Justice and/or Democracy?

Power and Justification in the EU and other International Organizations

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The main task of international organizations is to provide a corrective mechanism to normative and functional failures of the nation-state under conditions of interdependence. Assessments of the legitimacy of international organizations should judge them to the degree to which they fulfill that task. The adequate normative yardstick to be applied is justice, not democracy. The article develops an understanding of justice as the 'right to justification' and identifies three major obstacles of realizing it under conditions of the international system. The main part of the article is devoted to explaining how supranational organizations help overcoming these obstacles and how they open up a new chance for transnational justice. The concluding section summarizes the argument and discusses its relevance for the debate on the legitimacy of international organizations.

1. Beyond the Democratic Deficit[1]

Much of the debate on the legitimacy of the EU and other international organizations is built on the assumption of a universal applicability of the concept of democracy. Conceptions of legitimate governance are exported from standard democratic theory and applied to the EU without systematically investigating whether the notion of democracy is the adequate standard at all. Democracy, so the implicit argument, is a value that cannot be meaningfully be disputed. It is a normative good in itself and therefore applicable always and everywhere, independently of whether the object under scrutiny is a city, a state, a region or an international organization. Such an approach is difficult to justify both for theoretical and empirical reasons.

On a theoretical level, it ignores the insight that all theories are built on abstractions and that they therefore only work under specific conditions. In positive theory, this insight is reflected in the use of scope conditions, i.e. the identification of conditions which limit the range of applicability of a certain statement. Scope conditions are of eminent importance in most positive theories, for example, in liberal intergovernmentalism or in neofunctionalism. None of these theories claims to offer a universally valid explanation but limits its propositions to certain specified conditions. The modesty that accompanies the notion of scope conditions is sometimes lacking in normative theory. It is not clear, however, why the logical nexus between abstract categories and a limited applicability of the theory (that is established on those categories) should not hold true for normative theory, too. The implication of this argument is that we should ask any normative theory of democracy to identify its analytical abstractions and to explicate in how far they limit the applicability of the argument.

There are also good empirical reasons to be skeptical about the analytical usefulness of the notion of democracy for justifying the EU. The EU lacks all those political competences which lay at the heart of democratic governance and which have historically been the most prominent resources for the provision of public order: the powers to tax, to en-

1 Earlier versions of this paper have been presented to the conference on "Justice and Global Democracy", Frankfurt am Main, May 25-26, 2007 and the workshop on "Transnational Standards of Social Protection: Contrasting European and International Governance", Bremen, November 23-24, 2007. The author is thankful for critical comments by the participants of both meetings and especially Andreas Niederberger and Karl-Heinz Ladeur.

force legally guaranteed freedoms by means of coercion, and to provide security against foreign powers (Tilly 1990). The EU has none of these competencies. It does not levy taxes, it commands no police, and its defense and security policy is embryonic if not less. In addition, even after the Treaty of Lisbon it still is the case that the supremacy of European law is not explicitly mentioned in the law of the Union and that every member state could by means of simple legislation revoke its "Anwendungsvorrang". The EU – or any other international organization – also has no demos. European-wide public discourses emerge only sporadically as responses to political scandals or soccer championships. The nations-state is still the primary locus of allegiance in Europe and the place where political discourse and democratic reflection take place. Democratic theory, be it in a Rawlsian (Rawls 1971), a Habermasian (Habermas 1992) or in a Dahlian (Dahl 1998) fashion, emphasizes that democracy necessarily entails a demos which identifies with a certain authoritative structure (even if only understood in the Habermasian term of *Verfassungspatriotismus*). There can be no democracy without a demos.

