassociation also becomes apparent as economic globalisation processes fatefully undermine one of the defining features of modernity: law's 'reflexive' sovereignty, or, its dual legitimised genesis in, and concurrent legitimation of, the modern democratic constitutional state.

In other words, drawing on traditional legal theory, as well as earlier Jürgen Habermas,[9] proliferation of bodies of law amongst distinct

[4] A Milward, *The Rescue of the European Nation State* (2nd edn, London, Routledge, 1999).
[5] G Majone, *Regulating Europe* (London, Routledge, 1996).
[6] N Luhmann, *Das Recht der Gesellschaft* (Frankfurt, Suhrkamp 1993), p. 156.
[7] Vaslov Karavas & Gunther Teubner, *'http://www.CompanyNameSucks.com:* The Horizontal Effect of Fundamental Rights on 'Private Parties' within Autonomous Internet Law', in W Hoffmann-Riem and K-H Ladeur (eds), *Innovationsoffene Regulierung des Internet* (Baden-Baden, Nomos, 2003).
[8] C Joerges (2001): *Das Recht im Prozess der Konstitutionalisierung Europas,* EUI Working Paper 2001/6.
[9] *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass, MIT Press, 1996).

national, supranational and international levels, represents a twofold assault on the reflexive constitutional legitimation of law by politics, and of politics by law. Modernity's greatest achievement, its concurrent location of the genesis of law and politics within the national constitutional settlement, both instantiated counterfactual law through its subordination to political direction, and civilized parochial national politics through the application to them of universal legal conduct norms (the symbolic act of creating the nation[10]). Certainly, the nation state and its economy were closed institutions. Nonetheless, modernity's capture of counterfactual law and ill-disciplined politics within the reflexive national constitutional settlement, paradoxically ensured the validity of the nation's claim to 'universalism', at least within its own borders and in relation to its own citizens.[11]

Globalisation, as we know, however, makes claims for the validity of its counterfactual (European or national) legal norms far beyond the universalising reach of traditional constitutionalised political processes, while global politics, even where founded in the natural law fiction of globally-applicable human and fundamental rights, remains anarchic and unsanctioned by the will of a non-existent post-national polity. Globalisation may accordingly have shaken off parochial nationalism. It has yet, however, to establish its own valid claim to 'universal' application.

In the eyes of legal theory, at least, functional and normative disassociation within the law thus seems to add up to 'a crisis in modernity' with implications extending far beyond the legal order; an inexorable breakdown in the forms of legal and political organisation that have successfully informed modern life within Europe, at least over the past half Century. Lack of democratic political direction over market forces, the re-emergence of the enduring paradox of 'quasi-natural', non-instantiated law, an end to nationally-generated 'universalism': these are all developments undermining both of the interventionist capacities of democratic intervention and of the normative foundations upon which such interventionism rested. They are, further, developments to which a response must be found.

Responses to the crisis in modernity, however, necessarily vary, based both upon the particular functional or normative aspect of the crisis in

[10] At least in the sense of Rousseau: the nation is ultimately not a people, but a *pouvoir constituent*.

[11] Alternatively, the universal application and universalising claims founded in modern civic, political and social citizenship. 'True' universalism, of course, remains a chimera: not least since the body of citizens is itself restricted, but more importantly, since no form of political organisation can answer to the demands of differentiated subjectivity (our own perceptions of ourselves) or contextual restraints (our personal histories). Nonetheless, and this is the genius of Rousseau's 'Nation', the constitutionalised nation, consolidated by the symbolic act of constitutional settlement, delivers us the axiom of universal (if territorially defined) will and solidarity.

modernity that they most closely seek to address, and in respect of the enduring value that they ascribe, or do not ascribe, to the achievements of modernity itself. Generalising greatly, two initial approaches may be identified:

(1) *Modernity recaptured*, or, the effort to adapt the normative axioms of the past half century to suit conditions of globalisation, but concomitantly retain the perceived advantages of the 'modern condition', most notably, the 'universalism' created by the nation state.
(2) *'Post-modern' reckonings*, or, the final acceptance of the primary condition generated by globalisation, 'pluralism', and the subsequent effort to re-introduce some form of functional rationality to a globalised, but plurally-constructed, legal order.

II. ERIKSEN & FOSSUM: MODERNITY BITES BACK

The modernity recalling nature of the position taken by Eriksen & Fossum in the effort to assess the 'governance order' of the transnational regime of the EU for potential emerging features of 'government', or, put bluntly, for emergent democratic will formation elements, is readily identified in two interconnected normative premises:

(1) Along with Jürgen Habermas, Eriksen & Fossum are keen to regain modernity's universalism. Europe's economic integration, in common with all market-formation processes, entails winners and losers, and, in the future (or, at least, so we all hope), will also be subject to measures of redistribution. Toleration for the acts of winning, losing and redistribution, however, cannot simply be assumed amongst a diverse set of Europeans, each with their own subjective interests. Instead, that selfsame 'solidarity amongst strangers' which Habermas characterises as the 'painful', but necessary process of personal disassociation from tribal or feudal loyalties, which the impersonal rights endowing states of modernity both promoted and were founded within,[12] must be reproduced at European level in order to replenish modernity's vital integrative glue of (market inequality overcoming), 'social solidarity amongst strangers'.
(2) By the same token, 'pluralism', and plural representation, although an inevitable part of the current EU order, is, as far as

[12] Jürgen Habermas, 'A Constitution for Europe?' (2001) *New Left Review* 11, 5–26.

> is possible, to be avoided. Ostensibly, for practical reasons, such as the forever uncertain provenance of pluralist claims to legitimate representation, such a rejection of pluralism also serves the universalist goals of modernity as the essence of legitimate politics is re-established not as the pursuit of plural goals, but as a *common* will, a *unitary* desire for political action.

Europe re-founded? Modernity re-established within a European nation state? Not quite. The real achievement of Eriksen & Fossum is not simply that they state a normative vision of solidarity. Instead, they seek pragmatically to adapt their inspirational vision to prevailing European circumstances.

Europe is not a state, much less is it a nation. Are the concepts of statehood or nationhood necessary, however, to secure modernity's primary goals of universalism and solidarity amongst strangers? 'No', argue Fossum & Eriksen: the state is surely only relevant as a normative axiom of legal and state theory, a mere tool of logical perfectionism to give comprehensible form to the dual genesis of law and politics in the constitution; the nation, or forging of a 'people', a purely 'symbolic' act creating an 'imagined' community. Instead, the benefits of modernity can be founded outside the state and outside the nation. The operative construct for us then, is not the state or nation, but the *res publica*, in which citizens are 'men bound to one another by the personal bond of fellow-membership of one body'.[13] The EU need not be a state, it need not be a nation. Instead, as long as it affords its citizens a sense of 'fellow-membership', it can remain an inchoate 'body', founded not upon territory or symbolism, but upon mutual rights and obligations.

Turning this formulation around then, the aim can also be seen as one of the highly laudable, even vital, freeing of Marx's 'symbolic city' of the 'republic' from time and place. It is an aim of ending the exclusion, which necessarily attached to the closed national constitutional settlement. Regarded in these 'metaphysical' republican terms, it is one of 'freeing the republic's slaves', one of extending the benefits of the republic to those who once lived beyond its spatial and temporal borders.[14]

The tool to be deployed to perfect the metaphysical republic is 'civil society'. As Habermas and others teach us, civil society is not a product of state, nor yet of nation, but one of the constitution; of the rights which it furnishes, the division of competences which it delineates, the institutions which it guarantees and the political representation which it founds. Civil

[13] JW Salmond, 'Citizenship and Allegiance' (Part I), [1901] 17 *Law Quarterly Review,* 270–82, at 272.

[14] In the terms of this paper, 'slaves' are perhaps best understood as the weaker individual economies that must falter under the onslaught of their stronger counterparts.

society is founded in 'deliberation', the act of rational debate between individuals who, armed with objective constitutional rights, have 'painfully' liberated themselves from their personal allegiances, such that they can engage in disinterested consideration of political issues, rather than simple pursuit of political interests: common will and common good is founded in the metaphysical act of *personal disassociation*, rather than in the logical axiom of the national constitutional settlement.

All so far, all so good: taking the creation of a European civil society as their starting point, Eriksen & Fossum pragmatically demonstrate that the EU is not so short on elements of 'government' as may first appear. Certainly, experts may play their 'non-majoritarian' role in committees or agencies. Nonetheless, the ECJ secures rights, while parliamentary debates and constitution-building processes within the EU are marked by a civil society securing measure of deliberation.

Of course, Eriksen & Fossum, together with their underlying Habermasian and Kantian models, can be duly criticised from the far extremes of deconstructivist, post-modern positions. Remember, we are told, that the nation's 'universalism' was 'appropriately' modest, its limitation to time and space necessary:[15] 'painful' acts of liberation from the status of personal subjectivity to objective citizenship are only possible to a certain degree.[16] All men are born out of their real world experience and are not mere products of counterfactual law. The concept of universal, inalienable rights, or 'true' universalism extending beyond imagined communities, is a chimera, disregarding of personal and collective history and wholly dependent upon a fiction of shared global values. Rousseau's nation was universal only to the extent that personal and collective history made philosophical concordance possible at one moment and within one territory. Such a 'universalism', however, could not, would not and should never claim (peaceful) application beyond the borders of the founded nation. Far from being a mere logical axiom, the national constitutional settlement, was a real world expression of the only form of 'universalism' known and knowable to man: the concretised expression of common political interest and struggle within an, admittedly, 'imagined' community,[17] within the boundaries of which, all individual claims were constructed as being equal.

Worse still,[18] to conclude, with Kant, that the civilising effects of western nationhood would 'somehow' radiate throughout the world to

[15] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford, Hart Publishing, 2000)
[16] See above, note 11.
[17] 'Imagination' is not, in this analysis, a negative construct, but a neutral descriptor of the concordance of individual and collective histories.
[18] Peter Fitzpatrick, 'Gods would be needed …': American Empire and the Rule of (International) Law', *Leiden Journal of International Law* (forthcoming).

transform the universalism of the law of *the* nation into a universal law *of* nations, is, paradoxically, to return to de-instantiated law, to impose a quasi-natural law conception of constitutionalism on communities and individuals, which that self-same constitutionalism demands must be self-determining. It is to de-politicise real-world individuals and communities, to re-construct them as rights-bearing automatons and to transform the problem of the exclusion of slaves *outside* the republic into one of their enslavement *within* the republic: what price liberty, if that liberty is founded within 'abstract' values, which my 'real' self cannot but reject?

Potentially damning critiques indeed, which seem, in this particular historical moment, of western-fundamentalist conflict, to have found a certain concrete global relevance. Nonetheless, to apply them apply them here to Eriksen and Fossum's more modest efforts to find 'government', rather than 'governance', principles for the EU is perhaps churlish. After all, Europeans nations do share a common history and common set of constitutional values. Furthermore, such critiques would also unduly detract from Eriksen & Fossum's great achievement in recognising, from the standpoint of political science, that globalisation, in its European manifestation, cannot simply be responded to in terms of traditional normative state constructs, but instead requires pragmatic solutions to answer our most pressing of challenges within Europe: the establishment of enduring social solidarity.

III. POST-MODERN CONSTELLATIONS?

However, if pragmatism is to be the guiding principle of our democratising response to European integration, Eriksen & Fossum's assessment of the evolution of government in the transnational setting of the EU, might yet be subject to a measure of useful critique from functional standpoints. The establishment of a functioning civil society at European level might aid in establishing a measure of democratic political control over economically interventionist European law. Can it, however, fully solve the problem of disassociation between the building of social expectations and legal implementation, if and where national, supranational and global legal systems continue to be differentiated, not simply on territorial, but also on functional lines?

In such an analysis, the functionalism of the European legal system is not simply an historic matter of a, now superseded, but always limited, commitment to the (non-political) regulation of risk as a simple market externality, rather than a global attempt to implement social regulation and redistribution.[19] Instead, European law continues to be only one in a

[19] G Majone, see above note 5.

series of 'new-type' post-national legal orders, both public and private in their inception, which are differentiated, not wholly along territorial, but also along functional lines.[20] Whether a *lex mercatoria*, the law of the WTO, a *lex digitalis*, the national legal order, a global competition order, or regional economic legal orders, such as the EU, each modern legal order exists within a plethora of 'laws', each with its own partial territorial or functional locus of regulation.

Seen in this light, an emergent global economic subjectivity, unleashed by various legal orders, including European law, has given rise to a new and paradoxical post-modern constellation of legal organisation. Territorial legal orders, such as the nation state, and increasingly so, the (if Eriksen and Fossum have furnished a correct analysis), the EU, may seek to make comprehensive claims to regulatory powers in all areas of social expectation-building, conduct-control and conflict-resolution. Nonetheless, not only do territorial orders sometimes clash with one another. But, 'universalist' aspirations, more particularly, in the guise of recognition for economically-efficient economic subjectivity, still leave the social expectation building functions of territorial orders exposed to the irritating influences of partial, functional legal orders with claims to global validity.

In the concrete case of the EU legal order, post-modern constellations of legal pluralism thus give rise to twofold functional disassociation: (1) at least during the phase of transition from governance to government, an emergent European civil society might yet find itself in conflict with countervailing social expectations established within still vibrant national civil societies; while (2), the EU, like its national counterpart, may yet be faced with a situation whereby its efforts to implement the social expectations established within a European civil society are themselves undermined by the actions of a global functional legal order, such as, say, the WTO.

IV. CONCLUSION: PRAGMATIC CONFLICTS RULES?

Post-modern constellations of economic globalisation are problematic. They are, without doubt, a threat to our traditional conceptions of democratic expression. Functional pluralist responses, accepting or prizing of self-determining legal diversity above 'imagined' or 'constructed' unity, can and do seek to correct functional disassociation between legal orders by establishing distinct social-expectation building, conduct-control and conflict-resolution measures for each plural legal order.[21] Nonetheless, such approaches also have few if any answers to question of how we

[20] See above, note 7.
[21] *ibid*.

might establish solidarity *between* plural legal orders, or, of how we might co-ordinate the different social expectations which one order establishes.[22]

Especially if we are able to minimise clashes between national and European civil societies, the democratisation of the institutions of European governance, the slow transition to European 'government', surely cannot damage Europe. Nonetheless, it also cannot be claimed as a panacea for all of Europe's ills. Ultimately, the founding, or non-founding, of a European nation state, the establishment, or non-establishment, of the metaphysical *res publica*, is an irrelevance. The establishment of a 'universal' European civil society, even in the absence of comprehensive constitutional settlement, is necessarily a step on the road to the selfsame claim of territorial invincibility of social expectations made on behalf of the territorial national state, at least within the, admittedly still contested, borders of the EU. It is a claim, however, that comes far too late in a process of economic globalism that is primarily characterised by intensified functional splintering between a plethora of legal orders, many of which claim global validity and bear the potential to 'irritate' European claims to be able to fulfil Europe's social expectations.

In this context, neither the normative certainties of modernity, not simple adaptation to functional post-modern constellations would seem to offer us a wholly convincing response to the question of how we can secure comprehensive democratic control over globalisation, or, indeed, ensure 'solidarity amongst strangers'. Here, then, perhaps the most we can hope for is a more differentiated form of (legal theory) pragmatism.

In a world of pluralist legal and governance orders — a multi-level global system of governance without hierarchical direction — the vital issue is surely one of establishing the norms that (constitutionally) govern conflict *between* legal orders. We may not be able to establish a global system of 'solidarity between strangers'. We may yet, however, be able to civilise plural legal interaction in the effort to preserve existing solidarities.

In this regard, then, final correcting attention should be drawn to possible misunderstandings and incoherencies as amongst deliberative theorists themselves. The deliberative standards aspired to by, say, Joerges,[23] do not, in contrast to those supported by Eriksen & Fossum, entail a claim for the comprehensive establishment of a European civil

[22] The tendency indeed, is occasion, to dispense with all traditional measures of normativity, or 'solidarity between strangers', as plural legal orders are emptied of all connotations of subjectivity and analysis moves on simply to assess the quality of the results produced by each legal order, KH Laduer, 'Towards a Legal Theory of Supranationality: the Viability of the Network Concept', (1997) 3:1 *European Law Journal* 33–54.
[23] See above, note 8.

society. Rather, they are to be seen as political-legal conflict norms; the institutional-legal conditions which foster informed decision-making on which legal-governance-government order (each with its own social expectations to fulfil) should take precedence and when. Within this view of the role of deliberation, the lot of the republic's slaves (outsiders) is not to be improved by means of their integration within the republic. Instead, it is to be bettered by the imposition of a duty upon the republic to respect the views and interests of those located without it: the nation state is to be retained, but to be made 'deliberatively' open to the social expectations of others.

Of course, such pragmatic solutions may seem incomplete and possibly even dismissive of the possibility of founding a political Europe. Nonetheless, they also embody a vital respect for long-established *loci* of political decision-making; a respect that is currently relevant in terms of still vibrant member state politics, but that may also, in the future, be relevant in relation to non-western centres of political power who do not necessarily share our 'universalist' perceptions of the normative foundations of economic globalisation. Economic globalisation poses problems for democracy: such problems, however, will never be easy of solution.

Part II

Exempla Trahunt: Five Case Studies

9

Constituting Private Governance Regimes: Standards Bodies in American Law

HARM SCHEPEL
KENT/BRUXELLES

I. INTRODUCTION

EARLY LAST CENTURY, the People's Amusement Company operated a playhouse where it provided all sorts of entertainment for the hard-working and God-fearing people of Topeka, Kansas. One day, however, a building inspector came along and saw to his horror that the electrical wiring of the theatre lay bare and was not enclosed in conduit or armoured cable. The People were not amused. Fines were imposed, licenses were withdrawn. The Law had been offended. Or had it? The relevant part of the Kansas Fire Prevention Act of 1915 read: 'All electrical wiring shall be in accordance with the National Electrical Code.' Now, the NEC was, and is, a collection of standards elaborated and promulgated by the National Fire Protection Association, a private organisation of electricians, contractors, manufacturers, fire officials, underwriters and others. And so it was that, in 1919, the People's Amusement Company's electrical wires made it all the way to the Kansas Supreme Court for a Big Constitutional Question: can the People of a state be bound by regulations that are issued by a private association, the vast majority of whose members are not even residents of the state? The Court's answer in *Crawford* was emphatic:

> [T]he fallacy of such legislation in a free, enlightened and constitutionally governed state is so obvious that elaborate illustration or discussion of its infirmities are unnecessary. If the Legislature desires to adopt a rule of the National Electrical Code as a law of this state, it should copy that rule, and give it a title and an enacting clause, and pass it through the Senate and

> the House of Representatives by a constitutional majority, and give the Governor a chance to approve or veto it, and then hand it over to the secretary of state for publication.[1]

A good eighty years on, we can easily recast the questions facing the *Crawford*-court in the light of present conditions of globalisation and privatisation. Frames were broken long ago, if not with the persistence and violence that they are today: the 'law' on electrical safety was written by a private body operating outside the territorial frame of Kansas law and society and outside the hierarchical frame of the Kansas constitution.[2] The *Crawford*-court's answer seems familiar as well. Never mind that economic imperatives and a conspicuous lack of expertise among law-makers preclude any pretence of the code actually being amended by a single *iota*. Law is not law if it is not made according to the procedures and passed through the institutions prescribed by law. In the words of the California Court of Appeals: 'manifestly, any association may adopt a 'code' but the only code that constitutes the law is a code adopted by the people through the medium of their legislatures.'[3] The basic political theory underlying this stance was affirmed in 2002 by the Court of Appeals for the Fifth Circuit in *Veeck v Southern Building Code Congress International*. At issue was whether the SBCCI, a private association responsible for the *Standard Building Code*, a collection of safety standards for the construction industry adopted throughout the southern United States, had lost its copyright on the Code after the towns of Anna and Savoy, Texas, had adopted it *verbatim* as their local building codes. There is no such thing, of course, as copyright on the Law:

> Lawmaking bodies in this country enact rules and regulations only with the consent of the governed. The very process of lawmaking demands and incorporates contributions by 'the people', in an infinite variety of individual and organisational capacities. Even when a governmental body consciously decides to enact proposed model building codes, it does so based on various legislative considerations, the sum of which produce its version of 'the law.' In performing their function, the lawmakers represent the public will, and the public are the final 'authors' of the law.[4]

[1] *State v Crawford* 177, 360, 361 (Kan 1919). It is by alphabetical injustice that the case has not become known by the co-defendant's name.
[2] See G Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems', (1997) 45 *American Journal of Comparative Law* 149. Or see L Jaffe, 'Law Making by Private Groups', (1937) 51 *Harvard Law Review* 201.
[3] *Columbia Specialty Co v Breman* 90 *Cal App* 2d 372, 378 (1949).
[4] *Veeck v Southern Building Code Congress International* 293 F 3d 791, 799 (5th Cir, 2002). This is the *en banc* reversal of the panel decision of the same court in *Veeck v Southern Building*

Nothing much seems to have moved between facts and norms since *Crawford*.[5] As Gunther Teubner explains:

> The distinction law/non-law is based on law's hierarchy of rules where the higher rules legitimate the lower ones. Normative phenomena outside of this hierarchy of rules are not law, just facts. After the decline of natural law, the highest rules in our times is the constitution of the nation-state- whether written or unwritten- which, in turn, refers to democratic political legislation as the ultimate legitimation of legal validity. … Contractual rule-making as well as intra-organisational rule production is still seen as either non-law or as delegated law-making that must be recognised by the official legal order. Rule-making by 'private governments' is thus subjugated under the hierarchical frame of the national constitution that represents the historical unity of law and state.[6]

The sociological question of law's recognition of private governance is, then, indissolubly connected with a normative question of democratic theory: can law recognise legal validity and democratic legitimacy outside the constitution, without constitutional political institutions and beyond the nation state?[7]

This contribution sets out to see how state and federal courts in the United States have dealt with the status of regulatory decisions laid down in standards promulgated by private standards development organisations since *Crawford*. According to legal classifications, the cases discussed are a motley lot, ranging from tort to administrative law to anti-trust. All of them, however, deal with the same fundamental question: under which conditions does law recognise regulations issued by private parties as constitutionally legitimate 'law'? Or rather: how does law 'constitute' private governance?

Code Congress International, 241 F 3d 398, 406 (5th Cir, 2001). ('We believe that if code writing groups like SBCCI lose their incentives to craft and update model codes and thus cease to publish, the foreseeable outcome is that state and local governments would have to fill the void directly, resulting in increased government costs as well as loss of the consistency and quality to which standard codes aspire.')

[5] See J Habermas, *Between Facts and Norms*, (Cambridge, Polity, 1995).

[6] See G Teubner, 'The King's Many Bodies. The Self-destruction of Law's Hierarchy', (1997): 31 *Law & Society Review* 763, 768. See G Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in G Teubner (ed), *Global Law Without a State*, (Aldershot, Dartmouth, 1997) 3.

[7] For criticism on Habermas' insistence on the central institutions of the constitutional state and his surrendering of democratic self-governance, see, for example, J Bohman, *Public Deliberation- Pluralism, Complexity and Democracy*, (Cambridge, Mass, MIT Press, 1996); J Cohen, 'Reflections on Habermas on Democracy', (1999) 12 *Ratio Juris* 385, and JS Dryzek, *Deliberative Democracy and Beyond*, (Oxford, Oxford University Press, 2000). Or see J Dewey, 'The Public and Its Problems', in *idem*, *The Later Works, 1925–1953*, Vol. 2: 1925–1927, (Carbondale, Southern Illinois University Press, 1984) 235.

II. THE GLOBALISATION OF PRIVATE GOVERNANCE/THE PRIVATISATION OF GLOBAL GOVERNANCE: THE RISE AND RISE OF PRIVATE STANDARDS

Courts are increasingly likely to face codes and standards published by professional organisations or trade associations. Product safety-standards around the world are written by private, or semi-private, organisations. Regulators count on them, markets cannot function without them. In a process which has greatly accelerated over the last decade or so, these standards are increasingly harmonised, either by regional or international federations of standards bodies, by bilateral joint-development schemes, or by brute exports of standards to foreign markets. This state of affairs is partly due to the relatively autonomous demands of industry for harmonised standards to facilitate market integration.[8] A large part of it, however, is due to the political co-optation and legal instrumentalisation of standards bodies. Private standards first shot to international legal prominence with the advent of the 'New Approach to Technical Harmonisation and Standardisation' in the European Community. From the mid-1980s onward, the Community legislator gave up on the task of harmonising detailed technical requirements and left this chore to European federations of national private standards bodies.[9] This privatisation of European governance swiftly led to the Europeanisation of private governance, as EC Member States embraced the regulatory technique of referring to private standards rather than writing these specifications themselves.[10] The process was soon to be rehearsed on a global level. In what has been dubbed a 'slow motion *coup d'état* against accountable, democratic governance,'[11] the WTO Agreement on Technical Barriers to Trade obliges members to base their technical regulations on 'international standards.'[12] National standards bodies that sign up to the

[8] The success of the ISO 9000 series is, perhaps, an all too obvious example. See, further, for example, A Casella, 'Product Standards and International Trade: Harmonization Through Private Coalitions?' (2001) 54 *Kyklos* 243.

[9] See for example Ch Joerges, H Schepel and E Vos, 'The Law's Problems with the Involvement of Non-Governmental Actors in Europe's Legislative Process: The Case of Standardisation Under the "New Approach"' EUI Working Papers Law 99/9, Florence: European University Institute, 1999.

[10] See, generally, H Schepel and J Falke, *Legal Aspects of Standardisation in the Member States of the EC and EFTA*, Volume 1: Comparative Report, (Luxembourg, Opoce, 2000).

[11] LM Wallach, 'Accountable Governance in the Era of Globalisation: the WTO, NAFTA, and International Harmonisation of Standards', (2002) 50 *University of Kansas Law Review* 823, 826. Ms. Wallach works with Public Citizen's Global Trade Watch.

[12] Article 2.4, TBT Agreement. The obligation is qualified by the possibility of derogation in the event that international standards 'would be an ineffective or inappropriate means of the fulfilment of the legitimate objectives pursued.' Conformity with international standards lends a rebuttable presumption of not being an 'unnecessary obstacle to trade.' For legal bewilderment, see MJ Trebilcock and R Howse, *The Regulation of International Trade*, 2nd edn, (London/New York, Routledge, 1999), 150 (noting how 'back-room' organisations are put in

Code of Good Practice bind themselves to the same obligation.[13] As a consequence, national regulatory policy around the globe developed in tandem, emphasising the use of private standards rather than public regulation.[14] In 1995, the United States Congress passed the National Technology Transfer and Advancement Act, which instructed federal agencies to use standards developed by 'private, consensus organisations.'[15] The policy was soon backed up by executive action,[16] and fleshed out by revamping several agency statutes.[17]

III. THE SELF-REGULATION OF PRIVATE GOVERNANCE

Under such conditions, the *Crawford*-solution of simply applying a coat of constitutional varnish over private regulations seems simplistic at best. But an acceptable alternative seems to elude legal imagination.[18] The general

a 'new light', and asking, but not answering, 'How are such institutions governed? To whom are they accountable? To what extent do they permit public participation? How are their standards actually developed?'). The technique is now firmly established in virtually every single regional trade arrangement, especially in the Americas. See, for example, Chapter Nine of NAFTA; Mercosur/GMC/Resolution 2/92, Creación del Comité Mercosur de Normalización y Comités Sectoriales de Normalización; the Reglamento de la Red Andina de Normalización, adopted by Resolution 313 of 1995 of the Secretariat- General of the Andean Community, and the Chapter on Standards and Technical Barriers to Trade in the Draft Free Trade of the Americas Agreement (*www.sice.aos.org*).

[13] Code of Good Practice for the Preparation, Adoption and Application of Standards, Annex 3 to the TBT Agreement. The Code is applicable without ado to public standards bodies; for non-governmental bodies, members 'shall take such reasonable measures as may be available to them' to ensure that they accept the Code. Article 4, TBT Agreement. By February 2002, 138 standards bodies from 94 Members had accepted the Code; of these, 65 classify themselves as government bodies. The list is published by the WTO as G/TBT/CS/2/Rev.8.
[14] Discussing the general trend, OECD, Consumers, Product Safety Standards and International Trade, Paris 1991. See also OECD, Regulatory Reform and International Standardisation, TD/TC/WP (98) 36/final.
[15] 15 USC 272 (b)(3), as amended by Public Law 104–113.
[16] See Office for Management and Budget, Circular A–119, Federal Participation in the Development and Use of Voluntary Consensus Standards and Conformity Assessment Activities, as revised on 2 October 1998. See 15 USC 272 note (Supp IV 1998) (Utilisation of Consensus Technical Standards by Federal Agencies).
[17] See, for example, the Food and Drug Administration Modernisation Act of 1997, Public Law 105–115, Section 204, amending 21 USC 360d (Obliging the FDA to publish a list of 'recognised standards' for devices in addition to its own performance standards) and the Manufactured Housing Improvement Act, Title VI of the American Home-ownership and Economic Opportunity Act 2000, Public Law 105–569, amending the Manufactured Housing Construction and Safety Standards Act at 42 USC 5403. (Setting up a 'consensus committee' operating under the *aegis* of a 'recognised, voluntary, private sector, consensus standards body' to write standards that can be adopted by the Department of Housing and Urban Development without further rule-making.)
[18] Indeed, the prominence of private governance poses such conceptual and normative problems to law and lawyers that there is scarcely a legal discipline that has not recently

normative imperative seems obvious: these private structures need somehow to be juridified and so rendered, if not democratic, if not public, then at least 'public-regarding.'[19] And thus public lawyers go to work 'privatising' administrative law in order 'to extend public law values to private governance structures.'[20] And so Gunther Teubner embarks on a project of 'transforming private law into the constitutional law of the diverse private governance regimes.'[21] Privatise public law? Publicise private law? Both?

Before stretching the limits of legal categories, perhaps, we should stretch the limits of 'law'. Standardisation procedures have developed into a remarkably consistent set of truly global principles of 'private administrative law'. Partly influenced by legal instruments, partly by the ethics of engineering and other professions, and structured by an extensive process of global reciprocal normative borrowing between the public and private spheres at various levels, these procedures provide, *at a minimum,* for:

1. The elaboration of draft standards in technical committees with a balance of represented interests (manufacturers, consumers, social partners, public authorities);
2. A requirement of consensus on the committee before the draft goes to:
3. A round of public notice and comment, with the obligation on the committee to take received comments into account, and;

been threatened with a descent into obscurity unless it comes to terms with it. See, for example, E Brown Weiss, 'The Rise or the Fall of International Law?', (2000) 69 *Fordham Law Review* at 342, 346 (Warning that, to keep the discipline from falling into oblivion, 'it is necessary to redefine international law to include actors other than states among those who make international norms and who implement and comply with them.') and J Freeman, 'The Private Role in Public Governance', (2000) 75 *New York University Law Review* 543, 545: ('Administrative law, a field motivated by the need to legitimise the exercise of governmental authority, must now reckon with private power, or risk irrelevance as a discipline.') See also, FI Michelman, 'W(h)ither the Constitution?' (2000) 21 *Cardozo Law Review* 1063 (discussing, without such stress, the possible implications of the combined processes of globalisation and privatisation for constitutional law doctrines).

[19] The term was coined by JL Mashaw, 'Constitutional Deregulation: Notes Toward a Public, Public Law', (1980) 54 *Tulane Law Review* 849.

[20] AC Aman, jr., 'The Limits of Globalisation and the Future of Administrative Law: From Government to Governance', (2001) 8 *Indiana Journal of Global Legal Studies* 379, 385. See, also, AC Aman, jr., 'Proposals for Reforming the Administrative Procedure Act: Globalisation, Democracy and the Furtherance of a Global Public Interest', (1999) 6 *Indiana Journal of Global Legal Studies* 397; J Freeman, above n.18, and J Freeman, 'Private Parties, Public Functions and the New Administrative Law', (2000) 52 *Administrative Law Journal* 813.

[21] G Teubner, 'After Privatisation? The Many Autonomies of Private Law', (1998) 51 *Current Legal Problems* 393, 394. See, also, G Teubner, 'Contracting Worlds: The Many Autonomies of Private Law', (2000) 9 *Social & Legal Studies* 399.

4. A ratification vote, again with the requirement of consensus rather than a mere majority among the constituency of the standards body, and;
5. The obligation to review standards periodically.[22]

Procedural robustness is especially important in the United States. Compared to the generally centralised and heavily regulated corporatist systems in Europe,[23] standardisation in the United States is decentralised, fragmented and free of government interference.[24] Without the cover of the state, procedure is all standards bodies have to make their claim for recognition. By the same token, so they argue, procedure should be the only criterion for recognition as 'international standards' at the stateless level of the WTO.[25] The question is: does 'the law' accept this as 'law'?

[22] See, for example, ISO/IEC Guide 59 and ISO/IEC Directives Part 1: Procedures; American National Standards Institute, Procedures for the Development and Co-ordination of American National Standards; Standards Council of Canada, CAN-P-2E Criteria and Procedures for the Preparation and Approval of National Standards of Canada; the European Standardisation Committee, CEN/Cenelec Internal Regulations Part 2: Common Rules for Standards Work; DIN 820 and BS 0, the 'standardisation standards' of the German and British standards bodies respectively, and the Standardisation Guides of Standards Australia and Standards New Zealand.

[23] See, generally, H Schepel and J Falke, above n.10.

[24] See, for example, SI Warshaw and MH Saunders, 'International Challenges in Defining the Public and Private Interest in Standards', in R Hawkins, R Mansell and J Skea (eds), *Standards, Innovation and Competitiveness*, (Aldershot, Edward Elgar, 1995), 67, 70; (Contrasting the European system — 'monolithic, integrated, formalistic and policy-driven', with the US system — 'pluralistic, sometimes fragmented, ad hoc and market-driven'.) A useful comparative and historical introduction is S Krislov, 'How Nations Choose Product Standards and Standards Change Nations', (Pittsburgh, University of Pittsburgh Press, 1997). The classic study of the turf wars between public and private regulators in the US prior to the NTTAA is in RE Cheit, *Setting Safety Standards — Regulation in the Public and Private Sectors*, (Berkeley and Los Angeles, University of California Press, 1990).

[25] The debate centres around the question of whether the ISO, a 'private intergovernmental' organisation based on national delegations, should be granted a monopoly for the promulgation of 'international standards.' See Transparency in International Standards Development, Contribution from the United States, G/TBT/W/64, 2 April 1998. 'Globalisation brings together odd bedfellows'. See LM Wallach, above n.11, at 833 (Deploring the fact that the WTO and NAFTA 'do not mandate any procedural safeguards requiring openness or transparency', operating, instead, on the sole criterion of 'whether the standard is set in an international body.'). The debate has culminated in the WTO TBT Committee's Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, Annex 4 to the Second Triennial Review of the Operation and Implementation of the TBT Agreement, G/TBT/9, 13 November 2000 (Enunciating transparency, openness, impartiality and consensus, effectiveness and relevance, coherence and a development dimension as 'general principles' to be observed in the elaboration of 'international standards.') The European Commission objects vehemently. See European Policy Principles on International Standardisation, Communication from the European Community, G/TBT/W/170, 8 October 2001.

IV. STANDARDS BODIES UNDER CONSTITUTIONAL LAW

State Courts have followed *Crawford* with enthusiasm,[26] and, for a while, it seemed that their constitutional disgust with private regulators was shared by the federal Supreme Court. At the height of the New Deal, the Court decided that 'corporatism' was distinctly un-american. Or, at least, unconstitutional. In *Schechter Poultry*, it struck down the National Recovery Act that provided for a system of Presidential rubber-stamping of 'codes of fair competition' proposed by trade associations and industrial groups:

> Could trade or industrial associations or groups be constituted legislative bodies because such associations or groups are familiar with the problems of their enterprises? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.[27]

As it turned out, however, this was but an isolated outburst.[28] The Court's attitude ever since has been to ignore any difference between public and private delegations, and to allow the latter with as much lenience as it does the former. As Lawrence puts the matter, 'private exercise of federally delegated power is no longer a federal constitutional issue.'[29] It is only in State courts, then, that challenges to private delegations stand a chance of success.[30] But even there, the *Crawford*-doctrine has been crumbling around the edges ever since courts started to realise

[26] For further State Supreme Court condemnation of reliance on the NEC, see, for example, *City of Tucson v Stewart*, 40 P 2d 72 (Ariz 1935), *People v Hall*, 287 NW 361 (Mich 1939), and *Hillman v Northern Wasco*, 323 P 2d 664 (Ore 1958). See, also, *Agnew v Culver City*, 147 Cal App 2d 144 (1956).

[27] *ALA Schechter Poultry Co v United States*, 295 US 495, 537 (1935). Cf., *Panama Refining Co v Ryan*, 293 US 388 (1935), and *Carter v Carter Coal*, 298 US 238 (1936). Only months before *Schechter Poultry* was decided, the Wisconsin Supreme Court struck down one of the 'Baby NRAs', state legislation patterned on the federal model. This Court was presciently horrified about the perverse effects of transnational private governance. See *Gibson Auto v Finnegan*, 259 NW 420, 423 (Wis 1935)('It is conceivable at least that a code might be proposed under the terms of the act by persons not citizens of the United States, which would, when approved by the Governor, become the law of the land.')

[28] The Court soon gave its blessing to federal agricultural programmes that involved a lot of market and price fixing by farmers' associations. See, for example, *Currin v Allace*, 306 US 1 (1939) and *United States v Rock-Royal Corp.*, 307 US 533 (1939). See Louis L. Jaffe, 'An Essay on Delegation of Legislative Power: II', (1947) 47 *Columbia Law Review* 561, 581 (Consigning *Schechter Poultry*, with some relief, to 'the museum of constitutional history.')

[29] David M Lawrence, 'Private Exercise of Governmental Power', (1986) 61 *Indiana Law Journal* 647, 649. See H. I. Abramson, 'A Fifth Branch of Government: The Private Regulators and their Constitutionality', (1989) 16 *Hastings Constitutional Law Quarterly* 165.

[30] That conclusion was drawn already in Note, 'The State Courts and Delegation of Public Authority to Private Groups', (1954) *67 Harvard Law Review* 1398 (noting demise of the doctrine in federal courts and its 'continuing vitality' in state courts). See

that the pace of technological development and the resulting complexity of regulation required knowledge not necessarily available to law-makers.[31] As soon as courts declare legislatures technically incompetent to develop standards themselves, it becomes a little difficult to explain what exactly is gained by having legislatures adopt standards through the usual constitutional channels.[32] This task becomes even more complicated when standards bodies are credited with a virtue which is notoriously absent from public law-making: the ability to keep abreast of new developments in science and technology and, consequently, to update standards regularly.[33] Spectacularly, the New Jersey Supreme Court, in 1969, held a statutory reference to the NEC to be perfectly legitimate, and elevated the NFPA to the status of federal government agency in the process:

> The Code is promulgated by the National Fire Protection Association and the American Standard Association through 17 panels of recognised electrical and safety experts throughout the country, who review and revise it every three years. The procedures of adoption, review and revision reflect a national consensus of manufacturers, scientific, technical and professional organisations, and governmental agencies. While the product bears no

Boll Weevil v Lewellen, 952 SW 2d 454, 69–470 (Tex 1997) (finding it 'axiomatic' that courts 'should subject private delegations to a more searching scrutiny than their public counterparts' and contrasting the Supreme Court's willingness to uphold private delegations with state courts' practice of frequently invalidating them.)

[31] See, for example, *Madrid v St Joseph Hospital*, 928 P 2d 250, 257 (New Mex 1996) ('Legislatures encounter resource limitations, as well as other practical obstacles, which render them incapable of developing their own standards. Furthermore, the technical sophistication required to develop standards in certain fields has a prohibitory impact on legislative development of such standards'). Discussing *Davis v Fowler*, 114 So 435 (Fla 1927), where the Florida Supreme Court struck down legislation adopting a plumbing code, Jaffe commented: 'The Florida legislature might do worse than spend its time adopting a plumbing code, as the courts have compelled it to do. It may call in experts or set a committee to work. But imagine the Mother of Parliaments sitting down to debate the Empire's drains! Where not only technical skill but continuous judgement is demanded the legislature is helpless.' Louis L Jaffe, 'An Essay on Delegation of Legislative Power: I', (1947) 47 *Columbia Law Review* 359, 362–63.

[32] For attempts, see, for example, *North American Safety Valve v Wolgast*, 672 F Supp 488 (D Kan 1987), and *Royal Insurance v RU-VAL Electric*, 918 F Supp 647, 654 (ED New York 1996).

[33] Yet, the 'dynamic' reference is still rejected by a wide majority. See *McCabe v North Dakota Workers Compensation Bureau*, 567 NW 2d 201, 204–05 (ND 1997) (collecting cases for the proposition). See, further, for example, *Northern Lights Motel v Sweaney*, 561 P 2d 1176 (Ala 1977) (Striking down adoption of Uniform Building Code 'and all future amendments thereto'), and *People v Mobil Oil Corporation*, 422 NYS 2d 589 (1979). (Striking down ordinance adopting NFPA standards 'currently in effect, or as may be amended'). But, see *Madrid v St Joseph Hospital*, 928 P 2d 250, 259 (New Mex 1996) ('Where a standard is periodically updated because of new scientific developments recognised by eminent professionals interested in maintaining high standards in science, the standard may still be adopted by the Legislature.')

> formal governmental *aegis*, the manner of its adoption and revision, and the universality of its acceptance indicates to us that it should be accorded the same standing for the present purposes as if it were adopted and revised by some non-New Jersey governmental agency.[34]

V. STANDARDS BODIES UNDER ADMINISTRATIVE LAW

When standards are adopted into federal law, they are not, of course, copied, passed through Congress, submitted to the President for veto or approval, and published in the federal register. They are adopted by federal agencies. Thus, the 'delegation' inquiry necessarily expands along a chain — from Congressional mandates to agencies and to agency supervision of standardisation.[35] The only real playground for private standards in federal law has so far been the provision for 'interim' standards in the Occupational Health and Safety Act of 1970. In the first years of its operation, OSHA was allowed to adopt 'national consensus standards' as its own without having to go through normal notice-and-comment rule-making.[36] These standards were defined as

> any occupational health and safety standard or modification thereof which (1), has been adopted and promulgated by a nationally recognised standards-producing organisation under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope of

[34] *Independent Electricians and Electrical Contractors' Association v New Jersey Board of Examiners of Electrical Contractors*, 256 A 2d 33, 42 (NJ 1969). At issue was a provision that listed failure to perform electrical construction in conformity with the NEC as grounds for the suspension or revocation of a contractor's licence. Delegation to federal agencies is allowed in New Jersey; *see State v Hotel Bar Foods*, 112 A 2d 726 (NJ 1955). Other states treat federal agencies as 'foreign.' See, for example, *Taylor v Gate Pharmaceuticals*, 639 NW 2d 45 (Mich App 2002).

[35] It is, of course, the first step that virtually monopolises the delegation debate. 'Thesis, antithesis and synthesis' in D Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation*, (New Haven, Conn: Yale University Press, 1993); JL Mashaw, *Greed, Chaos, & Governance — Using Public Choice to Improve Public Law*, (New Haven, Yale University Press, 1997) 131, and CR Sunstein, 'Non-delegation Canons', (2000) 67 *University of Chicago Law Review* 315. On the second step, see, generally, for example, *National Association of Regulatory Utility Commissioners v FCC*, 737 F 2d 1095, 1143 fn 41 (DC Cir 1984) (Allegations of unlawful delegation are 'typically presented in the context of a transfer of legislative authority from the Congress to agencies, but the difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals') and *Perot v Federal Election Commission*, 97 F 3d 533, 559 (DC Cir 1996) ('We agree with the general proposition that when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor such as the CPD.')

[36] 29 USC 655 (a). The agency was constrained by the substantive requirement that such standards should 'result in improved safety or health for specifically designated employees'. In cases of divergent standards, the agency was adopt the one that offered 'the greatest protection.'

> provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.[37]

For Theodore Lowi, these standards are 'indistinguishable' from NRA Codes and, hence, he marvelled that 'there is so little suspicion as to their constitutionality that there is no particular urge to take these issues to court' under the non-delegation doctrine.[38] But the ink on *The End of Liberalism* was not even dry when this urge became widespread. And every single time the issue has reached the federal Courts of Appeals, the arrangement has been held to be perfectly constitutional.[39] The only problem with these cases is that the Circuits do not seem really to know *why* they consider the delegation lawful. Some of them focus on the relationship between Congress and the agency. In *Plum Creek*, the Ninth Circuit held that the Act's definition of 'national consensus standards' 'clearly establishes standards for the agency to follow, and is well within Congress' authority.'[40] Other decisions focus on the relationship between the agency and the standards body in question. In *Noblecraft*, the same Court held that no 'undue delegation' had taken place since

> 'OSHA, in practice, did not surrender to ANSI all its standard-making function. It selected among ANSI standards with apparent discrimination.'[41]

Beyond choosing among standards, however, this 'discretion' argument is a dead-end. As soon as the agency exercises discretion on the *contents* of specific standards, it engages in 'normal' rule-making and should be subjected to 'normal' APA procedures. Hence, under the arrangement of adopting 'consensus standards', the agency is not allowed to 'substantively' modify a standard and 'may not impose requirements which the standard's source did not impose.'[42] Hence, Courts find themselves without any substitute for constitutional legitimacy: no APA procedures to make up for wide Congressional delegation,[43] and no discretion

[37] 29 USC 652 (9).
[38] Th Lowi, *The End of Liberalism*, 2nd edn, (New York, Norton, 1979) 118.
[39] Most recently and categorically in *Towne Construction v OSHA*, 847 F 2d 1187, 1189 (6th Cir 1988).
[40] *Plum Creek v Hutton*, 608 F 2d 1283 (9th Cir 1979). See *Blocksom v Marshall*, 582 F 2d 1122 (1978).
[41] *Noblecraft v OSHA*, 614 F 2d 199, 203 (9th Cir 1980).
[42] *Diebold v Marshall*, 585 F 2d 1327, 1332 (6th Cir 1978).
[43] See *Bowen v American Hospital Association*, 476 US 610, 627 (1986) ('Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative

of the agency that could, in some way, be linked back to the electoral legitimacy of the President.[44] What courts are forced to do in the end, then, is to uncover a Congressional sanctioning of the *procedural* legitimacy of national consensus standards:

> In authorising the promulgation of standards without a public hearing or other formal proceedings, Congress reasoned that the standards had been adopted under procedures which had already given diverse views an opportunity to be considered, which indicates that interested and affected persons had reached substantial agreement on their adoption.[45]

The arrangement under the Occupational Health and Safety Act was unique, and the idea that courts would exercise this amount of restraint in their review of agencies and private associations in future regulatory adoptions of standards is very unlikely indeed. The dilemma facing the judiciary is much like the conundrum Richard Abel describes for efforts to escape legalism generally: either informal institutions remain powerless, in which case they will have responded to demands of increased access by creating a right to invoke a useless institution. Or, as an alternative, they may regain power, in which case they can only claim legitimacy by introducing all the technicalities of due process.[46] In the case of the regulatory use of standards, courts could either review the agency's adoption of standards under exactly the same 'hard look' as they do any federal standard and relegate the standards-setting process to a

responsibility of the agency to explain the rationale and the factual basis for its decision, even though we show respect for the agency's judgement of both.')

[44] See *Chevron US v Natural Resources Defence Council, Inc.*, 467 US 837, 866 (1984) (deferring to agency interpretations of vague statutes on the theory that agencies are accountable to the executive and hence, via Presidential elections, to the people.) There are those, of course, who take this seriously as a meaningful form of accountability and legitimacy. See E Kagan, 'Presidential Administration', (2001) 114 *Harvard Law Review* 2245. There are even those who think it should serve as a model. See PL Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community', (1999) 99 *Columbia Law Review* 628, 698 (arguing that the Community's democratic legitimacy stems from an inability to establish democratically-legitimate hierarchical supervision over supranational technocrats, and urging 'Europeans' not to ignore the American 'yearning' for ultimate responsibility).

[45] *Modern Drop Forge v Secretary of Labour*, 683 F 2d 1105, 1110 (7th Cir 1982). See, also, *Diebold v Marshall*, 585 F 2d 1327, 1331 (6th Cir 1978) ('Notice-and-comment requirements could be dispensed with, because these *interim standards* would have already been subjected to close public scrutiny through the use of equivalent procedures in their original issuance.')(italics mine), *Noblecraft v OSHA*, 614 F 2d 199, 203 (9th Cir 1980)(Dismissing objections about inadequate representation on an ANSI committee on the grounds that '[C]ongress was aware of ANSI's procedures, and approved the adoption of ANSI standards as national consensus standards').

[46] R Abel, 'Delegalisation — A Critical Review of Its Ideology, Manifestations, and Social Consequences' (1980) 6 *Jahrbuch für Rechtssoziologie und Rechtstheorie* 27, 42.

form of innocuous 'advice'; alternatively, they could consider that the standards-setting process itself provides, by and large, the safeguards of rationality and representativeness that the APA provides for agencies. In this case, however, the milder look at the agency will be paid for by opening up the standardisation process itself for judicial review. The danger of the first option is that the notice and comment procedure under the APA becomes one huge exercise in re-enacting the standards process itself, which would effectively eliminate all the advantages of relying on standards in the first place.[47] The drawback of the second approach is that it would subject the standardisation process to the same paraphernalia of due process that have had such disastrous effects on regulatory action by public agencies.[48] Consider, for example, the Clean Air Act's provisions directing the Environmental Protection Agency to promulgate 'reasonable regulations and appropriate guidance to provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances, and for response to such releases by the owners or operators of the sources of such releases.'[49] The Act continues:

> Any regulations promulgated pursuant to this sub-section shall to the maximum extent practicable, consistent with this sub-section, be consistent with the recommendations and standards established by the American Society of Mechanical Engineers (ASME), the American National Standards Institute (ANSI) or the American Society of Testing Materials (ASTM). The Administrator shall take into consideration the concerns of small business in promulgating regulations into consideration under this sub-section.[50]

The EPA could decide that ANSI standards do not prevent release 'to the greatest extent practicable' and promulgate a stricter standard. The agency

[47] This is what the Consumer Product Safety Act effectively does. See 15 US 2058 (b) (2) ('Before relying upon any voluntary consumer product safety standard, the Commission shall afford interested persons (including manufacturers, consumers, and consumer organisations) a reasonable opportunity to submit written comments regarding such standard. The Commission shall consider such comments in making any determination regarding reliance on the involved voluntary standard under this sub-section.') It is also what 'negotiated rule-making' amounts to after Judge R Posner had his say in *USA Group Loan Services v Riley*, 82 F 3rd 708, 714 (7th Cir 1996) (Describing the idea of an agency's relying on consensus reached among interested circles in negotiated rule-making processes as 'an abdication of regulatory authority to the regulated, the full burgeoning of the interest-group state, and the final confirmation of the 'capture' theory of administrative regulation.')

[48] The phenomenon is now generally known as the 'ossification' of the rule-making process, after McGarity coined that term to describe the effect of judicial review on agency regulation. See, for example, Th McGarity, 'Some Thoughts on 'De-ossifying' the Rule-making Process', (1992) 41 *Duke Law Journal* 1385; Richard J Pierce, 'Seven Ways to De-ossify Agency Rule-making', (1995) 47 *Administrative Law Review* 59, and M Seidenfeld, 'Demystifying De-ossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rule-making', (1997) 75 *Texas Law Review* 483.

[49] 42 USC 7412 (r) (7) (B) (i), as amended by Section 301, Public Law 101–549.

[50] 42 USC 7412 (r) (7) (C).

would then have to explain in court why it feels that the ANSI standard is too lax. But what if the EPA issues a standard that does conform to ANSI standards? In this case, the question becomes whether the standard will still be judged as any other EPA standard or whether judicial review will focus on the standards bodies themselves. Both scenarios seem absurd. Is the EPA supposed to stage a defence of ANSI's methods, procedures and findings? Is the EPA to argue that ANSI has taken 'small business concerns' into account? Alternatively, is the court going to make a 'careful and searching' inquiry to verify whether ANSI considered the 'relevant factors' and did not make a 'clear error of judgement'?[51]

VI. STANDARDS BODIES UNDER ANTI-TRUST LAW

In 1988, the Federal Supreme Court had to decide in *Allied Tube* whether the NFPA should be considered to be a 'governmental agency.'[52] A standard adopted at committee level would have allowed for PVC, and not just steel, to be used in electric conduit under the NEC. Allied Tube, the nation's biggest steel conduit producer, then agreed with other producers, sales agents and other members of the industry to pack the NFPA's General Assembly and vote the standard down.[53] Plastic conduit manufacturers sued for treble damages under the Sherman Act. The Court observed that 'agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute or purchase certain types of products.'[54] Clearly, then, the NFPA and other standards bodies are, in the Court's phrase, 'rife with opportunities for anti-competitive activity' as manufacturers fight for their products to be endorsed.[55] And so it seems imperative to subject standards bodies to strict anti-trust scrutiny. The problem with this seemingly straightforward proposition starts as soon as one realises that the anti-competitive potential of the NEC only comes to full fruition when it is adopted into law and the agreement not to manufacture or distribute plastic conduit becomes a legal prohibition. And laws and regulations have been immune from anti-trust scrutiny ever since the Court made it clear in *Parker v Brown* that the Sherman Act

[51] *Citizens to Preserve Overton Park Inc v Volpe*, 401 US 402 (1971).
[52] *Allied Tube & Conduit Corp. v Indian Head Inc*, 486 US 492 (1988).
[53] This involved Allied Tube & Conduit Corp, itself arranging for 155 persons — including employees, sales agents, agents' employees, company executives and the wife of the national sales director to register as voting members and attend the meeting, all at the company's considerable expense. With another 75 votes arranged in similar fashion by other steel interests, Allied Tube & Conduit Corp, managed to get the proposal defeated by a 394–90 vote. See *Indian Head, Inc v Allied Tube & Conduit Corp*, 817 F 2d 938, 940 (2nd Cir 1987).
[54] *Allied Tube & Conduit Corp v Indian Head Inc*, 486 US 492, 500 (1988)
[55] *American Society of Mechanical Engineers v Hydrolevel Corp*, 456 US 556, 571 (1982).

is intended to regulate business, and not politics.[56] And ever since *Noerr*, any genuine effort to influence legislation, even if its sole objective is to eliminate competition and even when the methods employed are deceptive or unethical, is immune as well.[57] Allied sought *Noerr*-immunity on the basis of two theories. The first is the flip-side of basic state action immunity. Rejecting the argument that the NFPA was, in effect, a governmental agency, the Court held:

> [T]he Association cannot be treated as a 'quasi-legislative' body simply because legislatures routinely adopt the Code the Association publishes. Whatever de facto authority the Association enjoys, no official authority has been conferred on it by any government, and the decision-making body of the Association is composed, at least in part, of persons with economic incentives to restrain trade. The dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious. But where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action.[58]

For its second theory, the defendant cast the net further in search of protective state involvement. Local and state legislatures, lacking expertise and resources to second-guess the Code, adopt it without ado. Participation in the standards body, then, is, if not the only, certainly the most effective way of influencing legislation. At issue, then, was not the effort to influence decision-making in the Association, but the effort to influence that legislation. And there can be no doubt that state and local regulations adopting the Code are protected by the state action doctrine. The Court did not blink:

> Although one could reason backwards from the legislative impact of the Code to the conclusion that the conduct at issue here is 'political', we think that, given the context and nature of the conduct, it can more aptly be characterised as commercial activity with a political impact. Just as the anti-trust laws should not regulate political activities simply because those activities have a commercial impact, so the anti-trust laws should not necessarily immunise what are, in essence, commercial activities simply because they have a political impact.[59]

[56] *Parker v Brown* 317 US 341 (1943). See, generally, ER Elhauge, 'The Scope of the Anti-trust Process', (1991) 104 *Harvard Law Review* 667.
[57] *Eastern Railroad Presidents Conference v Noerr Motor Freights*, 365 US 127 (1961). See *United Mine Workers v Pennington*, 381 US 657 (1965). See generally ER Elhauge, 'Making Sense of the Anti-trust Petitioning Immunity', (1992) 80 *California Law Review* 1177.
[58] *Allied Tube & Conduit Corp v Indian Head Inc*, 486 US 492, 501 (1988).
[59] *Ibid*, 507 (1988). In affirming *Indian Head Inc v Allied Tube & Conduit Corp*, 817 F 2d 938 (2nd Cir 1987), the Supreme Court resolved a Circuit split. See *Sessions Tank Liners v Joor*

Without the shield of immunity, then, decision-making processes in standards bodies are subject to the rigours of competition law. Even if they inevitably restrict competition, standards are not liable to per se condemnation because courts recognise that they may have important benefits. Thus, in Judge Breyer's phrase,

> activity that harms competitors because it lowers production or distribution costs or provides a better product carries with it an overriding justification.[60]

The issue then becomes how to distinguish good standardisation from bad — or, as Breyer put it, from standard-setting that 'serves no legitimate purpose' or is 'unnecessarily harmful'.[61] The obvious answer is to scrutinise the contents of the standard at issue.[62] Appellate courts have hinted at the possibility of standards being 'so unreasonable that their net effect would be to injure competition.'[63] Not one single decision, however, has actually struck down a standard on its merits. In *Consolidated Metal*, the Fifth Circuit explicitly held that 'a technical debate among engineers' could not be construed as an anti-trust claim:[64]

> Not only would this tax the abilities of federal courts, but fear of treble damages and judicial second-guessing would discourage the establishment of useful industry standards. Under such a regime, the anti-trust laws would stifle, not protect, the competitive market.[65]

What courts concentrate on is what they feel most comfortable with: procedure. And thus it is expertise, and not politics, that brings principles of

Manufacturing, 827 F 2d 458 (9th Cir 1987), vacated by *Sessions Tank Liners v Joor Manufacturing*, 487 US 1213 (1988) (Granting Noerr immunity to efforts to influence the Western Fire Chiefs Association's decision-making on the Uniform Fire Code). See, also, *Rush-Hampton Industries v Home Ventilating Institute*, 419 F Supp 19 (MD Fla 1976) (Noerr immunity as regards SBCCI and others), and *Wheeling-Pittsburgh Steel v Allied Tube & Conduit Corp.*, 573 F Supp 833 (ND Ill 1983), where Allied Tube was the victim of a campaign for the NFPA not to endorse one of its products. Immunity was granted.

