Re-embedding the Market Through Law? The Ambivalence of Juridification in the International Context

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Among the complex processes that fall under the globalization label there are above all two dynamics that have fundamentally transformed the international structural order. By means of a progressive *socialization* of international relations states have handed over formidable authority for decision and organization to other international actors (NGO's, international economic and financial organizations, private corporations). In the passage from the national to the 'post-national constellation' (Habermas) non-state actors undertake what were previously governmental tasks, for instance energy supply, security issues, WTO negotiations, or regulations for environmental protection and human rights (Perraton et al. 1998; Habermas 1998; recently, Leibfried/Zürn 2006; Zangl 2006: 237 ff.).

At the same time, a *strengthened* juridification of international relations has led to the fact that the communication between new and old actors is no longer primarily stamped through informal, diplomatic relations, but proceeds along legally formalized tracks. These can be understood as an expansion in terms of content and as a proceduralization of infrastructure according to international law. Procedural regulations can be found not only for the security domain, but also for the economic, cultural and social domains (Abbott et al. 2000; List/Zangl 2003; Zangl/Zürn 2004). Both processes decisively shape governance beyond the nation state and contribute significantly to the development of trans-national governing institutions. Following Renate Mayntz's definition, I characterize governing institutions as the collective, non-hierarchical regulations for societal states of affairs that serve to establish a political order (Mayntz 2004). Virtually impossible to overlook, however, are the 'dysfunctionalities' that emerge as a consequence of juridification and that have far-reaching negative effects on the socialization of the citizens. They range from the generation of hegemonic, democratically deficient legislation, to its deformalization and a lack of separation of powers in a multi-leveled system, to the disempowerment of politics and the exclusion of

a great part of the global population from access to money, knowledge, power, and judicial outlets for grievances.

The long-neglected and extremely controversial question regarding the legitimacy of trans-national governing institutions emerges more pressing than ever. What normative demands must trans-national governance comply with? When is trans-national law legitimate? When are processes of juridification legitimate? And how should one value the role of non-state actors in this context? A whole series of theorists agrees that the normative demands, as we understand them to be self-evident for the democratic nation state, are too optimistic. The democratic participation of citizens in trans-national negotiations and other law-making forums, and also the need to limit administrative and executive power, are considered to be either completely utopian or normatively undesirable.[1] Thereby, the problems that originate with the non-hierarchical coordination of function-specific domains are not banal and make a watering down of legitimizing needs appear quite questionable.

In what follows I shall propose a conception of legitimacy for trans-national governance that must be measured against the problems appearing in the course of juridification-problems that are still to be sketched out. The conception of 'democratic governance' advocated here against its skeptics connects deliberation with democratic elements and public spheres with an institutionalized praxis of justification. This happens in a way that does not allow the project to fall prey to the 'powerlessness of the ought' but endows it with normative and empirical advantages against other formulations. The legitimacy of democratic governance thereby arises from a coupling of deliberation and democratic elements. Naturally, what is being offered here is not only a description of existing relations, but also an argument in favor of an ideal that already looms in an institutional context and develops incentives for its further realization.

Firstly, I will present which developments of a global society have been considerably transformed by trans-national rule-setting and implementation, and which legitimacy deficits have arisen thereby. They concern democratic law-making under

[1] Andrew Moravcsik (2004), among others, is sceptical regarding democratic forms of government. He measures the EU against the 'real world standards' and thus can discern no democracy deficit (for this, see also Niederberger 2007). Outside of the EU region he barely sees possibilities for the realization of trans-national democracy. Allen Buchanan and Robert O. Keohane are also sceptical (2006: 416 ff). They invoke the missing social and political conditions.

conditions of a plural system of law, the dialectic of juridification and de-juridification, and the de-politicization of international relations (1). Subsequently, I will discuss three important contemporary formulations that relate to these developments for their concept of legitimacy: admittedly, neither the 'neo-Marxist' formulation, nor the heterarchical global society, nor the world order as a global network of governments is normatively or empirically convincing (2). Finally, I shall advocate a concept of legitimacy against critics, characterized by three features: it is based on decentrally organized forums of deliberation, democratic equivalents of trans-national governance and public spheres, whose potential for a critique against the negative consequences of functional juridification feeds on the socialization of political actors in the global society. Thereby, in no way does the formulation remain in the cocoon of a normative demand. The implementation of these forms of trans-national governance is already supported through an institutionalized praxis of reciprocal justification (3).

1. Problems of Juridification

Juridification processes are ambivalent. On the one hand, they can be understood, following Mathias Albert, as indication of a 'formal shifting of sovereignty to a supra-national plane' (2005: 228). Seen from this perspective, they could pave the way for a legitimate and efficient form of 'global governance', that is, for a structure of governance that goes beyond the nation state and aims towards the formation of trans-national systems of law, to the point of reaching a global constitution (ibid). On the other hand, processes of juridification produce anomic inner and trans-national conditions. I will discuss the three most important ones: 1. the fragmentation of a unitary law into plural systems of law and the de-democratization associated therewith, which can be seen in the incongruence between subjection to and authoring of rules; 2. the dialectic between juridification and de-juridification; 3. the de-politicization of international relations. All of these specify the conditions that a critical confrontation with the demands of legitimacy directed towards trans-national governance must consider. They pose the question regarding how the gaps in legitimacy caused by the shifting of what previously were nation state government tasks towards international organizations and networks could be mended.

1.1. De-democratization

The international system of law, based on the inner-societal functional differentiation, has long ago already become pluralized concerning domains (Fischer-Lescano/Teubner 2006), which has led to the development of hegemonic international structures of law. This seems to be a paradoxical assertion, for one could mean that a functional pluralization of law displaces the existent constellations of power in favor of previously less powerful actors. However, this is not the case at all. Rather a development, labeled here with the term 'de-democratization', is portrayed. Thereby, we do not mean that there were peculiar forms of trans-national democratization before, which now disappear. De-democratization refers to the fact that with the fragmentation of the unitary law, the realization of trans-national democratization and possible strengthening of earlier already powerless actors is thwarted. I would like to clarify this by means of three aspects.

Inequality of the legal entity. As soon as in addition to a central law-giver there are further instances that operate in different trans-national domains of law, and on different local, regional, national, international and trans-national planes, the one system of law disintegrates into a myriad of systems of norms. With it, the structure of a hierarchically gradated order of primary and secondary norms that possess their unifying basis in a fundamental norm disintegrates (Günther 2001: 541). The *fact of the pluralism of law*, following Klaus Günther, upsets the familiar principle of equal treatment for equal cases, since it undermines the possibility of relating to one sole system of norms equally valid for all legal entities. In this way it opens up maximum maneuvering room for the legal interpretation that relies on power.

