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Democratic Governance beyond the State

Operationalising an Idea

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Foreword

This working paper was written as part of the Global Governance Project, a joint research programme of the Vrije Universiteit Amsterdam, the Potsdam Institute for Climate Impact Research, the Freie Universität Berlin (Environmental Policy Research Centre), and Oldenburg University. Within the larger context of earth system analysis, the Project investigates international institutions, political processes, organisations and other actors that influence the emerging system of global environmental governance. The current focus is on questions of institutional and organisational effectiveness, learning processes in environmental policy, institutional inter-linkages, the role of private actors in governance systems, and questions of legitimacy beyond the nation state. Major analytical tools are qualitative social science methods, including structured case studies, as well as legal analysis and integrated modelling. Project members represent political science, economics, international law and integrated modelling.

Within the Global Governance Project, this working paper contributes to the efforts of the research group MECGLO—“New Mechanisms of Global Governance”. More information is available at the Project’s web site at www.glogov.org.

Comments on this working paper, as well as on the other activities of the Global Governance Project, are highly welcome. We believe that understanding global governance is only feasible as joint effort of colleagues from various backgrounds and from all regions of the world. We look forward to your response.

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Summary

The paper offers a conceptualisation of democratic legitimacy beyond the state which can be used to evaluate actual processes of transnational rule-making. The argument unfolds in three steps: First, I introduce and discuss constitutionalist, pluralist, and deliberative models of democratic governance beyond the state. Building on the discussion of these models, I then distinguish between three basic dimensions of legitimate rule-making, namely legitimacy through participation, legitimacy through democratic control, and legitimacy through discursive practice. The discussion of these three dimensions serves to establish a set of more specific criteria for the evaluation of decision-making processes beyond the state. Finally, I discuss to what extent different social contexts may justify variation in the degree of inclusiveness, control, and deliberativeness of decision-making processes. I conclude the article with a set of criteria and questions which may serve as a basis for evaluating actual decision-making processes beyond the state in terms of their democratic legitimacy.

Contents

1	Introduction	9
2	The Concept of ‘Democratic Legitimacy’	10
3	Models of Democratic Governance beyond the State	11
3.1	<i>‘More Government’: Constitutional Approaches</i>	12
	Theory of the World (Minimal) State	12
	Cosmopolitan Democracy	13
3.2	<i>Less Government: Pluralist Approaches</i>	16
3.3	<i>More Discourse: Deliberative Approaches</i>	18
	The Idea of Deliberative Democracy	19
	Deliberative Democracy and Transnational Politics	21
4	Dimensions of democratic legitimacy: A framework for analysis	23
4.1	<i>Legitimacy through participation</i>	23
4.2	<i>Legitimacy through democratic control</i>	24
4.3	<i>Legitimacy through discursive practice</i>	26
5	Context-specific differences: How much participation, control and deliberation does transnational rule-making require?	28
6	Conclusions	30
	References	33

1 Introduction

This working paper is motivated by the search for adequate normative criteria to evaluate processes of transnational rule-making.¹ If we conceptualise rules as consciously devised and relatively specific commands for behaviour whose normative authority is such that a certain level of compliance can reasonably be expected, then transnational rule-making can be conceived of as the making of such rules in which at least one of the negotiation parties is a non-state actor.²

Whether in the field of the environment, human rights, or the economy, such transnational rule-making is empirically linked to the proliferation of transnational policy networks, multi-stakeholder processes, expert commissions, and public-private partnerships, all of which do not easily fit into the traditional pattern of world politics as a mainly or exclusively state-centric activity. The guidelines of the World Commission on Dams (Dingwerth, 2005), the certification schemes of the Forest Stewardship Council (Pattberg, forthcoming), the ISO 14000 standards on environmental management systems (Clapp, 1998), or the Rugmark Foundation's labour standards for the carpet industry (Wolf, 2002a) can all be cited as examples of the significance of transnational rule-making in world politics. As instances of (public-) private rule-making, these mechanisms pose a number of interesting and challenging questions to international relations research. I focus in this article on one specific question, namely the question of the democratic legitimacy of these new mechanisms of global rule-making.

The evaluation of the democratic legitimacy of transnational rule-making is relevant for at least two reasons: First, norms of soft law may serve as the foundation for subsequent efforts to create binding international rules. While historical examples such as the Basel Convention's legalization of the non-binding OECD guidelines on trade in hazardous waste may be cited to support this claim,³ I think it is a relatively weak argument because the eventual decision to turn the 'soft' rules into 'hard' rules usually lies with governments that are accountable to their national constituencies.

Second, however, transnational rules can have a direct impact on the expectations and behaviour of actors. As the examples of the World Commission on Dams and of the Forest Stewardship Council demonstrate, this holds particularly true for areas in which no clear international rules exist and where, as a consequence of this lack of al-

¹ An earlier version of this article was first presented at the 45th Annual Convention of the International Studies Association in Montréal, Canada, 17-20 March 2004. I thank Marianne Beisheim, Mervyn Frost, Aarti Gupta, Mireia Tarradell, and Philipp Pattberg for commenting on earlier versions of this article. Financial support from the German National Academic Foundation and the Volkswagen Foundation is gratefully acknowledged.

² This conceptualization relates to the definition of transnational relations as "regular interactions across boundaries when at least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organization" (Risse-Kappen, 1995: 3).

³ I am grateful to an anonymous reviewer for this observation.

ternative rules, transnational rule-making processes can establish their results as the new normative frames of reference and thereby alter the discourse (Dingwerth, 2005).

Since they cannot rely on the binding force of hard law, the success of transnational rule-making processes is often tied to the success of their own claim to legitimacy. Given both the success of transnational rule-making processes and the specific preconditions for their success, it seems imperative to analyse the normative quality of these processes and to ask questions about their democratic legitimacy. Accordingly, this article seeks to provide a set of criteria that are both theoretically coherent and empirically useful for the normative evaluation of transnational rule-making processes. More specifically, I ask:

- Which models of democratic governance beyond the state are most suitable for evaluating the democratic legitimacy of transnational rule-making processes?
- Which criteria can be derived from these theoretical models in order to allow for a theoretically grounded evaluation of real-world decision-making processes?
- Which contextual factors justify variation in the extent to which these criteria are met in a given decision-making process?

In analogy to these questions, the argument unfolds in three steps: After briefly introducing the concept of ‘democratic legitimacy’ as used in this paper (section 2), I discuss three different approaches to democratic governance beyond the state: constitutionalism, pluralism, and deliberative democracy (section 3). Building on the discussion of these models, section 4 distinguishes between four basic dimensions of legitimate rule making, namely legitimacy through participation, legitimacy through democratic control, and legitimacy through argumentative practice. The discussion of the three dimensions serves to translate the abstract categories of the various models of democratic governance into a set of more specific questions that can serve as a basis for the analysis and evaluation of actual transnational decision-making processes. Finally, section 5 discusses to what extent contextual factors may justify variation in the degree of participation, control, and deliberation among different decision-making processes. I conclude the article with proposing a set of concrete questions which can assist in evaluating the democratic legitimacy of actual transnational rule-making processes.

2 The Concept of ‘Democratic Legitimacy’

As ‘legitimacy’ is a concept that is used in a variety of different meanings, it may be helpful to briefly introduce how the term is applied in this article. In general, two important distinctions can be made. A first distinction is between legitimacy as an empirical concept that refers to the social acceptance of a political order as rightful and legitimacy as a normative concept, which refers to the moral or ethical reasons that

support such an acceptance. While it is plausible that the two dimensions are empirically linked to each other, it is important to differentiate them analytically in order to avoid confusion.