Democracy is also hard to imagine without firm borders. Although many speculate about the possibility of democratic governance in functionally specified policy networks, all established theories of democracy underline the importance of drawing a line between those who are insiders and those who are outsiders. It is common sense that democratic procedures are instruments for identifying and implementing those normative ideas as they are held by a people with a clear territorial and juridical distinction. If adopted, those ideas become formal rules and apply to all people inside the demarcated territory and to no one outside that territory. The EU does not only violate that principle, but follows an entirely different logic. It does not have fixed borders but consists of a set of functionally specified political regimes with changing memberships. Whilst some regimes like the CFSP accept only governments as members, others guarantee broad rights to individuals. In addition, some regimes cover all 27 member states of the EU whilst others are more exclusive. The EU does not limit its influence to its 27 member states but is proud to export its norms to its neighbors and to make close cooperation dependent on their compliance with the EU's standards of democracy, human rights and, last but not least, industrial products. In sharp contrast to any nation-state, the EU does not respect territorial

boundaries but, in the words of the Declaration of Laeken, only those of "democracy and human rights".[2]

2. Transnational Justice as a Right to Justification

One option to avoid the categorical mistake of applying a normative concept to an empirical reality which is structurally incompatible with its empirical pre-conditions, is to ensure that the analytical categories which we are using in normative theorizing are empirically explained. Normative categories should be formulated with a view to the connection between 'ought' and 'can' and reflect an awareness that normative requirements will only be convincing to the degree that we provide evidence that they are indeed "fit for reality". It is true that such evidence is often hard to collect. Any statement about the possibility to transform normative ideas into real-world conditions must always remain to some degree speculative and can be formulated only hypothetically. Nevertheless, in order to make the criterion operational we can consider all those normative ideas to be prima facie fit-for-reality, which build on some existing element of the empirical reality and merely expand its reach rather than invent something completely new. That idea reflects the insight of Rawls (1999: 15) that a necessary precondition for a convincing normative concept is "that its major principles and instructions are practiced and can be applied to existing political and social institutions". Hence, such a concept expands "the borders of what we usually consider practically-politically possible" (Rawls, 1999: 4) while remaining at the same time on solid empirical ground.

An interesting possibility to move in that direction is offered by a concept of justice which focuses on the right to justification. An important advantage of switching from the democracy discourse to the justice discourse is that the notion of justice can indeed be applied to all political contexts. Justice is "the prime social virtue, the most important virtue of social institutions" (Kersting 1993: 31). No other quality can substitute for a lack of justice. Only conditions that are just, and never unjust conditions, are acceptable. Everything which is unjust has to be rectified through practical political measures and im-

[2] "The European Union's one boundary is democracy and human rights" Declaration of Laeken 2001, European Council.

proved upon. Democracy and justice are closely related to one another. Democracy is cherished by most of us because of its contribution to the fostering of just politics. We cherish democracy because is the political procedure with the highest probability to produce just outcomes.

Following Rainer Forst, the right to justification is a most basic human right.[3] It is centered on the idea that any restriction of individual freedom must be justified by whoever causes that restriction or has the intention to do so. This argument takes the individual freedom from domination as a starting point and places any restriction of this freedom under the reservation of good reasons. In crafting the argumentative design of a justification, the justifying person or organization cannot act arbitrarily but must apply good reasons. Only those reasons are to be understood as good reasons which fulfill the two minimum conditions of reciprocity and universality, meaning that nothing more is demanded from anybody than we are willing to concede ourselves and that they apply to everybody to the same degree.

Understanding justice as the 'right to justification' gives the notion of justice an intrinsically procedural and discursive character. Any question about the specific implication of justice in a specific situation is answered with reference to a normatively demanding discursive procedure. A so-defined right to justification can well be applied to international relations. It resonates with the idea of self-determination and refers to the basic right of every society to choose, independent of foreign influence, its political status, its form of state and government and its economic, social and cultural development. As a matter of principle, restrictions of this freedom are acceptable only when a state either voluntarily complies with an international legal provision, when *ius cogens* is applicable, or when other good reasons can be articulated.