Incongruence between the authors of law and its subjects. In addition, it is considered a historical accomplishment that in the production of primary and secondary norms or in the practice concerning norms within a democratic constitutional state, there is no domain deprived of the citizen's norm-giving activities. However, this is precisely the case presently on the trans-national plane. Whereas in the democratic constitutional state the political autonomy ensured the societal inclusion side by side with the protection of private autonomy, the congruence between authors of the law and its subjects is dissolved through the plurality of systems of law. And whereas international organizations, such as

the World Trade Organization (WTO), the World Bank, the International Monetary Fund (IMF), and even the EU by means of the interests of its member states represent at least indirectly the will of their citizens, this does not apply to non-state actors such as trans-national corporations and non-governmental organizations (NGO's). International law—for example the *Lex mercatoria*—appears as hegemonic law, that is, as law that without adequate and direct representation of all interests involved, lays hands on nation state matters.

Confrontation between law-making and law-enforcement. Finally, law-making and law-enforcement have already come asunder in the international accrual of rights. This can be seen particularly clearly in United Nations law and also at the EU level, for instance, in the direct effects of the European laws on those of the individual member states. A particularly clear example thereof is the priority in the implementation of European over national law in cases of conflict (Brunkhorst 2002: 176). Here there obviously exists a gulf between law-enforcement of substantial norms and a procedural juridification (Brock 2005: 15) only slowly catching up, which cannot be bridged without the will of the politically powerful international actors.

1.2 De-Juridification

Juridification admittedly possesses still more negative 'implications'. Some voices warn that a stronger 'privatization' of international relations could amount to exactly the opposite of rules of law that are more binding: a subtle de-juridification and, therewith, conflicts (see Koskenniemi in this volume). Here also can be found three partial aspects.

Deformalization. The expansion of the law to content-undetermined and thereby deformalized private right spurs its arbitrary interpretation and political instrumentalization (Koskenniemi 2004). Its drive are privatization processes in the domains of health, education, media, energy, security and the military, which lead to an 'unlimited self-empowerment' of the already powerful economic actors (Maus 2002: 255).

Missing separation of powers in a multi-level system. This refers to the question concerning how in a multi-plural system the vertical legitimacy and control of the executive and judicial branches can be guaranteed through the citizens (Maus 2002: 252;

Möllers 2005). Numerous states worldwide succeed only laboriously in establishing and maintaining a rule of law operating to some degree authoritatively and in a way that ensures peace. The internal rule of law, however, is an essential presupposition for law steering and law bindingness (see Oeter in this volume). Contrary to the idea that in a 'system of global governance' there exists a sovereignty partition between cross-linked law-making structures and implementation structures, reference is frequently made to the danger that the separation of powers limiting authority in a multi-level system can *no* longer be sustained if a clear-cut attribution of responsibility is not possible. The functionally differentiated systems of law emphasize the decentralization of power. As a result, a momentum of its own develops that is difficult to control and completely exacerbated by the fencing in of the executive and the independence of the judicial.

Exclusion. However, de-juridification does not exclusively proceed in a law-immanent manner, but is rather decisively bolstered through what Hauke Brunkhorst, following and updating a term from Jürgen Habermas, characterizes as 'colonization of the law through power and money' (2002: 166). Political power and the market enter into an alliance that, without being based on a *legal* acquisition of power, overlaps the functional differentiation between right and wrong, government and opposition, haves and have-nots (ibid). The exclusion of a great part of the global population from access to money, knowledge, power, and judicial outlets for grievances bears witness not only to the fact that the differences between exclusion and inclusion have become a determining measure for the description of processes of juridification and de-juridification. These differences also raise the question as to how the completely excluded, those who do not even dispose of the provision of their manpower, nor can build on the reciprocal dependence of labor and capital, can be included in the system of law.

1.3 De-politicization.

Lastly, questions of legitimacy are raised that have to do with the fact that the role of politics has changed in international relations. This can be accounted for through at least three *tendencies towards de-politicization*.

The state between complete authority and loss of authority. Political matters were for a long time societal conflicts whereby not only those who ignited the observance of

'liberal freedoms' counted. Ever since the canon was expanded to allocation of resources, equal opportunities for access to societal institutions, and protection of minorities, many societal conflicts revolve around these issues. All problems connected therewith seemed manageable through human action. This distinguished politics from natural catastrophes, which befall humans and to which they surrender without bearing responsibility for their occurrence. At present, there is a disjunction between the expectation towards politics and their real possibilities of intervention: politics are offered complete authority, but their alleged main actor, the state, has long surrendered competencies (for instance, national control of capital flows, reduction of trade barriers) to international private actors, international organizations, and international government organizations, in order to confront domestic problems such as inflation and excessive indebtedness (Mayntz/Scharpf 2005). One consequence is that an interventionist state has been transformed into a moderate state that defends the public interest in international negotiations against private actors (Zumbansen 2005).

Privatization. In addition, politics withdraw from the public sphere and become an issue for commissions, think tanks, lobbying groups, and NGO's that are not transparent and make far-ranging decisions behind closed doors. The protection of the private interests of the citizens still belonged to a liberal understanding of politics, whereas international politics increasingly move away from this and become themselves private. The already addressed privatization of whole domains of policies (health, senior care, energy, public transportation, etc.) deprives politics of significant possibilities of action. In addition, the transparency missing in the decision-making processes complicates even further the accountability for undesired consequences, the effects of which the citizens must bear in the end.

Loss of power through self-actualization of politics. There existed initially a relation between the steering subject politics and the steering object society. Now this relation has drifted apart and revealed a paradox: politics have been loosened from their anchor in a national society in order to gain power vis-à-vis a globally operating economy (Brunkhorst 2002: 119). Without the connection to morality, law, and religion, to territorial borders and civic solidarity, politics self-actualize for the sake of their own retention of power and thereby simultaneously risk their own loss of power. Political

representatives place decision-making authority in the hands of international organizations and other actors, who, following the logic proper to institutions, permanently obey only their own particular requirements. In this manner, politics obstruct precisely the steering possibilities they seek to practice.

These sketched implications inherent in juridification already prevent one from concluding that demands for the legitimacy of governing processes should be reduced. Rather, a concept of legitimacy must adequately reflect these 'dysfunctionalities'.