A second distinction relates to input vs. output legitimacy (cf. Scharpf 1999). The argument of this article is concerned with a specific aspect of the normative concept of legitimacy—namely ‘democratic legitimacy’ which is mainly concerned with the input dimension of political processes—that is, with whether or not those affected by a decision have a say in the decision-making process and whether or not the procedures of that process are fair. Questions relating to the substantive quality of the results of decision-making processes (*output legitimacy*) are thus not at the centre of this article.

3 Models of Democratic Governance beyond the State

Concepts of ‘democratic legitimacy’ and ‘democratic governance’ have become rather popular in the discussion of governance beyond the state and a number of theoretical as well as empirical articles on the issue have been published over the last few years. The aim of this section is to give a brief overview of the different approaches and to discuss their usefulness for a normative evaluation of transnational rule-making processes.

As for the meta-criteria that may guide such a discussion, Klaus Dieter Wolf has identified context adequacy as the most important aspect. According to Wolf, models of democratic governance are “compatible with the specific milieu of governance beyond the state” (Wolf, 2002b: 35) if they accommodate both input- and output-oriented grounds for legitimation, are applicable to functional rather than territorial differentiation as the main organizing principle of politics beyond the state, and rely on a horizontal rather than hierarchical mode of interaction (Wolf, 2000: 153-75; 2002b).⁴ In addition, Rainer Schmalz-Bruns (1999: 221-23) has further specified that the theoretical models should provide a basis for addressing the problem of identifying relevant constituencies for sector or issue specific will-formation und decision-making processes, include procedural demands on the internal will formation in the different arenas “in order to link the guarantee of the democratic quality of procedures with socializing and civilizing effects”, and include demands on the “management of complex interdependence of the political processes in the different arenas and the connected problem of allocation of competences” (Schmalz-Bruns, 1999: 221, my translation).

In the following subsections, these relatively broad criteria will be used as a baseline for the evaluation of the usefulness of constitutionalist, pluralist, and delibera-

4 On context adequacy, see also Keohane (2002: 3, emphasis added) who argues that “rules are only legitimate if they conform to broadly democratic principles, appropriately adapted for the context.”

tive approaches for providing appropriate criteria for the democratic legitimacy of transnational rule-making processes.

3.1 *'More Government': Constitutional Approaches*

The basic idea of constitutionalism is the “legal codification of [the] relation between the governors and the governed, who are conceived as parts of an overarching common polity” (Preuss, 1996: 24). At the heart of modern constitutionalism lies the possibility of legally-politically organizing a community based on the recognition of individual rights. In the perspective of constitutionalism, such recognition can constitute itself primarily on the basis of mutual recognition as individual right-holders. The background of constitutionalist thought is provided by a crucial insight from the philosophy of the enlightenment:

Constitutionalism is the conception of a polity in which sovereign power and natural individual freedom coexist and create a political order which cannot resort to antecedent bonds of mutual obligation but must produce its very own mechanisms of obligations. Constitutionalism is, in other words, the answer to the horrifying experience that worldly rule has become immanent; that is, that naturally free individuals have to create a good order by their own limited means (Preuss, 1996: 13).

As one of these ‘own limited means’, the rule of law is central to constitutionalist theorizing. It is given a twofold meaning in that “acts of domination must acquire the form of the law (government *through* law), and the government itself must subject its will power to the constraints of the law (rule *by* law)” (Preuss, 1996: 16). As can be seen from these summary statements, the idea of constitutionalism is usually applied to domestic political structures, that is, to existing ‘polities’ or ‘communities.’ However, the idea of a legally circumscribed political order which guarantees individuals a right to an adequate share in the making of decisions that significantly affect them also figures prominently in two approaches to democratic governance beyond the state: Otfried Höffe’s theory of the world minimal state and David Held’s model of cosmopolitan democracy.

THEORY OF THE WORLD (MINIMAL) STATE

According to the theory of the world (minimal) state, the demand for collective action on a global scale implies a demand for a global legal and political order (Höffe, 2002: 11). Based on the recognition that

wherever humans interact, arbitrariness and violence are to be replaced with rules (...), the rules are to be placed in the hands of public powers (...), and the powers are to be institutionalised as qualified democracy (Höffe, 1999: 267, my translation),

the resulting ‘world republic’ is “not demanded per se, but only for those tasks that are not yet solved in legal form” (Höffe, 2002: 14, my translation). As a consequence, the aim of establishing a ‘world (minimal) state’ does not imply that individual nation states ought to be dissolved. Instead, the global state is viewed as a “complementary and subsidiary state” (Höffe, 2002: 14, my translation) with only a secondary na-

ture. In accordance with the two-dimensional character of international law, the imperative of a world republic (*Weltrepublikgebot*) includes two dimensions: While the *public* international law dimension is responsible for the lawful co-existence of states, the *world civic* (*weltbürgerliche*) dimension fulfils the same function with regard to the lawful co-existence of non-state subjects, that is, it regulates the legal relations between world citizens. Theoretically speaking, the federal organization of such a world (minimal) state requires a “two-fold world republican treaty” (*weltrepublikanischer Doppelvertrag*) (Höffe, 2002: 22-24). Practically speaking, it requires, above all, a functioning global public sphere (Höffe, 2002: 26).

Criticism of the idea of a world state most often invokes that the idea is beyond what can reasonably be expected to be realizable (cf. Maus, 2002: 249-50). Second, it has been argued that even if it could be realized, the idea of a world state would not be desirable. Without going into too much detail, we can however conclude with regard to the criteria of context adequacy introduced above that the theory of a world (minimal) state is of minor significance for our purpose. First, the model’s mode of legitimation is rather unbalanced in that it hardly speaks to the output dimension of legitimacy. Furthermore, it is based on a hierarchical rather than horizontal style of policy-making. Third, the model presupposes rather than supports social bonds between citizens, thereby violating the requirement to link the democratic quality of its procedures with socializing and civilizing effects. In sum, the theory of the world (minimal) state is therefore largely unable to provide a context-adequate model for the evaluation of transnational decision-making.

COSMOPOLITAN DEMOCRACY

David Held’s model of cosmopolitan democracy is more promising in this regard. While it has similarities with Höffe’s approach in according a central status to law and in emphasizing the idea of subsidiarity, Held’s model starts from a more explicit acknowledgement of the essentially pluralist nature of world politics (Held, 1995: 22). As a consequence, the model appears closer to reality, and its conclusions should therefore be able to provide us with more relevant insights for developing a normative framework for the evaluation of global rule-making processes.