[60] *Clamp-All Corp v Cast Iron Soil Pipe Institute*, 851 F 2d 478, 487 (1st Cir 1988). See also *ECOS Electronics v Underwriters Laboratories*, 743 F 2d 498 (7th Cir 1984).
[61] *Ibid*.
[62] Advocacy in this direction in SP Gates, 'Standards, Innovation and Anti-trust: Integrating Innovation Concerns Into the Analysis of Collaborative Standard-Setting', (1998) 47 *Emory Law Journal* 681.
[63] *Eliasen Corp v National Sanitation Foundation* 614 F 2d 126, 130, n.6 (6th Cir 1980)
[64] *Consolidated Metal Products Inc v American Petroleum Institute*, 846 F 2d 284, 295 (5th Cir 1988)
[65] *Ibid*, 297. See, also, *DM Research v College of American Pathologists and National College for Clinical Laboratory Standards*, 170 F 3d 53, 58 (1st Cir 1999). ('Without some kind of protective screen for treble damage liability, there would be few standards set since most involve disputable judgment calls').

good governance back into the equation. The Supreme Court's faith in due process was expressed most clearly in *Allied Tube*:

> When private associations promulgate safety standards based on the merits of objective expert judgements and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant pro-competitive advantages.[66]

The finding seems paradoxical. After having denied that the standards body, in the absence of 'official authority', could qualify as a 'quasi-legislative body' in order to have the restraints it imposes taken out of the realm of the Sherman Act altogether, the Court now holds out the prospect of holding the body's decisions not to be a restraint at all, as long as it endows itself with the hallmarks of regulatory decision-making. Thus, procedural requirements under anti-trust analysis, in effect, replace the requirements of state involvement under *Parker*. The Court admits as much:

> Thus, in this case, the context and nature of petitioner's efforts to influence the Code persuade us that the validity of those efforts must, despite their political impact, be evaluated under the standards of conduct set forth by the anti-trust laws that govern the private standard-setting process. The anti-trust validity of these efforts is not established, without more, by the petitioner's literal compliance with the rules of the Association, for the hope of pro-competitive benefits depends upon the existence of sufficient safeguards to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anti-competitive activities of is members simply by adopting rules that fail to provide such safeguards. The issue of immunity in this case thus collapses into the issue of anti-trust liability.[67]

Anti-trust law is thus posited as the functional equivalent of administrative law as applied to private governance. This use of anti-trust law to proceduralise the regulation of self-regulation, however, is far from evident under the Court's own precedent. For one thing, it is unclear how *Allied Tube* relates to the Court's case-law on the relevance of procedural safeguards in anti-trust analysis. Until 1985, courts generally relied on *Silver* for the proposition that self-regulatory arrangements could escape per se anti-trust scrutiny if and when accompanied by fair procedures.[68] In *Northwest Stationers*, however, the Court narrowed *Silver*'s application

[66] *Allied Tube & Conduit Corp v Indian Head Inc*, 486 US 492, 501 (1988)
[67] *Ibid*, 509.
[68] *Silver v New York Stock Exchange*, 373 US 341, 364 (1963).

to instances of an 'important national policy' of promoting industrial self-regulation and allowed the Sherman Act to be narrowed 'only to the extent necessary to effectuate that policy'. It then added:

> In any event, the absence of procedural safeguards can, in no sense, determine the anti-trust analysis. If the challenged concerted activity of Northwest's members amounted to a per se violation of 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of 1, no lack of procedural protections would convert it into a per se violation because the anti-trust laws do not themselves impose on joint ventures a requirement of process.[69]

There is an obvious tension with *Allied Tube* here. Just as it precludes per se condemnation on the sole basis of the complete absence of fair procedures,[70] *Northwest* precludes the theory that self-regulation be treated under the rule of reason on the basis of procedural guarantees. On the other hand, standard-setting is analysed under a rule of reason analysis because standards could be pro-competitive, and that very pro-competitiveness, the Court held in *Allied Tube*, depends precisely on the procedural safeguards the standard-setting process allows for.

The more fundamental limit of competition law as a regulatory instrument is the scope of reasoning that it confines courts to. Analysis under the rule of reason is confined to economic parameters. The Court made an act of neo-liberal faith in *National Society of Engineers* that precludes consideration of any policy objective but that of competition:

> It is this restraint that must be justified under the Rule of Reason, and petitioner's attempt to do so on the basis of the potential threat that competition poses on the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.
>
> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The assumption that competition is the best method of allocating resources in a free market recognises that all elements of a bargain — quality, service, safety, and durability — and not just the immediate cost, are favourably affected by the free opportunity to select among alternative offers.[71]

The lesson of *National Society of Engineers* seems to be, therefore, that courts must construe benefits to health and safety as side-effects of

[69] *Northwest Stationers v Pacific Stationery* 472 US 284, 293 (1985).
[70] See *Moore v Boating Industry Associations* 754 F 2d 698 (7th Cir 1985), vacated and remanded by *Boating Industry Associations v Moore* 474 US 895 (1987), and *Moore v Boating Industry Associations* 819 F 2d 693, 695, 711 (1987).
[71] *National Society of Professional Engineers v US* 435 US 679, 695 (1978).

enhanced competition. On the other hand, the Court added a curious footnote to the opinion suggesting that restraints 'related to the safety of a product' may have 'no anti-competitive effect'.[72]

Even more problematical is the proposition that anti-trust law can secure 'objective expert judgment'. Try as they may to avoid it, it seems inevitable that courts *and juries* will have to engage in a review of the technical basis of standards. If it is accepted, first, that standards always restrict competition to a certain extent, but also that, second, the benefit to safety and quality 'carry with it an overriding justification',[73] it seems difficult to avoid asking whether the objective base of the standard actually does anything to further these objectives. The courts' solution to this dilemma is the same as their solution to problems of expertise in administrative law: instead of judges behaving like technical experts, standard-setting bodies are now supposed to behave like courts.

> Petitioner remains free,

says the Court in *Allied Tube*,

> to take advantage of the forum provided by the standard-setting process by presenting and vigorously arguing accurate scientific evidence before a non-partisan private standard-setting body.[74]

Courts' reluctance to be drawn into technical debates on the contents of the standard will thus have to be compensated for by their having to decide whether a sub-committee member's successful arguing that the hazards of a competitor's product should count as offering 'accurate scientific evidence' or count as dressed-up self-interest.[75] And it is difficult to see how this decision will not necessarily have to be followed by a decision on the merits of the final standard's reflecting this 'accurate scientific evidence' or not. And finally, it is very difficult to see how this inquiry will not pose a striking resemblance to a 'hard look',[76] and not produce much of what the 'hard look' has produced in regulatory agencies: lots of

[72] *Ibid*, 699, n.22.
[73] *Clamp-All Corp v Cast Iron Soil Pipe Institute*, 851 F 2d 478, 487 (1st Cir 1988).
[74] *Allied Tube & Conduit Corp v Indian Head Inc*, 486 US 492, 510 (1988).
[75] *Ibid*, 515 (Justice White dissenting, joined by Justice O'Connor).
[76] See, for example, JJ Anton and DA Yao, 'Standard Setting Consortia, Anti-trust, and High-Technology Industries', (1995) 64 *Anti-trust Law Journal* at 247 & 252–53 (Arguing that courts and enforcement agencies should scrutinise standards for a 'substantive reasonable basis'), and M Goldenberg, 'Standards, Public Welfare Defences, and the Anti-trust Laws' (1987) 42 *Business Lawyer* 629, 650 ('The courts should approach the issue in much the same way as they review administrative regulations. They should seek to determine whether the standard organisation' decision is reasonably supported by the available evidence.')

lawyers, lots of record-keeping, clogged up appeals mechanisms, paralysis and conservatism.[77] Moreover, courts looking hard into administrative law is one thing; but juries looking hard in anti-trust law is quite another.[78] Justice White's dissent in *Allied Tube*, then, is an evergreen in the standardisation community:

> Insisting that organisations like the NFPA conduct themselves like courts of law will have perverse effects. Legislatures are willing to rely on such organisations precisely because their standards are being set by those who possess an expert understanding of the products and their uses, which are primarily, if not entirely, those who design, manufacture, sell, and distribute them. Sanitising such bodies by discouraging the active participation of those with economic interests in the subject matter undermines their utility.[79]

VII. STANDARDS BODIES UNDER TORT LAW

Even when they are not adopted into law, industry standards largely determine what is legally required of manufacturers. In negligence cases, but even in strict product-liability cases, evidence of compliance with standards will go a long way towards fulfilling the various requirements of reasonableness in tort law and towards fencing off punitive damages.[80] If, then, either through legislative adoption or judicial consecration, standards exert such power that it would be sheer foolishness for manufacturers not to comply with them, the question seems obvious: do standards bodies owe a duty of care to third parties in elaborating and promulgating standards?[81] Do juries get to take a 'hard look' at standards bodies in tort law as well?

[77] For concern, see RE Cheit, above n.24, 233.

[78] See *Allied Tube & Conduit Corp v Indian Head Inc*, 486 US 492, 514–15 (1988) (Justice White dissenting, joined by Justice O'Connor) ('In this case, for example, even if Allied had not resorted to the tactics it employed, but had done no more than successfully argue in good faith the hazards of using respondent's products, it would have inflicted the same damage on respondent and would have risked the same anti-trust suit, with a jury ultimately deciding the health and safety implications of the products at stake').

[79] *Ibid.*

[80] See, for example, *Otilio Romero v Cincinatti Inc*, 171 F 3d 1091, 1095 (7th Cir 1999) (compliance with ANSI standard 'relevant, though not conclusive' in products liability case), and *DiCarlo v Keller Ladders*, 211 F 3d 465, 467 (8th Cir 2000) ('evidence of compliance with ANSI standards bears on the question of whether a product contains a design defect').

[81] Technically, the issue revolves around so-called 'Good Samaritan' or 'Voluntary undertaking' liability, as codified in Section 324A of the Restatement (Second) of Torts, which provides for third party liability when one undertakes to 'render services which he should recognise as necessary for the protection of a third person or his things' if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. The first case allowing for the

In 1996, the New Jersey Supreme Court had to decide whether the American Association of Blood Banks was to be considered a 'governmental agency.' In 1984, William Snyder underwent open-heart surgery during which he received blood transfusions. He was subsequently diagnosed as HIV positive and contracted AIDS. Snyder accused the AABB of failure to recommend surrogate testing or other practices that could have prevented contaminated blood from being collected by blood banks. The Court established a duty of care in the light of the AABB's longstanding and successful effort to be recognised as the leading standard-setter for the sector:[82] 'In 1984, the AABB was more than a trade association. It was the governing body of a significantly self-regulated industry.'[83] The AABB then argued that it did not owe a duty of care to private parties *just because* it played such a major role in public policy. The Court dismissed this claim for government immunity on a formal public/private distinction:

> Unlike government agencies, the AABB is not created by statute. It does not act pursuant to a government mandate. Nor is it accountable either to the public or to another branch of government. No matter how much power the AABB exercised, the inescapable fact is that it is not a government agency. Consequently, we need not defer to the AABB's decisions on the protection of the blood supply and the allocation of industry resources, as we might otherwise defer to agency determinations.[84]

It also dismissed a claim for qualified immunity — where liability would be limited to failure to act in good faith — on a slightly less formal public/private interest distinction:

> Merely because the AABB sometimes acted like a government agency does not mean it was such an agency or the functional equivalent of one. No law or government directive required the AABB to subordinate its interests to

application of s 324A to standard-setting proper, as opposed to certification, is *Arnstein v Manufacturing Chemists Association*, 414 *F Supp* at 12 & 14 (ED Pa, 1976). There, the Court timidly refused to dismiss the theory on summary judgment, limiting itself to the observation that the plaintiff 'should not be precluded from attempting to prove a case' under Section 324A. At issue was the MCA's purported negligence in setting stricter standards for exposure to vinyl chloride.

[82] *Snyder v American Association of Blood Banks*, 676 A 2d 1036, 1048 (NJ 1996) ('Society has not thrust on the AABB its responsibility for the safety of blood and blood products. The AABB has sought and cultivated that responsibility.')

[83] *Ibid*., at 1050.

[84] See n.82 at 1050–51. For the basis of government immunity, see, for example, 28 USC 2680 (a), codifying the Federal Tort Claims Act, as interpreted in *Berkovitz v United States*, 486 US 531, 536–37 (1988)(no judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort.)

> those of the public. Indeed, the record reflects the AABB's unswerving commitment to its interests and those of its members.

It then noted the absence of public scrutiny, procedural safeguards and governmental oversight to conclude against any liability immunity.[85] The parallel with *Allied Tube* is obvious, and was reinforced even further by the resonance of Justice Garibaldi's dissent with that of Justice White on the Supreme Court:

> Where a private organisation performs a quasi-governmental task that the state would otherwise to perform, public policy requires a grant of immunity.
>
> Granting immunity to non-profit associations which have assumed some governmental duties will ensure that, undaunted by the prospect of litigation expense and potential damages, they will continue to perform the essential public service that they alone are well-positioned to undertake: the good-faith development of industry standards to protect the public health and safety.[86]

Generally speaking, the law as regards standard-setters' duty of care is in flux, with courts coming down on either side of the issue in a fairly even split.[87] What is more, in the one case where a Federal Court of Appeals had the opportunity to address the issue, the Fourth Circuit declined to do so.[88] Courts on either side forthrightly admit to being influenced more by public policy considerations than by legal niceties.[89] The problem is that they cannot seem to agree on what this policy should be, let alone how best to achieve its objectives.

[85] See n.82 at1053.

[86] See n.82 at 1058–59 (Garibaldi J, dissenting). Garibaldi admits that complete immunity 'might encourage the AABB to make negligent decisions', but maintains that no immunity 'might deter effective decision-making'. He, hence, calls for qualified immunity, 'the best attainable accommodation of competing values, because it simultaneously preserves both the incentive of private associations to continue developing industry rules and the right of injured parties to seek relief in extreme cases where malice or bad faith can be demonstrated.' 1062. The majority was underwhelmed: 'By defending the AABB's status as a private organisation free from public accountability while conferring on the AABB governmental immunity, the dissent seeks to impute to the AABB power without responsibility.' *Ibid*, at 1053.

[87] For contrasting reaction to Snyder, for example, see *Weigand v University Hospital of New York*, 659 NYS 2d 395 (1997) (move to dismiss complaint on 'no duty' basis rejected); *Douglass v Alton Ochsner Medical Foundation*, 696 So 2d 136 (La App 1997)(summary judgment in favour of AABB on 'no duty' basis reversed), and *NVV v American Association of Blood Banks*, 75 Cal App 4th 1358 (1999) (granting summary judgment on 'no duty' basis in favour of AABB).

[88] *Sizemore v Hardwood Plywood and Veneer Association*, 114 F 3d 1177 (4th Cir 1997)(Table), 1997 WL 295644, 3 (Declining to decide on duty of care absent proximate cause).

[89] See *Hanberry v Hearst Corp*, 276 Cal App 2d 680, 683 (1969) (influenced 'more by public policy than by whether such cause of action can be comfortably fitted into one of the law's

There are several interrelated clusters of arguments. The first and most straightforward regards the nature of compliance with standards. If trade associations merely provide a forum for the promulgation of *voluntary* standards, so the argument goes, responsibility lies squarely with individual manufacturers that are free to use or reject these standards.[90] As the *Meyers* Court said, to impose a duty 'would amount to raising NSPI to the status of a rule-making body which the facts clearly show is unwarranted and legally unsupportable.'[91] The landmark case here was the decision, in 1990, of the Supreme Court of Alabama in *King*, one of the many cases brought against the National Spa and Pool Institute by severely injured divers. The Court observed that the trade association had 'no statutorily or judicially imposed duty to formulate standards; however, it did so.'[92] It then noted how the standards referred to 'the needs of the consumer' and were presented as being based on considerations of safety. Under these conditions, 'foreseeability' as opposed to 'control' is enough to establish a duty of care:

> We find that the trade association was under a legal duty to exercise due care in promulgating the standards in question. The trade association's voluntary undertaking to promulgate minimum safety design standards for safe diving from diving-boards installed in residential swimming pools (such standards being based on studies of the 'needs of the consumer' and founded on a consideration of 'safety' involved in the design and construction of such swimming pools) and to disseminate those standards to its members for the purpose of influencing their design and construction practices, made it foreseeable that harm might result to the consumer if it did not exercise that care.[93]

Generally, courts finding a duty of care take the argument of 'control', as such, seriously, and seek to establish the normative force of standards in

traditional categories of liability'); *Meyers v Donnatacci*, 531 A 2d 398, 404–5 (NJ Super 1987) ('whether a duty exists is ultimately a question of fairness'); *Bailey v Hines*, 719 NE 2d 178, 183 (Ill App 1999) ('public policy alone might not be reason enough to reject a duty in this case, but it does become part of the legal mixture that leads us to this conclusion. However, we make no ringing policy endorsement concerning the non-existence of a duty in all cases involving trade associations.').

[90] See *Howard v Poseidon Pools*, 506 NYS 2d 523, 527 (NY 1986) (The National Spa and Pool Institute did not have the duty or the authority to control the manufacturers who did produce the product here in question), *Meyers v Donnatacci*, 531 A 2d 398, 406 (NJ Super 1987) (NSPI had no authority to mandate compliance nor did it attempt to force its members to comply). See, further, *Beasock v Dioguardi Enterprises*, 494 NYS 2d 974, 979 (NY 1985) (Tire and Rim Institute 'neither mandates nor monitors the use of its standards by any manufacturer') and *Bailey v Hines*, 719 NE 2d 178, 182 (Ill App 1999) (Truss Plate Institute 'exercised no control' over manufacturer and intended the standard at issue as a 'guide').

[91] *Meyers v Donnatacci*, 531 A 2d 398, 405 (NJ Super 1987)

[92] *King v National Spa and Pool Institute*, 570 So 2d 612, 614 (Ala 1990).

[93] *Ibid*, at 616.

one way or another. In *Douglass*, the Court found *Snyder* supported 'by the numerous cases absolving blood banks from liability to transfusion recipients upon a showing of compliance with the guidelines of the AABB.'[94] In *Meneely*, the Court pointed to the economic realities of compliance with industrial standards. Since the NSPI publishes the swimming pool and equipment industry's only comprehensive set of safety standards, and members opting not to comply with them would be at a competitive disadvantage, 'members followed the standard out of economic imperative.'[95] This argument becomes complicated, however, as soon as it is realised that at least part of this 'economic imperative' stems from the (semi-) regulatory adoption of standards. In *Meneely*, the Court held the fact that NSPI's standards were incorporated into SBCCI Codes to be a factor which added weight to the argument.[96] In *Prudential*, an action was brought against the American Plywood Association for roofing damage caused by hurricane 'Andrew'. The APA was quick to shift the blame to the Florida Building Code. The Court was unimpressed:

> Although it is true that homebuilders must follow the requirements in the local building code, building code officials and legislators rely upon the recommendations provided by APA, which holds itself out as a research and testing agency, in adopting that code.[97]

Other courts, however, see the adoption of standards in codes and regulations as diluting, not reinforcing, the standards body's duty towards the end-user. In *Grinnell*, an insurance company held the NFPA responsible for a warehouse fire, because the sprinklers failed. The Court held:

> NFPA standard 231(C) is four-times removed from the plaintiff's insured. NFPA standard 231(C) was incorporated by the Southern Building Code Congress International and its Standard Building Code. The City of New Orleans then adopted the Standard Building Code. The building contractor

[94] *Douglass v Alton Ochsner Medical Foundation*, 696 So 2d 136, 139 (La App 1997). See *Weigand v University Hospital of New York*, 659 NYS. 2d 395, 399 (NY 1997) ('a blood bank's compliance with the industry standards of collection and testing generally constitutes proof of reasonable care on the part of the blood bank. Thus, it is clear that the care used in establishing these industrial standards has tremendous impact on the manner in which blood is collected and tested.'), and *King v National Spa and Pool Institute*, 570 So 2d 612, 616 (Ala 1990) (noting that 'in Alabama, evidence that a defendant manufacturer complied or failed to comply with industrial standards, such as the standards promulgated by the trade association in this case, is admissible as evidence of due care or the lack thereof.')

[95] *Meneely v Smith*, 5 P 3d 49, 56–7 (Wash App 2000).

[96] *Ibid*.

[97] *Prudential Property and Casualty Insurance v American Plywood Association*, 1994 WL 463527, 3 (SD Fla 1994).

> was then obliged to build and equip the warehouse in accordance with that Code. Lloyd's insured was the tenant of the building. The relationship between the NFPA and the building occupant is simply too remote to warrant the imposition of a legal duty on the facts of this case. This conclusion is buttressed by the fact that the NFPA had no control over which of its minimum standards were incorporated into municipal building codes or over any construction that purported to conform to its standards.[98]

A second cluster of arguments sees to the composition of codes and standards committees. In *Grinnell*, the Court noted how the NFPA is 'not even a trade association which acts in the economic self-interest of its members':

> It is not a trade group consisting of businesses with homogeneous economic interests. Rather, it consists of insurance providers, enforcement officials, architects, engineers, fire protection manufacturers and distributors, testing laboratories, consumers and academics. It does not profit from the issuance of standards, promote the economic interests of its members, or control the activities of its members.[99]

The AABB, in contrast, was characterised in *Snyder* as 'representing its interests and those of its members. At stake for its members was a substantial financial interest in the regulation of the industry. Blood is big business.'[100]

The third cluster of arguments focuses on the relationship between private standardisation and public regulation. In *Meyers*, the Court based its public policy decision largely on a sensitivity to the 'many laudable purposes' served by trade associations, including the one of 'assisting the government in areas that it does not regulate.'[101] In *NVV*, the California Court of Appeals explicitly rejected *Snyder* not by constituting the AABB as a 'governmental agency' but by constituting the AABB as a 'scientific community.' In a familiar line of reasoning, the Court first noted the incompatibility of legal process and scientific discovery:

> To impose liability on the defendant for choosing the wrong side in a scientific debate, particularly when that side represented the majority viewpoint at the time, does not further the goal of preventing future harm. The very

[98] *Commerce and Industry Insurance v Grinnell*, 1999 WL 508357, 3 (ED La 1999).
[99] *Ibid*. See *Meyers v Donnatacci*, 531 A 2d 398, 400, 403 (NJ Super 1987) (noting the diverse membership of NSPI, including the American Red Cross, officials from the public health and safety sector, coaches, physicians and teachers involved in swimming and aquatics, and noting the federal Consumer Product Safety Commission's involvement in the public review process.)
[100] *Snyder v American Association of Blood Banks*, 676 A 2d 1036, 1050 (NJ 1996).
[101] *Meyers v Donnatacci*, 531 A 2d 398, 404 (NJ Super 1987).

> nature of scientific debate is that the 'right' answer has not yet emerged. Imposing liability would not aid in choosing the right side in a medical or scientific debate and might encourage rash or premature action rather than allow a medical or scientific consensus to develop and mature.[102]

It then went on to accuse the plaintiff of seeking to have the jury substitute their 'lay opinion' for that of the 'scientific and medical community.'[103] In this line of thinking, encumbering the standard-setting process with Good Samaritan liability would lead to disastrous consequences. First, the standards body's function as an 'arena' for scientific debate would be lost and researchers would digress to the 'ad hoc peer review journal process'. Second, and even worse, the result could be to leave these matters 'solely in the hands in the hands of government agencies' which would 'not further the public's interest.'[104] Agencies, after all, are subject to the paralysing rigours of notice and comment, procedural safeguards and the obligation to convince courts of the 'rationality' of their decision:

> We believe imposition of liability here would have adverse consequences to the public by chilling scientific and medical debate on important issues and leaving these matters to the often slow and cumbersome processes of government agencies, or to the equally slow process of published medical journal articles and annual conferences.[105]

Denying a duty of care, then, is premised on a declaration of legislative incompetence.

As the dissent notes, the problem with the majority's opinion in *NVV* is that it confuses the issue of duty with breach.[106] Courts that immunise standards bodies on a 'government function' or 'scientific community' rationale leave a disturbing regulatory void. Courts that immunise standards bodies on the basis of the voluntary nature of compliance misunderstand the realities of economic life and underestimate the normative force of private standards. Denying a 'duty of care' is, in the final analysis, the denial of the regulatory potential of tort law and a declaration of incompetence of the jury system. It should not be so hard to develop principles for the 'exercise of due care' which take account of the difficulties of decision-making under conditions of scientific uncertainty, encourage the revision of outdated safety standards,[107] and punish the

[102] *NVV v American Association of Blood Banks*, 75 Cal App 4th 1358, 1383–84 (1999).
[103] *Ibid*, at 1385.
[104] See n.102 at 1386–87 (1999).
[105] See n.102
[106] See n.102, 1404 (1999)(J Amos, concurring in part and dissenting in part).
[107] In *Commerce and Industry Insurance v Grinnell*, 1999 WL 508357, 4 (ED La 1999), the Court noted that even if the NFPA were to be subject to a legal duty of reasonable care, the

pursuit of narrow private interests. These are the fundamental principles of good governance — if you will, the 'public law values' — that anti-trust law imposes on private bodies. The exercise of 'due care' by standard-setters themselves can, and should, be based on the same principles. As in anti-trust law, the immunity issue collapses into the liability issue.

VIII. CONCLUSION

Methodologically, the argument made here is simple. It is generally accepted that globalisation and privatisation collapse many a distinction. The only distinction that lawyers seem incapable of deconstructing is the one that defines their own discipline. And it is not only the category of 'law' itself that limits our understanding of private governance; it is the carving up of law in distinct legal disciplines that does the real damage. Approaching private standardisation from public law inherently implies that standardisation is intrinsically a political process. Approaching private standardisation from private law inherently implies that standardisation is intrinsically an economic process It is both and neither. It is a political process that relies on market mechanisms — standard-setters get together to write health and safety standards not moved by a civic awakening but because they hope to use these standards as marketing tools and hence sell more products. It is also an economic process that relies on political principles — weeding out dangerous, inferior, and otherwise undesirable products, not via the market mechanism but through structured deliberation.

The normative argument here is not that long lists of procedural requirements established by private associations are necessarily sufficient to accept standards as legitimate. The argument is more limited: if we accept that standards bodies are, in principle, useful and legitimate *loci* for the social organisation of deliberation of complicated regulatory issues, legal policy should be directed at policing the quality of that deliberation. The legal imperative, then, is to resist the lazy impulse to turn private associations into public agencies and thus destroy their social autonomy, and, instead, promote the procedural integrity of autonomous private standardisation. In different ways and to different degrees, courts have been willing to tinker with doctrines of both public and private law to pursue just this objective. In accepting standards as valid, as legitimate,

association did not fail to exercise that care since it 'reviewed and revised standard on a periodic basis to keep current with new fire protection knowledge and technologies' and had procedures in place to amend standards 'to include fire safety lessons learned from significant fires or to recognise new technologies or methods.'

yes, as 'legal', courts have indeed discovered something between facts and norms. If you look hard enough, you will find courts capable of recognising and validating private governance, of accepting as legitimate 'law' norms generated in private associations outside the central political institutions of the constitution and beyond the nation state. However, tentatively and hesitantly, law can accept forms of deliberative, rather than constitutional, democracy as its normative foundation. It can, because it must.

10

Law and Constitutionalism in the Mirror of Non-Governmental Standards: Comments on Harm Schepel

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I. TOUGH TIMES FOR LEGAL POSITIVISTS

We live in constitutionally perplexing times. A global order is emerging both around us and through us. Many key rules of this order emanate from organisations which are neither encompassed nor controlled by nation states. Their strength stems not from armies but from diffuse types of authority that we struggle to understand. Received conceptions of law and constitutionalism, with their focus on structuring state lawmaking and limiting state powers, are thus of limited use. How are we to comprehend this emergent global order? More particularly, how are we to comprehend law and constitutionalism in this order?

II. 'PRIVATE' STANDARDS IN AMERICAN COURTS

Of the many approaches that can be taken to the above questions, Harm Schepel adopts a relatively conservative one. He examines the treatment of non-governmental standards by traditional law courts, specifically US courts. In quite a short space, he reviews a host of judicial decisions in the fields of constitutional, administrative, anti-trust, and tort law, and adds bits from other fields, such as intellectual property.[1] Schepel is not entirely explicit about what he is looking for in the decisions, but his implicit standard is that they should reveal a coherent and logically

[1] H Schepel, 'Constituting Private Governance Regimes', this volume.

defensible set of rules regarding the legal and constitutional status of private standard-setting in the US legal system. Perhaps embedded in this criterion is the hope that, given US dominance in the post Bretton Woods international order, coherent treatment of non-governmental standard-setting at the US domestic level might point toward coherent treatment at the transnational level, and that law might thus sustain a high degree of unity in the end — but this is conjecture on my part.

Whatever Schepel might have hoped for, he is disappointed by what he finds. Rather than a systematic set of rules for the treatment of private standards, American courts are found to have produced a hodgepodge of conceptions embodied in incomplete, and sometimes inconsistent, rules. Constitutional law, for example, claims to reject private law-making in principle while generally accepting it in practice, typically on expertise or process grounds. Administrative law keeps private standard-setting at a distance, generally requiring agencies to go through a separate decisional step before adopting privately developed standards, but without reviewing the quality of the agency's judgment or giving a substantively persuasive reason for requiring it.

One can quibble with some of the details in Schepel's analysis. It is not necessarily true, for example, that requiring government agencies to review privately developed standards independently is equivalent to 're-enacting the standards process.'[2] Instead, it is plausible to expect that the ensuing agency process will be shorter than it would otherwise have been, and that it will result in rules that fit the situation better while achieving governmental purposes. Similarly, Schepel's conclusion that anti-trust courts generally, but fruitlessly, try to substitute procedural analysis for substantive review in decisions on private standards may conflate 'per se' and 'rule of reason' analyses.[3] In practice, anti-trust courts have gradually retreated from per se analysis in favour of examining the substantive justifications for agreements that might restrain trade, and not merely the procedures through which they were made.[4] And, of course, procedural and substantive analyses are often closely tied to each other, so it would not be surprising if a holding formally based on procedural factors reflected an implicit substantive analysis of the costs and benefits of the agreement.

Still, none of these low-level quibbles answer Schepel's larger point, which is that the US courts have not developed a logically consistent or unified way of treating private standards. This point, I think, must be granted. The question is, what are its implications for law and

[2] *Ibid,* text preceding n.47.
[3] See above n.1, text preceding n.69.
[4] See, generally, TA Piraino Jr, 'Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis', 64 South *California Law Review* (1991) 685.

constitutionalism in transnational governance? Here, I take a slightly different tack from Schepel, although, ironically, I may find more to work with in his analysis than he does. Schepel concludes that the US courts' treatment of private standard-setting in the fields reviewed is sufficiently incoherent and disjointed to offer little reason to believe that what his introduction terms 'the law' (the accumulated decisions of courts)[5] deals effectively with private standard-setting. Yet, at the same time, he sees a functional imperative that they must learn to do so, since traditional legal institutions are incapable of generating the manifold standards required by the global economy, and since private *fora* enjoy certain deliberative and decisional advantages over state ones. In the end, he concludes, despite the doctrinal disarray described in his paper, that courts will find appropriate ways of policing private standards systems and incorporating them into the law. This will happen, he says, because it must happen. But how much progress has actually been made toward this end?

III. PLURAL LAW MAKERS, PLURAL PRINCIPLES

For many readers of this book, it will be a truism that law emanates from multiple sources, some of them outside the state.[6] If we take this proposition seriously, how authoritative and conclusive can we expect state courts' treatment of law produced by other law makers to be? After all, state courts will have a difficult time acting as absolute arbiters while simultaneously acting as competing law makers. Nearly two centuries ago, the US Supreme Court Chief Justice, John Marshall, addressed a version of this question in deciding among two competing claims to land, one deriving from tribal authority and the other from federal authority. In affirming the federal claim over the tribal one, Marshall observed that

> [c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim.[7]

However, that was not the end of the matter, and Marshall knew it would not be. The validity of Indian claims could not be authoritatively disposed of by the Supreme Court in one fell swoop. The authoritative principles of

[5] Above n.1, text following n.25.
[6] For example, HLA Hart, *The Concept of Law*, 2nd edn (Oxford, Oxford University Press, 1994); B de S Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York, Routledge, 1995).
[7] *Johnson v M'Intosh*, 21 US 543, 588 (1823).

property law, thus, could not be exclusively and conclusively authored by the US courts, even the highest one, when competing plausible sources of property law were present.

Analogous limitations apply to the court decisions reviewed by Schepel. While the state-based legal system which they represent is easily the most powerful one in most situations, its capacities are nonetheless limited. The limits are not merely ones of coercion, but also of analytical capacity and legitimate authority. Since no single law-maker can supply or enforce all of the law that Schepel asserts is called for by the expanding global economic system, the various law-makers are, in effect, dependent on each other to achieve effective legal governance. The question is, how are their relationships with each other co-ordinated? One possibility, of course, is that there is very little co-ordination among competing legal systems. And, clearly, there are overlaps and confusion among them. But if the confusion becomes too great, as Schepel's functionalist criteria indicate, essential ordering functions will not be fulfilled.

As noted above, while Schepel focuses primarily on the doctrinal disorder of the court decisions that he reviews, one can also see an intriguing degree of order in them. How one views the materials depends on one's analytical perspective, of course. By working primarily within the conventional analytical framework of the legal professoriate, Schepel is in effect applying a particular aspirational standard — logical coherence of rule systems. This standard is aspirational for two reasons. First, it reflects the preferred work of law professors — systematising rule systems — which is normally done on relatively developed legal systems. Even there, it has the great advantage of never being finished! Second, the plausibility of such work is ordinarily premised on the existence of a single legal system. Where the system analysed is actually one of several, and must treat the others in both conceptual and strategic ways, it is probably unrealistic to expect comprehensive logical consistency.

Multiple legal systems could conceivably be co-ordinated in various ways. An obvious possibility is through division of jurisdiction, perhaps according to subject matter. While a few areas do seem to follow this pattern, most seem to contain multiple rule-making and adjudication systems. However, the overall situation is not chaotic, but relatively orderly. Rules are made, actors proceed, and their actions are effectively co-ordinated — all with surprisingly few claims of regulatory confusion. If the explanation for this situation is neither the existence of a master logic in the state legal system, nor an effective division of labour, what is it?

A plausible hypothesis can be derived from an alternative reading of Schepel's paper. In this reading, although the courts have not produced a logically unified system of rules for non-governmental law-making systems, they have, in dealing with them, articulated and applied a limited number of principles which effectively structure the field. At the

simplest level, three basic principles organise the decisions described in Schepel's paper: (1) expertise, (2) deliberation, and (3) market promotion.[8] The principle of expertise requires that rule-makers speak with credible empirical knowledge of the field for which a rule is being made. If they cannot do so, no amount of procedure will protect or validate the rules that they produce. The principle of deliberation requires that rule-makers follow procedures which demonstrate careful consideration of all the relevant issues and viewpoints, and explain their decisions with regard to them. In the absence of such a procedure, no amount of expertise will protect or validate the resultant rules. Finally, the principle of market promotion requires rules to be structured so as to promote markets to the greatest degree consistent with the legitimate aims of social and environmental protection. Clearly, the relationship between market promotion and social and environmental protection is contested, and will vary with a number of circumstances. Equally clearly, the set of principles described here may be seen as consistent with 'neo-liberal' policy prescriptions. The point of the description, however, is not to promote neo-liberal policies, but, instead, to reflect how entrenched they appear to be in US law and possibly in the larger law-making arena.

The principles of expertise, deliberation, and market promotion are obviously neither identical nor mutually entailed, and cannot be reduced to a single master principle, much less a rule. They operate cumulatively, each having the capacity to invalidate non-governmental rules. And they seem to be effectuated largely in the negative. Rules which egregiously violate any of them are highly vulnerable, and are likely to be set aside, by either the courts or other authorities. Their affirmative requirements remain somewhat open and contested, and are subject to continual definition and revision in adjudication and other law-making processes, as outlined in the deliberation section below. Finally, despite dealing with largely separable concerns, the principles can, in some cases, conflict with each other, thus creating the kinds of uncertainty noted by Schepel. However, although these conflicts do arise, they do not appear to be a central feature of the system.

The reading proposed here can be extended into a larger model in which the principles, perhaps together with others,[9] effectively regulate

[8] It could be argued that this account leaves out the role of tort law with regard to standard-setting. This is not the case, however. The main role of tort law has been to serve as a conduit for private standards into the corpus of court administered law. It does so primarily by making non-governmental standards that meet the three criteria described above mandatory for actors in the fields to which they apply. While the possibility that non-governmental standard-setting organisations might be liable in tort will obviously affect their activities in some cases, it does not serve as an organising governance principle in the field.

[9] A number of more abstract principles may be operating as well, such as liberty, equality, democracy, and perhaps most pressingly, fairness. These do not emerge directly from Schepel's analysis, however, and remain relatively diffuse and indeterminate at global level.

plural law-making bodies so as to make their workings sufficiently compatible to achieve functional governance. If there are a multitude of 'global villages' as Teubner suggests,[10] they are likely to contain multiple law-making institutions, all of which are subject to a general set of global principles, while, at the same time, trying to clarify and modify them. Thus, 'the law' is simultaneously seen as *making rules* and as *being made by them*. This reading is consistent with a number of broader theoretical perspectives, such as regime theory,[11] discourse theory,[12] and legal systems theory,[13] but the materials discussed in Schepel do not necessarily point toward one theory as opposed to the others.

The perspective outlined here may, of course, be seen as naïve. Anyone who suggests that law is ordered by principles which are both immanent in and controlling of the law-making process has a considerable burden of persuasion to carry, a burden which cannot be met in this short piece. However, the next few sections pose several questions which are helpful to clarifying this perspective.

IV. DELIBERATION

Some of the most striking parts of Schepel's paper discuss the nature of deliberation in standard setting bodies. Early on, he notes that

> standardisation procedures have developed into a remarkably consistent set of truly global principles of 'private administrative law'.[14]

The key requirements are the publication of drafts, the consideration of external comments, and the making of decisions based on consensus. This model is increasingly being adopted in government processes as well. Thus, a global discussion of the proper way to develop rules is underway. This discussion sweeps across public and private *fora*, seemingly bringing them together in an expanded discursive space. As this paper is completed, for example, a global NGO-based group called the International Social and Environmental Labelling Alliance (ISEAL) is conducting a public discussion on 'good practices' for global standard-setting open to everyone around the world.[15] It draws upon and seeks to accommodate

[10] G Teubner, 'Societal Constitutionalism,' this volume.
[11] For example, SD Krasner (ed), *International Regimes* (Ithaca, Cornell University Press, 1983).
[12] For example, J Habermas, *Between Facts and Norms* (Cambridge, Mass, MIT Press, 1996).
[13] For example, N Luhmann, *A Sociological Theory of Law* (London and Boston, Routledge and Kegan Paul, 1985); Teubner, above n.10.
[14] See above n.1, text preceding n.22.
[15] ISEAL Alliance, 'Code of Good Practice for Voluntary Standard-Setting Procedures,' *http://www.isealalliance.org/programs/index.htm*

standards developed by the World Trade Organisation (WTO),[16] the International Organisation for Standardisation (ISO),[17] and other authorities in a strategic manner. While its potential influence on the larger standard-setting discussion is impossible to gauge prospectively, it cannot simply be written off as irrelevant, as would have happened only a few years ago. ISEAL has an agenda, which is to strengthen the role of environmental and social justice interests in global standard-setting. What is more interesting is that ISEAL and its members find it worthwhile to devote their scarce resources to engaging in the global dialogue over standard-setting.

The meanings within the dialogue of some deliberative criteria, such as 'consensus', have evidently been stabilised at a global level.[18] The big issues now have to do with what kinds of 'stakeholders' must be included in the standard-setting process, what kind of 'balance' is necessary, and to what degree any given standard-setting process must consider the products of other processes. If these discussions progress, it becomes increasingly plausible that a global public law is emerging — a public law that can be reduced neither to conventional state-based public law nor to private law.

V. PRIVATE AND PUBLIC

As the amount of standard-setting carried out in 'private' relative to governmental *fora* has grown, so, naturally, has the public interest in the standard-setting activities of the nominally private bodies. While there has been much discussion of whether they should therefore be subjected to the full panoply of traditional public law requirements, this discussion is partly beside the point. The argument outlined above suggests that, by developing standards which they claim further public goals, non-governmental bodies inevitably subject themselves to expanded legal requirements, regardless of whether they are fully equated to government bodies. Rather than a simple dichotomy, therefore, it may be useful to think in terms of either a public-private continuum, or, at least, an intermediate category. Even here, the expanding deliberative process requirements described above may be changing the nature of private

[16] The WTO provisions on recognised standards for products or processes and production methods are an example. WTO, TBT Agreement, Annex 3.
[17] The ISO's definition of consensus is widely accepted as a given. 'General agreement, characterised by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments. NOTE — Consensus need not imply unanimity.' ISO/IEC Guide 2:1991.
[18] *Ibid*.

standard-setting bodies. They have already largely accepted a duty to subject their proposed standards to broad public comment. Now, the private standard-setting arena has been entered by NGO-promoted standard-setting organisations which formally incorporate multiple interests in self-consciously representative decision structures.[19] These, in turn, seem to be forcing trade association-based standard-setting organisations to expand their participation provisions. Indeed, the very idea of setting publicly-oriented standards without broad stakeholder participation is now under challenge. In summary, the nature of 'private' standard-setting has changed considerably in the past decade. And while it has become more 'public,' it also seems to be changing the definition of what it means to be public. This change cannot be understood simply by extending traditional public law concepts to new organisations. Instead, it will require incorporating their innovations into our understanding of public law.

VI. CONSTITUTIONALISM

Assessing the implications of transnational non-governmental standard-setting processes for constitutionalism requires a concept of constitutionalism. This is not a simple matter, since the concept has shifted over time, and seems to vary with the concerns of the commentator.[20] In recent times, it has become most closely identified with the nation state, and particularly with limiting its powers.[21] In this mode, constitutionalism has little to say about non-governmental standard-setting. However, this seems potentially perverse, since one of the underlying purposes of constitutionalism is to define the appropriate institutional arrangements for the exercise of public power, especially for the exercise of law-making power. If we reason that, under most constitutions, only states can make

[19] The leading example is the Forest Stewardship Council, which seeks to promote environmentally responsible, socially beneficial and economically viable management of the world's forests. The FSC is governed by a 'general assembly' consisting of economic, environmental, and social chambers, each of which is divided into equally powerful 'northern' and 'southern' chambers. For an overview, see E Meidinger, Law Journal ''Private' Environmental Regulation, Human Rights, and Community,' 7 *Buffalo Environmental Law Journal* 123 (1999). See also *http://www.fscoax.org/principal.htm*.

[20] These have included, among many other things, (1) social ordering (co-ordination, stabilisation, adaptation, and learning) (eg, A Giddens, *The Constitution of Society*, (Berkeley, University of California Press, 1984); (2) social protection (fundamental rights, freedom, difference, communication) (Sajó, *below* n.21; Teubner, above n.10); (3) legitimation (eg J Rawls, *A Theory of Justice* (Cambridge, Mass, Harvard University Press, 1971); J Habermas, above n.12); and (4) authoritative decisions (conclusive dispute settlement, structuring of authority) (eg HLA Hart, above n.6).

[21] For example, A Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest, Central European University Press, 1999).

law, and that no standards or rules are law until they are adopted by a state, the issue of constitutionalism can be side-stepped.

Limiting constitutionalism to the activities of states is an option, but it may not be a particularly palatable one. It will not be palatable if we believe that the world we live in is being fundamentally reshaped by standard-setting and other governance institutions operating outside the ambit of the state. The reason goes to the heart of constitutionalism: to 'constitute' something is to make it what it is, to give it its essential form.[22] Constitutions made in revolutionary moments quite clearly have this character. They can give a human group its essential structure for a long time to come. They then can also define a 'higher' kind of law-making, often governing regular law-making, which retains constitutional stature.[23] But, given the absence of a revolutionary moment in the case of non-governmental standard-setting, are there any persuasive grounds for viewing these processes in constitutional terms? Only if they are, in fact, remaking who we are, only if they are fundamentally restructuring public authority. Here we face a quandary that can only be resolved by time. At present, a plausible case can be made on either side of the question. Two issues counsel for engaging in constitutional discussion, however. First, transnational non-governmental standard-setting is likely to be a critical testing ground for whether non-coercive forms of global social authority can be sustained. Second, it may be one of the key *fora* in which we learn whether a new global 'we' is being created.

VII. THE SOCIAL POSITION OF THE LEGAL SCHOLAR

For the first time in centuries, scholars of law are broadly confronted with questions about their relationship to public authority. The rise of non-governmental standard-setting places the long standing affiliation of legal scholars with state based legal systems in sharp relief.[24] True, legal scholars have often taken critical positions with regard to state law, but the criticism has generally been 'in-house', focusing on inconsistencies, anomalies, or social malfunctions of state-based law. Only in rare situations has the professoriate challenged the state monopoly over law-making.

[22] See, for example, the definitions in the Oxford English Dictionary (compact edition), particularly 'To set up, establish, found (an institution, etc.)'; 'To make (a thing) what it is; to give its being to, form determine.' (Volume 1 at 529, 1971).

[23] For example, B Ackerman, 'The Storrs Lectures: Discovering the Constitution,' 93 *Yale Law Journal* at 1013 (1984).

[24] Strikingly, little scholarship exists on this subject. For an exemplary study of the relationship between the legal profession and the state, see L Karpik, *French Lawyers: A Study in Collective Action: 1274 to 1994*, (Oxford, Clarendon Press, 1999).

The rise of non-governmental and transnational standard-setting has the potential to unsettle this relationship. And, over time, how we look at these processes will tell us much about ourselves. On the one hand, legal scholars' relationship to state legal systems is comfortable, well worked out, and well rationalised. On the other, transnational standard-setting processes are increasingly important forms of social ordering, and legal professionals are notoriously responsive to shifts in authority. Moreover, we have the tools to contribute to the process. Yet, how we analyse it will also have implications for who we are. And nothing in the near future is likely to be more telling about legal scholars than how we assess the constitutional implications of transnational, non-governmental standard-setting. For, in doing so, we will have to work out anew what we believe makes us, and what should make us, who we are.

11

Transnational Governance Regimes for Foods Derived from Bio-Technology and their Legitimacy

ALEXIA HERWIG
NEW YORK/BRUXELLES

RISK-TAKING IN OUR day-to-day activities is widespread and the role of governments in regulating these risks commensurately large. Many of the risks and processes by which they are regulated do not attract much public attention, but the regulation of food-borne risks of genetically-modified foodstuffs has attracted considerable scrutiny. Public interest in the processes for the regulation of food-borne risk may be explicable by the fact that the technology is novel and that any risks, while potentially affecting livelihoods, are not easily detectable. Accordingly, a claim can be made that the general public ought to be involved in the regulatory processes in order for them to be legitimate. Because of the lack of expertise of the general public, however, an argument can also be made in favour of overriding public opinion in favour of paternalist regulation. Precisely because the asymmetries of knowledge between laypersons and experts justify the regulation of these risks in the first place, the process of risk regulation cannot be usurped in *toto* by processes of public governance. In this connection, two further problems present themselves: whether non-rational choices such as the rejection of an evidently safe substance should be permitted, and whether science can be trusted as being objective, value and interest-free.

The problem of risk regulation of GMOs at transnational level is compounded by several factors, including the existence of strong preferences which are divergent along national lines. This leads to the difficult situation that the attainment of the goal of free trade is premised on eroding national preferences and market boundaries, while the outcomes of national democratic choices and different ways of life ought still to be respected. Trade in GM products also has effects on wealth because GMOs may replace traditional forms of agriculture in industrialised and developing countries. Bio-technology has the potential to bring significant

benefits to developing countries, for instance, through the development of drought-resistant crops. Yet, most of the GM seeds are sterile and thus have to be re-bought annually making agriculture dependent on biotechnology companies. Because GM and non-GM foods are so indistinguishable, stringent regulations affect not only the biotechnology sector but also traditional food production. They may thus close off market access to all kinds of food exports, the effect of which is gravest when it concerns exports from developing countries. Hence, the transnational regulation of GM foodstuffs invariably has redistributive consequences. At the same time, where to draw the line between unjustified levels of regulation and acceptable levels of caution and proportionate collateral effects is less than certain given the novelty of bio-technology and the manifold possibilities for combining genes.

In recognising the *Codex Alimentarius* Commission, as the relevant standard-setting organisation in the area of food safety, the Agreement on the Application of Sanitary and Phytosanitary (SPS Agreement)[1] has embraced a form of soft positive harmonisation, in that such standards, guidelines and recommendations are used as benchmarks against which to assess whether national SPS regulations are WTO-consistent. While WTO members retain the 'autonomous right' to set higher appropriate levels of protection than the relevant standard,[2] a risk assessment that reasonably supports and sufficiently warrants the measure[3] is need in order to justify departure from the standard.

In so far as the *Codex Alimentarius* Commission is charged with the task of scientific evaluation of risk, risk management and, in the end, formulating a standard, that is, with determining an internationally acceptable level of risk, risk regulation has become integrated into the process of governance under the auspices of the World Trade Organisation.[4] The basic problem can be formulated thus: how can risk regulation control national parochial and protectionist interests, and ensure an adequate

[1] Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter SPS Agreement) available at <*http://www.wto.org/english/docs_e/legal_e/legal_e.htm*>, Annex A3(a).
[2] Appellate Body Report, *EC — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, para 104. See, also, para 165 which reads: 'To read Article 3.1 as requiring Members to harmonise their SPS measures *by conforming those measures with international standards,* guidelines and recommendations, *in the here and now,* is in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex *recommendatory* in form and nature) with *obligatory* force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding *norms.* But, as already noted, the *SPS Agreement* itself sets out no indication of any intent on the part of the Members to do so.'
[3] Appellate Body Report, *EC — Hormones,* para. 193.
[4] For a contrary view, see D Victor, 'The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years' in 32 *New York University Journal of International Law and Policy 865* [arguing that the Codex standards can be derogated from easily and that it is accordingly wrong to characterise the Codex Alimentarius Commission as a regulatory agency].

level of safety while it is sufficiently connected, in substance, to what the public considers an acceptable level of risk, a fair distributive outcome consistent with their considered collective preferences and while it is sufficiently connected to processes of participation so that this form of governance meets with our notion of legitimacy.

Several commentators have espoused theories of deliberation which allow for the above-described legitimate governance and have found such elements in the European comitology procedure, free market regulation,[5] and the SPS Agreement.[6] Against the backdrop of normative and ethical pluralism, theories of deliberation seek to uncover processes whereby governance can be legitimised and remain optimistic about the discovery of shared norms which transcend particularised values and interests. According to Habermas,

> [t]he deliberative mode of legislative practice is not just intended to ensure the ethical validity of laws. Rather, one can understand the complex validity claims of legal norms as the claim, on the one hand, to take into consideration strategically asserted particular interests in a manner compatible with the common good and, on the other hand, to bring universalistic principles of justice onto the horizon of a specific form of life stamped by particular value constellations.[7]

Given the diversity of interests, values and normative understandings at the level of transnational governance and its transformation from a state-based system to one in which private actors increasingly participate, deliberation offers a theoretical framework whereby the transition from nation-state governance to transnational or supranational governance need not necessarily entail a loss of legitimacy.

Discourses about the legitimisation of transnational governance through deliberation embody implicit assumptions about the form of deliberation, participation and the appropriate level at which governance should take place. One of the commentators who detects elements of deliberation in the SPS Agreement in fact premises such a finding in the 'downgrading' of the *Codex Alimentarius* Commission to an information agency, and the Appellate Body to an administrative court, ensuring certain procedural guarantees while locating the deliberative 'to and fro'

[5]Ch Joerges, 'Good Governance- Through Comitology' in Joerges and Vos (eds) *EU Committees: Social Regulation, Law and Politics* (Oxford, Hart Publishing, 1999) 109; J Neyer, 'The Comitology Challenge to Analytical Integration Theory' in C Joerges and E Vos (eds) 219; M Everson, 'The Constitutionalisation of European Administrative Law: Legal Oversight of a Stateless Internal Market' in Joerges and Vos (eds) 281.

[6]R Howse, 'Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization' in 98 *Michigan Law Review* at 2329.

[7]J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA, MIT Press, 1996) 344.

discourses in the Member States.[8] On the premise that reasonable people can reasonably disagree, this commentator and others resist centralising tendencies as overly deterministic and, thus, irrational.[9] Such views coincide with horizontal governance at a low level and broad-based popular participation in discursive practices.[10] By extension, these commentators view the relationship between the WTO, states and their deliberative publics as necessarily vertical. In other words, transnational governance is neither capable of being legitimised through a horizontal outreach to deliberative publics nor is there much of a prospect of developing shared understandings at transnational level. It is not clear, however, why only nation-state governance should be capable of the transformation from a vertical relationship of dominance to a horizontal one of inclusion and deliberative legitimacy, nor can one assume that national deliberative publics, even if informed by science, are thus enabled to address and deliberate on global problems arising from the production of extra-territorial effects of nation-state regulations if the process of joint deliberation is essential to reaching a rational outcome.

Other commentators are more optimistic about the possibility of mutual learning and perspective-taking, the reshaping of preferences and the ability of particular discussants to orient themselves towards a common global good.[11] On these accounts, scientific evidence is conceived of as an input, but not an all-decisive factor, in risk regulation that fosters more rational outcomes and can help unveil national regulations that are really protectionist while still leaving room for normative, ethical and distributive discourses that form part and parcel of risk regulation. These commentators are less troubled by some vertical form of governance beyond the nation-state,[12] for instance, through the European comitology procedure, which brings together representatives of states and scientists in a forum in which risk regulation is multi-lateralised. Because participants are required to advance arguments which are acceptable to their counterparts from the other EC Member States, the final considered conclusion could also meet, if only hypothetically, with the agreement of discursive publics. According to one commentator,

[8] R Howse n.6; and R Howse and PC Mavroidis, 'Europe's Evolving Regulatory Strategy for GMOs — The Issue of Consistency with WTO Law: Of Kine and Brine,' in: 24 *Fordham International Law Journal* at 317; Ch Schmid, 'A Theoretical Reconstruction of WTO Constitutionalism and its Implications for the Relationship with the EU' EUI Working Paper LAW 2001/5.

[9] CF Sabel, 'Diversity, Not Specialization: The Ties that Bind the (New) Industrial District' Paper presented to Conference Complexity and Industrial Clusters: Dynamics of the Models in Theory and Practice, 19–20 June 2001.

[10] As argued by A-M Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' Working Paper No. 018 Harvard Law School Public Law.

[11] See n.5.

[12] As pointed out by AM Slaughter, n.10.

> by virtue of its feedback links to Member States, comitology can, in principle, take all social concerns and interests into account while, at the same time, links with science (seen as a social body) can be shaped so as to allow for the plurality of scientific knowledge to be brought to bear.[13]

It is not clear whether this statement is to be understood as making reference to an implicit concept of representation. If this is not the case and only the actual practice of joint deliberation can bring about the meeting of minds and legitimacy of the final outcome, it is not clear how the non-participating public could agree with the outcome of governance through comitology unless such consensus operates at a fairly general and abstract level. If there is, nevertheless, a deep agreement with these transnational or supranational policies, it is not clear why the actual practice of deliberation is indispensable, and, indeed, why governance beyond the nation-state in the form of risk regulation is necessary in the first place.

In grounding legitimacy in the normative discourses of independent public spheres, theories of deliberation advance a notion of procedural legitimacy less dependent on representative government and nation states that meets the demands that the collectivised autonomy of citizens should also, somehow, be of relevance at the level of transnational governance. As I have argued above, such theories still — no doubt rightly — adopt nation states as their frame of reference, but accordingly give rise to inconsistencies when they are applied at European or transnational level. In order to realise the strong concept of participation that horizontal theories require, transnational governance would have to be augmented to address most issues that are commonly debated in nation-states. Such extensive transnational governance probably is not desirable, and would be difficult to reconcile with normative pluralism and the requirement for broad-based popular deliberation. The vertical theories of deliberation, in my view, fail to elaborate why their thin concept of participation is sufficient for governance beyond the nation-state to be legitimised without having to have recourse to a theory of representation or without departing from a thin consensus at nation-state level in the first place.

I submit that an appropriate theory of the legitimacy of transnational governance would take the notion of horizontal assent seriously.[14] While being able to accommodate pluralism and recognising that the centripetal drift of ever more policies into a 'world constitution' is not desirable, such a theory would also provide a mechanism for addressing such other

[13] C Joerges, n.5 at 335.

[14] In so arguing, I position myself in the line of thought developed inter alia in O Gerstenberg, 'Expanding the Constitution Beyond the Court: The Case of Euro-constitutionalism' [developing a horizontal notion of legitimisation through deliberation]; CF Sabel, n.9: GR Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization' in 44 *Duke Law Journal* at 829; *contra,* see GC Shaffer, 'The World Trade

policies and concerns as form part and parcel of risk regulation. Essentially, this view advocates the flexible migration of governance to different levels, and requires international organisations to be transparent and discursively open.

In taking up the claims of deliberative theories and applying them to the regulation of foodstuffs through the *Codex Alimentarius* Commission, I will try to show certain inconsistencies of deliberative theories and raise some empirical doubts as to the deliberative elements of international foodstuff regulation. My theoretical reflections focus on the unresolved tension between procedural legitimacy and both the rationality of outcomes and the number of discussants, the priority of rules of discourse over substantive norms, and the contextualisation of science. I will initially provide a brief introduction to the *Codex Alimentarius* Commission, before making certain empirical observations as to the deliberative nature of governance through the symbiosis of the SPS Agreement and the *Codex* Commission and will, lastly, engage in a theoretical evaluation of theories of deliberative democracy.

I. THE CODEX ALIMENTARIUS COMMISSION

The *Codex Alimentarius* Commission was created under the joint auspices of the Food and Agriculture Organisation (FAO) and the World Health Organisation (WHO).[15] Its legal basis is a joint resolution by the two parent organisations. It is the implementer of the Joint Food Standards Programme whose objective is to protect the health of the consumers and to ensure fair practices in the food trade, to determine priorities for global or regional standards, and to finalise and amend such standards as appropriate.[16] These food standards aim to protect consumers' health and to ensure fair practices in the food trade[17] and to ensure for the consumer sound, wholesome food which is free from adulteration, and correctly labelled and presented.[18] The *Codex Alimentarius* Commission is an inter-governmental body whose members are national delegations.[19] In the US, delegations comprise officials from the Food and Drug Administration,

Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters' in 25 *Harvard Environmental Law Review* at 1.

