CHAPTER 3

RE-EMBEDDING THE MARKET THROUGH LAW?
THE AMBIVALENCE OF JURIDIFICATION IN THE INTERNATIONAL
CONTEXT[1]

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In describing the historical differentiation of the economic and political spheres and the development of capitalism, Karl Polanyi came to a surprising conclusion: with the emergence of the market economy, the market sphere ceased to be embedded in the life of society. This has affected social life enormously. The relation between capitalism and society was turned upside down. The function of the market economy was no longer to serve the people; instead, social processes and social institutions were shaped to meet market requirements. This brought about the need for political forms which would re-embed the market into the market society and compensate for the negative effects of the unrestrained market. Thus, social regulations, welfare services and social protectionist measures were created to trigger a process of re-embedding economy.

Polanyi did not have the chance to analyse the globalisation of the market, law, and politics and their effects on society. However, one question which interested him intensely is still crucial for today's political and legal research: What are the mechanisms and instruments, if any, that allow the global market to re-embed itself into society?

This question is even more pressing as it is not just the global market that has become more or less independent of any societal links or restrictions. The role of law has also changed within the processes of globalisation. Indeed, law has become an important factor for dis-embedding processes. Nowadays, international relations are characterised by processes of *juridification*, which can be understood as an expansion in terms of content, and as a

proceduralisation of infrastructure according to international law. Procedural regulations can be found not only for the security domain, but also for the economic, cultural and social domains.[2] And this decisively shapes governance beyond the nation state, and contributes significantly to the development of transnational governing institutions as well as market institutions. What I focus on in this chapter, however, is not so much a re-construction of how markets have been dis-embedded or could be re-embedded into society. Instead, what interests me is the legitimate framework for global governance which will be capable of both curbing markets and tying law down to society. The underlying assumption is that legitimate global governance focuses on the inclusion of citizens into law-making processes on a national, as well as transnational, level, while, at the same time, it tries to place the expanding markets under the control of popular sovereignty.

Based upon Polanyi's question, it is argued first, that the current global market is organised by transnational law, whose development is best described as ambivalent. On the one hand, juridification can lead to a hegemonic international law which lacks legitimacy, as it paradoxically creates extra-legal spheres, promotes the "privatisation" of political areas, and, by this, reduces the competences of states. On the other hand, juridification can also function as a motor of transnational democratisation and as a barrier to an unhampered growth of transnational administrative and executive power.

Current works on the concept of legitimacy in law and on transnational governance in law, political science, and philosophy have to reflect these aspects of market economy on a world scale. In the second part of the chapter, I argue that three prominent approaches to these issues (Neo-marxism, some approaches of "systems theory", and a network approach) have serious flaws: they do not offer - in Polanyi's terms - an adequate empirical diagnosis of the dis-embedding of the market economy and of international law, nor do they provide convincing ideas about the re-embedding of global markets and international law into world-society.

Finally, I show that the way is paved for a dialectical position which offers a critical analysis of legal codification processes as well as a realistic notion of democratic governance,

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[2]   B. Zangl, *Die Internationalisierung der Rechtsstaatlichkeit*, (Frankfurt aM-New York: Campus, 2006); B. Zangl & M. Zürn, "Make Law, Not War: Internationale und transnationale Verrechtlichung als Baustein für Global Governance", in: *idem*, (eds), *Verrechtlichung – Bausteine für Global Governance*, (Bonn: Dietz, 2004), pp. 12–46; K.W. Abbott *et al.*, "The concept of Legalization", in: (2000) 54 *International Organization*, p. 401.

both of which meet certain criteria of legitimacy. This demonstrates how the containment, albeit not a full re-embedding, of the global market economy may work.

I. THE PROBLEMS OF JURIDIFICATION

Karl Polanyi used the conception of the "embedded economy" in his book "*The Great Transformation*" to analyse the transition from "pre-industrial" to modern "industrial" societies.[3] In the "pre-industrial" era, "primitive" as well as "archaic" societies were integrated through the reciprocal exchange of goods. Economic processes were based upon kinship and other forms of social relations: it was not, primarily, the individual's goal to gain more products out of personal interest, but merely to stabilise his or her social standing, including through assets and marriage, as people were assets, too.[4] Economic exchange processes were embedded in society, in the sense that social relations created economic situations and were part of it. However, this explicit link between the economy and social relations was severed in the modern market economy. Instead of social relations, a formal contract among trading parties determined economic exchange processes in modern societies, and the logic of law separated the economic sphere from social relations. The market became an institution of its own, which was integrated according to the logic of production and consumption (supply and demand), and was thus de-coupled from kinship values, social status or prestige. In short, the market was dis-embedded from social relations, with modern law playing an important role in transforming social relations into formal contract relations, and, at the same time, detaching social relations from politics.

The concepts of embedded and dis-embedded can be understood as an analytical tool that Polanyi uses to describe the historical transition of markets in the Nineteenth century. However, the dichotomy between social relations either being embedded or dis-embedded in society was probably never true. And I argue that, even today, there are political mechanisms which may have the potential to function in a way in which market exchanges may be contained and law more deeply rooted in society.

In what follows, I turn to the role of law in international relations to find out more about the dis-embedding elements in international relations. What is striking, here, is that juridification processes are ambivalent. On the one hand, they can be understood, following

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[3] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, (Boston MA: Beacon, 1944/2001).

[4] See Polanyi, note 3 *supra*, pp. 47-48, and the contribution of Alexander Ebner in this volume.

Mathias Albert, as indication of a "formal shifting of sovereignty to a supra-national plane".[5] Seen from this perspective, they could pave the way for a legitimate and efficient form of "global governance", in other words, for a structure of governance that goes beyond the nation state, and aims towards the formation of transnational systems of law, to the point of reaching a global constitution.[6] On the other hand, processes of juridification produce anomic inner and transnational conditions. Of these, I will discuss the three most important ones: 1. the de-democratisation which can be seen in the incongruence between the subjection to, and the authoring of, rules; 2. the dialectic between juridification and de-juridification; and 3. the de-politicisation of international relations. All of these specify the conditions that a critical confrontation with the demands of legitimacy directed towards transnational governance must consider. They pose the question of how the gaps in legitimacy - caused by the shifting of what were previously the tasks of nation state governments towards international organisations and networks - can be mended.