2. Conceptions of Legitimacy for Trans-National Governance

At the moment at least three prominent formulations towards the legitimacy of international law can be found, which offer different solutions to the problems diagnosed—de-democratization, de-juridification, and de-politicization. The neo-Marxist proposal of an 'ontological republicanism' argues for the overcoming of economic and political power structures through subject-centered political resistance (1). In a 'heterarchical global society', on the contrary, it amounts system-internally to a quasi-democratic balance of spontaneous generation of norms and organized decisions of value (2). And in the 'global network-order' a functionally differentiated sovereignty creates efficient arbitration structures through a simultaneous strengthening of the duty of accountability vis-à-vis national societies (3).

2.1 The Neo-Marxist Formulation

In Michael Hardt and Antonio Negri's book *Empire* the image of an all-obtrusive global order in which diffuse economic and political relations of power, detached as far as possible from state influence, form not only the economic relations of societal structures, but also pervade the cultural and political superstructure. In at least one regard the authors lean heavily on Marx: where they say that the economic production, which certainly in the course of globalization can no longer be located and thereby takes place everywhere, causes the exploitation and alienation of the many (2001: 210 f.). However, the disciplining and controlling forces do not remain limited to the economy, as in Marx. The economic coercive relations that commonly proceed in a nearly law-less space are supplemented almost perfectly in an insidious manner through a 'biopolitics' inspired by

Foucault, which displays its effect in communications systems of an accelerating service society, in informal networks and welfare state arrangements. There is no escape from this 'structured totality' (Saar 2007: 812), from 'empire'. What is missing is the idea of a 'being-outside', a state beyond capitalist relations, which one reaches by overcoming class contradictions, and in which the management of things and the control of the production process displaces politics.

The privatizationof international politics and its transformation into a play field of power has led to the elimination of politics from the public sphere, where it clears the room for medial symbol politics. Politics finds itself instead in a virtual space: the place of the political is the place of the counter-empire (Hardt/Negri 2001: 207), formed through the multitude, the aggregate of the many individuals that are exposed but not surrendered to oppression. The aggregate, one could say, is the dialectal counterpart to empire. Multitude is the basis of empire; however, it is not merged with it, but as its dynamical element lies on its outskirts. As soon as multitude becomes conscious of its creative power of 'being-against' (ibid. 211), it can 'assimilate' itself into empire and give it the desired shape. It is wherever opposition against formal and informal domination is active. The virtual politics of networks can become the harbinger of the opposition against the neo-liberal project.

It is not immediately clear how this political form achieves political legitimacy. This might have to do with the fact that the authors concentrate on critical descriptions of contemporary relations. One can say with certainty, however, that according to the authors, previous forms of democracy are no longer effective through procedures, rules of co-determination, elections, and social organizations; instead, national democracies have surrendered to global regimes (from WHO to WTO).[2] It should be assumed that here an 'ontological republicanism' is presupposed, which is understood as *res gestae*, as spontaneous acts of the aggregate. These are then legitimate if they serve the correct *telos*: the re-appropriation of a self-determined being (Ibid, 367). To that extent, multitude appears as the direct transformation of the *principle of congruence*: all of the present structures of domination concerned bring their needs and interests to expression in a political project coordinated by the aggregate. Albeit, this construction lacks a

[2] For this see an interview with Michael Hardt in *Tagesanzeiger*, December 4, 2001, 57.

decisive aspect: open-ended political debate. Hence, the critics are right to warn against the 'de-politicizing' tendencies of an ontology that is seen as the real political force (Saar 2007: 818). If instead of open political struggle, ontology has its fixed place, the emancipation from the chains of empire will be transformed into its opposite and will cement the existing relations of domination. The outcome of any political activity will then already from the beginning be inscribed in the resistance of the many.

Another problematic issue is the formulation regarding the background of the diagnosed tendencies of de-juridification. The adoption of a deformalized conception of law assumed by Hardt and Negri obstructs the view of the important role that the individualistic and egalitarian human rights claims play in the process of transformation of international law, to be observed at this stage. This might also serve as an explanation for the fact that the conditions for political participation, namely human rights and equality, are not made thematic (Habermas 2004: 186 f.). It also remains unclear how the resistant force of the multitude can without support limit the informal and formal forms of domination through enforceable law.

2.2 Systems-Theoretical Global Society

The legitimacy of the juridification processes looks completely different from the point of view of the conception of a 'heterarchical global society'. Already the description of the state of the global society seems to possess barely any similarities with the neo-Marxist project. In the global society theories of Luhmann, Stichweh and Teubner we find an uncoupling of almost all systems (economics, education, sports, love) from territorial referencing. Only the political system and the system of law are excluded. The institutionalization of the sovereign nation state and of the state apparatus is the fundamental premise of the 'global political system' (Stichweh) and of the system of law (Luhmann 1997: 166; Stichweh 2000: 23 f.). This double structure of inner-societal and global-societal differentiation also determines the place for politics in systems theory, which branches out into the nation state political system and the global society political system. It is not, for instance, as is commonly accepted, the economic globalization that has led to a fragmentation of the law. According to this view, the growing economic exchange relations made it necessary for the law to catch up and therefore established

such a trans-national private law. Rather, the inner-societal differentiation into autonomous sub-systems—an accelerated differentiation that did not stop at the limits of the nation state—led continuously to a fragmentation of trans-national law (Fischer-Lescano/Teubner 2006: 25 ff.). According to the opinions of systems-theoretical authors, this 'polycentric globalization' (Ibid: 26) is irreversible and always generates new differentiations. Correspondingly, politics can only be successful when it is likewise oriented towards *issue*-specific topics.

What is problematic in this description is that possible negative side-effects of the systemic integration (such as the poverty of whole segments of the population) are not dealt with at all by politics, where they originate. As a result, the perpetrators are not accountable to those concerned since they have only performed according to the designated function logic. *Congruence between the authors of the law and those subject to it* is very difficult to achieve under these general conditions.

With regard to the second problem described above, de-juridification as a consequence of juridification, systems theory comes to an interesting assessment. There is a further criterion of differentiation that traverses functional differentiation: that of inclusion/exclusion. Whereas from the perspective of the political global system the issue is the inclusion of states within the state commonwealth, the nation state political system functions smoothly when it includes the individual in the political global system and in the nation state and thereby at the same time excludes it from everything else. Thus, whereas the inclusion of the states equates in principle all states to one another, the equality/inequality difference in the global society system is perpetuated through nation state citizenship (Stichweh 2000: 60). In this manner, and this is the diagnostic strength of systems-theory, even the dysfunctionalities of the nation state political system come into view. Within the state the inclusion in the political system was still facilitated by state intervention in other domains. Examples of this are labor laws, compulsory education or unemployment insurance. In a global society these incentives towards political inclusion no longer function. The cause for this is that a state no longer reacts to the side-effects of efficient mechanisms of integration (production outsourcing to areas where one can produce more cheaply) with political intervention in another system, for instance the economic system, since global societal developments are given priority

(Luhmann 1993: 584; Stichweh 2000: 34). This brings as a consequence the exclusion and therewith de-juridification of whole segments of the population.