[15] GG Sander, 'Gesundheitsschutz in der WTO — eine neue Bedeutung der Codex Alimentarius Commission im Lebensmittelrecht?' in 3 *ZeuS* at 335 & 338.
[16] Statutes of the Codex Alimentarius Commission in the Procedural Manual of the Codex Alimentarius Commission, 11th edition [herinafter Procedural Manual], available at <*http://www.codexalimentarius.net*>, Article 1.
[17] General Principles of the Codex Alimentarius Commission in Procedural Manual, para.1.
[18] General Principles of the Codex Alimentarius Commission, para.3.
[19] See n.15.

the US Department of Agriculture, the Environmental Protection Agency and the Department of Commerce.[20] The governmental delegates may decide whether or not to include members from labour groups, academia, business firms, public interest groups or the public at large in their delegations.[21] The Commission, meeting bi-annually, is the final decision-making body. It decides on all standards as well as all changes to procedures and the work programme of the Commission, and usually operates on a consensus basis although decision-taking by simple majority is possible.[22] Proposals for standards may come from any national government, the specialised committees or a decision by the *Codex* Commission itself. [23]

The specialised *Codex* Committees work on the same procedure as the *Codex* Commission, including the emphasis on consensual decision-making with a possibility of majority-voting.[24] The Commission has established commodities or vertical committees that elaborate product-specific standards and horizontal committees setting standards for inter alia food additives, labelling and pesticide residues.[25] In order to investigate specific issues, the *Codex* has also established task forces, including the Intergovernmental Task Force on Foods Derived From Bio-technology.[26]

Drafting of the standard occurs usually in co-operation with the government proposing the standard. The specialised committees are staffed with government experts in the field and representatives from industry, as well as some consumer organisations.[27] They carry out the task of risk management, whereas the scientific assessment of food additives and pesticide residues is carried out by the Joint Expert Committee on Food Additives (JECFA), the Joint Meetings on Pesticide Residues (JMPR), and the Joint Meeting on Microbiological Risk Assessment, all of which are operate under the auspices of the FAO and WHO. The members of JECFA and JMPR are independent scientists who are selected by the parent organisations without input from national governments.[28] Information is

[20] Department of Agriculture Notice No. 95–054N, on file with the author.
[21] *Ibid*.
[22] See n.16
[23] Uniform Procedure for the Elaboration of Codex Standards and Related Texts in Procedural Manual, Step 1.
[24] Rules of Procedure of the Codex Alimentarius Commission, Rule IX(11).
[25] See n.15 at 340.
[26] *Ibid*.
[27] See n.15 at 340–5.
[28] Rules of Procedure of the Codex Alimentarius Commission in Procedural Manual, Rule IV, and Constitution of the Food and Agriculture Organization, Article VI '…The individuals appointed in their personal capacity shall, as regards the Organization, be designated either by the Conference, the Council, selected Member Nations or Associate Members, or by the Director-General, as decided by the Conference or Council.' The FAO is responsible for selecting members to deal with the development of specifications for the identity and purity of food additives and the assessment of residue levels of veterinary drugs in food. The WHO selects members to deal with the toxicological evaluations of the substances. See 'Fact Sheet — What is JECFA?' available at <*http://www.fao.org/es/ESN/jecfa/files/what-e.pdf*>

often submitted by the industry under review, but experts are expected to conduct their own review.[29] Decisions are made by consensus with a possibility of including minority reports.[30]

Elaboration of standards in the *Codex* takes place according to an eight-step procedure with a possibility of a fast-track procedure.[31] Once a committee has elaborated a draft standard, the standard is sent out to governments for comments.[32] Comments and proposed amendments are then reviewed by a specialised Committee that will amend the draft as necessary.[33] The draft standard is then submitted to the Commission for approval as a draft standard with

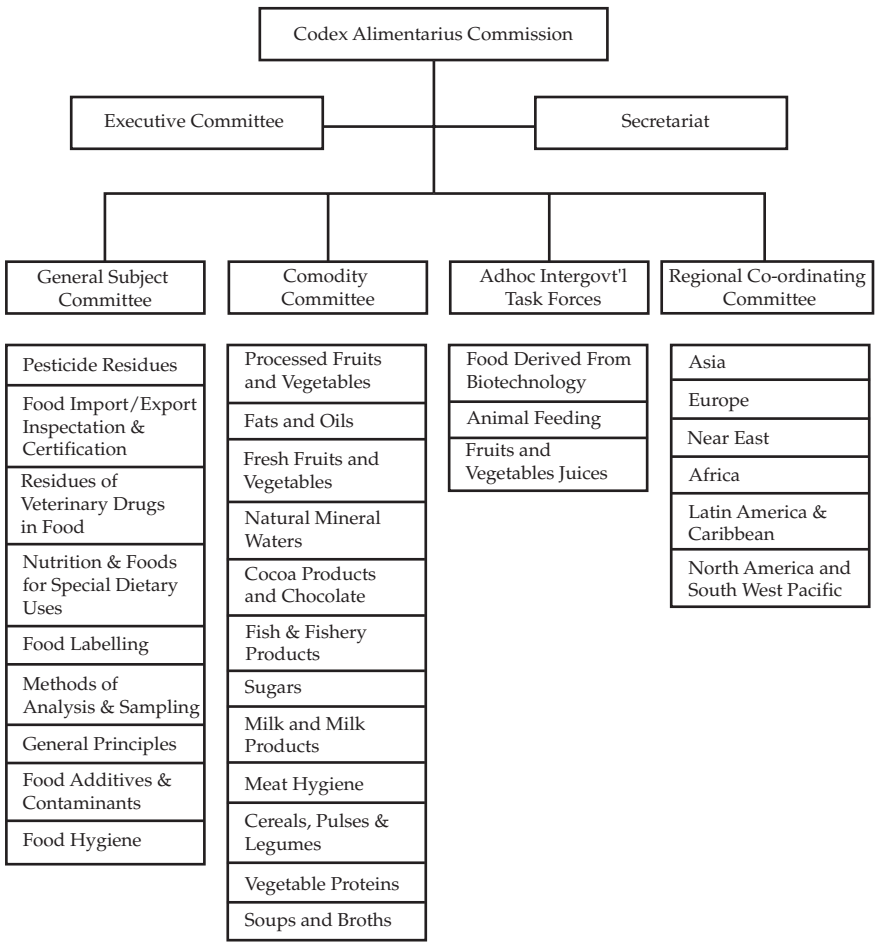
> 'due consideration [given] to any comments that may be submitted by any of its Members regarding the implication which the proposed draft standard or any provision thereof may have for their economic interests.'[34]

After a second round of comments with the possibility of further amendment, the draft is submitted to the Commission to be adopted as a *Codex* standard.[35] Even if a standard has been adopted as a *Codex* standard, a Member State remains free to decide on the acceptance of a standard. There a three modalities of acceptance: full acceptance, target acceptance,[36] and acceptance with specified deviations.[37] The modalities of acceptance entail essentially similar duties for the various types of standards developed by the *Codex*.[38] Members have the obligation to allow the free distribution of all conforming products and to prevent the distribution of non-conforming products.[39] No other regulations pertaining to consumer health and food standards are to hinder the distribution of conforming

[29] JECFA Fact Sheet, at 2.
[30] JECFA Fact Sheet, at 3.
[31] See n.23.
[32] *Ibid*.
[33] *Ibid*.
[34] *Ibid*. The Guide to the Consideration of Standards at Step 8 of the Procedure for the Elaboration of Codex Standards Including Consideration of any Statement Relating to Economic Impact provides: 'In considering statements concerning economic implications the Commission should have due regard to the purposes of the Codex Alimentarius concerning the protection of the health of the consumers and the ensuring of fair practices in the food trade, as set forth in the General Principles of the Codex Alimentarius, as well as the economic interests of the Members concerned.'
[35] Uniform Procedure for the Elaboration of Codex Standards n.23, Step 8.
[36] General Principles of the Codex Alimentarius Commission, para. 4 A (ii).
[37] *Ibid*.
[38] General Principles n.36, paras. 5A(i); 6A(i)(ii); 8; Guidelines for the Acceptance Procedure for Codex Standards in Procedural Manual, para. 7 and paras. 11, 13. [The acceptance procedure for Codex general standards entails the same obligations for members except that, under full acceptance, a member is to ensure that a product to which the general standard applies will comply with all the requirements of that standard. For maximum limits for residues of pesticides and veterinary drugs in food, a member can accept this standard for home and imported products alike or only for imported products].
[39] General Principles n.36, paras 4 A (i) a, b.

products except for regulations concerning human, plant or animal health which are not specifically dealt with in the standard.[40] Any member that accepts a *Codex* standard in one of the above ways also commits to the uniform and impartial application of the provisions of the standard to home-produced and imported products alike.[41] A country which considers that it cannot accept the standard should indicate whether conforming products are allowed to be distributed freely, and in what ways its present or proposed requirements differ from the standard, and, if possible, give reasons for this difference.[42]

The structure of the *Codex Alimentarius* Commission is depicted in the following diagram:



[40] General Principles n.36, para 4 A (i) c.
[41] General Principles n.36, para 4 C (i).
[42] General Principles n.36, paras. 4 B (i), (ii).

The *Codex Alimentarius* Commission has embarked on the task of defining guidelines for the scientific assessment of foods derived from bio-technology, due to be adopted at the general session of the *Codex Alimentarius* Commission in the summer of 2003.[43] These guidelines include 'Principles for the Risk Analysis of Foods Derived from Modern Biotechnology'[44] and guidelines for the conduct of food safety assessment of foods derived from recombinant-DNA plants and micro-organisms.[45] There are currently few product specific standards.[46] The principles for risk analysis envisage that foods derived from bio-technology be tested for substantial equivalence, which compares GM foods with conventional foods with a history of safe use with a view to identifying new or altered hazards, nutritional or safety concerns.[47] Only if substantial equivalence testing provides grounds for concern that GM foods may present novel or increased hazards is a full-fledged risk assessment carried out.[48] Risk management is to be based on the outcome of the risk analysis and should be proportional. The draft principles also require consistency in the management of risk for GM foods with that of similar foods already on the market.[49] It is recognised that measures should also be taken to manage any uncertainties.

In addition, the Commission also considers guidelines for the conduct of food safety assessment of recombinant DNA micro-organisms in food. An amendment to the Annex on the guidelines for allergenicity testing provides further guidelines on how testing should be carried out with respect to foods derived from bio-technology. Moreover, there is a proposals to harmonise detection methods for the presence of rDNA in food and to develop guidelines for the safety assessment of foods derived from rDNA animals. It is also possible that the Commission could start to work on traceability.

An amendment to the General Standard for the Labelling of Prepackaged Foods requires all foods or ingredients obtained through bio-technology in which an allergen is present to be labelled.[50] There is another controversial draft amendment to label all products obtained through bio-technology when they differ significantly from the corresponding food as regards composition, nutritional value or intended use.[51] Alternatively, the second option under this draft amendment

[43] Report of the Third Session of the Codex Ad Hoc Intergovernmental Task Force on Foods Derived from Bio-technology ALINORM 03/34 [includes draft guidelines].
[44] *Ibid*.
[45] See above n.43.
[46] There are standards for GM derived enzymes.
[47] Proposed Draft Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants, Sec 1.5.
[48] *Ibid*.
[49] General Standard for the Labelling of Pre-packaged Foods CODEX STAN1, as amended, available at *<http://www.codexalimentarius.net/standards_search.asp>*.
[50] *Ibid*.
[51] Proposed Draft Amendment Concerning the Labelling of Foods Obtained Through Biotechnology CX/FL 00/6.

requires all foods and ingredients containing GMOs to be labelled, including all foods and ingredients made from GMOs in which DNA and protein is detectable, or if they differ significantly from the corresponding food.[52] For the last four years, the Commission has been unable to reach consensus on the proposals to label foods derived from bio-technology.[53]

II. DO THE SPS AGREEMENT AND THE CODEX ALIMENTARIUS COMMISSION FOSTER DELIBERATION?

How risk regulation can be legitimised and most notably what the appropriate relationship between science and the normative, ethical, distributive aspects of both risk and popular idiosyncratic choices should be, has occupied several commentators in national contexts. The controversy is whether the regulation of risk should be made more rational, effective, efficient and, in this way, transparent,[54] or whether it should be more responsive to popular understandings of risk, and evaluations of costs and benefits.[55] International risk regulation is thus often criticised as usurping democratic choices through undue reliance on science, and without itself being legitimate.[56] An interpretation of the SPS Agreement and the *EC — Hormones* decision as striking a balance between these conflicting demands placed on risk regulation and enhancing the quality of rational democratic deliberation about risk has been advanced on the grounds that the scientific evidence, the accurate information about risk, costs and benefits which the SPS Agreement calls for, may enhance the democratic control of risk.[57] At the same time, science makes national processes of regulation transparent and removes the possibilities of disguised protectionism.[58] According to this proffered interpretation of the SPS Agreement and relevant jurisprudence, any judgment that has duly considered the scientific evidence but still deviates its conclusions should, nevertheless, be considered consistent with the WTO Agreements.[59]

[52] *Ibid*.
[53] Report of the Evaluation of the Codex Alinentarius Commission and Other FAO and WHO Food Standards Work available at: <*http://www.codexalimentarius.net*> , at 28.
[54] S Breyer, *Breaking the Vicious Cycle: Toward Effective Risk Regulation* (Cambridge MA, Harvard University Press, 1993).
[55] CR Sunstein, *Free Markets and Social Justice* (New York, Oxford University Press, 1997).
[56] VR Walker, 'Keeping the WTO from Becoming the 'World Trans-science Organization: Scientific Uncertainty, Science, Policy, and Factfinding in the Growth Hormones Dispute' in 31 *Cornell International Law Journal* at 251; and DA Wirth, 'The Role of Science in the Uruguay Round and NAFTA Trade Disciplines' in 27 *Cornell International Law Journal* at 817.
[57] R Howse, n.6.
[58] *Ibid*.
[59] See above n.57.

Because deliberation requires public justification and reason-giving, science undoubtedly has a pivotal role in making judgments more considered, and, in this sense, the SPS Agreement fosters deliberation. To the extent that minority scientific opinions have been recognised as constituting sufficient scientific evidence,[60] regulatory diversity and joint deliberation about the best regulatory strategy are encouraged as WTO members may regulate risks whose existence has not been confirmed by all the members of the scientific community. In recognising minority scientific opinions as sufficient scientific evidence, the Appellate Body exhibits a sophisticated understanding of science as an evolutive process of discovery and validation.

However, in other respects, the SPS Agreement interferes with processes of deliberation. The SPS Agreement may skew the evaluation of acceptable levels of risk through discursive processes as a result of the narrow definition of risk assessment. In *EC — Hormones*, the panel and Appellate Body ruled against the EC on the grounds that the general studies about the carcinogenic potential of the hormones in question were insufficient to justify the hormones ban.[61] The crux is that this narrow definition removes the possibility of regulating risks that are considered not to provide any clear benefits. Thus, the general public, informed of the general risk presented by hormones could very well have reached a considered judgment that the benefits of using hormones for purposes of growth promotion did not warrant incurring the possible risk of cancer, or a normative judgment that such risk should not be imposed on consumers regardless of whether this specific use entails a higher risk than the use for therapeutic purposes.

As has been argued by Cass Sunstein, laypersons' understanding of risk and their opinion on whether or not risks are acceptable are often informed by evaluations of the underlying activities.[62] On this account, assuming two activities may have exactly the same risk, laypersons may consider one of the risks unacceptable and demand regulation (eg mortality risk due to lack of airplane safety) and the other acceptable (eg mortality risk of parachuting). According to Sunstein, it is often the subjective evaluation of the activities themselves or their costs and benefits that accounts for terming risks acceptable, unacceptable, voluntary or involuntary. Some of these value judgements may, of course, be idiosyncratic, but in the absence of a risk assessment which specifically establishes such a higher risk, the SPS Agreement treats these — possibly — informed judgements as irrelevant and, to this extent, interferes with the outcomes of deliberations.

[60] Appellate Body Report, *EC — Hormones*, para. 194.
[61] Appellate Body Report, *EC — Hormones*, para. 208–9.
[62] CR Sunstein, 'A Note on 'Voluntary' Versus 'Involuntary' Risks' in 8 *Duke Environmental Law and Policy Forum* at 173 & 176–179.

In a similar vein, the requirement in the SPS Agreement that levels of protection be consistent across different, but comparable, risks[63] interferes with considered judgments on which risks merit regulation. Such consistency requirements have been criticised on the grounds that they focus on the end-state, ignoring processes of risk imposition and qualitative differences in risk.[64] The question of whether distinctions in the levels of protection in different, but comparable, situations are both arbitrary and unjustifiable involves, indeed presupposes, a decision on the part of the panel or Appellate Body as to whether two risks are so qualitatively similar that they ought to be treated the same. According to the Appellate Body, not all differences in levels of protection, but only arbitrary and unjustifiable ones, need to pass muster under the test in Article 5.5 of the SPS Agreement.[65] In selecting a certain sample of risks as the benchmark, however, idiosyncratic evaluations on the part of the 'judge' enter into the picture.

Contrary to the interpretation put forward by other commentators, the jurisprudence shows that the SPS Agreement is not just a procedural check on the regulatory processes of WTO members. According to the Appellate Body in *EC — Hormones*, any risk assessment must sufficiently warrant and reasonably support the measure,[66] and whether this test is met is, in essence, in the estimation of the 'judge'. More importantly, however, the SPS Agreement is not focused on the question of protectionism because it does not hinge on a finding of like products. Rather, its objective is to remove regulations that hinder trade, inter alia because they are unreasonable. This brings into adjudication precisely those cases where citizens' deliberations reach conclusions that have considered the evidence (in this case suggesting an absence of harm) but are, nevertheless, not based on its findings. As the Appellate Body stated:

> The requirements of a risk assessment under Article 5.1, as well as of 'sufficient scientific evidence' under Article 2.2, are essential for the maintenance of the delicate and carefully negotiated balance in the SPS Agreement between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings.[67]

[63] Appellate Body Report, *EC – Hormones*, paras. 215, 240 and Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, WT/DS18/AB/R paras. 163–4. [even though the Appellate Body opined that the extent of the difference in levels of protection only operates as a warning sign, and that perfect consistency was not required, it considered that other factors, such as the absence of a risk assessment, might cumulatively lead to the conclusion that the measures are a disguised restriction on trade]. The Appellate Body in Appellate Body Report, *Australia — Salmon*, paras. 146 and 152 considered that the risk that had to be compared includes risks of the same biological or economic consequence or involving similar substances.

[64] CR Sunstein, n.55, at 131.

[65] Appellate Body Report, *EC — Hormones*, para 217.

[66] Appellate Body Report, *EC — Hormones*, para 193.

[67] Appellate Body Report, *EC — Hormones*, para 177.

Such a statement clearly views science not as merely a catalyst for legitimate processes of risk regulation in a transnational setting, but as a substantive element generating correct outcomes.

Due to the symbiotic relationship between the SPS Agreement and the *Codex Alimentarius* Commission, it is also necessary to consider whether governance through the *Codex* makes deliberation possible. In comparison to many other international organisations, the *Codex Alimentarius* Commission has a high degree of openness towards non-governmental organisations because such organisations may participate in the meetings of the Commission but they do not have a right to vote. In addition, the draft standards are sent to national governments for comments at two stages in the elaboration procedure, at which stage civil society may have an opportunity to comment on the standards.[68] All *Codex* reports also identify the national representative attending the relevant committee meetings. Transparency is further enhanced through current efforts to define risk assessment procedures, the role of precaution, and to articulate more clearly what other factors it may be relevant to consider in the elaboration of standards by the Commission. Making public the basis for risk analysis and standard-setting allows for a wider social debate on whether these other factors are sufficiently exhaustive. On the other hand, the scientific findings that the JECFA, JMPR or the Task Forces consider are not made public. This reduces opportunities for other organisations with expertise to comment, question these studies, or to contribute additional studies. Additionally, voting is secret and the minutes of committee meetings are not made public.

The requirement to attempt to reach a consensual decision, if at all possible, encourages joint deliberation because it ensures that all views are considered. At the same time, the possibility of voting on standards ensures that a minority of objectors cannot hold up the majority and skew deliberations. In the *Codex* procedure, science is not treated as an all-decisive factor in the procedure, and the specialised committees and the Commission often consider and change the draft based on other considerations. Even at the stage of the scientific assessment of risk through the JECFA, JMPR and other specialised bodies, there is a possibility of dissent through a minority report. Thus, there is a recognition that risk regulation can never be an exclusively technical process. However, in spite of the emphasis in the rules of procedure on discussing views fully in the committees, the discussion of economic considerations

[68] In the US, a Federal Register notice mentions the standards due to be adopted at the next Codex Commission meeting, but does not provide details of the draft standards or the US position. The Trade Agreements Act of 1979, as amended, Section 491 19 USC 2578 requires that the agency responsible for a particular Codex standard shall provide for public comment. See Federal Register Notice 29531 of 31 May 2001.

is given special weight.[69] In this sense, any emergent discussion is likely to be centred around interest rather than rational argumentation on the basis of the common good. The separation of risk assessment, risk management and general, non-technical aspects through the allocation of distinct responsibilities to the FAO/WHO risk assessment expert committees, the *Codex* specialised committees and the general Commission segregates risk regulation into a presumably objective exercise of risk assessment, and a general value-based evaluation and risk management.

In addition, the deliberative nature of the *Codex Alimentarius* Commission has to be called into question because recent developments show that, on an increasing number of occasions, standards had to be voted on and have become adopted with narrow majorities.[70] The controversy over the labelling of foodstuffs obtained from bio-technology provides one example. This trend has continued at the most recent meeting of the *Codex Alimentarius* Commission.[71] Some standards were probably controversial because of underlying trade interests, for instance, the standards on growth hormones or anti-microbial treatment of mineral waters, but, for other standards, concern over the protection of consumers and, in particular, of children probably accounted for the lack of consensus, eg in the case of aflatoxins in milk or certain pesticide residues in apples. To the extent that voting by simple-majority occurs, it can be concluded that the Commission has moved away from a deliberative model because social, distributive, normative or ethical arguments can be outvoted by the majority. The reverse also holds true: majority-voting places an insufficient check on parochialism and protectionist motivations. A high standard is a window of opportunity for ratcheting up that prevents non-compliant

[69] Guidelines for Codex Committees para. 21.

[70] Codex Alimentarius Commission, Report of the 21st Session, List of Standards and Related Texts Adopted by the 21st Session of the Codex Alimentarius Commission, ALINORM 95/37 (July 8, 1995) [The standard on maximum residue levels for growth promotion hormones additives was adopted by a secret vote at the instigation of the US with 33 votes in favour, 29 opposing and 7 abstentions]; See Codex Alimentarius Commission, Report of the 22nd Session, Appendix V: Confirmation of Chairmanship of Codex Committees, ALINORM 97/37 (June 28, 1997) [the standard for natural mineral waters preventing waters with anti-microbial treatment from being marketed under the description of natural mineral waters was passed by 33 votes in favour, 31 against it and 10 abstentions; a resolution postponing a standard for maximum residue levels for bovine somatotropin (BST) was passed by 38 to 21 votes with 13 abstentions]; this is also argued by TP Stewart and DS Johanson, 'The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics' in 26 *Syracuse Journal of International and Comparative Law* at 27 and UPThomas, see n.90.

[71] Codex Alimentarius Commission, Report of the 24th Session, ALINORM 0141 (2–7 July 2001) [the draft standard on aflatoxin in milk was adopted based on the majority opinion despite strong objections from various countries; reservations were expressed regarding standards for honey, unripened fresh cheese; patulin in apple juice; lead in cocoa butter; ethephon, natural mineral and bottled waters and labelling of wheat gluten].

foreign products from being imported or marketed under the same description.[72]

If one takes the view that the legitimising force of deliberation depends primarily on widespread participation, international standard-setting is afflicted by several deficits. Fewer representatives of developing countries participate in the meetings of the *Codex* specialised committees, and only a minority of scientists on the FAO/WHO joint expert committees come from developing countries.[73] For three rosters of JECFA scientists, the percentage of scientists from developing countries ranged between 20 to 30 percent.[74] Because the expenses of the *Codex* risk management committees have to borne by the country that chairs the committee, all committees, bar the regional ones, have been chaired by industrialised countries.[75] Such specialised committees are often influential in setting the agenda for standards to be elaborated. In consequence, developing countries may be less able to introduce their views on priorities for standard-setting. Because developing countries dispose of fewer specialised risk management officials and scientists, they may face greater difficulty in influencing standards which are inappropriate to their circumstances or which burden their exports. As has been criticised with respect to European comitology, the insistence on science has had the effect of privileging access by the rich over the poor.[76] This could also be said of the *Codex Alimentarius* Commission. In addition, industry representatives have had privileged access to the decision-making of the *Codex Alimentarius* Commission.[77] Although the *Codex* has formed permanent relationships with certain consumer organisations, they are far outnumbered by representatives of industry. Thus, participation of NGOs largely depends on the decision of their national governments to consult civil society and include them in their delegations. According to a 1993 study, over 80 percent of the NGOs accompanying national delegations were representatives of industry.[78] In the 1997 *Codex* meeting, for instance,

[72] TP Stewart and DS Johanson, n.69 at 27. [pointing out that, in both the hormones case and the mineral waters case, the EC also had a strong trade-related interest in a higher standard].
[73] Interview with Ezzedine Boutrif. An increase in participation by developing countries is also one of the key recommendations of the Report of the Evaluation of the Codex Alimentarius and other FAO and WHO Food Standards Work, available at <*http://codexalimentarius.net*>.
[74] 'Call for experts' available at <*http://www.fao.org*>
[75] Interview with Ezzedine Boutrif. Consider, for example, pesticide residues and veterinary drug residues or food labelling, primarily of relevance to products and consumers in developed countries respectively.
[76] JHH Weiler, 'Epilogue: "Comitology" as Revolution — Infranationalism, Constitutionalism and Democracy,' in C Joerges and E Vos (eds) n.5.
[77] See n.15 at 345.
[78] N Avery, 'Cracking the Codex: An Analysis of Who Sets World Food Standards'? 1 *National Food Alliance* 1993.

only the United States, Germany and Norway had included consumer representatives in their delegations.[79]

The existence of multi-lateral *fora* in the form of the *Codex* and the SPS Committee for the evaluation of risk and the discussion of its economic and normative implications in itself promotes deliberation and legitimate transnational risk regulation because it requires states to explain their regulation. Through imposing a requirement that scientific evidence be considered in the regulation of risk, the SPS Agreement contributes towards making the deliberation of citizens more informed while the *Codex* Commission provides a forum for addressing transnational problems of risk regulation. However, neither the *Codex* Commission nor the SPS Agreement currently provide for a horizontal outreach to deliberative publics, nor are they radically deliberatively open, in part due to rules on access, limits on transparency, and the unequal ability to participate. It remains to be seen whether the establishment of an FAO/WHO Trust Fund to provide financial assistance to enable developing countries to participate in the *Codex* Alimentarius Commission will partly redress this balance.

III. THEORIES OF DELIBERATION IN APPLICATION TO TRANSNATIONAL GOVERNANCE

Theories of deliberation view the actual practice of joint communication and discussion along rational lines connected to broader normative public debates as essential for the legitimacy of law and law-making processes. It is, therefore, neither representation, nor processes of interest aggregation, nor *primarily* conformity with a pre-given body of higher norms that makes governance legitimate. Thus, the articulation of the discourse principle in Habermas is that only the norms that meet (or could meet) with the approval of all those affected in their capacity *as participants in a practical discourse* can claim to be valid. It is through connection to these discourses that law becomes normatively embedded and thereby legitimised. Habermas' conceptualisation of ideal discourses is, as he maintains, primarily procedural.[80] According to Habermas,

> … modern legal subjects content themselves in actual practice with legitimation through procedure, for, in many cases, substantive justification is not only not possible, but is also, from the viewpoint of the lifeworld,

[79] Codex Alimentarius Commission, Report of the Twenty-Second Session of the Codex Alimentarius Commission Doc. ALINORM 97/37 app. 1, at 75–82.
[80] J Habermas, 'Postscript to Between Facts and Norms' in M Deflem *Habermas, Modernity and Law* (Thons and Oaks CA, Sage Publications, 1996) at 144.

> meaningless. This is true of all cases where the *law* serves as a *means for organising media-controlled sub-systems* which have, in any case, become autonomous vis-à-vis the normative contexts of action oriented towards reaching understanding.[81]

According to this theory, as long as an ideal speech situation persists, that is, everyone has a right to speak, and people treat each other's arguments seriously, the procedural rules allow discussants to achieve their autonomy collectively, transform individualist preferences through an orientation towards the common good, and are most likely to yield rational outcomes. In the words of a commentator,

> … the assumptions of mutual respect and equal applications are written into the very discursive shape of the process of reaching an understanding which derives autonomy inter-subjectively.[82]

The primacy of procedure over substantive norms in theories of deliberation presents at least three problems when transposed to higher-level governance structures. First, it becomes unclear why discourses and procedures are so essential to reach rational outcomes. If it is possible for less than fully participatory *fora* to arrive at laws that could meet with the considered normative judgments of the collective, it seems that such societal discourses yielding shared normative understandings must operate at a fairly general level. After all, the application of norms to real life problems is often hotly contested. If, on the other hand, only a fully inclusive communicative sphere had any hope of reaching the said rational outcome acceptable to all, any exclusion of participants from dialogues would be fatal. Looking at the problem at issue, the transnational regulation of risks and its possible legitimisation through discourses, one is led to conclude that the lesser degree of participation of developing countries, the absence of a developed civil society, or even traditional representative democracy poses a problem for legitimate transnational governance. Moreover, once deliberative public spheres have truly established themselves at a global level, it is not clear how transnational governance should relate to national deliberative processes or laws with an equal claim to legitimacy.

Second, without a pre-dialogic theory of fair distribution, deliberation falls victim to a 'situational blindness' that ultimately affects the ability of discussants to conceive of themselves as potential authors of the outcome. In the same vein as the unequal distribution of wealth 'spoils' the fairness

[81] As cited in P Guibentif 'Approaching the Production of Law Through Habermas' Concept of Communicative Action,' in M Deflem, *ibid*, 64.
[82] DM Rasmussen, 'How Is Valid Law Possible?' in M Deflem, above n.80, 29.

and justice of the social contract, so differences in scientific resources, differentiation of civil society and development affect the ability to participate in rational transnational discourses. The pattern of participation that one observes in international deliberation about risk and its control could more possibly be a reflection of the ability of certain discursive spheres to participate. If, as is here submitted, the international distribution of wealth, and the availability of scientific evidence are part and parcel of the ability to become a potential participant in transnational economic and risk governance, the legitimacy of institutions such as the *Codex Alimentarius* Commission and the WTO cannot be examined in isolation, but has to take account of the fairness of international distribution. Accordingly, an appropriate theory on the deliberative legitimisation of transnational governance has to be supplanted by normative understandings on distributive justice, rights and entitlements. In this sense, then, the legitimacy of governance can no longer depend merely on the existence of an ideal speech situation, but is intertwined with substantive norms. In his more recent work, Habermas seems to acknowledge that discussants will come to an agreement to grant each other certain rights, even if they are only a precondition for ideal deliberations.[83]

Third, there is an uneasy relationship between the fact of normative pluralism and the discursive *genesis* of a transnational set of norms which centre around market access, non-discrimination and the pursuit of valid protection objectives. It may well be the case that discussants disagree with a transnational standard or regulation but nevertheless accept it as binding because it emerged from legitimate governance processes. However, even though international institutions are open towards horizontal deliberation, discussants may nonetheless be incapable of rational assent if an arrangement at a lower level of governance more consistent with their considered collective, national understandings *and* some shared normative understandings is possible. Taking normative pluralism seriously, the complexity of problems and legitimation through communicative action requires a flexible conceptualisation of levels of governance. In other words, in order for a person to understand himself or herself as a participant in rational discourses which influence the content of norms which, in turn, embed transnational economic governance, institutions need to be transparent and open towards the influence of horizontally structured discourses through which a shared notion of common, global norms can be developed. At the same time, such discourses need to be open so that the appropriate level of governance can be debated, thus allowing for diverse conceptions of norms to be collectively achieved but validated against a discursively developed understanding

[83] See n.80 at 141.

of norms in common. In practice, this means that, when the deliberating public spheres of a WTO member reach an informed judgment derogating from a *Codex* standard or currently available scientific evidence, deliberative theory would allow for such a result to be implemented and would simultaneously require a mechanism through which such particular laws could be made consistent with common norms. *Codex* standards and available scientific evidence, if resultant from substantively fair deliberative procedures and normatively embedded scientific research, thus become proxies for the recognition of a discursively validated right to export, or a recognition of the special needs of developing countries on which there is shared agreement. Consistency with such shared agreement could then take the form of, for instance, agreed upon compensation or non-discriminatory labelling.[84]

IV. THE ROLE OF SCIENCE

Scientific evidence plays an important role in theories on the deliberative legitimacy of transnational governance. While not being perceived as the all-decisive criterion for the regulation of risk, scientific evidence serves to unveil regulations that are protectionist in focus, and provides the ground upon which states may be required to explain their health and safety regulations. Some commentators view science as a form of rational debate ensuring a rational regulatory outcome that can either meet with public assent[85] or as an element that informs national regulatory processes so that citizens can debate the regulation of risk more rationally.[86] One can hardly argue with the view that scientific evidence makes the decision-making process more informed, and that anyone debating the question of what an acceptable level of risk that does not unduly discriminate against foreign products is, would want to have the best evidence available of what that risk is. Scientific evidence is perceived as the modicum by which less than fully inclusive deliberative institutions can reach rational outcomes and communicate their agreements to the multiplicity of non-institutionalised public spheres in a way that allows these spheres to verify and agree with the results. By being exposed to a continuous process of validation through peer review and research,

[84] Habermas himself recognises that some matters in heterogeneous, pluralist societies cannot be resolved through discourse but require a negotiated settlement. See J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge MA, MIT Press, 1996) at 127, 188 & 340–4.
[85] J Neyer, n.5.
[86] R Howse, n.6.

scientific evidence certainly holds out the potential of enabling discussants to validate scientific findings continuously and revise the regulation of risks accordingly. The rules of the *Codex* Alimentarius Commission encourage such validation in that they require the regular re-examination of standards, and allow any member to request a change in the light of new scientific evidence. Similarly, the SPS Agreement allows members to derogate from standards if scientific evidence suggests a need for doing so.[87]

In order for science to transform interest into discourses about the common good, commentators on deliberation treat science as a black box that is not, in itself, based on certain normative understandings or values. Yet, for the public to accept a food safety standard as legitimate, trust in the correctness, objectivity and neutrality of science becomes crucial. This poses an intricate problem: trust in scientific expertise is partly a function of the validity and correctness of past results. One may surmise, and it has been argued before,[88] that trust in scientific expertise has become eroded in the European Union as a result of various food scandals, such as the BSE crisis or the contamination with dioxin. This may explain the resistance of Europeans towards GMOs and the comparatively more favourable attitude towards GMOs in the United States. In this connection, the novelty of GMOs as commercially available products probably exacerbates the absence of trust. This has been described as the phenomenon of new risks often attracting the attention of regulators while comparatively more dangerous old risks remain less regulated.[89] In addition to this phenomenon, studies suggesting a risk of allergenicity of GMOs, some uncertainty in the scientific community over the method for safety testing of GMOs, and the validity of classic risk assessment studies for the testing of whole foods reverberate in the public mind.

In these circumstances, procedural guarantees assuring that all sides of the bio-technology have been studied in an objective and neutral manner become crucial. Such an endeavour would require the contextualisation of science, thereby exploring its normative underpinnings, its internal limitations and its contingency on interest or power.[90] At present, transnational governance regimes insufficiently contextualise science in this manner. In the *Codex Alimentarius* Commission, there has been little transparency in the way scientists are appointed for the JECFA or JMPR. It is not certain

[87] SPS Agreement, Article 3.3.
[88] L Buonanno, S Zablotney and R Keefer, 'Politics versus Science in the Making of a New Regulatory Regime for Food in Europe' in 5 *European Integration Online Papers,* No. 12.
[89] CR Sunstein, above n.55 and H Peter, 'The Old-New Division in Risk Regulation' in 69 *Virginia Law Review* at 1025.
[90] M Foucault *The Archaeology of Knowledge and the Discourse on Language* (London, Routledge 1989); JD Faubian (ed), *Power*: *Essential Works of Foucault 1954–1984* (London, Penguin, 1994).

that the appointment process serves to remove sources of bias through ensuring that experts from neutral institutions such as national science associations or independent research centres are also selected. In addition, the absence of conflict of interest rules has allowed the industry to influence the selection of experts. The tobacco industry was able to hire a former Executive and Technical Secretary of JMPR as a consultant,[91] who was then approached by the WHO to act as temporary adviser to the JMPR without disclosing his source of funding.[92] There was also evidence suggesting some scientists evaluating milk hormones in 1997 in the JECFA were sponsored by industry.[93] While the real impact of 'hired' scientists on the final evaluation is hard to assess, the possibility of capture cannot be ruled out. Although the WHO has a roster of experts, financial constraints have forced scientific committees to rely on outside experts. The FAO and the WHO meet the attendance costs of experts, but do not pay honoraria, thus giving experts an incentive to accept industry contributions.[94] In the FAO, disclosure of interest is already mandatory and violators will be barred from committee meetings.[95] The WHO, on the other hand, lacks strong conflict of interest rules for experts, staff and voluntary advisers, and financial disclosure of funding is not mandatory.[96] In addition, there are no disciplinary proceedings against violators.[97]

The contextualisation of science depends, in large measure, on the public availability of the scientific studies, and the clear articulation of its underlying assumptions and normative choices. For instance, how risk assessment is methodologically defined introduces variations in scientific findings as a result of the selection of the population group that is

[91] Under the terms of the contract, the consultant was to represent the tobacco industry in bodies like the JMPR and the CAC, and to publish supporting reports in scientific journals. See contract between CORESTA and Vettorazzi on file with the author.
[92] Report of the Committee of Experts on Tobacco Industry, 'Tobacco Company Strategies to Undermine Tobacco Control Activities of the World Health Organization' The JMPR considered setting acceptable daily intakes (ADI) and maximum residue levels (MRL) for certain pesticides that prevent fungi and moulds and are widely used in tobacco growing. Because of its need for funding, it had to rely on outside advisers. The Expert Group was unable to determine whether the final standard was the result of the adviser's influence, but noted that both the JMPR and the adviser failed to consider contradictory scientific reports. The exact impact could not be assessed because there were no minutes kept of the meetings.
[93] According to an Italian TV report, Dr N Weber and Miller were funded by the Monsanto Company which produces such milk hormones and Dr Ritter received funding from the Canadian Animal Health Institute, a cattle producer lobby. See Raitre Report of April 2000, available from the FAO Media Relations branch.
[94] Raitre Report n.93.
[95] Interview with E Boutrif, transcript on file with the author.
[96] See Chapter VIII, United Nations Standard-Setting for EBCD Pesticides on file with the author at 181–85; recommending according reforms.
[97] *Ibid*.

exposed; or of the appropriate factor by which to extrapolate from animal studies to humans; or of the selection of the relevant exposure level (common are lowest-observable-effect and no-observable-effect). The decision whether or not to set a standard for a vulnerable population group results in the redistribution of risk, especially if the substance or technology brings benefits for other less susceptible population groups. The attempts currently underway in the *Codex* Commission to draft guidelines on risk assessment, the use of precaution, and on which other legitimate factors to take into account in risk management, make transparent the choices inherent in risk regulations and thereby expose them to public scrutiny.

The contextualisation of science exposes a paradox: in order to be able to augment knowledge about risk and safety, scientific inquiry has to pay selective attention to a certain type of problem requiring it to ignore other lines of inquiry or harms. Which risks are well-researched may, however, also be the result of the availability of funds or research grants for certain types of problems. In addition, the possibility of error and the domain of the unknown but possible, against which scientific evidence reflexively constitutes itself, while not amenable to identification, is nevertheless characterisable through meta-scientific discourses and other forms of disciplined inquiry. Only a continuous questioning of scientific findings and an exploration of its contingency on power or interest and underlying normative understandings can help validate science. In other words, in order to be of use in the legitimate regulation of risk, science has to be anchored in communicative spheres with regard to normative issues outside its own system of reference.

V. CONCLUSION

Bio-technology as a new technology, perceived to be qualitatively different from traditional breeding calls into question conventional understandings of foods, products, nature and, with time, perhaps even of our own selves. Given this breakdown of traditional concepts, it is unsurprising that the adequacy of existing scientific methodologies is called into doubt. At the same time, questions concerning access to the benefits of this technology, the distribution of new risk and economic redistribution, and the autonomy of consumers need to be resolved in order to anchor the transnational regulation of foodstuffs derived form bio-technology in normative contexts. Only truly open deliberative spheres can have any hope of producing legitimate outcomes. Recasting GMOs into old paradigms through reliance on substantial equivalence short-circuits these debates. Although the guidelines on the safety assessment of foods derived from bio-technology, which are likely to be adopted in due course, only bind

the *Codex Alimentarius* Commission in its own assessment of such foods, they do reset the parameters of the debate. The result of the adoption of these guidelines is that any novel food assessed to be substantially equivalent to its conventional non-modified food or organism would fall under any existing *Codex* standards for food safety. Accordingly, substantially equivalent GMOs would have to be treated in the same way as non-GMOs, thus not allowing for specific labelling or regulation. Such an outcome camouflages the normative issues underlying the risk regulation of GMOs in a way that is hardly consistent with the concept of deliberative legitimacy. The legitimacy of transnational governance may thus soon be put to test in the WTO consultations that have been requested by the US and Canada concerning the EC's moratorium on the approval of new GMOs.

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Legitimation of Transnational Governance Regimes and Foodstuff Regulation at the WTO: Comments on Alexia Herwig

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I. POLITICAL THEORY AND EMPIRICAL FINDINGS

IN HER PAPER, Alexia Herwig presents a scholarly, critical and fine-grained account of the emerging transnational governance regime on foodstuffs, the *Codex Alimentarius* Commission (Codex). In particular, she seeks to link insights from her empirical research on the WTO to wider theoretical debates on the legitimacy of international governance. This is done by confronting the assumptions of democratic theory, in particular its deliberative variant, with the current practice of foodstuff regulation in the WTO system. Her conclusion seems to be that the complex reality of international food policy-making in the *Codex* does not fulfil the requirements of deliberative democracy, and that therefore these theories cannot provide an adequate yardstick for its assessment. Given the current popularity of deliberative approaches to international governance, this is a timely and interesting project. However, before commenting on Herwig's take on deliberative democracy, I wish to make some critical remarks on the particular type of enterprise that Herwig has embarked upon, which is mainly aimed at the clarification of some issues along the normative/empirical frontier.

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My first point is an epistemological one. At many points in the paper, it seems that, by citing empirical evidence, Herwig seeks to prove that theories of deliberative democracy, in particular Jürgen Habermas' discourse-theoretical interpretation, are flawed or inconsistent. However, the validity of normative theories as such cannot be questioned by the empirical evidence that political processes do not live up to ideal models of democratic procedures,[1] ie, 'show certain inconsistencies of deliberative theories'[2]. Habermas' discourse ethics certainly do not offer blueprints which can be 'applied' to a political practice, for example, to the regulation of foodstuffs through the *Codex*.

For the sake of clarification, I would like to make a small remark on the way Herwig presents deliberative democracy as a normative ideal. The fact that economic considerations are given special weight in the current *Codex* deliberation procedure[3] is an important empirical finding. However, it does not jeopardise the validity of a normative model of deliberative procedures. The procedural ideal model does not even suggest that economic considerations should be kept out of decision-making in the institutions of international governance, such as the *Codex* regime. Rather, it relies on a multiplicity of communicative forms of rational political will-formation: deliberative politics

> should be conceived as a syndrome that depends on a network of fairly regulated bargaining processes and of various forms of argumentation, including pragmatic, ethical, and moral discourses.[4]

Economic considerations are to be balanced as pragmatic reasons in the process of a mutual exchange against ethical (eg, health concerns, or environmental protection) and moral reasons (eg, social justice). Processes of governance under the auspices of the World Trade Organisation, as, for example, standard-setting through the *Codex Alimentarius* Commission, should ensure a balance between the interest of free trade with the interest in a high level of protection against risks to life and health. From this normative perspective, one could construe real political procedures as imperfect approximations of this ideal.

Although discourse ethics points to a general principle of democratic will formation, they do not point to a particular way of organising this formation. The institutional form of democratic will-formation must, in

[1] Such evidence can be used to refute empirical theories of social science, such as those that claim to identify law-like regularities in social behaviour or that claim to be an adequate tool to describe political processes.
[2] A Herwig, this volume, text preceding n.15.
[3] A Herwig, this volume, text accompanying n.69.
[4] J Habermas, *Between Facts and Norms* (Cambridge, MA, MIT Press, 1996), at 25.

itself, meet standards of discursive validity. The choice of a certain form of organisation depends both on the concrete social and political conditions as well as on the scopes of the dispositions. In this sense, for example, a legitimate kind of bargaining certainly depends on a prior regulation of fair terms for achieving results which are acceptable to all parties on the basis of their differing preferences. Here, a deliberative mode of political practice is only intended to compromise competing interests in a manner which is compatible to the common good. The general idea is that deliberation, for example, within standard-setting entities, forces various social actors — representatives of the Member States, economic interest groups, scientific experts and advocacy groups — to explicate and scrutinise heterogeneous interests (national, governmental, sectoral, technical, or self-avowedly public interests), and eventually to transform their preferences as part of the elaboration of shared interpretations. However, democracy at organisational level should be understood in terms of democratisation defined in terms of a self-controlled learning process that is capable of allowing, and even generating, institutional change.

This remark is not meant to question Herwig's general research strategy of confronting normative programmes and empirical developments, but to question the epistemological orientation of her enterprise. Her approach cannot tackle the question of whether a normative theory of transnational democracy is consistent or flawed. Instead, it addresses the problem of relevance. If normative political theory is not well-grounded in experiences of the social world, if its vision of politics is disconnected from empirical evidence, then its tenacity is in question. Hence, it is to Herwig's merit that she uses her empirical findings to raise some critical questions about the legitimacy of policy-making processes in the *Codex* regime. The question is (one of) whether deliberative theory can find tendencies in global governance arrangements that render its general principle of democratic will formation conceivable. Only if it were willing to give the minimum conditions necessary for the organisation of democratic institutions, could it become a good guide towards the institutional reforms of, for example, the WTO. It would then have to spell out the requirements for institutionalising an ideal deliberative procedure for foodstuff regulation at the *Codex*. It is precisely in this praxeological perspective that normative political theory should be informed by empirical findings; in this case, ideas on democratic legitimacy should be informed by the already existing forms of political institutions.

In what follows, I shall try to provide some further clarifications of the arguments that prominently feature in Herwig's paper. I will also add some of my own ideas on the question of the legitimation of international standard-setting and on deliberative democracy. More specifically, I will argue that the democratisation of global governance arrangements will depend upon the creation of a transnational public sphere. From such

a perspective, global governance arrangements within the WTO could become sites of public deliberation and co-operative inquiry of a variety of social actors (eg, representatives of international organisations, scientific expertise, NGOs, stakeholders etc) that generate democratic legitimation in a heterogeneous global polity. Organised civil society can play a key role in enhancing a broader public sphere by permeating the boundaries between the formal institutions of global governance and their global constituency.

II. DIVERGING NOTIONS OF DELIBERATION AND DELIBERATIVE DEMOCRACY

It is not an easy task to present 'the theory of deliberative democracy' and its tenets, simply because it does not exist as a unified and coherent body of thought. At times, Herwig does not seem to be sufficiently clear about what several deliberative theories precisely claim, and how these claims can be related to international food governance. I will try to shed some light on this issue. Generally speaking, from the perspective of deliberative theories, democracy is regarded as intrinsically enhancing the legitimacy of government or governance, because it ensures the (procedural) conditions for a high quality of the decision-making process with respect to regulatory choices. Deliberation as reason-giving focuses political debates on the common good — the interests, preferences and aims which comprise the common good are those that 'survive' deliberation. However, in the literature, there are two quite distinct approaches to the issue of deliberation itself.

In the context of international relations, the model of deliberative decision-making has taken on a vision *sui generis*. Since a parliamentarisation of politics above the nation-state is not in sight, enhanced political deliberation has been regarded as an alternative avenue for global governance. Well-informed and consensus-seeking discussion in expert committees that are embedded in international decision-making procedures has been suggested as an effective remedy to the legitimation problems of international governance.[5] In this perspective, political deliberation is primarily viewed in a functional fashion as a pre-requisite for a high level of efficiency, efficacy and quality in political regulation. This approach to deliberation is inspired by thinking from public policy and international

[5] Legitimacy can be understood as a general compliance of the people with decisions of a political order that goes beyond coercion or the contingent representation of interests. Normatively, democratic legitimacy results from a rational agreement among free and equal citizens.

relations theory which have highlighted the importance of scientific expertise and consensus-seeking in the epistemic community of experts.[6] Generally speaking, global governance regimes draw their legitimacy from the deliberative quality of their decision-making process. This process is not designed to aggregate self-interests, but to foster mutual learning among experts, and eventually to transform preferences while converging on a policy choice that is oriented towards the public interest.[7] In this perspective, deliberation becomes an important element of good functional governance by a responsive administration: citizens' concerns feed into the policy-making process only hypothetically through the links to Member States representatives.[8]

Political theorists, and most notably Jürgen Habermas, whose work is extensively quoted in Herwig's essay, view deliberation from the perspective of democracy. From such a perspective, political procedures are democratic only if they are validated by discourse ethics, ie by a rational principle of legitimation. The idea of democratic legitimacy is that the citizens decide for themselves the contents of the laws that organise and regulate their political association. Deliberation, understood as reasoning about how best to address a practical problem, is not intrinsically democratic: it can be conducted within (non-legitimised) cloistered bodies that make fateful choices, but are inattentive to the views or the interests of large numbers of affected parties — without being connected to open public debate and practice.[9] Unlike functionalists, who approach deliberation mainly from the empirical problem of successful norm implementation in a polity, Habermas views political deliberation from the normative perspective of the citizen. Democracy is deliberative when collective decisions are founded not on a simple aggregation of interests, but on arguments both from and to those governed by the decision, or their representatives. Thus, deliberative governance can only be democratic if it includes the participation of citizens affected by political decisions.

[6] See P Haas, *Saving the Mediterranean: The Politics of International Environmental Cooperation* (New York, Columbia University Press, 1990).

[7] For it is far from clear how bureaucratic procedures such as 'comitology' (Joerges and Neyer 1997) can make sure that the concerns of citizens will be given appropriate weight in the process of argumentation that leads to an informed decision on binding rules. Even if we trust experts and scientists to advocate norms which, in their view, serve the common good of a polity, and not some particular interest, it still remains their assessment and their view of the good that prevails. What is missing from the committee model is a plausible mechanism that links expert governance with the discourse of ultimate stakeholders.

[8] See Ch Joerges, ''Good Governance' Through Comitology', in Ch Joerges and E Vos (eds) *EU Committees: Social Regulation, Law and Politics*, (Oxford, Hart Publishing, 1999). J Neyer, 'Discourse and Order in the EU: A Deliberative Approach to Multi-Level Governance', in *Journal of Common Market Studies*, (2003) 41:4, 687–706.

[9] See J Zeitlin/DM Trubek (eds), *Governing Work and Welfare*, (Oxford, Oxford University Press, 2002).

Here, deliberation ensures that the concern of citizens feed into the policy-making process, and that they are de facto taken into account when it comes to a decision on binding rules. Although Habermas' deliberative democracy does not prescribe a particular form of democratic organisation, one can argue that democracy relies on certain participatory conditions for rule-making. From such a perspective, it is crucial that the process of (political) deliberation within international organisations is opened up both to public scrutiny and to the input of stakeholders' concerns. Any bestowal of democratic legitimacy on global governance must ultimately depend on the creation of an appropriate public sphere, ie an institutionalised arena for (deliberative) political participation beyond the limits of national boundaries. This is a point to which I will return later.

Herwig seems to assume that most deliberative theories are doomed to locate public deliberation at national level (Herwig p.3). Robert Howse is one of several authors who argue that the provisions of the WTO can be understood as enhancing the quality of deliberation about risk and control among citizens, although only at the level of membership (of a certain '*demos*').[10] Political automomy remains ultimately locked in the nation state. Instead of assuming that democratic legitimation presupposes a certain (pre-political) homogeneity of the citizens of a polity (a '*demos*'), Habermas' deliberative theory of democracy claims that legitimation is generated through public deliberation of free and equal citizens. The legitimation of the regulations emanating from transnational governance regimes should derive from the (transnational) collectivity of the citizens affected by these regulations. Rather than securing the legitimating force of law-making in advance by binding it to an ethical consensus of a (particular) political community, he argues that the 'democratic procedure for the production of law' is the only 'postmetaphysical source of legitimacy'. According to such a perspective, there is no *a priori* reason why transnational governance regimes cannot subsequently create the politically necessary communicative context with the core being formed by a political public sphere.[11] At international level, the public sphere — understood as a pluralistic social realm of a variety of sometimes overlapping or contending (often sectorial) publics engaged in transnational dialogue — can provide the political realm with actors and deliberative processes which can further democratise global governance practice.[12]

[10] See R Howse, 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization', (2002) 98 *Michigan Law Review* 2329.

[11] A public understood as a collectivity of persons connected by processes of communication over particular aspects of social and political life, can, in principle, extend beyond national borders.

[12] P Nanz 'Les voix multiples de L'Europe. Une idée interdiscursive de la sphère publique', (2003) 10 *Raisons politiques*, 69.

III. CIVIL SOCIETY PARTICIPATION AND DELIBERATION IN THE WTO AND THE CODEX ALIMENTARIUS COMMISSION

Does the *Codex Alimentarius* Commission (Codex) regime go beyond traditional forms of functional international governance? Formally, the *Codex* decisions and the resulting standards are advisory and not legally-binding. Member States retain the right to establish higher domestic levels of protection if they deem them necessary. In this sense, the *Codex* regulation is different from, for example, an EC regulation or, in other words, formally less intrusive into state autonomy. On the other hand, as Herwig rightly states, there is a strong incentive for states to bring their domestic foodstuff regulation into conformity with WTO standards. For if a trade dispute arises, these regulations are used as a benchmark to determine the acceptable level of national protection. In addition, Member States can be obliged to justify a trade-relevant deviation from agreed standards in their domestic legislation by citing scientific expertise. Thus, the *Codex* standards are intrusive in the sense that they limit the right of nation states to determine standards of protection in complete autonomy.[13] However, they 'rarely receive significant attention outside of scientific circles'.[14]

The internationalisation of governance and the discursive legitimation of laws, rules and decisions are not natural friends. In most international institutions, regulations are negotiated by diplomats and, at times, through the consultation of experts. Decisions are adopted by delegations of government representatives.[15] The WTO, traditionally a very secretive organisation, is slowly opening itself to public scrutiny and to the participation of non-state actors, and is thus becoming potentially more responsive to the concerns of stakeholders. However, the project of democratising decision-making in the WTO points both to the limits of direct citizen involvement and to the need for organised civil society. It remains an empirical question whether the involvement of stakeholders through transnationally organised civil society is a viable and more democratic alternative.[16]

[13] See N Woods and A Narlikar, 'Governance and the limits of accountability: the WTO, the IMF and the World Bank' (2001) 53 *International Social Science Journal* , 569.

[14] T Stewart/D Johanson, 'The SPS Agreement of the World Trade Organization and International Organizations: the Role of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics' (2001) 26 *Syracuse Journal of International Law and Commerce*, 27, at 28.

[15] There are very few exceptions to the rule that citizens are represented by states in international governance. The European Union and the North American Free Trade Organisation (NAFTA) are prominent examples of institutions that admit individuals as plaintiffs to procedures of judicial review.

[16] This is the task of my current research project 'Participation and Legitimation in International Organisations' at the University of Bremen as part of the new research centre on 'changes in statehood', for details, see *http://www.staatlichkeit.uni-bremen.de*.

I have argued elsewhere that — under certain conditions — organised civil society may play a key role by ensuring a broader public discussion of policy alternatives and by bringing the concerns of citizens into the decision-making process.[17] It has a high potential to act as a 'transmission belt' between deliberative processes within international organisations and an emerging transnational public sphere. Such a discursive interface operates in two directions. First, civil society organisations can give a voice to the concerns of citizens, and channel them into the deliberative process of international organisations. Second, they can make internal decision-making processes of international organisations more transparent to the wider public and formulate technical issues in accessible terms. From a normative point of view, these civil society actors must ensure that the concerns of citizens are reflected in the decision-making process of international organisations. However, this can function only if several institutional conditions are fulfilled. First, international public organisations must provide appropriate access to documents and meetings to members of civil society. They also must incorporate all relevant concerns from civil society into their own agenda. At the *Codex Alimentarius*, this is not ensured, given that NGOs have only an 'observer status'; all other contacts of expert information, advice and assistance are of informal character.[18] Second, in order to contribute to the democratisation of global governance, civil society organisations must themselves remain open to citizen input and take newly emerging issues on-board, including those of marginalised groups. Their own agenda must not be 'hijacked' by an élite group of professional activists or special interest groups. Only then are civil society organisations the 'legitimate' participants in deliberative *fora* of global governance regimes.

What institutional mechanisms can be envisioned at global level which could serve as an institutional focus for a broader, decentred public sphere? We may envisage deliberative *fora* in which groups of social actors (eg national officials, scientific experts, NGOs, etc) address a certain global problem (functional participation), the ensemble of which could serve to enhance broader transnational public debates. Such participatory arenas reserve themselves the prerogatives to scrutinise the policy choices of international organisations. They introduce a deliberative element at public level, while protecting the autonomy and internal complexity of the administrative realm (eg the so called

[17] See P Nanz and J Steffek, 'Global Governance, Participation and the Public Sphere', *Government and Opposition* 2 : 2004, Special Issue on 'Global Governance and Public Accountability', edited by D Held and M Koenig-Archibugi.
[18] See: *http://www.codexalimentarius.net/ngo_participation.stm*

'outreach meetings'[19] could be understood to be such publics). Public scrutiny, monitoring and the consultation of organised civil society would complement decision-making. With respect to democratisation, transnational civil society would have three particular tasks: to expose global rule-making to public scrutiny, to bring the concerns of citizens to the agenda of international organisations, and to empower the most disadvantaged groups of stakeholders to participate actively in political deliberation.

My approach to the legitimation and democratisation of global governance can be summed up as follows: Fostering extended deliberation among stakeholders over the nature of problems and the est way to solve them, decision-making arenas produce a pool of (transnationally) shared arguments which — channelled through civil society organisations — contribute to the emergence of a transnational public sphere in which the decisions of international organisations are exposed to 'transnational' public scrutiny. With regard to the WTO and the *Codex* regime, the crucial issue seems to be to establish a *nexus* between expert deliberation in the respective committees and a wider, more inclusive public debate on international food governance.

[19] Outreach meetings are all those that are specifically designed to engage an organisation with external constituencies.