I.1. DE-DEMOCRATISATION

The international system of law, based upon the inner-societal functional differentiation, became pluralised a long time ago with regard to domains,[7] which led to the development of hegemonic international structures of law. This seems to be a paradoxical assertion, for one could mean that a functional pluralisation of law displaces the existent constellations of power in favour of previously less powerful actors. However, this is not the case at all. Instead, a development, labelled here with the term "de-democratisation", is portrayed. Thereby, we do not mean that there were particular forms of transnational democratisation before, which now disappear. De-democratisation refers to the fact that, with the fragmentation of unitary law, the realisation of transnational democratisation and the possible strengthening of previously already powerless actors is thwarted. I would like to clarify this by means of two aspects.

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[5] M. Albert, "Politik der Weltgesellschaft und Politik der Globalisierung: Überlegungen zur Emergenz von Weltstaatlichkeit", in: B. Heintz, R. Münch & H. Tyrell (eds), *Weltgesellschaft – Theoretische Zugänge und empirische Problemlagen*, (Stuttgart: Zeitschrift für Soziologie Sonderheft, 2005), p. 228.

[6] Following Renate Mayntz's definition, I characterise governing institutions as the collective, non-hierarchical regulations for societal states of affairs that serve to establish a political order; see R. Mayntz, "Governance im modernen Staat", in: A. Benz (ed), *Governance – Regieren in komplexen Regelsystemen*, (Wiesbaden: Verlag für Sozialwissenschaften, 2004), pp. 65–76.

[7] A. Fischer-Lescano & G. Teubner, "*Regime-Kollisionen. Zur Fragmentierung des globalen Rechts*", (Frankfurt aM: Suhrkamp Verlag, 2006).

First, there is an *incongruence between the authors of law and its subjects*. It is considered a historical accomplishment that, in the production of primary and secondary norms or in the practice concerning norms within a democratic constitutional state, no domain is deprived of the citizen's norm-giving activities. However, this is precisely the case that exists at present at transnational level. Whereas, in the democratic constitutional state, political autonomy ensured the integration of society side by side with the protection of private autonomy, the congruence between the authors of the law and its subjects was dissolved through the plurality of the systems of law.[8] And whereas international organisations, such as the World Trade Organisation (WTO), the World Bank, the International Monetary Fund (IMF), and even the European union (EU), by means of the interests of its Member States, which represents, at least indirectly, the will of its citizens, this does not apply to non-state actors such as transnational corporations and non-governmental organisations (NGOs). International law - for example, the *Lex mercatoria* - appears as hegemonic law, in other words, as law, which without the adequate and direct representation of all the interests involved, lays its hands on nation state matters.

Secondly, democratisation comes to the fore in the c*onfrontation between law-making and law-enforcement*. Law-making and law-enforcement have already come asunder in the international accrual of rights. This can be seen particularly clearly in United Nations law and also at the EU level, for instance, in the direct effect of the European laws on those of the individual Member States. A particularly clear example of this can be found in the priority of the implementation of European over national law in cases of conflict.[9] Here, a gulf clearly exists between the law-enforcement of substantial norms and a procedural juridification which is only slowly catching up, and which cannot be bridged without the will of the politically powerful international actors.

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[8] Ch. Joerges, "Integration through Conflict Law: On the Defence of the European Project by Means of Alternative Conceptualisation of Legal Constitutionalism", in: R. Nickel (ed), *Conflict of Laws and Law of Conflict in Europe and Beyond*, (RECON Report 7, 2009), p. 531.

[9] H. Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community*, (Studies in Contemporary German Social Thought, transl. by J. Flynn), (Cambridge MA: MIT Press, 2005), p. 176. A related problem, which I cannot discuss in greater detail here, is that of the internal differentiation of conflicts law within the multi-level European system. The "diagonal" and less hierarchical organisation of law inevitably leads to law collisions. One problem is that competences are required to establish at what level of the EU problem-solving should take place. Another problem is that these problems require an "intense degree of administrative co-operation", which, as a side effect, strengthens the power of the administration and reduces the legislative power. See Joerges, note 8 *supra*, at 533; Ch. Joerges & F. Rödl, "Zum Funktionswandel des Kollisionsrechts II: Die kollisionsrechtliche Form einer legitimen Verfassung der post-nationalen Konstellation", in: G.-P. Callies *et al.*, (eds), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag*, (Berlin: de Gruyter, 2009).

I.2   DE-JURIDIFICATION

Juridification, it has to be admitted, possesses even more negative "implications". Some voices warn that a stronger "privatisation" of international relations could amount to precisely the opposite of the binding rules of law: a subtle de-juridification and, therewith, an increasing number of conflicts. Here, two partial aspects can also be found.

The first aspect *is the missing separation of powers in the multi-level system*. This refers to the question concerning how the vertical legitimacy and control of the executive and judicial branches can be guaranteed through the citizens in a multi-level system.[10] Numerous states worldwide succeed, only with great difficulty, in establishing and maintaining a rule of law which operates, to some degree, authoritatively, *and* in a way that ensures peace. The internal rule of law, however, is an essential pre-supposition for the steering and bindingness of law. Contrary to the idea that, in a "system of global governance", a sovereignty partition exists between cross-linked law-making structures and implementation structures, reference is frequently made to the danger that the separation of powers which limits authority in a multi-level system can *no* longer be sustained if a clear-cut attribution of responsibility is not possible. The functionally-differentiated systems of law emphasise the de-centralisation of power. As a result, a momentum of its own develops, which is difficult to control and is completely exacerbated by the fencing in of the executive and the independence of the judiciary.

However, de-juridification does not exclusively proceed in a law-immanent manner, but is somewhat decisively bolstered through what Hauke Brunkhorst, following and updating a term from Jürgen Habermas, characterises as the "colonisation of the law through power and money".[11] Political power and the market enter into an alliance which, without being based upon a *legal* acquisition of power, overlaps the functional differentiation between right and wrong, government and opposition, and haves and have-nots. The *exclusion* of a great part of the global population from access to money, knowledge, power, and judicial outlets for grievances bears witness not only to the fact that the differences between exclusion and inclusion have become a determining measure for the description of processes of juridification and de-juridification, but also raise the question as to how the completely excluded - those who do not even dispose of the provision of their manpower, and

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[10] I. Maus, "Vom Nationalstaat zum Globalstaat oder: Der Niedergang der Demokratie", in: M. Lutz-Bachmann & J. Bohman (eds), *Weltstaat oder Staatenwelt?*, (Frankfurt aM: Suhrkamp Verlag, 2002), p. 252; Ch. Möllers, *Gewaltengliederung*, (Tübingen: Mohr Siebeck, 2005).

[11] Brunkhorst, note 9 *supra*, p. 166.

cannot build on the reciprocal dependence of labour and capital - can be included in the system of law.