Political power and the market come into an alliance here, which, without being based on legal acquisition of power, overlays the functional differentiation between right and wrong, government and opposition, possession and dispossession (Brunkhorst 2002: 166). The exclusion of a great section of the global population from access to money, knowledge, power and judicial outlets for grievances shows that the code exclusion/inclusion has become a decisive criterion for the description of juridification processes—and that means here: de-juridification—over which politics have no influence. This poses the question how the completely excluded, those who do not even dispose of the deployment of their labor, nor can build on the reciprocal dependence between labor and capital, can be included in the political system and the system of law.

The authors are well aware of this problem. Their answer, however, remains unsatisfactory. Protest movements, such as "Madres de la Plaza de Mayo" and those that stand for the so-called "Mercedes Benz Disappeared" could move human rights violations committed in the 'periphery' once again back to the center of the administration of justice (Fischer-Lescano 2005: 31–41).[3] Through procedures of trans-national courts the groups excluded in a nation state context are once again included in the global system of law (Ibid: 154 ff.). The law can be the cause of exclusion and, coupled with the public sphere, at the same time means of inclusion. Yet still the impression arises that the weak public character of the protest remains weak and nothing can oppose the ‚de-politicization' of international politics. For, the mobilization of the public sphere remains related to the law-making power. It is not institutionally tied to the decision-making organs of democratic law-making. Thus, the question remains unanswered whether within the right to organization in existing trans-national constitutions there are indications for a democratic alternative (Brunkhorst 2007a: 89).

It is no wonder, then, that the systems-theoretical formulation is not convincing for the legitimacy of trans-national law. The accomplishments of the system replace as far as possible the categories of legitimacy. The neutrally observable efficiency of the state

[3] Regional human rights commissions, such as the Inter-American Human Rights Commission and the European Human Rights Commission, have become active after the numerous and constant activities of the movements that were also supported by NGO's like *Amnesty International*.

apparatus, of the economic system and the system of law, suffice as legitimation.[4] Similar to Max Weber's concept of legal domination, grounded in technical processes, decisions achieved legally are accepted with no motive nor regard for grounds and their examination. However, the fact that political domination can obtain the loyalty of the masses in the long run, without being related to legitimate political power, has been often enough historically refuted.

2.3 The Network Formulation

Starting from a systems-theoretical inspired analysis, some advocates of the network formulation (Slaughter 2004, 2004a; Rischard 2002; Ladeur 2003) see in the concept of 'accountability' an encouraging normative guideline for the legitimacy of *global government networks*. In a manner similar to the advocates of systems-theory, Ann-Marie Slaughter, for instance, starts from a world-wide pluralism of law, which is the result of self-differentiating inner-societal functional needs (2004). Beyond the nation state, the state-centered vertical and hierarchical relations of power are displaced by the horizontal regulation forms based on functional integrations. These nets of global governments can adopt different forms; Slaughter is interested above all in the global government networks in which official advocates of the states from the finance and economics sector, the domain of police investigative work, as well as other representatives and even judges, exchange information across nation state borders and attempt to find solutions to global problems. This sectoral extension and consolidation of government work across nation state borders has led to a 'disaggregation of state sovereignty' (Ibid: 266 ff.). The state now appears as a many-headed power entity that speaks with many voices inwardly and outwardly.

According to Slaughter, this does not mean, however, that great legitimacy gaps inevitably emerge; in case they do, though, they can be dealt with just through trans-national government work. Global government networks, in contrast to *global policy networks*, have the advantage of not only working efficiently, but beyond that of also being accountable to national societies. *Global policy networks*, in contrast, encompass all groupings, organizations and NGO's that are committed to a specific issue. For the

[4] For a critique of Niklas Luhmann, see Jürgen Habermas' observations (1976: 273 ff.).

most part it remains vague who exercises what form of power under whose orders (Slaughter 2004a: 162). In contrast, advocates of government and other global elites are accountable to national societies already in virtue of their duty in their double function as representatives of different inner-societal interests and as trans-national actors that must defend the concerns of the nation state against other nation states (Ibid). This involves an information politics as transparent as possible, that is, a deepened collaboration not only among experts, but also between experts and legislative networks whereby an expanded public sphere is also included over the policy networks (Ibid: 171–174). Even vis-à-vis other nations, the participants in global government networks are compelled to adhere to certain global norms.[5] According to Slaughter, in this manner the globally extended legislative organ is strengthened and the executive and administrative organs are curbed.

Admittedly, Slaughter's proposal with regard to the principle of congruence remains stranded halfway. This can already be seen in the concept of justification central to her theory. Slaughter understands justification as 'accountability' and for her a transparent and public justification is required of the past conduct of an actor (compare also to Benz/Papadopolous 2006). This conception of accountability is detached from any conception of reciprocity or of political involvement of stakeholders. By contrast, a second interpretation proposes to understand justification on the basis of the 'principle of affectedness' in such a way that it is essentially connected to the idea of *reciprocal* justification. Anyone subject to a norm should be able to actively partake at the same time in the process of establishing the norm (Habermas 1992; Forst 1999: 44). Slaughter's proposal abandons the negotiation of multi-lateral regulations to the global elites, who only need to inform the citizens of the societies about the results of these negotiations. What happens, however, when the arrangements are not acceptable to them? One searches in vain for proposals for the possible alteration of these regulations in Slaughter's theory. Hegemonic law maintains legitimacy *through* and not *vis-à-vis* the ruling elites.

[5] This includes among others, the global deliberative equality of all states—a principle that requires the inclusion of states in a network when they have something to do with the subject matter to be dealt with; in addition, a sort of *Ordre-Public* principle, according to which a state or its courts does not need to apply any foreign or trans-national rule if it contravenes a fundamental national principle (Ibid: 178); and an idea of *checks and balances*, going all the way back to Madison, by which, however, the legislative organ should be strengthened vis-à-vis the other two. And finally, there is also the principle of subsidiarity, which wants to have as many political decisions as possible dealt with locally (Ibid: 185).