Held (1995: 15) starts from the premise that “a defensible account of the proper meaning of democracy must acknowledge the importance of fundamental liberal and liberal democratic tenets.” In line with this premise, the focal point of his theory of cosmopolitan democracy is the ‘principle of autonomy’ which states that “persons should enjoy equal rights and, accordingly, equal obligations in the specification of the political framework which generates and limits the opportunities available to them” (Held, 1995: 147). The ‘principle of autonomy’ has the status of

an articulation of “the basis on which public power can be justified” and it should therefore be “thought of as a principle of political legitimacy” (Held, 1995: 153).⁵

According to David Held, the idea of democracy derives its attractiveness primarily from the idea of self-determination, that is, from the notion that the members of a political community are able to freely choose the conditions of their own association and that their choices constitute the ultimate legitimation of the way the community interprets and pursues its needs. Held’s theory therefore (a) centres around the idea that the members of a political community shall be able to decide about their life conditions under conditions of freedom and equality—an idea which requires, in turn, that these members are able “to participate in a process of deliberation, open to all on a free and equal basis, about matters of public concern” (Held, 1995: 155).⁶ In order to realize this latter condition, the idea of cosmopolitan democracy (b) entails, as a core element of its conceptualisation of democracy, a number of legal guarantees.

ad (a): In terms of collective self-determination, the growing interdependence among diverse political communities results in a problem of congruence between those involved in making a decision and those affected by it. As a result of the growing interlinkages between societies, the idea of collective self-determination is confronted with the problem of how to determine the relevant community (or communities) for a specific decision. The consequences are far-reaching:

At issue is the nature of a political community and how the boundaries of a political community might be drawn, as well as the meaning of representation and the problem of who should represent whom and on what basis and the proper form of participation – who should participate in which domains and in what ways (Held, 2000: 410).

The solution envisaged by cosmopolitan democracy primarily lies in the principle of subsidiarity. Thus, Held conceives of cosmopolitan democracy as a “system of overlapping democratic institutions at different territorial levels from the city up to the global level” (Melchior, 1999: 203, my translation; cf. Held, 1995: 235-36). In this way, the nation state remains a central point of reference, and decision-making centres beyond the confines of national boundaries are considered appropriate only to the extent that lower levels of decision-making cannot satisfactorily address a political question (Held, 1995: 136). In order to solve the problem of allocating decision-making compe-

5 As a counterpart to the idea of autonomy, the concept of ‘nautonomy’ refers to “the asymmetrical production of life chances which limit and erode the possibilities of participation” (Held, 1995: 171). “To the extent that nautonomy exists,” Held (Held, 1995: 171-72) writes, “a common structure of political action is not possible, and democracy becomes a privileged domain operating in favor of those with significant resources.”

6 This formulation points to the difficulties in clearly delineating constitutionalist approaches from deliberative theories of democracy. If the distinction is nonetheless upheld in this section, it is mainly for analytical reasons, i.e., to elaborate the different emphases on the codification of individual rights and on deliberation, respectively.

tences to the appropriate levels of governance, Held proposes the three tests of extensiveness, intensity, and comparative efficiency (Held, 1995: 236).⁷

ad (b): For Held, the basis for citizens' ability to participate as free and equal in the process of political will-formation lies in the institution of public law (cf. Melchior, 1999: 206). Since the individual—rather than the community—constitutes the subject of cosmopolitan democracy, the principle of autonomy can best be institutionalised in terms of individual rights. As a result, Held maintains that

a democracy would be fully worth its name only if citizens had the actual power to be active as citizens; that is to say, if citizens were able to enjoy a bundle of rights which allowed them to command democratic participation and to treat it as an entitlement (Held, 1995: 190).

It is here that cosmopolitan democracy becomes 'constitutionalist' in the above-mentioned sense. By defining "the proper forms and limits of state action" (Held, 1995: 50) and by referring "to implicit and/or explicit limits on political or state decision-making" (Held, 1995: 50), constitutionalism—or, to use David Held's words, 'cosmopolitan democratic law'—is expected to provide the conditions of and to give shape to "the successful entrenchment of legitimate political power" (Held, 1995: 22).

In this way, democracy is ultimately conceptualised as the sum of individual democratic rights. As to the contents of this "cosmopolitan democratic law," the canon of rights it comprises is guided by the principle of autonomy and by the acknowledgement of various "sites of power" that shape the life choices of citizens. It results in a rather encompassing agenda of seven "clusters of rights" that encompass civil and political as well as cultural and economic rights, the right to health care and the right to peace (Held, 1995: 191-97). These clusters of rights ought to be understood as a "constitutional structure which articulates and entrenches rights across the seven spheres [of power]" and, therefore, as a "key condition for the possibility of democracy" (Held, 1995: 199-200). In analogy to this catalogue, democracy can be understood as "a continuum across which particular rights *within* clusters will be more or less enforced, and *different* right clusters will be more or less entrenched" (Held, 1995: 191).

Held's model is explicitly tailored to politics beyond the state and it could therefore be expected to score high on our criteria of context adequacy. However, Wolf (2000: 192-195) has argued that the model relies too heavily on ideas inherited from national democratic practice, that is, on elements of majoritarian democracy and on the establishment of a supranational world 'government,' presuming among other things that citizens can avail of (or at least develop) an identity as 'world citizens.' Because of its preference for 'government' rather than 'governance,' Wolf classifies cosmopolitan

7 Whereas the test of extensity refers to the "range of peoples within and across delimited territories who are significantly affected by a collective problem and policy question;" the test of intensity relates to the "degree to which [a policy question] impinges on a group of people(s) and, therefore, to which national, regional, or global legislation or other types of intervention are justified" (Held, 1995: 236; for a discussion see Schmalz-Bruns, 1999: 220).

democracy as “not particularly context-suitable” (Wolf, 2000: 194, my translation). In particular, the model is criticized for being relatively weak on the output side of legitimacy since it does not specify how its substantive and procedural demands may promote the common welfare. Second, it accords hierarchical modes of policy-making a fairly prominent role in its overall framework, thus violating a central criterion of context-adequacy.

In sum, constitutionalist approaches are thus generally found wanting in terms of their context adequacy, mainly because they are based on a hierarchical rather than a horizontal style of policy-making and because they presuppose the existence of social bonds between citizens who conceive of themselves as ‘world citizens.’ Nonetheless, some insights of cosmopolitan democracy such as its emphasis on the idea of self-determination and on the centrality of participation and inclusiveness, its focus on the principle of subsidiarity, and its notion of sites of power may be kept in mind as important elements of democratic governance beyond the state.

3.2 *Less Government: Pluralist Approaches*

If constitutionalist approaches are inadequate because their style of policy-making is not sufficiently horizontal, then a pluralist model of democratic governance may appear more suitable. Pluralist approaches do not ascribe to the state a role as central as their constitutionalist counterparts. Instead, they conceive of the balanced interaction among societal forces—organized in interest groups, political parties or other voluntary associations—and the dispersion of power among a variety of social actors as the core elements of democratic governance (cf. Cunningham, 2002: 73-90; Laclau, 2001: 514). The following paragraphs are intended to give a brief overview of the pluralist doctrine.

Pluralism is a label that in connection with democracy is used both in an empirical and in a normative sense. In its empirical usage, the notion of pluralism points to the observation that in existing liberal democracies, a plurality of social and political actors share in the making of politics. As a normative idea, it holds that the dispersion of power among a variety of collective actors and the balancing of diverse social interests through the—more or less unimpeded—interaction of societal forces should constitute the core of any political system that may rightly be called democratic.

The normative theory of pluralist democracy is based on the view that associations—“voluntary organizations created by private citizens to pursue a shared interest or activity” (Hirst, 1995: 91)—are a highly desirable feature of democratic political systems and that “[t]hey are (...) necessary to the functioning of the democratic process itself, to minimizing government coercion, to political liberty, and to human well-being” (Dahl, 1986: 1). Normative pluralism rests on the acknowledgement that modern societies are characterized by a high degree of social differentiation, a diversity of life styles, and a plurality of interests. In these diverse societies, independent organiza-

tions act as intermediate institutions through which interests can be aggregated and articulated.