I.3. DE-POLITICISATION

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

Politics withdraws from the public sphere and becomes an issue for commissions, think tanks, lobbying groups, and NGOs, which are not transparent and make far-ranging decisions behind closed doors. The protection of the private interests of citizens still belongs to a liberal understanding of politics, whereas international politics increasingly moves away from this and also become private. The already addressed *privatisation* of whole domains of policies (health, care for the elderly, energy, public transportation, *etc.*) deprives politics of significant possibilities for action. In addition, the transparency missing in the decision-making processes complicates even further the accountability for undesired consequences, the effects of which the citizens have to bear in the end.

Secondly, a *loss of power through the self-actualisation of politics* can be observed. Initially, a relationship between the steering subject, politics, and the steering object, society, existed. Now, this relation has been severed and revealed a paradox: politics have been loosened from their anchor in national society in order to gain power *vis-à-vis* a globally-operating economy. Without the connection to morality, law, and religion, to territorial borders and civic solidarity, politics self-actualises for the sake of its own retention of power and thereby simultaneously risks its own loss of power. Political representatives place decision-making authority in the hands of international organisations and other actors, who, following the logic proper to institutions, permanently obey only their own particular requirements. In this manner, politics obstructs precisely the steering possibilities which it seeks and purports to practise.

The above-sketched pathologies reveal the implications inherent to juridification, which enforces the dis-embeddedness of *both* markets *and* the law from social and political relations. This already prevents one from concluding that demands for the re-embedding of markets and law through legitimate governing processes should be reduced. Instead, a concept of legitimacy must adequately reflect these "dysfunctionalities".

II. CONCEPTIONS OF LEGITIMACY FOR TRANSNATIONAL GOVERNANCE

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

II.1 THE NEO-MARXIST FORMULATION

Michael Hardt and Antonio Negri sketch the image of an all-obtrusive global order in which diffuse economic and political relations of power, detached as far as possible from state influence, form not only the economic relations of societal structures, but also pervade the cultural and political superstructure. In at least one regard, the authors lean heavily on Marx: where they say that economic production, which, certainly, in the course of globalisation, can no longer be located, and thereby takes place everywhere, causes the exploitation and alienation of many.[12] However, the disciplining and controlling forces do not remain limited to the economy, as in Marx. The economic coercive relations that commonly proceed in a nearly lawless space are supplemented, almost perfectly, in an insidious manner through a form of "biopolitics" inspired by Foucault, which displays its effect in the communications systems of an accelerating service society, in informal networks, and in welfare state arrangements. There is no escape from this "structured totality", from "empire".[13] What is missing is the idea of a "being-outside", a state beyond capitalist relations, which one reaches by overcoming class contradictions, and in which the management of things and the control of the production process displaces politics.

The privatisation of international politics and its transformation into a playfield of power has led to the elimination of politics from the public sphere, where it clears the room

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[12] M. Hardt & A. Negri, *Empire*, (Cambridge MA: Harvard University Press, 2001), p. 210 *et seq*.

[13] M. Saar, "Michael Hardt/Antonio Negri, 'Empire'", in: Manfred Brocker (ed), *Geschichte des politischen Denkens*, (Frankfurt aM: Suhrkamp Verlag, 2007), p. 812.

for media symbol-politics. In contrast, politics find itself in a virtual space: the place of the political sphere is the place of the counter-empire,[14] formed through the multitude, the aggregate of the many individuals who are exposed, but have not surrendered, to oppression. The aggregate, one could say, is the dialectal counterpart to the empire. A multitude is the basis of an empire; however, it is not merged with it, but, as its dynamical element, instead, lies on its outskirts. As soon as a multitude becomes conscious of its creative power of "being-against", it can "assimilate" itself into an empire and give it the desired shape. This occurs wherever opposition against formal and informal domination is active. Thus, the virtual politics of networks can become the harbinger of the opposition against the neo-liberal project.

However, it is not immediately clear how this political form achieves political legitimacy. This might have to do with the fact that the authors concentrate on critical descriptions of contemporary relations. What one can say with certainty, however, is that, according to the authors, previous forms of democracy are no longer effective through procedures, rules of co-determination, elections, and social organisations; instead, national democracies have surrendered to global regimes (from the WHO to the WTO). It should be assumed here that an "ontological republicanism" is pre-supposed, which is understood as *res gestae*, as spontaneous acts of the aggregate. These become legitimate if they serve the correct *telos*: the re-appropriation of a self-determined being.[15] To this extent, the multitude appears as the direct transformation of the *principle of congruence*: all of the present structures of domination bring their needs and interests to expression in a political project which is co-ordinated by the aggregate. However, this construction lacks one decisive aspect: open-ended political debate. Hence, the critics are right to warn against the "de-politicising" tendencies of an ontology that is seen as the real political force.[16] If, instead of open political struggle, ontology has a fixed place, the emancipation from the chains of the empire will be transformed into the opposite, and will cement the existing relations of domination. The outcome of any political activity will then, right from from the very beginning, pre-determine the resistance of the many.

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[14] Hardt & Negri, note 12 *supra*, p. 207.

[15] *Ibid*., p. 367.

[16] M. Saar, note 13 *supra*, p. 818.

II.2 SYSTEMS-THEORETICAL GLOBAL SOCIETY

The legitimacy of the juridification processes looks completely different from the point of view of the conception of a "heterarchical global society". The description of the state of the global society already seems to possess almost no similarities with the neo-Marxist project. In the global society theories of Luhmann, Stichweh and Teubner, we find an uncoupling of almost all systems (economics, education, sports, law, *etc*.) from territorial referencing. Only the political system and the system of law are excluded. The institutionalisation both of the sovereign nation state and of the state apparatus is the fundamental premise of the "global political system"[17] and of the system of law.[18] This double structure of inner-societal and global-societal differentiation also determines the place for politics in systems theory, which branches out into the nation state political system and the global society political system. It is not, for instance, as is commonly accepted, economic globalisation that has led to a fragmentation of the law. According to this view, the growing economic exchange relations made it necessary for the law to catch up with the growing economic inter-connectedness, and thus established such a transnational private law. Instead, the inner-societal differentiation into autonomous sub-systems - an accelerated differentiation that did not stop at the limits of the nation state - continuously led to a fragmentation of transnational law.[19] In the opinions of systems-theory authors, this "polycentric globalisation"[20] is irreversible and always generates new differentiations. Correspondingly, politics can only be successful when it is likewise oriented towards *issue*-specific topics.