Slaughter, correctly so, criticizes that the power of the states is unequally distributed among the international organizations with regard to their economic weight and military might. However, even here her institutional proposals remain one-sided. The idea of trans-national *checks and balances* must remain incomplete since the legislative is restricted insofar as it includes only delegated public officials. Courts do not apply the law of a democratic law-giver, but rather set the law themselves (a WTO example: procedures for settling disputes and courts of appeals). At the same time, in view of the underdeveloped legislative instances legal decisions can only with difficulty be introduced again to a political discourse. The *de-juridification* initially diagnosed, the expansion of the domain in which on the basis of a missing restriction arbitrary decisions by the executive and judicial could flourish, advances thus unchecked.

Finally, the vast disconnect between the decision-making networks and the global policy networks close to the public underlines the progressive de-politicization. Those affected are deprived of the political concerns and issues through the delegated government agents that conceal rather than reveal the citizens' marginalization in the decision-making process through their representative function. This does not mean that Slaughter's focus on the institutionalized government networks is not at bottom a promising formulation. The states' position regarding their representatives is in the long run strengthened through the de-differentiation of sovereignty—as is also the position of the public officials who are only appointed for their functions on a trans-national level, and not directly elected (Slaughter 2004a: 189). However, without an institutional bridge between functionalistic elite legislatives and the local public spheres the citizens' interests are further outmaneuvered.

Summarizing, one could say that the neo-Marxists provide a fitting diagnose given the privatization of politics and its transformation into a play field of power. This diagnose also clarifies why the participation of the citizens in central international processes of decision-making and rule-setting plays such a small role. Also, the authors do not stop at the description of the de-politicization, at the displacement of the political from the international decision-making bodies. They trace the return of the political in everyday resistance to the multitude. And nonetheless, through the ontologization of politics they carry forward precisely that de-politicization tendency they criticize.

In the systems-theoretical global society those excluded from the system of law through the law, the disenfranchised, become visible. In contrast to the neo-Marxist formulation, the inclusion of the marginalized itself occurs only by means of the law—an extremely realistic suggestion in view of the dominating power relations. Only thus does the communication between systems, and also the failure thereof, emerge. The legitimacy of the law, in any case, remains self-referential. What is missing is the coupling of the system-internal development of law to the democratic law-making organ. Only then would the objects of law affected by regulations turn into political subjects.

Finally, the network formulation is linked to systems-theory, though it concentrates its analysis of the functional differentiation on the differentiation of state instances that still play a key role in international relations. The representation of the citizens and accountability of the representatives are therefore a decisive aspect of analysis and constituent of government legitimacy. Here, however, the political participation is limited to a global elite, and it remains vague how the other two organs of government, the judicial and the executive, could be kept at bay.

3. Democratic Governance

A fourth formulation, which I call 'democratic governance', is linked to a 'global domestic politics without global government' (Habermas). However, it sets its sights on the future. I define 'democratic governance' as multi-level politics based on a system of institutions that are just, linked to one another, and accountable to one another and to those involved. By institution I do not understand organizations such as the UN or the WTO, but rather the rules of the game that coordinate our coexistence, even within organizations. To this belong norms, regulations, conventions and laws that already possess validity or will in the future be of significance for a specific community of law, be it national, regional or global (Pogge 2002: 170). Thereby the legitimacy of the legally authored institutions is of particular interest here. The ambivalent process of juridification accelerates the exclusion of many from the political, and also the de-juridification and de-politicization of international politics. However, juridification can also be the motor for democratization and work as a brake on an unhindered and growing administrative and

executive power. The legitimacy criteria for the assessment of this dichotomous process are supplied in the formulation of 'democratic governance' by the normative integration of the global society.[6] They claim to already be fixed components of the normative socialization and thereby to be able to be themselves the outcome of a deliberative practice. Surely, an ideal is reflected in these criteria. Yet the present relations of power are reflected in the formulation of 'democratic governance' and there is clarity regarding the fact that the functional differentiation penetrates and transforms the socialization process, and from the perspective of the global society the described 'dysfunctionalities' therefore arise. At the same time, however, this differentiation makes use of the 'porosity' of the heterarchical, systematic integration and adds to the institutional points of intersection between global society and global system.

Global institutions, according to the thesis, are legitimate when there are good grounds for recognizing the authority of a rule of law or a system of laws. From a normative perspective this means that laws should justly rule our coexistence in a determinate domain. From an empirical point of view these regulations are legitimate when it is not only asserted of them that they would be valid, but also when they actually obtain a widespread acceptance and it could be stated that they hold for most of us.

This still very vague definition of the legitimacy of global institutions needs to be made more concrete. More precisely put, global institutions are legitimate when they satisfy at least three demands: first, they should be the result of a deliberative practice that attempts to close the gap between being affected by and setting rules (1); second, the formulation of 'democratic governance' is directed towards the anchoring of *democratic elements* that counteract de-juridification (2); and third, a rule-setting that does not contribute to de-politicization remains dependent on active public spheres and on the *sensibility* of rule-setting instances vis-à-vis the 'input' from the different public forums (3). But how realistic is the actualization of legitimate forms of governance? I will briefly show that already now global actors are subject to an increased pressure for justification, created through an emerging institutional context and requiring the realization of legitimate governance (4).

[6] For the normative integration of the global society and the consequences of colonization through functional differentiation for the global society, see Brunkhorst 2007b.

3.1 Deliberative Practices

Deliberative practices, which we find in international bargaining systems, and also in the communication structures of the European Commission, yield arguments and grounds with which those involved react to the public pressure for justification.[7] According to a frequently applied definition, political deliberation is a practice of legitimation for the foundation of (laws-) regulations, which depends on public discussion and reason-giving among equal citizens (Cohen 1989: 22).[8] This definition is thereby distinguished from the conception repeatedly encountered lately in political science according to which deliberation has become the measure for successful international relations and even the foundation of diplomatic negotiations (Risse 2004 and also Müller 2004). This conception of deliberation, however, ignores aspects that are an important element of the politically deliberative practice and of the practice of argumentation: next to *public* deliberation, this encompasses the *same opportunities* for any individual to have access to these deliberations without thereby being subject to an internal or external restraint, and includes the regulated exchange of information under the employment of reasons (Cohen 1989: 17 ff.).[9] Under these alleged 'ideal' conditions the participants achieve a grounded 'hypothetical agreement'. The real political process, according to a general objection against deliberative practices in international politics, proceeds otherwise in different regards, which makes deliberation seem relatively uninteresting as an adequate form of practice for many theorists. In addition, the concentration on deliberation as political practice obstructs the view of other, legitimate if possible, forms of process, such as 'fair

[7] See also Christian Joerges und Jürgen Neyer (1998) who focus on an indirect representation of the citizens through experts who arrive at decisions at an EU level in topic-specific bodies.