13

The Many Faces of the Trade-Environment Conflict: Some Lessons for the Constitutionalisation Project

OREN PEREZ
RAMT-GAN (ISRAEL)

CITIES & EYES 2

> It is the mood of the beholder which gives the city of Zemrude its form. If you go by whistling, your nose a-tilt behind the whistle, you will know it from below: window sills, flapping curtains, fountains. If you walk along hanging your hands, your nails dug into the palms of your hand, your gaze will be held on the ground, in the gutters, the manhole covers, the fish scales, wastepaper. You cannot say that one aspect of the city is truer than the other, but you hear of the upper Zemrude chiefly from those who remember it, as they sink into the lower Zemrude …
>
> Italo Calvino, '*Invisible Cities*', 54 (Picador, 1974)
> (Marco Polo's reflections on his travels, as they were told by him to Kublai Khan, the great emperor of the Tartars)

THE CONFLICT BETWEEN trade and environmental values has been one of the major themes of the anti-globalisation movement. It dominated the street protests in Seattle in 1998 and in Quebec and Genoa in 2001, and was invoked in various other domains (from the Internet to the popular media). This persistent invocation has placed the 'trade and environment' *problematique* forcefully on the public sphere, triggering a wide-ranging debate. The phrase 'trade and environment conflict' has been used, increasingly, as if it represents, or designates, a singular social dilemma, whose boundaries and contours are well-defined. I want to challenge this assumption. The trade and environment conflict, I will argue, should not be viewed as a singular problem, amenable to unitary descriptions, but rather as a collection of multiple dilemmas, constituted by a myriad of institutional and discursive networks.

The first part of this chapter seeks to expose this multiplicity — to generate a richer map of the trade-environment conversation. To achieve this, the chapter examines some of the more prominent motifs of this conversation.[1] The first motif concerns the opposition between the notions of *nature/environment* and *trade/economic growth*. The second concerns the *institutional* aspect of the trade-environment conflict. The third motif concerns the ideas of '*legitimacy*' and '*democracy*'. A close reading of these three motifs, and the way in which they have been invoked in this debate, brings forth a complex world of meaning. The trade and environment conflict emerges as a multiple challenge, taking place in multifarious institutional and discursive universes. My main thesis, which follows from this deconstruction effort, is that this dispute cannot be resolved by a singular (meta) legal formula or economic model.[2] Instead, its resolution requires an assemblage of varied responses which must be sensitive to the multi-dimensional character of this conflict.

This simple realisation creates a challenge to the constitutionalisation dream (in its universal version). It questions the logic of erecting a unitary institutional structure as *the* solution to global dilemmas, and looks, instead, for a more modest constitutional vision. This alternative vision replaces the search for uniform, all-embracing universalistic structures, with an experimental (even opportunistic) outlook, which is directed by a deeply pragmatic and contextual approach. The term '*polycentric constitutionalisation*' provides a good heading to this alternative conception. In its second part, the chapter seeks to demonstrate this general thesis by examining the work of the International Monetary Fund, in particular, its 'structural adjustment' programmes. The aim of this part is both to expose the contours of the trade-environment conflict as they arise within this domain, and to propose some ideas for resolving this conflict, which will follow my more sceptical conception of constitutionalisation.

I. THE DIFFERENT FACETS OF 'NATURE' AND 'ECONOMIC GROWTH'

Let me start with the thesis: what seems to constitute the essence of the trade-environment conflict — the opposition between the notions of nature/environment and trade/economic growth — does not reflect a clear binary opposition, but constitutes, in effect, a complex discursive continuum,

[1] By its nature, this deconstruction effort cannot start with a clear-cut portrait of the trade-environment conflict. This portrait emerges as the outcome, rather than as the starting-point of the discussion. Indeed, as will be indicated below (Section I), some observers strongly deny the 'reality' of this conflict, attributing its social persistence to the popularity of the 'ecology' theme, rather than to any real opposition between trade and environmental protection.

[2] For example, by changing the wording of Article XX of the GATT 1947, or by devising some 'meta' economic formula.

whose two sides are imbued with a variety of (sometimes-conflicting) interpretations. Thus, the combination of these two terms does not produce a singular opposition, but, instead, produces a broad spectrum of distinct 'disputes'. This means that the trade-environment debate is not governed by a single discursive system (with common and well-defined criteria for reaching understanding), but is, instead, the playground of multiple discourses and ideologies.[3] The discursive disorder, which embodies the trade-environment debate, explains, I believe, much of the bitterness and violence that has characterised it over the last years. Making the differences between these conflicting discourses more transparent is a necessary step in the attempt to alleviate the tensions between trade and environmental concerns.[4]

One way by which the rich discursive horizon which underlies the trade-environment conversation can be exposed is by looking at it through the lens of a distinct (but closely-related) *problematique*: the relationship between *society* and *nature*. The traditional construction of the *nature/society* duality insisted that nature could be of value — whether intrinsic or instrumental — only to the extent that it is of value to humans.[5] One of the major achievements of the modern 'environmental' movement has been to call the validity of this traditional conceptualisation into question. However, as the discussion below demonstrates, this common challenge has not produced a singular understanding of the nature/society duality (a common *environmental rationality*). Instead, it has created an assemblage of different visions which generate a variety of images of the trade-environment conflict.

Consider, first, the view of 'deep ecology'. The deep ecologists argue that the *nature/society* duality should be understood in terms of a new *transcendent, non-anthropocentric ethics.* The answer to the current ecological crisis lies, according to this view, in a different conception of nature, which gives nature a 'social role beyond being a means for human well-being'.[6] This trend of thought sees the major problem of the modern

[3] This argument draws on the work of writers such as Gunther Teubner, Niklas Luhmann and Richard Rorty. In this context, Rorty distinguishes between 'normal discourse' and 'abnormal discourse'. For Rorty, the traditional distinction between the search for 'objective knowledge' and other, less privileged areas of human activity merely constitutes a 'distinction between 'normal discourse' and 'abnormal discourse'. Normal discourse … is any discourse (scientific, political, theological or whatever) which embodies agreed-upon criteria for reaching agreement; abnormal discourse is any which lacks such criteria.' R Rorty, *Philosophy and the Mirror of Nature* (Oxford, Princeton University Press, 1980) at 11.

[4] This does not mean that inter-discursive disputes can be resolved through some meta-discourse. Any resolution of inter-discursive conflicts must, therefore, be — to some extent — arbitrary.

[5] This point of view is the heritage of the Enlightenment tradition; see J Whitebook, 'The Problem of Nature in Habermas', 40 *Telos* (1979) at 41.

[6] K Eder, *The Social Construction of Nature: A Sociology of Ecological Enlightenment* (London, Sage, 1996) at 207.

society in the idea of 'domination' of nature, which informs all our political and economic institutions. In practical terms, the deep ecologists call for a complete withdrawal from the industrial system and the adoption of a pre-capitalist way of life.[7] For the deep ecologists, the route of 'social asceticism' constitutes the only route by which the belief in the intrinsic value of nature can be given full-effect.

For other ecological and moral thinkers, there is no reason to abandon the very familiar grounds of the Kantian, anthropocentric morality. What we need, instead, is to take the idea that what is 'good-for-man' depends on what is good for 'nature' more seriously. And if the challenge to the Kantian moral vision is rejected, it seems more appropriate to view the 'environmental problem' not as a problem of a 'new ethics', but, instead, as a sequence of *pragmatic dilemmas*: how to utilise (exploit) nature more responsibly. This pragmatic vision leads to various interpretations. Some (economic conservatives) take this view to mean that there is no need for a fundamental change in the basic *ethos* of the modern society, with its strong reliance on technology and free-market structures, and its endless appetite for growth.[8] For these trade observers, the trade-environment conflict represents a 'false-dilemma', which disappears once this conflict is analysed through the tools of neo-classical economics. Trade liberalisation, or economic integration, cannot be harmful to the environment for two main reasons. First, because it should lead to 'improved allocation and more efficient use of resources', and, second, because it should help developing countries to generate the resources they 'need to protect the environment and work towards sustainable development'.[9] Other economic observers take a more sceptic view of the power of the 'market', and believe in the need to develop a more 'enlightened', or ecologically-sensitive, form of economics, which will be able to deal with the various maladies (market failures, externalities, etc.,) of the current economic system.[10]

Yet, for others, the current ecological crisis is, in fact, a reflection of a deeper *political crisis*: our multiple environmental problems are seen as the inevitable result of, on the one hand, the failure of the political

[7] See, for example, A Naess, 'The Shallow and the Deep, Long-Range Ecology Movement: A summary', 16 *Inquiry* (1983) at 95.

[8] For a similar appeal to ideas of economic efficiency in the legal literature, see, for example, E Petersmann, 'International and European Trade and Environmental Law After the ruguay Round' (London, Kluwer Law International, 1995) at 3, and D Ahn, 'Environmental Disputes in The GATT/WTO: Before and After US — Shrimp Case', 20 *Michigan Journal of International Law* (1999) 819, at 860–61.

[9] See 'Trade and the Environment in the GATT/WTO', Background Note by the WTO Secretariat for the High Level Symposium on Trade and Environment, 15 March 1999, at 7.

[10] See, for example, the various contributions in Van Den Bergh (ed), *Handbook of Environmental and Resource Economics* (Cheltenham, Edward Elgar, 1999).

institutions of the modern democratic state to create mechanisms for fair deliberation, which could give voice to the *different constituents* of the polity (including its non-human members), and, on the other, the uncontrollable rise of an expert-technocratic administrative culture.[11] Another variant of this 'political' strand takes a more anthropocentric view of the *trade/society* problematique. The eco-socialists in the West and the Gandhians in India prefer to construct the discussion not as a critique of the human domination of *nature*, but as a critique of the *social injustices* which, for them, underlie the contemporary ecological crisis.[12] Pollution and environmental degradation are seen as (another) form of injustice that was unfairly inflicted by society's élite ('omnivores') on the poor and marginal sectors of society. While these two variants of 'eco-politics' take a different view of the distinction between nature and society, both see the solution to the trade-environment conflict in the creation of a new political order. However, the details of this 'new' order remain unclear.

The various interpretations of the nature/society dichotomy allow us to observe the trade-environment debate from different standpoints. Whether nature is conceptualised as a *docile but highly sensitive resource*, as a *locus* of *sacredness*, as a reflector of *social injustices*, or as a *legitimate partner* in a new polity, influences the interpretation of the trade-environment conflict. Thus, for those who accept the Kantian framework, the debate focuses on the *value* of free trade and the institutional framework that supports it *for humanity*. The fact that the Bretton Woods institutions (the GATT/WTO, the World Bank and the IMF) were established with the particular task of facilitating expansion in the scale and scope of inter-national commerce, is not, in itself, a 'bad' thing. Under these premises, these institutions can only be criticised if it is shown that they are not sufficiently attentive to the environmental impact of international commerce, to the extent that this impact *has an adverse effect on humanity*. Neo-classical economics and environmental economics offer differing views on this question.[13]

[11] See, for example, B Latour, 'To Modernise or to Ecologise? That is the Question' in N Castree and B Willems-Braun (eds) in *Remaking Reality: Nature at the Millenium* (London, Routledge, 1998).

[12] See, for example, D Harvey, 'Marxism, Metaphors and Ecological Politics', 49 *Monthly Review* (1998) 17, and M Gadgil and R Guha, *Ecology and Equity: the Use and Abuse of Nature in Contemporary India* (New Delhi, Penguin Books India, 1995) at 118–20.

[13] Modern environmental economics rejects the simple narrative of classical trade theory, according to which the (free) forces of the global economy should necessarily lead to environmental improvement. It argues, instead, that once the different 'imperfections' of the modern society — environmental externalities and governmental failures — are taken into account, trade liberalisation *can* and *does* lead to environmental degradation — both at *local* and at *global* levels (See, for example, MA Cole, AJ Rayner, and JN Bates, 'Trade iberalisation and the Environment: the Case of the Uruguay Round', 21 *The World Economy* (1998) at 337).

From the perspective of Eco-socialism and Gandhism, the trade-environment conflict is not conceptualised in terms of the limits of 'nature', but, instead, in terms of social domination and social injustices. For them, this debate is just another reflection of the deep injustices which characterise contemporary global society. These injustices cannot be captured, or indeed resolved, through the methodology of economics (not even those of the more enlightened environmental economics). They demand other tools, other perspectives. The two foregoing standpoints are encased within the anthropocentric discourse of the Kantian world-view. However, as was noted earlier, the Kantian world-view does not exhaust the discursive spectrum in which the trade-environment debate is entertained. From the perspective of *deep-ecology* or *eco-politics,* the Kantian frame constitutes a treacherous discursive straitjacket which should be resisted. The Kantian perspective is necessarily incomplete because it leaves the *basic paradigms* of the appropriation of nature, economic growth, and political governance, which lie at the core of the free trade *ethos*, *unchallenged*. For these observers, there is no reason why the current structure of the global economy should be taken as a legitimate 'starting point' for the debate. Accepting this 'starting point' will bar any discussion of the radical reforms which these non-anthropocentric view-points call for.[14] For these non-Kantian observers, the trade-environment conversation is seen as an opening to a broader debate about the structure of human society and its relationship with the natural (non-human) environment.

Thus, the trade-environment conflict has many facets. The fact that some of these facets have, so far, dominated the trade-environment conversation does not provide a good-enough reason to neglect the other facets of this conflict. Indeed, I believe that any attempt to resolve this conflict must take these varied interpretations, and the world-views that generate them, into account. There is no *a priori* reason why the trade-environment debate should be entertained under the shadow of the *Kantian* tradition. Deliberating this conflict requires a frame which is sensitive to this discursive complexity. The problem, of course, is that these multiple world-views are, to a large extent, non-commensurable. Thus, recognising them as legitimate standpoints could bar any attempt to resolve this conflict through 'rational' deliberation. I will return to this question in the two concluding sections of this article.

These failures call for various 'fixes' or 'internalisations modules'. The nature and structure of these 'modules' is still highly debated. See, for example, Van Den Bergh, n.11 above.

[14] See the discussion in H Daly, 'Sustainable Development: Definitions, Principles, Policies', Invited Address, World Bank, 30 April 2002, Washington DC (available at *www.worldbank.org*).

II. THE FALSE SOLITUDE OF THE WTO

The trade-environment conversation was undermined by another blind-spot. The debate — as it was enacted in the streets of Seattle, the media, and academia — was dominated by one prominent and rarely contested assumption — that the WTO constitutes the epitome and focal point of this conflict. This is an unfounded assumption. It ignores the fact that this conflict takes place in *a variety of institutional arenas*, and that the WTO — despite its significance — is only one of these multiple settings. The global economic system is governed by a complex legal network, which consists both of treaty-based regimes, such as the IMF and the World Bank, and of regional trade agreements[15] and private legal systems. Each of these domains has its own institutional infrastructure, overburdened by a unique history and tradition. Of these multiple systems, the private realm has received the least attention. The power to make law at transnational level has ceased to be the prerogative of inter-state politics. Similar processes of norm-creation, with matching global aspirations, take place outside the inter-state system. These processes do not follow the familiar routes of public international law (treaty-making or customary law), but, instead, reflect the work of trade associations, independent professional organisations, commercial arbitrators and multi-national enterprises.[16] The emergence of these new forms of *a-national* law reflects a deep social phenomenon: the *transition from a fragmented civil society to a globalised society*.[17]

The influence of this complex network of legal governance (from the IMF to the *lex mercatoria*) has not been limited to the economic domain. These multiple forms of law have encroached deeply into the civic domain — *influencing various civic concerns, including the environment*. Thus, for example, in the field of technical standardisation, the International Organisation for Standardisation ('ISO') and the Codex Commission have been involved in the production of standards with serious social impact, which include the ISO environmental management standards (the ISO 14000 series), and the Codex evolving standards on foods derived from bio-technology.[18] Another example is the field of

[15] For a survey of these different systems, see E-H Petersmann, 'Dispute Settlement in International Economic Law — Lessons For Strengthening International Dispute Settlement in Non-Economic Areas', 2 *Journal of International Economic Law* (1999) 189, at 209–29.

[16] See, for example, G Teubner, 'Global Bukowina' Legal Pluralism in the World Society, in G Teubner (ed) *Global Law Without a State* (Aldershot, Dartmouth, 1997).

[17] The economic environment of expanded international commerce, which was facilitated by the establishment of the WTO, has contributed and supported the growth of these private forms of governance.

[18] The ISO 14000 series is a wide-ranging collection of international, voluntary environmental standards, which deal with a variety of corporate-management issues (including

accounting standards. The International Accounting Standards Committee has, on several occasions, announced that it has an interest in developing global standards on environmental and social responsibility reporting.[19] There are other examples.[20] Section IV examines the ecological sensitivity of one of these 'other' legal domains — the work of the IMF — more closely.

A proper analysis of the trade-environment conflict must be sensitive, then, to this institutional diversity. There is no place in this pluralistic picture for the monolithic image of a reified global 'cartel' — consisting of the three Bretton Woods institutions and the transnational corporations — which has dominated the Green protest since Seattle. This pluralistic exploration should not only bring forth the different institutional cultures that separate these legal domains (which inevitably affect how they view environmental dilemmas), but could also expose the *intricate linkages* between these different settings. Of particular importance in this context are the various, and not always transparent, links between the WTO and other legal domains. While it is true that some institutions, such as the WTO and the IMF, have more influence on the world economic order than other global organisations (eg the ISO), ignoring the existence and influence of these other bodies will generate a distorted image of the transnational domain.[21]

Environmental Management Systems, Environmental Auditing, Environmental Labels, Environmental Performance Evaluation, and Life Cycle Assessment). See, for further details, the web-site of the ISO 14000 series: *www.iso.ch/iso/en/iso9000–14000/iso14000/-iso14000index.html*. The Codex Commission is currently developing general principles for the risk analysis of foods derived from modern bio-technology. See, for further details, the Report of the Third Session of the Codex Ad Hoc Intergovernmental Task Force on Foods Derived From Bio-technology, Yokohama, Japan 4–8 March 2002, available at: *ftp://ftp.fao.org/codex/alinorm03/Al03_34e.pdf*. The Codex Commission was involved in other controversial issues such as the risks of administrating growth-hormones to cattle. For general information on the Codex Commission, see its web-site: *http://www.codexalimentaius.net/*.

[19] 'IASC Current Trends and Future Perspectives', Presentation by IASC Chairman, Stig Enevoldsen, Berlin, 30 March 2000 (a copy is filed with the author). The ISAC standards have substantial global influence. Several stock-exchanges, such as the Australian, German and British ones, permit foreign companies to issue securities using IASC standards. The US Securities and Exchange Commission and the Canadian Securities Administrators are currently considering the use of IASC standards in their markets. See, for further details, the IASC web-site: *http://www.iasc.org.uk*.

[20] Two other legal domains, which are highly important to the environmental context, are the fields of project finance and international construction law. See, Oren Perez, 'Using Private-Public Linkages to Regulate Environmental Conflicts: the Case of International Construction Contracts' 29 *Journal of Law & Society* (2002) at 77.

[21] For a further discussion of this organisational multiplicity, see JE Rauch. 'Business and Social Networks in International Trade', 39 *Journal of Economic Literature* (2001) at 1177.

III. DEMOCRACY AND LEGITIMACY

The criticism against the Bretton Woods institutions highlighted the non-participatory and unaccountable nature of their decision-making procedures.[22] This criticism reflected a deep scepticism of the *legitimacy* of the Bretton Woods framework, and a conviction that the citizens of the world should be given a greater 'voice' in the operation of these regimes. To a large extent, this critique reflects a general problem: as more and more powers are transferred from state-level to transnational level, the detachment between these global legal networks and the traditional sources of legitimacy — the nation, the cultural unit — is becoming more problematical. The result is a deepening legitimacy crisis. The recent wave of anti-globalisation protests has provided a clear indication of the profundity of this crisis.

The problem, then, seems to be clear: *legitimacy.* The solution, too, seems close at hand: *democratisation* — only on a larger scale. The only antidote to the shift in the power structure (from the state to transnational level), so the argument goes, is a parallel shift in the institutions of democracy, which will enable a worldwide democratic experience. The problem is that, once the triplet 'legitimacy-democracy-globalisation' is examined more closely, both the question and the answer seem to lose their sharpness. Rather than leading to a unitary moral-political theory or a distinct action-programme, this triplet gives rise to a plurality of ideologies and practices — each with its own claim for social, moral or political superiority. 'Legitimacy' and 'democratisation' emerge as highly indeterminate linguistic artefacts. Consequently, none of these terms can operate as a stable anchor for the trade-environment debate. On the contrary, the repeated invocation of these terms in the context of this conversation contributes to its vagueness.

The analysis of this triplet ('legitimacy-democracy-globalisation') cannot be pursued to its full extent in this chapter. Thus, the discussion below only seeks to sketch some of the interpretative uncertainties that this triplet generates. Consider, first, the question of *legitimacy*. Two major interpretations of 'legitimacy' (of 'law' or 'authority') can be distinguished.[23] The *first* views the question of legitimacy from a *functional*

[22] For a good introduction to the environmental criticism against the Bretton Woods institutions, see the report in *The Ecologist*, 'Globalising Poverty', September 2000 (attached to *The Ecologist* 30(6), (September 2000).

[23] This question of 'legitimacy' is raised, usually, in the context of the *use of authority*. It became a dilemma for transnational law, because of its increasing ability to influence worldwide social processes. See the discussion in D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law', 93 *American Journal of International Law* (1999) at 596. Bodansky notes that legitimacy 'concerns the justification of authority; it provides grounds for deferring to another's decision, even in the absence of

or *substantial* perspective: to the extent that a transnational norm promotes the common good, it should be seen as legitimate. From this perspective, the process which led to the adoption of a certain norm is not relevant to the question of its 'legitimacy'. 'Democracy', under this account, has no role in the 'making' of legitimacy. The question is somewhat different: which set of criteria constitutes the *best expression* of the common good. And there are numerous answers to this question — from economics, to science and religion — each with its own community of 'experts'.

Social experience provides mixed signals with respect to the acceptability of this interpretation. On the one hand, the declining trust in 'experts' and 'professional expertise' has significantly eroded the power of expert-knowledge to provide privileged accounts of the 'common good', and hence to serve as a source and arbiter of legitimacy.[24] This erosion seem to reflect a widely-shared societal expectation that the people affected by a certain normative structure should be involved in its design and implementation. On the other hand, the decline of 'expert-knowledge' has not been absolute. There are still many occasions in which the legitimacy of the international regime depends more on the opinion of the relevant expert-community than on the qualities of the political process which preceded its establishment.[25] The scientific work of the Inter-governmental Panel on Climate Change is a good example of such a legitimisation process.[26] What turns one set of experts into legitimate proxies of the common good (eg scientists in the cases of the climate change convention), and disqualifies others (eg other scientists in the case of bio-technology, the economists of the IMF) constitutes a difficult puzzle.

The decline in the status of expert-knowledge reflects, among other things, the increasing popularity of a competing vision of legitimacy — which envisions this concept as a measure of *consent* and *control*. Legitimacy is to be measured, first and most, by the nature of the process that led to the creation of the relevant regime, and by the accountability of the players that take part in its operation.[27] This brings

coercion or rational persuasion' (at 603). Theories of legitimacy 'attempt to specify what factors might serve as justifications …' (at 601).

[24] For a discussion of the decline of the 'expert-rule' see, for example, B Wynne, 'May the Sheep Safely Graze? A Reflexive View of the Expert-Lay Knowledge Divide', in S Lash, B Szerszynski and B Wynne (eds) *Risk, Environment and Modernity: Towards a New Ecology* (London, Sage, 1996).

[25] For the role of scientific communities in shaping environmental regimes, see, for example, PM Haas, 'Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone' 46 *International Organisation* (1992) at 187.

[26] For more information on the work of the IPCC, see its web-site at: *www.ipcc.ch.*

[27] Under the substantive interpretation of legitimacy, the democratisation project makes sense only as a measure for enhancing the 'fit' between the law and the common good

me to the *second source* of interpretative obscurity in the legitimacy 'critique' — in what sense (if at all) does the call for 'democratisation' solve the problem of 'legitimacy' in the transnational domain? Deeper reflection raises various doubts about the almost taken-for-granted association between 'democratisation' and 'legitimacy'.

A *first set* of doubts is primarily *practical*. It questions the possibility of erecting a global democratic scheme.[28] The two alternative solutions, which tend to be mentioned in this context — 'global federalism' and 'directly deliberative democracy' — are both highly problematical, and the arguments in this context are widely known.[29] A *second set* of doubts is directed towards the *theoretical assumptions* which are used to justify the link between democracy and legitimacy. These theoretical assumptions portray the concept of democracy as an instrument for attaining *consent*, and take the latter as the only possible ground for legitimacy. But is democracy a reliable proxy of consent? Without entering too much into this wide-ranging debate, it will suffice to point out that the argument which associates deliberation with consent depends on strong assumptions with respect to the nature of inter-subjective communication, and the possibility of inter-subjective agreement.[30] If one's vision of social communication considers disagreements, misunderstandings, and consensus as equally-probable results of communication,[31] the linkage between democratic deliberation and consent becomes less obvious.

These diverse visions of democracy and legitimacy cast doubts on the ability of the global society to conclude the trade-environment debate

(expressed by a certain set of evaluative criteria). This interpretation of the democratic project is, of course, radically different from the procedural vision mentioned above, which emphasises the idea of consent. Indeed, it could lead to 'twisted' accounts of democracy in which democratic deliberation becomes the exclusive right of a closed (élite) community (eg scientists) rather than a process which is open to all those who might be affected by the proposed normative structure. Furthermore, this interpretation of legitimacy takes the criteria for evaluating the 'common good' as exogenous: they cannot be renegotiated through public deliberation.

[28] This way of putting the question presupposes the failure of the institutions of the 'nation-state' (or current global institutions) to offer a real solution to the democratic deficit of transnational law.

[29] For a critique of global federalism, see Bodansky, n.23 above, at 600. The idea of 'directly deliberative democracy' raises the question of the limits of effective conversation. How can the idea of 'free and equal deliberation' be implemented on a global scale? The Internet, despite all its various advantages, does not provide a suitable solution to this problem, even if this is only because it is still not accessible to large portions of the world population.

[30] See, for example, J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass., MIT Press, 1996) and MK Power, 'Habermas and the Counterfactual Imagination', 17 *Cardozo Law Review* (1996) at 1005.

[31] See, for example, N Luhmann, '*Quid Omens Tang it*: Remarks on Jürgen Habermas' Legal Theory', 17 *Cardoon Law Review* (1996) at 883, and G Teubner, '*De Collision Discursion*: Communicative Rationalities in Law, Morality, and Politics' 17 *Cardoon Law Review* (1996) at 901.

with *a* 'legitimate' solution. These doubts provide further support for the conceptual shift, which was alluded to above, from uniform to polycentric constitutional vision.

IV. THE CASE OF THE INTERNATIONAL MONETARY FUND

A Story of Ecological Indifference

This part of the paper seeks to provide a concrete illustration to the general argument, which was sketched above. It has two complementary goals: first, to give a portrait of the trade-environment conflict as it has arisen in the context of the International Monetary Fund ('IMF'), and, second, to sketch possible solutions to this conflict.[32]

The IMF sits at an important junction at the global governance map. Its wide regulative powers and unique lending capacities have turned it into a powerful global player. Like the WTO, the work of the IMF was subject to intense criticism, especially in the wake of the 1997 Asian crisis. However, not much has been written about the environmental aspects of the IMF's work. And it is this neglected question to which this section is directed. Thus, this section seeks to do two things. First, to expose the sensitivity (or lack of) of the IMF to ecological considerations, and, second, to consider the implications of this (in)sensitivity from a constitutional perspective; in other words, to search for possible ways to change it in a constitutional way.[33]

Understanding the way in which the IMF constructs and responds to ecological concerns requires an analysis of its institutional features. It requires a diagnosis of the discursive or intellectual tradition of the IMF and its organisational structure. The IMF's environmental (in)sensitivity arises from the coupling of these structural and discursive attributes. I will focus, in particular, on the way in which the IMF legal system and its unique economic tradition have contributed to the creation of an atmosphere of indifference towards environmental concerns. The role of law in the IMF's institutional apparatus has received little attention in the

[32] The linkage between the IMF and international trade is reflected both in its practices and in its constitution (eg Article I(ii) of the IMF Articles of Agreement). See, further, Sections (ii) and (iii) below.

[33] I do not intend to deal with the more general question of the proper role of the IMF as a global 'central bank' in this section. I will only refer to this debate when I feel that it is relevant to the ecological problematic of the IMF work. This question has received wide attention in the last three years. See, for example, the report of the Meltzer Commission (Report of the International Financial Institution Advisory Commission, 2000, available at: *www.house.gov/jec/imf/imfpage.htm*), J Tobin and G Rains, 'The IMF's Misplaced Priorities: Flawed Fund', *New Republic*, 3 September 1998, and DK Trollop, 'Rules, Discretion, and Authority in International Financial Reform' 4 *Journal of International Economic Law* (2001) at 613.

literature.[34] The IMF is usually presented as the playground of monetary and political calculations. Thus, the argument that legal communication plays a significant and independent role in the IMF decision-making process requires some clarification. To understand the role of law in the IMF, it is necessary to look into the informal practices, customs, and routines, which together form the institutional culture of the IMF. Looking at these practices reveals two key-ways in which the IMF makes law: *standardised loan agreements* and *universal standards*. It is through these two paths of norm-making, and after a long process of institutionalisation, that the law has turned into an independent force within the IMF.

Of the two forms of norm-making that were noted above, the contractual realm plays a more important role in the context of this chapter.[35] The contractual realm has become central to the IMF work with the expansion (in scale and scope) of its lending activity — in particular, the increasing role of the IMF's 'structural adjustment programmes'.[36] While, historically, the IMF was supposed to focus only on short-term financial assistance to countries suffering liquidity crises, in recent years, most of its lending portfolio has consisted of general-purpose loans, with broad economic and social objectives.[37] The recipients of these loans were usually countries (mainly developing or transition economies) suffering from severe financial crises. The change in the IMF activity had significant legal repercussions. The lending instruments were structured as regulative instruments — seeking to 'restructure' the economies of the recipient countries (thus, they were markedly different from private loan-agreements). This was achieved by subjecting the loans to a broad set of conditions, which reflected the IMF vision of 'sound economic policies' — '*conditionality*' in the IMF jargon.[38] However, what turned this sequence

[34] But, see Trollop, *ibid*, for a discussion of the role of rules, and normative codification, in a possible reform of the IMF.

[35] However, the role of the IMF in the creation of universal standards is not less important. For a more detailed discussion of its role in this field, see the IMF web-site at: *http://www.imf.org/external/standards/index.htm* (visited: 14 May 2003).

[36] See, RF Mikesell, 'Bretton Woods — Original Intentions and Current Problems', 18 *Contemporary Economic Policy* (2000) 404, at 406–8, and NS Finlike, 'The International Monetary Fund', *New England Economic Review* (Sept/Oct 1994)17, at Section V.

[37] See, Mikesell, *ibid*., at 411. The Bretton Woods framework foresaw a clear division of labour between the IMF and the World Bank. The IMF was supposed to focus on short-term financial assistance to countries suffering liquidity crises, while the World Bank was given the responsibility for assisting countries in their long-term development needs, mainly through project-specific loans. However, this distinction has been significantly eroded in recent years, as both bodies have increasingly become involved in general-purpose assistance packages. See, Mikesell, *ibid*. Similar questions also arise with respect to the work of the World Bank. However, a review of the World Bank lending practices is beyond the scope of this chapter.

[38] For a more detailed description of this practice, see the Report of the IMF, *Structural Conditionality in Fund-Supported Programmes* (Washington, DC: International Monetary Fund, 2001) at 8–20.

of highly complex contracts or programmes into a semi-independent legal domain was the evolvement of certain *regularities*, or *discursive practices*, which were independent of any cognitive considerations (of economic, political or moral nature).[39] These linguistic practices became *sanctified in and by themselves*.[40]

These emerging normative patterns reflected a certain economic-political *ethos*, which gave little weight to ecological concerns. A recent study of the IMF structural adjustment programmes, which was conducted by the IMF in 2001, provides a clear indication to the nature of these normative patterns.[41] It points out that the structural conditions imposed by the IMF tend to focus on a limited number of issues: close to two-thirds of the conditions have been related to reforms in the fiscal and financial sectors, the exchange and trade system, and economic statistics.[42] To a lesser extent, the programmes also included conditions related to the restructuring of public enterprises, privatisation, and the reform of the social security system (which together accounted for another 20 per cent of total conditions). All the various conditions were based on a shared economic vision — 'the neo-liberal consensus' — which emphasised the importance of fiscal restraint and greater openness to foreign investment and trade, as necessary measures for the achievement of a stabilised and growing economy.[43] Other issues of social concern — environmental problems, poverty, health, education — had no place in this vision, and, indeed, appear rarely (if at all) in the IMF conditions.[44] Annex A of this chapter provides more details on the distribution of IMF structural conditions across economic sectors between 1987–99.

The environmental indifference of the IMF 'structural adjustment programmes' had, in general, a negative impact on the environmental conditions in the recipient countries, and, in this sense, hampered the capacity of these countries to achieve 'sustainable development'. This result could be associated with several features of the IMF structural adjustment lending. First, by their very nature, the IMF conditions have

[39] On the weakness of the IMF cognitive apparatus, see J Stiglitz, 'The Insider: What I Learned at the World Economic Crisis', *New Republic*, 17–24 April, 2000.
[40] Indeed, as was noted by Joseph Stiglitz in a recent paper, senior officials at the IMF 'repeatedly speak of defaults or standstills as an abrogation of the sanctity of contracts', J Stiglitz, 'Failure of the Fund: Rethinking the IMF Response', *Harvard International Review* (Summer, 2001) 14, at 16.
[41] IMF Report, n.38 above. Because the IMF adjustment programmes were negotiated and signed in private, the existence of these patterns was not 'common knowledge'.
[42] IMF Report, *ibid*, at 23.
[43] C Eduardo, F Young, and J Bishop, 'Adjustment Policies and the Environment: A Critical Review of the Literature', CREED Working Paper Series No 1 (1995) at 4.
[44] See Eduardo *et al*, *ibid*, and the IMF Report, n.38 above at 24–6.

tended, overall, to exacerbate local ecological problems.[45] Consider, for example, the policy of 'trade liberalisation' — a prominent IMF medicine. Trade liberalisation has been shown to produce adverse ecological effects within developing countries (when unaccompanied by appropriate environmental measures).[46] This is mainly due to a shift in the output composition — towards more pollution-intensive products — and to the general effect of economic growth (the *scale* effect) that is predicted to raise aggregate emission levels.[47] A second common IMF measure — deep cuts in government spending — tends to undermine the recipient country's environmental institutions, and thus leads to further environmental deterioration.[48] This feature of the IMF programmes is particularly problematical because it is especially in times of financial distress that proper environmental management is mostly needed.

A second problematical aspect of the IMF programme was the way in which the loans were *distributed*. Over the last years, the IMF funds have mainly been used to support the currency of the recipient countries and to meet obligations on external debt.[49] The funds were not used to support the citizens of these countries, who were facing serious financial crisis. On a personal level, these citizens were confronted with an almost unbearable situation: increasing unemployment and high inflation rates (accompanied by loss of consumer purchasing power), leading to severe poverty. This financial distress at an individual level led, in many cases, to over-exploitation of natural resources (eg unsustainable land-clearing practices).[50]

It is possible to offer several explanations for this ecological indifference which became codified in the IMF law. The first explanatory path links the IMF policy-priorities to a certain discursive or intellectual tradition. The discursive universe of the IMF is dominated by the rules and conventions of classic macro-economics with its traditional methods of 'national accounting'. This tradition relies on measures such as Gross Domestic Product (GDP) as indicators of well-being and economic growth.[51] This measure fails to reflect the (negative) impact of the

[45] For a more detailed analysis, see J Kessler and M van Drop, 'Structural Adjustment and the Environment: The Need for an Analytical Methodology', 27 *Ecological Economics* (1998) 267 and Eduardo above n.43.
[46] See, for example, S Dessus and M Bussolo, 'Is There a Trade-off Between Trade Liberalisation and Pollution Abatement: A Computable General Equilibrium Assessment Applied to Costa Rica', 20 *Journal of Policy Modelling* (1998) 11.
[47] See S Dessus and M Bussolo, *ibid*, at 23–24.
[48] J Kessler and M van Drop, n.45 above, at 268.
[49] Stiglitz, above n.40 at 14, and Mikesell, n.37 above at 407.
[50] See, for example, Sunderland *et al*, 'Economic Crisis, Small Farmers Well-Being, and Forest Cover Change in Indonesia', 29 *World Development* (2001) at 767, and J Kessler and M van Drop, n.45 above.
[51] GDP — the value of final goods and services produced within the country in a given period. See R Downburst and S Fischer, *Macro-economics* (Singapore, McGraw-Hill, 1990) at 34–35.

economy on the environment (in terms of the depletion of natural resources, pollution, etc) or on society (in terms of income inequalities) — all of which may be positively correlated with adjustment programmes.[52] The traditional methods of 'national accounting' do not, therefore, measure the opportunity costs of economic growth, and thus fail to reflect the possibility that (conventional) economic growth can lead to a decline in well-being.[53]

The IMF disregard of ecological issues can also be explained in terms of the IMF 'statutory' mandate. The IMF 'constitution' provides that its role is to promote macro-economic stabilisation, an open exchange system, and a balanced growth of international trade.[54] Since, the practice of 'conditionality' was seen as a way 'to ensure that the Fund's resources are used in accordance with the purposes and provisions of the Articles of Agreement',[55] constructing these conditions in the spirit of traditional macro-economics was seen as a natural interpretative choice. This explains, then, why the conditions imposed by the IMF focused on traditional macro-economic concerns (ie the fiscal, monetary, and international trade policies of the borrowing nations), leaving out ecological issues. However, as will be argued below, there are other possible interpretations to the IMF's 'Articles of Agreement', which are more environmentally-friendly.

A second explanatory path links the IMF ecological indifference to its organisational culture and human profile. The recent writings of Joseph Stiglitz on the IMF are revealing in this regard. Stiglitz's comments are interesting not just because of his recent Noble prize, but, more importantly, because he was the Chief Economist of the World Bank, and thus has an extensive knowledge of the internal 'side' of these two global organisations. Stiglitz argues that the IMF's current lending policy does not reflect its original mandate, which was 'to provide liquidity in a world of imperfect capital markets'. Today, Stiglitz argues, the IMF 'focuses on the repayment of loans far more than on the maintenance of the affected country's GDP'.[56] This change in focus, Stiglitz argues, reflects the interests of the financial community in advanced industrialised nations.[57] The IMF's huge bail-out programmes provide, in effect, 'the funds for the developing countries to repay the developed countries' banks, but the real burden is borne by the taxpayers in the developing countries, since the IMF is almost always repaid'.[58] Thus, the legal regularities that were

[52] See, for example, R Downburst and S Fischer, *ibid.* at 33–62.
[53] See Daly, above n.14 and, Eduardo *et al*, above n.43 at 30.
[54] Article I of the Articles of Agreement, and the IMF Report, n.39 above at 3.
[55] IMF Report, above n.39., at 6.
[56] Stiglitz, above n.40 at 16. See, also, his 2000 paper, n.39 above.
[57] Stiglitz, 2001, above n.40., at 16.
[58] Stiglitz, 2001, above n.40., at 18.

pointed out above both consolidate and give normative effect to the economic expectations of the financial community of the West — they do not flow from a 'real' concern (not even a 'macro-economic one) about the well-being of the peoples of the recipient countries.

The radical cynicism of this explanation could raise objections. A close examination of the IMF human profile does, however, offer another explanation, which is a bit 'softer' in its portrait of the IMF officials. This explanation interprets the IMF environmental indifference as a reflection of closed intellectual paradigms, a weak cognitive (fact-finding) base, and entrenched arrogance. IMF officials, in both their education and social background, have little experience with the analysis of ecological problems. Their fields of expertise are prominently macro-economics and international trade. The comprehensive economic theory which was developed to deal with ecological problems over the last 30 years, is largely unfamiliar to them.[59] This shared educational background has turned the IMF officials into facile captives of the conventional macro-economic discourse, with its inherent blindness towards ecological concerns. This intellectual closure has been exacerbated by a tradition of arrogance, and a weak cognitive capacity. The IMF has been criticised for the 'top down' manner in which it designs and implements its adjustment programmes, and the inability of its officials to comprehend the real difficulties of the Fund's 'clients'.[60] These two features of the IMF working culture have provided a strong incentive for relying on normative regularities (rather than on contextual/local indicators) in the development of financial assistance programmes. The following account of an IMF 'bail-out' mission provides a good illustration of these dual features:

> When the IMF decides to assist a country, it dispatches a 'mission' of economists. These economists frequently lack extensive experience in the country; they are more likely to have firsthand knowledge of its five-star hotels than of the villages that dot its countryside. They work hard, poring over numbers deep into the night. But their task is impossible. In a period of days or, at most, weeks, they are charged with developing a coherent programme sensitive to the needs of the country. Needless to say, a little number-crunching rarely provides adequate insights into the development strategy for an entire nation. Even worse, the number-crunching isn't always that good. The mathematical models the IMF uses are frequently flawed or out-of-date. Critics accuse the institution of taking a cookie-cutter approach to economics, and they're right. Country teams have been known to compose draft reports before visiting. I heard stories of one unfortunate incident when team members copied large parts of the text for one

[59] See, for example, Stiglitz, 2001, above n.40.
[60] See, for example, Eduardo *et al*, n.43 above at 6.

country's report and transferred them wholesale to another. They might have gotten away with it, except the 'search and replace' function on the word processor didn't work properly, leaving the original country's name in a few places. Oops.[61]

Ecological Sensitisation: Bridging the Unbridgeable

Constitutional scepticism denies the possibility of resolving the tensions that arise in international relations through mega-constitutional structures. Instead, it looks for possible bridges in the 'fabrics' — in the micro-textures — of a particular dilemma. In the case of the IMF, any such solution would have to overcome two critical obstacles: the closure of the macro-economic discourse — as it has become *codified in IMF law* — and the *top-down arrogance* that characterises the IMF operational routine. I will argue that it is possible to design a plausible compromise in the context of the IMF by utilising the same economic and legal rationalities which have generated the blindness of the IMF towards ecological problems.

Consider, first, the closure of the macro-economic discourse. A pessimistic observer would interpret the ecological indifference of the IMF as a reflection of unbridgeable 'epistemic rupture'. This interpretation leaves very little room for negotiation or dialogue. Indeed, from an environmental perspective, it could only lead to the dismantling of the IMF. Moreover, this conclusion has some support within the economic circle (although not necessarily for the same reasons).[62] However, this recommendation does not seem to constitute a plausible political agenda. An alternative, and more opportunistic, approach would seek to provide the IMF and its 'Green' opponents, with some common ground, which would enable them to co-operate without denouncing their underlying ideologies.

The insights of environmental economics provide such a possible common ground. Environmental economics provides both the theoretical and the methodological means to translate ecological failures into monetary terms.[63] While this translation is not without problems[64] — it could, nonetheless, provide a route for incorporating environmental considerations into the IMF decision-making process. Using the discourse of

[61] Stiglitz, n.39 above.
[62] See, for example, Stiglitz, n.40 above, at 16, and 'Doubts inside the Barricades', *The Economist*, 28 September 2002, at 75–7.
[63] See, for example, *World-Bank, Expanding the Measure of Wealth: Indicators of Environmentally Sustainable Development* (Washington, DC, The World Bank, 1997).
[64] See, for example, D Pearce, *Economics and Environment: Essays on Ecological Economics and Sustainable Development* (Cheltenham, Edward Edgar, 1998) at 55–66 (discussing the limits of cost-benefit analysis as a guide to environmental policy).

environmental economics (ie putting monetary values on our use or abuse of nature) provides the ecological argument with an 'entry-ticket' into the world of macro-economics. This solution does not, however, force the parties to agree to a common philosophical vision, but, instead, utilises a 'local' discursive module ('environmental economics' here) as an instrument for attaining a common practical goal (the prevention of ecological degradation).[65] Each side retains the freedom to interpret this process according to his particular world-view.

This argument offers a different interpretation to the IMF formal mandate, as defined in its Articles of Agreement. Article I(ii) of the Articles of Agreement provides that the purposes of the IMF are (also):

> To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income, and to the development of the productive resources of all members as primary objectives of economic policy.

An environmental-oriented interpretation of the IMF mandate will interpret the notions of 'balanced growth', 'real income', and 'the development of the productive resources' as reflecting a commitment to the idea of sustainable development. Using this interpretation, it is possible to argue that the current IMF lending practices are incompatible with its statutory obligations. As was noted above, the IMF's indifference towards ecological questions has — most probably — had a negative effect on the environmental conditions in its recipient nations, and, in this sense, has hampered the capacity of these nations to achieve 'balanced growth'. New studies indicate that this negative effect is not minor — unsustainable trade and monetary liberalisation could cause substantial environmental damage.[66]

[65] This solution requires both sides to make compromises. For the IMF, it entails not just a departure from its usual economic models, but also a willingness to give ecological concerns priority over the interests of Western banks. For the Greens, this means a subscription to an economic way of valuing ecological assets with all of the difficulties associated with such a move.

[66] See, for example, Sunderland *et al*, n.50 above, J Kessler and M Van Drop, n.45 above, and R Johan and J Whaley, 'The Environmental Regime in Developing Countries', Paper presented at a NBER/FEMI conference on 'Distributional and Behavioural Effects of Environmental Policy', Milan, 11–12 June 1999, available at *www.cid.haravard.edu/cidtrade.* Johan and Whalley tried to estimate the ecologically-triggered economic losses which are suffered by countries undergoing extensive processes of industrialisation and trade-liberalisation. They examined the annual productivity losses incurred as a consequence of various ecological problems, such as the erosion and contamination of soil, contamination of water resources, over-use of natural resources (eg deforestation, fishery, etc), increased vehicle use (emissions and congestion), and untreated human and non-human waste. Their results indicate that these costs could be as high as 10% of the GDP of these countries. This value is much higher than the estimated gains from trade reforms, which are usually in the region of 1–3% of GDP (*ibid*, 15). The study refers to China, India, Indonesia, Pakistan, the Philippines and Thailand.

To the extent that structural adjustment programmes are understood as mechanisms for increasing the long-term development prospects of the recipient nations, the current indifference of the IMF to environmental concerns seems, therefore, to be unsupported. This environmental interpretation could also be expressed and justified through legal means, by relying on the similarity between the IMF's 'structural-adjustment-programmes' and traditional (private) loan agreements. The main goal of banking instruments is to ensure that the lender will 'get' its money back. From this perspective, an important part of the IMF role is to operate as a 'debt-collector' for its 'share-holders'.[67] If, as was argued above, ecological degradation causes severe economic damage, it could also affect the ability of a borrowing nation to meet its contractual obligations. It could also increase the probability that such a nation will suffer from balance-of-payments problems in the future, which will force it, once again, to turn to the IMF. Thus, even from a narrow 'lawyery' perspective, the introduction of ecological conditions into the loan instruments makes 'good sense'.[68]

The Practicalities of Ecological Sensitisation

It is, therefore, possible to base an argument for the ecological sensitisation of the IMF's lending practices on the discourse of economics and banking law. There remains, however, the question of implementation. I argued above that the IMF's weak cognitive apparatus and inappropriate knowledge-base contribute to its unsatisfactory approach towards environmental questions. It seems unreasonable to expect that these barriers could be overcome over a short period. How, then, can the environment be incorporated into the IMF lending practices? I see two possible paths to resolve this difficulty. The first path is based on a clear division of labour between the IMF and other international organisations. This division of labour could be implemented in two ways. The first way maintains the current involvement of the IMF in long-term financing. However, it requires the IMF to involve bodies with environmental expertise (eg the World Bank or the United Nations Environmental

[67] This expression was used — in a rather derogatory way — by Joseph Stiglitz in his recent critique of the IMF, Stiglitz, n.40 above, at 16.

[68] John Ciorciari makes a similar argument with respect to the World Bank's ability to consider a nation's human rights record in its lending decisions. He argues that the World Bank must determine whether the particular human rights violations it wishes to consider amount to an 'economic concern' under the World Bank Articles of Agreement. That condition is safely met whenever such violations would, in the eyes of a reasonable lender in the Bank's position, adversely affect the prospective borrower's ability to meet its obligations to the Bank under the credit agreement. JD Ciorciari, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement', 33 *Cornell International Law Journal* (2000) at 331 & at 370.

Programme) in its decision-making process, especially when making decisions over 'conditionality'. Another option is to limit the IMF lending operations to the provision of liquidity (short-term funding). The IMF would serve as a stand-by lender to prevent panic or crises. Thus, the task of long-term lending should lie exclusively in the hands of development banks, in particular the World Bank.[69] Unlike the IMF, the World Bank has made an extensive effort over the last years to develop its environmental and social expertise.[70]

Another possible path is based on the idea of codification. If we anticipate that the IMF will continue its involvement in long-term financing, but do not believe that it can be forced to delegate some of its decision powers or to develop the necessary environmental expertise, a possible solution is to transform the requirement for environmental sensitivity into a fixed normative prescription. This will require the Fund (by law) to include certain environmental conditions in each structural adjustment programme. These conditions could include, for example, a commitment to direct some of the funding to ecological issues, ensuring the priority of these funds over debt-servicing (the funds could be used for erecting sound environmental institutions, supporting sustainable agricultural and industrial practices, and providing a safety-net to small farmers). Further conditions could be directed to the recipient government (eg requiring the abolition of unsustainable subsidies, reducing taxes or customs on less toxic pesticides, etc). This codification process does not require a change to the IMF's Articles of Agreement. It could be implemented through internal guidelines.[71]

Let me finish with two short queries. Jessica Einhorn, a former Managing Director of the World Bank, has raised the following dilemma, speaking of the Bank's structural adjustment lending:

> 'The checklist for getting credit may now require assessing the loan's impact on poverty, gender disparities, and the environment; it may also call for competitive procurement and enhanced financial management. These requirements raise the cost of doing business with the bank to discouraging levels. The need for realistic management is acute.'[72]

[69] This was the view of the Meltzer Report.

[70] It is true that the World Bank lending activity was also subject to extensive criticism. However, the Bank has made a genuine effort to respond to this criticism. Thus, for example, it has introduced an enhanced 'safeguard policy' to its lending operations and is investing substantial resources in the study of environmental problems (the 2003 World Development Report is dedicated, for example, to the issue of Sustainable Development). For a critique of the World Bank and a description of these efforts, see, NL Bridgeman, 'World Bank Reform in the 'Post-Policy' Era', 13 *Georgetown International Environmental Law Review* (2001) at 1013.

[71] This argument is in line with Article XXIX of the IMF Articles of Agreement, which provides that any question of interpretation of the IMF Agreement arising between any member and the Fund or between any members, shall be submitted to the Executive Board, and at a second stage to the Board of Governors, whose decision shall be final.

[72] J Einhorn, 'The World Bank's Mission Creep' 80 *Foreign Affairs* (2001) at 22.

The argument for environmental or social sensitisation of the lending process could thus end in an administrative nightmare. To me, this objection remains unconvincing — especially in view of the IMF and World Bank commitment to the well-being of the people who receive their funds. After all, if the IMF and the World Bank feel that the task of 'remote control' economic structuring is beyond their capacity, they could leave these decisions to the borrowing countries. It might be better to let them make their own mistakes than to impose the mistakes of the IMF or the World Bank officials upon them. Indeed, if we take Einhorn's argument seriously, it gives support to a move from conditioned loan-based assistance to unconditioned grant-based assistance.[73]

Another difficulty concerns the legitimacy of these potential changes to the IMF lending practices. The wide criticism against the secretive and undemocratic way in which the IMF operates indicates that changing the lending practice in itself may not suffice.[74] It is not enough for environmental experts and economic experts to agree among themselves on the 'right' combination of lending criteria. Such agreement will not satisfy the expectations of many that sit at the receiving end of the IMF loans. Two initial steps that could contribute to the legitimacy of the IMF are ensuring greater transparency in the way in which it operates,[75] and involving other global institutions, such as UNEP or the World Health Organisation in its decision-making process. However, these two steps will probably not suffice in themselves — the IMF will have to introduce some deep structural changes which will allow the developing world a greater 'say' in the IMF decision-making process.[76] However, none of these steps can offer a complete solution to the problem of legitimacy, with its multi-faceted interpretations.

V. CONCLUSIONS

The main thesis of the article was that the trade-environment conflict is not amenable to *meta* solutions — of any kind. The idea that this conflict could be resolved by a singular legal formula or a sophisticated economic model is ill-founded. The resolution of this conflict requires continuous experimentation with diverse responses which will be sensitive to its highly pluralistic nature. It requires polycentric solutions. This conclusion is somewhat disappointing — certainly from a constitutional

[73] The Meltzer Commission moves in this direction in its Report.
[74] See, for example, Stiglitz, n.40 above.
[75] See, for example, *ibid*.
[76] See, for example, in the context of the World Bank, Bridgeman, n.70 above at 1041–46.

perspective — with its inherent inclination for all-embracing structures. However, it seems to reflect the limits of our current knowledge of the rules and mechanisms, which govern the relationship between humanity and nature.[77]

It is possible, though, to draw some more concrete — albeit tentative — lessons from this pluralistic thesis. The first lesson concerns the direction of the trade-environment research programme. To be effective, this programme must broaden its spectrum of inquiry in a way which will reflect (and take account of) the manifold institutional and discursive domains in which the trade-environment conflict is embedded. The second lesson has to do with what I called 'polycentric constitutionalisation'. Gaining better knowledge of the multiple organisational and thematic domains in which this conflict takes place could indicate potential 'bridges' between competing parties or discourses, and thus pave the way for 'local' solutions.[78] These 'local' solutions could utilise various discursive modules (eg 'environmental economics'), or novel decision-making mechanisms (eg various participatory schemes). However, they cannot be deduced *a priori* from some 'meta' universal principles. The law could have an important role in this process, both in the development of these 'local' solutions (using its experience in 'coupling' with other systems) and in giving such solutions a more permanent status (through normative consolidation).

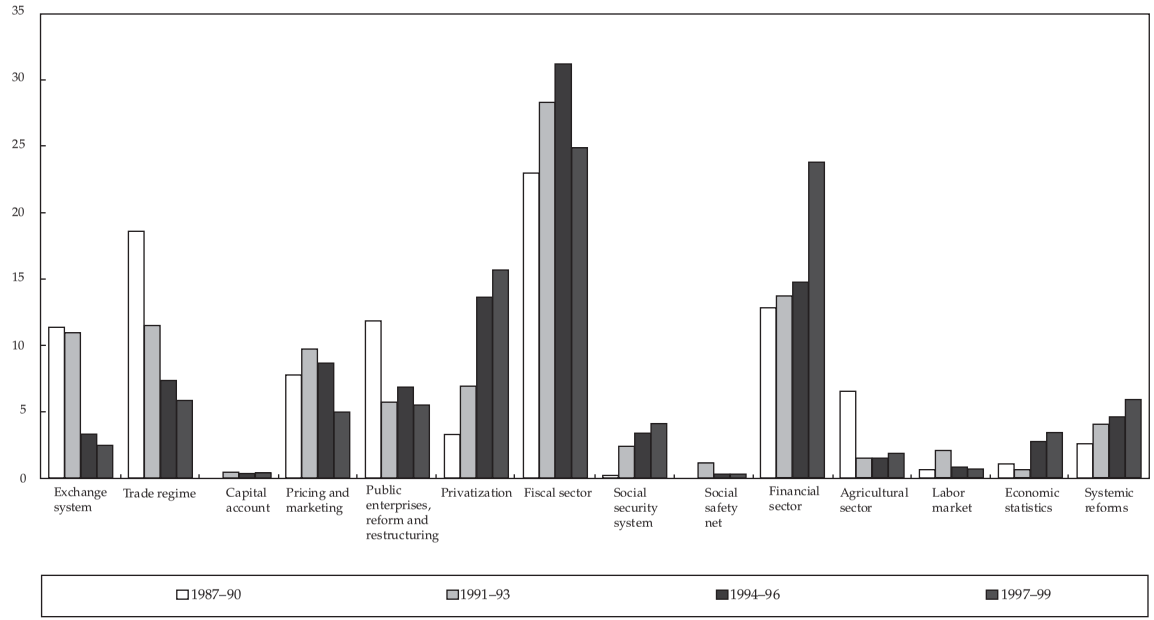
[77] For a similar conclusion, which emphasises the importance of institutional diversity, and polycentric governance — in the context of common-pool-resources dilemmas, see E Ostrom, 'The Danger of Self-Evident Truths' 33 *Political Science* (2000) at 33 & at 42.

[78] One example of an opportunistic solution was given in Section IV. Let me now give another example, which draws on the experience of the World Bank. In providing assistance to Muslim countries, the Bank was facing a difficult dilemma: how to pursue an increasingly humanistic and democratic agenda without appearing to be politically intrusive. In order to avoid this tension, the Bank has described social goals as economic inputs rather than morally-right choices. Thus, for example, to justify a programme of female education in Pakistan, the Bank argued that Pakistan will reap higher economic returns by educating its girls. See Einhorn, n.72 above.

Annex A

Structural Conditions by Economic Sector, 1987–99

(In per cent of total structural conditions)[79]



Source : International Monetary Fund, MONA database, and country papers.

Figure 5. Structural Conditions by Economic Sector, 1987–99
(In per cent of Total Structural Conditions 1)

[79]The table is taken from IMF Report, n.39 above, at 24 (Figure 5).

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*The Structural Limitations of Network Governance: ICANN as a Case in Point**

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THE TERM 'GOVERNANCE' has become an important conceptual tool in the academic and the political discourse in the field of international relations as well as in European Union political and legal science literature.[1] The meaning of the term is constituted by its deliberate separation from the related term 'government'. This separation constitutes a boundary which, like every boundary, in a paradoxical way also links the elements it separates, namely, the two terms 'governance' and 'government'. Thus, the term governance is used to describe policy arrangements that emerge outside the administrative system of a single nation state (government), but which, nevertheless, have a comparable impact on a globally or regionally defined set of recipients. Or, as the Commission on Global Governance has defined the term,

> 'Governance is the sum of the many ways that individuals and institutions, public and private, manage their common affairs.'[2]

The 'governance' term, as used by the Commission on Global Governance, embraces the idea that there are problems 'out there' that are solved by

* This chapter exclusively reflects the personal views of the author. I wish to thank Christian Joerges, Karl-Heinz Ladeur, Jo Murkens and Peer Zumbansen for their active support of the ICANN project and for many helpful suggestions, ideas and criticisms.

[1] See, with further references, M Jachtenfuchs, 'The Governance Approach to European Integration', 39 *Journal of Common Market Studies* (2001) 245–64, and, for an overview and interpretation of recent theoretical approaches, C Joerges, 'The Law's Problems with the Governance of the European Market' in Ch Joerges, R Dehousse (eds), *Good Governance in Europe's Integrated Market*, (Oxford, Oxford University Press, 2002) 3–31.

[2] Commission on Global Governance, *Our Global Neighbourhood*, (Oxford, Oxford University Press, 1995) at 2 and 4.

institutions which are not exclusively under the control of a single national administrative system. 'Governance' is like 'government' because it stands for the regulation of the economy and social relations while, at the same time, avoiding the alleged inherent restrictions of the term 'government'. Governance is not national but European, international, transnational or global; governance is not exclusively public but also private; governance involves experts and knowledge-pools and is, therefore, technical rather than political and bureaucratic; governance is not hierarchical, but heterarchical and organised in networks.