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

However, with regard to the second problem described above, de-juridification as a consequence of juridification, systems theory comes to an interesting assessment. There is a

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[17] R. Stichweh, *Die Weltgesellschaft. Soziologische Analysen,* (Frankfurt am Main: Suhrkamp 2000)

[18] N. Luhmann, *Law as a Social System*, ed. by Fatima Kastner, Richard Nobles, David Schiff & Rosamund Ziegert, (Oxford: Oxford University Press, 2004), p. 465 *et seq*; R. Stichweh, *Die Weltgesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 2000), p. 23 *et seq*.

[19] Fischer-Lescano & Teubner, note 7 *supra*, p. 25 *et seq*.

[20] *Ibid*., p. 26.

further criterion of differentiation that traverses functional differentiation: that of inclusion/exclusion. Whereas, from the perspective of the political global system, the issue is that of the inclusion of states within the state commonwealth, the nation state political system functions smoothly when it includes the individual in both the political global system as well as in the nation state, and thereby at the same time excludes it from everything else. Thus, whereas the inclusion of states equates, in principle, all states to one another, the equality/inequality difference in the global society system is perpetuated through nation state citizenship.[21] In this manner, and this is the diagnostic strength of systems-theory, even the dysfunctionalities of the nation state political system come into view. Within the state the inclusion in the political system was still facilitated by state intervention in other domains. Examples of this are labor laws, compulsory education or unemployment insurance.

In a global society, these incentives towards political inclusion no longer function. The cause of this is that a state no longer reacts to the side effects of the efficient mechanisms of integration (production outsourcing to areas in which one can produce more cheaply) with political intervention in another system, for instance, the economic system, since global societal developments are given priority.[22] This, as a consequence, brings the exclusion, and, therewith, the de-juridification of whole segments of the population.[23]

The authors are well aware of this problem. Their answer, however, remains unsatisfactory. Protest movements, such as "*Madres de la Plaza de Mayo*" and those that stand for the so-called "*The Disappeared of Merceded Benz*" could move human rights violations committed in the "periphery" back to the centre of the administration of justice once again.[24] Through the procedures of transnational courts, the groups excluded in a nation state context are once again included in the global system of law.[25] The law can be the cause of exclusion, and, coupled with the public sphere, can, at the same time, be a means of inclusion. Notwithstanding this, the impression still arises that the weak public character of the protest remains weak and nothing can oppose the "de-politicisation" of international

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[21] Stichweh, note 17 *supra*, p. 60.

[22] Luhmann, note 18 *supra*; Stichweh, note 17, p. 34.

[23] Brunkhorst, note 9 *supra*, 166.

[24] A. Fischer-Lescano (2005), *Globalverfassung. Die Geltungsbegründung der Menschenrechte*, (Weilerswist: Velbrück, 2005), pp. 31–41. Regional human rights commissions, such as the Inter-American Human Rights Commission and the European Human Rights Commission, have become active after the numerous and constant activities of the movements that were also supported by NGO's similar to *Amnesty International*.

[25] *Ibid*., p. 154 *et seq*.

politics. This is because the mobilisation of the public sphere remains related to the law-making power. It is not institutionally tied to the decision-making organs of democratic law-making. Thus, the question remains unanswered as to whether there are indications for a democratic alternative within the right to organisation in the existing transnational constitutions.

It is no wonder, then, that the systems-theoretical formulation is not convincing for the legitimacy of transnational law. The accomplishments of the system replace, as far as possible, the categories of legitimacy. The neutrally-observable efficiency of the state apparatus, of the economic system and of the system of law, suffices as legitimation.[26] Similar to Max Weber's concept of legal domination, grounded in technical processes, decisions achieved legally are accepted with neither motive nor regard for their grounds and their examination. However, the fact that political domination can obtain the loyalty of the masses in the long run, without being related to legitimate political power, has been historically refuted often enough.

II.3   THE NETWORK FORMULATION

Starting from a systems theory inspired analysis, some advocates of the network formulation see an encouraging normative guideline for the legitimacy of *global government networks* in the concept of "accountability".[27] In a manner similar to the advocates of systems-theory, Anne-Marie Slaughter, for instance, starts from a world-wide pluralism of law, which is the result of self-differentiating inner-societal functional needs. Beyond the nation state, the state-centred vertical and hierarchical relations of power are displaced by the horizontal regulation forms which are based upon functional integrations. These nets of global governments can adopt different forms; Slaughter is interested, above all, in the global government networks in which the official advocates of the states from the finance and economics sector, the domain of police investigative work, as well as other representatives including judges, exchange information across nation state borders and attempt to find solutions to global problems. This sectoral extension and consolidation of government work

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[26] For a critique of Niklas Luhmann, see Jürgen Habermas' observations, in: J. Habermas, *Zur Rekonstruktion des Historischen Materialismus*, (Frankfurt aM: Suhrkamp Verlag, 1976), p. 273 *et seq.*

[27] A.-M. Slaughter, *The New World Order*, (Princeton NJ: Princeton University Press, 2004); *idem*, "Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks", (2004) 39 *Government and Opposition*, pp. 159–190; J.F. Rischard, *High Noon: 20 Global Problems, 20 Years to Solve Them*, (New York: Basic Books, 2002).

across nation state borders has led to a "disaggregation of state sovereignty".[28] The state now appears as a many-headed power entity that speaks with many voices both inwardly and outwardly.

However, according to Slaughter, this does not mean that great legitimacy gaps inevitably emerge; in the event that they do, though, they can be dealt with simply through transnational government work. Global government networks, in contrast to *global policy networks*, have the advantage of not only working efficiently, but, beyond that, of also being accountable to national societies. *Global policy networks*, in contrast, encompass all groupings, organisations and NGOs that are committed to a specific issue. For the most part, it remains vague who exercises what form of power under whose orders.[29] In contrast, advocates of government and other global élites are already accountable to national societies by virtue of their duty in their double function as the representatives of different inner-societal interests and as transnational actors who must defend the concerns of the nation state against those of other nation states. This involves a policy of information which must be as transparent as possible, that is, a deepened collaboration not only among experts, but also between experts and legislative networks whereby an expanded public sphere is also included over the policy networks.[30] Even *vis-à-vis* other nations, the participants in global government networks are compelled to adhere to certain global norms.[31] In this manner, according to Slaughter, the globally-extended legislative organ is strengthened and the executive and administrative organs are curbed.