[8] Here I refer to Jürgen Habermas' theory of law, which has substantially shaped the concept of 'deliberative politics'. Habermas worked out his ideas on the legitimacy of law for the democratic state of law in *Between Facts and Norms* (1996). Later works, dealing with the legitimacy of international law, are more cautious in terms of the normative presuppositions. In *The Postnational Constellation* (2001, above all 109-111), Habermas proposes two criteria at a minimum that should be fulfilled: rationality and transparency in the processes of communication and decision. For a different interpretation of deliberation, see Ian Shapiro (2002), who considers neither argumentation nor openness and expectation of consensus to be features of deliberation.

[9] Habermas understands deliberative practice as "the core structure in a separate, constitutionally organized political system", but not as a procedure constituted for the whole of society, nor even for all state institutions (1996: 305 f.).

bargaining'.[10] In what follows I would like to illustrate the conception of deliberation advocated here through the discussion of different objections.

A fundamental objection against deliberation is the consideration that it plays no role at all in international politics. Is it not the case that the negotiations and prevailing political and economic bargaining power of the parties involved determine international agreements and regulations? Recent investigations have shown that deliberative practices, understood in the previously formulated and discerning sense, *rationalize* the decision-making process not in all, but at least in some 'soft' bargaining systems, for instance in the domains of human rights and the environment. This is particularly the case when the public sphere is likewise engaged, that is, when the negotiations are transparent and representatives of NGO's have a certain influence on the outcome (Habermas 2007: 436). Using the example of the implementation of human rights, Thomas Risse was able to show that in international political negotiations argumentation, deliberation and persuasion ('action oriented towards mutual understanding') become meaningful for the progress of the bargaining if international recognition as a legitimate bargaining partner is at stake.[11] In this context he speaks of 'argumentative entrapment': even the participants that enter negotiations with a strategic intention must somehow give in to the discourse of the 'better argument' if they do not want to get caught in a contradiction (2000). In this manner, reasons are produced that can be brought up as justification vis-à-vis the parties involved—be they constituents, governments, employers or NGO's (Habermas 2007: 436).[12]

An additional objection frequently raised is that deliberative processes are less efficient than pure bargaining practices (Scharpf 1999). Does deliberative legitimacy undercut the capability of political systems for action? This objection is raised with

[10] I am thankful to Andrew Arato and Jean Cohen for this indication.
[11] As was mentioned earlier, Risse's concept of deliberation is normatively undemanding; however, his work on the observance of human rights norms shows that in many areas a discerning concept of deliberation can already be found.
[12] Justification can be understood in a very narrow sense as 'internal justification (accountability)', by which the agents or political representatives have the corresponding duty to answer to their employers or constituents (Keohane 2003). Nonetheless, in a globalized economy with its undesired consequences for many this seems insufficient. 'External justification (accountability)' involves a more broadly grasped openness. According to this, all those exposed to an institution are entitled: through environmental catastrophes, unhealthy products, or low wages; also entitled are those exposed to the institutions that either do not prevent these harms or even foster them. The concept of accountability assessed here springs from reciprocal accountability (Forst 1999).

reference to the necessary majority principle, which, however, is 'foreign' to deliberation. According to this objection, the majority principle contradicts the conception that autonomous citizens reach consensus through understanding. The technical element of an aggregate of voices does not admit that one can hypothetically decide against the will of the majority on the basis of morally persuasive opinions (Gosepath 2001). Yet, it is not such an easy matter. In what follows I will concentrate on a central point.

It is misleading to assume that a post-deliberative majority decision is completely insensitive to the quality of arguments and therewith to their rationality. This would mean to deny that the deliberative process has any influence on the aggregate of voices and that this could proceed in a democracy in principle independently of any previous argumentation. This is a quite short-sighted assumption. Through deliberation namely what is 'extracted' are precisely those arguments that persuade a majority and impose on a minority the task of coming up with a better argument (Lafont 2006). The majority principle determines which arguments experience more approval at time X. One could say it is a type of indicator of the present state of the argumentation. If the majority principle only served the mere aggregate of voices, without connecting back to a deliberative practice, one could even do without the institutional anchoring of processes of formation of opinions and wills, and simply carry out periodical 'opinion polls'. However, such a procedure clearly contradicts our conception of democracy by which minorities should again and again have the chance to challenge the status quo.

Deliberation is accused of inefficiency for still a second reason. It is allegedly concentrated on the input- and so-called through-put legitimacy, the legitimacy of the practice, but is not aimed at the output-legitimacy. For this reason alone the applicability of the outcome and its consequences play a rather coordinate role. In a well-cited contribution and with a view towards the European Union, Fritz Scharpf remarked that missing input-legitimacy can and should be replaced by output-legitimacy—a recommendation also taken up for global governance. Since one can speak neither of a European *demos* nor of a European identity or even solidarity, although according to Scharpf there is considerable need for regulation, it would do the EU well to concentrate on its problem-solving capacities (1999). The deliberation theory, however, does not concern the critique of the neglect of the output-legitimacy. An advantage of this

formulation is, namely, that the process of argumentation is always already directed towards problem-solving. The possible negative consequences and side effects of a regulation are injected into the deliberative process as argument and can be invoked against the adoption of a controversial regulation. In addition, a problem-solving strategy is more successful the more thoroughly integrated into the rule-setting process the parties concerned are. In the end they are the ones who must deal with the results in different societal domains. Success would come sooner if they were involved in the rule-setting process and correspondingly adopted the result. According to studies, the problem of the insufficient compliance with norms does not appear more serious than at a domestic level (Zürn 2005: 26 ff.; Risse 2004). Thus, the effectiveness of global governance is directly connected to the quality of the decision-making process.

Finally, the possibility of establishing congruence between subjection to and authoring of rules is called into question.[13] Who should be included? According to which measure will it be decided who shall participate in which rule-setting process? A principle that can offer an answer to this is the so-called 'principle of affectedness', which states that all those who are affected through the outcome of a regulation should also be involved in its development.[14] Defined so generally, the principle is still very vague. The question regarding how to measure affectedness needs to be made more concrete.