It is important to note that self-determination today cannot be equated with autonomy. The global condition of complex interdependence implies that one can neither pursue a successful unilateral money and currency policy nor conduct a sensible unilateral security policy. All these policy areas are characterized by a significantly reduced ability of single

[3] Cf. Rainer Forst 2007: Das Recht auf Rechtfertigung. Elemente einer konstruktivistischen Theorie der Gerechtigkeit. Frankfurt am Main: Suhrkamp.

states to realize their preferences independently of the actions of other states. It is a generally shared insight therefore that complex interdependence among national societies has turned a purely national organization of politics into a problem for democratic governance itself: in a great number of issues areas, from environmental degradation to security affairs and migration issues, the single nation-states is increasingly inappropriate for the formulation and implementation of effective policies. The normative deficiency of the nation-state is not limited to its capacity as an effective problem-solver, however. It also applies to the related structural phenomenon that the political measures taken by individual states often have effects for other states. The decision to raise or lower the interest rates of a central bank may have the effect of making neighboring countries more or less attractive to capital. The easing or restricting of national provisions for immigration will likewise re-orient the decisions of individuals seeking refuge from violence or a better income and have an effect on the relative attractiveness of other states. The national establishment of certain requirements for legally sold products will make it more or less costly for producers in foreign states to import their products and may lead to losses or gains or employment opportunities. All these effects are structural phenomena under conditions of interdependence. Without being embedded in an international structure of policy coordination, the individual nation-state has little incentive to take the external effects of its actions seriously, i.e. to systematically integrate them as an important calculus into its own decision-making practices. The basic normative principle that those who are affected by a decision should have a say in its making, is therefore systematically violated by almost all interdependent nation-states if they are not embedded in an international structure that fosters the internalization of the external effects of domestic decision-making.

Thus, international organizations such as the EU, the WTO, the ILO or even the United Nations (UN) derive their legitimacy first of all from their function as a correcting mechanism for this systematical nation-state failure. They foster the right to justification by making interdependent nation-states systematically aware of one another, by helping to pool resources that are necessary for tackling pressing cross-border problems and by providing an organizational setting, in which the responsibility to take the concerns of others states seriously is transformed into legal obligations (Joerges/ Neyer 1997, Joerges

2000). International organizations, therefore, carry, first of all, the potential to remedy the structural shortcomings of the nation-state and should be seen as important and necessary devices for adapting the nation-state to the condition of complex interdependence. Today, insisting on a traditional form of self-determination that emphasizes the right and the ability to unilateral action (sovereignty and autonomy), leads not to more freedom, but runs into the paradox of self-chosen heteronomy. A modern concept of self-determination entails participation in the political discourses and justificatory practices of international organizations and of multilateral cooperation.

3. Obstacles to Transnational Justice

Even if the right to justification is a sound request from a normative point of view, it is clear that the practice of the most international organizations, including the EU, differs sharply from the normative ideal of a universal right to justification. It is three obstacles which are most serious:

1. The fact of asymmetrically distributed international power resources poses a major challenge to the idea of a transnational discourse on justification. From world trade politics to environmental politics to international security politics, we observe that the more powerful states dominate the policy-making process, while the smaller states have to subordinate themselves to the policies agreed upon by the bigger ones. Due to the unequal ability of states to transform their interest into international norms binding for other states, many international regimes reflect the particular interests of a limited number of powerful states only. Many international regimes produce heteronomy for weaker states instead of international justice. Within the World Trade Organisation (WTO), for instance, the big member states until recently negotiated all important agreements among themselves in a so-called “Green Room Procedure” and announced their findings to the secretary general. He then presented the outcome as a “consensus” to the rest of the mem-

ber states (Kwa, 2003; Steinberg, 2002).[4] Obviously, any such procedure leaves little scope for a justice-oriented discourse of mutual justifications.

