

**Quod omnes tangit:  
Transnational Constitutions Without Democracy?**

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*Abstract: Is the constitutionalisation of transnational regimes accompanied by their democratization – this is a hotly disputed topic in democratic theory and in political practice. Critics invoke a time-honoured principle of democracy: The identity of authors and affected people is the universal core of democracy. However, in its long winding history, this principle had always been re-contextualized. Such a re-contextualization which requires generalization as well as respecification is needed again today under the conditions of transnationalization and functional differentiation of world society. As for generalisation the main thesis is: The democratic principle of political representation, which is the traditional concept of democracy for the nation state, needs in transnational regimes to be replaced by the principle of self-contestation. As for respecification the main thesis is: In transnational regimes, self-contestation is facing context-dependent challenges, which are quite different from those in national political systems.*

WHO CARES FOR REGIME DEMOCRACY?

Is the constitutionalisation of transnational regimes accompanied by their democratisation – this is a hotly disputed topic in democratic theory, but not only there. In the real world, national and international courts, international politics, social movements and the regimes themselves experience the grave democratic deficit of transnational regimes as an urgent problem for which they search novel solutions.

Courts deal with the legitimacy question, when they have to decide whether to recognize the autonomous regime constitutions as valid law. One example may suffice: The case *Waite and Kennedy vs. Germany* confronted the European Court of Human Rights with the question whether the constitution of a transnational regime - of the European Space Operations Centre - could be the object of judicial review.<sup>1</sup> The Court practiced judicial review and established the following rule: If provisions of a regime constitution violate fundamental principles of democratic legitimacy, particularly human rights, the court will declare these provisions as null and void.<sup>2</sup> Thus, the recognition of regime constitutions as valid law depends on the courts' perception of their legitimacy. It is a kind of generalized *Solange*-principle: As long as regime constitutions do not provide for sufficient legitimacy, the courts will not recognize them as valid law. If this becomes a major trend, then courts will exert

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<sup>1</sup> *Waite and Kennedy vs. Germany* (Application No. 26083/94). For a discussion see C. Walter, 'Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law' (2001) 44 *German Yearbook of International Law* 170, at 187 ff.

<sup>2</sup> The provisions in question granted ESA immunity from national jurisdiction.

considerable external pressures on regime constitutions to strengthen the regimes' democratic legitimacy.<sup>3</sup>

For transnational politics Andrew Moravcsik raised the question: "Is global governance [...] democratically legitimate, or does it suffer from a 'democratic deficit'?"<sup>4</sup> This is emerging as one of the central questions – perhaps the central question – in contemporary world politics". In the meantime, with the worldwide emergence of vociferous re-nationalisation movements on both sides, on the political right and on the left,<sup>5</sup> pressures on transnational regimes to deal with their legitimacy problems have been heightened. Moreover, civil society, protest movements, labour unions and stakeholders of transnational regimes are confronted with the strategic alternative: Shall they use their political influence in order to strengthen the legitimacy of transnational regimes or shall they attempt to delegitimize them and shall they push their activities back to the nation states.

And it is in the self-interest of the transnational regimes to confront their legitimacy problem. Ingo Take argues that transnational regimes and private governance regimes in particular, to a large degree depend on the voluntary cooperation of their rule-addressees, therefore they must generate legitimacy from within in order to implement their rules.<sup>6</sup> And their capacity to solve problems in an effective way depends on their acceptance as legitimate actors in the view of their stakeholders.<sup>7</sup>

#### CRITIQUE: TRANSNATIONAL CONSTITUTIONS GETTING PAST DEMOCRACY?

But democratic legitimacy remains the Achilles heel of transnational regimes. Constitutionalisation without democracy – this is the basic tenor of a vociferous critique on transnational constitutionalism.<sup>8</sup> Under a variety of labels such as 'new constitutionalism', 'imperial global state in the making' or 'post-democratic executive federalism', transnational constitutionalism is criticized as a self-serving device for

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<sup>3</sup> On the constitutionalization of transnational regimes via external pressures, L. Viellechner, 'Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law' (2015) 6 *Transnational Legal Theory* 1; id., *Transnationalisierung des Rechts* (2013) 285 ff.

<sup>4</sup> A. Moravcsik, 'Is there a "Democratic Deficit" in World Politics? A Framework for Analysis' (2004) 39 *Government and Opposition* 336, at 336.

<sup>5</sup> While for the political right arguing for a re-nationalisation of globalised policy-areas is business as usual, for the political left this is a rather embarrassing turn of its internationalist past, W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (2014); D. Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (2013).

<sup>6</sup> I. Take, 'Legitimacy in Global Governance: International, Transnational and Private Institutions Compared' (2012) 18 *Swiss Political Science Rev.* 220, at 220.

<sup>7</sup> J.-A. Scholte, 'Reinventing Global Democracy' (2014) 20 *European J. of International Relations* 3.

<sup>8</sup> Most prominent J. Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law: An Essay on the Constitution for Europe' (2012) 23 *European J. of International Law* 335; id., 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' in id., *Europe: The Faltering Project* (2009) 109, at 112. For an elaboration of this critique K. Möller, 'From Constituent to Destituent Power Beyond the State' (2017) 8 *Transnational Legal Theory* (forthcoming); id., 'A Critical Theory of Transnational Regimes: Creeping Managerialism and the Quest for a Destituent Power' in *Contested Collisions: Norm Fragmentation in World Society*, ed. K. Blome, A. Fischer-Lescano, H. Franzki and N. Markard (2016) 255, particularly at 264 ff. For a similar critique on transnational societal constitutionalism, J. Priban, 'The Concept of Self-Limiting Polity in EU Constitutionalism: A Systems Theoretical Outline', in *Self-Constitution of European Society Beyond EU Politics, Law and Governance*, ed. J. Priban (216) 37, at 51 ff.

political and economic elites<sup>9</sup> or for functional social systems.<sup>10</sup> Non-state constitutions may establish successfully the internal procedures of decision making, they may strengthen the rule of law, they may guarantee constitutional rights - but they fail when they are measured against the standards of democracy.

In its insistence on legitimacy principles, which have been developed in democratic theory and political practice, this critique is well justified. It points to one of the main problems of transnational regimes. However, there are elements of hypocrisy and self-immunization in this critique. They are effectively blocking what Roberto Unger calls “institutional imagination”.<sup>11</sup> It is hypocritical when public lawyers and political scientists categorically declare “private” transnational regimes as illegitimate due to their lack of “publicness”, but at the same time they accept their legitimacy without ado if only they are based formally on public law institutions in nation states and in international politics.<sup>12</sup> They ignore empirical studies which demonstrate that several so-called private transnational regimes, for example the private internet governance ICANN, have a considerably better record of democratic decision-making than many so-called public regimes.<sup>13</sup> And when they criticize the undemocratic practices of transnational private regimes, they turn a blind eye and a deaf ear to the massive democratic deficit of national and international public institutions whose “post-democratic” character again and again has been revealed and criticised.<sup>14</sup>

Hauke Brunkhorst, one of the most outspoken critics of transnational constitutions in the name of democracy, suggests that the regimes’ democratic deficit can only be compensated if their constitutions are authorised by political institutions like the European Parliament.<sup>15</sup> How serious is it to rely on such a delegation of power if one realizes that delegation necessarily creates spaces of autonomy that are in fact uncontrollable?<sup>16</sup> Would the legitimacy gap of private transnational regimes vanish when they were institutionalized as the states world’s formal “delegation” of public power and supported by the more than shaky legitimation chain that starts at the bottom with individual citizens in various nations, moves up via representation to the politicians of nation states, further up via interstate negotiations and international

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<sup>9</sup> R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

<sup>10</sup> Möller, op. cit. (2017), n. 8.