The field of global Internet regulation serves as a prime example for the rise of global 'a-centric' network-like governance structures. Intriguingly, the sociological network concept is analogous to the Internet and directly translates the technical infrastructure of the Internet to the humanities. The network concept in general focuses on heterarchical relationships between multiple actors. The unity of these relationships is conceptualised as a network, and networks are characterised by a non-hierarchical and relatively loose coupling (nodes) of their constituent elements.[3] At the same time, however, a network, as a whole, depends on these nodes. Thus, every node is interdependent of the other nodes of the network. From this a-centric conception, it follows that authority is conceptualised as being shared along the network. Unsurprisingly, the regulation of new communication technologies has been the preferred field for the establishment of network-like governance structures. To this extent, the computer scientist's notion of technical networks has, arguably, influenced policy-makers in the creation of corresponding regulatory structures.

Out of a range of new global governance structures in this field, ICANN (Internet Corporation of Assigned Names and Numbers) is the most prominent. Another one is the Global Business Dialogue on Electronic Commerce (GBDe).[4] Whereas ICANN was founded as a network of private and public actors that run the Internet domain name system, a crucial part of the Internet's technical infrastructure, the GBDe is a private/public actor network which aims at global standard-setting for data protection, consumer rights, encryption and dispute settlement in the field of e-commerce. Both 'self-regulatory' entities have been initiated either by the US-government (ICANN) or the European Union (GBDe). Neither is based on international treaty law; they are both incorporated as private non-profit organisations. They claim to be

[3] For the European Union, see A Benz, 'Politikverpflechtung ohne Politikverpfle-chtung-sfalle. Koordination und Strukturdynamik im europäischen Mehrebenensystem' in 39 *Politische Vierteljahresschrift* 1998 at 558–89.
[4] See *http://www.gbde.org*

'participatory' networks that enable both deliberation and effective regulation by the 'relevant' commercial and non-profit actors in the Internet field. In this paper, I intend to focus on this particular claim. It seeks to establish a network-like democratic polity that goes beyond both the nation state and traditional international organisations. The reconciliation of effective global governance and participatory democracy is the promise behind the ICANN experiment.

This aspiration can also be isolated as the driving force behind a certain strand within the political science and legal literature on 'global governance'.[5] The spread of network-like governance structures as a facilitator of global democracy through the participation of the 'relevant' private actors has been proposed by scholars as a blueprint to handle public policy questions in the age of 'globalisation'.[6] Usually, intergovernmental *fora* based on treaties are not regarded as being capable of providing regulatory decisions with the necessary legitimation, both in terms of public participation and in terms of efficiency and flexibility. Consequently, 'A-centric' networks are proposed as an alternative model of regulation. Within the abundant governance literature from the field of European Union Studies and from the field of International Relations theory, two theoretical approaches to network-governance can be distinguished.

European approaches are usually based on sociological premises which stem from systems theory.[7] As a result of the process of rationalisation and functional differentiation, (post-)modern society is, according to this view, constituted by numerous societal systems without hierarchy or a common centre. The political system, according to Niklas Luhmann, the

[5] For a reflective 'tour d'horizon' concerning the inevitable interplay between traditional and new semantic concepts of state, society and law in the global governance literature, see P Zumbansen, 'Spiegelungen von Staat und Gesellschaft, Governance-Erfahrungen in der Globalisierungsdebatte', *Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Rechts*, M Anderheiden, S Huster, S Kirste (eds), (Stuttgart, Steiner, 2001), at 13–40.

[6] WH Reinicke, F Deng, 'Critical Choices: The United Nations, Networks, and the Future of Global Governance, Better World Fund', *United Nations Foundation* 2000; LA Tavis, 'Corporate Governance, Stakeholder Accountability, and Sustainable Peace': Corporate Governance and the Global Social Void, in 35 *Vanderbilt Journal of Transnational Law* 2002, 487–547; K Jayasuriya, 'The Rule of Law in the Era of Globalisation: Globalisation, Law, and the Transformation of Sovereignty. The Emergence of Global Regulatory Governance', in 6 *Indiana Journal of Global Legal Studies* (1999) 425–55; and with the above-mentioned focus on 'transgovernmental networks', AM Slaughter, 'Governing the Global Economy through Government Networks', in *The Role of Law in International Politics: Essays in International Relations and International Law*, M Byers (ed), (Oxford, Oxford University Press, 1999) 177–205. See, with an illuminating methodological critique, M Koskenniemi, *The Gentle Civilizer of Nations*, (Cambridge, Cambridge University Press, 2002) 480–94, who points out the link between the doctrinal emphasis on fluid actors and processes and US hegemony.

[7] See, with further references, M Jachtenfuchs, 'The Governance Approach to European Integration', 39 *Journal of Common Market Studies* (2001), at 253–56.

founder of this sociological approach, is only one of these sub-systems, and has no privileged position within society. Thus, societal relationships can only be regarded as heterarchical communicative interaction.[8] Command and control interventions by the political system are considered as useless, since they do not respect the inner communicative logic of the relevant sub-system of society. The second premise, which is of special importance for the question of technical regulation, is the assumption that post-modern societies in general lack a common social knowledge and value basis which allows for reliable reality constructions on which the regulatory decisions of administrative bodies can rely.[9] Since this common knowledge basis has been destroyed by post-modern complexity and uncertainty, regulation is bound to include the knowledge resources of the functional differentiated sub-systems of society.[10] Notwithstanding this, these societal sub-systems do, in themselves, also operate under conditions of uncertainty. This has created a trend among national and supranational bureaucracies to supplement authoritative decision-making by 'informal' agreements with private actors from the relevant sub-systems in network-like structures. This theoretical approach has tried to react to the empirical fact that, in national administrations and in the European Union, a whole range of new levels and modes of distributing responsibilities between public and private actors can be observed.[11]

Another influential approach stems from liberal IR-theory. Even in the 1970s, Keohane and Nye, under the heading of 'Interdependence', had already started to focus on transgovernmental policy 'channels' as an important way of international policy-making. This approach

[8] N Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt am Main, Suhrkamp, 1997) 16–44.

[9] KH Ladeur, 'Towards a Legal Concept of the Network in European Standard-Setting', Ch Joerges, E Vos (eds), *EU-Committees: Social Regulation, Law and Politics*, (Oxford, Hart Publishing, 1999) 155.

[10] For Ladeur, the lack of a hierarchy of general ideas or a common definition of public interest under conditions of uncertainty and technological complexity should lead to a redefinition of public interests: ''Public interests' should be understood as emanating from a linking of private and public actions, the observation of which allows for the identification of productive co-operative patterns of tentative or provisional controls on the consistency and circumstantial viability of actions', KH Ladeur, 'Towards a Legal Concept of the Network in European Standard-Setting', C Joerges, E Vos (eds), *EU-Committees: Social Regulation, Law and Politics*, (Oxford, Hart Publishing, 1999) 162.

[11] *Ibid*, at 154. Likewise, Inger-Johanne Sand sees the current changes of government within the European Union as a paradigmatic change of focus from institutions to processes, and from relatively stable to unstable institutions. For her, one effect of these developments is that 'the structure and argumentation of political or knowledge-based discourses become increasingly important for the structuring of the processes and the formation of the changing boundaries of the institutions.', IJ Sand, Understanding the new forms of governance: 'Mutually Interdependent, Reflexive, De-stabilised and Competing Institutions', in: 4 *European Law Journal* (1998), at 285.

was revitalised in the late 1990s by Anne-Marie Slaughter under the normative heading of a 'Liberal International Relations Theory'. For her, 'transgovermentalism' is the 'real new world order'.[12] This order is constituted by the fact that government institutions such as central banks communicate on their own with foreign counterparts, and that these contacts can institutionalise into a network-like form. Slaughter's theory is based on the assumption that states consist of a lot of different public and private institutions (ministries, agencies, private sector and civil society actors) that can develop semi-autonomous relationships with foreign institutions and actors. Like the interdependence literature, 'transgovernmentalism' puts an emphasis on the assumption that states are institutionally 'disaggregated' entities. Transgovernmentalism is presented as a 'fast, flexible and effective' way of co-operation. A form of co-operation that does not have to deal with formal procedures about guaranteed access to negotiations and participation in regulatory decision-making for the global economy. International and supranational organisations as well as international legislation are described as overly bureaucratic institutions which lack the alleged dynamic and democratic virtues of the new world order. For Slaughter, 'transgovernmentalism is a world order ideal in its own right, one that is more effective and potentially more accountable than either of the current alternatives'.[13]

Along these lines, Reinicke, an advocator of 'Global Public Policy' (GPP) networks, for instance, describes regulatory decisions by international law-based institutions as 'by-passing' the concerns of the private sector and civil society.[14] He observes both a 'participatory gap', as private organisations and individuals increasingly perceive themselves as being excluded from policy decision-making, and the continuing inability of public institutions to address this gap. For him, GPP networks create bridges between the public and the private sector, have the potential 'to pull diverse groups and resources together, and address issues that no one sector can resolve by itself'. He further explains why the focus on co-operation based on international law in the age of globalisation is an old chestnut:

> Equating politics with political institutions masks a simple truth: individuals and groups, not bureaucracies or formal institutions, drive innovation and learning. Change is a bottom-up process, not a top-down steering committee.

[12] AM Slaughter, 'The Real New World Order', 76 *Foreign Affairs* (1997) 183–97.
[13] AM Slaughter, 'The Real New World Order', 76 *Foreign Affairs* (1997) 186.
[14] WH Reinicke, F Deng, 'Critical Choices: The United Nations, Networks, and the Future of Global Governance, Better World Fund', *United Nations Foundation* 2000, 3–4.

Reinicke links the network-metaphor to normative aspirations of legitimate sectorial polities beyond governmental and intergovernmental policy-making. As indicated above, the ICANN-experiment embraces this hope for a more participatory private sector-orientated form of global regulation. It is this normative dimension that will be critically assessed throughout my paper. While analysing this claim within the ICANN-context, I want to focus on the structural limits of participatory network governance.

I. ICANN AS NETWORK GOVERNANCE IN PRACTICE

The ICANN experiment promised to constitute a new and more efficient co-ordination structure. The main advantage of the new institution was supposed to be its capacity for flexible non-bureaucratic and technically-informed regulation. In 1998, the Clinton Administration called on the National Telecommunications and Information Administration (NTIA) to facilitate the privatisation of the domain name system of the Internet. Let us briefly recall the central function of the domain name system. This system distributes domain names to individual users and ensures the proper routing of every single Internet Communication through the maintenance of the so-called root servers and the respective software elements. The entity that controls the domain name system has the factual power to add or remove web-pages, such as, for example, the entire group of '.it', '.us' or '.com' web pages. The power over the so-called 'root' has implications not only for e-commerce and the protection of intellectual property rights, but also for consumer choice, competition, the prohibition of illicit content and the ease of political discourse.

In its White Paper on Internet Governance, the NTIA invited the 'Internet community' to found a representative 'self-regulatory' body to which hitherto direct governmental control over the domain name system could be transferred. In 1998, the NTIA recognised the Internet Corporation of Assigned Names and Numbers (ICANN) as this representative body. ICANN was founded by a few private key 'stakeholders' in the field of Internet regulation for this particular purpose, which aimed at the integration of the relevant private actors in the field of Internet regulation in a network-like organisational structure. This small group of influential computer scientists came from private standardisation institutes such as the Internet Society (ISOC) and the Internet Address and Number Authority (IANA) and called themselves 'Internet-pioneers'. ICANN was eventually founded as a private non-profit corporation operating under Californian Law.[15] Regardless of its

[15] *http://www.icann.org*

private nature, ICANN seeks to represent the global public interests of the so-called 'Internet Community'. In its Articles of Incorporation, ICANN described its own role as follows:

> in recognition of the fact that the Internet is an international network of networks owned by no single nation, individual or organisation, the corporation shall (…) pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet (…).[16]

ICANN's organisational structure was supposed to integrate the 'stake-holder organisations' through three different supporting organisations which are co-ordinated by the ICANN board. The three supporting organisations (domain names, addresses and protocols) reflected the main functional tasks of the organisation. The new ICANN by-laws adopted in October 2002 provide for an Address-, a Generic Names- and a Country Code Name Supporting Organisation. The supporting organisations are sub-divided into various constituencies. The constituencies themselves consist of different private or public organisations, associations or groups of individuals. ICANN maintains separate agreements with the constituencies and their individual members. These private actors are supposed to co-operate and to contribute to the ICANN-process while still maintaining their independent status. Thus, ICANN as a whole is constructed analogously to the Internet, which is often described as being a network of multiple networks. The domain name supporting organisation, for instance, has been entrusted with the main policy questions of domain name administration. Until October 2002, it consisted of seven constituencies: (1) commercial, (2) trade-marks, (3) registries of generic top level domains such as '.com' or '.org', (4) Internet service provider, (5) registries of country code top level domains such as '.it' or '.us', (6) non-commercial entities that hold a domain name and (7) registrars. Thus, constituencies with a particular commercial interest have clearly dominated the domain name supporting organisation. This also holds true for the new ICANN by-laws, according to which the former domain name supporting organisation is sub-divided into two separate supporting organisations (generic names and country code names). New constituencies are accredited by a simple majority decision of the ICANN-board.[17] Governments only have an advisory status, which is

[16] *http://www.icann.org/general/articles.htm*

[17] Art. VI-B Section 3 d) ICANN by-laws, *http://www.icann.org/general/articles.htm.* Unless expressly cited, ICANN by-laws are the ones in force before December 2002. The new by-laws adopted on 31 October 2002 will become effective in December 2002 (subsequently cited as 'new by-laws').

organised in the governmental advisory committee (GAC) outside of the supporting organisations. The new ICANN by-laws adopted on 31 October 2002 try to strengthen the GAC by providing it with the right to appoint non-voting liaison members in the supporting organisations, in the nominating committee and on the ICANN board. This, however, does not change the mere 'advisory' function of governments within these ICANN *fora*.[18]

Thus, in the summer of 2002, the President's reform proposal drew a negative picture of ICANN's organisational structure and the resulting performance:

> ICANN, in its current form, has not become the effective steward of the global Internet's naming and address allocation systems as conceived by its founders (…) ICANN has also not shown that it can be effective, nimble, and quick to react to problems.[19]

Throughout the first four years, ICANN was also heavily criticised for its administrative performance from the relevant NGO watchdog and academic community.[20] ICANN did not live up to the promises of an efficient regulatory body. The report saw the reason for this negative performance of ICANN in the 'structural weakness' of ICANN as a decentralised 'purely private sector body'.[21] It seems as if the informal private sector-based network structure that was supposed to be ICANN's strength was now seen as its weakness. Surprisingly, the ICANN reform of October 2002 has not substantially changed the concept of a private network-like regulatory body. As illustrated above, the reform has only marginally increased the influence of public actors and remains committed to the idea of informal regulation through the voluntary contributions of certain private actors. We will have to assess the structural problems of this assumption by examining several fields of ICANN regulation, which have not been solved by the most recent reform. A special focus will, accordingly, be laid on the formal or informal character of the different forms of regulatory action. The fact that ICANN, as a private institution — compared to a public law regulatory agency — has no public law-related coercive power is another factor that has to be kept in mind when assessing various regulatory projects.

[18] See Art. VII s 21 of the by-laws from 31 October 2002.
[19] ICANN-President's reform proposal, 24 Feb 2002 *http://www.icann.org/general/lynn-reform-proposal-24feb02.htm*
[20] See, with systematic links to critical e-mails and statements about ICANN's regulatory policies, *www.icannwatch.org*
[21] ICANN-President's reform proposal, 24 Feb 2002 *http://www.icann.org/general/lynn-reform-proposal-24feb02.htm*

a) Root Server Management

Root servers translate or resolve domain names into addresses, and thus constitute a central element of the technical infrastructure of the Internet domain name system (DNS). The domain name system relies on thirteen root servers. Ten root servers are located in the US, the other three can be found in Europe and in Japan. The root server system resolves name queries (about 3,000 per second) that refer to the highest level of the domain name system, the so-called top level domains. They administer the authoritative data concerning this highest level of the domain name hierarchy. The so-called A-root server contains the original root database and spreads it to the other root servers, which use a copy of this central A-root server data file. In general, the root server system ensures the proper functioning of the domain name system as an inter-operable unitary name and address space. According to its Memorandum of Understanding with the US government, ICANN's task was to ensure the stability and operability of this system.[22]

The main problem for ICANN was that the root server operators had no formal obligation to co-operate with ICANN. Funding for these private research or business institutions came chiefly from governmental sources (in the US), or other scientific or commercial research funds (Europe and Japan). ICANN has, until now, not managed to exercise meaningful control over this system. For instance, the central A-root server is operated by the private company Network Solutions, which stands in contractual relations with the US government. It is the US department of commerce that decides over the insertion or removal of new data to the authoritative A-root server-file operated by NSI. In practice, the US government did not reject ICANN's proposals (elaborated by IANA) concerning data-changes in the root zone file, but formal authority lies with the US government and will not be transferred in the near future. If the US government had rejected to add the recently newly created generic top level domains to the root, ICANN would have had no possibility for their technical implementation.

Nor did ICANN manage to formalise its relations with the other root server operators. Organisations that sponsor root server operations had no motivation to sign formal agreements with ICANN. Since they had devoted technical skills and financial support to the root server system, they were not willing to share authority over their part of the technical system. Or, as the President's reform proposal described the problem, 'What do they gain in return? (…) They receive no funding for their efforts, so why should they take on any contractual commitments,

[22] *http://www.icann.org/general/icann-mou-25nov98.htm*

however loose?'.[23] The aim of ICANN's regulatory activity was to increase the control over central parts of the technical infrastructure. Two interpretations of the limited success in this field are possible. One explanation could be that ICANN should not have attempted to increase the control over the root server operators in the first place. According to the network logic, the root server system was maintained by a decentralised set of actors that controlled their part of the technical system on their own, in line with the 'shared authority' logic of the network structure. They directly co-operated with their technical counterparts on an informal basis. ICANN's attempt to enter into a formalised agreement with them was a move towards centralisation, which had to be resisted according to the network logic. Another interpretation would see formalisation via memoranda of understanding as a stabilisation of expectations that would have contributed to the accountability of the overall regulatory system. This leads us to the role of law within the network structure. ICANN, as we will also see in other regulatory fields, is only able to stabilise expectations by bilateral agreements with other actors of the network. The ICANN by-laws cannot create substantive legal obligations to co-operate with the network. In practice, however, the root server operators were reluctant to enter into contractual relations with ICANN as a representation of the regulatory network.

While ICANN was struggling for influence in the field of root server management, the Open Root Server Confederation (ORSC) set up its own root server system aiming at the distribution of new generic top level domains.[24] Since this system also used the data files from the traditional root server system, it could root messages to all the already existing addresses while adding 250 new top level domains. All queries relating to such a new top level domain are directed via a normal name server to the new root server system to be resolved by one of its servers. Thus, the new system did not endanger the inter-operability of the Internet, because it used names hitherto non-existent in the domain name system. The introduction of the '.biz' top level domain by ICANN in 2001 led to the first problem of collision, because this domain had already been distributed by the ORSC. The new root server system had to decide whether to resolve the '.biz' queries on the basis of the authorative A root zone file or on the basis of its own '.biz' zone files.[25] Without a subordination under

[23] ICANN-President's reform proposal, 24 Feb 2002 *http://www.icann.org/general/lynn-reform-proposal-24feb02.htm*

[24] See *http://www.orsc.net*; Dittler, ICANN's Rolle bei der Kontrolle über die Schaltzentralen des Internet, p. 482.

[25] HP Dittler, 'ICANN's Rolle bei der Kontrolle über die Schaltzentralen des Internet', I Hamm and M Machill (eds), *Who Controls the Internet. ICANN as a Case Study in Global Internet Governance*, (Gütersloh, Bertelsmann, 2001), at 482.

the A-root zone file, the Internet, at least as regards the '.biz' domains, could have split into two parts.

b) The ccTLD Agreements

Another field of regulation in which the ICANN board struggled for a more formalised relationship with the principal actors of the network was the distribution of country code top level domains (ccTLDs). The ccTLDs were set up by the late Postel on the basis of his personal contacts among the small international group of Internet 'pioneers'. Some are run by private companies, others by non-profit organisations or governments. All of these had been entitled by Jon Postel on the basis of his famous request for comments (RFC) 1591. RFCs were the normal instrument of regulation and standardisation in the early days of the Internet. Jon Postel — widely accepted as the 'father' of the domain name system — made frequent use of RFCs to implement new domain name system policies. If the small number of individuals involved in domain name policies did not object to an RFC-mail, its content became a new 'law' in the domain name space. The ccTLD-registries later became actors of the ICANN-network through their representation in the domain name supporting organisation. Even though they had been entitled by RFC 1591, they are all subject to the laws and regulations of the countries in which they operate. ICANN's Governmental Advisory Committee has made it clear that it regards the relationship between ICANN and the ccTLD-registries as a matter of public concern, and that it wants to be involved in ccTLD policy-making.

To complicate the affair, ICANN saw the relationship with the registries as the only possibility of funding its increasing expenses. It aimed at a formalised relationship that should include cost-recovery mechanisms. A year of negotiations between ICANN and the 247 ccTLD registries did not produce an agreement that was suitable to everyone. The ICANN strategy aimed to allocate fees ('ccTLD-tax') on the basis of how many names were registered. Even without the desired formal contracts, ICANN started to charge the registries for their registration activities. After the bigger registries had refused to pay the ICANN bills, the negotiations about contractual relationships continued.[26] ICANN could not coerce these registries into formal agreements on a cost-recovery basis. Enforced replacement of the old registry by a new administrator, through the transfer of authority over the respective data files to a new

[26] See the refusal of the South-African registry and the reaction of ICANN at *www.mids.org/pay/mn/1006/za.html*

entity, would have required governmental support. Only the Australian and the Japanese registries entered into a formalised agreement which included the regular payment of fees. Apparently, the two respective governments had put pressure on them to formalise their relationships with ICANN.[27] Here, again, two diverging interpretations are possible. The move to formalisation, which is also supported by national governments, is an attempt to centralise the decentralised network-arrangement and should be resisted by the ccTLD-registries. The other interpretation sees the informality of these relationships as an institutional weakness because the allocation of ccTLDs as a public resource should, effectively, be controlled by ICANN as the representative of the global 'Internet-community'.[28] It seems as if the hybrid network-polity is haunted by questions of authority and hierarchy. Who decides over the contribution of the nodes to the overall network? Is this a decision that should be taken by a centralised organ, or does this decision lie within the autonomy of the individual nodes, and how can such decisions be enforced against the resistance of the most powerful actors? The new polity was conceptualised as an alternative to traditional bureaucratic command control structures and has increasingly found itself incapable of fulfilling its task without being equipped with analogous instruments.

c) Competition in the Domain Name System Markets

As the above-mentioned example shows, one of the central problems of self-regulatory networks which assume public responsibility is the existence of monopolistic structures as far as certain knowledge resources are concerned. Networks have difficulties in coping with the resulting asymmetries in power over regulatory decisions, as they structurally lack a mechanism that both privileges and potentially enforces the network interest over the divergent interests of the individual actors. At the same time, the whole network may depend on these individual actors. A field of ICANN-regulation, in which this dilemma became particularly obvious, was the opening of the domain name markets for more competition. Since 1995, the commercial company Network Solutions (NSI) had administered the central registry for the most important '.com', '.org' and '.net' top level domains (registry-function) and had distributed

[27] ICANN-President's reform proposal, 24 Feb 2002 *http://www.icann.org/general/lynn-reform-proposal-24feb02.htm*

[28] This is the argument of the ICANN-president, *http://www.icann.org/general/lynn-reform-proposal-24feb02.htm*

domain names under these top level domains to individual users (registrar-function). The US-Government had also entitled the NSI, in 1995, to exercise these functions and to charge $50 per domain name per year to individual users.[29] ICANN tried to convince NSI to hand over the registrar function to other commercial entities. NSI could have kept the lucrative registry function, but would have had to give up its monopoly over the distribution of domain names. NSI simply refused to co-operate with ICANN concerning these questions and threatened to invoke its alleged intellectual property rights concerning the registration data-files.[30] Only after massive interventions by both the US government and the European Union competition authorities did NSI agree, at least partially, to open up the registrar function for the '.com' domain.[31]

A further attempt to create a more competitive environment in the field of domain name registration was the introduction of new generic top level domains. At the end of the 1990s, for instance, almost all possible '.com' domain name variations had already been distributed to individual users. The introduction of new top level domains became the first important policy-decision of the ICANN board and had a relatively strong global media coverage. Technically, the ICANN board could have introduced an almost unlimited number of new names. As far back as 1995, Jon Postel had advocated the introduction of 150 new top level domains. The main opponents of a large widening of the domain name space were the former commercial registries, such as NSI, and the representatives of trademark and intellectual property interests. This group was represented by a constituency in the domain name supporting organisation and — as a principal donator of the Clinton/Gore election campaign — had privileged access to US governmental policy-making circles.[32] From the perspective of efficient trademark protection, more top level domains constitute a threat since the control over the use of names and ideas becomes more complicated and gives rise to higher transaction costs for rights' holders.

Eventually, only seven new top level domains were introduced. An interesting aspect of this regulatory decision was the fact that the ICANN board did not refer to the protection of trademarks as a relevant factor for

[29] See M Mueller, 'ICANN and Internet Governance: Sorting through the debris of self-regulation', *Info* (1999) 1(6): 502.
[30] JP Kesan, RC Shah, 'Fool Us Once Shame on You — Fool Us Twice Shame on us: What we can learn from the Privatisation of the Internet Backbone Network and the Domain Name System', 79 *Wash ULQ* (2001), 184.
[31] Commission Press Release IP-99-596 (29.7.1999), (1999) 5 CMLR, p. 586; see Vajda, Gahnström, 'EC Competition Law and the Internet', at 101, and 123/83 *BNIC v Clair* (1985) ECR 391.
[32] See M Mueller, 'ICANN and Internet Governance: Sorting through the debris of self-regulation', in: *Info* (1999) 1(6): 502.

the restrictive approach to the introduction of new domains. In contrast, it referred to an alleged 'community consensus' that had stopped them from the introduction of more names. At the ICANN-Marina del Rey Meeting in December 2000, the ICANN board decided to introduce the following seven new generic top level domains ('.biz', '.info', '.name', '.museum', '.coop', '.aero', and '.pro'). These new names were selected out of hundreds of applications. An application for the introduction of a '.trade union' top level domain by a coalition of 140 national trade union associations was, however, turned down by the ICANN board, who referred to a lack of 'community consensus' concerning the recognition of trade unions as useful societal institutions.[33] Apart from this rather arbitrary reference to a 'community consensus', the board deliberations in Marina del Rey obscured the fact that the most important decision, namely, the restriction to only seven new top level domains, had already been taken, and was in line with both the position of the trademark lobby and the US government. In general, ICANN did not manage to enhance competition in the domain name registration markets substantially. The influence of trademark interests and the factual power of the NSI '.com' registry prevented the breaking up of monopolistic structures in the domain name registration markets.

d) The Uniform Dispute Resolution Policy

Trademark protection has been a primary concern of ICANN. Here, the organisation has proved to be an efficient regulatory body by implementing a so-called Uniform Dispute Resolution Policy (UDRP). The UDRP has been developed by ICANN in co-operation with the World Intellectual Property Organisation (WIPO). The drafting and adoption of the policy only involved the WIPO secretariat on a rather informal basis, and the WIPO-member states played no formal role in this process. The principal aim of this policy is the limitation of abusive registrations of domain names ('cybersquatting'). It provides trademark holders with a quasi-legal procedure for the resolution of domain name disputes and constitutes an experiment in the globalisation and private enforcement of intellectual property rights. The resolution panels of the WIPO arbitration centre and three other private arbitration institutes decide the disputes on the basis of uniform rules without having to refer to the complex question of the applicable law.[34] The registrars of domain

[33] See Ch Ahlert, Babylon 3.0: Die Dialektik Digitaler Demokratie, *http://www.heise.de/tp/deutsch/htm/result.xhtml?url/tp/deutsch/…/html&words=ICAN*
[34] UDRP 15.a., *http://www.udrp.law.net/udrp.htm*

names under the '.com', '.net' and '.org' top level domains are obliged to adopt the UDRP by their registration agreement with ICANN.[35] An increasing number of registrars of the country code top level domains have voluntarily adopted the policy. In turn, individual users registering a domain name are contractually bound by the registrar to commit themselves to arbitration under the UDRP. Thus, most of the world's domain name registrations fall under the jurisdiction of the UDRP. The decision of the arbitration panel can be electronically enforced by removing the address of this particular web page from the zone files.[36] ICANN enforces the decisions after 10 days on the condition that neither the plaintiff nor the defendant has challenged the panel-decision by instituting a regular national court procedure.[37]

The cases are decided on the basis of the question of whether the actual domain name-holder has registered the name in bad faith, and whether he has a legitimate interest in holding the domain name. More precisely, the material preconditions for a successful suit brought against the registration of a name by the defendant are: Article 4(a)(i): the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; Article 4(a)(ii): the registrant has no rights or legitimate interests in respect of the domain name; and Article 4(a)(iii): the domain name has been registered and is being used in bad faith. This last criteria is the most problematical one since it refers to the subjective motivation for the registration. According to Article 4 (b) of the UDRP, a domain name has been registered in bad faith if there is evidence that the respondent acquired the domain name primarily for the purpose of selling or renting it to the complainant who is the owner of the trademark, or to disrupt the business of a competitor. For instance, in December 1999, the World Wrestling Association brought a suit against an individual from California who had registered the domain 'worldwrestlingfederation.com'.[38] According to this First Panel decision, the defendant failed to demonstrate that he had registered the name in good faith, because he had not set up a web page and had offered to sell the domain to the WWF for $1000. Since the WWF had registered its name as a trademark, the panel required that the domain name should be transferred to the organisation. Another field of application of the UDRP has been the protection of famous names. After, for instance, the domain name-holder of

[35] Section II (K) of ICANN's registrar accreditation agreement, see *http://www.icann.org/nsi/icann-raa-04nov99.htm*
[36] Statistik de WIPO Arbitration and Mediation Centre, *http://arbiter.wipo.int/domains*
[37] UDRP 4. k., *http://www.udrp.law.net/udrp.htm*
[38] See B Young, '*World Wrestling Federation Entertainment Inc v Michael Bosmann*: ICANN's Dispute Resolution Policy at Work' 1 *NCJL & Tech* (2000).

'juliaroberts.com' had put the domain name up for auction at *e-bay*, Julia Roberts was awarded her name by a UDRP panel.[39] So far, more than 4,000 cases have been decided by UDRP panels.[40]

The UDRP can be criticised at different levels. The first and most radical criticism does not see any role for trademark protection in the Internet domain name system. According to this approach, the 'first come, first served' principle decides over who holds which name in cyberspace. The intentional registration of trademark protected names or the names of famous people ('cybersquatting') should not be sanctioned because it corresponds to the anarchical character of the virtual space. Yet, in general, the literature acknowledges that cybersquatting should be prevented.[41] This criticism concentrates either on individual cases, in which the reasoning of the panel is allegedly unsound, or refers to the fact that, in over 80 per cent of the cases, the complainant wins the case. The most intriguing criticism refers to the organisation of the arbitration process. Four private arbitration institutes have the right to render UDRP judgments. Seemingly, in some of these institutions, the UDRP is interpreted in a more complainant-friendly way than in others.[42] As a result, these arbitration centres are more often frequented by complainants. Since these institutions charge for the arbitration procedure, they have an economic motivation to be known as complainant friendly. Thus, the arbitration-market logic disturbs the juridical logic of the arbitration process. The claimants possibility of forum shopping combined with a competitive private arbitration market is detrimental to the emergence of a self-referential legal logic. Not surprisingly, the more complainant friendly arbitration institutes, such as the WIPO, decide most of cases (WIPO 61 per cent), whereas *e-Resolution*, for instance, which is statistically known for its greater likelihood of finding for the defendant, has only a very small market share (7 per cent), even though it is the institution with the lowest arbitration fees.[43]

All in all, the UDRP can be seen as a highly efficient form of global private adjudication, even though the judgments given can be appealed or challenged before national courts. It shows the enormous power that private institutions with the support of a strong state can exercise in terms ofboth global legislation and adjudication. Without any meaningful

[39] *Julia Fiona Roberts v Russel Boyd*, WIPO-Arbitration and Mediation Centre, at, *www.arbiter.wipo.int/domains/decisions/html/d2000-0210.html*

[40] For other cases, see JG White, 'ICANN's Uniform Domain Name Dispute Resolution Policy in Action' 16 *Berkeley Technical. Law Journal* (2001) 229.

[41] M Mueller, 'Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy', at 2 at *www.digital-convergence.org*

[42] *Ibid*.

[43] See above n.41.

international public participation, new substantive global private rights have been created by ICANN. Given the strong influence of the US government on ICANN and the WIPO-secretariat, it is not surprising that the UDRP has striking similarities to the material rules of the US Cybersquatting Act, which came into force shortly before the UDRP was adopted by ICANN.

e) Protocol Standardisation

Within the ICANN organisational structure, the protocol supporting organisation is supposed to administer the standardisation of the central Internet protocols. The members of the protocol supporting organisation initially were the Internet Engineering Task Force (IETF), the International Telecommunications Union (ITU), the European Telecommunications Standards Institute (ETSI), and the World Wide Web Consortium (W3C). Concerning the development of Internet protocols, the IETF can be regarded as the most important standardisation organisation. It belongs to the Internet Society (ISOC) and has created the 'Transmission Control Protocol' (TCP/IP) which, as a software element, provides for the interconnectivity required to maintain the Internet as a network of networks. Before the creation of ICANN, the IETF stood in contractual relations with IANA. According to this agreement, IANA was obliged to distribute addresses on the basis of the IETF protocol parameters. Thus, IANA realised the practical implementation of IETF-standards in the Internet domain name system. After the foundation of ICANN, this distribution of tasks remained unchanged.

According to the memorandum of understanding with the IETF, ICANN accepted and recognised the existing agreements between IANA and the IETF. In spite of the integration of the two organisations into the protocol supporting organisation, both the distribution of authority within the field of standardisation and the implementation of protocols were preserved via bilateral agreements.[44] In practice, ICANN did not play a significant role in this field, with the exception of the official integration of these two actors into the ICANN-network, and its remaining, albeit powerless, overseeing function.

In the context of the ICANN-reform debate, the IETF was not willing to increase ICANN's control over the standardisation of Internet Protocols. Instead, it questioned any role of ICANN in the field of

[44] K Birkenbiehl, 'Selbstregulierung des Internet am Beispiel von Ipv6 und die Rolle ICANNs', I Hamm and M Machill (eds), *Who Controls the Internet. ICANN as a Case Study in Global Internet Governance*, (Gütersloh, Bertelsmann, 2001), at 442.

Internet Protocol standardisation.[45] In fact, the ICANN By-laws of the 31st of October 2002 have eventually abolished the protocol supporting organisation. However, the ICANN network essentially depends on the knowledge resources of both the IETF and the other standardisation institutes, which are no longer integrated in ICANN's organisational structure. They collaborate with ICANN with the facilitation of a technical liaison group.

In conclusion, ICANN could not establish itself as an efficient regulatory body for the domain name system. The informality of the network structure successfully prevented ICANN from implementing the policies which it had defined as the 'general good' in the field of domain name regulation. This became particularly obvious in the attempt to increase competition in the domain name markets and in the attempt to establish more stable relations with key-actors for the functioning and inter-operability of the domain name system. ICANN has proved to be an efficient legislator only in the field of intellectual property protection in which ICANN — pushed by the most powerful actors of the network — was in a position to develop a policy in the absence of a representation of divergent interests in the organisation. Apart from this area, ICANN did not become an efficient co-ordinator of 'stake-holder' and 'community' interests and contributions.

II. THE PROBLEM OF EXCLUSION AND DISRUPTIVE PARTICIPATION

As outlined above, the ICANN rhetoric focused on the widespread participation of the 'Internet community' in line with the republican ideal of democracy as collective self-determination.[46] In practice, the 'Internet Community' was supposed to be represented in ICANN by 'stake-holder' organisations, who were to be the initial set of private actors constituting the network. The question of who is allowed to participate in a governance network leads us to the central problem of exclusion.[47] The decision over the 'relevant' actors is of fundamental importance for the legitimating effects of the participatory process itself. The problem

[45] IAB-response to ICANN evolution and reform, at, *http:/www.iab.org/DOCUMENTS/icann-response.html*

[46] On this notion of democracy and its practicability, see, in general, R Howse, 'Transatlantic regulatory co-operation and the problem of democracy', *Transatlantic Regulatory Co-operation, Legal Problems and Political Prospects*, GA Berman/M Herdegen/PL Lindseth (eds), (Oxford, Oxford University Press, 2000), at 472–4.

[47] The following reflections draw heavily on H Lindahl, 'Sovereignty and Representation in the European Union', in: N Walker (ed), *Sovereignty in Transition*, (Oxford, Hart, 2003).

of political philosophy, in which the foundation of an order cannot be part of the order, equally effects governance networks. The constitution of the network cannot be legitimated by the participatory processes of that network. Thus, the first, and inevitably arbitrary, decision over the initial set of members of the network puts the chosen participants in a privileged position to decide who will be able to participate in the network in the future. At the same time, this foundational act lies beyond participatory politics. It is an inevitably exclusionary act and is, consequently, often described in political theory as a manifestation of power.[48] The foundational paradox is usually obscured by constitutional conventions and referendums, which also presuppose a found-ational decision about who will participate and vote. In the ICANN case, the foundational decision was taken by a handful of computer scientists from IANA, the IETF and the US Department of Commerce.

Moreover, the founders of ICANN had allegedly assumed that the different private actors would dedicate parts of their communicative resources to the overall ICANN policy process, even if their particular interests were not at stake in a certain policy issue. This leads us to another central problem of participatory and deliberative democracy: participants need to be willing to engage in the discourse over central regulatory issues and decisions actively. In the absence of such a willingness, a Habermasean rational discourse that could have penetrated the barriers of the actors' individual economic preferences did not evolve within the ICANN *fora*.[49] ICANN's 'Internet community' did not develop the potential to become a 'Rechtsgemeinschaft'. The presuppositions of a participatory process being able to entrench legitimacy in line with the discourse principle might, in practice, be lacking in network governance arrangements. Powerful private commercial actors tend to stick to strategic ('zweckrational') actions. As described above, the monopolistic '.com' Network Solutions registry (NSI), for instance, refused to engage in an open debate about the sharing of the highly

[48] About the 'Aporien des Rechts', see J Derrida, *Gesetzeskraft. Der mystische Grund der Autorität*, (Frankfurt am Main, Suhrkamp, 1991) deconstructing a text of W Benjamin; Kelsen translates this phenomena into a problem of validity trying to encapsulate it in the concept of a fictitious ('hypothetisch') Basic Norm, H Kelsen, Reine Rechtslehre. *Einleitung in die rechtswissenschaftliche Problematik*, (Leipzig; Wien, Springer, 1934), at 130; see, on this concept in Kelsen's theory of international law, J von Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler*, (Baden Baden, Nomos Verlag, 2001), at 141–6.

[49] J Habermas, *Erläuterungen zur Diskursethik*, 2. Aufl. (Frankfurt am Main, Suhrkamp, 1992), at 155, and, in general, for the discursive presuppositions of legitimate law, J Habermas, *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*, (Frankfurt am Main, Suhrkamp, 1992).

lucrative registration function by threatening to use its control over the central '.com' database to set up its own new root server system outside the ICANN-network.[50] This practical example illustrates that participation by included actors can be highly selective and destroy, rather than create, a discursive ('verständigungsorientiert') environment even if non-commercial entities are strongly represented in the network.[51] The reluctance of the ICANN board to implement a general membership scheme (of large-membership) reinforced this problem.[52] The problem of selective and destructive participation is a direct consequence of what Teubner justifies as a necessary feature of 'inter-systemic networks', namely, the actors' 'capacity to balance, on their own, the relationship between what they perceive as their social function and their contribution to the environment'.[53] This is the flip-side of the assumption of the system theory that better regulation is a quasi-automatic result of efficient protection of the actors' autonomy in hybrid networks.

The idealistic image of the board's role as a mere 'co-ordinator' of the network and a translator of 'community consensus' into decisions could not be upheld.[54] Through the lack of substantial support from the three supporting organisations, the ICANN board operated in an isolated and hierarchical way, being influenced mainly through channels outside the envisaged policy-process by a handful of powerful actors; namely, the US government, IANA, the private '.com' registry Network Solutions (NSI), and the World Intellectual Property Organisation (WIPO).[55] The staff of the ICANN–board, which, according to the original concept, was meant to inform the board about the results of the Internet community's consensus-building process, attained a dominant role in the substantial preparation of board decisions.

Paradoxically, as a critical reaction to these developments, non-profit watchdog organisations began to organise themselves outside the ICANN framework. Whether it be ICANN-watch, the NGO and

[50] See above n.30 at 184.
[51] This is the central problem of motivation for communicative action ('verständigungsorientiertes Handeln') that Habermas tries to solve by his reference to 'solidarity' as an extra-legal precondition for such a motivation, J Habermas, *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*, (Frankfurt am Main, Suhrkamp, 1992), at 51 *et seq*, 111 and 165.
[52] See NGO and Academic ICANN Study, Executive Summary, *http://nais.poject.org*, the ICANN Bylaws from October 2002 in Art. XI provide for an 'At-Large Advisory Committee'.
[53] G Teubner, 'Hybrid Laws: Constitutionalising Private Governance Networks', in: R Kagan/K Winston (eds), *Legality and Community*, (Berkeley, University of California Press, 2003), forthcoming, and at, *http://www.uni-frankfurt.de/fb01/teubner/publikat.html*, at 20.
[54] See, only, M Froomkin, 'Wrong Turn in Cyberspace: Using ICANN to Route Around the Constitution and the APA', 50 *Duke Law Journal* (2000), at 259.
[55] *Ibid*, at 182–5; see, also, J Weinberg, 'ICANN and the Problem of legitimacy', in: 50 *Duke Law Journal* (2000), at 257–60.

Academic ICANN-Study Group, or the exclusive Boston Working Group, they all developed a highly critical attitude towards the work and decisions of the ICANN-board and the problem of 'capture' by commercial stake-holders.[56] These organisations are run by a handful of academics mainly from the US, Canada and Europe. Most of these institutions provide accessible web-pages, discussion *fora* and mailing lists (with the exception of the Boston Working Group). They can be regarded as the first step towards an emerging public sphere (Teilöffentlichkeit). But, given the small number of participants in these communication processes, these *fora* cannot claim to form a discursive basis for a global sectorial polity.

III. CONCLUSION

In the first five years of its existence (1998–2003), ICANN has served as an example of the limits of private self-regulation and deformalised global governance structures. The ICANN experiment illustrates that flexibility and efficiency are neither an automatic consequence of informal governance structures nor of their heterarchical design. The concept of shared authority between the relevant private actors has — at least, in the ICANN case — proved to be a myth. The central philosophical problem of every liberal polity to provide the 'common good' or communal life without giving up individual autonomy also haunts the network polity. The network concept is based on the liberal assumption of the autonomy of actors. Communal goals are to be achieved by the network through the simple informal linkage between actors from diverse sub-systems of society. The emerging plurality of societal rationalities — ensured by a decentralised connection of autonomous private actors — is supposed to entrench a more sensitive form of regulation. Since a general and substantive 'common good' is difficult to identify in a post-modern globalised world, the network approach seeks to replace it by specific regulatory decisions that encapsulate the various 'relevant' rationalities of societal sub-systems.

However, this ideal of an 'a-centric' realisation of the common good — as the ICANN example shows — cannot escape the fundamental decision about who is a 'relevant' actor, or which are the 'relevant' societal rationalities in a certain field of regulatory policy, and about how these diverging societal interests should be balanced. The decision about who participates in the first place reintroduces a hierarchical structure by inevitably constituting a centralised manifestation of power in the form

[56] *http://www.icannwatch.org; http://nais.poject.org*

of a foundational act. The question of how conflicting rationalities are balanced demands an institutional arrangement which allows for a binding and enforceable definition of the particular 'common good' in the form of individual regulatory decisions. The main problem of the move to deformalised global governance structures is that the created polity is stripped of the possibility of solving this dilemma through formal law. Law can proceduralise the question of the substantive common good. It can ensure that, regardless of their economic or technological strength, affected parties are heard in the process of will-formation, and that the effective imposition of communal values as a result of this process respects a certain core of rights for all the parties affected.

Global governance structures that operate outside international law do, indeed, have the advantage of being able to empower private actors with their scientific, technological and emancipatory resources without any prior formal government involvement. Informal bilateral agreements between the centre of a governance structure and individual private actors might also be able to stabilise reciprocal expectations concerning regulatory behaviour. However, these agreements disempower the other public and private entities affected. The exercise of formally unconstrained power through the strongest actors of a global governance arrangement, be they public or private, may even be obscured by a rhetoric of 'participatory governance' and the heterarchical design of governance structures. Yet, these governance arrangements determine access and control of global technological and economic resources.

Since we are shaped by national experiences with democratic systems, we tend to see pluralistic 'disaggregation' and informal spheres of 'deliberation' as an enormous potential for democratic legitimacy.[57] Even though this is correct for national democratic systems, an uncritical transfer to the global level might lead to unintended consequences. It is often overlooked that these spontaneous spheres of public deliberation are not only a presupposition of legitimate law (Habermas) but, in a circular fashion, depend on a system of public law that guarantees formal equality and rights of participation at all stages of the process of will-formation. This distinguishes 'global' governance networks from new governance arrangements within the European Union. Here, governance networks are embedded in a legal system which can, at least potentially, guarantee a minimum level of balanced participation[58] and

[57] See, for instance, J Bohman, 'International Regimes and Democratic Governance', 75 *International Affairs* 1999, at 499–513.

[58] See, for the participation problem in the EU-comitology system, Ch Joerges, 'Good Governance Through Comitology?', in: Ch Joerges and E Vos (eds), *EU-Committees: Social*

procedural rights via legislation, and a well-established system of compulsory jurisdiction.[59] A comparable system does not exist at global level.[60] The only procedural law for global co-operation that operates with notions of formal equality as a pre-requisite of will-formation is international law. For historical reasons, this body of law — through an exclusive foundational process — has initially privileged (European) national governments over other actors in the international sphere. The promises of participatory global governance move away from this legal order and its central notion of 'sovereign equality'.

But let me briefly illustrate the structural characteristics of the international law of co-operation in the field of communication technologies. On the basis of international treaty law and the formal 'one-state one-vote' principle which has existed from the second part of the nineteenth century onwards, permanent bodies of international administration for global communication networks such as the telegraph, telephone and radio were created.[61] The eldest of these is the International Telecommunications Union (ITU). Thus, a central political issue of regulation has always been the question of common access to communicative resources which had been monopolised either by innovative private enterprises or by individual states.[62] Later, after decolonisation, the 'newly independent states' became active members of the ITU. In the beginning of the 1980s, in a move which was strongly opposed by the US government and other western states, the new governments from the developing world managed to use their numeric majority to implement the purpose of development assistance as a core principle of the ITU Convention.[63] In general, within

Regulation, Law and Politics, (Oxford, Hart, 1999) 310–38, and, with a diverging concept of participation, J Cohen, C Sabel, 'Directly-Deliberative Polyarchy', 3 *European Law Journal*, 313–42.

[59] For an in-depth account of the function of law in constraining and enabling institutional conduct within the complex EU-political system, see G de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis', in P Craig and G de Búrca (eds) *The Evolution of EU Law*, (Oxford, Oxford University Press, 1999), at 64 *et seq*.

[60] On the interdependent relationship between law and global democracy, see L Kühnhardt, 'Globalisation and democratic Values', *Transatlantic Regulatory Co-operation, Legal Problems and Political Prospects*, GA Berman, M Herdegen, and P L Lindseth (eds), (Oxford, Oxford University Press, 2000), at 469–94, in particular 486–90.

[61] JG Savage, *The Politics of International Telecommunications Regulation*, (Boulder, Westview Press, 1989), at 28–55.

[62] The problem of a private monopoly over maritime radio communication in the early 1900s led, in 1906, to the first convention on access to maritime communication infrastructure regardless of the origin and technical nature of the message; see n.53, at 30–33.

[63] See Art 4 of the ITU convention (1982), HM White Jr and L White, 'The Impact of New Communication Technologies on International Telecommunication Law and Policy: Cyberspace and the Restructuring of the International Telecommunication Union',

the ITU *fora*, substantive international legal principles for the distribution of, and common access to, technological resources were elaborated and restated in numerous multi-lateral conventions. The use of frequencies for satellite communications, for instance, was discussed and regulated on the basis of the 'common heritage' principle and outer space law in general.[64] For the US and its powerful communication industries, the institutional and legal constraints based on the formal 'one-state one-vote' principle have increasingly constituted an obstacle for the unmediated exploitation of the newly de-regulated communication markets. Even though industry representatives from developed states were gradually granted access and participatory rights within the ITU, the organisation was increasingly side-stepped by the US government and criticised as being 'politicised' and 'inefficient'.[65] As we have seen in the ICANN-case, the enthusiasm for democratic global network governance is directed against both the formality of treaty law co-operation and the privileged position of 'despotic' governments.[66]

International law as the law of international co-operation can be interpreted as a form of diplomatic discourse that provides weak and strong states with discursive legal strategies for diverging political and economic claims. The resulting legal formulation of the 'common good' is a result of diplomatic negotiations, instrumentalised expert opinions, and an often pragmatic compromise. However 'irrational' this compromise might be in terms of the view of individual economic actors, the process leading to it has allowed for political struggle over power and access to economic resources to take place on the basis of the interpretations of legal principles. International law stands for the aspiration to integrate these different claims into various coherent legal frameworks for

32 *California Western Law Review* 1995, at 1–30 (esp 10); see, for a general illustration of the legal and political environment of the 'international law of co-operation' of the 1970s and the 1980s compared to that of the 1990s, PM Dupuy, 'International Law: Torn between Co-existence, Co-operation and Globalisation, General Conclusions', 9 *EJIL* 1998, at 278–86.

[64] MA Rothblatt, 'Satellite Communication and Spectrum Allocation', 76 *American Journal International Law* 1982, at 56 *et seq*.

[65] On the turn to unilateralism in the field of frequency management, see JH Harwood II, WT Lake and DM Sohn, Competition in International Telecommunication Services, 97 *Columbian Law Review*. 1997, at 874–904 (esp 893–98).

[66] See, as an example a comment of M Froomkin, who is one of the most influential ICANN commentators and the founder the ICANN watch organisation: 'ICANN cannot have it both ways — either it embraces the public voice, unmediated by the input of despotic governments (recall that the governments of the world just elected Syria to the UN Security Council), and tries to make the case for why it should have a policy-making role in matters that cut to the core of communication and citizen participation (…)', *http://www.interesting-people.org/archi …interesting-people/200202/msg99259.htm* and for ICANN watch in general *http://www.icannwatch.org*

global policy.[67] In the case of an international law-based approach to global Internet regulation, principles such as '*res communis*' could be advanced by weaker states, and would probably be opposed by national sovereignty — just as they would be opposed by the technological necessity claims of the US, who are trying to defend their exclusive jurisdiction of the root server system. Within an emerging international law framework, the human right to free information, for instance, would have to be weighed against public and private attempts to increase their exclusive control over the Internet's infrastructure and Internet content.

The creation of fragmented global governance structures such as the ones emerging in the field of global Internet regulation is an attempt to circumvent the formalised framework for policy-making provided by international law. What we are hereby leaving behind is the allegedly discredited ideal of a global rule of law, in which procedural equality between the weak and the rich helps to channel and arbitrate diverging substantive claims. Given the structural limitations of network governance arrangements, we may eventually find out that we have given up too early.

[67] For an analysis of the diplomatic process that has led to the creation of the Law of the Sea Convention, see M Koskenniemi, 'The Privilege of Universality, International Law, Economic Ideology and Seabed Resources', 65 *Nordic Journal of International Law* (1996) at 533.

15

ICANN and the Illusion of a Community-Based Internet: Comments on Jochen von Bernstorff

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ICANN AS A form of international governance has an atypical character in as much as it originates out of spontaneous co-operation among a network of people who have a number of common interests and have set up a sort of 'community'. The common feature of this type of organisation is a lack of basic conflict of interest. This is why, in the past, the involvement of a public authority in the decision-making process and in the management of common resources might not have been regarded as problematical. However, the spread of the internet throughout the whole world, the increasing number of users, and, as a consequence, the growing heterogeneity of interests, have rendered this underlying assumption rather dubious.

This is all the more so because from the very beginning, American (Californian) — ie, state-based — authority has had a stake in the regulatory procedure, although its exact role was able to remain hidden as long as the community-like structure of the internet prevailed.

The transformation of the internet from a community-based network into the world-wide 'network of networks' of communication needs a well-thought out and elaborated type of legitimation. The response to this requirement has been the democratic process of the election of a board of representatives from the world-wide network of users in all continents. The democratic election procedure which has been put in place has some flaws because the interests of users are clearly so diffuse that the mobilisation of the internet users as members of a world-wide virtual community has not worked in a satisfactory way. The participation rate of voters has been minimal, and its outcome is far from being a good legitimation basis for the first rule-making procedure. One might think of bringing ICANN

back under the umbrella of a traditional public organisation, this time the UN. However, this would only shift the problem to a public organisation, without changing the legitimation problem. This version would provide a formal chain of legitimation without finding its counterpart in a shared basis of interests.

At this point, one might think of a more modern form of legitimation, a form of public-private co-operation based on supervised self-regulation which combines private self-organisation on the one hand, and an element of public control on the other. But this would also be unsatisfactory because, yet again, there is the problem of the lack of a clear structure of basic shared interests which would, ideally, be at the bottom of self-organisation: interests are, and remain, diffuse, and no formal core structure of decision-making is in view. Moreover, this core structure would be the precondition for a functioning mode of public-private co-operation. Once again, the problem is the extremely fluid and diffuse character of the interests which are at stake.

ICANN might also work as an independent agency-like body which derives its legitimation from public delegation on the one hand, and from a technical-professional knowledge-basis on the other. In order to be promising, such a form of organisation would presuppose a shared knowledge basis, which would add a functional legitimacy to the decision-making procedure. Whether this shared knowledge basis can be presupposed is doubtful.

The case of ICANN shows that an environment which is characterised by both its self-organisational potential and the emergent character of its rules needs some stable organisational nodes to keep its spontaneous mode of processing going. Emergent norms work in a bottom-up mode — that is where its strengths can be located. But it is difficult to solve very general abstract problems, such as the attribution of domain names, in such a way.

On the other hand, the 'committee' model can only work on the basis of a substantive shared interest, or a shared functional or professional aim (constraints to put new technology, such as digital TV, etc in place).

This might finally be a case for a solution based on public international law linked to the UN, etc. However, this form might not be compatible with the unavoidable spontaneous element of the internet in general, though it seems to be the new organisational formula which is favoured for the future. A solution which focuses on organisational issues, established by public law, might leave more substantial issues to private groups. The public service broadcasting system might be used as a blueprint for such a new pattern: it makes use of public organisational and procedural forms in order to set up a framework for co-operation among private groups which have an interest in public affairs. This might form a background for professional groups that are requested to develop

standards for new fields of action. Another strand of this model might lead to a focus on a small group of experts as in the British broadcasting system. Perhaps the latter pattern might be more appropriate for a new unstructured system of decision-making. The democratic model of election is probably not adequate, because it might be too unstructured for a field of action with so many participants, which neither allows for mutual observation — a basic precondition for self-organised rule — nor for decision-making.[1] The organisational problems raised by the internet are a repercussion of the hybrid character of communication on the net: it is extremely heterogeneous and does not lend itself to optimal forms of regulation. However, it should be clarified that one should not overestimate the necessity of taking regulatory decisions within a context which has a predominantly self-organised character.

A better solution might consist of a clearer separation of more technical questions from legal and economic questions. The attribution of domain names has clearly changed its character in the evolutionary process of internet communication. It would be preferable to privatise this domain of action altogether and look to a more consistent regime of judicial control of decisions being taken by private actors.[2]

[1] See M Mueller, 'ICANN and the Problem of Legitimacy', Wayne State Law School, Working Paper 2001.
[2] AM Froomkin, 'Wrong turn in cyberspace: Using ICANN to route around the APA and the constitution', (2000) 50 *Duke Law Journal*, at 17.

16

Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation

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I. INTRODUCTION

A. International Human Rights Norms and the Governance of Transnational Business Conduct

TRANSNATIONAL BUSINESS CONDUCT has the potential to threaten many of the concerns of international human rights law. As much as state conduct, business conduct can pose a threat to individual life and security, health and safety, access to housing, and freedoms of association and expression.[3]

While the regulation of business conduct is principally assigned to state governments, state performance of this regulatory function in the transnational context is impaired in several respects. In an anarchic international system with no overarching governing authority

[1]The author wishes to thank the Social Sciences and Humanities Research Council of Canada for its generous financial assistance, and Boris Nevelev for his excellent research.
[2]Thanks to Lulu Tao and Mihai Ionescu for research assistance.
[3]See 'Note, Developments in the Law: International Criminal Law, Corporate Liability for Violations of International Human Rights Law', (2001) 114 *Harvard Law Review* 2025 at 2027–28; C Scott, 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights' in A Eide *et al* (eds), *Economic, Social and Cultural Rights*, 2nd edn (The Hague, Kluwer, 2001) at 564–67.

to co-ordinate and enforce regulation, significant problems arise for effective governance. The lack of supranational authority may create regulatory gaps in which transnational collective action problems of cost-externalisation and free-riding by private actors are under-regulated and public goods under-supplied. Moreover, a fragmented international system increases the possibility of harmful regulatory competition among jurisdictions, particularly where private actors can shift production to take advantage of lower-cost regulation in different jurisdictions, or use threats of relocation to induce regulatory concessions. Finally, transnational business actors, whether multinational enterprises or networks of businesses regulated by non-state norms such as *lex mercatoria*, might achieve a 'lift-off' or separation from state laws as a source of norms for at least some of their conduct.[4] In the absence of a comprehensive multilateral arrangement, effective governance of transnational private actors is compromised by regulatory gaps and competition.

International human rights law has conceptual and doctrinal tools to address harms caused by transnational private actors. The principal method is through doctrines of state responsibility. In particular, under the doctrine of indirect state responsibility, states have the responsibility to regulate private actors under their control.[5] In areas such as criminal liability, there is increasingly the ability, if not yet an obligation, for states to claim prescriptive jurisdiction over the conduct of their own nationals abroad.[6] In this connection, states are sometimes granted universal jurisdiction to deal with particular kinds of transnational conduct by actors. Human rights theory is also developing the idea of horizontality, in which private actors can themselves be the source of human rights violations.[7] In general, international human rights law has been one area of public international law that has moved beyond an exclusive state focus, in which non-state actors may have rights as well as obligations under international law.