2. Power asymmetries exist not only in the horizontal dimension of cross-border politics but also in its vertical dimension. In international politics, executives have far more leeway to use their discretionary powers than in the domestic realm (Moravcsik, 1994). In democratic domestic politics, governments act as the legislature's executive organ and normally are delegated the task of implementing its decisions. By contrast, in international politics, executives generally act as gatekeepers for political proposals and decide which issues are discussed and being dealt with at all. The legislative branch can only ask its government to put an issue on the international agenda, thereby promoting the involvement of other governments. Unlike national politics, the legislative branch has no right to set the political agenda of an international organization or to call on a government, or, in this case, a group of governments, to actually implement a certain legal norm. Governments are by and large free to set the international agenda as they wish and to decide among themselves upon regulations. It is true that international rules concluded among executives become domestic law only after a national parliament has ratified the legal act, thereby transforming it into a national legislation. Thus the legislative branches retain a veto – formally. But at the same time, a parliamentary veto against a legal act concluded among executives is, for good reasons, very rare. Vetoing a legal act by refusing to ratify it is a massive declaration of mistrust from the parliamentary majority towards the government. This is unlikely to happen in parliamentary systems where the government can rely on a parliamentary majority. The problem of executive empowerment through international negotiations is aggravated by the fact that executives do typically possess better information about positions and scopes of other executives and are therefore able to assess the politically viable with greater accuracy. Through their membership in international organizations such as the OECD, the World Bank or the IMF they have access to a kind of specialized expertise that is not – or only with great efforts – available to MPs. Thus, a parliament arguing against an inter-

4 For an analysis on power politics in the EU see Tallberg (2006).

nationally negotiated regulation and denying its ratification implicitly arrogates to itself a better knowledge of the politically viable than the executive – despite being less informed. A denied ratification is also improbable because it is the executives themselves who decide on which information about the positions and scopes of other executives to pass on to the media and parliament. Thereby, the executives do not only have the possibility to determine the international agenda; they are also in a strong position to influence the perception of the respective legislative (and the national public) about what is politically viable at all.

3. A third crucial obstacle relates to the non-coercive character of the international system. Justice-oriented discourses presuppose that successful justification is a necessary condition for implementing a certain policy and that therefore any failure to explain and justify incurs costs for a policy entrepreneur. Costs, however, will only incur to a policy entrepreneur if the group toward whom the justificatory effort is directed has some enforcement capacity which it can exert in case of a failure, i.e. a non-convincing justification. Because the international system is a self-help system, however, the power to impose costs on other states is structurally limited to the powerful states. It is for this reason that the limited capacity of the international community to provide incentives to powerful states to comply with their legal commitment is often described as the *Achilles' heel* of effective global governance (Young, 1999, chap. 4). Some even dispute that international legal rules are proper legal rules. And indeed, in international relations it is only too often the case that weaker states have a formal right to some justification, explanation or even compensation but lack any means to enforce that right. Justice-oriented discourses therefore presuppose that not only strong but also weak states have access to effective enforcement capacities in order to give a significant incentive to powerful actors to take justificatory discourses seriously.

4. Supranationalism as a New Context for Justice

The considerations above are hardly apt to found great optimism with regard to the chances of a justice-oriented transnational discourse. The international polity is a space in

which horizontal and vertical power asymmetries, and the inexistence of a global coercive power, are important factors in policy outcomes. Under conditions of supranational integration, however, much of the scepticism can be relaxed. Supranational structures combine a vertical and hierarchical legal order with a horizontal and non-hierarchical coercive order (Weiler, 1981).[5] They are neither state nor international politics. Supranationalism is established not on a monopoly of power but on an oligopoly of power. All member states remain in full command of their legitimate monopoly of coercion and none of that is transferred to the supranational level. Supranationalism is likewise different if compared with traditional international diplomacy. Vertical legal integration ties individuals, governments and supranational organizations together into a multi-level legal structure in which the legal requirement to justify and give reasons is codified and can be enforced by both supranational and domestic courts (Pernice, 1999). Law in a supranational setting therefore is similar to national law in that it distinguishes between basic norms (primary or constitutional law) and secondary law (statutory law) with the former more difficult to change than the latter. Individuals are not only subjects and affected parties as they are under international law but have domestically enforceable rights.