The approach is based on the premise that, in principle, all interests can be articulated and organized and that a balance between these interests can be achieved. If it is further assumed that the organization of interests requires the investment of resources, then this would presuppose that all interest groups dispose of roughly equal resources (cf. Schmidt, 1997: 151-61). Since this precondition is not necessarily given in actual societies, the state is called upon to establish and guarantee the “equality of weapons” (*Waffengleichheit*) (Schmidt, 1997: 156) among interest groups. Thus, pluralist democracy does not accord the state as central a status as other theories of democracy may do, but neither does it categorically rule out state involvement in social and economic affairs. Importantly, law as well as other institutional controls on the executive power are seen as core elements of a democratic political system.

As a general model, pluralism has developed a number of variants and provided fertile ground for the development of related theories. Thus, labels such as corporatism and neo-corporatism (see Schmitter, 1995 for an overview), competitive elitism (Schumpeter, 1950), polyarchy (Dahl, 1989, 1998) or associationalism (Cohen and Rogers, 1995; Hirst, 1994) stand for a number of approaches the common core of which is the idea that in a democratic society, power ought to be dispersed among a variety of actors and that, as a result, policy-making ought to derive largely from the interaction either among interests groups or between interest groups and government. The virtue of pluralism, it is argued, is that, “ideally, those who are most affected by an issue have the greatest say about its resolution”—which would however presume that “all those directly affected by prospective policy changes were represented by interest groups, and all interest groups were included in the bargaining and negotiating that lead to new legislation or regulatory action” (Berry, 1995: 619).

At a first glance, pluralist approaches seem more suitable to the specific requirements of transnational politics than their constitutionalist counterparts.⁸ Thus, pluralism offers a solution to the problem of identifying relevant constituencies in that it ties the democratic quality of decision-making to the inclusion of self-selected organized interest groups at the bargaining table. In addition, the pluralist approach can cope with the absence of government as it is based on a mainly horizontal style of policy-making. Finally, power is necessarily dispersed in the inter- and transnational arenas,

8 See for instance King (2003: 32-33) who holds that “pluralist approaches of democracy (...) have the obvious virtue of applying in a straightforward way to multilateral organizations.” In contrast, Cunningham (2002: 207) argues that despite some similarities on the descriptive side, “pluralist prescriptions are hard to apply on a global scale” and that “[c]hecks and balance systems of government, active promotion of global interest groups overlap, and the like would require world political coordination beyond that favoured even by cosmopolitans.” The coexistence of various formal and informal control mechanisms in world politics (cf. Rosenau, 1998; see also Benner, Reinicke and Witte, 2004; Keohane and Nye, 2001) however indicates that checks and balances may exist without the degree of ‘world political coordination’ that Cunningham would presume as necessary.

and the recent transnationalisation of (alliances of) nongovernmental actors as well as the observation of ‘corporatism going global’ (Ottaway, 2001) further indicate that the idea of bargaining among societal forces has an empirical correspondence in world politics. However, while the approach may satisfy some of the requirements with regard to the empirical context of world politics, it is less satisfactory from a normative perspective.

First, the democratic quality of the pluralist approach rests on the notion that all interests may be organized to a similar degree. However, numerous empirical studies have demonstrated that this is not the case. As a consequence, interests which share some specific qualities will be better organized than others and hence be better represented in decision-making processes while other interests will be neglected. Ultimately, pluralism allocates competences to strong interests without being able to provide, from within the theory, principled arguments for a protection of weaker social interests. As a consequence, pluralism becomes more or less identical with power politics, thus putting aside questions that have been at the heart of democratic theory “from Athens to nineteenth Century England” (Held, 1996: 209).⁹

Second, pluralism contravenes the requirement to “offer procedures which do not consume, but instead generate collective identity and mutual trust” (Wolf, 2002b: 46). In fact, its procedures are neither ‘qualifying’ in that they reward the actualisation of moral orientations, nor ‘civilizing’ in the sense of supporting the development of solidarity among fellow citizens. In contrast, the pluralist doctrine gives every reason to fear that the already weak bonds between citizens will decrease gradually as a result of decision-making based on the unrestricted bargaining among societal forces.

In sum, pluralism can therefore do little more than provide some relevant insights for the construction of a theory of democratically legitimate rule-making beyond the state. Among these insights are the importance of the dispersion of power and, more generally, the idea of controlling decision-makers. In addition, the more specific notion of bargaining among societal forces may serve as an important element of such a theory. The precondition would, however, be that it is subjected to a number of specifications and constraints in order to correct for the normative deficits of the ‘pure’ pluralist doctrine.

3.3 *More Discourse: Deliberative Approaches*

In contrast to constitutionalists and pluralists, for adherents to deliberative democracy the idea of democracy is not so much tied to the fate of government but rather

9 A similar criticism was put forward by Schattschneider (1960: 35) who argued that “The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent” and that “Probably 90 per cent of the people cannot get into the pressure system.” While Schattschneider made his comment with regard to industrialized societies of the 1960s, it seems equally relevant for transnational politics of today.

to the discursive quality of collective decision-making. Hence, instead of calling for more or less government, deliberative democrats' recipe for democratisation can be summarized by the call for "more discourse" or "more deliberation."

THE IDEA OF DELIBERATIVE DEMOCRACY

As most other theories of democracy, deliberative approaches see their primary task in spelling out "the conditions under which political decisions should be considered legitimate expressions of the collective will of the people" (Hauptmann, 1999: 858). Based on the observation that contemporary societies are characterized by a plurality of reasonable religious, philosophical, and moral doctrines (Rawls, 1997: 96), deliberative democracy grounds its considerations on the understanding that "legitimacy in complex societies must be thought to result from the free and unconstrained public deliberation of all about matters of common concern" (Benhabib, 1996: 68).¹⁰ Thus, Jon Elster (1998: 8) defines the 'democratic' part of deliberative democracy as "collective decision making with the participation of all who will be affected by the decision or their representatives." In turn, the attribute 'deliberative' refers to "decision making by means of arguments offered *by* and *to* participants who are committed to the values of rationality and impartiality." The common core of deliberative democracy can thus be summarized in the statement that

A law is legitimate only if it is based on the public reasons resulting from an inclusive and fair process of deliberation in which all citizens may participate and in which they may continue to cooperate freely (Bohman, 1996: 184).

Both John Rawls and Jürgen Habermas stress that the democratic procedure of collective will-formation constitutes the only post-metaphysical source of legitimacy. Democratic procedure derives its legitimising force from the fact that

it makes it possible for issues and contributions, information and reasons to float freely; it secures a discursive character for political will-formation; and it thereby grounds the fallibilist assumption that results issuing from proper procedure are more or less reasonable" (Habermas, 1999: 448).

On this account, collective decisions derive their legitimacy not from their form—that is, from their formulation as general laws that abstract from the empirical differences of the individuals subject to them—or their moral content, but from the procedures of decision-making themselves.¹¹

As far as such procedures are concerned, deliberative democratic theory is organized around the notion of an ideal procedure for deliberation and decision-making (Habermas, 1996). This conception of an ideal procedure serves the purpose of a counterfactual thought experiment against which real procedures can be critically evaluated. The notion of an 'ideal deliberative procedure' has been elaborated most clearly by

¹⁰ For similar formulations, see Elster (1998: 5) and Bohman (1998: 401).

