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WZB Berlin Social Science Center
Reichpietschufer 50
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Germany
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Affiliation of the authors other than WZB:

Poul F. Kjaer

Copenhagen Business School, Solbjerg Plads 3, DK-2000 Frederiksberg,
Denmark

Abstract

The Function of Justification in Transnational Governance

by Poul F. Kjaer¹

Developing a sociological informed social theory perspective, this article asks the question why social praxis' of justification has moved to the centre-stage within the debate on transnational ordering. In contrast to perspectives which see the relationship between national and transnational forms or ordering as characterised by a zero-sum game, the co-evolutionary and mutually reinforcing relationship between national and transnational forms of ordering is emphasised. It is, moreover, argued that this complementarity can be traced back to the fundamentally different function and position of national and transnational forms of ordering in world society. The widespread attempt to analyse transnational developments on the basis of concepts of law and the political which emerged in national contexts are therefore seen as problematic. Instead context adequate concepts of transnational law and politics are needed. It is on this background, that a discourse on justification has emerged in relation to transnational settings. Transnational justificatory praxis' can be understood as functional equivalents to democracy in transnational settings in so far as both can be understood as reflexivity increasing instruments. The central difference is, however, that democratic frameworks implies an ex ante form of the political in contrast to the ex post emphasis of justificatory praxis'. In addition, law gains a central role as the framework through which justificatory praxis' are structured in transnational settings.

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Key words: Justification, transnational law, transnational politics, global governance, democracy.

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I. Introduction

Recent years have seen an upsurge in academic debates on justice in relation to transnational developments.² Whereas the ongoing debate largely has unfolded within a normative terrain this article takes a different route. It presents a sociological informed social theoretical reflexion on the question why a move to justification is unfolding. The central focus is therefore on the social praxis of justification rather than on the logical coherency of philosophical reasoning's in relation to the concept of justice.

Praxis' of justification needs to be observed in the contexts within which they unfold. The understanding of the very nature of transnational governance which one departs from therefore tend to be decisive for understanding praxis's of justification in transnational contexts. To put it simple, the academic discourse on transnational governance in general and the European Union (EU) specifically is characterised by two central approaches. The first one seeks to describe and evaluate the EU on the basis of factual setups and normative yardsticks which originally emerged in national contexts. The other approach insists that national and transnational political and legal processes are substantially different in both structure and purpose. From the latter perspective, the actually existing normative grids as well as the normative yardsticks on which transnational legal and political processes should be evaluated are considered to be fundamentally different. The argument advanced in this article belongs to the latter category but it rest on a specific sociological foundation which, it is argued, provides the basis for repealing the antinomy between the national and the transnational without ending up with a zero-sum perspective. It is argued that national and transnational forms of social ordering are not mutually substitutable. Rather they are complementary phenomenon's which historically have emerged hand in hand in a mutually supportive way. This complementarity is described with the concepts 'condensation' and 'transfer'. These two concepts respectively serve to describe the intended orientation, understood as the unity of function and normative grid, of national and transnational political and legal

² Most notably: R Forst, *Das Recht auf Rechtfertigung – Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Suhrkamp Verlag, Frankfurt am Main, 2007); D Kochenov, G de Búrca and A Williams (eds.), *Europe's Justice Deficit?* (Hart Publishing, Oxford, 2015); J Neyer, *The Justification of Europe. A Political Theory of Supranational Integration* (Oxford University Press, Oxford, 2012).

processes. Breaking down the antinomy between the national and the transnational implies that more statehood implies more transnationality and more transnationality implies more statehood. This is also being testified by the fact that, contrary to popular perception, no weakening of statehood has taken place in recent decades. On the contrary, since the mid-20th century a drastic increase in the strength of statehood has unfolded throughout the globe.