4.1. Transforming Bargaining into Legal Reasoning

A supranational context has important implications for the probability of effective justificatory discourses. In order to understand the difference that supranationalism makes, it is important to recall that power in international relations is most often exerted in the mode of intergovernmental bargaining. Preferences of states are treated as intrinsically legitimate reflections of domestic political processes. International negotiations are not about justifying governmental preferences but about bargaining the differences.[6] Under conditions of supranationalism, i.e. in a highly legalized setting, bargaining is in general an inappropriate mode of interaction. Highly legalized settings such as in the European Community (EC), prescribe both material and procedural norms against which the preferences

5 For a discussion of the sui generis character of the EC see Jachtenfuchs (1997).

6 According to Elster, bargaining refers to a mode of interaction in which an actor tries to change the behavior of other actors by promising or threatening consequences for certain actions taken by these actors (Elster 1998a).

of actors are to be weighted. Complying with theses norms necessitates justifying preferences by explaining how they relate to these norms. Legal integration forces actors to abstain from simply issuing threats and promises and requires them to reformulate their preferences in the language of law (by referring to material and procedural norms). Legal integration transforms bargaining into legal reasoning.[7]

It is true that legal reasoning is not immune to power asymmetries. Good arguments are often expensive arguments because they require good lawyers and must often refer to technical expertise or scientific evidence. It is also true, however, that reformulating preferences in the language of law acts as a filtering mechanism which limits the range of preferences that can be put on the table to those preferences which can be justified publicly. In his discussion of the analytical differences between arguing and bargaining, and their effects on political outcomes, Elster refers to this effect as the "civilizing force of hypocrisy" (Elster, 1998b: 104-105 and 111): In order to argue, speakers must hide base motives. Hiding base motives, however, requires proposals to be subjected to a number of constraints which may modify them quite substantially. The first constraint is the 'imperfection constraint', which implies that proposals must show less than a perfect coincidence between private interests and impartial arguments in order to be perceived as good arguments. Arguments must also be in accordance with positions that have been formulated at an earlier point in time and be maintained even if they no longer serve the speaker's interests (consistency constraint). Otherwise, a speaker will easily be viewed as acting opportunistically and lose his or her credibility. And, finally, arguments must abstain from making claims which can easily be shown to be incorrect (plausibility constraint). Together, all three constraints both work as a filter against openly selfish claims and thus civilize interaction by forcing disputants to engage in argumentative interaction. Legal reasoning therefore is a deliberative mode of interaction which forces actors to perform in accordance to shared legal norms even if they only have self-minded interests.

By fostering argumentation in cross-border policy-making, supranationalism implies a change in the mode of representation. In international relations, states are in general represented by governments. International negotiations are in fact intergovernmental nego-

7 On the concept of legal reasoning see Kratochwil (1989).

tiations in which the weight of an argument depends on the power resources of the state that is represented by that government. The importance that is attached to good arguments in a supranational context significantly changes this. Under conditions of legal reasoning, it is no longer a state's vulnerability to a failure of negotiations which decides who gets what, but the quality of the argument which the opposing sides can make. Supranationalism therefore is about the representation of arguments and not of power and preferences. Under conditions of anarchy, states bargain. In supranational structures, states argue.

Although it is hardly possible to observe instances of purely legal reasoning in any real-world organizational context,[8] it is also true that most political discussions in close-to-supranational entities like the EC or (with even less approximation) the WTO show significant elements of such a justificatory balancing of arguments. Art. 28 and 30 of the European Community Treaty (ECT) describe the prohibition of discriminatory trade practices and list those reasons which can be brought forward in order to justify an exemption. The overwhelming majority of political disputes and decisions of the European Court of Justice (ECJ) in the EC fall under the rubric of these legal provisions. Even more important, most legal (and even most political science) scholars agree that the decisions of the ECJ are hardly ever motivated by the difference in size or wealth of the disputing parties (Alter, 2001; Burley and Mattli, 1993). It is arguments and justification not preferences and power which carry the day. Likewise, the Dispute Settlement Body (DSB) and the Appellate Body (AB) of the WTO most often have to decide on disputes that take issue with equivalent principles of non-discrimination and reciprocity as well as a multitude of exemptions that define and restrict the normative framework described. As in the EC, most scholars here agree that the DSB/AB's decision follow the logic of legal reasoning and are by and large immune to power concerns (Zangl, 2006; Hudec, 1999; Park and Umbricht, 2001).