¹¹ See also the earlier formulation of Manin (1987: 351-52) that "the source of legitimacy is not the predetermined will of individuals, but rather the process of its formation, that is, deliberation itself."

Joshua Cohen (1989: 22-23). According to Cohen, deliberations have to be free from coercion and follow an argumentative mode of communication. In other words, participants are required to give reasons for their proposals and be ready to critically judge other participants' propositions. Second, deliberations have to be inclusive and public in that all those who are potentially affected by a decision have equal chances to access and participate in the deliberations. Third, deliberations should be oriented towards consensus, that is, the participants are required to approach the deliberations openly and with the aim of reaching a reasoned agreement.¹²

As indicated, the 'ideal deliberative procedure' has the theory-internal function of a counterfactual thought experiment. Thus, as one observer has remarked, "[t]he ideal speech situation by itself tells us nothing about the structure of discourses, but it does give us a standard from which to evaluate real discourses" (Chambers, 1996: 172) and "the relationship between thought experiments and real discourse is optimally one of reflective equilibrium" (Chambers, 1996: 168-69). Unlike Rawls's notion of reflective equilibrium, in which we check our thought experiments against our own considered judgments, however, "the discourse version calls for checking our thought experiments against the considered judgments of others as well" (Chambers, 1996: 169).¹³

As a counterfactual idea the 'ideal deliberative procedure' has the additional benefit of clarifying some of the key elements of deliberative democratic thought. First, the ideal procedure speaks to the role of impartiality and respect in the deliberative process. Because deliberators are required to frame their arguments in terms they can reasonably expect other participants to accept, in the end "even self-interested speakers are forced or induced to argue in terms of the public interest" (Elster, 1998: 12).¹⁴ In addition, the "process of mutual reason-giving" (Gutmann and Thompson, 2002: 157) can be understood as an expression of the more fundamental democratic norm that citizens should respect one another as persons with equal fundamental rights and liberties. In sum, the notion that the "legitimacy of laws rests on the persuasiveness of the reasons that can be garnered for these laws" (Chambers, 1996: 8) can therefore be interpreted as reflecting how impartiality and respect can form the basis of collective decision-making in a society marked by a diversity of comprehensive doctrines.

Second, the ideal procedure also speaks to the epistemic value of deliberation. Thus, in the words of Habermas (1999: 304), "Deliberative politics acquires its legitimating force from the discursive structure of an opinion- and will formation that can fulfill its socially integrative function only because citizens expect its results to have a

12 In addition, other authors have argued that ideal deliberations should be free from time restraints, that is, either open-ended or subject to being reassumed at any point in time; and that deliberations should extend to all matters that need to be regulated in the interest of all (Schmidt, 1997: 178).

13 See also Shapiro (2002: 197) on the distinction between Rawls's essentially solipsistic 'reflective equilibrium' and a 'deliberative equilibrium' such as the one envisaged by Chambers.

14 See also Cohen's (1996: 106) related argument that "[t]he background conception of citizens as equals sets limits on permissible reasons that can figure within the deliberative process."

reasonable *quality*.” In the ‘ideal speech situation’ envisaged by Habermas, citizens would be able to communicate without distortions caused by differences in power, resources, or capabilities. As a consequence, it should be expected that their deliberations, in which no force except ‘the force of the better argument’ is at work, would eventually lead to the epistemically ‘best’ agreement. While it is obvious that real deliberation will be unable to meet such extraordinary standards of rationality, the potential for rationality inscribed into the requirement of actual “mutual reason-giving” is an asset of the deliberative model, not least with regard to the demand for models of transnational democratic governance to combine elements of input- and output-legitimation (see also Wolf, 2000).

Third, the ideal procedure can provide guidance with regard to the institutionalisation of “discursive designs” (Dryzek, 1990). Thus, while most adherents of deliberative democracy would agree that for an institutionalisation of deliberative procedures, the existence of “arenas in which citizens can propose issues for the political agenda and participate in debate about those issues” (Cohen, 1989: 31) is central and that the function of institutions in deliberative democracy is to “establish the framework for free public deliberation” (Cohen, 1989: 21), such general statements do not yet convey a very clear picture of what we can and should expect from real procedures and discourses or how we ought to design them. Here, the various elements of the ‘ideal deliberative procedure’ may provide assistance.

DELIBERATIVE DEMOCRACY AND TRANSNATIONAL POLITICS

As it stands, most authors now seem to agree that deliberative democracy is a rather attractive model not only for local or national politics, but also for inter- and transnational politics. Thus, Dryzek (1999: 44) notes that the discourse model of democracy is particularly conducive to international society because, unlike other models of democracy, it can downplay the problem of boundaries. Furthermore, the absence of an overarching state or a state analogy, while at the same time accounting for the pervasiveness of conflict in international and transnational politics, is seen as “one less obstacle to discursive democracy” (Dryzek, 1990: 90). Third, the model derives its usefulness for the conceptualisation of democratic governance beyond the state from the fact that it is not primarily dependent on the existence of a strong sense of community (Wolf, 2000: 196). In turn, the procedures of deliberative democracy themselves have a potential of contributing to the generation of community and solidarity (Schmalz-Bruns, 1999: 189). Fourth, as indicated above, the epistemic quality of deliberative democratic decision-making—although disputed among theorists—is also attractive to transnational politics that are pervaded by complexities and that cannot, for the time being, rely on a strong solidarity among citizens.

Finally, a deliberative conception of transnational democracy seems capable of connecting to existing research programs in the discipline of International Relations, such as for instance the academic debate about the role of arguing and communication

in world politics (Zürn, 1998; see Risse, 2000; 2004 for an overview). Thus, the deliberative quality of decision-making may be translated into a continuum marked by the two poles of arguing (as an expression of communicative action) and bargaining (as an expression of strategic action) whereby the deliberative quality of a decision-making process would be measured in terms of its closeness to the arguing-end of the continuum (cf. Elster, 1998: 13).¹⁵ However, while publicity and inclusiveness are not necessarily elements of arguing as a mode of social interaction, they are necessary if decision-making is to qualify as democratic (Wolf, 2000: 200; Schmalz-Bruns, 1999). In sum, the mode of communication can thus be called upon in order to evaluate the *deliberative* quality of a decision-making process. The evaluation of its *deliberative-democratic* quality however needs to include the additional dimensions of publicity, universal access, and the linkage of collective decisions to public discourse.

The discussion of the three approaches to democratic governance can be summarized as follows: At a very general level, all three approaches provide insights about democratic governance beyond the state, and the three approaches can be seen as complementary to the extent that they highlight different aspects of democratic theory. While constitutionalist approaches focus on self-determination, inclusiveness, and subsidiarity, pluralist conceptions of democracy emphasize the importance of checks and balances on the exercise of power and the role of voluntary associations in negotiating the common good. Third, deliberative approaches stress the discursive character of will-formation and decision-making and therefore demand that mutual reason-giving should play a central role in collective decision-making. While all three approaches have their strengths and weaknesses, the deliberative model seems most suitable to the context of transnational governance. By relying on a horizontal mode of political coordination, combining aspects of input, throughout and output legitimacy, and by combining the democratic quality of procedures with concerns about socializing and civilizing effects, it offers an attractive model not only for politics at the local and national level, but also for politics beyond the state.