As states are the only sites where democracy has been realised and also the only places with a potential to act as sites of democracy, the strengthening of statehood provides good news for democracy.³ Transnational political and legal processes are for structural reasons, however, not potential sites of democracy. Instead a context specific understanding of the combined function and normative purpose of transnational law and politics is needed. In short: Specific concepts of the transnational forms of law and the political, which reflects the location, function and normative purpose of transnational processes, needs to be developed. It is on this background that processes of justification have emerged as a potential constitutional substitute for democracy within transnational political processes. This development however implies a stronger focus on the strategic function of law since law becomes the central framework through which practices of justification are structured and unfolds.

Complementing the perspectives of the other contributions to this special issue the article proceeds as follows: First, the long-term co-evolution of modern statehood and transnational governance is briefly outlined in order to set the scene. Second, the relationship between facticity and normativity is analysed with the aim of carving out the basic tension which drives transnational and national ordering forward. Third, the form and content of the national and the transnational forms of the political are analysed. Fourth, on this background the turn to justification is addressed. This is done with a particular emphasis on the role of law in structuring processes of justification.

³ G Harste, 'The Democratic Surplus that Constitutionalized the European Union – Establishing Democratic Governance through Intermediate Institutions', in E Hartmann and P F Kjaer (eds.), *The Evolution of Intermediary Institutions in Europe. From Corporatism to Governance* (Palgrave Macmillan, London, 2015) 190 – 215.

II. Modern Statehood and Transnational Governance – Beyond the Antinomy

Most contemporary approaches dealing with transnational constitutionalism and governance explicitly or implicitly depart from the assumption that a weakening of national statehood can be observed, and that this development is one of the primary reasons for the emergence of constitutionalism beyond the state. This perspective however reflects, in several ways, a crude and simplified understanding of the evolution and status of modern statehood. From a purely numerical perspective, the number of modern states has continued to expand rapidly throughout the last two centuries, and, in particular, throughout the last 50 years. In the mid-19th century only a small segment of the globe was subject to modern statehood and it was only in the wake of the decolonisation processes of the mid-twentieth century that modern statehood gained a global status. Thus, when observed from a long-term historical perspective, an unprecedented quantitative expansion in modern statehood has taken place in recent historical times. But qualitatively statehood has also kept expanding. If one characterises a “strong state” as a form of statehood which is based upon a distinction, both formally and in terms of social practise, between the state and other segments of society, a fairly stable institutional set-up and an extensive, although not necessarily exclusive, capability to deploy political power in a generalised and all-inclusive manner, then it is possible to argue that a larger part of the planet is characterised by strong statehood today than in any previous historical period.⁴

A historical view furthermore reveals that modern statehood and extensive forms of transnational ordering emerged hand in hand, and that the two forms of ordering are, in fact, mutually constitutive. From England and the Netherlands, the two first modern states in early modernity, to the United States today, all mature states have been structurally-linked to very elaborated forms of transnational ordering either through colonialism, or, as is the case today, through their embeddedness in dense and

⁴ P F Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (Routledge, London, 2014) 23ff. In relation to the qualitative expansion of modern statehood one can furthermore add that the capacity of states to engage in ‘micro-management’, moulding and regulating social processes down to the smallest details has undergone a massive increase in recent decades. For more on this see G Thompson, ‘The Constitutionalisation of Everyday Life?’, in E Hartmann and P F Kjaer (eds.), *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance* (Palgrave Macmillan, London, 2015) 177 – 197.

increasingly global transnational governance networks.⁵ The decolonisation processes of the mid-twentieth century however triggered a fundamental transformation in transnational ordering characterised by an exponential expansion of public and private transnational entities. This move came about through a contracted process. The first public international organisation the Commission Centrale pour la Navigation du Rhin was established in 1831 and followed by the International Telegraph Union (now the International Telecommunication Union) in 1865 and the General Postal Union (now the Universal Postal Union) in 1874.⁶ A similar trend can be observed in relation to private international organisations. The International Committee of the Red Cross was established in 1863, and the first private international intellectual property organisation, the Association Littéraire et Artistique Internationale, in 1878. From this slow start, the number of transnational sites of ordering have, especially throughout the last 60 years, rapidly mutated through the establishment of functionally-delineated public organisations such as GATT (now the World Trade Organization), the International Monetary Fund, the World Bank, the World Health Organization and, hybrid public/private organisations such as the International Organization for Standardization and the Internet Corporation for Assigned Names and Numbers as well as a vast amount of purely private organisations in the form of trade associations and other types of non-governmental organisations. Today some 68.000 public and private international organisations exist.⁷