It is important to reflect upon a final caveat: even if supranational organizations have the capacity to transform bargaining into legal reasoning, they are nevertheless founded on an original bargaining process and often reflect to some degree the outcome of an asym-

8 For an empirical research project that tried to describe instances of international arguing see Nicole Deitelhoff/Harald Müller (2005).

metrical distribution of power. The founding of WTO, for example, is described by some as reflecting a blackmailing process in which the Northern states threatened to conclude among themselves a mini-WTO if the South world would not accept the inclusion of trade related intellectual property rights (TRIPS) and a General Agreement of Trade in Services (GATS) into the legal framework of the new WTO (Kwa, 2003, Steinberg, 2004). One is tempted to assume thus that even an ideal mode of transnational legal reasoning only applies those procedural and material norms which have been dictated by the powerful actors. If that were true, then legal reasoning would only perform as if it were a neutral and fair language but in fact would express nothing but the hidden dominance of the powerful. It is also the case, however, that the law is a living thing which adopts its own dynamic once it has been established. The practices of the ECJ and the DSB give clear evidence that Courts are only to a limited degree under control of the member states and have some leeway in interpreting the law in a way which is compatible with shared notions of fairness. Burley and Mattli have explained the incomplete political control of the member states over "their" Court with reference to the argument that the law acts "as a mask and shield" against politics (Burley/ Mattli, 1993). It is also worth mentioning that intergovernmental bargaining hardly ever takes place in a normatively void environment. International customary law provides a distinct normative environment that encompasses compelling formal and informal norms such as the ideas of reciprocity, sovereignty, pacta sund servanda, and ius cogens. International law is thus not only the product of intergovernmental bargaining but also the normative frame in which negotiations are conducted.

4.2. Safeguarding Executive Responsiveness

Legal integration in a supranational context is not limited to the horizontal level of intergovernmental relations but also applies to its vertical dimension. In abstract terms, vertical legal integration can be understood as connecting supranational, national and individual actors by means of legal provisions so that justifications can and must be exchanged. Legal integration thus is not limited to relations among supranational organizations but covers the whole range of relevant political actors in a multi-level structure. Supranational legal integration is highly relevant for establishing the preconditions of transna-

tional justificatory discourses since it has the potential to safeguard that governmental and supranational actors are compelled to comply with the requirement to justify their actions and that their policy discretion is not expanded beyond a degree which can be justified towards their respective principles.

At member states level, legal integration can tie executive discretion to a mandate formulated by a parliamentary committee. The Danish Folketing, for example, exercises its control over the Danish government in European affairs by clearly outlining in advance which positions the governmental delegate may present and which are beyond (cf. Dosenrode, 2000; Nehring, 1998). The responsible minister has to present his proposal in person to a specialised European Affairs Committee of the Folketing and to reach a supportive majority. The members of the committee do not only vote on the proposal but have the right to propose amendments. The minister has no right to enter any negotiations in Brussels if she does not convince the majority of the committee of his proposal. Likewise, if the negotiations in Brussels seem to make it necessary to change the Danish position and if she wants to go beyond the authorisations given by the mandate, she must present new suggestions to the committee and wait for new instructions. The integration of the Folketing into the daily decision-making in Brussels is an important element for explaining the high political awareness in Denmark toward European affairs. European politics is not limited to executive discretion but an essential part of domestic legislative politics. Although this awareness may from time to time lead to a critical stance of the public toward the EU, it is obviously highly attractive from the perspective of a justificatory discourse.