Admittedly, Slaughter's proposal with regard to the principle of congruence remains stranded halfway. This can already be seen in the concept of justification, which is central to her theory. Slaughter understands justification as "accountability", and, for her, a transparent and public justification is required of the past conduct of an actor.[32] This conception of

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[28] Slaughter, *The New World Order*, note 27 *supra*, p. 266 *et seq.*

[29] Slaughter, note 27 *supra*, p. 162.

[30] *Ibid.*, pp.171–174.

[31] This includes, among others, the global deliberative equality of all states - a principle that requires the inclusion of states in a network when they are involved in the subject matter to be dealt with; in addition, a sort of *Ordre-Public* principle, according to which neither a state nor its courts need to apply any foreign or trans-national rule if it contravenes a fundamental national principle (*Ibid.*, p. 178); and an idea of *checks and balances*, extending back to Madison, by which, however, the legislative organ should be strengthened *vis-à-vis* the other two. And, finally, there is also the principle of subsidiarity, which requires that as many political decisions as possible are dealt with locally (*Ibid.*, p. 185).

[32] Compare also with A. Benz & I. Papadopolous, *Governance and Democracy – Comparing National, European and Transnational Experiences*, (London: Routledge, 2006).

accountability is detached from any conception of reciprocity or of the political involvement of stakeholders. In contrast, a second interpretation proposes to understand justification upon the basis of the "principle of affectedness", in such a way that it is essentially connected to the idea of *reciprocal* justification. Anyone subject to a norm should be actively able to partake at the same time in the process of establishing the norm.[33] Slaughter's proposal abandons the negotiation of multi-lateral regulations to the global élites, who only need to inform the citizens of their societies about the results of these negotiations. But what happens when the arrangements are not acceptable to the citizens? One searches in vain for proposals for the possible alteration of these regulations in Slaughter's theory. Hegemonic law maintains legitimacy *through*, and not *vis-à-vis*, the ruling élites.

In summary, one could say that the neo-Marxists provide a fitting diagnosis, given the privatisation of politics and its transformation into a playing field of power. This diagnosis also clarifies why the participation of citizens in central international processes of decision-making and rule-setting plays such a small role. Furthermore, the authors do not stop at the description of de-politicisation, at the displacement of the political from the international decision-making bodies. They trace the return of the political sphere in everyday resistance to the multitude, a kind of re-embedding the political sphere into everyday life. Paradoxically, notwithstanding this, through the ontologisation of politics, they carry forward precisely the selfsame de-politicisation tendency that they criticise.

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

Finally, the network formulation is linked to systems-theory, although it concentrates its analysis of the functional differentiation on the differentiation of the state instances that

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[33] J. Habermas, *Between Facts and Norms. Contribution to a Discourse Theory of Law and Democracy*, transl. W. Rehg, (Cambridge MA: Polity Press, 1996; see, also, R. Forst, "Dialektik der Moral. Grundlagen einer Diskurstheorie transnationaler Gerechtigkeit", in: *idem*, *Das Recht auf Rechtfertigung*, (Frankfurt aM: Suhrkamp Verlag, 2007), p. 343.

still play a key role in international relations. The representation of the citizens and the accountability of their representatives are, therefore, a decisive aspect of the analysis of government legitimacy. Here, however, political participation – and with it, the re-embedding of the political sphere into society - is limited to a global élite, and it remains vague as to how the other two organs of government, the judicial and the executive, could be kept at bay.

III.   DEMOCRATIC GOVERNANCE

A fourth formulation, which I call "democratic governance", is linked to a "global domestic politics". I define "democratic governance" as multi-level politics based upon a system of institutions that are just, linked to one another, and accountable both to one another and to those involved. By the term "institution", I do not mean organisations such as the UN or the WTO, but, instead, refer to the rules of the game that co-ordinate our co-existence, even within organisations. To this belong norms, regulations, conventions and laws, which already possess validity, or will be of significance for a specific community of law, be it national, regional or global, in the future.[34] Thus, the legitimacy of the legally-authored institutions is of particular interest here.

The ambivalent process of juridification accelerates the exclusion of many from the political sphere. However, juridification can also be the motor for democratisation, just as it can work as a brake on an unhindered and growing administrative and executive power, which fosters dis-embedding markets. The legitimacy criteria for the assessment of this dichotomous process are supplied in the formulation of "democratic governance" by the normative integration of the global society. They already claim to be the fixed components of the normative socialisation, and, thus, are themselves able to be the outcome of a deliberative practice. Without doubt, an ideal is reflected in these criteria. However, the present relations of power are reflected in the formulation of "democratic governance", and there is clarity regarding the fact that the functional differentiation penetrates and transforms the socialisation process, and, from the perspective of global society, the described "dysfunctionalities" therefore arise.

At the same time, however, this differentiation makes use of the "porosity" of heterarchical, systematic integration and adds to the institutional points of the intersection between global society and global system. Although procedural juridification is a conflict-

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[34] R. Kreide, "The Obligations of Transnational Corporations in the Global Context. Normative grounds, real policy, and legitimate governance", (2007) 4 *Èthique et Èconomique/Ethics and Economics*, p. 34.

filled endeavour, it is, nonetheless, a learning process. Law, alone, does not possess the substance to determine such a process, and, because of this, it has to rely on external normative factors. Law's very own normative character, however, lies in its self-dedication to the processes of law-making and justification, which expresses justice within law.[35] It is precisely this law-immanent normativity which allows it to spell out what legitimate law-making should look like. This is what I am aiming at in what follows.

Global institutions, according to this thesis, are legitimate when there are good grounds for recognising the authority of the rule of law or of a system of laws. From a normative perspective, this means that laws should rule our co-existence in a just manner. From an empirical point of view, these regulations are legitimate when it is not only asserted that they are valid, but also when they actually obtain a widespread acceptance and it can be stated that they hold true for most of us. Markets can best be curbed and re-embedded into daily life through legitimate political rules.

This - still very vague - definition of the legitimacy of global institutions needs to be made more concrete. To put it more precisely, global institutions are legitimate when they satisfy at least three demands: first, they should be the result of a *deliberative practice* that attempts to close the gap between the setting of rules and those who are affected by them (1); second, the formulation of "democratic governance" is directed towards the anchoring of *democratic elements* that counter-act de-juridification (2); and third, a rule-setting that does not contribute to de-politicisation remains dependent on active *public spheres* and on the *sensitiveness* of rule-setting instances *vis-à-vis* the "input" from the different public forums (3).