The crucial insight here is not just that the expansion of both modern statehood and transnational sites of ordering came about through a protracted process but rather that they unfolded simultaneously, thereby indicating that the two forms of social ordering are structurally-linked. A dual movement can be observed through a parallel incremental expansion and globalisation of modern statehood, and a conversion of transnational forms of ordering away from a reliance on the colonial form and its replacement with contemporary global governance frameworks.⁸ It follows that the

⁵M Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011), 61, *University of Toronto Law Journal* 1-36.

⁶ C Walter, 'Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law' (2001), 44, *German Yearbook of International Law*, 176.

⁷ The Yearbook of International Organizations: <http://www.uia.org/yearbook>. Accessed on 25 June 2015.

⁸ A dual movement which, however, does not imply that profound conflicts can and does take place between transnational and national types of ordering as for example was the case in relation to the

vibrant debate on “global and multi-level governance”⁹ needs, from a historical perspective, to be seen as intrinsically linked to the former version of colonial transnational ordering. In the same manner in which modern statehood grew out from within the preceding feudal orders,¹⁰ contemporary global-governance structures grew out from within the colonial form of transnational ordering. But at the same time, the normative orientation of both modern statehood and contemporary transnational governance remains fundamentally different than those guiding the type of orders they emerged from.¹¹

III. Facticity, Normativity and Teleology

It might be argued that the constitutive distinction of social phenomena, including those related to modern statehood and transnational governance, is the doubling of reality between facticity and normativity.¹² The distinction between the factual existing order and the internally reproduced, and equally real, idea concerning how the order in question ought to look like might therefore be considered to be the central driving force of social evolution.¹³ As all social phenomena are process-based, this distinction is, however, of a dynamic nature. Normative visions are not fixed in time, but also change over time but they tend to do so at a slower pace than actually unfolding social operations of a given order.

The degree of dynamisms varies from social order to social order. The emergence and gradual expansion of specifically modern structures have, however, implied a general increase in temporalisation, thereby re-enforcing the idea that the expectations which

standoff between Argentina and the IMF at the turn of the millennium and the ongoing clash between “the institutions formerly known as the Troika” and Greece.

⁹ For an overview over the ever-expanding literature, see H Enderlein, S Walti and M Zürn (eds.), *Handbook on Multi-level Governance* (Edward Elgar Publishing, Cheltenham, 2011).

¹⁰ N Elias, *Über den Prozeß der Zivilisation, Band 2* (Suhrkamp Verlag, Frankfurt am Main, ([1938]1976).

¹¹ P F Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (Routledge, London, 2014) 31ff.

¹² N Luhmann, ‘Quod Omnes Tangit: Remarks on Jürgen Habermas’ Legal Theory’ (1996), 17, *Cardozo Law Review*, 883.

¹³ H Brunkhorst, *Critical Theory of Legal Revolutions. Evolutionary Perspectives* (Bloomsbury, London, 2014) 33ff.

exist at given moments are constituted upon the basis of the distinction between the past and the future.¹⁴ It follows that internal teleologies appear in the sense that regulatory principles of selection emerge which are linked to a contra-factual normative vision of an ultimate end-goal which fulfil the purpose of stabilising the structure in question over time. For example, a state such as France, “La Grande Nation”, is constructed around a narrative which points to the future upon the basis of the past in the sense that the self-understanding of the French state is closely-linked to the continued striving for the realisation of the ideals of the French Revolution on a global scale. The German Federal Republic was, moreover, founded upon the basis of an imperative of increased Westbindung, the (re-) integration of Germany in the Western community of states, upon the basis of a narrative which had the avoidance of a future repetition of Germany’s recent history at its core.¹⁵ Both of these narratives have become increasingly strained in recent years as a result of the profound structural transformations which have unfolded since the fall of the Berlin Wall. But similar logics can also be found elsewhere. The EU, in spite of continued resistance from its social environment including its member states, reproduces itself upon the basis of the logic of an “ever closer Union” thereby making increased integration an end in itself.¹⁶ Global transnational regimes also rely on such teleologies. For instance, the Catholic Church, the first global operating modern organisation, is driven forward by a counter-factual objective of turning the entire world population into practising members of the Church. The world-trade regime might be conceived of as relying on a self-understanding which is contra-factually oriented towards a world-wide abolition of barriers to trade. In a similar vein the still emerging global human-rights regime could be seen as having not only the principle but also the factual establishment of a space of law comprising the world in its entirety as its ultimate aim.