The justificatory discipline of supranational legal integration also covers relations between the EC's supranational institutions and its member states. The delegation of competences to the Commission is almost always only conditional, and subject to control mechanisms. The provisions of Art. 202 ECT are a typical example. The article stipulates in its first sentence that the Council delegates all competences to the Commission to implement its legislative acts. The second sentence, however, immediately adds that the Council may establish certain modalities for the execution of these competences. In practice, the second sentence has been a major reason for the huge growth of the European comitology system, which acts as a safeguard against the Commission becoming a "run-

away bureaucracy" (Pollack, 1997). Even in an area like external trade, where the Commission has had broad competences already codified in the Treaty of Rome, it must justify its international policies towards the member states. According to Art. 133 ECT, the Commission can act only after it has presented recommendations to the Council of Ministers and after these recommendations have been authorised. In addition, every international legally binding agreement that was concluded by the Commission on the part of the EC is subject to critical scrutiny in the Council.

It is true that all of these mechanisms do not provide any guarantee for the complete lifting of vertical power asymmetries between the supranational bodies of the EU, the member states and individuals. Organizational procedures never determine action but only provide incentives to act according to prescribed rules. It is also true, however, that the list above is far from complete and only presents selected parts of a picture which in reality is much more complex and imposes a much more rigid discipline than the three mechanisms imply. In addition, the very existence of these procedures gives evidence that supranational legal integration is not only a means to expand governmental discretion but that it imposes at the same time additional needs for justification. Supranationalism therefore does not just expand or limit governmental discretion but provides an argumentative discipline according to which it is to be exercised.

4.3. Healing the Achilles Heel

It is an often cited conclusion that "(a)lmost all nations observe almost all principles of international law and all of their obligations almost all of the time" (Henkin, 1979: 47). This observation has recently been rediscovered by scholars endeavouring to understand why and when international regulations are complied with.[9] According to their findings, good legal management of rules is a most important factor for eliciting compliance. Chayes and Chayes (1993: 205) have put that finding quite clearly: "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." It is the power of the legitimacy of legal norms, the way legal

9 For an overview see Mitchell, R. B. (1996).

norms work once they are established, and the smart management of cases of alleged non-compliance, which leads to compliance.

The reasoning of Henkin and Chayes/Chayes is based on the insight that a rule which is part of a broader legal system usually has a far stronger compliance-pull than an individuated legal rule, because the former is part of a larger normative design and embodies basic principles which are generally perceived as being legitimate or just. Even in the light of explicitly opposing interests, specific international legal norms have a high probability to be observed because they are perceived by the members of the international community as being part of an encompassing normative superstructure. The blatant, unexcused transgression of rules that are founded on broader ethical principles is thus deemed to be synonymous with a general repudiation of the normative fundaments of international cooperation.

It is also important to underline that a well-functioning international legal system is both in the interest of weak and strong states (Hurrell 1993). For weak states, an international legal order is an important precondition for having any chance at all that their concerns are being heard and taken seriously. Weak states will only then have a chance to succeed in international negotiations against more powerful states if they have enforceable rights. Likewise, powerful states are normally those states which have a prime interest in the stability of an international order. Any such stability, however, depends on rules which are accepted by most, if not all, states. Acceptance for rules presupposes that they are not the product of purely arbitrary decisions but are based on commonly agreed ethical standards and part of an overarching normative superstructure (see above). In short, stability requires law. In this sense, it is indeed appropriate to argue that legal rules possess a compliance pull of their own (Franck, 1990).

It follows that the more a rule is considered part of a legal system, or, to put it differently: the more an international organization is legalized, the more likely compliance with the rule becomes. Empirical evidence is highly supportive of the legalization hypotheses:[10]

10 See the contributions in the special issue on Legalization of International Organisation (54:3) and in Zürn/ Joerges (2005).