The determining feature is the effect on vital interests and human needs (Held 2004: 273 ff.; Kreide 2008: 166 ff.).[15] Yet, one is not thinking here of the effects of decisions, for instance, of a neighbor that through the development of her property reduces the amount of light in my apartment, or a management that decides to raise the price of coffee—although both naturally have effects on my life. It is rather *institutions*—norms, regulations, rights, conventions—standing in the foreground that are valid for a determinate community, be it national, regional, or global (Pogge 2002: 170). What is meant by 'affectedness' here is to what degree the access to essential resources through

[13] Due to reasons of space, I cannot address a further problem, namely, that the principle of affectedness only functions on a small scale. For this critique, see Robert Goodin (2000). John Parkinson (2003) und John Dryzek (2001), among others, reject this criticism.
[14] This principle is a minimal normative principle underlying any democratic order. Rainer Schmalz-Bruns (1999: 201; see also Gabriëls/Kreide 2002) already uses the concept of the 'principle of affectedness'.
[15] David Held uses the term 'significantly affected' and speaks of 'strong, moderate and weak interests' (2004).

institutions is prevented or facilitated. For a more detailed determination of 'affectedness', one should distinguish between *fundamental*, *expanded* and *marginal* interests.

Fundamental interests are affected when the existing institutions approve of or even encourage not having command over one's own life and its physical integrity, or when its development is threatened or sharply curtailed. Among these fundamental interests, next to subsistence, health care, and education, one also finds the exercise of cultural practices, for instance the practice of faith, and a political participation that first enables making these interests publicly thematic. Expanded interests are affected when existing institutions approve of or even encourage the fact that the needs exceeding the elementary needs cannot be realized. These refer to equal opportunities for participation in public, economic, and private life, and the fulfillment of life projects made possible through them, which concern public life, vocation, and family. Finally, marginal interests are affected when it is a matter of the promotion or obstruction of the accomplishments of a life project that requires challenging aesthetic or material presuppositions relating to 'lifestyle'.

For the identification of those who should be involved in the law-making processes, only the first two aspects are relevant; only they possess the necessary potential of being so general that in turn agreement is to be expected from all those concerned with making concrete the principle of affectedness. The 'principle of affectedness' is inclusive and aimed at regarding as congruent as possible the circle of those whose fundamental and expanded interests are subject to political rule with the circle of those who exercise this rule (Brunkhorst 2002: 107; Oeter 1999: 50 f. for legislation within democracies).

The ideal of (trans-national) deliberation advocated here is only one of four aspects that characterize ‚democratic governance'. The related question is: „What space does democracy occupy?" The relation between deliberation and democracy is in no way free of tension. Deliberation, in contrast to democracy, aims at generalizable interests and not at individual self-interest. It requires congruence between those subject to regulation and the authors of regulation, and is not satisfied with indirect representation. In a deliberative practice what counts is the argument and not the amount of votes—only to mention some important points. And yet, deliberation and democracy refer to one

another. Without the connection to democratic elements, deliberation remains a regulation practice that neither effectively institutionalizes the principle of congruence, nor can adequately react against de-juridification and de-politicization.

3.2 Democratic Elements

Deliberative processes alone cannot close the legitimacy gap that emerges when international treaties, decisions, or even internationally binding conventions are for the most part not even indirectly linked back to democratic constitutions through the states involved in the negotiations. Therefore, it requires democratic elements, that is, institutional hinges that, analogous to inner-societal organizations, adopt democratic functions in a decentralized multi-level system.[16] An institutionally anchored participation of the citizens, the legal obligation of the executive, and independent courts are only some proposals I will more closely address in what follows.

Deliberation cannot adequately represent institutionally the interests of marginalized groups. Minority positions must also obtain *actual* access to the negotiations and there even possess influence over the decision-making. An expansion of the possibilities of the citizens' political cooperation would prevent the law from not only becoming pluralized internally, but also losing external sovereignty vis-à-vis other systems of norms and complexes of rules (perhaps local traditions). But how could this look in the political reality? The minimal normative foundation for legal unity should also prospectively embody the United Nations charter. It could possess constitutional status, in contrast to the *lex mercatoria*, since it is based on international agreements and its basic elements are reflected in domestic constitutions that have been at least partially achieved through referenda (Habermas 2007: 450). The long discussed reform to the United Nations should aim towards not only including the General Assembly 'in deliberative ways in the decision-making of the Security Council' (Maus 2007: 380), but also making it an organ that represents the world citizens. This could perhaps occur by being in the long run reformed into a world parliament consisting of delegates from democratically elected

[16] Rainer Forst (2007) also argues for inner-societal equivalents in the form of democratic elements.

parliaments (and a chamber of state representatives).[17] Even in the World Security Council a fundamental principle of the Charter must be made procedural, namely, that of the sovereign equality of all member states (Maus 2007: 380). Only then would the participation of all states in the decision-making be assured, independent of their economic and political power.

Beneath the level of world organizations one can already recognize indications of the constitutionalization of democratic participation. By now, political affiliation has been detached from the general state citizenship that encompasses all rights. Regional and international norms ensure entitlements for the individual beyond nation state borders (above all, at the EU level), whereas the political activities of the citizens are positioned at local, regional and international levels (see Benhabib in this volume). Decentralized, deliberative forums for issues such as human rights, environment, health, retirement plans, and energy are precursors to an institutional participation in brain trusts and decision-making organs. The EU in particular sees itself open to the demand for a democratization of its governance and attempts to honor it, even in the failed constitutional EU draft.

What deliberation alone lacks, as was already mentioned, are the legal instruments to achieve a trans-national institutionalized control of the executive and administration. For this, it requires institutional efforts to *bind* administratively operating international organizations (for example, WTO or NATO) to nation state, democratically achieved decisions. Only by virtue of this is the administrative power subject to the democratic will of the citizens. Legal obligations are a normative pillar of nation state democracies, but are not easy to establish at a trans-national level. The fencing in of the executive by classical international organizations such as NATO still functions trans-nationally to some extent since its representatives must abandon accountability to the constituency 'at home' (Brunkhorst 2007: 337). Even international organizations such as the WTO, the World Bank and the International Monetary Fund, are aware of their external responsibilities regarding justification and have become sensible vis-á-vis those

[17] I cannot expand here on the important problem consisting in that from the perspective of the state the citizens, if anything, speak out against universalizable regulations and duties, which from the perspective of the global citizen would be sanctioned (for this, see Schmalz-Bruns 2007).

concerned. Studies show that precisely these organizations have opened themselves up to participation of NGO's, and this has amounted to the formalization of relations between international organizations and NGO's (Nanz/Steffek 2007: 99). For international organizations, this presents a possibility for tapping into one of the state-independent sources of legitimacy. This indeed weakens the connection back to the domestic constituency, but simultaneously strengthens the position of the citizens that do not come from democratic industrialized states and can count on support from NGO's.