<sup>11</sup> R. M. Unger, 'Legal Analysis as Institutional Imagination' (1996) *Modern Law Rev.* 59.

<sup>12</sup> A. v. Bogdandy and S. Dellavalle, 'The Lex Mercatoria of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective' (2013) 4 *Transnational Legal Theory* 59.

<sup>13</sup> In contrast to the usual prejudices, Take, op. cit., n. 6, p. 222, comes to the conclusion that none of the empirical case studies show that „international governance in principle can claim a higher degree of legitimacy than transnational or private forms of governance.“

<sup>14</sup> C. Crouch, *The Strange Non-Death of Neoliberalism* (2011). This applies particularly to Habermas’ somewhat weird assertion that transnational democracy will be realized if political power is concentrated in the hands of few global players (like USA, China, EU), because they are able to negotiate binding compromises and implement the resulting rules for large territories.

<sup>15</sup> H. Brunkhorst, 'The Beheading of The Legislative Power: European Constitutionalisation Between Capitalism and Democracy' in *The European Union in Crises Or The European Union as Crises?*, ed. J. E. Fossum and A. J. Menéndez (2014) 585. Others ask for strengthening the legitimacy bonds of transnational regimes to nation states, Maus, 'Verfassung oder Vertrag: Zur Verrechtlichung globaler Politik' in *Anarchie der kommunikativen Freiheit*, ed. P. N. B. Herborth (2007) 350, at 381; M. Renner, *Zwingendes transnationales Recht: Zur Struktur der Wirtschaftsverfassung jenseits des Staates* (2011) 244 f.

<sup>16</sup> P. F. Kjaer, 'Why Justification? The Structure of Public Power in Transnational Contexts' (2017) 8 *Transnational Legal Theory* 8, at 17.

treaties between different nation states - many of them authoritarian regimes with questionable democratic credibility - and ends up in the lofty air of delegation of powers to those transnational regimes?<sup>17</sup>

More theoretically minded authors practice a self-immunization of their critique when they apply double standards for nation state constitutions on the one side and for transnational regime constitutions on the other. Some of them even use the conceptual tools of systems theory but, alas, highly selectively. They treat the problematic relation between the functional logic of social systems and democratic legitimacy completely different when it comes to the political system on the one side and to the economy (or other social systems) on the other.<sup>18</sup> In politics, they admit of course that the functional imperatives of the power apparatus tend to instrumentalize democratic legitimacy, but they treat this as the eternal difference between mundane politics and the higher political and give implicitly the political a good chance of success if only we fight strongly enough. In contrast, in other social sectors, particularly in the capitalist economy, democracy, they submit, has no chance at all as a matter of principle. Any attempt of democratization, they argue, claiming support from systems theory, is totally and necessarily instrumentalized by the functional imperatives of the capitalist economy and other functional systems.<sup>19</sup> And they uphold this systemic version of capture theory even then when they are confronted with existing democratic counter-institutions in capitalist economies. Activities of labour unions, strikes and boycotts, institutionalized workers' participation, protest movements, consumer activism, feminist and ecological protest, the existence of the third sector, co-operatives and actually ongoing activities of the "commons" – the critics denounce the whole range of existing democratic counter-institutions within the capitalist economies of welfare states as mere window-dressing, since they are necessarily captured by the logic of profit maximization.

How can one defend the argument that within political systems the functionalization of democratic legitimacy for power purposes is historically contingent and can be overcome, while in the economy its functionalization for profit purposes is a fateful necessity? As mentioned above, available empirical evidence for transnational regime suggests that this is plainly wrong. None of the empirical case studies of different policy fields show that "public" international governance in principle can claim a higher degree of legitimacy than "private" governance.<sup>20</sup> Although such an assumption has numerous adherents, a systematic correlation between the type of a governance arrangement (international, transnational, private) and the degree of its acceptability does not seem to exist. Would we not have to admit that in both systems it is historically contingent whether and to what degree democratic counter-institutions will modify the stubborn unidimensional self-

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<sup>17</sup> For a critique of attempts to base the legitimacy of transnational institutions on the nation states or on international public law, see J. Horst, 'Lex Financiaris: Das transnationale Finanzmarktrecht der International Swaps and Derivatives Association (ISDA)' (2015) 53 *Archiv des Völkerrechts* 461; R. Forst, 'Transnationale Gerechtigkeit und Demokratie: Zur Überwindung von drei Dogmen der politischen Theorie' in *Transnationale Gerechtigkeit und Demokratie*, ed. P. Niesen (2012) 29, at 44.

<sup>18</sup> D. Schneiderman, 'Global Constitutionalism and International Economic Law: The Case of International Investment Law' in *European Yearbook of International Economic Law*, ed. M. Bungenberg, C. Herrmann, M. Krajewski and P. J. Terhechte (2016) 23; M. Goldoni, 'The Politics of Global Legal Pluralism' (2014) 11 *Jura Gentium* 104; E. A. Christodoulidis, 'On the Politics of Societal Constitutionalism' (2013) 20 *Indiana J. of Global Legal Studies* 629.

<sup>19</sup> Christodoulidis, id., pp. 661 f.

<sup>20</sup> Take, op. cit., n. 6, p. 220.

reproduction of power or that of profit? In the case of the economy, critics indeed practice what they otherwise abhor – reification. By misusing Luhmann’s conceptual tools they reify the properties of social systems - function, programmes and binary codes - by declaring them to functional necessities that are immune to any change. And they do so although Luhmann – in his analyses of the economy, for example, where the property code has been transformed to the monetary code - has shown that not only programmes, but also binary codes are subject to considerable transformation over time.<sup>21</sup>

Combining hypocrisy and self-immunization, the critique almost necessarily ends up in a cynical attitude, which Bertolt Brecht has aptly revealed: “Exaggerated hopes are followed by exaggerated hopelessness”.<sup>22</sup> And they share their exaggerated hopelessness with those cynical realists from the political right who assert that in transnational institutions democracy will not and should not have any chance. Of course, from this position of exaggerated hopelessness they will look with contempt at the more or less modest proposals for democratization which will be discussed in the text to follow. They will declare them either as totally unrealistic or, when they realise that they do work, they turn around and call them the last tricks of capitalism. But both positions, from the left as well as from the right, suffer from a lack of credible alternatives which they are carefully hiding behind their exaggerated critique. The best answer to them is: Critique without a counter-proposal does not count.

#### RE-INTERPRETING DEMOCRACY UNDER TRANSNATIONAL CONDITIONS

But where exactly lies the exaggeration? Critics err fundamentally when they invoke a time-honoured principle of democracy and transfer it uncritically to the transnational condition: *Quod omnes tangit, ab omnibus tractari et approbari debet*. What touches all should be considered and approved by all. The identity of authors and affected people is presented as the timeless hard core of democracy.<sup>23</sup> However, if we look more closely into the history of *omnes tangit*, universality turns into extreme particularities.<sup>24</sup> In Roman law the supposedly universal principle *quod omnes tangit* had been invented exclusively to resolve a tiny problem of private law, namely when a plurality of legal guardians had to decide over the emancipation of the same ward when each of them had the power to represent the ward. Democracy? In the twelfth century both civil and Canon lawyers amplified this principle and applied it to a totally new context, the medieval *corporationes*. Under these conditions of feudal stratification the principle was not at all used in a universalistic way to all people concerned, but introduced whenever men of higher rank wanted to use their veto power. Democracy? Only with the rise of modernity

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<sup>21</sup> N. Luhmann, *Die Wirtschaft der Gesellschaft* (1988) 187 ff.