Although international human rights law is developing adequate conceptual and doctrinal tools to address transnational business conduct, its

[4] G Teubner (ed), *Global Law without a State*, (Aldershot, Dartmouth, 1997); Y Dezalay and B Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, (Chicago, University of Chicago Press, 1996). For a survey of these regulatory challenges in the context of private international law, see R Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization', (2002) 40 *Columbia Journal Transnational Law* 209.

[5] C Scott, 'Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms' in C Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, (Oxford, Hart Publishing, 2001) at Section 2 [hereinafter *Torture as Tort*].

[6] *Ibid*, Section 7.

[7] See above n.5, Section 3.

main challenge has been enforcement and compliance. Unlike some other areas of international or national law, whether public or private, inter-national human rights institutions have limited direct enforcement capabilities, even as against states responsible for human rights violations. With respect to business conduct, there is an additional enforcement problem in that international human rights treaties do not provide for any direct international monitoring or assessment of conduct concerning private actors. Instead, monitoring is indirect, through the lens of state responsibility.

It may be that the significance of international human rights law operates in less obvious ways. International human rights complaints, in particular, can be useful to efforts by government and non-government actors to mobilise and pressure states and non-state actors such as corporations without necessarily resorting to a legalistic complaint process. The value of international human rights law may, therefore, be as part of a larger system of countervailing power and oversight by networks of civil society actors and government actors who utilise international human rights law as a basis for conceiving of and framing action against business actors such as consumer boycotts, shareholder activism, shaming strategies, and state regulation itself.[8]

This paper is an effort to link this social take-up of international human rights law to a further role that is situated between the realm of the institutions of international human rights law proper and the indirect impact of international human rights principles as they operate in countervailing networks: the use of international human rights norms within other *legal* venues and discourses of transnational economic law.

B. The Migration of International Human Rights Norms to Other Transnational Legal Regimes?

This paper builds on models of transnational governance based on plural norm systems. On the one hand, a unified system of governance of business conduct for the protection of democratic, regulatory and distributive concerns based on a single institutional venue, such as the United Nations, is unlikely.[9] On the other hand, the current transnational order involves more interaction between and among systems in different *legal* venues than some systems theories of global networks

[8] See M Keck and K Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, (Ithaca, NY, Cornell University Press, 1998).

[9] See, for example, C Scott, 'Toward the Institutional Integration of the Core Human Rights Treaties' in I Merali and V Oosterveld (eds), *Giving Meaning to Economic, Social and Cultural Rights*, (Philadelphia, University of Pennsylvania Press, 2001).

now imagine.[10] In particular, the existence of a multiplicity of international and domestic legal institutions provide venues that are points of potential conflict and dispute between different systems of interests and values. The end of the pre-eminence of state law and the failure of any world government is not yet so dramatic as to end the need to consider familiar venues and styles of law-making and disputing.

Any emerging system of governance or accountability will involve a mixture of responses, including international treaties and institutions, transnational co-operation among governmental actors, transnational NGO networks, revived national state regulation, transnational litigation, consumer boycotts, and corporate codes of conduct.[11] Faced with this necessary eclecticism (or, put more positively, pluralism) of normative venues, this paper attempts to explore how governance strategies that would promote the objectives of international human rights norms can be developed through the migration of these norms into legal interpretation and application in venues of transnational private litigation in domestic courts. In this task, we are also interested, at a legal-doctrinal level, in what specific roles international human rights norms themselves might play, and, at a sociological level, in the ways in which intra-legal migration is interdependent with extra-legal social and political discourses and associated institutional processes.

C. Structures of Policy Argumentation and the Collision of Policy Discourses in Transnational Economic Law

Domestic private law regimes may not seem to be concerned with the regulation of transnational economic actors for human rights concerns. But, by disturbing narrow doctrinal analysis and policy discourses in these legal regimes, international human rights norms can potentially play an effective role in empowering, framing and expressing in legally acceptable forms a set of policy concerns that would otherwise be too readily ignored.

Transnational economic law lacks a plausible single policy discourse that necessitates either particular doctrinal rules or outcomes of particular cases.[12] In this respect, many kinds of transnational economic law

[10] See Teubner, above n.4.

[11] See, for example, Teubner, above n.4; J Braithwaite and P Drahos, *Global Business Regulation*, (Cambridge, Cambridge University Press, 2001); D Trubek, J Mosher and J Rothstein, 'Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks', (2000) 25 *Law & Social Inquiry* 1187.

[12] R Wai, 'Commerce, Cooperation, Cosmopolitanism: Structures of Internationalist Policy Argumentation in Private International Law', SJD Dissertation, Harvard Law

now recall the account of the contested space of private law adjudication in the US context mapped out by critical legal studies scholars such as Duncan Kennedy. Kennedy argues that the contested terrain of formal, substantive and institutional debates in US legal adjudication is best understood as a force-field of 'conflicting considerations'.[13] In this contested order of contemporary legal adjudication, there is no single reconstruction theory based on outside normative theories that can be considered dominant for the purposes of filling the gaps, contradictions and ambiguities built into the formal, substantive and institutional debates.[14] This work also leads to a view of legal argumentation that follows a 'semiotic' or 'discursive structure' approach.[15] It identifies how legal argumentation and reasoning demonstrate repeated patterns of legal and policy arguments, and attempts to map out some of these patterns. Kennedy claims that this model of adjudication applies to public, private and international law,[16] and the scholarship of international lawyers such as David Kennedy and Martti Koskenniemi has provided sustained examples of the utility of this approach in examining public international law.[17]

This recent work on policy argumentation in international law has similarities to contemporary work by Gunther Teubner on law as a 'collision of discourses'.[18] Internationalism in policy discourse in law can be examined as combining elements of economic, political and moral argumentation, each of which can be distinguished and assessed on their own terms. In Teubner's account of law, a number of different belief-systems exist in contemporary societies, and these are often dramatically different

School (2000). In this chapter, transnational economic law refers to the range of private and public laws relevant to transnational economic activity, including international trade regulation, private international law, and the laws of international business transactions.

[13] See, for example, D Kennedy, 'Form and Substance in Private Law Adjudication', (1976) 89 *Harvard Law Review* 1685; D Kennedy, 'The Structures of Blackstone's Commentaries', (1979) 28 *Buffalo Law Review* 205; D Kennedy, 'A Semiotics of Legal Argument', (1991) 42 *Syracuse Law Review* 75.

[14] D Kennedy, 'From the Will Theory to the Principle of Private Autonomy: L Fuller's 'Consideration and Form'', (2000) 100 *Columbia Law Review* 94 at 95.

[15] This approach is commonly, but not exclusively, associated with critical legal studies scholars such as D Kennedy. Other examples include J Balkin, 'The Crystalline Structure of Legal Thought', (1986) 39 *Rutgers Law Review* 195; R Unger, *Law in Modern Society,* (New York, Free Press, 1976); R Unger, *The Critical Legal Studies Movement*, (Cambridge, Mass, Harvard University Press, 1986).

[16] Kennedy, above n.13, at 95; D Kennedy, *A Critique of Adjudication: Fin-de-siècle,* (Cambridge, Mass, Harvard University Press, 1997) at 253–54.

[17] D Kennedy, *International Legal Structures,* (Baden-Baden, Nomos, 1987); M Koskenniemmi, *From Apology to Utopia: The Structure of International Legal Argument*, (Helsinki, Finnish Lawyers' Publishing, 1989).

[18] G Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses' in R Rawlings (ed), *Law, Society and Economy: Centenary Essays of the London School of Economics and Political Science 1895–1995*, (Oxford, Oxford University Press, 1997).

in their guiding values: these include the discourses of 'politicisation, moralisation, scientification and economisation'.[19] Teubner's 'discourses' or 'rationalities' are not simply ideational systems, but complex social systems which combine a 'material base of social practices' and reflexive conceptual aspects.[20] In the legal context, Teubner sees each of these systems as having staked out a position within legal theory and jurisprudence and in legal decision-making and legal doctrine; in addition, each of these systems is producing 'social norm production' outside the state law system.[21]

In the international context, Teubner sees the operation of transnational systems as 'breaking the frame' of state-based law, creating 'global law without a state'.[22] Systems such as transnational human rights, transnational labour, transnational commerce and multinational corporations challenge the supremacy of state-based legal systems for pre-eminence in social norm production.[23] One view of the international human rights regime is that it acts as a separate system, with its own internal dynamics, in countervailing relation to, for example, networks of business bound by *lex mercatoria* and non-judicial dispute resolution, or the internal networks of large multinational enterprises. It has a formal set of treaties and institutions, in particular, the UN treaty systems and regional human rights systems, as well as a vigorous NGO network.[24]

This paper understands the new transnational landscape of corporate governance as involving a more complex relationship of legal venues and functional systems. Across state borders, but also across functions, identities and interests, there is significant movement, interpenetration and multiple functioning. To highlight the actual and potential intersection and overlap of these different systems in law, we look at the role that international human rights norms play in private litigation in domestic courts, a legal regime that is not commonly viewed as concerned with international human rights.

This paper can be partly understood as an effort to bring a critical policy discourse approach to the subjects of private international law and international private law.[25] Too often what is a collision of

[19] *Ibid*, at 152.
[20] See above n.18, at 151–52.
[21] See above n.18, at 152–53.
[22] G Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems', (1997) 45 *American Journal of Comparative Law* 149.
[23] Teubner, above n.4.
[24] A Bianchi, 'Globalization of Human Rights: The Role of Non-State Actors', in Teubner, above n.4.
[25] For early examples of work of this kind in international trade law and private international law, see D Tarullo, 'Beyond Normalcy in the Regulation of International Trade', (1987) 100 *Harvard Law Review* 547 and J Paul, 'Comity in International Law', (1991) 32 *Harvard International Law Journal* 1.

discourses is claimed, in the context of the law relating to international economic transactions, to be a coherent convergence of discourses in the context of a particular liberal internationalist vision of the international system. This vision of liberal internationalism is linked together through a common principle of co-operative benefit, which, as the policy complement to consent doctrine, acts as the key policy principle that is argued to draw reinforcing support from fundamental ethical, political and economic objectives.[26] For example, the dominant economic, political and moral discourses, which emphasise the facilitation of commerce, the promotion of inter-state co-operation and comity, and the values of cosmopolitan non-discrimination, operate to justify reform of the rules of private international law which promote the use of international arbitration, encourage state courts to decline or limit jurisdiction, and increase the recognition and enforcement of arbitration awards and foreign judgments.[27] In contrast, policy goals such as distributive fairness, effective regulation and maintenance of community diversity are put aside as being too controversial or political.

The policy terrain is more open and contestable than an internationalist vision suggests. Internal conflicts among the policy dimensions do exist,[28] but are obscured because of a number of factors, such as the particular history of a doctrinal subject,[29] national and international legal cultures,[30] and broader ideological commitments.[31] Moreover, policy discourse about each of the economic, political and normative bases for internationalism have numerous 'internal' conflicts with regard to the correct way to analyse particular legal problems. And, of course, there are further policy objectives that could be included in as legitimate policy concerns for transnational regimes.

In this model of policy discourse, international human rights norms may help to bring out the internal conflicts that have been obscured, and to identify further policy objectives that have been excluded

[26] Wai, above n.4 and n.12.
[27] Wai, above n.4; R Wai, 'In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law', (2001) 39 *Canadian Yearbook International Law* 117.
[28] It can be argued, for example, that the commercial activity exception to sovereign immunity is based on a model of co-operative benefit and consent that relies on strong distinctions between transnational economic activity as, unproblematically, a matter of co-operative benefit. In contrast, issues of human rights are cast in a relativistic light and, therefore, as a subject of fundamental controversy of values among states, to be avoided in the interests of a co-operative international order. See Wai, 'The Commercial Activity Exception to Sovereign Immunity and the Boundaries of Contemporary International Legalism' in *Torture as Tort*, above n.5.
[29] Wai, above n.4.
[30] Wai, above n.27.
[31] See, for example, Wai, above n.28, at 239–45.

as incompatible, or as less of a priority, in regimes of transnational economic law.

D. The Migration of International Human Rights Normativity to Private Law Venues

Invoking international human rights norms can translate and frame a different set of policy concerns within legal venues that otherwise focus on policy goals other than human rights protection.[32]

First, international human rights treaties may *directly* provide a formal vehicle at the level of sources and interpretation to which legal actors in other legal venues could turn to retrieve other policy values. In US private litigation under the Alien Tort Claims Act (ATCA), for example, the statute expressly provides for a violation of the (public international) 'law of nations' as a trigger for a (domestic, private-law) tort action.

Secondly, human rights could be *indirectly* pleaded in that, while they could be the object or purpose of the litigation, other legal categories would be invoked in order to vindicate the substance of human rights protections; for example, rather than a human right of torture providing the direct cause of action, a plaintiff might choose to sue a corporation for a recognised cause of action such as the tort of battery. Claims in categories such as tort-delict are the most obvious kind of cause of action to frame domestic common law litigation related to the protection of third parties from the harmful effect of the activities of international economic actors. In addition, private actions for private remedies also are part of mixed regimes such as anti-trust or securities regulation. Lastly, the regulatory function of contract law for claims against private actors should not be overlooked; for example, a claim in contract might be made in relation to harmful treatment by a commercial actor in its employment relations.[33]

In this latter context of indirect private claims, the turn to international human rights law provides a vehicle for the introduction and consideration of alternative *policy* considerations and *value*-laden premises — let us call this *the social* — that help channel and structure reasoning 'within' law. This kind of indirect impact can be especially important,

[32] For a discussion of how 'translation' is both an apt metaphor for thinking of the relationship between public international law categories (such as torture) and domestic private law categories (such as tort) and a problematic metaphor that needs to be re-worked into a notion of mutual translation, see Scott, above n.5.

[33] For a discussion of the regulatory function of these various private laws in relation to transnational economic conduct, see Wai, above n.4, at 232–6. For a discussion of framing 'human rights tort' claims in terms of existing tort categories, see Scott, above n.3, at 587–95.

as we will see in the case studies that follow, with respect to various preliminary or procedural aspects of transnational litigation.

E. Transnational Civil Society as a Key Discursive-Institutional Medium for Migration of Human Rights Norms into and from Private Law Venues

It is one thing to discuss the framing of arguments for the social in transnational economic law through the injection of international human rights norms into transnational litigation against corporations. It is another — closely related — thing to map the institutional modalities by which the legal may interact with the social to produce actual behavioural change. In the narratives of litigation contexts that follow, some attention will be paid to the involvement of actors within 'transnational civil society' in order to speculate on the extent to which this sphere acts as the discursive medium that explains, in large part, the social↔legal↔social processes of normative migration.

It is not our purpose in this paper to elaborate a specific theory about the role of (transnational) civil society in bringing about behavioural changes in the name of human rights. That this can occur has been argued by Thomas Risse in his studies of the role of transnational actors in 'international' politics.[34] In particular, Risse's account of the role of transnational civil society actors (non-governmental organisations, both international and local) in advancing the human rights agenda and inducing change in 'internal' behaviour of states seems to us to be a sophisticated demonstration of a form of what could be called 'discursive dynamism' — the always-evolving and often unpredictable ways in which the language of critique intersects with the material power vulnerabilities and the psychological needs of governing élites. Risse and Sikkink build on the notion of the 'boomerang effect' advanced by Keck and Sikkink, in which a

> boomerang pattern of influence exists when domestic groups in a repressive state bypass their government and directly search out international allies to bring pressure on their states from outside.[35]

[34] See T Risse-Kappen (ed), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions*, (Cambridge, Cambridge University Press, 1995); T Risse, S Ropp and K Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change*, (Cambridge, Cambridge University Press, 1999).

[35] Risse and Sikkink, 'The Socialisation of International Human Rights Norms into Domestic Practices' in Risse, Ropp and Sikkink, above n.34, at 18; Keck and Sikkink, above n.8, at 12–13.

They map out a 'spiral model' in which sequences of bomerang throws crossing national boundaries spiral out, with the key involvement of transnational civil society actors. Central to this account of the five phases of the spiral effect is how external actors help to facilitate social mobilisation such that (national) local action is crucial before repressive conduct changes — even as that power could not reach the critical point without (transnational) external solidarity and pressure.

Risse focuses on the state and civil and political rights, but he observes that multinational corporations and their particular capacity to infringe upon economic, social and cultural rights is an 'underdeveloped agenda of the human rights arena.'[36] In this chapter, we will try to trace how various non-governmental actors are key players in the development of the human rights agenda through their efforts to use and then to build from the use of human rights norms in private litigation in domestic courts.

F. The Narratives

What follows is a modest effort to assess the potential transnationalisation of governance of multinational corporate conduct through the institutional medium of 'private party' litigation in domestic courts and the injection of international human rights discourse into this litigation. We are conscious that these 'case studies' are not detailed empirical inquiries.[37] Also, limitations of space preclude a discussion of other litigation contexts that would shed further light on the actual or potential migration of international human rights normativity into litigation against corporate actors, or the role of organisations of transnational civil society in this migration.[38] Nonetheless, we believe these abbreviated accounts usefully suggest the more probing questions that should be asked and eventually answered.

[36] T Risse, 'The Power of Norms versus the Norms of Power: Transnational Civil Society and Human Rights' in A Florini (ed), *The Third Force: The Rise of Transnational Civil Society*, (Washington DC, Carnegie Endowment for International Peace and Japan Center for International Exchange, 2000) at 177.

[37] Although we have benefited from the unpublished views delivered in talks at our university of key actors in two of the three contexts we discuss; M Ratner, partner at Lieff, Cabraser, Heinmann & Bernstein, lecture organised by the York University and Université de Montréal Centre for German and European Studies, 21 February 2002, Toronto; J Orbinski, former president of Médecins Sans Frontières (MSF), lecture on 'Global Health and Global Governance', Osgoode Hall Law School, Toronto, 2 April 2002.

[38] For example, the role of trade unions in transnational litigation against Unocal for conduct in Burma; and the role of activist public interest law (ie, solicitor) firms in the UK litigation against UK companies for harms caused in South Africa and Namibia.

Although the United States provides the obvious venue for most such litigation (given its overall litigation culture, its status as home state for more companies than any other state, and a congenial statutory directive which allows tort actions for breaches of the 'law of nations'), an effort has been made to choose other national contexts — Canada/Québec and South Africa — which appear to have strong transnational civil society connections. We have also tried to discuss three different examples of how human rights normativity played a role in litigation against companies. In the Nazi-era forced-labour cases brought in US courts against German industrial companies, human rights provided the cause of action due to the existence of ATCA jurisdiction, although it was a cause that was almost certainly destined to be dismissed for jurisdictional and procedural reasons. Yet, the litigation was key to the transnationalisation of the normative debate that resulted in the largest human-rights-related law-suit settlement in history — not in the United States, but in Germany. In the South African pharmaceutical patents case, we will see that a phalanx of multinational pharmaceutical companies invoked their constitutional right to property and were met by a response from a transnational social movement that invoked, as a shield, the countervailing *human* right to health, with dual connotations of being both about universal morality and about constitutional priority over corporate economic interests; and we will note how the withdrawal of the suit in this case served and continues to serve as a normative precedent in other countries, such as Brazil, and perhaps to changes in the international trade regime. In the Canadian case related to a cyanide spill in Guyana at a Canadian-owned mine, a special transnational-solidarity NGO was created for the specific purpose of litigating in Québec on behalf of communities harmed in Guyana, using standard private law to found the action, but invoking international human rights standards as a way to argue why the case could not be justly heard in Guyana; both the awarding of costs against the NGO and the failure of the argument before a single judge (and the failure to appeal due to exhaustion of resources) should not obscure the potential of human rights discourse to inform conflict-of-laws queries as to the adequacy of foreign courts.

II. CANADA/QUÉBEC: INTERNATIONAL HUMAN RIGHTS REMEDIES DOCTRINE AND AMENABILITY TO CIVIL PROCESS — A MISSED OPPORTUNITY

Canada is the world's leading capital market for mining companies. Mining corporations which are incorporated, based, or with significant ownership links in Canada, are active worldwide. This level of activity

has been accompanied by risks of serious harm to the environment, and directly associated harm to human health and sources of livelihood. Such harm has not been limited to less affluent countries such as the hilippines, but has also included countries such as Spain and the United States.[39] Yet, transnational law-suits against Canadian mining corporations were, to the authors' knowledge, non-existent until a recent case was brought in Québec.

A concerned humanitarian NGO called Recherches Internationales du Québec (RIQ) was formed in Québec specifically to launch a law-suit against a Québec company, Cambior, for a cyanide spill from its Omai goldmine into a Guyanese river.[40] Under the Québec Civil Code, the court had clear general jurisdiction over the dispute because Cambior was incorporated in Québec. However, unlike civil codes in countries such as France, Québec's Code recognises a discretionary power on the part of the trial judge to decline to retain jurisdiction on the basis of *forum non conveniens*, in other words, that there is an appropriate alternative forum where the defendant is amenable to process.[41] RIQ probably assumed that it would be hard for a dismissal for *forum non conveniens* to be triggered because of the state of the judicial system in Guyana, a country in the early, faltering stages of transition from repressive rule.

To prove that Cambior could not establish *forum non conveniens*, RIQ was assisted by a leading professor of international human rights law, William Schabas, who gave expert-witness testimony on his adverse conclusions as to both the willingness and the capacity of the Guyanese judiciary to deliver justice for the spill victims.[42] This was a rare example — if not the first — of the use of international human rights law as a background to litigation that was not itself premised on the violation of human rights norms. Instead, international human rights law was used in the assessment of jurisdictional matters, in this case, to give content to the standards that a foreign judiciary must meet with respect to the *forum non conveniens* threshold test.

Two streams of international human rights law were most relevant: the jurisprudence on the right to a fair trial and the jurisprudence on the

[39] S Seck, 'Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law', (1999) 37 *Canadian Yearbook International Law* 139.
[40] *Recherches Internationales Québec v Cambior Inc*, [1998] QJ No 2554 (Québec Superior Court, 14 August 1998) [hereinafter *Cambior*].
[41] This is its own interesting case of normative migration, as this common-law doctrine was only codified in the last revisions of Quebec's private international law code.
[42] W Schabas was, at the time, Professor of Law and head of the Department of Law at the Université du Québec à Montréal.

exhaustion of domestic remedies.[43] As regards the latter, international human rights tribunals generally do not require pursuit of domestic remedies before accessing international processes where it would be futile to seek to vindicate one's human rights in a national court system. As regards the former, a person's rights to a fair trial are violated when the court that is to hear the claim of a breach of legal rights is not independent from other branches of government, or is, for other reasons (such as bias or susceptibility to influence of one of the parties to the case), incapable of treating the claim fairly. While the jurisprudence on the exhaustion of local remedies applies to *human rights* claims, the fair-trial case law applies, in general, to any *legal rights* claims (such as a claim in negligence). The *Cambior* claims were both standard legal rights claims and surrogate claims for human rights violations related to health and livelihood. The fair trial norm is directly relevant to the *forum non conveniens* amenability inquiry, while the exhaustion of local remedies jurisprudence is relevant by way of close analogy.

Whether or not thoroughly documented, as a way of linking private international law jurisdictional analysis to international human rights law norms related to the judicial process, the plaintiff's strategy in *Cambior* represents a conceptual breakthrough that can be developed in other cases. At the same time, this linkage between private and public international law also serves the valuable function of reinforcing the interdependence of 'civil and political rights' and 'economic, social and cultural rights'.[44] The claims in *Cambior* were surrogate 'economic, social and cultural rights' claims related to health and livelihood; the plaintiff's *forum non conveniens* argument was, in essence, that violation of these rights would go unremedied unless they could access a court system where a classic civil and political right, the right to a fair trial, would be a reality.

The judge, however, was not impressed:

> Professor Schabas conducted what he referred to as a 'one-week fact-finding mission to Guyana' where he attended trials and met with government officials, lawyers, judges and law professors. He would have the court believe that Guyana is little more than a judicial backwater such that a refusal by the court to exercise its jurisdiction by referring the case to the courts of Guyana would likely result in a violation of the victims' human rights and a denial of justice.

[43] It is not, it should be noted, clear from the judgment how carefully Prof Schabas' examination-in-chief took him through the relevant international standards.

[44] See the Vienna Declaration and Programme of Action, UN World Conference on Human Rights, UN Doc A/CONF 157/23 (1993) para 5; C Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', (1989) 27 *Osgoode Hall Law Journal* 769.

> Professor Schabas' comments about Guyana's legal system are scathing. He describes Guyana's pre-1992 judicial system as nothing more than an appendage of the repressive administrative dictatorship it served. He compares it to the systems of justice which prevailed in South Africa during the worst excesses of the apartheid regimes in the 1970s and 1980s and in Nazi Germany where the concept of the rule of law did not exist. He adds that since 1992 Guyana has been doing little more than 'tottering along the road to democratic development and to the restoration of the rule of law' and that recovery has been slow ….
>
> If the court were to accept Professor Schabas' evidence at face value, it would have little hesitation in dismissing Cambior's Declinatory Exception. The picture Professojr Schabas portrays is such that the victims could hardly expect to receive substantial justice before a Guyanese court. The difficulty with assessing this proof, however, is that it is based primarily, if not exclusively, on secondary sources. While the court recognises Professor Schabas' expertise in the field of international human rights, it questions the accuracy of many of his opinions on Guyana's system of justice which are not based on any first hand knowledge by him.[45]

Without going quite so far as to say it expressly, the judge seems to have found this intrusion of an international human rights lawyer presumptuous — or, to return to Teubnerian notions, an unwelcome irritant and disturbance. The normal method for receiving evidence in private international law cases is through experts in the domestic law of the foreign country. Cambior retained members of the Guyanese legal profession, including three former judges, to give testimony that Guyanese judges were not lacking in either integrity or capacity to deliver effective justice. One witness was Guyana's former Chancellor of the Judiciary and Chief Justice, Kenneth George. George headed a government-appointed commission of inquiry into the Omai spill that, in 1995, concluded that contaminated water did not pose a serious threat to life or a hazard to the health of workers or riverain residents.[46] The former Prime Minister of Barbados, now a barrister, also testified as a Cambior expert witness, going so far as to credit

> the strength of the Guyanese legal institutions as having been crucial in the preservation and enhancement of the rule of law during a period in Guyana's recent history when the executive attempted to exercise absolute power.[47]

[45] *Cambior*, paras 82, 83 and 87. Schabas appeared to rely heavily on his on-site visit, as the judge only specifically mentions one secondary source cited by Schabas.
[46] On the basis of the report, the mine had recommenced operations. The report is cited in a Cambior press release, 'Cambior sets the record straight on Guyanese 1995 spill', 30 July 2001, found at *http://www.cambior.com/archives/communiqués/2001/anglais/index/fr_press_2001.htm* (last accessed 22 September 2002).
[47] *Cambior*, para 94.

Finally, a former justice of the Québec Court of Appeal conducted an on-site visit and provided an affidavit and oral testimony contradicting much of the testimony of Professor Schabas.[48] To the trial judge, the evidence of an academic who had only ever visited Guyana once, briefly, and who spoke without inside knowledge of the system was simply not credible in comparison. It was as if the expert in international human rights law embodied an alien normative system that did not translate into the dominant discourse of judges. In contrast, the trial judge seemed to warm to his brother judges on the witness stand, although some observers believed that the former Chief Justice of Guyana had not fared well under cross-examination.[49]

In assessing the Guyanese judiciary, the Québec judge demonstrated a virtually non-rebuttable deference to the foreign judiciaries of democratic countries. The idea of impugning not only brethren judges but also a sister democracy may be too much for some judges;[50] from this perspective, the existence of a functioning judiciary and the existence on paper of the right to sue for the alleged harms were together sufficient. In *Cambior*, the judge made much of the credibility of the evidence provided by another former Guyanese judge, who had served for many years before the advent of democratic rule, and who claimed that the Guyanese judiciary had *always* been fair and independent, even during periods of dictatorial government.[51] While the current Guyanese judiciary may have the ability to handle a case against Cambior, there is much reason to be sceptical of such sanguine views about the capacity of a judiciary to be fair and independent with respect to a legal system which it was required to administer on behalf of a dictatorial government.[52]

[48] *Cambior*, para 94.
[49] For example, F Shalom, 'Head of panel that probed Cambior's cyanide accident can't recall committee's findings', The Montreal Gazette, 3 June 1998.
[50] See A-M Slaughter, 'International Law in a World of Liberal States', (1995) 6 *European Journal International Law* 503.
[51] *Cambior*, para 89.
[52] See, for instance, even in relation to the current (post-1992) judicial system, US Bureau for International Narcotics and Law, International Narcotics Control Strategy Report, 1998 (Washington, DC, 1999) *http://www.state.gov/www/global/narcotics_law/1998_narc_report/carib98_part2.html*: 'Some judges and magistrates issued questionable rulings and injunctions in connection with narcotics prosecutions and investigations, fueling rumours of corruption in the judiciary.' See, also, US Department of State, Guyana Country Report on Human Rights Practices for 1998 (26 February 1999) *http://www.state.gov/www/global/human_rights/1998_hrp_report/guyana.html*: 'The judiciary, although constitutionally independent, is inefficient and often appears subject to government influence.' With respect to the period preceding 1992 and the period of the immediate transition, see Amnesty International Report 1992 (New York, covering January to December 1991). The only finding against Guyana to date by the UN Human Rights Committee under the Optional Protocol petitions procedure found a violation of the Article 14 right to a fair trial with respect to court handling of a case prior to the transition (mainly from 1987 to 1992): *Abdool Saleem Yasseen v Guyana*, Communication No 676/1996, UN Doc CCPR/C/62/D/676/1996 (7 May 1998) at paras 2.9 and 7.8.

The Québec judge concluded that *forum non conveniens* factors necessitated that the Québec court decline jurisdiction in favour of the case being heard in Guyana.[53] The judge made it a condition of the dismissal that Cambior undertake 'not to invoke any grounds based on *forum non conveniens* before the High Court of Guyana if it is sued in any action arising out of the spill at the Omai Gold Mine.'[54] However, this condition did not require Cambior to submit to the foreign courts' jurisdiction.[55] Moreover, in a further chill for transnational litigation efforts, the Québec court ordered RIQ to pay special costs to Cambior for the failed law-suit in Québec.[56]

Within four days of the dismissal of the Québec action, plaintiffs filed a representative action against Omai in Guyana for US$100 million in damages. Although information is scarce on the exact terms of the law-suit and its development, the action was apparently dismissed in February 2002 for procedural reasons.[57] At the date at which this contribution has been written, we have no clear view of how these legal proceedings ended up being dismissed. The dismissal may have occurred because of a failure by legal representatives to provide a required legal document or it may potentially signal divided or disorganised litigants. No doubt the Omai situation will provide an excellent case study of the limits of seeking justice through litigation, whether generally or in the context of a resource-dependent developing country like Guyana.[58]

[53] Due to the plaintiff's lack of funds, there was no appeal.

[54] *Cambior*, para 100.

[55] This can be compared to the condition imposed on Union Carbide in the Bhopal litigation; *In Re Union Carbide Corporation Gas Plan Disaster at Bhopal, India, in December 1984*, 634 F Supp 842 (SDNY 1986); aff'd, 809 F2d 195 (2d Cir 1987). That case was dismissed subject to the condition that 'Union Carbide shall consent to submit to the jurisdiction of the courts of India, and shall continue to waive defenses based upon the statute of limitations.'

[56] *Recherches internationales Québec c Cambior Inc*, [1999] JQ No 1581 (Québec Superior Court, 12 May 1999). RIQ did not contest the application for special costs by Cambior, because it maintained that it lacked funds to hire counsel. Justice Maughan granted Cambior special costs of $50,000 (Canadian) for a number of reasons including the complexity and novelty of the questions of law and fact addressed in the litigation. The judge also noted, at para 29, the repercussions of the litigation on the reputation and business of the defendants, especially in light of the negative publicity campaign led by RIQ against Cambior.

[57] Cambior, Press Release, 'Dismissal of Omai-related class-action suit in Guyana', 22 February 2002. The press release claims that the action was struck 'for repeated failure to file an affidavit by the plaintiffs.' The action in Guyana was a representative action, not a class action, and Cambior's press release emphasises that it has settled some '522 writs representing 881 claimants.' It is not clear what overlap there is between these 'writs' and the representative action, or whether they were part of another claims process. A new suit for US $2 billion in damages has recently been filed, in which a lawyer for the plaintiff claims procedural errors have been corrected; W Stueck, 'Cambior Dam Fallout Brings Guyanese suit', *The Globe and Mail (Toronto)*, 24 May 2003, B3.

[58] In this regard, an Internet digest on the February 2002 dismissal claims that the government of Guyana will not support the plaintiffs, and has generally favored Cambior, the

In this connection, we note that there has been a distinct lack of attention from, and mobilisation by, a transnational network of NGOs around the Omai spill. Clearly, Guyana neither has the visibility of Germany nor its vulnerability to moral leverage.[59] It is notable in this regard that the litigation failed despite the fanfare with which the lawyers filing the August 1998 suit associated their effort with the support of a transnational network of lawyers and of NGOs.[60] The costs award against RIQ and the inability of a civil-society effort in Québec to sustain an appeal may have had an impact. Obviously, such costs-awards, if followed in Canada or elsewhere, will severely dampen solidarity-based transnational litigation against transnational companies. Finally, the lack of significant, or at least effective, transnational civil-society solidarity may also be partly attributable to the attenuated way in which 'human rights' discourse was made part of the substantive claims being advanced in the litigation efforts in Canada and Guyana, despite the alleged very serious health harms. In contrast to the successful politics of litigation in the US/German and South African cases, the pressure to allow the case to be heard on its merits or to settle has accordingly not entered into the corporate bottom line.

III. DIRECT LIABILITY OF TRANSNATIONAL ECONOMIC ACTORS THROUGH TRANSNATIONAL LITIGATION IN US COURTS

A. US Tort Litigation and Transnational Corporate Accountability

While, in general, private litigation is not the most effective regime among regulatory alternatives, it may be an effective legal regime for promoting transnational corporate responsibility.[61] As Trubek, Dezalay, Buchanan and Davis have observed, the spread of 'Cravathism' and US models of corporate and commercial law abroad may be accompanied by the spread of US modes of private regulation of corporate conduct, such as through

majority owner of the Omai Mines Ltd. deposit in the country's interior and one of the country's largest sources of revenue.' 'Hotspots — Guyana' in (2002) *Drillbits and Tailings*, 7(3) at *http://www.moles.org/ProjectUnderground/drillbits/7_03/hotspots.html* (last accessed 17 May 2002).

[59] Keck and Sikkink, above n.8, at 23–4.

[60] See C Jones, 'Riverain residents file US$100M suit against Omai Gold Mines', Stabroek News, 18 August 1999, at *http://ourworld.compuserve.com/homepages/rayobei/news3.htm* (accessed 17 May 2002). This report may overreach in its claims of northern NGO solidarity. The authors have found no evidence of a focus on Omai by the mega-NGOs cited, such as Amnesty and Greenpeace; and the inclusion of the US State Department as part of the supporting network seems implausible.

[61] This is also a phenomenon that has increasing presence in the UK as well, notably after two path-breaking jurisdictional decisions in *Connelly v RTZ Corp plc* [1997] 4 All ER 335 and *Lubbe v Cape plc* [2000] 4 All ER 268.

public interest litigation.[62] Rather than the spread of public interest litigation in the US mode, this section explores whether US private litigation itself could provide assistance in the regulation of transnational business conduct for human rights concerns. This seems especially important because private law litigation in the US is an example of legal regulation at 'touchdown' points where transnational business actors might be forced to face some of the consequences of their actions.[63]

The US private law system has distinctive procedural features that are attractive to parties interested in commencing private litigation against multinational businesses. Its features are well-known, and often criticised and feared abroad.[64] These include the presence of many such businesses in US jurisdiction, access to *pro-bono* legal representation, contingency fee arrangements, more generous rules on class actions, possible use of jury trials, no dangers of reprisals, a relatively independent judiciary, favourable rules on pre-trial discovery and on punitive damages, and a greater likelihood of recovering damages if successful.[65] More generally, the US courts operate in a jurisdiction where private actions play a significant role in what, in other countries, might be regulated directly by the legislative or executive branches of the state; examples of this include such areas as anti-trust, securities regulation, and mass tort litigation.

Litigation has a number of clear defects as well. Litigation in US courts is an asymmetric transnational governance regime in the sense of being dominated by US institutions, interests and values.[66] But the fact that it is a US regime does not necessarily rule out its potential role in transnational regulation, if only because of its effective transnational reach. Questions of the legitimacy of this reach are far more complex and even intractable, but at least some legitimacy issues relate to the purposes to which the US litigation is put, including whether it addresses international human rights claims rather than merely US domestic concerns.

[62] D Trubek, Y Dezalay, R Buchanan and J Davis, 'Global Restructuring and the Law: Studies in the Internationalization of Legal Fields and Creation of Transnational Areas', (1994) 44 *Case Western Law Review* 407.
[63] See Wai, above n.4.
[64] See, for example, Lord Denning's observation that 'As a moth to the light, so a litigant is drawn to the United States. If he can only get his case to their courts, he stands to win a fortune'; *Smith Kline & French Laboratories Ltd, v Bloch* (1983) 2 All ER 72 at 74. See, more generally, R Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge Mass, Harvard University Press, 2001).
[65] B Stephens, 'Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts' in M Kamminga and S Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, (The Hague, Kluwer, 2000).
[66] On the complexity of US power in the contemporary international system, see S Strange, *The Retreat of the State*, (Cambridge, Cambridge University Press, 1996) Chapter 2.

B. The Third Reich Industry Cases: True Transnationalisation of Litigation

A considerable amount has now been written on recent cases brought under ATCA or, sometimes, under traditional causes of action.[67] Most of these commentaries focus on the doctrinal issues, with respect to how human rights obligations can be attached to corporate conduct, and whether US courts should, or even must, adjudicate the merits of the claims.

However, our discussion of US litigation against private actors for human rights abuses will focus on one recent episode in transnational human-rights-informed litigation against corporate actors: the law-suits and linked settlements brought first against Germany and then against (mostly) German companies for involvement in human rights abuses, notably slave labour, during World War II. Our purpose is not to narrate the reasoning in these cases in detail.[68] Instead, our purpose is to show how the opening for tort claims for transnational human rights litigation, including for foreign nationals under the ATCA, albeit a failure at law in this case, could nonetheless be taken beyond the courtroom and open up normative debate in broader social and political processes.

Despite the consistent failure to persuade American judges to allow the Nazi-Era Industry cases to proceed on their merits, the litigation was at the heart of a wider normative advocacy and political pressure strategy that produced unique transnational settlements. As extensive literature on social justice litigation has noted, courtroom defeats (or probable defeats) can still serve a rallying and shaming function that produces significant legal reforms.[69] What is special about the Nazi Era Industry cases is their trans-border character and development.

The first case, *Princz*, was launched in the mid-1990s against Germany itself.[70] This case was dismissed on the jurisdictional ground of foreign state immunity. Princz then sued certain corporations directly.[71] The latter claim was also dismissed, this time for considerations including lack of personal and subject-matter jurisdiction, and because of a

[67] For example, Stephens, above n.65; Scott, above n.3.

[68] For excellent commentary on this litigation, see L Adler and P Zumbansen, 'The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich', (2002) 39 *Harvard Journal of Legislation* 1; D Vagts and P Murray, 'Litigating the Nazi Labor Claims: The Path Not Taken', (2002) 43 *Harvard International Law Journal* 503.

[69] See, for example, A Hunt, 'Rights and Social Movements: Counter-Hegemonic Strategies', (1990) 17 *Journal of Law and Society* 309 at 317–25; T Prosser, *Test Cases for the Poor: Legal Techniques in the Politics of Social Welfare,* (London, Child Poverty Action Group, 1983) at 83 and 85.

[70] *Princz v Federal Republic of Germany*, 26 F 3d 1166 (DC Cir 1994).

[71] See *Princz v BASF Group, et al*, Civ No 92-0644 (DDC 18 September 1995).

concern that the issue of compensation for slave labour was the subject of state-to-state negotiations between the governments of the United States and Germany. These decisions suggested that the post-war reparations instruments and ongoing political negotiations would be interpreted so as to immunise not just Germany but also corporate actors from private law claims.[72]

The first of the two political outcomes stemming from the US-based law-suits and losses is linked to the *Princz* litigation. A treaty was reached between the US and Germany, which provided for further reparations to a limited number of US citizens subjected to forced labour beyond the compensation stipulated in the post-war settlement instruments.[73] A causal link is suggested in that the settlement is generally styled 'the *Princz* Agreement.'[74]

Subsequent to the *Princz* litigation and the associated treaty, a new series of cases were brought against a host of other companies, mostly German but also including companies such as Ford.[75] The *Princz* Agreement, not surprisingly then, became part of the normative context. In particular, the agreement provided an additional reason for the courts to defer to the interstate political realm as the appropriate venue for the ongoing pursuit of reparations, even for litigants who felt that the *Princz* Agreement and the earlier reparations instruments were either inapplicable to their claims, or inadequate. For example, the case in *Iwanowa* was dismissed on multiple procedural grounds, including (a) a treaty subsumption doctrine, which suggested that earlier treaties subsumed private litigation; (b) the political questions doctrine, which suggested deference to the US executive's approach to settlement, and (c) the doctrine of international comity, in this case with respect to the pronouncements of the German Federal Government.[76] However one views these reasons — deference to an interstate agreement, deference to the executive of the home state (US), or deference to the foreign state (Germany) — the plaintiffs were faced with a dismissal.[77] Arguably,

[72] Similar barriers faced litigation in German courts; see Adler and Zumbansen, above n.68, at 30–40.

[73] Agreement Concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution, 19 September 1995, US-FRG, 35 ILM 193.

[74] *Iwanowa v Ford Motor Co and Ford Werke AG*, 67 F Supp 2d 424 (DNJ 1999) at 488.

[75] *Iwanowa*, *ibid*. For a fuller description of the variety of cases, see Vagts and Murray, above n.68, at 508–14.

[76] *Iwanowa*, above n.74.

[77] In the same year as the Ford case, the District Court in New Jersey issued its decision in *Burger-Fischer v Degussa AG*, 65 F Supp 2d 248 (DNJ 1999). Again, treaty subsumption and political questions non-justiciability were invoked, with international comity not being stated as a separate ground but implicitly being present when the court gave weight to the objections to the case presented by both Germany and Poland in the form of amicus briefs.

broader use of international human rights law might have helped to reframe these various forms of deference, as with the procedural barrier of *forum non conveniens* in the Canadian litigation previously discussed. However, in this case, what is arguably most interesting is that the legal opening of a claim of violation of the law of nations, even though unsuccessful, precipitated broader political consequences.

By 2000, some fifty cases had been launched in US courts against German banks, insurance companies and industrial corporations. Despite the discouraging US court precedents, the sheer existence (and number) of these cases appears to have tapped into a media-centred spotlight on the question of German (corporate) guilt decades after the end of the war. Whereas one might have thought that conditions were not propitious for a plaintiff-favourable settlement, given the fact of the post-war reparations regime, the passage of time, and the demonstrated tendency of the US courts to dismiss the cases,[78] the result was the opposite: an unprecedented settlement for a compensation fund initially capitalised at ten billion Deutschmarks, with the German government paying one half and German industry paying the other half. As described in a later judgment in the litigation, the process that produced the fund is a textbook paradigm of multi-actor, normative-world-finessing, border-transcending *transnational process*:

> [T]he German Foundation 'Remembrance, Responsibility and the Future' ('The Foundation')…is the result of a collaboration among American plaintiffs' attorneys, representatives of German industry, numerous governments including those of the United States, Germany and Israel, and other non-governmental organizations …. The negotiations which culminated in the creation of the Foundation began in Fall of 1998, when the German government asked Deputy Secretary of the Treasury Stuart E Eizenstadt to help facilitate a resolution of the numerous class action lawsuits …. Over the span of one-and-a-half years, Eizenstadt co-chaired a series of formal and informal discussions …. Also participating were the State of Israel, the governments of Belarus, the Czech Republic, Poland, Russia, and Ukraine, and the Conference of Jewish Material Claims Against Germany, which is an umbrella organisation representing numerous international Jewish non-governmental organisations. The quasi-formal initiative … was publicly announced by German Chancellor … Schroeder, as well as a group of German companies, on February 16, 1999. After the public announcement, twelve formal conferences chaired by representatives of the United States and German governments were held to discuss the initiative …. As a result of these conferences, and following the personal involvement of United States President Clinton and German Chancellor Schroeder, in

[78] For a fuller discussion of the many legal barriers facing the US litigation, see Vagts and Murray, above n.68, at 514–28.

> December, 1999, it was agreed that a foundation would be established, in exchange for which the claims against German defendants would be dismissed. … In July 2000, the German Parliament passed a law creating the Foundation 'Remembrance, Responsibility and the Future', which closely embodied the detailed agreements reached by the parties to the negotiations. … The parties gathered in Berlin on July 17, 2000, to sign a Joint Statement concluding the negotiations, and expressing their support for the Foundation. … The governments of the [USA] and the [FRG] simultaneously signed an Executive Agreement, which memorialised the specific commitments of the two governments to the Foundation. … Unlike typical international agreements, the [Executive] Agreement … is not a government-to-government claims settlement agreement. … Rather than extinguishing the legal claims of the nationals or anyone else, the United States merely helped facilitate an agreement between victims, German industry, and the German government. … By acting in this manner, the [US] goal was to 'bring expeditious justice to the widest possible population of survivors, and to help facilitate legal peace.'[79]

There is too much embedded in this description, and in the history of the establishment of the Foundation, for us to comment further on the hybrid normativity represented by the combined processes and outcomes.[80] Instead, we will limit ourselves to briefly commenting on how the multi-polar (non-)settlement of the Foundation impacted on the cases still on US court dockets.

In the wake of the creation of the Foundation in mid-2000, the Judicial Panel on Multidistrict Litigation consolidated a large number of the cases before the District Court of New Jersey. The Panel justified the consolidation not only by reference to the common subject-matter but also by reference to the existence of

> an important international agreement that promises to present significant pre-trial issues pertaining to the settlement of dismissal of the actions.[81]

The Foundation and associated Agreement required that all law-suits pending in US courts against German industry be dismissed with prejudice (ie, dismissed without capacity to re-initiate) before the compensation payments could begin. Any one outstanding case could stymie the (non-)settlement. The 'overwhelming majority' of plaintiffs then voluntarily withdrew their cases with prejudice.

[79] In *re Nazi Era Cases Against German Defendants Litigation*, 129 F Supp 2d at 370 (DNJ 2001). Emphasis added.
[80] For a description and critical commentary of the legal and broader contexts for the establishment of the Foundation, see Adler and Zumbansen, above n.68.
[81] In *re Holocaust Era German Indus, Bank and Ins Litig*, 198 FRD at 429 (DNJ 2000).

One plaintiff refused to acquiesce and maintained his action.[82] The impleaded companies brought a motion to dismiss with prejudice. The context for the motion was not only the various legal precedents that had relied on doctrines of deference to dismiss earlier claims but also the highly charged political context in which permitting this case to go forward would result in ten billion marks continuing to sit in escrow as ageing plaintiffs in other cases began to pass away. In accordance with the terms of the Executive Agreement with Germany, the US government filed with the court a Statement of Interest recommending 'dismissal on any valid legal ground' in the light of the existence of the Foundation and the 'twin concerns of justice and urgency.' Not surprisingly, the court dismissed the case, relying on the political questions and international comity doctrines.[83] However, the US position implicitly expressed a logic of what we would call *transnational comity* rather than international comity. As summarised by the court, the US government favoured the Foundation

> because it is the result of the parties, governments, and non-governments together reaching a plan for restitution and compensation through dialogue, negotiation, and cooperation.[84]

The slave-labour litigation represents a fascinating example of transnational legal process. Our interest has been in the characterisation of the nature of the process, and the nature of the transnational comity deference that seems to have emerged in relation to it; but more sociological inquiry is needed into how the German government actively pursued this settlement and how German industry were pressured into the agreement. Factors clearly include US pressure, but also the ongoing debates inside Germany concerning Germany's war guilt, including German litigation.[85] As for German companies, most accounts suggest they had to be dragged into the process and agreement, and that they were much more inclined to rely on legal victory.[86] However, concerns about corporate image may have become central considerations as the newly-elected German government was creating a political context that prevented them from remaining out of the spotlight.[87]

[82] *Ibid*.
[83] 'The German Foundation does not form the basis for this dismissal; the political question doctrine and considerations of international comity do'; above n.81, at 389.
[84] See above n.81, at 381.
[85] See Adler and Zumbansen, above n.68.
[86] As confirmed in question to M Ratner, an attorney at one of the leading law firms pursuing the US litigation, above n.37.
[87] The new coalition government of the Social Democrats and the Green Party, which was elected in 1998, had declared compensation of slave labour as part of their programme; see Adler and Zumbansen, above n.68, at n.65.

One final observation. The dismissals in the US courts seem to have had everything to do with what the courts perceived as deep state interests at play, whether of the US government, the German government or the two states combined. The *Princz* Agreement and the Foundation just deepened the reasons for the courts to bow out. But what would have happened had the plaintiffs begun such litigation in a context where no interstate instruments were in play, and where the individual state interests were not as salient? The strong state interest may not always be present in relation to suits against private actors such as corporations. In this respect, it is interesting to consider that, at the same time as the German cases were being dismissed *en masse*, a US federal court judge refused in *Bodner v Banque Paribas* to dismiss an action against French financial institutions alleging their participation in the expropriation of the assets of Jewish customers during the Vichy regime of Nazi-occupied France.[88] Arguments to dismiss based on the act of state doctrine, *forum non conveniens*, limitations periods, and the indispensable-third-party argument, were all rejected. But most significantly, the court also refused to rely on the 'international comity' doctrine. At least at this stage of the case, neither France nor the United States had made it known they objected to the case going forward, and the specific government regime in which the banks operated was a government (Vichy) which had suffered 'wholesale rejection … at the close of World War II.' Where interstate politics and vocal assertions of state prerogatives are not in play, it seems that the course of transnational comity may very well be one in which claims will — and should — go forward instead of being dismissed.

IV. THE SOUTH AFRICA ESSENTIAL MEDICINES LITIGATION: TRANSNATIONAL MIGRATION OF HUMAN RIGHTS NORMS THROUGH DOMESTIC LAW TO OTHER JURISDICTIONS AND TO OTHER INTERNATIONAL LAW VENUES

A third example of litigation in domestic courts that highlights the potential impact of the migration of human rights norms is recent litigation initiated by international pharmaceutical companies as part of their campaign to challenge legislative changes to the intellectual property regime related to essential medicines in South Africa.[89] The litigation in South African courts alleged violations of South African constitutional and administrative law, as well as international law, particularly the international trade

[88] *Bodnor v Banque Paribas*, 114 F Supp 2d at 117 (EDNY 2000).
[89] Act 90 of 1997, Medicines and Related Substance Control Amendment Act of 1997.

commitments of South Africa under the TRIPS Agreement.[90] Drug companies and foreign governments also applied other pressure including diplomatic pressure and trade sanctions. Justifiably, the episode is studied as an example of complex transnational politics in which MNEs, powerful governments, political forces within each state, and transnational and local NGOs all operated to affect changes.[91]

The case was eventually withdrawn from the South African courts.[92] For our purposes, there are two key points with respect to normative migration. The first is that international human rights norms would have provided a basis for framing the legal arguments in the case that was proceeding in the South African courts. In particular, vindication of the international human right to health[93] would have been invoked as the *raison d'être* for the South African statutory regime, thereby playing a defensive role such as has often been the case in constitutional rights adjudication in different legal systems. As often as not, a human rights victory lies in having successfully defended state law and policy from attack by economically privileged groups in the name of their (alleged) rights.[94] In the case of the South African courts, this would have been especially promising given that social rights are expressly justiciable, but also given the openness of South African courts to the use of international treaties and cases in their interpretation of domestic law, including constitutional provisions.[95]

[90] In the matter between Pharmaceutical Manufacturers' Association of South Africa and the President of the Republic of South Africa and others, Case No 4183/98, Notice of Claim, 18 February 1998 (High Court of South Africa, Transvaal Provincial Division). We will not address here the precise legal status of the different arguments, including how alleged violations of international law were assumed to be cognisable — either directly or by interpretive influence — before South African courts.

[91] See, for example, R Park, 'The International Drug Industry: What the Future Holds for South Africa's HIV/AIDS Patients', (2002) 11 *Minnesota Journal of Global Trade* 125; T Rosenberg, 'How to Solve the World's AIDS Crisis', *New York Times Magazine*, 28 January 2001, 26.

[92] R Swarns, 'Drug Makers Drop South Africa Suit Over AIDS Medicine', *New York Times*, 20 April 2001, A1.

[93] International Covenant on Economic, Social, and Cultural Rights, 993 UNTS 3 (1966), Article 12 [hereinafter ICESCR]; Committee on Economic, Social and Cultural Rights, The right to the highest attainable standard of health, General Comment 14, UN Doc E/C12/2000/4.

[94] See, for example, J Nedelsky and C Scott, 'Constitutional Dialogue', J Bakan and D Schneiderman (eds), *Social Justice and the Constitution: Perspectives on a Social Union for Canada*, (Ottawa, Carleton University Press, 1992). See, also, the proposed defence-against-privilege clause in C Scott and P Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution', (1992) 141 *University Pennsylvania Law Review* 1.

[95] The South African courts have expressly considered the ICESCR and the General Comments of the Committee in other constitutional cases involving social rights; see *Grootboom v Oostenberg Municipality*, 3 BCLR 277 (2000), per J Davis. For a comment, see

Arguably, human rights norms could also have helped to frame an argument if there had been an international trade complaint at the WTO Dispute Settlement Body alleging that the South African legislation violated the TRIPS Agreement.[96] The importance of the interpretation issue related to intellectual property 'rights' claims has been starkly illustrated in recent controversies concerning access to medicines, public health emergencies, and intellectual property rights under the TRIPS Agreement. The TRIPS Agreement controversially expanded the protection of intellectual property through the trade regime, including, for example, a requirement for 20-year patent protection.[97] The concern about the impact of patent protection for social rights concerns has been highlighted by recent efforts by states such as India, Brazil and South Africa to address public health issues related to HIV/AIDS. In particular, treaty interpretation questions exist with respect to the scope of certain exceptions, such as those for unauthorised use in situations of 'national emergency or other circumstances of extreme urgency'.[98]

In this context, international human rights law could play a 'countering' function in relation to 'trumping' claims made in terms of 'rights' under international trade agreements such as the TRIPS Agreement.[99] In this context, the deployment of international human rights norms would operate as a direct analogue to the kind of 'shield' briefly discussed above in relation to the role of the right to health in fending off the right to property.

C Scott and P Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise', (2000) 16 *South African Journal on Human Rights* 206.

[96] The debate concerning whether human rights norms should be considered in international trade law is subject of an expanding trade law commentary; see, for example, R Howse and M Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000). International human rights law may be argued to be relevant to interpretation of international trade law through several possible transmission belts. These include the customary international law of interpretation set out in the Vienna Convention, Article 31(3)(c) ('relevant rules of international law') with respect to either ratified international human rights treaties or as objective law where ratification is not crucial. Additional arguments for the relevance of international human rights treaties might be based on the paramountcy provision in Article 103 of the UN Charter, and therefore for provisions such as Articles 56 (and therefore 55) which address human rights. In some cases, these norms might even be argued to have some hierarchical priority, either because an international human rights norm is a *jus cogens* norm or because of a general constitutional priority for human rights norms.

[97] TRIPS Agreement, Article 33.

[98] TRIPS Agreement, Article 31(b). For a commentary on these interpretive issues, see R Howse, 'The Canadian Generic Medicines Panel — A Dangerous Precedent in a Dangerous Time', (2000) 3 *Journal World Intellectual Property* 493.

[99] These issues are discussed in more detail with respect to international economic and social rights in R Wai, 'Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime', (2003) 14 *European Journal of International Law* 35.

With respect to the expansion of 'market-friendly' rights such as those of international investors, the 'countering' function of international human rights norms could be used, for example, to defend state measures taken to advance the human rights to health of other members of that society. In this way, international human rights norms can contextualise and limit excessively expansive interpretations of IP rights in so far as they make the ability to address public health concerns difficult or impossible.[100] The use of international human rights norms challenges a policy understanding of the trade regime as only being related to economistic objectives such as maximising incentives for IP producers; instead, international trade provisions related to IP rights are reframed as a balancing of policy concerns in which health considerations should be as important as IP protection.

The second key point arising from the South African litigation lies at the level of process. The case is a strong example of the way in which human rights ideas can help to connect narrower issues of treaty interpretation in international trade to broader world politics. The success in South Africa of the co-ordinated efforts by local NGOs (in particular, the Treatment Action Campaign),[101] transnational NGOs (such as Medicins Sans Frontières/MSF), and, to a lesser extent, the South African government to link legal defence with other kinds of political action signals the role of the migration of international human rights norms in the broader structures of transnational advocacy networks.[102] Former President of MSF, James Orbinski, recalls how he met with the president of one of the 39 pharmaceutical companies challenging the South African government, each in their capacity as point person in the NGO and corporate coalitions, respectively.[103] He conveyed the position of the NGOs that the drug company insistence on IP rights in the face of the inaccessible costs of patented drugs had devastating health — and life — effects on the huge percentage of South Africans infected with the HIV virus. He further warned that they were prepared to mount not only a legal defence in solidarity with the South African government — a number of groups were granted intervener status in the court case before the companies withdrew their actions — but also a concerted transnational spotlight-and-shame campaign if the companies did not back down. The chief executive officer in question did not budge, saying they intended to invoke every legal right and avenue they could. The subsequent transnational pressure campaign made good on the MSF warning, and showed how the use of

[100] Above n.93.
[101] See N Geffen, 'Applying Human Rights to the HIV/AIDS Crisis', (2001) *Human Rights Dialogue* 2(4): 13.
[102] See Keck & Sikkink, above n.8.
[103] Orbinski, above n.37.

multi-lateral human rights norms can be especially important as a way of bridging tensions between transnational and domestic NGOs operating mainly in developed countries with the concerns of developing countries.[104] Faced with the worldwide condemnation involving states and not just civil society, the companies withdrew their case. But the migratory effects did not end there: this non-precedent (in the strict legal sense) rippled across the globe to empower other governments which had or contemplated similar legislation to that in South Africa.[105] US trade complaints against Brazil for similar kinds of governmental measures were withdrawn, and drug companies also appear to have abandoned — at least for now — their plans to litigate their 'rights' against the government of Brazil.[106]

Finally, the WTO Ministerial Meetings at Doha in November 2001 demonstrated how the combination of the co-operative actions of non-governmental and developing country governments led to some movement on the public health issue within the domain of international trade. The Declaration on the TRIPS Agreement and Public Health acknowledges a broader ability of developing and the least-developed countries to address public health crises, including provisions affirming the right to grant compulsory licenses and to determine the grounds for their grant, and the right to determine what constitutes a national emergency.[107] While it remains to be seen how the Declaration will be applied in particular trade disputes at the WTO, the invocation of it, perhaps buttressed by further arguments based on international human rights norms, would seem to offer more room to argue against a purely economistic understanding by a dispute settlement panel.