III.1   DELIBERATIVE PRACTICES

Deliberative practices, which we find in international bargaining systems, and also in the communication structures of the European Commission, yield arguments and grounds with which those involved react to the public pressure for justification.[36] According to a frequently applied definition, political deliberation is a practice of legitimation for the foundation of

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[35] This idea that has been laid out in more detail by Ch. Joerges, note 8 *supra*, p. 491 and goes back to Rudolf Wiethölter's conception of "Just-ifications" ("Recht-Fertigung"), R. Wiethölter, "Just-ifications of a Law of Society", in: O. Perez & G. Teubner (eds), *Paradoxes and Inconsistencies in the Law*, (Oxford: Hart Publishing, 2005), pp. 65-77.

[36] See, also, Ch. Joerges & J. Neyer, "Vom intergouvernementalen Verhandeln zur deliberativen Politik" in: B. Kohler-Koch (ed), *Regieren in entgrenzten Räumen*, (1998) 29 *Politische Vierteljahresschrift*, (special edition), (Opladen: Westdeutscher Verlag, 1998), p. 207, who focus on an indirect representation of citizens through experts who arrive at decisions at EU level in topic-specific bodies.

political regulations and laws, which depends on public discussion and reason-giving among equal citizens.[37] This definition is thereby distinguished from the conception repeatedly encountered recently in political science, according to which deliberation has become the measure for successful international relations and even the foundation of diplomatic negotiations.[38] This conception of deliberation, however, ignores aspects that are important elements of the deliberative political practice and of the practice of argumentation: next to *public* deliberation, this encompasses the *same opportunities* for any individual to have access to these deliberations without thereby being subject to an internal or external restraint, and includes the regulated exchange of information under the employment of reasons.[39] Under these alleged "ideal" conditions, the participants achieve a grounded "hypothetical agreement". The real political process, according to a general objection against deliberative practices in international politics, otherwise proceeds in different directions, which makes deliberation seem relatively uninteresting as an adequate form of practice for many theorists. In addition, the concentration on deliberation as a political practice obstructs the view of the other forms of process, such as "fair bargaining".[40] In what follows, I would like to illustrate the conception of deliberation here through the discussion of different objections.

A fundamental objection against deliberation is the consideration that it plays no role whatsoever in international politics. Is it not the case that the negotiations and the prevailing political and economic bargaining power of the parties involved determine international agreements and regulations? Recent investigations have shown that deliberative practices,

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[37] J. Cohen, "Deliberation and Democratic Legitimacy", in: A. Hamlin & Ph. Pettit (eds), *The Good Polity. Normative Analysis of the State*, (Oxford: Oxford University Press, 1991), pp. 17–34, at 22. See C. Gould, *Globalizing Democracy and Human Rights*, (Cambridge: Cambridge University Press 2004). Here, I refer also to Jürgen Habermas' theory of law, which has substantially shaped the concept of "deliberative politics". Habermas worked out his ideas on the legitimacy of law for the democratic state of law in *Between Facts and Norms*, note 32 *supra*. Later works, dealing with the legitimacy of international law, are more cautious in terms of the normative pre-suppositions. In *The Postnational Constellation. Political Essays* (Cambridge MA: Polity Press, 2001), especially, pp. 109-111, Habermas proposes two criteria which should be fulfilled as a minimum: rationality and transparency in the processes of communication and decision. For a different interpretation of deliberation, see I. Shapiro, "Optimal Deliberation?", (2002) 10 *The Journal of Political Philosophy*, p. 196, who considers neither argumentation, nor openness and expectation of consensus, to be features of deliberation.

[38] Th. Risse, "Global Governance and Communicative Action", (2004) 39 *Government and Opposition*, p. 288, and, also, H. Müller, "Arguing, bargaining and all that: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations", (2004) 10 *European Journal of International Relations*, pp. 395–435.

[39] Cohen, note 37 *supra*, p. 17 *et seq*. Habermas understands deliberative practice as "the core structure in a separate, constitutionally organized political system", but not as a procedure constituted for the whole of society, nor even for all state institutions; Habermas, note 33 *supra*, p. 305 *et seq*.

[40] I am thankful to Andrew Arato and Jean Cohen for this indication.

understood in the previously formulated and discerning sense, *rationalise* the decision-making process, not in all, but at least in some, "soft" bargaining systems; for instance, in the domains of human rights and the environment. This is particularly the case when the public sphere is likewise engaged, that is, when the negotiations are transparent and representatives of NGOs have a certain influence on the outcome.[41] Using the example of the implementation of human rights, Thomas Risse was able to show that, in international political negotiations, argumentation, deliberation and persuasion ("action oriented towards mutual understanding") become meaningful for the progress of the bargaining if international recognition as a legitimate bargaining partner is at stake.[42] In this context, he speaks of "argumentative entrapment": even the participants that enter negotiations with a strategic intention must somehow give in to the discourse of the "better argument" if they do not want to get caught in a contradiction.[43] In this manner, reasons are produced that can be brought up as justification *vis-à-vis* the parties involved, be they constituents, governments, employers or NGOs.[44]

Secondly, deliberation is accused of inefficiency. It is allegedly concentrated in the input-, and so-called through-put, legitimacy, the legitimacy of practice, but is not aimed at the output-legitimacy. For this reason alone, the applicability of the outcome and its consequences play a sub-ordinated role in political processes, neglecting the efficiency of political rules. In a well-cited contribution and looking towards the European Union, Fritz Scharpf remarked that the missing input-legitimacy can, and, indeed, should, be replaced by output-legitimacy - a recommendation also taken up for global governance. Since one can speak neither of a European *demos*, nor of a European identity, not to mention solidarity, although, according to Scharpf, there is considerable need for regulation, it would do the EU

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[41] J. Habermas, "Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik", in: P. Niesen & H. Benjamin (eds), *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik*, (Frankfurt aM: Suhrkamp 2007), p. 436.

[42] As mentioned earlier, Risse's concept of deliberation is normatively undemanding; however, his work on the observance of human rights norms shows that, in many areas, a discerning concept of deliberation can already be found; see Th Risse, "'Let's Argue!': Communicative Action in World Politics", (2000) 54 *International Organization*, pp. 1–39.

[43] *Ibid.*, p. 35.