<sup>22</sup> “Der Anstrengung folgt die Erschöpfung, der vielleicht übertriebenen Hoffnung die vielleicht übertriebene Hoffnungslosigkeit.“ B. Brecht, 'Vorwort zu Galileo Galilei' (1939) [www.ddr-hoerspiele.net/3-lp/galileo-galilei.html](http://www.ddr-hoerspiele.net/3-lp/galileo-galilei.html).

<sup>23</sup> J. Habermas, 'On the Internal Relation between Law and Democracy' in J. Habermas, *The Inclusion of the Other: Studies in Political Theory*, (1998) 253; id., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) 135 f.; K. Günther, 'Rechtspluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretisches Problem' in *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit: Festschrift für Jürgen Habermas*, ed. L. Wingert and K. Günther (2001) 507.

<sup>24</sup> N. Luhmann, 'Quod Omnes Tangit: Remarks on Jürgen Habermas's Legal Theory' in *Habermas on Law and Democracy: Critical Exchanges*, ed. M. Rosenfeld and A. Arato 157, at 157 ff.

*quod omnes tangit* was applied to public matters and became the guiding principle for direct participation. However, later on in the times of the large scale nation state the *omnes* transformed soon from the participation of everybody into the representation by governing elites and the competition among them. The identity of authors and affected people, this is silently admitted even by its ardent defenders, can no longer be maintained for real decisions of real people, but only for the hypothetical situation of the ideal discourse among hypothetical participants.<sup>25</sup>

Today, in the transition from national to transnational institutions the *quod omnes tangit* undergoes an even more dramatic transformation. Continuously, in its long winding history the democratic principle has been able, despite all its variations, to combine more or less satisfactorily two contradictory tendencies - identitarian consensus building as well as enlargement of internal dissent. Both tendencies are rightly seen as complementary democratic principles. And what is more, they were combined not only in precarious compromises, but sometimes they were even mutual reinforcing each other. The democratic nation state was the apex - but also the end - of this symbiosis. Having overcome the narrow boundaries of small closely-knit communities which effectively blocked internal dissent, the nation state was large and complex enough to institutionalize the dynamics of fundamental dissent in organized opposition and political pluralism. And organized dissent, which had productive effects by creating higher variability of collective decisions, frequently resulted in a stronger identification of citizens with the polity.

Now, as the critique of “postdemocratic” societies shows forcefully, this version of democracy’s paradise is lost.<sup>26</sup> The mutually reinforcing link between the two tendencies has been broken. First fissures are observable already in nation states, however, in transnational institutions the rupture is clearly visible. In this situation it would be erroneous to give up the identitarian element of democracy. Instead, the size and scale effects of transnational institutions urge for a division of labour of democratic principles in different contexts. Identitarian consensus building remains a necessary element of democracy, but its chances of realization are limited to the local level and to a certain degree to the national level. Here lies the relative merit of the new movements of re-nationalization and re-localization, which are today expressed by both the political left and the right. Indeed, there exists a still unexploited potential for strengthening participation, identification and community building on the local, the regional and the national level. And the chances for identitarian democracy are high if one extends the democratic principle from the political system to numerous “non-political” institutions within society, to corporations, universities, foundations. In stark contrast, transnational institutions are weak candidates for identitarian consensus building. The division of labour just mentioned means for them to concentrate on the second element of democracy. If we are interested in making transnational institutions more responsive to their various - social, natural and human - environments, then their democratization cannot be understood as a guarantee for the identity of rulers and ruled. But it can be understood as a guarantee for forceful organized dissent which challenges the decisions of power-holders effectively and “brings to the fore the power of powerlessness”.<sup>27</sup>

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<sup>25</sup> Habermas, op. cit. (1998), n. 23; Günther, op. cit., n. 23.

<sup>26</sup> C. Crouch, *Post-democracy* (2006).

<sup>27</sup> N. Luhmann 'Die Zukunft der Demokratie' in id., *Soziologische Aufklärung 4* (1987) 126, at 127. This is different from the argument that in transnational relations, democracy will be replaced by justification,

This concept of organized dissent is not far away from epistemic and deliberative theories of democracy.<sup>28</sup> They concentrate on the problem-solving capacity of democratic institutions. But there is a difference: while they strive for rightness of political decisions, a theory of organized dissent is sceptical on such claims to normative truth and concentrates instead on a “right to contingency”, which opens alternative world constructions.<sup>29</sup> Not the naïve hope for the one best solution, but the confrontation with alternative world views is at the center of democratic communication.<sup>30</sup> Considerable institutional imagination is required if one then searches for a new and different relation of mutual reinforcement: organized dissent needs to be supported by a high learning capacity in collective decisions and vice versa.<sup>31</sup> Transnational regime democracy requires that well-working decision procedures create the space for the “possibility of dissent as a precondition of an independent selectivity distributed within society”. Vice versa, organized dissent needs to be accompanied by a high potential for collective decisions.<sup>32</sup>

In its history the principle of *quod omnes tangit* had always been re-contextualized by two operations: generalization out of a particular context and its respecification for new situations.<sup>33</sup> And this is needed again today under the conditions of transnationalization and functional differentiation of world society.<sup>34</sup> If it is true that transnational democracy requires furthering institutionalized dissent, how then can the institutions of nation state democracy - elections, representation and organized opposition - be generalized and respecified for the issue-specific regimes of globality? I would like to suggest two theses:

First thesis, generalization: The democratic principle of political representation, which still expresses the traditional democratic symbiosis, needs to be generalised and replaced by the principle of *self-contestation of transnational regimes*. Self-contestation requires them to be responsive to external irritations on the one side and to institutionalize sites of internal dissent on the other.

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J. Neyer, 'Justice, Not Democracy: Legitimacy in the European Union' (2010) 48 *J. of Common Market Studies* 903. Without the pressures of an effectively institutionalised dissent, mere justification tends to become a sheer ideological self-justification.

<sup>28</sup> Epistemic theory: D. Estlund, 'Introduction: Epistemic Approaches to Democracy' (2008) 5 *Episteme*; deliberative theory: J. Elster, *Deliberative Democracy* (1998).

<sup>29</sup> A. Weiss, 'Left After Luhmann? Emanzipatorische Potentiale in Luhmanns Systemtheorie und ihre Anwendung in der Demokratietheorie' in *Politische Theorie und Gesellschaftstheorie*, ed. M. Haus and S. De La Rosa (2016) 169.

<sup>30</sup> id., 'Die Verdoppelung der Welt und das Recht auf Kontingenz' in *Systemtheorie und Gesellschaftskritik*, ed. K. Möller and J. Siri (2016) 169: 182.

<sup>31</sup> In my view, Luhmann op. cit., n. 27, pp. 126 f. gets it wrong when he discards totally the participative and identitarian elements of democracy and restricts democracy exclusively to the production of political alternatives by parliamentary opposition. Instead, democratic theory would need to develop an analogy to theories of federalism that associate different territorial levels with different governance structures and their guiding principles.