As every model of democratic governance, deliberative democracy is, however, not without its weaknesses. Among these weaknesses are potential trade-offs between deliberation and other goals such as, for instance, efficiency; difficulties in terms of identifying relevant constituencies for a specific decision; and difficulties in regard to allocating competences to entities more specific than ‘discourses’ in general.¹⁶ Since some of these difficulties may be linked to the abstract nature of ‘grand’ democratic theory as such, the following section will lower the level of abstraction by translating the insights from cosmopolitan, pluralist, and deliberative democracy into the notions of legitimacy through participation, control, and discursive practice. The section’s aim

¹⁵ On the concepts of arguing and bargaining, see also Saretzki (1996).

¹⁶ For further criticism of deliberative democracy, see, among others, Sanders (1997), Stokes (1998), and Young (2001).

is to formulate questions which can guide the evaluation of the democratic legitimacy of actual transnational rule-making processes.

4 Dimensions of democratic legitimacy: A framework for analysis

What does the discussion of the various models of democratic governance tell us in terms of more concrete criteria which we can use to evaluate actual decision-making processes? In other words, which institutional requirements ought transnational rule-making processes aspire to meet? I argue that we can distinguish between three sources or dimensions of democratic legitimacy, namely participation or inclusiveness, democratic control, and discursive quality. I will discuss each of the three dimensions in some more detail in this section. The aim of the discussion will be to establish more specific criteria for the evaluation of the democratic legitimacy of transnational rule-making-processes. In other words, I seek to answer the question ‘To which questions should we subject transnational rule-making processes if we want to know more about their democratic legitimacy?’

4.1 Legitimacy through participation

A first way to establish the democratic legitimacy of collective decision-making processes is through participation. Participation is a core element of any democratic theory, and one could hardly speak of democratic legitimacy where none of the individuals subject to a collective decision has taken part in its making. In turn, it goes without saying that decision-making equally implies individuals that actually make a decision; in other words, any decision-making process presupposes at least some degree of participation. The real question of democratic legitimacy is therefore not so much about *whether* there is participation, but *to what extent* those who are subject to a decision have been included in the decision-making process.

This question has two aspects, namely the *scope* and the *quality* of participation. The scope of participation refers to *who* participates; it relates to the postulate of congruence which requires that the range of individuals that are significantly affected by a collective decision is identical to the range of individuals who make the decision. This leads to the problem of identifying and defining relevant constituencies for a decision-making process—and it should lead the analyst to be sensitive to the ways in which this problem is solved in actual decision-making processes. Thus, a first set of questions for the evaluation of decision-making processes can be formulated as follows: How are the relevant constituencies identified and defined, and how are the participants determined and selected? Which alternatives would have been available? And how convincing is the actual choice in the light of these alternatives? Generally speaking, the notion of ‘legitimacy through participation’ would imply that the higher the scope of participa-

tion in a decision-making process, the more legitimate the results. However, trade-offs with other criteria such as for instance efficiency (cf. Dahl, 1994) should be obvious so that it appears difficult to provide an absolute standard for the ideal scope of participation.

As a second aspect, the quality of participation asks *how* those who are included in the decision-making process actually participate. Here, various degrees of participation can be imagined, ranging from largely passive modes such as receiving information via the mass media to more active modes such as raising one's voice in public debate, voting in a referendum, selecting a representative, or representing a constituency in negotiations. Again, while a more active mode will generally be seen as providing more legitimacy, it is difficult to establish, independently of specific contexts, a clear standard for what kind of participation would be desirable for decision-making processes in general. Accordingly, it is difficult to 'measure' the adequacy of participation for the purpose of determining the democratic quality of a given rule-making process.

The different models of democratic governance can however assist in establishing appropriate criteria. For instance, the deliberative model would demand that those who perceive themselves as potentially affected by a collective decision be able to participate in the public exchange of arguments on the issue. In this perspective, the quality of participation is thus linked to the *equality of opportunities to participate* in decision-making in an adequate way so that analysts of actual decision-making processes would need to be sensitive to instances of exclusion.¹⁷ As a result, a second set of questions can be formulated as follows: How do those who are included in the decision-making process participate? Are there different qualities of participation and, if so, to what extent have constituencies access to the various modes of participation? Is representation a primary element of participation and, if so, who represents whom in what ways?

4.2 *Legitimacy through democratic control*

A second source of democratic legitimacy is linked to the idea of democratic control. The idea that the choices of the governors should to a certain extent be subject to the control of the governed is implicit in all three models of democratic governance introduced above—probably most explicitly in the pluralist model's emphasis on checks and balances. However, the models conceptualise the idea in different ways and accord it different weightings in their overall framework of democratic governance.

In general, the idea of democratic control has certain similarities with the idea of participation and forms of control might ultimately be conceived of as passive forms

¹⁷ The search for instances or mechanisms of exclusion could for instance be guided by David Held's analysis of different sites of power (see above).

of participation. If, for analytical reasons, we accept the distinction between citizen participation and democratic control, then the latter can be further specified by reference to the concepts of accountability, transparency, and responsiveness. Among these concepts, responsiveness—the notion that decision-makers should act in accordance with the interests of their constituencies¹⁸—marks the ultimate goal. In turn, accountability is seen as a means to achieve greater responsiveness, and transparency is conceived as a means to achieve greater accountability. I will briefly discuss the concepts of accountability and transparency in this subsection; responsiveness as an ultimate goal is inherent in these concepts and will thus not be treated as a separate issue in this section.

Accountability is a relational concept. In the words of Robert Keohane (2002: 12),

An accountability relationship is one in which an individual, group or other entity makes demands on an agent to report on his or her activities, and has the ability to impose costs on the agent. We can speak of an authorized or institutionalized accountability relationship when the requirement to report, and the right to sanction, are mutually understood and accepted. Other accountability relationships are more contested. In such situations, certain individuals, groups, or entities claim the right to hold agents accountable, but the agents do not recognize a corresponding obligation.

With regard to the general idea of accountability, a number of further distinctions can be made. Thus, Keohane and Nye (2001: 4-5) distinguish between electoral, supervisory, legal, reputational, and market accountability; and Keohane (2002: 13-14) further distinguishes between internal and external,¹⁹ and between democratic and non-democratic forms of accountability. As far as the latter distinction is concerned, accountability can be democratic, but it need not be:

Indeed, it can also be hierarchical (in which subordinates are accountable to superiors) or pluralistic (as in Madisonian constitutionalism, in which different branches of government are accountable to one another). Actual systems of accountability in constitutional democracies combine all three syndromes of accountability: democratic, hierarchical, and pluralistic (Keohane, 2002: 13).²⁰

The variety of forms of accountability points to an important difference between participation and control in as much as the language of democratic control often downplays the question who is able to exert control over decision-makers as long as checks and balances are existent and regarded as sufficient. It may therefore be useful to distinguish between ‘control’ as the existence of checks on the power of decision-makers and ‘democratic control’ as the existence of roughly equal access to such control mechanisms among individuals or groups that have a valid claim to control decision-makers. In general, control will be preferable to the absence of control, and democratic control will be preferable to non-democratic control. A third set of questions for the evaluation

18 Here the term ‘constituency’ is understood as referring to the inclusive range of individuals who will be significantly affected by a decision, and not to particular electoral constituencies of representatives.