[44] Habermas, note 41 *Supra*, p. 436. Justification can be understood in a very narrow sense as "internal justification (accountability)", by which the agents or political representatives have the corresponding duty to answer to their employers or constituents. Nonetheless, in a globalised economy with its undesired consequences for many, this seems insufficient. "External justification (accountability)" involves a more broadly-grasped openness. According to this, all those exposed to an institution are entitled: through environmental catastrophes, unhealthy products, or low wages; also entitled are those exposed to the very institutions that either do not prevent these forms of harm or even foster them. The concept of accountability assessed here springs from reciprocal accountability; see Forst, note 33 *supra*.

good to concentrate on its problem-solving capacities.[45] Deliberation theory, however, does not concern the critique of the neglect of output-legitimacy. One advantage of this formulation is that the process of argumentation is always *already* directed towards problem-solving. The possible negative consequences and side effects of a regulation are injected into the deliberative process as argument, and can be invoked against the adoption of a controversial regulation. In addition, the more thoroughly the parties concerned are integrated into the rule-setting process, the more successful the process is. In the end, they are the ones who must deal with the results in different societal domains. Success would come sooner if they were involved in the rule-setting process and correspondingly adopted the result. According to some studies, the problem of the insufficient compliance with global norms does not appear more serious than at a domestic level.[46] Thus, the effectiveness of global governance is directly connected to the quality of the decision-making process.

The ideal of (transnational) deliberation advocated here is only one of three aspects that characterise "democratic governance". The related question is: "What space does democracy occupy?" The relation between deliberation and democracy is in no way free of tension. Deliberation, in contrast to democracy, aims at generalisable interests, and not at individual self-interest. It requires congruence between those subject to regulation and the authors of regulation, and is not satisfied with indirect representation. In a deliberative practice what counts is the argument and not the amount of votes - just to mention some important points. And, yet, deliberation and democracy refer to one another. Without the connection to democratic elements, deliberation remains a regulation practice that neither effectively institutionalises the principle of congruence, nor adequately reacts against de-juridification and de-politicisation.

III.2 DEMOCRATIC ELEMENTS

Deliberative processes alone cannot close the legitimacy gap that emerges when international treaties, decisions, or even internationally-binding conventions are, for the most part, not even *indirectly* linked back to democratic constitutions through the states involved in the negotiations. Thus, it requires democratic elements, that is, institutional hinges which, analogous to inner-societal organisations, adopt democratic functions in a decentralised

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[45] F.W. Scharpf, *Regieren in Europa. Effektiv und demokratisch?*, (Frankfurt aM-New York: Campus, 1999).

[46] M. Zürn, "Introduction: Law and Compliance at Different Levels", in: Ch. Joerges & M. Zürn (eds), *Law and Governance in Postnational Europe. Compliance Beyond the Nation-State*, (Cambridge: Cambridge University Press, 2005), p. 26 *et seq*; see, also, Risse, note 38 *supra*.

multi-level system.[47] The institutionally-anchored participation of citizens, the legal obligation of the executive, and independent courts, are only some of the proposals that I will more closely address in what follows.

Deliberation cannot adequately represent the interests of marginalised groups institutionally. Minority positions must also obtain *actual* access to the negotiations, and must have the possibility of influencing the decision-making process there. An expansion of the possibilities of the political co-operation of citizens would prevent the law not only from becoming pluralised internally, but also from losing its external sovereignty *vis-à-vis* other systems of norms and complexes of rules (perhaps local traditions). But how would this look in the political reality? The minimal normative foundation for legal unity should also prospectively embody the United Nations charter. It could possess constitutional status, in contrast to the *lex mercatoria*, since it is based upon international agreements, and its basic elements are reflected in domestic constitutions that have, at least partially, been achieved through referenda.[48] The long-discussed reform of the United Nations should aim towards not only including the General Assembly "in deliberative ways in the decision-making of the Security Council",[49] but also to making it an organ that represents the citizens of the world. This could, perhaps, occur by being, in the long run, reformed into a world parliament consisting of delegates from democratically-elected parliaments (and a chamber of state representatives). Even in the World Security Council, a fundamental principle of the Charter must be made procedural, namely, that of the sovereign equality of all member states.[50] Only then would the participation of all states in the decision-making be assured, independent of their economic and political power.

Beneath the level of world organisations, one can already recognise indications of the constitutionalisation of democratic participation. By now, political affiliation has been detached from the general state citizenship which encompasses all rights. Regional and international norms ensure entitlements for the individual beyond nation state borders (above all, at EU level), whereas the political activities of citizens are positioned at local, regional

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[47] Forst, note 33 *supra*, also argues for inner-societal equivalents in the form of democratic elements.

[48] J Habermas 2007, note 39 *supra*, p. 450.

[49] I. Maus, "Verfassung ohne Vertrag. Zur Verrechtlichung globaler Politik", in: P. Niesen & B. Herborth (eds), note 41 *supra*, p. 350.

[50] *Ibid*., p. 380.

and international levels.[51] De-centralised, deliberative forums for issues such as human rights, the environment, health, retirement plans, and energy, are the precursors of institutional participation in brain trusts and decision-making organs. The EU, in particular, sees itself open to the demand for the democratisation of its governance and attempts to honour it, even in the failed constitutional EU draft.

The only thing that deliberation lacks, as already mentioned, are the legal instruments to achieve a transnational institutionalised control of the executive and administration. For this, it requires institutional efforts to *bind* operating international organisations administratively (for example, the WTO or NATO) to nation state, democratically-achieved decisions. This would be an important step towards re-embedding the economy in society. Only by virtue of this is the administrative power subject to the democratic will of the citizens. Legal obligations are a normative pillar of nation state democracies, but are not easy to establish at a transnational level. The fencing in of the executive by classical international organisations, such as NATO, still functions, to some extent, transnationally, since its representatives must abandon accountability to the constituency "at home".[52] Even international organisations such as the WTO, the World Bank and the International Monetary Fund are aware of their external responsibilities regarding justification, and have become sensitive *vis-à-vis* those concerned. Studies show that it is precisely these organisations that have opened themselves up to participation of NGOs, and this has amounted to the formalisation of relations between international organisations and NGOs.[53] For international organisations, this presents a possibility for tapping into one of the state-independent sources of legitimacy. This, indeed, weakens the connection back to the domestic constituency, but simultaneously strengthens the position of citizens who do not come from democratic industrialised states and can count on the support of NGOs.

However, what is finally needed is a transnational expansion of the existing legal guarantees of rights, through which the equality of the bargaining partners can be achieved independently of economic and political bargaining power. Independent arbitration is an important step on the way to a transnational legal guarantee of rights, and, next to the signs of

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[51] S. Benhabib, *Another Cosmopolitanism: Hospitality, Sovereignty and Democratic Iterations*, (Oxford: Oxford University Press, 2006).

[52] H. Brunkhorst, "Zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung", in: P. Niesen & B. Herborth (eds), note 41 *supra*, p. 321.