<sup>32</sup> N. Luhmann, 'Politische Verfassungen im Kontext des Gesellschaftssystems' (1973) 12 *Der Staat* 1, 178.

<sup>33</sup> On generalization and respecification as opposed to simple analogies, see T. Parsons and C. Ackerman, 'The Concept of “Social System” as a Theoretical Device' in *Concepts, Theory and Explanation in the Behavioral Sciences*, ed. G. J. DiRenzo (1966) 19.

<sup>34</sup> R. Prandini, 'The Morphogenesis of Constitutionalism?' in *The Twilight of Constitutionalism?*, ed. P. Dobner and M. Loughlin (2010) 309, at 310.

Second thesis, respecification: the self-contestation of transnational regimes cannot follow a one-size-fits-all approach, but needs to be established with *wide variations* that reflect the extreme diversity among issue-specific transnational regimes.

Contextualized self-contestation<sup>35</sup> - such a double requirement creates of course new and considerable difficulties for imagining democratic procedures but it opens as well realistic chances since it can build on institutions of organized dissent that exist already today rudimentarily within diverse regimes.<sup>36</sup> In this sense, Take identifies empirically in different transnational regimes a great variety of legitimate forms of governance which have the potential of future development.<sup>37</sup> Stewart argues that concepts of legitimacy and accountability have proven to take different effects when applied nationally or in the realm of global governance.<sup>38</sup>

Thus, we should now reformulate the old principle: *Quod omnes tangit, ab omnibus contestari debet*. For transnational regimes, no longer the identity of rulers and ruled is the adequate expression of democracy, but their self-contestation in diverse context-adequate forms.

Now, what are the context-dependent difficulties to which the renewed version of *quod omnes tangit* is exposed in transnational regimes as compared to nation states? The difference comes to the fore in each of its three components: *omnes – quod – tangit*. (1) *Omnes*: While the nation state's constituency is clearly defined as the one and only one *demos*, issue-specific regimes cannot rely on self-contestation within one well defined collective, rather they have to cope with the difficulty of extremely fluctuating constituencies. (2) *Quod*: While the political systems of the nation state makes collective decisions comprehensively on the whole range of national policy issues, a transnational regime is highly specialized for only one policy field. The resulting difficulty is an extremely narrow tunnel vision, which tends to paralyze self-contestation. (3) *Tangit*: While in the nation state it is political power that is contested by the counter-power of organized opposition, transnational regimes - acting within diverse social contexts like the finance economy, science and technology, health, education, culture, the new digital media – face the difficulty to develop procedures of contestation not only against power but against diverse sources of authority.

#### FIRST DIFFICULTY: FLUCTUATING CONSTITUENCIES

*Quod omnes tangit*: Who is the *demos* of transnational self-contained regimes? How can one identify the constituency of such diverse regimes like the WTO, the *lex mercatoria*, the *lex digitalis*, or multinational corporations and organize them in democratic procedures? Not by chance, the attempt to enhance the

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<sup>35</sup> Several authors come close to the first requirement when they argue for a high degree of contextual variation in regime democracy, P. F. Kjaer, 'The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law and the Political in the Transnational Space' (2010) 2010 *Wisconsin Law Rev.* 489, at 522 ff.; N. Krisch, 'Pouvoir Constituant and Pouvoir Irritant in the Postnational Order' (2016) 14 *International J. of Constitutional Law* 657.

<sup>36</sup> W. Martens, 'Democracy for Transnational Regimes' in *Futures of Democracy*, ed. W. Martens, B. Leijssenaar, J. Martens and E. Van der Zweerde (2014) 113, at 129, 132.

<sup>37</sup> Take, op. cit., n. 6.

<sup>38</sup> R. Stewart, 'The Normative Dimensions and Performance of Global Administrative Law' (2015) 13 *International J. of Constitutional Law* 499.

legitimacy of the internet governance ICANN by organizing a world wide election of representatives for each continent was a spectacular failure.

It seems that with the emergence of transnational regimes we experience a revival of an almost forgotten conflict, which aroused political passions in the late nineteenth and early twentieth century. The conflict was between a centralized comprehensive political system and decentralized issue-specific politics in specialized institutions. In those days the conflict was experienced as parliamentary democracy versus council democracy. Where is the legitimate site for political decisions? In a centralized political system where professionalized politicians legitimated by general elections decide all relevant questions for the whole of society? Or in a decentralized system where issue-specific questions are decided democratically within the social sectors concerned? While the repressive practices of fascism and real socialism had thoroughly discredited the idea of sector-specific functional representation, centralized political representation has become the standard model of liberal democracies. Only the social democratic version of Hugo Sinzheimer's *Rätedemokratie* (council democracy) found some echo today in democratic corporatism of the North European welfare states.<sup>39</sup>

In today's transnational areas, the balance between centralized comprehensive politics and decentralized issue-specific politics has decisively shifted toward the latter, *sit venia verbo*, toward a transnational council democracy. The much-discussed move from national government to global governance means among other things: There is no centralized political system comparable to the government of the nation state, which decides comprehensively on the whole range of global political issues. The politics of inter-state relations is only one of many global subsystems and cannot claim any primacy. Many political questions of highest relevance are decided in a decentred way within the new global villages outside international politics. Self-contained transnational regimes have become the decision centres for narrowly defined policy issues. Their legitimacy subjects can no longer be understood as a unified collective, which would be either the international community of states or the whole population of the globe, rather need to be localized within diverse boundaries of the segmented regimes, in the interstices of their interactions.<sup>40</sup> The compact demos needs to be replaced by a more plural notion of several *demoi* and several public spheres.<sup>41</sup> And what is important for democratic self-contestation, the style of decentralized issue-specific decision-making is the very reason why David Kennedy sees promising chances for transferring

“the democratic promise, of individual rights, of economic self-sufficiency, of citizenship, of community empowerment, and participation in the decisions that affect one's life to the sites of global and transnational authority, however local they may be. To multiply the sites at which decisions could be seen and contested, rather than condensing them in a center, in the hope for a

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<sup>39</sup> Cf. G. Teubner, 'Transnational Economic Constitutionalism in the Varieties of Capitalism' (2015) *Italian Law J.* 1, 2015. [http://www.theitalianlawJ.it/data/uploads/pdf/2\\_2015/teubner\\_transnational.pdf](http://www.theitalianlawJ.it/data/uploads/pdf/2_2015/teubner_transnational.pdf).

<sup>40</sup> Forst, op. cit., n. 17, p. 44.

<sup>41</sup> Krisch, op. cit., n. 35, sec. 5.3; Martens, op. cit., n. 36, p. 127.

heterogeneity of solutions and approaches and a large degree of experimentation.”<sup>42</sup>

Now, where can one identify the sites of self-contestation in transnational regimes that would serve as an institutional equivalent for parliamentary and extra-parliamentary opposition in the nation state?<sup>43</sup> Analyses of transnational regimes distinguish between three demoi, between three categories of regime ‘participants’: members, rule addressees, affected outsiders.<sup>44</sup> These three groups do not form a stable *demos*, they are rather extremely fluctuating constituencies.<sup>45</sup> Frequently, people change their place from one category to the other. This is why authors speak of the regimes’ “fuzzy citizenship”.<sup>46</sup> The groups therefore cannot be identified with real people, it is rather their concrete actions that define the belonging to one of these “groups”.