19 Internal accountability exists where claims are based on authorization or support; in contrast, external accountability exists where claims are based on impact (cf. Keohane, 2002: 14).

20 On different mechanisms and instruments of accountability in global governance, see also Benner, Reinicke, and Witte (2004).

evaluation of transnational decision-making processes can hence be summarized in the following way: Which effective mechanisms of accountability exist in a given decision-making structure? Which groups have a valid claim to hold decision-makers to account? And which opportunities do these groups have to access existing control mechanisms? (cf. Keohane, 2002: 15). As with the scope and quality of participation, trade-offs exist with efficiency and possibly also with other desirable goals and the empirical analysis will have to take account of these trade-offs.

As a second aspect of democratic control, the degree of transparency can be conceptualised as the extent to which individuals who may be significantly affected by a decision are able to learn about the decision-making process, including its existence, subject matter, structure and current status.²¹ The notion of transparency thus refers, on the one hand, to the quality and accessibility of information that is provided either by the decision-making bodies themselves or by way of independent monitoring via the media or other agents. On the other hand, a broader understanding of transparency will also include the capacities of those whom the information should reach, including the technical and intellectual capacities as well as the resources (time-wise or financial) required to obtain and make use of the information. Thus, a fourth set of questions may be formulated as follows: What information about the existence, structure, content and current status of the decision-making process is available to the public? How and at which costs can those who may be significantly affected by a collective decision inform themselves about the decision-making process? Which barriers to accessing, collecting, and disseminating information about the decision-making process exist?

4.3 *Legitimacy through discursive practice*

As the discussion of the various models of democratic governance has shown, establishing criteria by which we can distinguish more deliberative-democratic decision-making processes from less deliberative-democratic ones will be crucial. Broadly speaking, an important indicator for the deliberative-democratic quality of transnational rule-making processes will be the degree to which participants communicate in the mode of arguing rather than bargaining. More specifically, the practical demands of deliberative democracy can be analysed along the notions of universality, rationality, and reciprocity (Chambers, 1996: 197-211).

²¹ For a definition of transparency, see, for instance, Hood (2001: 701) who refers to the concept as “government according to fixed and published rules, on the basis of information and procedures that are accessible to the public, and (...) within clearly demarcated fields of activity.” For our purposes, ‘government’ would have to be replaced with ‘governance.’ In addition, Hood (2001: 704) also points out that, as with the other criteria mentioned above, transparency should not be regarded as an absolute standard and that trade-offs may exist with regard to the likelihood of cooperative behavior in bargaining situations and with individual rights in situations where “one person’s transparency (...) may be another person’s privacy.”

The criterion of universality demands that no barriers exist which systematically exclude specific individuals or groups from deliberations. Next to the absence of barriers to participation, the degree of actual participation—that is, the question whether deliberations extend beyond elite negotiations and whether organizations exist by means of which a critical public can feed in its opinions—and the degree of political interest among potentially affected groups can serve as a further indicator for the universality or inclusiveness of the decision-making process (cf. Chambers, 1996: 197-202). This criterion is thus linked to the dimension of participation and inclusiveness.

Second, the criterion of rationality or non-coercion asks how a consensus is reached and which role power plays within the deliberative process. Any attempt to determine this variable will, of course, inevitably meet with methodological problems induced by the complexity and internality of communicative processes (cf. Chambers, 1996: 203-05). Whether or not an agreement is based on an autonomous decision or not can ultimately only be answered by the participants themselves. In the light of these difficulties, the only way to at least approximately determine the degree of rationality or non-coercion seems to lie in the attempt “to become aware of the distortions in communication and discourse, which could be produced by these influences” (Chambers 1996: 203).

Third, the criterion of reciprocity refers to the extent to which impartiality and respect are manifest in a given discourse and to the extent to which participants approach the deliberations from the viewpoint of reaching a consensus. The consistency of participants’ argumentation, the consistency of their arguments and behaviour, the coherence of their argumentation, the recognition of the moral status of opposing views, and the “disposition to openness” can serve as indicators for such reciprocity (cf. Chambers, 1996: 207-11). In accordance with these criteria, a fifth set of questions may be formulated as follows: To what extent does a given decision-making process include deliberative elements and which role do arguments play in the decision-making process? To what extent do deliberations extend beyond elite negotiations and include a broader public? How do participants approach deliberations?

In contrast to this view of deliberation as a desirable instrument to reach collective decisions, some proponents of deliberative democracy regard discourses as “a long-term process of collective interpretation rather than a decision procedure” (Chambers, 1996: 200, see also 171; Dryzek, 2000) and conceive of democracy as the ‘balance of discourses.’ If we subscribe to such a broader view of discourse as the social space where collective interpretations are constructed and consider practical discourse as a long-term consensus-forming process rather than a decision procedure, then our evaluation of transnational rule-making processes would need to include a sixth set of questions such as: What are the qualities of the dominant discourse(s) that exist in the issue area in which the decision-making process is situated? How do they affect the decision-making process? Which role do alternative discourses play?

Reviewing this section, we can recapitulate that the democratic legitimacy of transnational rule-making processes can be analysed mainly along three dimensions, namely the participation or inclusiveness of a rule-making process, the democratic control it provides for, and its discursive quality. In the discussion of these dimensions of democratic legitimacy, I have attempted to further specify the criteria for distinguishing between more and less democratic forms of rule-making by indicating various sets of questions which ought to be addressed in an evaluation of actual transnational rule-making processes.

Since the three dimensions are partly related to each other, the existence of trade-offs should hardly come as a surprise. For instance, Michael Zürn (1998: 10) has noted that a tension exists between the requirements of inclusiveness and transparency on the one hand and the discursive character of communicative processes on the other. “As a rule,” he argues, “consensus-oriented deliberations and negotiations are more successful with a small number of actors and (at least sometimes) in camera. Yet both closed sessions and a biased selection of participants contradict democratic principles.”²² Other trade-offs such as those between transparency and privacy or between deliberation and efficiency have been mentioned. Accordingly, none of the criteria established in this section should be regarded as an absolute standard. In addition, the question of trade-offs should sensitise the analyst to the specificities and contingencies of the social contexts in which any given decision-making process is embedded. Before concluding this chapter, the following section will therefore complement the discussion by asking how much democratic legitimacy transnational rule-making processes require.

5 Context-specific differences: How much participation, control and deliberation does transnational rule-making require?

If we assume that not all rule-making processes need to be held to the same high standards of inclusiveness, control, or deliberation, the question arises which contextual factors may justify a variation in the degree of participation, control and discursiveness of transnational rule-making processes that is deemed sufficient. From the literature, at least four potential justifications can be derived:

First, decision-making processes may be distinguished by reference to their sources of authorisation. Thus, Wolf (2002a: 15-18) distinguishes between explicit authorisation by national or international law; implicit authorisation when states do not explicitly object to the rule-making efforts of other actors; ex post recognition by an

²² See also Shapiro (2002: 198) who notes a trade-off between publicity and deliberation inasmuch as the former often “rewards those with the resources to shout loudest and longest.”

authorizing body; and self-authorisation.²³ Wolf (2002a: 15) argues that, while “The exercise of power is traditionally regarded as legitimate if it is carried out by a legally authorised body”, the notion of ‘democratic legitimacy through legal authorisation’ is problematic when applied to inter- and transnational politics because of the legitimacy deficits of intergovernmental decision-making procedures themselves. In short, there is no international body that may authorise the delegation of rule-making authority with the same degree of legitimacy as in national political systems. Nonetheless, different forms of authorisation may justify variation in the degree to which standards of democratic legitimacy are met. To what extent they do is a question that is best addressed in the context of specific cases.