V. CONCLUDING REMARKS

We end by risking some speculation with respect to the potential for human rights to play a broader role in litigation (and politics of litigation) involving corporations whose activities impact on human rights. We approach the following comments obliquely, by first returning to the Risse hypotheses concerning *state* behaviour when states are normatively

[104] On this tension, see Wai, above n.99. Note that the major South African coalition of local NGOs, TAC, and MSF shared office space during the whole campaign: Orbinski, above n.37.

[105] See T Kasper, 'South Africa's Victory for the Developing World', 1 July 2001, http://www.accessmed-msf.org/prod

[106] See, for example, C Passarelli and V Terto Jr, 'Good Medicine: Brazil's Multifront War on AIDS', (2002) *NACLA Report on the Americas* 35(5): 35.

[107] Declaration on the TRIPS Agreement and Public Health, 14 November 2001, WT/MIN (01)/DEC/2, para 5.

confronted by what might be called a transnational public sphere.[108] In the spiral of pressure and argumentation that produces 'compliance' of states with international human rights, Risse emphasises the importance of human rights values occupying a space beyond a purely moral status, pointing to how 'the authority of international law' allows a qualitatively different form of argumentative practice:

> … advocacy groups not only have a moral case against the particular human rights violation; they can also argue that the norm violator puts itself outside the community of civilized nations and often is violating standards it has agreed to.[109]

However ironic may be any given actor's strategic invocation of interpretation-ridden legal norms as dispositive reference points, Risse's views on this score have an obvious relevance to the ways in which the social processes of human rights concerns can migrate into the legal processes of private law liability. A form of discursive necessity is created when international human rights norms *qua* international law can be invoked; it is putative legality that creates formal relevance to interpretation in other areas of transnational law and this formality must be dealt with by the court in question — somehow — in the language of law. Thus, plaintiffs in the Nazi-Era Industry cases were able to get their foot in the door through the formal incorporation by reference of the 'law of nations' in US alien tort claims law — even when the law-suits were probably fated to be dismissed. The ability to turn what would otherwise have been a moral and political discourse into one alchemically related to 'law' allowed a legal venue — the US federal courts — to be the magnet around which 'non-legal' parallel efforts to shame German public and private actors could coalesce. In the South African generic-drugs-versus-patents litigation, the advocacy strategy of the transnational NGO coalition almost certainly drew normative strength from the formal existence in the South African Constitution of a right to health and an express constitutional directive that international law (with a rather developed notion of the human right to health) must be used to interpret the Constitution. The decision of the drug companies to retreat appears to have been a combined social and legal result. One might ask rhetorically whether the drug companies would have bowed simply to transnational pressure had the South African constitution contained only a right to property, had that right not been circumscribed by the power of the state

[108] J Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, (1962; translated Cambridge Mass, MIT Press, 1989).
[109] Risse, above n.36, at 184.

to act to advance the interests of the underprivileged, had the right to health not had formal status in the same constitution, had the right to health not had a pedigree in international law, and had there been little chance that the South African courts would take international human rights law seriously in judging the companies' property claim. Finally, we would note that the (perceived) lack of formal relevance of international human rights law to a private international law question probably permitted the Québec judge in *Cambior* both to carry out a superficial analysis of the state of the Guyanese judicial system and to slide under the radar screen of media-dependent spotlighting by a transnational coalition of NGOs.[110] Quite possibly, the fact that the actual cause of action in *Cambior* was not framed in human rights terms, but in standard private law personal-injury terms, also created a drag on the interchange between the legal system and transnational social advocacy: it may not be enough for human rights to play an interstitial or informing role on the more detailed aspects of litigation (ie, here, jurisdiction) for the normative interchange (↔) in the legal↔social relationship to have much viscosity.[111]

The foregoing discussion elides the fact that, by and large, the international human rights system, conventionally understood, has no regime of direct applicability of human rights norms to corporate actors. In the main, the invocation of international human rights law has been mediated by the vagaries of domestic-law reception. We should expect this to produce a sporadic and uneven hook-up between international human rights norms and the domestic law applicable to private law obligations and the rights of corporations. Even though the indirect applicability of international human rights law does provide a degree of formal opening that can energise the link between legal and other social processes (and thus allow for the kinds of extra-legal campaigns that produced the Nazi-Era Industry settlements and the drug companies' withdrawal of their South African litigation), it seems to us that such prudential benefits cannot obscure the ongoing need to develop a clearer sense of the desirable place of transnational litigation *qua* private law phenomenon

[110] See Seck, above n.39, on the aporia in the analysis of *forum non conveniens* in *Cambior*.

[111] For some ways in which human rights can inform without being the direct legal category at stake in private litigation, see the discussion of plural characterisations in Scott, above n.5, at 61–63, and the discussion of a transnational limitations rule in Canadian private law that draws on the 'soft' law emerging from the UN on the (human) right to reparations in C Scott, 'Introduction to Torture as Tort: From Sudan to Canada to Somalia' in *Torture as Tort*, above n.5, at 40–44. On the importance of symbolism in deciding whether to seek recognition of human rights causes of actions versus relying on functionally workable existing private law categories, see G Virgo, 'Characterisation, Choice of Law, and Human Rights' in *Torture as Tort*, above n.5.

in the overall regulation of corporate conduct. Whatever the specific constitutional doctrine of reception of a given state with respect to international law, and whatever the specific statutory regimes that may be enacted (eg ATCA), the resistance of international legal discourse to a systemic notion of direct ac countability of corporate conduct will continue to produce normative drag in the legal↔social relationship over holding corporations liable in private law for violating human rights. At the moment, corporations are able to stand behind arguments that it is a public (international) law matter of the responsibility of states for regulation which cannot be outflanked by civil liability proceedings. Greater integration of the precepts of public international law (*both* jurisdiction-related precepts and human-rights-related doctrine) into the conceptual structure of private international law needs to occur before anything resembling a useful symbiosis can be expected to occur. While the precise contours of the necessary normative developments are far from clear at this early stage, there is room both for quasi-judicial bodies under international human rights treaties and domestic courts within private international law to advance transnational corporate accountability and to seek to promote normative harmonisation between the two juridical orders: private international law promoting international human rights values where possible, and international human rights law requiring that private international law processes do so and providing principled guidance on how to do so.[112]

Our focus on the migration of human rights norms into regulation of direct domestic claims involving corporate actors should not obscure a major point emerging from the three court-case narratives: the way such litigation can promote political response *by states*. There is good reason to believe that (many) states take very seriously their own failure to respond to corporate harms when proceedings in a foreign court begin to spotlight both that harm and the state's inadequate response.[113] As noted above, the litigation begun in the United States against the successors to the Third Reich companies resulted in the German state forging a joint public-private fund to compensate the plaintiff slave and forced labourers. More work would be needed to determine how much the mobilisation against the drug companies in South Africa may also have involved a strategy of stiffening the resolve of the South African government to adhere to its generic-drugs legislation and to empower

[112] See the discussion of transnational corporate accountability within 'public' governance structures of the UN human rights treaty system in Scott, above n.10.

[113] For example, the change in attitude of Ecuador towards the responsibility of Texaco for oil-related devastation in the Amazon in the context of litigation brought against Texaco in US federal courts (*Jota v Texaco*); see Scott, above n.3, at n.79.

the state to stand up to the pressure it was getting from other states that were supporting the legal position of the drug companies. It certainly seems that the transnational NGO coalition sees the profile created around the defensive strategy in the litigation as essential to further efforts to move the right-to-health issues into forward gear, in a context in which the South African government seems to have limited its initiative to producing lower pricing in the market without a wider commitment to accessibility.[114] Much, here, will depend on the susceptibility of entwined states to shame and embarrassment, which will, in turn, depend on factors such as the degree of activist organisation of domestic civil society, their connections to the transnational level, historical sensitivities to certain memories, the cultural concern with international reputation, the vibrancy of democratic structures, external pressures from powerful states, and the degree of media profile of a country or a particular human rights situation.[115]

None of the emphasis in this section on the take-up of legal discourses around corporations and human rights is meant to gainsay our earlier comments on the importance of inter-field normative migrations within law itself, for example between public and private international law, such as might have produced a different judicial sensibility in *Cambior*. However much we see the legal and the social processes as mutually embedded, and thus, to use now-trite phraseology, only relatively autonomous normativities, the very fact of discussing the legal and the social processes in terms of their (both analytical and institutional) relations to each other has a performative, if ironic, logic: something we can speak of as 'law' exists as an object not just of inquiry but of (social) practice, and, as such, we can meaningfully talk about the migration of the legal to the social and similarly about the effect of operating within the social. To this extent, we wish to leave open the relative

[114] For example, the TAC has subsequently challenged the failure of the South African government to provide adequate coverage with respect to mother-to-child HIV transmission; *Minister of Health v Treatment Action Campaign and others*, Case CCT8/02, 5 July 2002.

[115] See T Risse and S Ropp, 'International Human Rights Norms and Domestic Change: Conclusions' in Risse, Ropp and Sikkink, above n.34. Pressures towards globalisation of normative judgment are not limited to private law. The recent surge in judicial activity in Chile against former members of the Pinochet regime, notably by Judge Guzman, can be attributed by a number of observers to the initiatives against Pinochet led by Judge Garzon in Spain, and, in turn, to domestic and transnational human rights networks and norms; see, for example, D Hawkins, 'Human Rights Norms and Networks in Authoritarian Chile' in S Khagram, J Riker and K Sikkink (eds), *Restructuring World Politics: Transnational Social Movements, Networks, and Norms*, (Minneapolis, University of Minnesota Press, 2002) at 69. Judge Guzmán has commented that the efforts in Spain and in England to arrest and extradite Pinochet facilitated the indictment in Chile: 'It was like a vaccination: we Chileans got accustomed to him being locked up (so to speak) to seeing his case argued before the courts'; D Sugarman, 'Resilience of the judge who risked all to indict Pinochet', *The Times* (London), 19 February 2002, 7.

merits of not just speaking of, but also actively participating in, the development of an autonomous normative integrity of 'international human rights law' as important for vesting this body of law with critical power — a kind of power of the margins — when international human rights norms are invoked in other fields, such as private law or trade law.[116] Here, we would note the non-naïve perspective of many actors who view themselves as being part of a patient, and even subversive, order-building process that may eventually be recognised as the kind of constitutional field that, for example, EU treaty law has evolved into being — and, as such, a field that will understand the migration of its norms as a necessary precept of its very constitutionality.

[116] See M Koskenniemi, 'The Pull of the Mainstream', (1990) 88 *Michigan Law Review* 1946.

17

Human Rights, Transnational Private Law Litigation and Corporate Accountability: Comments on Scott and Wai

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WE DO NOT usually think of international human rights law as a tool for holding corporations accountable for the harm they may cause to workers or communities. While accountability is important, it is a matter that is usually left to national regulation and domestic private law. In the conventional view, international human rights law and the standards governing corporate responsibility exist in separate spheres. Scott and Wai want to bring these spheres together. They think that international human rights law and transnational advocacy coalitions could play a role in holding corporations accountable both to individuals and communities. They have developed a theory of how this could happen.

The theory rests on two pillars; the role of transnational advocacy coalitions, and the use by such coalitions of international human rights norms in domestic private law litigation. Scott and Wai recognise that there both are gaps in the system which regulates corporate conduct through domestic law and few situations in which supranational authority exists to fill the gaps. They think that in cases involving harm caused by corporations, especially those with contacts in multiple jurisdictions and exposure to multiple normative systems, transnational advocacy coalitions may partially be able to fill the gap through the deployment of international human rights norms. They think such norms can be used to destabilise the doctrines traditionally employed in such litigation, and change outcomes. Hence, the metaphor of normative 'migration' which appears in the title.

The project seeks to unite three analytic frames: advocacy networks theory,[1] a vision of transnational litigation,[2] and what the authors call a 'critical policy discourse approach'. They recognise that multi-actor advocacy networks have developed to promote human rights norms; they understand that such networks may use litigation in domestic courts as part of their advocacy efforts; and they believe that human rights discourse can be used outside the courts to frame public discussion, and inside them to destabilise doctrinal structures and open up the possibilities of inserting human rights norms into private law cases. Finally, they seek to illustrate the power of this approach through three case studies in which human rights norms were invoked in the course of domestic litigation involving multi-national corporations.

This sounds like an ambitious programme, and it is. Advocacy network theory is well developed and has been used to show how international norms can affect domestic political behaviour.[3] Socio-legal scholars have applied this analysis in a few areas to show how transnational coalitions including lawyers can use litigation and other forms of legal advocacy as part of an overall campaign on behalf of parties adversely affected by corporate (and state) action.[4] And the roots of what the authors call 'critical policy discourse' in domestic and international law can be found in the work of scholars such as Duncan and David Kennedy.[5] But no one has tried to put all three of these modes of analysis together, let alone deploy them together in the study of specific law-suits and advocacy campaigns. Such an effort would involve crossing a number of boundaries which are often carefully policed: these include the boundary between law and politics, public and private law, the domestic and international legal spheres, socio-legal and doctrinal analysis, critical legal studies and 'law and society'.

I applaud the authors' efforts to integrate these levels and types of analysis, cross all these boundaries, and buttress theoretical effort with case studies. A fully-worked synthesis of this type would bring together the best in contemporary international relations theory, social-legal analysis, and doctrinal critique. Such a synthesis would go beyond current knowledge in two crucial ways. First, it would bring advocacy network

[1] M Keck and K Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY, Cornell University Press, 1998).
[2] D Trubek, J Mosher and J Rothstein, 'Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks', (2000) 25 *Law and Social Inquiry* at 1187.
[3] T Risse, S Ropp, and K Sikkink, *The Power of Human Rights: International Norms and Domestic Change*, (Cambridge, Cambridge University Press, 1999).
[4] Trubek, Mosher and Rothstein, above n.2.
[5] For example, Duncan Kennedy, *A Critique of Adjudication: Fin-de-Siècle* (Cambridge, MA, Harvard University Press, 1997); David Kennedy, *International Legal Structures,* (Baden-Baden, Nomos, 1987).

and transnational litigation analysis to bear on the little understood area of private law litigation. Second, it would add agency to accounts of doctrinal change through critical policy discourse. As the authors note, there has been very little scholarly attention given to the ways in which private law litigation might be mobilised in the human rights cause. And while we have a rich literature that seeks to show that existing legal policy discourse contains gaps and contradictory elements which might be exploited to bring about doctrinal change, little attention has been paid to identifying the agents who could set such processes of doctrinal revision in motion. Birds may migrate on their own, but doctrines do not!

What would it take to realise this programme fully and document 'norm migration' through case studies? It would be necessary to show that there are networks that operate across national borders to promote interests protected by human rights norms; that the activity of these networks include private law litigation in the domestic courts of one or more nation; that, in such litigation, transnational actors have introduced human rights norms into the argumentation; and that, as a result of this introduction, legal outcomes which are favourable to protected interests have come about.

These are stringent conditions. Scott and Wai have gone fairly far in their effort to meet them, but the analysis in the case studies falls short of the strong claims of the theory. The paper relies on three cases to demonstrate norm 'migration'. The first is a law-suit brought in Canada on behalf of miners injured in Guyana in a mine owned by a Canadian firm named *Cambior*. The second are the cases brought under the US Alien Tort Claims Act against German corporations that employed slave labour during World War II ('Nazi Era Industry Cases'). The third are the cases brought by pharmaceutical companies challenging the South African government's decision to break their patents on HIV drugs ('South Africa Health').

The authors show that, in all three cases, there was an effort to interject human rights issues into what was, at least at face value, private law litigation. They show that in the 'Nazi Era Industry cases' and the 'South Africa Health' cases there were transnational advocacy networks in operation and the private law litigation was co-ordinated with a broader 'political' campaign which used human rights rhetoric. They argue that, in those two cases at least, the invocation of human rights norms contributed to favourable outcomes. In the 'Nazi Era Industry Cases', the campaign led to an inter-governmental solution promising redress to the victims; in South Africa, the campaign seemed to have influenced the decision by the pharmaceutical companies to drop the suit. But what Scott and Wai fail to show is any example in which the invocation of human rights norms changed the outcome of the private law litigation itself. Human rights argumentation was ineffective in defeating a *forum non*

conveniens motion in the *Cambior* case. And, in the other two cases, the litigation never reached a final conclusion because the working of broader political forces essentially preempted resort to the courts. To the extent that outcomes were changed and interests protected because human rights norms were invoked, the effects all occurred at the political, not the judicial or doctrinal, level. The norms may have 'migrated', but not to the domestic law courts!

One regrets that the authors did not include any case which showed a doctrinal change in private law litigation that came about because of the introduction by transnational actors of human rights norms in the court itself. Clearly, as Scott and Wai note, there is great value in providing further documentation for the idea that

> …human rights law may … be a part of a larger system of countervailing power and oversight by networks of civil society actors and government actors who utilise human rights law as a basis for conceiving of and framing action against business actors, such as consumer boycotts, shareholder activism, and shaming strategies.

But the authors want to go beyond such demonstrations to show that, if transnational agents could effectively introduce human rights norms into private law litigation, this might 'destabilise' doctrinal categories and lead to new legal outcomes favourable to rights-protected interests. They suggest that, in this way, international human rights law might become an independent source of 'global law without a state' along the lines developed by Gunther Teubner for *lex mercatoria* and other legal spheres.[6]

The paper sketches a theory of how the norms of international human rights law might transform the outcomes of private law litigation. The theory combines what we might call 'agency' and 'structure'. The structure is private law doctrine; the agents are lawyers working with transnational advocacy networks. Scott and Wai contend that private law doctrine is actually an unstable amalgam of conflicting policy ideas and values, and that the injection of human rights norms into doctrinal discourse can destabilise dominant doctrinal strands and allow suppressed ideas and values to emerge. In this case, they suggest that human rights discourse could help to bring to the surface concerns both for the community and the social suppressed within private law by the dominant strand that stresses the facilitation of commerce. Thus, they

[6] G Teubner (ed), *Global Law without a State* (Dartmouth, Aldershot,1997). Note that Scott and Wai also see Teubner's work, along with critical legal studies, as a source of 'critical policy discourse'. Whether this effort to bring these two approaches together is justifiable is an issue beyond the scope of this comment.

assert, the presence of change—agents committed to advocacy on behalf of rights-protected interests—can transform the doctrinal 'structure'. While the case studies do not show that this has actually occurred, if this theoretical claim were substantiated, it would have both practical and theoretical importance. At a practical level, it would provide guidance to future litigators. At a theoretical level, it would show that it is possible to integrate social-legal and critical doctrinal analyses.

This last issue deserves special attention. One of the unusual and promising features of this paper is its effort to integrate a socio-legal analysis of the nature and role of actors in litigation, and the extra-judicial effects of litigation campaigns with a critical analysis of legal doctrine and the ways that doctrinal contradictions can be manipulated to achieve progressive outcomes. These two forms of thinking about law — roughly associated with 'law and society' and 'critical legal studies' respectively — have usually been seen as incommensurate.[7] Scott and Wai make a good theoretical case that these boundaries can be crossed and the approaches integrated, even if they have failed to find an instance of effective doctrinal destabilisation and change through intervention by transnational human rights advocates.

[7] For a discussion of the tension between law and society and critical legal studies, and a plea for the kind of integration proposed by Scott and Wai, see Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism', (1984) 36 *Stanford Law Review* at 575; Trubek and Esser, 'Critical Empiricism in American Legal Studies: Paradox, Program, or Pandora's Box?', (1989) 14 *Law and Social Inquiry* at 3.

Part III

Conclusions

18

Transnational Governance without a Public Law?

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I. INTRODUCTION

WHAT IS NEW about the concept of transnational constitutionalism as presented in many of the contributions in this volume? If it is possible to identify an explicit or underlying homogenous theoretical concept in these chapters (and in the whole academic discussion), this concept could be called a *private law framework of public institutions*. In other words, one important innovative element of the actual academic discussion about transnational governance is the application of private law categories to some classical domains of public law, to the analysis of legal institutions that claim legitimacy beyond their own will or self-interest — institutions like empires, churches, kingdoms, international organisations or states.

But what is meant here by a 'private law framework'? By private law framework, this paper will refer to a theoretical approach that understands the production of law or the generation of norms as the result of a spontaneous co-ordination process, normally between formally equal actors. In this concept, the evolution of norms is not necessarily connected with the intervention of a public authority. And if there is a public intervention in the law-generating process, it takes place in a judicial form, rather than in an administrative or legislative form: The contributions of public authorities to the generation of norms appear more as neutral judicial wisdom than as political decisions. Thus, a private law framework stresses the heterarchical element in the making of law, and it underlines the evolutionary and procedural character of its development. The meaning of this concept becomes more graphic in comparison to its opposite, which is referred to in this article as a *public law framework*: For a public law framework, the production of law is the result of decisions made by a public authority that is hierarchical in itself (ie between

legislation and administration and within the administration) and in its relation to society. Legislative and administrative decisions (as even the notion of a decision itself) are disruptive, or even revolutionary, ways of legal development, not evolutionary. A public law framework couples law and society by a majoritarian political process.

It is very important for the understanding of this contribution that the construction of this difference between private and public law frameworks is distinguished from the doctrinal distinction between public and private law which is known to many national legal orders.[1] Understood as a conceptual distinction, we are looking here for different ways of conceiving law, for understandings that are at least implicit to the academic analysis of the internationalisation of the legal orders. The distinction between private and public law frameworks is a descriptive and conceptual one.

My conjecture in this paper is that both sides of this distinction are needed for the analysis of transnational law, but that there is (at least in academic discourse) a growing preference for the application of a purely private law framework. In other words, there is always both: law that is generated and implemented by a politicised hierarchical structure, and law that is the result of a co-ordination process between private actors?[2] But there is also a trend within academic discourse that favours private law frameworks for the analysis of transnational legal institutions. As the appearance of private law categories in transnational legal discourse undoubtedly has its own merits, and as it has already kept some of its promises, there is principally no reason against the application of such a framework towards all forms of legal development. But the application of a private law framework towards public institutions should be accompanied by a reflection of the possible theoretical problems and biases. This will now be exemplified by a brief analysis of three important notions in transnational jurisprudence, which are obviously very dear to a traditional public law approach: the concept of the state, the concept of the constitution and the concept of democracy.

II. PRIVATE LAW FRAMEWORKS: THREE TROUBLES

1. Nation-States

It is common for the actual discussion to identify a classical form of public law with the emergence of the 'modern state'. This idea of statehood is

[1] JWF Allison, *A Continental Distinction in the Common Law*, (Oxford, Clarendon Press, 1996); Ch Möllers, Globalisierte Jurisprudenz, (2001) 79 *Archiv für Rechts- und Sozialphilosophie*, Beiheft, at 41 and 59.

[2] See H Hofmann, *Das Recht des Rechts und das Recht der Herrschaft und die Einheit der Verfassung*, (Berlin, Duncker und Humblot, 1998) at 40.

identified with a certain form of hierarchical administrative organisation and a 'transmission belt' concept of democratic legitimacy that transports a democratic will from the electoral process via parliament to the pyramidally structured administration.[3] Furthermore, it is one of the central assumptions of the current debate in international law that this form, and with it the whole institutional setting of the classical 'modern state' or sovereignty is coming to an end.[4] For a specific understanding of the transnationalisation of law, one has to give up these ideas. But is this conclusion correct?

Before discussing the merits of such an assumption one should comment on its historical-philosophical subtext: the thesis of the end of the nation-states is more than a century old. Coming from French syndicalists, such as Léon Duguit, and British Pluralists, such as young Harold J Laski, this narrative made a long theoretical journey, appearing throughout Carl Schmitt's oeuvre and finally arriving at the contemporary international and European jurisprudence.[5] But if one takes the old texts of early theorists such as Duguit and Laski and replace words like 'trade unions' or 'Catholic church' with words like 'multi-national corporation' or 'non-governmental organisation', you will be struck by how 'contemporary' this discourse really is: the theory has changed very little in the last hundred years, although the political and institutional background is totally different.[6] The narration of its history could help the actual discussion to put itself into a context and to question clichés about the institutional development.

Even without knowing the history of the old drama of the Death of Leviathan, the identification of traditional public law with a hierarchical pyramidal sovereign state seems to be historically and systematically dubious in more aspects than one (1). But more important than worrying about its factual correctness is to see the implications that such an understanding must have for the analysis of contemporary legal regimes (2).

1. The identification of public law in general with the sovereign modern nation-state fails to include many important elements of the institutionalised wisdom of public law doctrines beginning

[3] For the anglo-american context, see PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America*, (Oxford, Clarendon Press, 1990). For Germany, see Ch Möllers, 'Braucht das öffentliche Recht einen Methoden- und Richtungsstreit?', (1999) 90 *Verwaltungsarchiv* at 187, and 188–90. For the European Union, see C Harlow, 'European Administrative Law', in P Craig G de Búrca (eds), *The Evolution of EU Law*, (Oxford, Oxford University Press, 1999), at 261 and 264.

[4] For a different assumption, see A-M Slaughter-Burley, 'Government Networks: The Heart of the Liberal Democratic Order', in GH Fox, BR Roth (eds), *Democratic Governance and International Law*, (Cambride, Cambridge University Press, 2000) at 199.

[5] See H Quaritsch, *Staat und Souveränität*, (Frankfurt, Athenaeum, 1970), at 11.

[6] See HS Jones, *The French State in Question: Public Law and Political Argument in the Third Republic*, (Cambridge, Cambridge University Press, 1993).

with Catholic canon law.[7] Public law in the United States and Europe has been well aware of many non-hierarchical phenomena. Examples of this include federalism, corporatism and self-regulatory structures. The identification of public law and a command-and-control concept of law misses the fact that nation-states have basically never relied solely upon such forms of implementation, but upon much more differentiated techniques of administration.[8] The whole administrative apparatus has always had to, and still has to avoid the final step, the use of force, in order to keep its functionality. The still current concept of states as the owners of the monopoly of legal force has, so far, been a real *obstacle épistémologique*.[9]

2. But the implications for new theories of governance are more troublesome than the historical correctness of this concept: looking at the state, new governance theories tend to start with an absolutist concept of sovereignty,[10] in order to perceive the obvious contingencies and defects of the modern nation-state from this point of departure. They observe co-operation and co-ordination, private actors crossing boundaries and transnational committees gaining a normative existence of their own, they compare these observations with the concept of undivided state sovereignty and remark that this concept is flawed nowadays. This diagnosis could, along with the leading distinction of this paper, be called a *private law dependence of the state*, and is used in many contributions as a proof of the end-of-the-state narrative. The nation-state is confronted with expectations that it was never expected to fulfil.

But it is such an absolutist concept of sovereignty that it makes the observer overlook what might be conversely labelled as *public law dependencies of private actions*. This can be made evident by reinterpreting two prominent examples of the allegedly stateless transnational law production:

Lex mercatoria is, at least, the main academic example for a stateless regime of transnational corporate actors.[11] But even if *lex mercatoria* could be used as both a representative and practically important example for a

[7] See HJ Berman, *Law and Revolution*, (Cambridge, Mass, Harvard University Press, 1983.)
[8] See M Foucault, *Il faut défendre la société*, (Paris, Gallimard, 1997). R Poscher, 'Verwaltungsakt und Verwaltungsrecht in der Vollstreckung', (1998) 89 *Verwaltungsarchiv* at 111 and 117.
[9] See G Bachelard, *La formation de l'esprit scientifique*, (Paris, Vrin, 1938), at 14–19.
[10] For a critique, see Stephen D Krasner, *Sovereignty*, (Princeton, Princeton University Press, 1999).
[11] M Albert, *Zur Politik der Weltgesellschaft. Identität und Recht im Kontext internationaler Vergesellschaftung*, (Weilerswist, Velbrück Verlag, 2002). G Teubner (ed), *Global Law Without A*

stateless law,[12] one would have to ask for its institutional dependence on state regimes. It may be the case that multi-national corporations invent a legal order of their own, a private common law of international trade contracts. But what is the contents of these contracts? Clearly, all the values that are allocated by transnational contracts must be guaranteed by some institution. Or, to put it in a simple assumption of institutional economics: there is no property to be sold without a state-like hierarchical institution.[13] To forget the guarantee functions of public institutions for private property is a well-known lapse. It reminds us of the non-political Common Law concept of property and law: property being assigned by nature, and law being the just solution to a two-person co-ordination game. This is a concept which is not state of the art, today, neither in terms of political philosophy, nor in terms of constitutional theory or institutional economics.

The deliberative power of NGOs is another important example for the alleged statelessness of new transnational regimes. NGOs may create a transnational legal discourse that has an important impact on the work of transnational legal regimes or international organisations, and are primarily private actors organised in a spontaneous and non-hierarchical fashion. But the contested legitimatory achievements of NGOs and their contributions to international legal deliberation are made possible by rights which are again guaranteed by national legal orders. There is no transnational political discourse without the national right to free speech. Here, again, alleged statelessness dwells on the democratic nation-state.

These reminders are not meant to contest the importance or the relative novelty of the discussed phenomena. However, they do stress the dangers of an analysis which is too-simply conceived in its application of what I have called a private law framework. Nation-states are not the main actors in these contexts, although they clearly produce a normative environment which is the condition for these forms of 'private' transnational governance. The informal and epistemological context-giving functions of nation-states have to be underlined. In a world of polycontextuality, states seem to be one of the major contexts, no more and no less. In a world in which transnational law has to invent new forms of implementation, states should be understood as information and

State. (Aldershot, Dartmouth, 1997). But, compare G Teubner, 'Idiosyncratic Production Regimes: Coevolution of Legal and Economic Institutions in the Varieties of Capitalism', in, John Ziman, *The Evolution of Cultural Entities: Proceedings of the British Academy*, (Oxford, Oxford University Press, 2002).

[12] But, see KF Röhl, S Magen, 'Die Rolle des Rechts im Prozeß der Globalisierung' (1996) 17 *Zeitschrift für Rechtssoziologie* 1, at 34.

[13] DC North, 'A Neoclassical Theory of the State', in J Elster (ed), *Rational Choice*, (Oxford, Blackwell, 1996) at 248.

discourse providers which allow us to know about the conditions of application of transnational law.[14] In Stanley Fish´s categories,[15] states are still important interpretive communities.[16] Even if they do not generate new norms, they are crucial for any form of law production and implementation. For the distinction between a public and a private law approach, this means that only a combination of both concepts is able to provide an adequate analysis of these phenomena.

2. Constitutionalism

There are two traditions of the concept of constitution or constitutionalism: these two traditions must not be separated, but they have to be distinguished, in order to render any meaning to the ubiquitous talk of constitutionalisation in the actual debate of international and European legal discourse. Only the distinction between these traditions can maintain the theoretical dignity as well as the descriptive force of the concept of the constitution. The identification of these two traditions may well be connected with our distinction between a public and a private law approach.

The Atlantic constitutional tradition, born in the French and American revolutions, is a tradition of discontinuity and disruption, legitimatory monism and a unilateral form of law-production by a political subject.[17] It is the tradition of founding a new order by finishing an old one. This tradition clearly contains a strong public law framework, stressing the role of the democratically politicised legislator for every part of the legal order. Compare what Robespierre had to say about property, or consider the crucial, new role of takings for the course of the American revolution. One might even say that there is no room at all for private law concepts in the French revolutionary tradition.

But it is the second tradition, a tradition which may best be identified with British constitutional history and, to some degree, with German predemocratic constitutionalism, which is more important for the discussion about international constitutionalism. This tradition can be best described by looking at the British concept of the rule of law,[18] or the German concept of the 'Rechtsstaat'.[19] This is a tradition of continuity, legitimatory

[14] See A and A Chayes, *The New Sovereignty*, (Cambridge, Mass, Harvard University Press, 1995).
[15] See S Fish, *Is there a Text in this Class*, (Cambridge, Mass, Harvard University Press, 1980).
[16] See Möllers, above n.1, at 43–46.
[17] See M Gauchet, *La Révolution des Pouvoirs*, (Paris, Gallimard, 1995) at 55.
[18] See AV Dicey, *Introduction to the Study of the Law of the Constitution*, (London, Macmillan, 10th edn 1959) at 183.
[19] I Maus, 'Entwicklung und Funktionswandel der Theorie des Bürgerlichen Rechtsstaats', in *Rechtstheorie und politische Theorie im Industriekapitalismus*, (München, Fink, 1986) at 11.

pluralism and the spontaneous evolution of a legal order. It is not a tradition of founding a new order, but of limiting, organising and controlling a pre-existing (and pre-democratic) one. Constitutional provisions against the crown had first been invented in the British Common Law tradition. On the one hand, it is a tradition with monarchical roots, on the other, it is a private law concept — designing constitutional provisions without any intervention except that of the judiciary — inventing discursive rules of fairness in a spontaneous judicial process, initiated by private parties. The role of the judge as the finder of fair rules creates a form of legitimacy which is different from the idea of the democratic accountability of legislators and administrators.

It is this second tradition which is almost always implicitly used to describe or to evaluate transnational or international legal developments as being 'constitutionalised': Processes of constitutionalisation are recognised in the regimes of the United Nations, the World Trade Organisation and in the European Union. They are applied to particular institutions such as the WTO Appellate Bodies, the European Court of Justice, as constitutionalisation of the European Administrative Law or to the European Committee System.[20] In this discourse, international or transnational constitutionalism is regularly conceived as a self-emergent process that invents its own standards of fairness without the intervention of the political organs which are created by standards of democratic equality. This notion of constitutionalisation seems to be inspired by an urgent need for the legalisation of power-driven state action. It is, in a way, the normative answer of international lawyers to the still influential realist concept in International Relations.

Very important for this concept is the emphasis on individual rights that are not mediated by a (national or transnational) democratic political process, but which are directly and transnationally applicable by courts or tribunals. Clearly, this concept of rights is closer to the second tradition of constitutionalism, in which rights are designed in a non-political natural-right fashion.

But, in particular, the discussion about the development of the European Union, which arguably is the institutional *avant-garde* of legal globalisation, shows that the tradition of Atlantic constitutionalism, which, in my words, is the public law concept of constitution, remains indispensable: divergent developments such as the parliamentarisation of European institutions on the one hand, and the system of Comitology

[20] AL Paulus, *Die internationale Gemeinschaft im Völkerrecht*, (München, CH Beck Verlag, 2001) at 293. Compare book titles such as JHH Weiler (ed), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade?*, (Oxford, Oxford University Press, 2000), and the reference to Evolution (above note 3). Ch Joerges, J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', (1997) *European Law Journal* 3, at 273 and 292.

on the other, cannot be analysed independently from the same theoretical standpoint, but have to be analysed together, and these analyses have to be related to each other. The rule underlying the development of the European Order seems to be, the more evolutory and rights-driven constitutionalisation can be found in a transnational regime, and thus its need for a constitution that creates democratic political processes is more urgent. To express this in terms of the leading distinction of this paper: the self-emergent private law constitutionalisation creates its own public law supplement.

3. Deliberative Democracy

Though rarely discussed, it may not be accidental that these forms of legitimatory procedures remind the observer of civil litigations, in which private parties are invited to make and justify their claims. At least, the classical common law concept of a civil suit had no room for any legislative intervention (ie intervention under egalitarian and majoritarian rules). Fairness and legitimacy are only produced by present participants of the procedure. Political representation is not needed. The idea that legitimacy is generated by a bilateral co-ordination process that may be moderated by a neutral third person — the idea of the institution of a court — is clearly both important and old, and has, moreover, been well-proved in practice. But one should not forget how similar this idea of democratic deliberation can become to the neo-liberal concept of the contract as the first and privileged instrument of democratic self-organisation. The assumption that a discourse is able to substitute party politics or the electoral process may come close to a laissez-faire idea of legal development, which is contradictory to classical democratic theory. This contradiction is not an argument in itself: democratic theory has to evolve, but the antagonism between both concepts should be mentioned in order to understand what is at stake. To ignore this contradiction means to ignore the crucial institutional differences between a parliamentary discussion and a discussion in court, and it also removes all the interesting and important tensions within the original concept of deliberative democracy.

The invention of a field of majoritarian politics beyond the contractual co-ordination between them can be justified by two aspects: first of all, democratic equality has to guarantee that decisions are not made for those who do not participate in the decision-making process.[21] It is this aspect

[21] See, similarly, K Günther, 'Rechtspluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretisches Problem', in Günther, Wingert (eds), *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit*, (Frankfurt, Suhrkamp, 2001) at 539 and 557.

that makes a strong point for representative forms of governance. Secondly, the difference between reason-giving and decision-making, between institutionalised veto positions, and the mere possibility of being heard guarantees that political powers cannot be disguised as 'reason'.[22] Both aspects prohibit any reduction of the concept of democracy to a purely deliberative or discoursive form. Although they are not dependent on the institutional framework of the nation-state, they do underline the deficient democratic state of most, if not all, examples of transnational governance. In terms of the public/ private law framework discussion, they reinforce the need for a combination of both concepts that has been postulated here.

III. CONCLUSION

The discussion on transnational constitutionalism can be reconstructed by a distinction between two forms of laws. A private law framework defines law as the result of spontaneous co-ordination efforts. A public law framework defines law as the result of a political process, which is not autonomous, but is intentionally steered. The decision for only one of these concepts has important implications for the understanding of other important notions such as democracy, state, rights or constitution. The actual discussion tends to stress the private law elements and to underestimate the public law elements in transnational institution-building.

But an adequate theory of law needs a dialectical synthesis of both approaches that lives up to its tensions and contradictions . Its analytical distinction and conceptual reintegration allows us to give a more complex theory of transnational constitutionalism.

[22] Karl Marx' critique of the French doctrinaires may be quoted as a critique of concepts of merely deliberative democracy: 'Parallel zur Hegelschen Doktrin entwickelte sich in Frankreich die Lehre der Doktrinäre, welche die Souveränität der Vernunft im Gegensatz zur Souveränität des Volkes proklamierten, um die Massen auszuschließen und allein zu herrschen.' (*Die Heilige Familie, Frühschriften, MEW* Bd 1 at 322).

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Constitutionalism and Transnational Governance: Exploring a Magic Triangle

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INTRODUCTION

AS EXPLAINED IN the preface, the editors of this volume pursue a common project and have searched for contributions which shed light on their agenda. A 'common project' of three individuals, cannot, and should not, be expected to fit into a single well-defined theoretical frame. Much less should one expect that the many contributions to this volume have been subjected to one conceptual framework. Nor can we claim that the ensemble of these essays covers or mirrors the complexity of our topic comprehensively. And yet, notwithstanding this diversity, there are common *leitmotifs* which have guided this project. Hence, the objective of this summary is twofold. It will provide orientation on both the commonalities and the differences in the individual contributions. It will also point to interdependencies of arguments, especially to the links between the theoretical contributions and the case studies. However, such an effort cannot be purely descriptive. Indeed, it has to be undertaken in a framework in which both the *problématique* of transnational governance can be situated and both the top-down and bottom-up approaches of the contributors to this volume can be observed. This framework will first be presented at some length (Section I), before we turn to an account of the individual contributions, first to the theoretical debate (II), then to the case studies (III). The final section will present some conclusions. But there, the editor and rapporteur has to transform into an author.

I. A LEGAL SCIENCE FRAMEWORK FOR THE OBSERVATION AND ASSESSMENT OF TRANSNATIONAL GOVERNANCE

Three legal dimensions of transnational governance will be addressed here. On the one hand, the turn to governance — as opposed to government — reflects the very general developments of the interaction between law and society, which were visible for decades, even within constitutional states — in such perspectives, the differences between national, European and transnational governance are gradual, rather than principal (below I.1). One aspect that the emergence of governance at international level has in common with the more general (national) developments which preceded it, has been the perception of the failure of 'purposive' legal programmes (*Zweckprogramme* in Niklas Luhmann's terminology) which the new arrangements were supposed to cure through the inclusion of non-governmental actors. This turn implied the development of legal strategies which reflected upon the pre-conditions of the law's efficacy and promised to overcome the traditional 'command-and-control' type of social and legal engineering. Thus, a loosening of the links between law and enforcement powers has been inherent in the turn to governance — which, again, is a phenomenon which all levels of governance have learned to live with (below I.2). Last but not least, transnational governance poses fundamental challenges for all international legal disciplines and their commitments to constitutional democracies; if, and, indeed, because transnational governance emerges beyond the realms that states can control, it poses a threat to the type of legitimacy that the citizens of constitutional states feel entitled to expect. And the search for legitimate transnational governance would be hopeless if legitimacy were equated with the type of *demos*-anchored constitutionalism that nation states have established (below I.3).

I.1 The Turn to Governance and its Precursors

The term governance has become so fashionable among political scientists and policy makers that efforts to define it with some precision have become rare. Nevertheless, the notion should be taken seriously. As Philippe Schmitter argues,[1] notwithstanding the 'oversell and vagueness' of this concept, it usefully designates

[1] Ph C Schmitter, 'What is there to legitimize in the European Union … and how might this be accomplished?', in Ch Joerges, Y Mény, JHH Weiler (eds) *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance, Jean Monnet Working Paper No. 6/01*, 79 *et seq.*, at 83 *et seq.*, (also at *http://www.iue.it/RSC/Governance/* and *http://www.jeanmonnetprogram.org/papers/01/010601.html).*

> a distinctive method/mechanism for resolving conflicts and solving problems that reflects some profound characteristics of the exercise of authority that are emerging in almost all contemporary societies and economies.

Such properties do not lend themselves to clear-cut definitions. One important element of the concept, at any rate, is undisputed: it designates actor configurations and problem-solving activities, which do not fit into the institutional frameworks foreseen by national, European and international law, but which have, instead, emerged as responses to functional exigencies. Modern modes of governance depend upon, and therefore have learned to build upon, expert knowledge and the management capacities of private enterprises and non-governmental organisations. These developments have given rise to two interdependent problems. One is the erosion of the public/private distinction. Of this phenomenon lawyers have debated for a long time; nevertheless, it is gaining a more dramatic importance. A second dimension may be less visible but seems even more intriguing. The legal system, as Niklas Luhmann has explained to us, distinguishes between legal and illegal acts and operations.[2] The operation of this binary code is now confronted with arrangements that seek to overcome the *impasses* the legal code has on offer as the 'solution' to a perceived problem. While governance arrangements seek the law's support, they also challenge the law's rule through a de-juridification of the polity.

The widespread turn to governance arrangements has long been prepared in the various disciplines concerned, even though these forerunners have used a different language. The whole debate on regulation, its failures and potential cures, could be cited here. In the present context, it seems sufficient to point to three areas of issues that have been intensively discussed in legal theory since the late 70s.

The critique of substantively rational legal concepts and of the subsequent interventionist social policies has inspired the search for 'post-interventionist' legal strategies and a proceduralisation of the category of law.[3] The new responses to the failures of social engineering experienced through law have all implied the recognition of novel

[2] See, for example, N Luhmann, 'The Coding of the Legal System', in A Febbrajo, G Teubner (eds), *State, Law, and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Milano, Giuffrè, 1992), at 145.

[3] See G Brüggemeier, Ch Joerges (eds), *Workshop zu Konzepten des postinterventionistischen Rechts*, Zentrum für Europäische Rechtspolitik, Materialien 4, Bremen, 1984. For an instructive recent overview in English, see J Habermas, 'Paradigms of Law', in M Rosenfeld, A Arato (eds), *Habermas on Law and Democracy: Critical Exchanges*, (Berkeley, University of California Press, 1998), 13.

governance regimes in which both state and private actors participate so as to make use of societal knowledge and the management potential of non-governmental actors.

These developments, which were particularly visible in the 80s, were stimulated by the Europeanisation and globalisation processes, which have eroded the regulatory grip of the states on national societies while, at the same time, establishing modernised transnational regulatory schemes. The processes of deregulation and re-regulation in Europe[4] had to involve national and European public and private actors; this is because they were intended to establish truly transnational governance structures.

Thus, the emergence of new legal regimes is a phenomenon which can be observed at national, European and international level. The challenges of these developments to the idea and ideals of constitutionalism have much in common at all levels. The legitimacy of governance is their common problem and the search for institutional innovation which may respond adequately to this problem is their common task.

The importance of the first two sets of assumptions and theses for national legal systems will not be discussed any further here. What will be explored are some implications for the third issue. To repeat: since new governance arrangements are typically generated beyond the realm of traditional law and politics, they challenge the idea of law-mediated governance even within constitutional states. Beyond this level, this challenge is even more radical and more demanding. Two aspects deserve particular attention, namely, the links of law to state-controlled enforcement mechanisms (Section I.2), and the difficulties of the international legal disciplines with the conceptualisation of 'governance' (Section I.3).

I.2 Implementation, Compliance and the Reflection of Law on its Effectiveness

The intense debates of the 1970s about the failures of welfare-state juridification strategies were guided by normative concerns about the intrusion of bureaucratic machineries into the economy and the life-world. It was the broadly experienced disappointment with 'purposive' legal programmes *and* a new sensitivity towards 'intrusions into the life-world' through a juridification of social policy goals that triggered the search for models of legal rationality that would fill the gaps left open by formalist legal techniques, and, at the same time, cure the failures of the

[4] See as one of the pioneering studies, G Majone (ed), *Deregulation or reregulation?: Regulatory reform in Europe and in the United States*, (London, Pinter/New York, St. Martin's Press, 1990).

law's grip on social reality on the basis of some 'grand theory' (such as economic theories of law, systems theory or discourse theories).[5] Proceduralisation and 'reflexive law' were, at the same time, concerned with very practical matters, namely, the problems of implementation and compliance. Discrepancies between legal programmes — especially between 'purposive' legislation designed to achieve specific objectives and the actual impact of such laws on society — were a core concern of legal sociology, of effectiveness and implementation research.[6] The normative and the pragmatic critique of purposive programmes and of command-and-control regulation have motivated a search for alternatives such as self-regulation and soft law. Since such strategies proved to be successful without enforcement within states, they became attractive beyond the nation state, at European as well as at international level. Why, then, should we hesitate to recognise what we observe: norms are generated outside the usual institutional channels; they are accepted and observed; why not assign legal validity to this kind of normativity?

For obvious reasons, this step cannot be taken without further ado. Even where national legal systems resort, in many ingenious ways, to institutionally unforeseen modes of law production, the contexts of these phenomena differ in many respect from that of the international arenas: the links to the 'official' legal system are stronger; the supervision of norm-generating mechanisms by politically accountable actors, the general public and civil society will be more intense; legislators, and courts and administrators remain closer and more powerful. Undoubtedly, the generation of norms involves an ever widening range of actors; at the same time, the supervision of this process has become more subtle — and it is on this interaction and co-evolution that the recognition of such 'law' can build.

At the international level, the existence of effective normative regimes is undisputed. 'Almost all nations observe almost all principles of internal law and all of their obligations almost all of the time', reads a much cited observation by Louis Henkin.[7] The *lex mercatoria*, we are told, is more effective than the hopelessly complex mechanisms which private international law has to offer. Even the compliance record of 'inconvenient' norms pursuing regulatory objectives is surprisingly positive; in the

[5] See G Teubner 'Substantive and Reflexive Elements in Modern Law', (1983) 17 *Law and Society Review*, at 239–85; R Wiethölter, 'Proceduralisation of the Category of Law', in Ch Joerges, DM Trubek (eds), *Critical Legal Thought: An American-German Debate*, (Baden-Baden, Nomos, 1989), 501.

[6] Famously summarised and analysed by G Teubner, 'Juridification — Concepts, Aspects, Limits, Solutions', *idem* (ed), *Juridification of Social Spheres*, (Berlin, deGruyter 1987), at 3.

[7] L Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edn, (New York, Columbia University Press, 1979), at 47.

comparative evaluations of compliance at different levels of governance, the record of national law is all but impressive.[8] Why is this so?

> Enforcement through these interacting measures of assistance and persuasion is less costly and intrusive, and is certainly less dramatic than coercive sanctions, the easy and usual policy elixir for non-compliance,

runs one famous explanation.[9] All of this is well documented. But what are the implications? Should these phenomena lead lawyers recommend such strategies to achieve 'compliance'? This would be too hasty a step. It is, after all, at national level the constitution which 'supplies' legitimacy to the norms requiring obedience within that polity. Undoubtedly, the sheer factum of transnational governance is a good enough reason to envisage alternatives to the type of constitution-mediated legitimacy that democratic nation states generate. However, such alternatives have to pass a twofold test. To rephrase the issue with Jürgen Habermas's lucid formula: we must not content ourselves with the observation of compliance; we also have to explain why efficient and socially accepted norms may 'deserve' recognition?[10] The formula is simplistic in that it does not inform us about the constitutive procedural and substantive prerequisites which might generate transnational legitimacy. Nevertheless, it is useful because it reminds us that analytical instruments, empirical research and normative reflections should be interdependent.

Even its vagueness is adequate. Inquiries into the legitimacy of transnational governance, which seek to bridge the schism between facticity and validity are faced with an enormous variety of governance arrangements; they have to live with uncertainties and issues of such complexity that they will retain an explorative and experimental status for some time to come. Accordingly, the approaches chosen by the contributors to this volume differ widely in their level of abstraction, the range of the theories they use, and the type of evidence they invoke.

But the debate on legitimacy of transnational governance arrangements need not embark on an uncharted sea. And the constitutional state is not its one and only safe harbour. It is equally important to recall and reflect upon the responses that the various legal disciplines dealing with the international system have to offer. The term 'governance' is relatively new, but the phenomena that the term denotes is less so, at least in some of its aspects.

[8] M Zürn, Ch Joerges (eds), *Governance and Law in Post-National Constellations: Compliance in Europe and Beyond*, (Cambridge, Cambridge University Press, forthcoming).
[9] A Chayes, AH Chayes, 'On Compliance', (1993) *47 International Organization*, 175.
[10] J Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', (2001) 29 *Political Theory*, at 766 and his 'Remarks on Legitimation through Human Rights', *The Postnational Constellation: Political Essays*, (Cambridge, MIT Press, 2001), 113.

I.3 Transnational Governance as a Challenge to the International Legal Disciplines

Even it its heyday, the nation state did not operate in a vacuum. The law observed and dealt with inter-state relations and international transactions; it adapted itself to the transnational regimes established by governmental and by private[11] actors. The irregular specifics of these phenomena were, however, rarely perceived.[12] The law 'somehow' adapted itself to them — but its difficulties in conceptualising 'governance' in a pro-active sense seemed to increase the more important and sophisticated these arrangements became: 'transnational governance' is a phenomenon outside the reach of the paradigms, with which the international legal disciplines have learned to operate. However, it is clearly a phenomenon which can no longer be disregarded, and the term has been quite widely taken up, especially in international law and in European law.[13] Terminological take-overs can, however, be misleading. They may only camouflage the tensions between the type of legitimacy which the international legal disciplines sought to ensure and the legitimacy which transnational governance would require if the quest to identify its structures and to spell out its normative problems was taken seriously. These difficulties are deeply rooted in the histories of the international legal disciplines.

I.3.1 Non-State 'Law' in the Perception of International Legal Disciplines

Traditional international law (*Völkerrecht*) was confined to the 'juridification' of inter*state* relationships;[14] international administrative or public law foresaw only 'one-sided' conflict rules which determined the international sphere of application of domestic legal norms, and could not even envisage any obedience to foreign public law or any co-operative regulatory

[11] For a pioneering inquiry into the structures of transnational private governance, see H Kronstein, *Das Recht der internationalen Kartelle. Zugleich eine rechtsvergleichende Untersuchung von Entwicklung und Funktion der Rechtsinstitute im modernen internationalen Handel*, (Berlin, Schweitzer, 1967) (*The Law on International Cartels*, (Ithaca, Cornell University Press, 1973)).

[12] But see, recently, Ch Tietje, *Internationalisiertes Verwaltungshandelns*, (Berlin Duncker & Humblot 2001), and, much earlier, H Kronstein, n.11.

[13] The term, of course, made its way into international law some time ago. See, for an overview, F Weiss, P de Waart, E Denters (eds), *International Economic Law with a Human Face*, (Den Haag, Kluwer Law International, 1998), and for European law, J Scott, DM Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', (2002) 8 *European Law Journal* 1, and the further contributions to the same ELJ issue. For a review of pertinent political science debates, see Anthony McGrew, 'From Global Governance to Good Governance: Theories and Prospects of Democratising the Global Polity', in Morten Ougaard and Richard Higgott (eds), *The Global Polity,* (London, Routledge, 2002).

[14] Every generalisation of this kind can be contested, because, as, for example, C Tietje, 'Transnationales Wirtschaftsrecht in öffentlich-rechtlicher Perspektive', *Zeitschrift für Vergleichende Rechtswissenschaft*, 404 by 'The changing Legal Structure of International

arrangement.[15] By contrast, private international law was, in the von Savigny and Story tradition, more co-operative and universalistic in its orientation. Admittedly, Savigny's universalism presupposed a type of private law which represented an apolitical *Gesellschaft*. This type of law could not be understood as an instrument of state policy. It was due to this disinterest of the sovereign, that the private-law systems of different states could, in principle, be regarded as equivalent. Accordingly, one could envisage 'universal' choice-of-law rules committed to a 'private international law justice'[16], ie rules which deliberately disregarded the contents of private law.

The perceptions of international relations and legal conceptualisations of inter-state relationships follow very similar patterns.[17] One parallel between the dominant traditions in both disciplines deserves particular attention in the present context: all positivist traditions in all international legal sub-disciplines have argued that any 'super-law' proclaiming the substantive superiority of one particular system is inconceivable, because the jurist is not qualified to identify the 'better' law and his particular sovereign lacks any competence outside its territory. This is why international law rests, in principle, upon the 'will' of states; and this is why private international law sought to identify 'neutral' rules for a purely 'spatial' justice. And, for this very reason, the so-called 'international economic conflict of laws' (*Wirtschaftskollisionsrecht*) was restricted to determining the international sphere of application of domestic regulatory law. Economic regulation, in particular, anti-trust law, has since the mid 60s been the most productive challenge to this inherited wisdom. With the internationalisation of markets, the need to respond to the internal effects of activities outside national territories and to weigh and balance interests and concerns has become irrefutable.[18] What remained inconceivable

Treaties as an Aspect of an Emerging Global Gevernance Architecture', in (1999) 42 *German Yearbook of International Law,* 26, at 30. observes, counter-traditions promoting an understanding of international as transnational law have existed from early on; two, not so recent, examples include PhC Jessup, *Transnational Law*, (New Haven, Yale University Press, 1956) (discussed by Ch Tietje), and, in the field of private international law, E Steindorff, *Sachnormen im internationalen Privatrecht*, (Frankfurt, Klostermann, 1958).

[15] See K Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm*, (Frankfurt, Metzner, 1965), at 176–239.

[16] '*Internationalprivatrechtliche Gerechtigkeit*' as conceptualised in the German tradition since FC von Savigny, *System des heutigen römischen Rechts* Vol VIII, (Berlin, Veit, 1849) [A Treatise on the Conflict of Laws (with notes by W Guthry), (Edinburgh, T&T Clark, 1869)]; in defence of, in particular, G Kegel, 'Story and Savigny', (1989) 37 *American Journal of Comparative Law* at 39.

[17] For more detail, see Ch Joerges, 'Vorüberlegungen zu einer Theorie des Internationalen Wirtschaftsrechts', *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 43 (1979), at 6, 9.

[18] Among many, see AK Schnyder, *Wirtschaftskollisionsrecht*, (Zürich, Schulthess, 1990).

was the design of pro-active transnational governance regimes. Such (co-)regulation seemed to belong to a realm of diplomacy, compromise and consensus.

I.3.2 'The Law Ends were Politics Begins?'

An equally important obstacle to the conceptualising of transnational governance within the settled frameworks of the international legal disciplines stems from the 'nature' of the tasks which governance arrangements are supposed to handle. They require problem-solving activities which legal adjudication is neither expected to accomplish, nor meant to. The shadow of the law hangs over governance arrangements within a constitutional state, and their governmental participants can be held politically accountable.[19] Such restraints do not operate or are much weaker in the international system. This is not, in itself, an argument that militates 'for' or 'against' transnational governance arrangements. Their growing importance is, to a significant degree, a *response* to the need for problem-solving activities which go beyond the capacities and competences of states.

Their emergence is, however, challenging the conceptual foundations of the international legal disciplines. Nobody has ever pointed this out more provocatively and stringently than the late, yet unforgotten, Brainerd Currie in his search for a new choice-of-law methodology. Currie's views were — from the time of their presentation in the late 50s and early 60s until today — perceived as nothing less than a revolutionary break with the traditions of American conflict of laws, not to mention continental private international law. Rightly so, since Currie had brought the message of legal realism into a field where traditional, pre-realist notions of law were cultivated. Laws, statutes and even common law rules, Currie argued, should be read as pursuing some form of policy. His real assault on the citadels of private international law, however, were the implications of this realist insight for intrastate settings: the application and implementation of policy-guided laws, he submitted, will often be backed by the 'interests' of that state (Currie's unfortunate term was 'governmental interests'), which courts must not disregard. In a nutshell:[20]

> 1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum ….

[19] C Harlow, *Accountability in the EU*, (Oxford, Oxford University Press, 2002), at 168.
[20] B Currie, 'Notes on Methods and Objectives in the Conflict of Law', *idem*, *Selected Essays on the Conflict of Laws*, (Durham, NC, Duke University Press, 1963) at 177, 183–84. See B Currie's particularly lucid summary of his position in his 'Comment on *Babcock v Jackson*', (1963) 63 *Columbia Law Rev*iew 1233 and 1242.

4. [False problems] If the court finds that the forum state has no interest in the application of its policy, it should apply the foreign law.
5. [True conflicts] If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy ….

Furthermore,

> [The c]hoice between the competing interests of co-ordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary: … the court is not equipped to perform such a function; and the Constitution specifically confers that function upon Congress.[21]

Currie's resistance against any derogation from the *lex fori* where the governmental interests of the forum state are affected may reflect an all too positivistic scepticism against legal validity claims that are not accredited through a state's legislature.[22] Even if this were so, he was, nevertheless, right in pointing out that the resolution of conflicts in the inter-state and international arena implies policy choices. This insight has been refuted by private international law scholars again and again — but in vain. Its implication is that the choice-of-law process is to be understood as an act of transnational governance. One may hesitate or be inclined to entrust courts with this task. The judiciary is an institutional option which is certainly sound in some fields, although it would be inadequate in others.[23] The case studies in this volume discuss this issue quite thoroughly,[24] And although they are not uniform in their suggestions, they do all share the view that decisions subjecting transnational phenomena to a particular regime require a legitimacy of their own.