Why is it so important to distinguish between these three action areas, first, the regime centre, which is often a formal organization (or several formal organizations with contractual relations among them) with professional core competencies, second, the regime periphery, consisting of the interactions of the centre with its constituencies, and third, the regimes’ external relations with their relevant environmental sectors? Answer: A workable self-contestation depends heavily on their differences and on the interrelations between these differences. It is the inherent tension between these three areas - the organized professional area, the spontaneous area of the norm-addressees and the area of externalities on outsiders - which is the regimes’ driving machine for democratic self-contestation. While the regimes’ policies are decided and implemented in the organized professional sector, actors in the spontaneous sector demand that their interests are taken into account, and the affected outsiders are the source of the strongest irritation, contestation and protest.<sup>47</sup> It follows that procedures of self-contestation need to be realized in each group, but what is crucial, for each of them in a different manner depending on their different roles in this conflict.

*First group, affected outsiders:* Probably, the most radical contestation can be expected from the third group, from the outsiders that are negatively affected by the regimes decisions.<sup>48</sup> A series of authors – James Tully, Antonio Negri, Gavin Anderson, Ugo Mattei – have rightly observed that the most relevant democratic potential will not be found within the transnational regimes themselves, but is manifested outside of the regimes in social movements, that is in the “multitude”, in a

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<sup>42</sup> D. Kennedy, 'The Mystery of Global Governance' (2008) 34 *Ohio Northern University Law Rev.* 827, at 859.

<sup>43</sup> This is the problematic question for the constituency of transnational institutions, S. Besson, 'Whose Constitution(s)? International law, Constitutionalism, and Democracy' in *Ruling the World? Constitutionalism, International law, and Global Governance*, ed. J. L. Dunoff and J. Trachtman (2009) 381, at 393 ff.

<sup>44</sup> F. Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 *J. of Law and Society* 20.

<sup>45</sup> Kjaer, op. cit., n. 16, pp. 12 ff.

<sup>46</sup> M. Koenig-Archibugi, 'Fuzzy Citizenship in Global Society' (2012) 20 *The J. of Political Philosophy* 456; A. Abizadeh, 'On the Demos and its Kin: Nationalism, Democracy, and the Boundary Problem' (2012) 106 *American Political Science Rev.* 867.

<sup>47</sup> G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012) 88 ff.

<sup>48</sup> For a profound analysis of such regime externalities Horst, op. cit., n. 17, sec. B II.

variety of protest movements, in NGOs and in transnational segments of the public.<sup>49</sup> Anderson identifies such a democratic potential “from below” in the new “constituent powers found both within and outside the structures of representative democracy, the latter comprising decolonisation and internationalist movements, alternative NGOs and bodies which escape traditional categorisation, such as the World Social Forum.”<sup>50</sup> These outsiders do not represent the *demos* on whose consensus the regime could be built, rather they form what Nico Krisch calls a “*pouvoir irritant*”<sup>51</sup>. This *pouvoir* plays the decisive role for regime contestation but not for regime foundation.<sup>52</sup> Protest movements across the globe are said to act as an “oppositional force to the process of economic constitutionalism imposed by the international economic institutions”.<sup>53</sup> “Civil society” countervailing powers outside the regimes, spontaneous protest, social movements, NGOs, trade union power, media, intellectuals, and public discussion have a considerable irritation potential, when they exert massive pressures on the regimes, forcing them into internal self-contestation.<sup>54</sup>

There is an empirically observable change in direction among protest movements that increases the chances for the regimes’ self-contestation. The conflicts in which these changes can be found today are Brent Spar, the World Social Forum, Gorleben, animal rights protests against universities, companynamesucks.com, Stuttgart 21, Wikileaks, the indignados and Occupy Wall Street. The common denominator is that these civil society protests are addressed not (only) against nation state institutions, but also on transnational corporations and regimes of other functional systems, that they hold responsible for seriously distorted development. Protest movements exert social pressure on the points where they believe they detect the causes and, even more so, real chances to bring change about. This explains why protest movements perceive a strong potential for a politicisation of law-making via transnational regimes and much less via the political systems of the nation states. Some authors see in these direct contacts of protest movements a new quality of political struggles which increases the potential for self-contestation in transnational regimes.<sup>55</sup>

Obviously, any formal institutionalization of their role as irritants is difficult, if not counter-productive. But their protest needs if it is supposed to have real effects support from two democratic institutions which in their turn need to be protected by the law – from counter-rights and from transparency. Some authors speak not only of counter-rights, but even call for “rights to resistance”, the time-honoured citizens’

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<sup>49</sup> J. Tully, 'The Imperialism of Modern Constitutional Democracy' in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. N. Walker and M. Loughlin (2007) 315, at 319, 323 ff.; M. Hardt and A. Negri, *Commonwealth* (2009); G. W. Anderson, 'Societal Constitutionalism, Social Movements and Constitutionalism from Below' (2013) 20 *Indiana J. of Global Legal Studies* 881; S. Bailey and U. Mattei, 'Social Movements as Constituent Power: The Italian struggle for the Commons' id. p.965

<sup>50</sup> Anderson, id. p. 881, at 902

<sup>51</sup> Krisch, op. cit., n. 35, sec. 5.3. Möller, op. cit. (2017), n. 8 sees the potential of protest movements not in constituent power but in destituent power.

<sup>52</sup> J. I. Colón-Riós, 'Five Conceptions of Constituent Power' (2014) 130 *Law Q. Rev.* 306.

<sup>53</sup> Bailey and Mattei, op. cit., n. 49, p. 1012.

<sup>54</sup> For recent analyses of global social movements, see D. Della Porta, *Global Justice Movement: Cross-National and Transnational Perspectives* (2016); C. Thornhill, *A Sociology of Transnational Constitutions* (2016) 405 ff.

<sup>55</sup> Crouch, op. cit., n. 14, ch. 6 ; O'Brien, Goetz, Scholte and Williams, *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (2002), 2.

weapon of last resort against a corrupt state, and transfer it to the economy and other social areas.<sup>56</sup> The effective protection of such resistance will be one of the most important tasks for the courts, which need to expand the legal doctrine of constitutional rights' horizontal effects to these constellations. It is no coincidence that this doctrine has been successfully applied in court cases to do with exposure of harmful working conditions and ecological protest against environmentally damaging corporate policies and whistle-blowing against organized irresponsibility.<sup>57</sup> Citizens' fundamental rights have been developed against transnational regimes in their repeated attempts to restrict them. In the future — again, conjured by catchwords such as *companynamesucks.com* and *WikiLeaks* — such societal fundamental rights will become politically more explosive and will require even stronger legal protection.