A second aspect is the level to which citizens are affected by a subject matter. Thus, the need for participation, control, and deliberation may be said to depend on the extent to which a decision directly affects the lives of citizens subject to a decision (Decker, 2000: 587). Accordingly, it has been argued that “[t]he greater the significance of (...) international institutions, the greater the need for democratic legitimation of their decisions” (Zürn, 1998: 7).²⁴ Such a distinction is also broadly in line with Robert Keohane’s (2002: 14) observation that “[m]erely being affected cannot be sufficient to create a valid claim [to hold an entity accountable].” On this account, a distinction between different degrees of affectedness and, ideally, a context-sensitive threshold that would determine the degree of affectedness that validates a claim to participation or control would be required.²⁵ Since such a threshold will be difficult to determine, the recommendation for the analyst of actual decision-making processes can—again—only be to be sensitive to the extent to the subject matter of a given rule-making process affects the lives of different individuals and groups.

Third, the quality of a rule may justify different degrees of participation, control, or deliberativeness. A first distinction can be made between decisions about rules for a specific area of policy-making and decisions about ‘constitutional rules’ (Pogge, 1997). This distinction basically conforms with John Rawls’s (1997: 94) argument that “the limits imposed by public reason do not apply to all political questions but only to those involving what we may call ‘constitutional essentials’ and questions of basic justice.” Similarly, Simone Chambers (1996: 196) argues that “[t]he more the issue is an issue of justice that affects all, the more the forum should replace the market,” thus providing a link between the subject matter and the quality of a rule. Linking this distinction to the more empirical literature on world politics, a further distinction can be made along the lines of the obligatory character, the precision, and the delegation a given set of rules

²³ Wolf includes “authorisation’ by those governed” as a fifth category. This is, however, a relatively elusive category whose value for empirical research seems questionable.

²⁴ See also Shapiro (2002: 209): “the more one’s basic interests are threatened, the stronger is one’s claim to insist on deliberation.”

²⁵ See, however, Joshua Cohen who maintains that “[d]emocracy is about justifying authority, not about justifying influence” (Cohen, 1996: 114, note 1)

provides for (cf. Abbott, Keohane, Moravcsik, Slaughter and Snidal, 2000). Finally, the (intended or actual) scope of the rule's application, that is, whether a rule applies only to the parties who have negotiated it or whether it also generates normative force beyond this circle can be called upon to distinguish between different qualities of rules.

Fourth, the degree to which a global rule is seen as necessary may justify different degrees of participation, control, or discursive quality. This distinction is linked to the idea of subsidiarity, that is, to the idea that decisions are best taken at the lowest policy-level at which a given problem may be effectively addressed. Thus, the empirical analysis may include questions such as 'Is a transnational or global rule necessary for a given issue?' and 'Which interests in a transnational or global rule exist?' Both questions relate to the more general question 'When is a problem a global problem?' In the light of the postulate of subsidiarity, where an argument for transnational or global rules cannot be formulated in a convincing manner, higher standards of democratic legitimacy will need to be applied.

6 Conclusions

Both legitimacy and 'democratic legitimacy' are multidimensional concepts. As such, it is likely to pose difficulties or even cause misunderstanding when it is used in private conversation, public speeches, or academic articles. We may notice this when we use the term ourselves—and we will most probably notice when other people use the term and we are struggling to grasp its meaning. The aim of this article has therefore been to disaggregate the concept of 'democratic legitimacy beyond the state' and to thereby make it more applicable to the study of actual international and transnational decision-making processes.

After discussing the theoretical foundations of the concept along the lines of constitutionalist, pluralist, and deliberative approaches to democratic governance beyond the state, I have distinguished between three dimensions of democratic legitimacy, namely participation and inclusiveness, democratic control, and discursive quality. Based on the distinction of different conceptual dimensions of democratic legitimacy, the following catalogue of criteria and questions—all developed in section 4 of this article—may serve as a valuable starting point for the evaluation of actual rule-making processes beyond the state:

- (L1) **Scope of participation:** How are the relevant constituencies identified and defined, and how are the participants determined and selected? Which alternatives would have been available? And how convincing is the actual choice in the light of these alternatives?
- (L2) **Quality of participation:** How do those who are included in the decision-making process participate? Are there different qualities of participation and, if so, to what extent have constituencies access to the

various modes of participation? Is representation a primary element of participation and, if so, who represents whom in what ways?

- (L3) **Democratic accountability:** Which effective mechanisms of accountability exist in a given decision-making structure? Which groups have a valid claim to hold decision-makers to account? And which opportunities do these groups have to access existing control mechanisms?
- (L4) **Transparency:** What information about the existence, structure, content and current status of the decision-making process is available to the public? How and at which costs can those who may be significantly affected by a collective decision inform themselves about the decision-making process? Which barriers to accessing, collecting, and disseminating information about the decision-making process exist?
- (L5) **Deliberativeness:** To what extent does a given decision-making process include deliberative elements and which role do arguments play in the decision-making process? To what extent do deliberations include a broader public, that is, to what extent do they reach beyond elite negotiations? Which role does power play within the deliberative process? How do participants approach deliberations?
- (L6) **Discursive balance:** What are the qualities of the dominant discourse(s) that exist in the issue area in which the decision-making process is situated and how do they affect the decision-making process? Which role do alternative discourses play?

Finally, since every actual political process will have to be judged in the light of the social context in which it is embedded, section 5 has identified a number of contextual factors that may justify a variation in the degree to which the various standards of democratic legitimacy are met in a given situation. The discussion of this section has led to the following list of additional criteria:

- (C1) **Authorisation:** On which source(s) of formal or informal authorisation can the rule-making process draw?
- (C2) **Affectedness:** To what degree do the issue(s) to be decided affect the lives of different individuals or groups? How are various individuals or groups affected by the outcomes of the decision-making process?
- (C3) **Quality of the rule(s):** What are the qualities of the rule(s) devised? Are they first order or second order rules? What degree of obligation, precision, and delegation is attached to the rules? Is the (intended or actual) scope of the rule's application internal or external?
- (C4) **Subsidiarity:** How convincing is the framing of the issue to be decided upon as a transnational global problem convincing? In other words, is a transnational/global necessary for the specific contents of the rule-making process? Which interests in transnational/global rules on the issue exist?

In conclusion, my answer to the question ‘When is transnational rule-making democratically legitimate?’ thus is that, taking into account the normative implications of the social contexts in which a given rule-making process is embedded (criteria C1 to C4), it can be considered as democratically legitimate to the extent that it is inclusive (criteria L1 and L2), provides for mechanisms of democratic control (criteria L3 and L4), and is based on a deliberative style of decision-making (criteria L5 and L6).²⁶ While the establishment of such a set of criteria will not render the evaluation of decision-making processes more independent from differences in the interpretation of the very phenomena our analyses are focusing on, I am confident that transparency about our criteria of evaluation and the comparison of different cases based on a similar framework has considerable potential to advance our understanding of the normative implications of transnational decision-making.

²⁶ As mentioned above, the evaluation of the overall legitimacy (as opposed to the more limited *democratic* legitimacy) would include an assessment of the impact of the rule(s) as an additional element.

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