[21] B Currie, 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function', *idem*, *Selected Essays*, 188 at 272.
[22] Currie has moderated his position somewhat in his later writings. Courts could, he explained, especially where their jurisdiction was 'disinterested', resort to a 'moderate and restrained interpretation' so as to avoid conflicts. See B Currie, 'Comment on *Babcock v Jackson*', (n.21), at 1242 and *ibid*, 'The Disinterested Third State', 28 (1963) *Law & Contemporary Problems*, at 754 and at 763. The term 'avoidable conflicts' is from DF Cavers, The Choice-of-Law Process, (Ann Arbor, MI, University of Michigan Press, 1965), at 73.
[23] Such as risk regulation. This is why comitology flourishes in pertinent areas of European law; see Ch Joerges, '"Deliberative Supranationalism" — Two Defences', (2002) 8 *European Law Journal*, at 133.
[24] III.1 and 2 below, 359–363.

I.4 The problématique of Transnational Governance: An Interim Summary

All of these developments, the gradual substitution of rule-of-law bound administrative bodies by governance arrangements within the nation state, the development of mechanism through which law can be effective even without formal sanctioning powers, and the growing substantive importance of transnational governance are interdependent. It is this interdependence which characterises the *problématique* of their legitimacy.

At national level, the turn to governance can be interpreted as a response to the failures of interventionist regulatory policies. The ingenuity of governmental and non-governmental actors in their efforts to make use of societal knowledge and management capacities, and the establishment of co-operative governance structures come, however, at a (legal) price. These innovations threaten the political authority of the constitutionally foreseen legislative and administrative bodies. The theorists of 'post-interventionist law' sought to compensate this erosion of traditional accountability mechanisms. In all fields of regulatory policies — as well as wherever else specialised, and yet not value-free, apolitical knowledge is integrated into a polity's response to a given problem — the law can no longer respond directly. It must instead organise the search for such responses through provisions which allow for an integration of expert knowledge and ensure the deliberative quality of decision-making. At European level, institutional innovations outside the structures foreseen by the Treaty have, for a long time, been an indispensable means for the European system to cope with its tasks. The present fascination of European politics with the so-called 'new modes of governance'[25] continues and accelerates these tendencies. Transnational governance comprises all these features: it becomes operative without government and its law claims validity beyond the state.

This is the 'facticity' which lawyers and political scientists, practitioners and theorists all perceive. Their doctrinal and theoretical reconstructions, however, rarely content themselves with purely affirmative descriptions. They tend, more or less explicitly, to inquire into the causes for these developments, and to assess their reasonableness — ie, to answer the question whether transnational governance *deserves* recognition.[26]

The *ensemble* of these aspects, then, enables us to design a framework for the *problématique* of transnational governance within which communalities and differences of goverance at national, European and international level, as well as open questions, can be addressed. The following

[25] See J Scott, DM Trubek, n.13 above.
[26] See the references to J Habermas, n.10 above.

sections mirror the table of contents. We will first present theoretical approaches to the legitimacy problem (II); these approaches will then be contrasted with the case studies on the practices of transnational governance (III).

II. VERBA DOCENT

Bottom-up or bottom down? Theoretical debate first, so that one becomes aware of one's conceptual tools and their limitations? Case studies first in such an uncharted territory? It does not really matter: '*Reines Recht kann nicht stark werden, starkes Recht kann nicht rein bleiben*'.[27] Theorists must realise that their perspectives will, in practice, again be exposed to competing views — and that the tensions between normativity and facticity will never fade away. Believers in the ingenuity of practice must realise that pragmatic problem-solving remains dependent on a continuous flow of inspirations which will always be influenced by considerations from differing sources and never, or, at best, only temporararily and provisionally, establish a coherent programme and practice.

We have chosen to start with theory, albeit in a way that would equip us with a range of alternatives for the discussion and interpretation of the case studies. The range of approaches presented here is, of course, limited. Our selection was motivated and biased by our interest to explore the sketched out dimensions of the legitimacy *problématique* — and our perception of the potential of the available approaches to address their interdependence.[28] Thus, the following presentation will seek to compare and evaluate how the various contributions conceptualise: (1) the notion and of governance; (2) the emergence of *transnational* law and governance arrangements; and (3) the role of factual and of normative elements in the generation of legitimacy.

II.1 Systems Theory

As early as 1991, Renate Mayntz and Fritz W Scharpf, in an internal memorandum for the *Max-Planck-Gesellschaft* on the state of the art in

[27] 'Pure law cannot be strong, strong law cannot stay pure', R Wiethölter, 'Recht-Fertigungen eines Gesellschafts-Rechts', Ch Joerges, G Teubner (eds), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, (Baden-Baden, Nomos, 2003, at 16.).

[28] As the title 'governance' suggests, we were particularly interested in contributions addressing the social and political embeddedness of markets and their 'moralisation' (in the sense of N Stehr, *Wissenspolitik. Die Überwachung des Wissens*, (Frankfurt, Suhrkamp, 2003),

European integration studies, underlined the discrepancy and mismatch between the type of analysis dominating European studies and the much more sophisticated methodology both available and in use for the study of modern societies. Integration research, they found, in both its intergovernmentalist and neo-functionalist factions, continued to use the national state as its core reference. They translated the specifics of the integration process into the language of functional differentiation. Europe's institutional design will intensify processes which the deliberate opening of borders and modern technologies favour anyway. It will lead to an integration of societal sub-systems at unequal speed and, in particular, favour economic integration and interaction, whereas political systems, in particular, will, in important respects, remain linked to territorial units. This will, as a consequence, foster functional differentiation further and require realignments among the societal sub-systems. Gunther Teubner and Inger-Johanne Sand share these premises, but build upon them in markedly different ways.

II.1.1 Societal Constitutionalism: Gunther Teubner

For many years now, Gunther Teubner has been exploring the implications of functional differentiation for the legal system not within the EU but, instead, following the compelling logic of his premises, at the level of world society.[29] The notion of 'societal constitutionalism' which he now employs[30] provides responses to all of the three concerns already mentioned: (1) in the perspectives of systems theory, it seems anachronistic to use the territorially organised nation state as the main reference point for the analyses of society in general, and of the legal sub-system in particular; (2) since social sub-systems interact with a very different intensity, we should envisage the emergence of 'sectorial', sub-system specific transnational norms; (3) where such regimes will be exposed to normative

at 222.). By no means did we manage to include all the potentially promising approaches. The task of exploring the potential contribution of institutional economics to the debate on transnational governance phenomena had been assigned to Erich Schanze. He complied orally but due to unfortunate circumstances, not in writing. — Regulatory competition would have been another topic we would have liked to include — in the way that Henri IT Tjiong, 'The Political Economy of Regulatory Competition Discovering the Impact of Globalization on Public Interest Regulation', PhD, Stanford, CA 2003, deals with that type of governance.

[29] See, especially in his 'Global Bukowina': Legal Pluralism in the World Society, in G Teubner (ed), *Global Law Without a State*, (Dartmouth, Aldershot, 1997), at 3.

[30] The term fits well but is not decisive. G Teubner ascribes its creation to D Sciulli (see note 24 of his chapter) and the review essay by M Frankford, 'The Critical Potential of the Common Law Tradition: A Review Essay on D Sciulli's *Theory of Societal Constitutionalism*', (1994) 94 *Columbia Law Review,* 1076.

demands, we can expect 'constitutionalisation' to occur outside the institutional confines presupposed by state-oriented constitutionalism.

To comment briefly on the points in order: one fundamental insight that systems theory helps to articulate concerns the uneven pace of globalisation processes. Undoubtedly, all international legal disciplines can claim to have anticipated this insight. But they did this usually only through normative concepts such as Gerhard Kegel's famous 'private-international-law justice' or the equally mysterious juxtaposition between the principles of autonomy in national contract law and that of autonomy in international transactions. The conceptualisation of globalisation processes in the analytical frameworks of systems theory reveals a non-normative social basis for such arguments which can then be developed in a much more sophisticated and differentiated way. It provides not only compelling non-legal reasons for the need to conceptualise transnational law as a distinct and indispensable realm, but also provides at least plausible reasons for a differentiated structuring of this realm along the lines of functional differentiation: if and because the generation of norms originates in the various sub-systems of world society, the normative surplus of these autonomous processes will be site specific, selective and unco-ordinated. Gunther Teubner does not claim to have positively proven the facticity of so many civil constitutions. Although his case is, at any rate in the cyberworld under scrutiny, a very good one, all he claims is to have established empirical plausibility for his thesis. It is exactly this caution which allows him to bridge facticity and validity in such an interesting way.

> As soon as expansionist tendencies arise in the political system, threatening to ruin the process of social differentiation itself, social conflicts come about, as a consequence of which fundamental rights, as social counter-institutions, are institutionalised precisely where social differentiation were threatened by the tendencies to self-destruction inherent in it.[31]

We can reckon with two sides, two dimensions of norm-generating processes: on the one hand, they will support societal dynamics and, at the same time and by the same token, they will discipline them. This is a message that many schools of thought, including institutional economists and Habermas's followers can subscribe to in principle. It is sufficient here to point to two of the case studies: a standardisation of products both creates *and* regulates markets.[32] Foodstuffs do sell better if consumers trust in their safety.[33]

[31] G Teubner, in this volume, ch. 1, 4ff, at 12.
[32] See H Schepel, in this volume, ch. 9, 161ff.
[33] See A Herwig, this volume, ch. 11, 199ff.

'Societal constitutionalism' puts its hopes in the logic and counter-logic of evolutionary processes. But can we really trust their internal dynamics? This is, I would argue, neither a valid a priori objection against Teubner's use of the term constitutionalisation nor against its ambivalences or lack of homogeneity which Vesting discerns in his reconstruction of a weak and a strong version of societal constitutionalism.[34] Much less is it an objection against Teubner's strategy to decouple societal constitutionalism from the type of political system that constitutional states shelter, or the pluralism of societal constitutionalism which his conceptualisation of the encounters between diverse societal sub-systems with their various counterparts.[35] The query that remains rather simply is, whether societal constitutionalism in all its variety 'deserves' recognition, and/or whether these moves and counter-moves may generate the type of legitimacy that responds to the concerns raised by those involved in 'constitutionalisation' processes. Two interdependent variables seem to suggest themselves as reference points and sources of legitimacy: One is the deliberative quality of the interactions in the norm-generating processes on which their recognition might depend; the other is the dependence of transnational governance on recognition by internally legitimated legal systems which may learn to exert an, at least, indirect influence on the procedures of norm generation and realise that their impact can be co-ordinated and substantial.[36] These aspects are by no means foreign to Gunther Teubner's theoretical edifice,[37] even though their importance seems somewhat indeterminate. And their impact may, indeed, be all too weak. However, the law loses its normative *proprium* once we no longer even try to discriminate between successful und unsuccessful 'constitutionalisation' processes by criteria which seek to spell out the normative reasons for their validity claims.

II.1.2 Poly-Contextuality of Transnational Governance: Inger-Johanne Sand

In her references to Niklas Luhmann's systems theory, Inger-Johanne Sand is both more traditional and more radical. She sticks to the linkages between constitututional law and the political system which characterise nation states[38] — in just the same way as the master thinker himself, her

[34] See Th Vesting's 'Commentary on Gunther Teubner', this volume ch. 2, at 30ff, 33ff. For a recent defence of Vesting's concerns cf D Grimm, 'Ursprung und Wandel der Verfassung', in J Isensee, P Kirchhof (eds), *Handbuch des Staatsrechts. Vol I. Historische Grundlagen*, 3rd edn, (Heidelberg, CF Müller, 2003), 4, esp. at 36–42.

[35] But see Th Vesting, *ibid*, at 35–36. Vesting's objections against Teubner's use of the term constitution invokes the heavy weight of the constitutionalist tradition (see, especially, at 33ff.). But there are also pragmatic considerations which motivate his plea for legal rather than constitutional theory (see Section IV.3 at 373–75).

[36] See J v Bernstorff, this volume, ch. 14.

[37] See, for example, his reference to J Guéhenno, ch. 1, n.46.

[38] See IJ Sand, this volume, ch. 3, especially at 41–42.

commentator observes critically.[39] As a consequence of this conservative understanding of constitutionalism, she is deeply sceptical as to the transferability/usefulness of this concept in transnational arenas. The bases of her scepticism are, however, by no means simply terminological preferences. Her doubts are, on the one hand, nurtured by her inquiries into the dynamics of functional differentiation in general and those of modern technologies in particular. These dynamics, Sand argues, have led to a still unstructured diversity at transnational level.[40] Transnational governance is a result, and a response to, these developments. And again, Sand questions the wisdom of conceptual efforts which seek to identify and define the recurring patterns in these arrangements. Hence, she does not subscribe to Teubner's concept of relative autonomies[41] and rejects Schmitter's[42] definitional efforts as being too narrow.[43] We are not back in a Hobbesian state of nature in the international system. Instead, globalisation is characterised by a multitude of *Vergesellschaftungsprozessen*, ie interactions between and across societal sub-systems, levels of governance, political and non-governmental, and public and private, societal actors. Law is by no means fading away.[44] It is growing. But it is not flourishing in any constructive sense. Law and politics are hopelessly overburdened, Sand argues. They do not have the potential to deal with the complexity of a globalising knowledge society.[45] 'Fragmentation, incoherence, pluralism and lack of co-ordination' she concludes, 'are probably unavoidable and should, as a consequence, be regarded as challenges'.

This is a sceptical, pessimistic and troubling account. Is it also realistic? The differences between national societies and the international system, her commentator argues, are, at best, gradual. Can we not put some trust, at all levels, in the potential of

> 'the legal system …[contributing] to the societal creation of procedural legitimacy, providing norms for constitutions, procedures, organisations and competences, which other systems need as a condition of democratic self-organisation and self-regulation',[46]

— and can we not undertake case studies if we feel uncomfortable with generalising accounts?

[39] A Fischer-Lescano, this volume, ch. 4, 70–72, referring to N Luhmann, 'Verfassung als evolutionäre Errungenschaft', (1990) 9 *Rechtshistorisches Journal*, 176 and *idem*, 'Politische Verfassungen im Kontext des Gesellschaftssystems', (1973) *Der Staat*, 1 and 165.
[40] See, in particular, 48–52.
[41] See 42.
[42] See n.1 above.
[43] See 43.
[44] Section IV, 48–52.
[45] Section VI E, 62–65.
[46] A Fischer-Lescano, this volume, ch. 4, 79–80.

II.2 At the Borderline of Law and Political Science: Jens Steffek and Agustín José Menéndez

In a short essay published in 1994, Jürgen Habermas[47] characterised the discrepancy between the approaches of legal and political scientists to objects which they seem to have in common as a kind of schism. Since each discipline, he argued, is committed to its specific methodological standards, it tends to be unable to communicate its messages across the disciplinary borders and to listen to the foreign voice; lawyers specialise in normative issues (in the *lege artis* type of doctrinal legal reasoning), whereas social scientists seek to explore and to explain the empirical dimensions of their objects. Habermas' observation related to constitutionalism and democracy. They are equally valid, and Habermas himself has dealt with these issues extensively,[48] in the debates on the legitimacy of law in general and of transnational norms in particular. The debate between Jens Steffek and Agustín José Menéndez is a particularly instructive illustration. Even though each of them is familiar with the logic of the other's research, they both stick firmly to the theoretical and methodological orientations of their own disciplinary *Heimat*; and then, Steffek is an IR scholar, whereas Menéndez is a constitutional lawyer and theorist; these fields do not correspond and the debate also mirrors the intra-disciplinary schism between political science and international relations, and national and international legal disciplines.

In addition, there is a cultural divide. Steffek, the German, cannot but start with Max Weber, according to his country's heritage, the twentieth century's master thinker on legitimacy *schlechthin*. With his reference to Max Weber, Steffek seeks to do justice to the differences of national, European and international governance: legitimacy was famously conceptualised by Weber in empirical terms,[49] albeit with a

[47] 'Über den inneren Zusammenhang von Rechtssaat und Demokratie', UK Preuß (ed), *Zum Begriff der Verfassung*, (Frankfurt a.M., Fischer, 1994), at 83–94 ('Social scientists take a distinct view of the legal system. They tend to perceive law from external perspectives. They do not engage in the business of a *lege artis* application of rules, but explore their impact on society, their effectiveness, or analyse processes of implementation. They thus tend to avoid the prescriptive dimension of law in general; normative issues, as dealt with by lawyers, are an aliud to truly scientific operations'. This observation can be well illustrated with the non-relation between mainstream legal and social science and their international sub-disciplines).

[48] See the references in n.4, 41–5 in J Steffek's and n.8 of A Menéndez's contribution (this volume, ch. 5 and ch. 6 respectively). See, also, J Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, (Frankfurt a.M., Suhrkamp 1992), at 541 [Tanner Lectures of 1986] and previously *Theorie des kommunikativen Handelns*, Vol. 1, (Frankfurt a.M., Suhrkamp, 1981) at 358–66.

[49] M Weber, *Economy and Society: An Outline of Interpretive Society*, translated by Guenther Roth, *et al*, (Berkeley/Los Angeles /London, University of California Press, 1968) (*Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie*, 5th ed 1972, (Tübingen, Mohr Siebeck, 1921), at 212 (see Steffek's reference in note 25).

quasi-normative tilt: the concept of legitimacy is an integral part of Weber's *Herrschaftssoziologie*. According to Weber, the functioning of *Herrschaft* (domination and obedience), and its 'validity' (*Legitimitätsgeltung*) presupposes the belief, on the part of those who are 'subordinated', in the legitimacy of the type of *Herrschaft* to which they are exposed. Steffek underlines the 'deliberative potential of this approach' and, by the same token, its *Biegsamkeit*, the need to reckon with the co-existence of different types of legitimacy. Whereas democratic governance has become the standard of legitimacy of nation states, 'international governance is likely to be regarded as legitimate when it is directed towards the agreed values of the international community, and when it respects commonly shared procedural standards'.[50] Just as legal sciences differentiates in its normative conceptualisations between national, European, and private and public international law, political science should, in an empirical approach to the legitimacy of *Herrschaft* and governance, distinguish between nation-state democracy, the commitment of the European Commission to administer impartially agreed upon values and other 'functionally differentiated and issue-specific form(s) of governance'.[51]

Menéndez, the constitutional lawyer, cannot but disagree. 'There is no political legitimacy', he argues, 'without democratic governance'. It does not matter at what level *Herrschaft* is established,

> 'the democratic principle states that all those affected by common action norms should have the chance to participate in the deliberation and decision-making of the said norms'.[52]

The argument is empirical, in that it underlines the widening and deepening of transnational governance. It is normative in claiming that the remaining differences do not justify a departure from the democratic principal. Lawyers are supposed to transform their views into institutional and or doctrinal suggestions. The comment hesitates to proceed to that level of concreteness. This is not just a problem of space, however. It is one thing to argue that European and transnational governance should become democratic. It is quite another to spell out how to ensure 'that all those affected by common action norms … have the chance to participate in the deliberation and decision-making of the said norms'.[53]

Steffek, one may summarise, defends a differentiated concept of legitimacy invoking primarily empirical evidence; Menéndez pleads for

[50] J Steffek, ch. 5, 82.
[51] J Steffek, Section IV, 88–91.
[52] A Menéndez, ch. 6, 109.
[53] A Menéndez, 109.

an exposure of *Herrschaft* to standards of democratic legitimacy at all levels of governance, primarily on normative grounds. Should all this be read as another confirmation of the schism between political science and law alluded to at the beginning of this section? Not really. Steffek is not simply pointing to empirical evidence, but seeks to specify the distinctions between national, European and international governance, and to explain why transnational governance arrangements *deserve* the recognition they seem to enjoy. Menéndez argues that Europeanisation and globalisation processes have eroded the very borderlines which Steffek seeks to defend. Their controversy is thus not just a disciplinary divide. Instead, it contains the core issues of the whole project in microcosm. In addition, the positions taken by both contributors resurface in the title of Erik O Eriksen's and John E Fossum's contribution.

II.3 Government v Governance: Erik O Eriksen and John E Fossum

To restate: all disciplines of international law suggest that the legitimacy and validity of domestic law is in principle categorically different from the type of legitimacy they pursue. National sovereignty is the best known way to express that autonomy. This schism between domestic and international legal disciplines has deep historical roots and is also backed by solid normative considerations. But it has become problematical. The case of the European Union is particularly worrying:

> As long as we do not, and cannot, envisage the transition of the Union into a statal entity, we have to live with two types of legitimacy, democratically legitimised Member States on the one hand, and a specifically transnational type of rationality on the other.

This is how Steffek's position could be rephrased in legal terms. 'But European governance has eroded the autonomy of national polities deeply and exposed European citizens to transnational governance so intensively that the inherited distinctions have become illegitimate' — this is the core of Menéndez's critique. 'One has to live with both paradigms for some time to come, but one should — and can — express the hope that the latter will steadily gain more weight' — this is my reading of the Eriksen/Fossum contribution.

In the introductory sections, their contribution analyses the reasons for the emergence of governance arrangements at international level and their normative characteristics.

> *Governance* is not political rule through responsible institutions, such as parliament and bureaucracy — which amounts to *government* — but

> innovative practices of networks, or horizontal forms of interaction. It is a method for dealing with political controversies in which actors, political and non-political, arrive at mutually acceptable decisions by deliberating and negotiating with each other.[54]

This is an analytically and normatively sensitive assessment. It neither downplays the importance of governance nor discredits its potential fairness. It insists, however, that governance *cannot* be made compatible with a deliberative notion of democracy, even though this version of democratic theory does not presuppose a *volk*, not even a *demos* or a state.[55] Core EU institutions are then analysed through these two lenses — and perceived as announced in the title. Comitology is a borderline case. Although it is 'networked governance rather than hierarchical government', it is also closely linked to law-embedded governmental decision-making. Hence, it is defended against such characterisations as networked governance as opposed to hierarchical government, 'administration without government' (Wessels) or 'technocratic deliberation' (Schmalz-Bruns) — and yet its weaknesses in terms of participation, accountability and representativeness are such that this 'institution' should not be called democratic. Comitology is clearly a specifically European invention, whereas the European Parliament and the European Court of Justice, which are scrutinised in the same section, have at least names with which we are familiar from constitutional states. This impression is not quite adequate. Eriksen and Fossum make us aware of the degree to which these institutions mirror the governance dimension of the EU. Their evaluation again does justice to those accomplishments which can be attributed to precisely this peculiarity. One might, therefore, expect a plea for a dual European structure which would recommend some new kind of 'institutional balance' between governance and government at the end of their paper. But their preference remains stable: although Eriksen and Fossum are by no means sure that the trend towards governance can be reversed, they concentrate on 'features and processes in the EU that point in the direction of *government*'[56] — in the direction of a world in which their theory could feel comfortable.

III. EXAMPLA TRAHUNT

What all theories assume in their specific ways is, in fact, the case: there is no such thing as a state of nature in the international system. International markets build their institutions; and technically quite sophisticated machineries

[54] EO Eriksen, JE Fossum, this volume, ch. 7, 115ff, at 120.
[55] *Ibid*.
[56] Thus, their concluding statement at 143.

generate norms and standards. The resolution of conflicts among governmental and, to an increasing degree, non-governmental actors becomes 'judicialised'. And all of the three sets of queries which we have used to structure the theoretical debate return and can be rephrased in their pertinent contexts: (1) How can we explain the apparent embeddedness of globalising markets in transnational governance arrangements? (2) What do we know about the effectiveness of transnational governance arrangements, their acceptance by states, non-governmental actors, and citizens? (3) How do we assess their normative legitimacy? Can transnational and national law ensure and supervise the 'quality' of transnational governance?

None of the case studies in this section can be expected to address all of these issues, and even the ensemble of the case studies by no means covers the *problématique* of transnational governance comprehensively. But each of them adds new insights, either by exploring the institutional setting in a field of exemplary importance, or by an analysis of law generating processes which 'format' governance arrangements. The order in which the studies are presented follows patterns which suggest themselves to students of regulatory policies: we start with standardisation — an example of 'governance' at national level, which was practiced long before that term was invented (III.1). Food safety is one of the classics of product regulation, and bio-technology is a particularly contested topical area — and it is one where the experience with European market integration indicates that the functioning of the market requires 'regulation' even where a politically accountable regulator is not available (III.2). Environmental protection usually focuses on the production process rather than its outcome and thus has traditionally been classified as a field in which differences in national preferences should not interfere with the free trade objective, where the imposition of a uniform regime may be unreasonable, at least for economic reasons. And yet, transnational governance is gaining ever more ground (III.3). The internet is the paradigm of de-territorialisation tendencies; it has no *Heimat*. Where regulatory concerns become irrefutable, they will have to be organised outside state territories and without coercive power — this impression, or expectation, turns out to be much too simplistic (III.4). Globalisation is opening many windows for corporate actors who know how to arrange and play with diversity — these actors, however, do not hold a monopoly in the skilful exploitation of the legal differences among jurisdictions (III.5).

III.1 Constituting Private Governance Regimes: Harm Schepel

In her analysis of 'The Private Role of Public Governance',[57] Jody Freeman suggests a 'conception of governance as a set of negotiated relationships

[57] (2000) 75 *New York University Law Review* at 543.

between public and private actors'. Among the many examples that she discusses *regulatory* standard-setting can be found,[58] which is often contrasted with the generation of standards by private organisations in which product safety policy, especially in Germany, has trusted since the beginning of the 20th century and which inspired the New Approach to technical harmonisation and standards adopted by the European Community in 1985.[59] Freeman, however, points to practices which are very familiar to Europeans: 'In truth, agencies routinely promulgate rules developed, not internally, but by private parties. Private standard-setting groups are so well integrated into the standard-setting process that their role appears to give neither administrators nor legal scholars pause. However, by adopting privately generated standards after a cursory notice and comment process, agencies may effectively (if not formally) share their standard-setting authority [footnote omitted]. In this sense, even traditional regulation illustrates public/private interdependence'.[60] The example illustrates that 'governance' is neither a new nor a transnational phenomenon. Harm Schepel's search for a constitution of private governance regimes[61] starts from this observation, and he immediately turns to the two dimensions of the legitimacy issue:

> 'The sociological question of the law's recognition of private governance is, then, indissolubly connected with a normative question of democratic theory: can law recognise legal validity and democratic legitimacy outside the constitution, without constitutional political institutions and beyond the nation state?'[62]

It is important to remain — or to become — aware of the fact that these issues arose within constitutional states many decades before globalisation and privatisation attracted so much attention. And even the shadow of domestic law is not so strong. National legal systems could have resorted to anti-trust and/or to tort law. Neither of these instruments has been used with any vigour. The true 'regulator' of standardisation seems instead acted much more subtly. The standardisation organisations themselves felt the need to enhance their legitimacy. This they achieved 'by introducing all the technicalities of due process' into their standardisation activities.[63] This finding indeed suggests that we should 'resist the lazy impulse to turn private associations

[58] *Ibid*, at 638.
[59] Council Resolution of 7 May 1985 on a New Approach to technical harmonisation and standards, OJ 1985 C 136/1.
[60] N.57, at 639.
[61] This volume, ch. 9, 161ff.
[62] *Ibid*, introduction, at 163.
[63] See above at 354, text accompanying n.46.

into public agencies and thus destroy their social autonomy, and instead promote the procedural integrity of autonomous private standardisation.

In different ways and to different degrees, courts have been willing to tinker with the doctrines of both public and private law to pursue just that objective. In accepting standards as valid, as legitimate, yes, as 'legal', courts have indeed discovered something 'between facts and norms'.[64] It is neither legislation in the institutionalised sense nor competitive processes among standardisers, but structured deliberation that seems to ensure the normative integrity of standardisation.

Can we assume that European and international standardisation procedures are of the same quality? At transnational levels, the shadow of the law may be even weaker and, more importantly, the cultural and social norms 'governing' standardisation practices may be lacking. At the other hand, standardisers form 'epistemic' communities. They can be expected to defend their professional ethos and standardisation organisations may be prudent and strong enough to operate along the same lines. Schepel raises all of these questions at the beginning of his contribution.[65] These issue are indeed, as Errol Meidinger, having acknowledged the originality and plausibility of Schepel's interpretation of the American practice, underlines in his comment of general and fundamental importance.

> First, transnational non-governmental standard setting is likely to be a critical testing ground for whether non-coercive forms of global social authority can be sustained. Second, it may be one of the key fora in which we learn whether a new global 'we' is being created.[66]

III.2 Transnational Governance Regimes for Foodstuffs and Genetic Engineering: Alexia Herwig

The practice of 'delegating' the elaboration of safety standards to non-governmental organisations which 'codify' good engineering practices is as long standing as the resort to legislation in the field of foodstuffs. This difference between 'self-regulation' by non-governmental and 'regulation' under administrative bodies has always made itself felt intensively in European law. At transnational level, the political dimension of foodstuffs regulation, which this public law regulatory tradition

[64] *Ibid*, Conclusion at 188.
[65] Above at 164.
[66] E Meidinger, 'Law and Constitutionalism in the Mirror of Non-Governmental Standards: Comments on Harm Schepel', this volume, ch. 10, 189ff, at 196.

documents, is even more difficult to handle than within the EU for the two reasons that Alexia Herwig[67] underlines in her introduction: the differences in 'preferences' which, especially in the debates on GMOs, mirror not just national tastes and habits but also much deeper political and ethical concerns. Equally important and even more difficult to handle at international level are the economic implications and redistributive side-effects of regulatory choices. The weight of principled objections against genetic engineering tends to become lighter in countries which simply cannot afford to forego the economic advantages of genetic engineering.

'*Begriffe ohne Anschauung sind leer*' — Kant's famous *monitum*[68] is the *leitmotif* of Herwig's contribution. She presents an overview of the attempts to enhance the legitimacy of transnational governance by deliberative modes of decision-making, and then contrasts her reconstruction with an analysis of decision-making practices, institutional arrangements and broader political and economic context of the type of 'soft positive harmonisation' that has been achieved through recognising the *Codex Alimentarius* Commission as the relevant standard-setting organisation in the area of food safety, and the Agreement on the Application of Sanitary and Phytosanitary (SPS Agreement).[69] Her account seems revealing at both fronts. The *Codex* Commission does not (and cannot) rely on a principle of democratic representation. Nor does it (or could it) function as a deliberative forum in which contested expertise and conflicting concerns could be heard, discussed and assessed. Inequalities among the participants in the generation of expert knowledge cannot be compensated. There are no mandatory rules to ensure the access of non-governmental organisations — and the practices of national delegations differ widely.[70] It would be simply naïve to try to build upon the model of the European committee system (and/or the benevolent interpretation of comitology). Under the prevailing conditions, a commitment to the standards of scientific discourses may be the only conceivable common ground for enhancing rationality and objectivity. Moreover, the Commission 'has embarked on the task of defining guidelines for the scientific assessment of foods derived from bio-technology that may include guidelines on modified micro-organisms in food, and on foods for which no conventional counterpart exists'.[71] But it is precisely this

[67] This volume, ch. 11, 199ff.
[68] In his *Kritik der reinen Vernunft*, ('Concepts without intuition are empty. Intuition without concept is blind').
[69] Agreement on the Application of Sanitary and Phytosanitary Measures; available at <*http://www.wto.org/english/docs_e/legal_e/legal_e.htm*>, Annex A3(a).
[70] See at 205.
[71] A Herwig, in her n.44, refers to the Report of the Second Session of the Codex Ad Hoc Intergovernmental Task Force on Foods Derived from Bio-technology, Chiba, 25–9 March 2001 ALINORM 01/34A p. iv.

example which discredits the legitimacy of such a reference framework, since it cannot do justice to the diversity of the concerns which GMOs give rise to nor to the distributive implications of regulatory standards. In view of all these deficiencies, it seems fortunate that the General Principles of the CAC provide for different modalities of acceptance of a standard and that the Member States remain free to reject it.[72] However, the WTO jurisprudence on the SPS agreement is not that soft. The progress in juridification that has been achieved threatens justice, Herwig concludes (in more polite terms). Her queries with the deliberative camp are equally serious. The yardstick of deliberative decision-making as a legitimacy ensuring strategy presupposes external conditions which the CODEX/SPS governance arrangement cannot fully ensure. Flexibility and the readiness to respect diversity must go hand in hand.

In her comment, Patricia Nanz focuses on the normative basis to which Herwig refers.[73] She seeks to show that the theory of deliberative democracy is capable of providing yardsticks for the assessment of present governance practices which are not as abstract and unreal as so many sceptical observers assume.[74] The pattern of the debate between her and Alexia Herwig has much in common with that between Menendez and Steffek. Do we really have to accept that the type of legitimacy which can be envisaged for transnational governance will be inferior to what we feel entitled to expect as citizens of constitutional democracies? Assuming, a nexus could be established 'between expert deliberation in the respective committees and a wider, more inclusive public debate on international food governance',[75] would such a regime be both sufficiently efficient and normatively superior to national and European practices? A reliable answer to such questions seems hardly possible — and we may be well advised to take these uncertainties seriously.

III.3 The Many Faces of the Trade-Environment Conflict: Oren Perez

In a similar vein as Alexia Herwig, Oren Perez, in his analyses of the tensions between free trade and environmental protection,[76] points to the fallacies of the abstractness of constitutional arguments in debates on global governance. In contrast to Herwig, however, he does not focus on one particular line of thought. Instead, he takes issue with the one-dimensional

[72] At 206.
[73] 'Legitimation of Transnational Governance Regimes: Foodstuff regulation at the WTO Comments on Alexia Herwig', this volume, ch. 12, 223ff.
[74] Her notes 16 and 17 refer to the projects in which she is elaborating these perspectives.
[75] P Nanz, this volume, 231.
[76] This volume, ch. 13, 233ff.

rationalities which are so characteristic of pertinent debates: 'Free trade will lead to a better allocation of resources and thus cannot be detrimental to the environment'; 'globalisation is destructive'; 'we need to re-conceptualise our relationship with nature and turn to a non-anthropocentric ethics', etc. Pronouncements of this kind, so Perez argues, can, at best, be taken as an indicator of the complexity of the conflict constellations that environmental issues present.

> This means that the trade-environment debate is not governed by a single discursive system (with common and well-defined criteria for reaching understanding), but is, instead, the playground of multiple discourses and ideologies.[77]

His own response is a 'deeply pragmatic and contextual' readiness to live with 'polycentric constitutionalisation' processes rather than unitary visions of some 'global federalism' or grand theories such as 'directly deliberative democracy'. He substantiates his objections with the help of an analysis of the role the IMF plays in environmental arenas. It is the mandate of this institution to 'promote macro-economic stabilisation, an open exchange system, and a balanced growth of international trade'.[78] It is the dedication to this one-dimensional rationality which is responsible for the IMF's environmental insensitivity and apparently poor performance.[79] The alternatives which Perez considers and his general conclusions all seek to further the responsiveness of institutional actors and to enhance the range of responses so that they reflect the complexity of the environmental problematic. However, this perspective may not be as disappointing to the proponents of the constitutionalisation of transnational governance as Perez assumes.[80]

III.4 ICANN as a Global Governance Network: Jochen von Bernstorff

The case study on ICANN[81] is narrower in its focus on one particular organisation and its performance than the preceding analyses. At the same time, it is broader, in that it addresses a governance structure of global dimensions which was, from the outset, established as a body beyond national and international law. The foundational period was characterised by self-organisational initiatives which were furthered, but not

[77] At 235.
[78] At 248.
[79] See, also, O Perez, 'Using Public-Private linkages to Regulate environmental Conflicts: the Case of International Construction Contracts', (2002) 29 *Journal of Law and Society* at 77.
[80] See his concluding remarks at 254–55 and Section IV.3 below at 372ff .
[81] J v Bernstorff's, this volume, ch. 14, 257ff.

regulated by the US government[82] — a foundational constellation with many parallels to the early days of standardisation organisations, eg in the German *Kaiserreich*. What kind of 'polity' did this initiative establish and what kind of 'constitution' governs its operation? The truly innovative aspiration, which von Bernstorff reconstructs, was the attempt to form an 'internet community', not consisting of a 'people' and not formed of nations but simply including 'those who have created and explored the new space and have been living together at the cyberspace frontier.'[83] The ambition of this self-organisational 'constitutional moment' was not only to redefine 'citizenship' but also, by the same token, to create a new type of legitimacy on which the authority of this new body politic could draw. How far did this project get? Did ICANN achieve its practical objectives and perform well as a (self-)regulator? And how were its normative aspirations implemented? The story von Bernstorff tells is both fascinating and disillusioning. In terms of regulatory performance, his account is partly positive, but mainly documents the failures of truly autonomous self-regulation and the dependence of ICANN upon governmental support.[84] Even more sceptical is his normative evaluation. The creation of a new 'citizenship' did not resolve the old problems of inclusion and equality.[85] His findings seem all the more significant since the turn to a non-hierarchical network structure was inevitable. The blessings of the new cyberworld, however, are mixed: 'Global governance structures that operate outside international law indeed have the advantage of being able to empower private actors with their scientific, technological and emancipatory resources without any prior formal government involvement. Informal bilateral agreements between the centre of a governance structure and individual private actors might also be able to stabilise reciprocal expectations. However, these agreements disempower other affected public and private entities. The exercise of formally unconstrained power through the strongest actors of a global governance arrangement, be they public or private, may even be obscured by rhetoric of 'participatory governance' and the heterarchical structure of governance.[86]

Alternative modes of legitimation are conceivable and could be tried out. In his brief comment, Karl-Heinz Ladeur[87] suggests that, paradoxically enough, in order to preserve the self-organisational potential on which ICANN relied, it will be necessary to lay down, in public international

[82] See Section 1 of *v* Bernstorff's contribution at 262ff.
[83] At 264.
[84] At 267ff.
[85] At 274ff.
[86] At 278.
[87] This volume, ch. 15.

law for example, some stable organisational patterns which would leave space to private groups for creative activities.

III.5 Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: Craig Scott and Robert Wai

The specific validity claims of constitutional law are usually and quite usefully defined by two characteristics, namely, its supremacy within a legal system and the protection of individual rights — it is these two dimensions which explain the use of the term in the case of the European Union and the WTO.[88] And the two dimensions reinforce each other. Supremacy claims of international law tend to become more plausible where that law strengthens, be it indirectly or directly, the human rights of individuals. Within EU law, the human rights dimension was originally narrowed by the economic objectives of the (old) European Community. On the other hand, it was due to the direct effect of the fundamental freedoms particularly easy to involve Community citizens into their implementation. European rights exert 'horizontal' effects, a functional equivalent to the doctrine of *Drittwirkung* in German constitutional law.[89] Beyond the EU and outside WTO law, the 'implementation' of international human rights law is a more demanding and non-linear process. But this process is, as Craig Scott and Robert Wai show in their introductory sections and in their three narratives, well under way. It is a process which requires skilful litigation strategies by which corporate actors can be confronted with the normative standards enshrined in human rights law. Through a strategic use of 'domestic', typically American courts for a progressive political agenda, international human rights law may indeed, as David M Trubek notes in his comment, 'become an independent source of global law without a state'.[90] This is a type of extra-territorial effect, which is rarely analysed by private international law scholars[91] and a variant of 'regulatory competition', which the proponents of this type of

[88] See, for example, H Brunkhorst, 'Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism', (2002) 31 *Millenium. Journal of International Studies* at 675 DZ Cass, 'The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Judicial Development in International Trade', (2001) 12 European Journal of International Law, 39 EU Petersmann, 'Constitutional Economics, Human Rights and the Future of the WTO', (2003) 58 *Aussenwirtschaft* at 49.

[89] See Ch Schmid, 'Patterns of Legislative and Adjudicative Integration of Private Law in Europe', (2002) 9 *Columbia Journal of European Law*, 415 esp. at 417.

[90] This volume, ch. 17, 321ff, at 322.

[91] But see R Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization', (2002) 40 *Columbia Journal of Transnational Law*, 209 and 260–64.

legal change rarely mention. It is an unsystematic, yet typical pattern of the juridification of the international system. In view of its — often — noble cause and — in the reported examples — its prudent judicial promotion, the use of the term constitutionalisation seems defensible.

IV. A SUBJECTIVE RÉSUMÉ

In the introductory section to this essay[92] we concluded by identifying three interdependent dimensions of our *problématique*, namely, (1) the turn to governance in the analysis of 'multi-level systems', (2) the definition and function of 'law' in governance arrangements, and (3) the specific legitimacy concerns of transnational governance. This thesis will now be substantiated further in the light of the theoretical contributions and case studies presented in Section III. However, in this exercise, it is not my ambition to repeat and evaluate the pros and cons which the various contributors have themselves presented. Instead, I prefer to summarise my personal conclusions, thereby drawing upon the background paper[93] which started the whole project. It will also become apparent to what degree the suggestions submitted here are indebted to the specific disciplinary background assumptions in private law and private international law. This is why this volume contains a second summarising essay by an author from the world of public law.[94] His contribution will be referred to where our preferences seem remarkably divergent or surprisingly close.

IV.1 What Kind of Governance? Varieties at National, European and International Levels

In his seminal work on 'governance without government', the concerns and messages of James N Rosenau were markedly different from the currently widespread use of the term. What Rosenau had brought to the attention of the International Relations community was the disjunction of governance from government, the delegation of governmental authority to non-governmental bodies. 'To presume the presence of governance without government is to conceive of functions that have to be performed in any viable human system …'.[95] Governance remained an intentional

[92] Section I.4, at 349–50.
[93] Ch Joerges, IJ Sand, 'Constitutionalism and Transnational Governance', Ms Florence 2001.
[94] Ch Möllers, this volume, ch. 18, 329ff.
[95] JN Rosenau, 'Governance, order, and change in world politics', in JN Rosenau, EO Czempiel (eds), *Governance without Government in World Politics*, (Cambridge, Cambridge University Press, 1992), at 1 & 3.

activity, in exactly the sense that the German term *Regieren* implies. However, when screening the current literature, one can no longer be so sure. In particular, the debate on the so-called 'new modes of governance', with its focus on processes such as the open method of co-ordination, bench-marking, policy competition and informal agreements, has shifted from goal-oriented 'intentional' strategies to a design of constellations which places its hopes on the ingenuity of the actors involved. This is same kind of shift from substantive to procedural rationality which legal theorists suggested as a response to the failures of interventionist legal policies and to which administrative lawyers refer whenever they diagnose the emergence of 'negotiated relationships between public and private actors' and 'public-private partnerships'.[96] It is important to note that these phenomena occur within national legal systems. Even within constitutional democracies, we can witness the relocation of law-production into institutionally unforeseen arenas — hence, the quest for a 'constitutionalisation' of ever more sub-constitutional legal fields.[97] It is equally significant to remain or to become aware of the differences of these arrangements at the various levels of governance. Three constellations[98] need to be distinguished: (1) Governance at European and at international level may *strengthen* national actors and *intensify* transnational governance where national policy-makers, regulators and administrators form co-operative networks which respond to problems that cannot be handled at national level; (2) Especially within the EU, the interaction within networks of Community and national administrative bodies has transformed the institutionally foreseen structures of governance. It generated semi-autonomous transnational administrative spheres of 'regulation by networks' and 'comitology';[99] and (3) Last but not least, transnational governance is even more likely than national governance to resort to co-operative arrangements with non-governmental actors, simply because there are no alternative resources available. Gerald R Ruggie has recently characterised the co-incidence of internationalisation and privatisation as

[96] See Section I.1 (at 340–42), and, for two mutually illuminating analyses, J Freeman, n.57 above, and KH Ladeur, 'Towards a Legal Concept of the Network in European Standard-Setting', in Ch Joerges, E Vos, (eds), *EU-Committees: Social Regulation, Law and Politics*, (Oxford, Hart Publishing, 1999), at 155. See also, M Shapiro, 'Administrative Law Unbounded: Reflections on Government and Governance' (2001) 8 *Indiana Journal of Global legal Studies*, at 369.

[97] See 372ff.

[98] For an analytically, empirically, and normatively rich elaboration, see AM Slaughter, Government Networks: the heart of the liberal democratic order, in GH Fox/BR Roth (eds), *Democratic Governance and International Law*, (New York, Cambridge University Press, 2000), at 199 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', in KH Ladeur (ed), *The Europeanisation of administrative law: transforming national decision-making procedures*, (Aldershot, Ashgate, 2002).

[99] See R Dehousse, 'Regulation by networks in the European Community: the role of european agencies, (1997) 4 *Journal of European Public Policy*, at 246, and Ch Joerges, E Vos (eds), *EU-Committees: Social Regulation, Law and Politics*, (Oxford, Hart Publishing, 1999).

an erosion of the 'embedded liberalism' he had discovered and analysed some 20 years ago.[100] Ruggie's own evaluation of the current developments is quite sceptical, even though he refrains from generalising assessments. What seems obvious, however, is the need for an approach which differentiates both the functions of law and the legitimacy problems of these constellations. The relative weight of public and private governance differs significantly. Christoph Möllers seeks to capture the differences between the private law and public law frameworks of law production by two ideal types of 'spontaneous co-ordination processes' as opposed to 'public law interventions'.[101] This contrast is simplifying — deliberately so. Nevertheless, it is useful because it underlines the potential of public governance — and of society as a whole — to supervise private governance arrangements. The more these actors move out of the reach of their national constituencies, the more difficult it becomes to ensure the accountability of policy-makers, regulators and administrators. The case studies in the previous sections illustrate the gradually increasing importance of private governance as well. At EU-level, public (administrative) governance is more intense than at international level. Standardisation, albeit a classical case of private governance in itself, is under much closer judicial observation in the EU than is even conceivable at international levels. None of the governance arrangements, however, not even the *lex electronica* as administered by ICANN, is fully immune to public governance. This is not to suggest, however, that a return to public governance would be a viable alternative. The interventionist potential of public governance is a threat to the autonomy, which private governance might achieve. However, public interventions tend to be increasingly selective, disruptive, and unco-ordinated. At EU level, the national 'go-it–alone' and exit options have become exceptional. The coherence of public governance is much higher and easier to ensure that at international level; and the intrusion of public or private law mechanism may, as the studies by Perez and Wai/Scott document, represent but a fragmentary juridification of governance. Even though all of these differences are only gradual, they are nonetheless characteristic for the differences between the national, European and international levels — and their implications are important.

IV.2 What Kind of Law? Analytical Observations

The private/public dichotomy just used is but one of three perspectives within which the legal embeddedness of governance arrangements can

[100] 'Taking Embedded Liberalism Global: The Corporate Connection', forthcoming in D Held/M Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance*, (Cambridge, Cambridge University Press, 2003).
[101] Ch. 18, at 329–330.

be perceived and characterised. A second one, namely, the dichotomy between conflict of law rules and substantive law, which was invoked in the introductory section,[102] offers a second opportunity to observe and define how the law structures transnational and national governance. The third and most fundamental distinction is that between law and non-law.

To restate briefly:[103] it is the insight into the failures of interventionist law that has led to the search for concepts that allow for the integration of non-legal expertise in decision-making processes, and for arrangements in which the resources of non-governmental actors can be used. It has, in a paradoxical sense, become illegal to rely exclusively on law when responding to social problems, and it has become inconceivable to organise such responses within a purely public sphere. This constellation can be observed at all levels of governance. The implications are nothing less than dramatic. Law is involved in responses which integrate legal and non-legal knowledge and have to be organised in extra-legal, constitutionally unforeseen institutional settings.

Even at national level, ie within 'integrated' polities, such responses have to coordinate different, and often enough conflicting, policies and programmes. Constitutional lawyers use the term '*praktische Konkordanz*', while legal theorists use the notion of '*Abwägung*' (weighing, balancing) to denote the need to synthesise conflicting perspectives. At least two of the editors do not shy away from the term *Kollisionsrecht* (conflicts law). But they find themselves, theoretically at least, at a crossroads, together with other contributors to this volume: whereas Gunther Teubner arrives at the notion of *Kollisionsrecht* on the basis of an analysis of the functional differentiation which underlies the decoupling of the legal system not only from the political system but also from the economic system, and then assigns the role of mediating between the conflicting rationalities of autonomous subsystems of society to private law.[104] Christian Joerges sees the 'discovery of a procedure of practice' operating and would seek to subject it to principles and rules which promote deliberative interactions.[105]

The choice of the term *Kollisionsrecht* may cause some irritation at national level. Its acceptance should be easier both at European and at international level, although its use may seem counter-intuitive there, too. European law is mostly understood as an autonomous body of law which

[102] Section I.4, at 349–350.
[103] See I.2 above, at 342–344.
[104] 'Altera pars audiatur: Law in the Collision of Discourses', in: R Rawlings (ed), *Law, Society and Economy*, (Oxford, Clarendon Press, 1997), at 150.
[105] For an early version of this argument, see Ch Joerges, 'Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples', in T Daintith/G Teubner (eds), *Contract and Organization*, (Berlin, deGruyter, 1986), at 142.

claims supremacy over national law. The same holds true for international law and, in particular, for WTO law, especially for all those who understand the liberties which WTO law protects, and the authority which it has achieved with respect to WTO members as the core elements of a 'constitutionalisation' of international trade law.[106] The traditional understanding of conflict law/the law of conflicts and constitutional law does, indeed, point to an irreconcilable discrepancy. Those who defend the autonomy of nation states interpret the reference to the terminology of a conflict of laws as an implicit recognition of that autonomy. By contrast, the use of the term 'constitution' indicates a pro-integration position which tends to insert the trajectory of an increasing(ly)? comprehensive supranational body of law structuring European governance into the constitutionalisation of Europe. This dichotomy is misleading, however, and both fields must revise their inherited self-understanding.[107] As long as the European Union remains without a *Kompetenz-Kompetenz*, it must recognise the spheres of autonomy of its Member States and its own non-unitary nature. Consequently, European constitutionalism is bound to deal with a non-hierarchical, imperfectly integrated entity. It is bound to seek principles and rules that organise the compatibility of (relatively) autonomous polities and the functioning of the EU. In very important instances, the search for compatibility occurs through an identification of rules which do not replace formerly autonomous national systems comprehensively, but only impose such changes which the achievement of agreed-upon objectives seems to require.[108]

The organisation of the compatibility of national legal systems with Europe's integration *telos* is only one dimension of European governance; this process has an additional dynamics. The very policies that aimed at the breaking down of barriers to trade and at the Europeanisation of markets, and the controls to which individual state are exposed, have initiated processes of intergovernmental re-regulation, and in addition, have also furthered the establishment of transnational, institutionally unforeseen, governance arrangements, which started to develop logics of

[106] See the references in n.88 above.

[107] The following brief remarks are more fully elaborated in Ch Joerges, 'The Law in the Process of Constitutionalising Europe', in, EO Eriksen, JE Fossum & AJ Menéndez (eds), *Constitution Making and Democratic Legitimacy*, Oslo (Arena Report No 5/2002), at 13 and 'On the legitimacy of Europeanising Europe's private law: Considerations on a Justice-Making Law for the EU Multilevel System, *Electronic Journal of Comparative Law* 7:3 (September 2003), <*http://www.ejcl/73/art 73-3.html*>

[108] The difference to conflict of laws in the traditional sense is threefold. European law subjects private and public law alike to adaptations which basic European principles and objectives require. It can trigger legal change through European and/or national legislation. It grants rights to European citizens, which they can invoke not only by choosing foreign law but also by confronting their own sovereign with their rights as European citizens.

their own; social actors have learned to adjust to a transnational reality that can no longer be domesticated nationally.

At international level, similar patterns can be observed. There are striking parallels between dispute settlements under the WTO agreements and the jurisprudence of the ECJ under Article 28 (ex Art. 30) EU-Treaty.[109] To take but one example: the conflict between the European Union and the US over the use of growth hormones in the feeding of animals (Article 5 of the SPS Agreement) had to be resolved by a meta-norm: the ban can be upheld only if it is based on a risk assessment. This is a conflict-of-laws rule in the sense just outlined.[110] And to take the parallels further: the elaboration of international safety standards, which Alexia Herwig analyses, and the Community's machinery for foodstuffs regulation respond to the same need.

But there are also obvious differences. The conflict-of-laws rule of the SPS Agreement is more indeterminate than its European counterpart, and the sanctioning mechanisms are less strict. Similarly, the procedural requirements and guarantees for the elaboration of international standards are not equivalents to those of the EU — and their claim to obedience is more modest.

These observations concern an issue of general importance, namely, the relationship between law and its enforcement, and the hard or soft nature of the validity claims of norms. Not one contributor to this volume has subscribed to the traditional view that an enforcement guarantee is inherent in the very notion of law. Instead, explicitly or implicitly, law is treated as a gradual concept. Given the practices of constitutional states, the broad resort to soft law and soft governance mechanisms under Community law, and the constraints under which 'legalisation' and 'judicialisation' strategies in the international arena operate, there is no conceivable alternative answer. This is not to say that the concern for enforceability is no longer important.However, this concern can only be meaningfully discussed in a normative context.

IV.3 What Kind of Legitimacy? Some Normative Suggestions

The notion of 'constitutionalism' in the title of this project sought to underline a normative commitment. It is the specific quality of constitutional law in a democratic state that legitimises and controls public power.

[109] See G de Búrca, 'Unpacking the Concept of Discrimination in EC and International Trade Law', in C Barnard/J Scott (eds), *The Law of the Single European Market. Unpacking the Premises* (Oxford, Hart Publishing, 2002), at 181.

[110] See, in more detail, the analysis in Ch Joerges, 'Law, Science and the Management of Risks to Health at the National, European and International Level — Stories on Baby Dummies, Mad Cows and Hormones in Beef' (2001) 7 *Columbia Journal of European Law*, 1.

'Constitutionalisation', as we defined the term in our preparatory paper,[111] extends this aspiration into two dimensions: it seeks to reach 'governance' phenomena and expose them to the legitimacy claims which are an inherent element of democratic rule. And, in addition, the term was deliberately brought into governance arrangements in a form which is beyond both statal orders and the EU. 'Constitutionalisation', in our understanding, is a — normative — response to the migration of law production within constitutional states into institutionally unforeseen arenas on the one hand, and to the erosion of nation-state polities through Europeanisation and globalisation processes on the other.

This use of the term is, of course, controversial, even among the contributors to this volume. Constitionalisation has, not unlike governance, become a trendy concept filled up with a plethora of meanings and messages. In relation to transnational governance, as opposed to Eurupean governance, the offers available are somewhat more restricted.[112] Within the contributions to this volume, three approaches can be distinguished:

Gunther Teubner's 'societal constitutionalism' is an alternative to the inherited notion of state-linked constitutionalism, not a mere substitute. Societal constitutionalism is autonomous, self-creating and self-legitimating: globalisation is not just about the economy, but is driven by many more social sub-systems which create a new global pluralism which exerts (self-)control through a 'decentralised multiplicity of spontaneous communication processes'.[113]

Thomas Vesting's comment can be read as a straightforward defence of the inherited meaning of the term, especially of its links with the state and its *demos*. Vesting's objections are, however, nuanced. 'Societal constitutionalism', he suggests, should be more modest: 'For the new phenomena

[111] See Ch Joerges/IJ Sand, at n.88.

[112] A very comprehensive pertinent study in Germany [Th Giegerich, *Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozess: wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung*, (The European Constitution and the German Constitution in the Transnational Process of Constitutionalization: Reciprocal Reception, Constitutional Evolution and Federal Interweavement), (Berlin/London, Springer, 2003).] conceptualises transnational constitutionalisation a reception of national constitutional standards by transnational law, 'their synthesisation and transformation into obligatory minimum standards for all states' and their projection 'unto the transnational level where they promote a constitutional evolution of … organisations …'[*Ibid*, at 1445. (English summary; in German: Transnationale Konstitutionalisierung [meint], daß Normen, die in fortschrittlichen Systemen zum innerstaatlichen Verfassungsrecht gehören (insbesondere menschen- und bürgerrechtliche Gewährleistungen, zunehmend aber auch demokratische Erfordernisse) ins transnationale Recht …(Völkerrecht/Europarecht) übertragen und dort rezipiert und synthetisiert werden zuVorgaben für die Verfassungsstruktur aller dem transnationalen Recht unterworfenen Staaten', at 6]. In such a use of the term, transnational governance and constitutionalism denote two distinct and unrelated topics.

[113] 'Privatregimes: Neo-Spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft?', in D Simon/M Weiss (eds), *Zur Autonomie des Individuums. Liber Amicorum Spiros Simitis*, (Baden-Baden, Nomos, 2000), at 437.

beyond the nation-state, the alternative to a state-centred constitutional theory can only lie in rejecting constitutional theory and replacing it with legal theory'.[114]

All the other contributors are somewhere in between these two poles. The reference to the two constitutional traditions identified by Christoph Möllers, namely, a private-law evolutionary production versus a public-law guided law production seems helpful in this respect.[115] It makes us aware of the constitutional pluralism and the varieties of legitimation concepts that democratic states rely on. It also provides a toolkit for the reconstruction of the efforts to create a legal framework for the chartering of transnational governance undertaken in this volume. But, in addition, it seems obvious that the notion of 'constitutionalisation' at international level must be open to the pluralism of legitimacy enhancing strategies.

To return to the beginning:[116] 'Sustainable' governance presupposes legitimacy, which is a notion with two sides. According to Max Weber's famous conceptualisation, any system of *Herrschaft* will carry a claim to legitimacy with it; and its sustainability will depend upon the acceptance of this claim, and the belief of those who are subordinate to it that this claim be justified. This is why legitimacy is dependent on specific empirical conditions, it cannot be petrified by law. Undoubtedly, the normative notion of legitimacy follows rules of its own; normative legitimacy can neither be derived from, nor subjected to, social legitimacy. However, the legitimacy claims of any given polity, or even one in the making like the EU, need to be exposed to public scrutiny, especially when the said polity is as uncharted and contested as transnational governance arrangements. Legitimacy can, therefore, be understood as resulting from a 'discovery procedure of practice' in which claims to legitimacy are raised and substantiated, tried out and contrasted with practical experience, discussed and eventually revised in that light.

These are certainly very abstract formula. They should, however, convey a series of messages: (1) Our exposure to governance at so many levels requires legal science to overcome the schisms between its national and international sub-disciplines and to embark upon the search for alternatives in the *gestalt* of *Herrschaft* in postnational constellations. (2) What a juridification of transnational governance needs to achieve is to transform notions of legitimate governance into legal formula.

[114] Th Vesting, this volume, ch. 2, at 39.
[115] See, also, his 'Verfassunggebende Gewalt — Verfassung — Konstitutionalisierung', in Av Bogdandy (ed), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge*, (Berlin, Springer, 2003), 1 especially at 3 and 47.
[116] Section I.4 (349–50). The following remarks draw on Ch Jetzlsperger, 'Legitimacy through Jurisprudence? Developing a Model for Assessing the Legitimatory Function of Courts', EUI Working Paper, LAW 2003/12.

This adventure requires a radically procedural understanding of law, a continuous reflection on the context in which law emerges and on the conditions which favour its justice. (3) 'Constitutionalisation' is gradually to codify the insights that this process produces. Implicit in this understanding is the idea that law will continue to be the mediator of the legitimacy of governance. In this respect, it is more precise and even more demanding than the quest for democractisation of international organisations and transnational governance.

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