But it is only on the basis of transparency that these rights can be made effective. Empirical studies show that today most transnational regimes are not ready to open up their decision-making processes for the participation of observers and make them transparent for the public.<sup>58</sup> Only few regimes have a codified information policy that incorporate even external actors and ensure that decisions are attributable to the responsible person, something, which has enhanced considerably their legitimacy. For the future, “transparency of structures and processes of global governance arrangements seems to be an indispensable indicator of legitimate governance”.<sup>59</sup>

*Second group, addressees:* A less radical contestation, but at the same time a more effective goal-oriented dissent can be expected from the spontaneous sectors within the regimes. They are formed by the actions of those who are regulated by the regime rules. For these rule addressees, it is a formalized stakeholder participation that potentially furthers self-contestation. Their role needs to be institutionalized in the regime's procedures. The historical examples are workers participation in business firms, rights to consultation in governmental agencies and group action and *amicus curiae* in court proceedings. Also in transnational regimes, the stakeholders' interests need to be “articulated by associations of directly affected persons, but also by experts or organizations that act on behalf of the affected persons”.<sup>60</sup> Alternatively to group representation proposals have been made to institutionalize different value orientations and political discourses within the regimes' decision procedures.<sup>61</sup> Indeed, these stakeholder institutions have been already developed in transnational regimes, albeit in rudimentary form. For example, the sector of bank regulations has been opened for comments from civil society.<sup>62</sup> The European Union is testing citizens' dialogues in several policy fields.<sup>63</sup> Briefs of *amicus curiae* have become

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<sup>56</sup> A. Golia, *La responsabilità delle imprese transnazionali in una prospettiva di diritto costituzionale* (2017) 321 ff. In the same direction, Möller, op. cit. (2017), n. 8, speaks of tendencies of “deconstitutionalization”, P. Femia, 'Infrasytemische Subversion' in *Kritische Systemtheorie*, ed. M. Amstutz and A. Fischer-Lescano (2013) 305, at 310 ff., of “infrasytemic subversion”.

<sup>57</sup> Cf. I. Kanalan, 'Horizontal Effect of Human Rights in the Era of Transnational Constellations: On the Accountability of Private Actors for Human Rights Violations' (2016) *European Yearbook of International Economic Law* <http://ssrn.com/abstract=2539110> 423.

<sup>58</sup> Take, op. cit., n. 6.

<sup>59</sup> Id. p., 243; Kjaer, op. cit., n. 16, pp. 12 ff.

<sup>60</sup> Martens, op. cit., n. 36, p. 130.

<sup>61</sup> J. Dryzek and S. Niemeyer, 'Reconciling Pluralism and Consensus as Political Ideals' (2006) 50 *AMERICAN J. of Political Science* 634.

<sup>62</sup> M. S. Barr and G. P. Miller, 'Global Administrative Law: The View From Basel' (2006) 17 *The European J. of International Law* 15.

<sup>63</sup> European Commission: *European Governance – A White Paper*, COM (2001) 428, Brussels 2001.

frequent in Investment Arbitration and have influenced considerably the outcomes in terms of outsider concerns.<sup>64</sup> And the WTO has created procedures for the participation of civil society actors.<sup>65</sup> However, these attempts do not go far enough. Self-contestation would mean that they question their fundamental strategies of strengthening and defending free markets. As Colin Crouch says, in future there is more at stake.<sup>66</sup> These global institutions need to take over responsibility for social policies and redistribution of wealth. They need to realize the ambitions of the welfare state on a transnational scale.

*Third group, members:* They form the regimes' organized-professional area, that is those communications that participate in the preparation, production and implementation of the regime-rules. These are mainly corporations, technical standard setters, experts, national states and international organizations. They participate in general on a voluntary basis; they have interests in the regulation of the issue at hand.<sup>67</sup> Their actions are the sources of regime authority. Now, here, in this narrower relation between regimes and their formal members it makes good sense to import representational principles from national democracies. Here it is possible to „reconstruct transnational regimes in terms of representation of a delimited demos, producing authoritative rules that are recognizable as the rules of the people“ – people, of course, not territorially but functionally defined.<sup>68</sup>

However, apart from principles of adequate representation of the regime members, one thing is crucial. Strict legal rules are needed which institutionalize firmly channels of self-contestation, geared toward internal responsiveness to external irritations, political demands, critique and protest that come from actors in the spontaneous sector and from the outsiders who protest against negative externalities. The legitimacy of the regimes is heightened when these rules are oriented toward a cognitive openness to environmental concerns in the broadest sense, toward the interests of third parties and toward public interests.<sup>69</sup>

Here is the proper site for regime constitutions to establish principles of critical professionalism,<sup>70</sup> of regime-internal opposition, and of regime-internal pluralism. And the principles that the school of global administrative law has developed — due process in regulation, notice- and- comment rules, obligations to consult experts, the principle of proportionality, respect of fundamental rights – are primary candidates for constitutional norms in transnational regimes.<sup>71</sup>

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<sup>64</sup> J. Saei, 'Amicus Curious: Structure and Play in Investment Arbitration' (2017) *Transnational Legal Theory* (forthcoming).

<sup>65</sup> A. Lang, *World Trade after Neoliberalism: Reimagining the Global Economic Order* (2011), 88 ff.

<sup>66</sup> C. Crouch, 'Globale Institutionen müssen Sozialstaat verwirklichen: Konsequenz aus rechten und linken Protest' (2017) *Die Welt* 5.5.2017 .

<sup>67</sup> Cafaggi, op. cit., n. 44.

<sup>68</sup> Martens, op. cit., n. 36, p. 115.

<sup>69</sup> P. Paiement, 'Paradox and Legitimacy in Transnational Legal Pluralism' (2015) 4 *Transnational Legal Theory* 197, at 224 ff.

<sup>70</sup> M. Herberg, 'Bringing Professions Back in: A Fresh Look at the Dynamics of Institution-building in (World) Society' in *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, ed. C. Joerges and J. Falke (2011) 107.

<sup>71</sup> B. Kingsbury and N. Krisch, *Symposium: Global Governance and Global Administrative Law in the International Legal Order. Symposium Issue of the European J. of International Law* 17 (2006); J. Steffek, 'Sources of Legitimacy Beyond the State: A View from International Relations' in *Transnational Governance and Constitutionalism*, ed. C. Joerges, I.-J. Sand and G. Teubner (2004) 81, at 82, 94–95.

It is decisive, however, to insist that those different democratic procedures for the three areas form a whole and inseparable ensemble. None of the three – neither vociferous protest of outsiders, nor stakeholder activities of rule addressees nor critical professionalism of regime members – could alone render transnational regimes more responsive to their environment. It is only when outsiders' protest, stakeholders' interest articulation and internal organized dissent are working together in intertwinement that an externally induced self-contestation becomes feasible.

## SECOND DIFFICULTY: TUNNEL VISION

*Quod omnes tangit.* The second difficulty for an effective self-contestation has to do with the regimes' decisions, their quality, their content, their scope. Here lies an additional important difference between nation-states and transnational regimes. While the political system of the nation state makes always collective decisions comprehensively on the whole variety of national policy issues, a transnational regime is highly specialized for only one policy field.

“Through specialization – that is to say, through the creation of special regimes of knowledge and expertise in areas such as ‘trade law’, ‘human rights law’, ‘environmental law’, ‘security law’, ‘international criminal law’, ‘European law’, and so on – the world of legal practice is being sliced up in institutional projects that cater for special audiences with special interests and special ethos”.<sup>72</sup>

The resulting difficulty is the regimes' extremely narrow tunnel vision, which tends to paralyze self-contestation.

National constitutions are all-embracing or “holistic” orders in which even highly specialist regulations form an intrinsic part of a dense fabric of national norms arising from the most varied areas of life.<sup>73</sup> This produces internal conflicts between the divergent norms, principles and policies that claim validity in the nation state. In contrast, highly specialised self-contained regimes, only establish their operative rules for the one single functional sector of world society to which they are connected. Their constitutional norms and principles unilaterally follow the rationality criteria of this societal sector. They are simultaneously solipsistic and imperialistic. The tunnel vision of function regimes makes it difficult to orient them to the public interest of a polity: this is by contrast more feasible in the context of conflicting norms within a nation-state constitutional order.<sup>74</sup>

While nation state constitutions rely strongly on formal procedures and enact only a limited range of substantive principles, in transnational regimes an increasing substantialisation of their constitutions takes place. They tend to rely on one and only

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<sup>72</sup> M. Koskeniemi, 'The Politics of International Law - 20 Years Later' (2009) 29 *European J. of International Law* 7, at 12 f.