The impressive compliance record of the EC is hard to explain without referring to its character as a legal community (Zürn and Neyer, 2005). The strongest single procedure with regard to compliance enforcement is the preliminary ruling procedure according to Art. 234 ECT. It directly connects governments to control exerted by their citizens and instrumentalizes national courts as agents of supranational law. Art 234 ECT provides that any national legal person may sue its government if that government has violated a legal provision of the EU and inflicted damage on that legal person. Governments are thus not only liable towards each other by means of an international legal obligation but have likewise adopted responsibilities towards their citizens.[11] A supranational legal order is thus categorically different from a merely international legal order because individuals may use their member state's courts against political decisions taken by the government or parliament of that state. It is not surprising that the direct linkage between the EC's supranational institutions and its citizens is often interpreted as a major constitutional step towards the establishment of a European political order sui generis (cf. Dehousse, 1998).

5. Multi-Level Legitimacy: Justice and Democracy

My talk started with the diagnosis of a categorical mistake often made when reflecting about the adequate normative foundations of international organizations. International organizations have neither the capacity for state-like governance nor will they acquire in the foreseeable future political competences which cover more than narrowly defined policies. It is inadequate therefore to assess their legitimacy in categories taken from the analysis of democratic statehood and more appropriate to consider their contribution to transnational justice. Although this argument seems to put primary emphasis on justice and to downplay democracy, it is ultimately oriented at explaining the relationship be-

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11 See Rs. 26/62, van Gend & Loos (N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos gegen Niederländische Finanzverwaltung), Urteil vom 5. Februar 1963; Slg. 1963, 1, 24.

tween national democracy and transnational justice: the normative promise of national democracy to foster self-governance will only survive globalisation if it is supplemented by an organizational layer that fosters transnational justice. And, vice versa, if transnational justice is to have a realistic chance, it must be established on strengthened domestic procedures of strong domestic control mechanisms, which guarantee that the executives remain closely connected to their constituencies and national parliaments. Legitimacy in the new international system can only be adequately conceptualized if it is explained as a normative multi-level structure in which the domestic and the international level are closely interwoven.

Only if interdependent national democracies are supplemented by a transnational layer of justificatory discourses, can we expect them to systematically respect the external effects of their decisions as a relevant factor for domestic decision-making. Democracy entails that those who rule and who take the decisions are identical with those who are addressed by those decisions. If that standard is to be respected, i.e. if we are not ready to accept the effects of other nation-states' decisions without having had the chance to make our concerns heard in 'their' decision-making processes, and if we are not willing to make other citizenries subject to our decisions, then we have to work for a system of collective multi-level governance, where national democracies open up to the concerns of foreigners. Otherwise, the external effects of the internal practices our democracy will impose illegitimate costs on foreigners, or, if foreign democracies do so, on us. Under conditions of interdependence, transnational justice and national democracy mutually support and necessitate each other.

The good news of this article is that supranationalism can deliver some of the functions which we traditionally attach to democratic procedures. Supranationalism promotes the cause of justice by providing an effective remedy to horizontal and vertical power asymmetries, and to the problem of non-compliance. Legal integration transforms intergovernmental bargaining into transnational deliberations by providing incentives to governments to reformulate preferences in the language of legal reasoning. In doing so, legal integration transforms the mode of representation from preferences and power to arguments and reasons. In addition, legal integration has the capacity to provide mechanisms which safeguard against the impact of vertical power asymmetries on the justificatory

discourse. Legal integration, finally, exerts a compliance pull of its own by increasing the costs of non-compliance to both powerful and weak states.

It is true that legal integration has no built-in causal connection to justice. At the end of the day, even the best procedures only provide incentives. In addition, it must be underlined that they will only be effective if the powerful actors realize that it is indeed in their best interest to accept the discipline that is imposed on them by supranational legal norms. If powerful states prefer to go it alone, supranational organizations have nothing but economic and political incentives to change those states' course of action. Real-world supranational integration must be understood as a long-term learning process which may lead to a constitutionalisation of effective justificatory discourses. It is also true, however, that the two real-world close-to-supranational entities that we know, the EC and the WTO, are moving slowly but steadily toward that goal. Both the EC and the WTO embody some significant elements of justificatory discourses and can well be understood as (imperfect) approximations of that ideal. They are both to be cherished for the degree to which they have walked down the road already and to be criticized for the long way that is still ahead of them.