Foreseeably, this can account for substantial differences regarding the openness of the different international organizations vis-à-vis civil society groups. Whereas in the project-oriented international organizations specializing in humanitarian aid, economic cooperation, human rights work, or the environment (*Forest Stuartship Council*) there is intensive cooperation, the large economic organizations (WTO) open up only moderately (NGO's have consultation rights there), and the financial organizations (IMF) next to nothing at all. This reluctance is explained by the danger of counter-productive speculation (Nanz/ Steffek 2007). The fencing in of administrative instances is also difficult because in addition to the national parliaments there are other trans-national law-giving instances. Overriding national parliaments, an arbitration added to the organization becomes a legislative organ (Brunkhorst 2007: 337).

Hence, what is finally needed is a trans-national expansion of the existing legal guarantees of rights through which the equality of the bargaining partners can be achieved independently of economic and political bargaining power. Independent arbitration is an important step on the way to a trans-national legal guarantee of rights and, next to the signs of a self-developing democratic legitimation, a further aspect of the constitutionalization of international relations. Since the nineties instances similar to courts have been created for a range of international procedures, which provide a binding interpretation of international norms of law and an at least approximate equality of the parties. An investigation by Bernhard Zangl shows that the juridification of international procedures for disputing settlements has led to the fact that the member states of the OECD are now more ready to follow the procedures (2006: 237 ff.). The increase of instances of dispute settlements is of enormous importance for the equal treatment of parties of varied power when laws have been breached. However, it is also beyond

question that the organs for settling disputes judge independently, above all from a political point of view, when the judges belong to a permanent judicial panel and do not receive their salary from 'their' state or from private actors (Ibid: 51).

3.3 Public Spheres

The inclusion of marginalized, relatively powerless, economically deprived population groups affected by trans-national decisions depends decisively on the pressure of the public spheres on the international organizations. The significance of the public spheres has been subject to a considerable change in the last thirty years. In the seventies and eighties 'civil society' was still a political space for the autonomous self-organization of the citizens, who defied the military regimes in Latin America and Eastern Europe.[18] In the nineties an increased critique emerged against the 'tamed' social movements that appeared in the form of trans-nationally operating NGO's and it clearly suited everybody, from the activists to the trans-national entities and the international government organizations (Chandhoke 2003: 90–137). Yet the NGO's embody the promise of externalizing the 'inner': protests, ideas and activities become global (Kaldor 2003: 591). For this reason they are the opposite of the terror that internalizes the 'external' above all by evoking angst among the population by means of repression, violence and arbitrariness, and by wanting to strangle any civic commitment. Despite the danger of global terror, social movements and NGO's that lobby international organizations have not let themselves be pushed back.[19] The gap between professionally working NGO's and social movements is often not as large as feared. For, NGO's rely on weak or informal public spheres, those public spheres that can prosper under the shadow of the fundamental right to freedom, but without having decision-making authority at their disposal (Fraser 2001; Brunkhorst 2002a). Their strength lies in being able to oppose something beyond the 'domain of spontaneity' (research, mass media, law and art) to the continuously threatening encroachments via the system-instrumental domain of organization (administrative control). However, faith in the vigilant public sphere,

[18] For Latin America and the affiliation to international networking, see Keck/Sikkink 1998; for a theory of civil society and Eastern Europe, see Cohen/Arato 1994.
[19] For a good overview of the different activities, publications and counter-positions, see Broad 2002; see also Keane 2003.

coupled with the supposition that bargaining in international organizations proceeds through deliberation, occasionally obstruct the view of the institutional necessity of fencing in the unleashed administrative and private law systems under the condition of flagging nation state sovereignty.

Hence, informal public spheres must be completed through formal ones that are assessed not only by the practical implementation of elections and referenda; they also establish hard law, that is, enforceable law and possibilities of action at all levels of interpretation, concretization and implementation of the law. They make possible a structural coupling between statements, political actions, and civil disobedience, on the one side, and test cases and verdicts, which can effectively enforce civil and international law norms, on the other. Examples of this can be found in international labor laws, where companies in Indonesia have been accused before courts in California of violating legal labor standards. A negative example in which the informal public sphere remains actually weak are the street children in Brazil, where despite spectacular international protests by NGO's no proper criminal proceeding following the rule of law has taken place (Brunkhorst 2002a).

3.4 Institutional Context

These empirically substantiated achievements show that we do not have to accept the 'powerlessness of the ought'. It must be added that present developments in the domain of trans-national governance, as well as in international law, can be understood as *institutional context* that, insofar as it generates pressure for justification and control, advances the implementation of legitimate processes of juridification. To name only one example: by now a juridical network has developed through the implementation of human rights obligations for collective, private actors. Among these are formulations of international liability for private actors, indictments regarding complicity with these same actors when it is a matter of grave human rights violations, even ILO agreements and private-public partnerships, such as the Global Compact (Brinkmann/Pies 2003; Kreide 2007). They present empirical structural inducements that make it difficult for the global actors to reject deliberative rule-setting processes and to prevent other actors from abiding by international law agreements (for instance from the *International Labour*

Organisation – ILO) and being subject to an independent jurisdiction. The limits of the 'disembedding' (Czada 2003) of the law and even of the market from political contexts lay in deliberative action.

4. Conclusion

Through the juridification of international relations trans-national governance seldom runs along informal paths, and is rather strengthened in legally formalized, decentralized paths. However, according to the argumentation, this development is highly ambiguous. On the one hand, as a consequence subjection to rules and authoring of rules drift apart from one another; de-juridification is accelerated through deformalized law and a missing law bindingness of the civil law regimes; and a de-politicization of political decision-making processes is advanced. On the other hand, juridification recovers the potential for taming precisely these 'dysfunctionalities'. Law then becomes the engine for the development of legitimate global forms of government.

Against three prominent formulations I have argued that trans-national governance forms are legitimate when, firstly, a deliberative practice closes the gap between being affected by and setting rules; second, when through the anchoring of democratic elements de-juridification is counter-acted; and, third, when those involved can trust in the sensibility of the rule-setting instances vis-à-vis the 'input' from the different public forums. A democratic trans-national government binds deliberation and democratic elements together: without democratic elements it amounts to the exclusion of marginalized minorities, whose position is perpetuated in informal mechanisms of power of the majority. Without deliberation, however, the practice becomes trivial, the complexity of the problems to be solved is not done justice to and becomes less important for those involved, for whom the results are merely decreed (Brunkhorst 2007: 333).

The potential for a critique against the existing legal relationships feeds on the normative integration of the global society. Without societal resistance against the colonialization of the global society through juridification, functional differentiation proceeds unhindered. In the end, only the unbridled force of the public spheres and the domesticating power of legitimate *hard law* can call a halt to this process.

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