<sup>73</sup> D. Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 *Constellations* 447; N. Walker, 'Beyond the Holistic Constitution?' in *The Twilight of Constitutionalism?*, ed. P. Dobner and M. Loughlin (2010) 291.

<sup>74</sup> Comparing nation state and transnational regimes in this respect, T. Kleinlein, 'Fragmentierungen im Öffentlichen Recht: Diskursvergleich im internationalen und im nationalen Recht' (2017) 17 *Deutsches Verwaltungsblatt* 1072, at 1078, criticizes the „thematic sectorialization“ of regimes as endangering democracy.

one *idée directrice*, maximizing either free trade, financial aspects of firms, relations in supply chains, safety of goods, food safety, quality of labour conditions, the environment, protection against epidemics, child labor, or the quality of scientific work. This results in a substantive overdetermination of the regimes' constitutions.<sup>75</sup> Koskenniemi criticizes vehemently self-contained regimes for their fixation on one hegemonic project on substantive grounds.<sup>76</sup> This political project is even inscribed in the higher-ranking legal rules of their constitution. This is problematic because their "teleologies function ... as forms through which the varieties of selection are reduced in the sense that 'alternative languages' are being systematically marginalised".<sup>77</sup> The regimes develop ideologies with tendencies toward a regime-totalitarianism, as "the self-description of a system under the condition that is the only right one and that it should be enforced".<sup>78</sup> The problematic result is a moralizing neutralization of alternative political options.

Is there an equivalent for a self-contestation via permanent conflicts between different rationalities which is indeed possible within the nation state? Martens puts his hopes in the overlapping interests of their members (consumers, workers and so on).<sup>79</sup> They would correct the one-dimensional regime orientation in favour of a broader range of conflicting values. But experience shows that this is a weak antidote for the pathologies.

It was Georg Wilhelm Friedrich Hegel who developed the more effective antidote against the tunnel vision of highly specialized social spheres – heterarchical contestation. Facing the dilemma to maintain the historical advantages of one-issue-institutions and at the same time to mitigate their destructive tendencies, he argued that the pathology lies not in their exclusive concentration on one value, rather in the imperialism imposing their values on other social spheres.<sup>80</sup> And the solution is a well-ordered system of various spheres of ethical life. Result would be an institutionalized mutual contestation between the different spheres.<sup>81</sup>

Heterarchical contestation basically works in two ways: internalising conflicting orientations into the decisions of the conflicting regimes themselves, or externalising them to inter-regime negotiations. The conflicts are either shifted to the constitutions of the regimes, or to the adversarial negotiations between them. Both cases are today being realised institutionally in rudimentary form: on the one hand in the case law of transnational regime tribunals and, on the other, in the negotiation procedures between regimes. Constitutional pluralism needs to choose between these two approaches of a "meta-constitutionalism" in order to correct the extreme tunnel vision of regimes and to open it to alternative world views.

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<sup>75</sup> Möller, op. cit. (2016), n. 8, pp. 261 ff.

<sup>76</sup> M. Koskenniemi, 'Hegemonic Regimes' in *Regime Interaction in International Law: Facing Fragmentation*, ed. M. Young (2012) 305.

<sup>77</sup> P. Kjaer, 'The Function of Justification in Transnational Governance' (2015) *Discussion paper, Center for Global Constitutionalism, SP IV 2015-808*, at 7.

<sup>78</sup> N. Luhmann, 'Enttäuschungen und Hoffnungen: Zur Zukunft der Demokratie' in id., *Soziologische Aufklärung 4* (1987) 133, at 135.

<sup>79</sup> Martens, op. cit., n. 36, p. 128.

<sup>80</sup> G. W. F. Hegel, *Philosophy of Right* (1967) 237; for a discussion under contemporary conditions, D. Loick, 'Juridification and Politics: From the Dilemma of Juridification to the Paradoxes of Rights' (2014) 40 *Philosophy and Social Criticism* 757, at 764 ff.

<sup>81</sup> Kleinlein, op. cit., n. 74, p. 1078.

And, in both cases, regimes react differently to the collisions. In the first case – internalisation – norms of the other regimes are reconstructed before the forum of the own constitution. This opens up avenues for a new conflict of laws. The regimes’ legal orders must “display considerable deference to substantive domestic regulatory choices as well as draw on and defer to other international regimes whose rules, policies, and institutions represent and articulate such values, whether in respect of health, labour standards, environment, or human rights”.<sup>82</sup> The disadvantage of internalising is of course that it furthers the fragmentation of the law.

In the second case – externalisation – the conflicts are addressed, relocated and decided in adversarial regime negotiations. There may be no obligation to reach a decision, but the chances of taking alternative views into account are increased. This opens up other perspectives for the role of the law: to structure the procedures of adversarial negotiations. Legal norms contribute to societal, non-legal forms of conflict resolution. They can ensure the confrontation with other interests and with diverging rationalities. Dunoff has shown the potential of cooperation between regimes to create a balance between colliding rationalities.<sup>83</sup> In order to cope with asymmetries between regimes, some authors ask for strengthening the bargaining power of weaker regimes like the Food and Agricultural Organization.<sup>84</sup>

The normative orientation in both cases is a question of whether counter-institutions in societal regimes – conflict of norms or negotiation arrangements – can increase the chances for opening the regimes to marginalized discourses. The law can play a supportive role in this process if it is prepared to transfer two opposing basic principles of inter-national law – mutual recognition of nation states and orientation toward an *ordre public transnational* – to the relation between transnational regimes. The principle of full faith and credit or mutual recognition would not only mean that transnational regime constitutions show reciprocal tolerance for one another, as is indicated by the principle of ‘constitutional tolerance’.<sup>85</sup> It also contains the additional demand that constitutions need to realize ‘constitutional responsiveness’, and to develop substantive rules, which resolve the requirements of conflicting constitutions by establishing a compromise.<sup>86</sup>

### THIRD DIFFICULTY: IDIOSYNCRATIC EPISTEMES

Quod omnes *tangit*: The third difficulty has to do with the extreme varieties of regulatory devices via which the regimes are interacting with their subjects. There is a categorical confusion at work which tends to choose the wrong methods of self-contestation. The confusion induces many scholars to concentrate exclusively on the phenomenon of power that is exerted on the regimes’ members, addressees or outsiders. As a consequence, when regime democratization is the issue they

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<sup>82</sup> R. Howse and K. Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity' (2003) 16 *Governance* 73, 308.

<sup>83</sup> J. L. Dunoff, 'How to Avoid Regime Collisions' in *Contested Regime Collisions: Norm Fragmentation in World Society*, ed. K. Blome, A. Fischer-Lescano, H. Franzki, N. Markard and S. Oeter (2016) 49, at 55 ff.; id., 'A New Approach to Regime Interaction' in *Regime Interaction in International Law: Facing Fragmentation*, ed. M. Young (2011) 136.