[53] P. Nanz & J. Steffek, "Zivilgesellschaftliche Partizipation und die Demokratisierung internationalen Regierens", in: P. Niesen & B. Herborth (eds), , note 41 *supra*, p. 99.

a self-developing democratic legitimation, represents a further aspect of the constitutionalisation of international relations. Since the 1990s, institutions similar to courts have been created for a range of international procedures, which provide a binding interpretation of international norms of law and an, at least approximate, equality of the parties. An investigation by Bernhard Zangl shows that the juridification of international procedures for disputing settlements has led to the fact that the member states of the OECD are now more ready to follow these procedures.[54] The increase of instances of dispute settlements is of enormous importance for the equal treatment of parties that possess varied different levels of power power when laws have been breached. However, it is also beyond question that the organs for settling disputes have to judge independently, above all, from a political point of view, when the judges belong to a permanent judicial panel and do not receive their salary from "their" state or from private actors.[55]

III.3   PUBLIC SPHERES

The inclusion of marginalised, relatively powerless, economically-deprived population groups affected by transnational decisions depends decisively on the pressure exerted by the public spheres on international organisations. The significance of the public spheres has been subject to a considerable change in the last thirty years. In the 1970s and 1980s "civil society" was still a political space for the autonomous self-organisation of the citizens, who defied the military regimes in both Latin America and in Eastern Europe.[56] In the 1990s, an increased critique emerged against the "tamed" social movements that appeared in the form of transnationally operating NGOs, which clearly suited everybody, from the activists to the transnational entities and international government organisations.[57] Yet, it is the NGOs that embody the promise of externalising the "inner": protests, ideas and activities become global.[58] Precisely for this reason, they are the opposite of the terror that internalises the "external", above all, by provoking angst among the population by means of repression, violence and arbitrariness, and by wanting to strangle all civic commitment. Despite the danger of global terror, social movements and NGOs that lobby international organisations

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[54] Zangl, note 2 *supra*, p. 237 *et seq.*

[55] *Ibid.*, p. 51.

[56] For Latin America and the affiliation to international networking, see Keck & Sikkink DETAILS 1998; for a theory of civil society and Eastern Europe, see J.L. Cohen & A. Arato, "*Civil Society and Political Theory*", (Cambridge MA: MIT Press, 1994).

[57] N. Chandhoke, *The Conceits of Civil Society*, (Oxford: Oxford University Press, 2003).

[58] M. Kaldor, "The Idea of Global Civil Society", (2003) 79 *International Affairs*, p. 591.

have not let themselves be pushed into the background.[59] The gap between professionally-working NGOs and social movements is often not as great as is feared. This is because NGOs rely on weak or informal public spheres, those public spheres that can prosper under the shadow of the fundamental right to freedom, but without having decision-making authority at their disposal.[60] Their strength lies in being able to oppose something beyond the "domain of spontaneity" (research, the mass media, law and art) to the continuously threatening encroachments *via* the system-instrumental domain of organisation (administrative control). However, faith in the vigilant public sphere, coupled with the supposition that bargaining, in international organisations, proceeds through deliberation, occasionally obstruct the view of the institutional necessity of fencing in the unleashed administrative and private law systems under the condition of flagging nation state sovereignty.

Hence, informal public spheres must be completed through formal ones which are assessed not only by the practical implementation of elections and referenda; they also establish hard law, that is, enforceable law and the possibilities of action at all levels of the interpretation, concretisation and implementation of the law. They make a structural coupling between statements, political actions, and civil disobedience possible, on the one hand, and test cases and verdicts, which can effectively enforce civil and international law norms, on the other. The/This structural coupling is an effective means in the process of re-embedding markets. Examples of this can be found in international labour laws, in which companies in Indonesia have been accused of violating legal labour standards before courts in California.

IV. CONCLUSION

Let us return to Palanyi's question, which I posed at the beginning of this chapter, the question about the mechanisms and instruments which allow for the re-embedding of the global market in society. It is difficult to speak about a fully-fledged idea of re-embedding the global market. Through the juridification of international relations, transnational governance seldom runs along informal paths, and is somewhat strengthened in legally formalised, de-centralised paths. However, according to the argumentation, this development is highly ambiguous. On the one hand, as a consequence, the subjection to rules and the authoring of

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[59] For a good overview of the different activities, publications and counter-positions, see R Broad, *Global Backlash. Citizen Initiatives for a Just World Economy*, (Lanham MD: Rowman & Littlefield, 2002); see, also, J. Keane, *Global Civil Society?*, (Cambridge: Cambridge University Press, 2003).

[60] N. Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy", in: C. Calhoun (ed), *Habermas and the Public Sphere*, (Cambridge MA: MIT Press, 1992), p. 109; H. Brunkhorst, "Globalizing Democracy without a State: Weak Public, Strong Public, Global Constitutionalism", (2002) 31 *Millennium*, pp. 675–690.

rules drift apart from one another; de-juridification is accelerated through de-formalised law and a lack of legal bindingness of the civil law regimes; and the de-politicisation of political decision-making processes is advanced. All three aspects are symptoms of the processes of dis-embedding of the international economy from politics and even more so of less domestically-organised societies. On the other hand, juridification recovers the potential for taming precisely these "dysfunctionalities", by offering modes of curbing *both* global markets *and* the law for re-embedding them into politics. Law, then, becomes the engine for the development of legitimate global forms of government.

Against three prominent formulations, I have argued that transnational governance forms, which may effectively deal with the above-mentioned dis-embedding processes, are legitimate when, firstly, a deliberative practice closes the gap between setting the rules and being affected by them; secondly, when, through the anchoring of democratic elements, de-juridification is counter-acted; and, thirdly, when those involved can trust in the sensitivity of the rule-setting instances *vis-à-vis* the "input" from the different public forums. A democratic transnational government binds deliberation and democratic elements together: without democratic elements, it is tantamount to the exclusion of marginalised minorities, whose position is perpetuated in informal mechanisms of the power of the majority. Without deliberation, however, the practice becomes trivial, the complexity of the problems to be solved is not done justice to, and becomes less important for those involved, for whom the results are merely decreed.

The potential for a critique against the existing legal relationships feeds upon the normative integration of global society. Without societal resistance against the colonialisation of the global society through juridification and market imperatives, functional differentiation proceeds unhindered and the dis-embedding which we are witnessing continues. In the end, only the unbridled force of the public spheres and the domesticating power of legitimate *hard law* can call a halt to this process.