<sup>84</sup> M. E. Margulis, 'The Regime Complex for Food Security: Implications for the Global Hunger Challenge' (2013) 19 *Global Governance: A Rev. of Multilateralism and International Organizations* 53.

<sup>85</sup> M. Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly So Called' (2006) 54 *AMERICAN J. of Comparative Law* 505, at 528 ff.

<sup>86</sup> Viellechner, op. cit. (2015), n. 3.

regularly restrict their recommendations to techniques of power-contestation. Again the nation state experience is responsible for this narrow perception. The normative paradigm of their critique is limited to institutions of countervailing powers in political democracy which have been developed for the nation state — popular participation, elections, representation, political parties, group pluralism, collective decision-making, organized opposition — and they suggest to use them as a universal antidote for contesting the suspect autonomy of transnational regimes. However, in many transnational regimes such a misplaced transfer of the logics of power would have *effets pervers*. Several regimes would be politicized in a direction which would be at odds with their idiosyncratic epistemes. The critique amounts to an over-hasty transposition of legitimation and control of power that only made sense in the national political context.<sup>87</sup>

Instead of replacing such a simplified model of political power with more complex models of a plural differentiation and then strictly orienting the self-contestation question towards these differences, these authors ignore the sharp differences between national political systems and transnational issue specific regimes and apply the normative claims of nation state democracy to practically every transnational institution.<sup>88</sup>

“The difference between issue-based transnational regimes and nation states makes an adoption of models that were developed in the latter impossible. An issue-based regime attempting to realize a default value in a social space that is populated by several values needs to invent new forms of (a) representation and (b) public discourse and decision-making”.<sup>89</sup>

Such an “one size fits all” approach falsely levels out fundamental differences between self-contestation in national politics and in transnational regimes.

The high functional specification of transnational regimes means above all that they use media of communication of very different kinds. Transnational regimes develop idiosyncratic epistemes; as a necessary consequence this requires a great variety of modes of self-contestation. It is only in “public” regimes that self-contestation attacks the medium of political power, while in other regimes resistance needs to be developed against other media of communication – against money, knowledge, law, digital calculation - because transnational regime use them in their own particular spheres of action through a series of sui-generis communication processes. For example, self-contestation of an economic regime would be incomplete if it worked only against phenomena of economic power, rather, it needs to be directed against monetary communication as such, regardless of whether or not the latter is ‘translated’ into power communications – for example, in corporate hierarchies or market monopolies. Similarly, a transnational regime dealing with issues of science and technology, medicine, or education cannot be successfully

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<sup>87</sup> „Because of diverse contexts, governance beyond the nation-state cannot refer to forms of decision making and mechanisms of enforcement established at the state level. Therefore, the criterion for legitimate global governance must be chosen with regard to the structural characteristics“ (Take, op. cit., n. 6, p. 221).

<sup>88</sup> The unbroken optimism of such a transposition of political decision-making models into areas far removed from politics is reflected in J. Habermas, *Protestbewegung und Hochschulreform* (1969).

<sup>89</sup> Martens, op. cit., n. 36, p. 128.

contested via countervailing power, rather via a specific counter-expertise that challenge effectively the dominant knowledge patterns.

What is needed is a careful respecification of self-contestation, its methods, its procedures, its institutions within each of the different regimes.<sup>90</sup> Due to highly diverse epistemic contexts, governance beyond the nation-state cannot refer to forms of decision making and mechanisms of enforcement established at the state level. Methods of contestation need to be carefully calibrated to the idiosyncratic episteme of the transnational regime in question. Counter-expertise becomes the relevant counter-power.

Theories of deliberative democracy come close to this view. They rightly stress the role of justification, in particular under transnational conditions when the classical democratic devices do not work well any more. They argue for the “transformation of power structures into structures of justification.”<sup>91</sup> However, two corrections seem to be in place. One is redirecting their dominant consensus-orientation toward a stronger dissent-orientation. The other is their reliance on discursive legitimation on the detriment of epistemic legitimation.<sup>92</sup> They underestimate the multiplicity of idiosyncratic epistemes to which the modes of justification need to be adapted.<sup>93</sup>

Here it is the constitutional principle of “epistemic subsidiarity” that opens new perspectives for developing procedures of self-contestation in different transnational regimes.<sup>94</sup> It works on the assumption that the relation between science and politics is context-dependent. It could be shown that this relation is different in the context of the European Union, and the contexts of different nation states.<sup>95</sup> This is so because epistemic legitimacy is not entirely a matter of scientific input; it is also based on the values, interests, and preferences of local and national communities.<sup>96</sup> Epistemic subsidiarity has been suggested as a constitutional principle that balances the relations between science and politics on those different levels.

This principle needs to be expanded and applied not only to different nation states but also to different transnational regimes. Each transnational regime needs to develop its specific legitimation by the interaction of expertise and stakeholder interests. For assuring the role of self-contestation in this interaction of expertise and regime-internal politics the regime constitutions will have to play a special role. For environmental regimes, describes such institutions bridging political legitimation and the authority of scientific expertise:

“One such set of institutions would be legal rules that would make possible non-arbitrary rulings on the adequacy of scientific evidence for a given

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<sup>90</sup> Id. p. 123, 133 ff.

<sup>91</sup> Forst, op. cit., n. 17, p. 46.

<sup>92</sup> J. Ellis, 'Scientific Expertise and Transnational Standards: Authority, Legitimacy, Validity' (2017) 8 *Transnational Legal Theory* 181 at sec. 2.

<sup>93</sup> A. Galán and S. Law, 'The Emergence of European Private Law and the Plurality of Authority' (2016) 7 id., p. 499.

<sup>94</sup> S. Jasanoff, 'Epistemic Subsidiarity: Coexistence, Cosmopolitanism, Constitutionalism' (2013) 2 *European J. of Risk Regulation* 133.

<sup>95</sup> V. Paskalev, 'May Science Be with You: Can Scientific Expertise Confer Legitimacy to Transnational Authority?' (2017) 8 *Transnational Legal Theory* 202.

<sup>96</sup> J. Ellis, 'Scientific Expertise and Transnational Standards: Authority, Legitimacy, Validity' id. p.181.

proposition or, more pertinent to the present case, the reasonableness of the application of a set of highly technical sustainability standards.”<sup>97</sup>

This is not the place to develop in detail the specific modes of self-contestation for each regime-type. Instead, private transnational regimes which are based on contractual relations may serve as an illustrative example for the calibration. The legitimation problems of private government cannot be subsumed under the legitimation problems of public law-making. Rather, the crucial test is whether production of transnational law via contracting allows for self-contestation within the contractual regime itself. Indeed, the negotiation of antagonistic interests within contracting has a certain self-contesting potential, which allows for the articulation of dissent. But this is possible only under two conditions of ideal contracting: that there are no power asymmetries between the contracting parties and that the contract does not develop negative externalities for third parties. The traditional legitimation of rules via contract comes to its end when problems of power asymmetries or negative externalities arise. This is the situation when private power begins to endanger the freedom of other private parties which in its turn requires the interference of horizontal effects of constitutional rights as the legitimation basis for transnational law production. Only under the condition that transnational private ordering realizes the horizontal protection of constitutional rights, they can increase their legitimacy.

Therefore it is only a careful calibration of counter-institutions that would foster democratic self-contestation in transnational regimes relying on an experimental attitude, on high-risk trajectories, on broad information about the interests concerned, and on the politics of trial-and-error.

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<sup>97</sup> Ellis *id.*, sec. 4.