As indicated, the teleological institutionalisation of normative counter-factual objectives pointing to the future emerges as a way of stabilising social orders which are process-based and as such in constant flux. But social orders are also characterised by a

¹⁴ R Koselleck, *Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten* (Suhrkamp Verlag, Frankfurt am Main, 1989) 321ff.

¹⁵ J Habermas, ‘Geschichtsbewußtsein und posttraditionale Identität. Die Westorientierung der Bundesrepublik’, in J Habermas, *Eine Art Schadensabwicklung. Kleine politische Schriften IV* (Suhrkamp Verlag, Frankfurt am Main, 1987)159-79.

¹⁶ P F Kjaer, *Between Governing and Governance: On the Emergence, Form and Function of Europe’s Post-National Constellation* (Hart Publishing, Oxford, 2010) 31.

fundamental indeterminacy as there always are more than one possible path to the future. All social orders are, although in varying degrees, autonomous, in the sense that they possess the ability to choose between two or more options when confronted with the future. One consequence of this is that they are faced with a demand from their social environments to justify why one path is selected and why others are not selected. Teleologies thereby come to serve an explicit justificatory purpose. The teleologies of social orders are not given by nature or, in any other sense, carved in stone as was often assumed in early modern philosophy. At the semantic level, justifications tend to emerge, which claim that higher forces underlie such teleologies, but from a practice perspective they remain temporal and contingent. Or to put it more precisely: contingent because they are temporal, thereby making them the result of purposive attempts of social construction at the same time as their degree of success remain subject to unpredictable evolutionary developments.¹⁷

From a sociological perspective, teleologies can also be understood as “hegemonic programmes” which are aimed at reducing contingency, in the sense that they are frames which are characterised by a higher level of stability over time than the social processes they are oriented against. They seek to establish a sense of overall coherence through narrative framings with strong normative implications. Whereas alterability is often understood as an essential feature of a normative world, in the sense that the possibility of thinking of or imagining a different world always exists, teleologies function, instead, as forms through which the varieties of selection are reduced in the sense that “alternative languages” are being systematically marginalised. A normative outlook does not only imply a striving for alterability, but also, and equally so, a condensation, established through re-iteration, of an already established view of the world.¹⁸

¹⁷ H Brunkhorst, *Critical Theory of Legal Revolutions. Evolutionary Perspectives* (Bloomsbury, London, 2014)

¹⁸ P F Kjaer, ‘Systems in Context: On the Outcome of the Habermas/Luhmann-debate’ (2006), Sep., *Ancilla Iuris*, 70.

IV. The National and the Transnational Form of the Political

The two sections above highlight the simultaneous and mutually constitutive emergence of national and transnational forms of social ordering and their shared basic foundation as derived from the distinction between the factual and the normative.¹⁹ This common basis does however not imply that the two types of social ordering can be understood as mutually substitutable. Both functionally and normatively they have a substantially different orientation. The central objective of states is to delineate and condensate a social space, typically referred to as a polity. The history of modern statehood is to a large extent the history of a century long and protracted process of society building through the construction of singular social spaces.²⁰ Processes, which, as for example described by Foucault, implied the development of a whole string of disciplining governing tools from population counts and tax registers to unified languages and national histories.²¹ In contrast, the central orientation of transnational orders from early colonialism to contemporary transnational governance have been to facilitate the transfer of densified social components, such as political decisions, legal judgments, scientific knowledge, religious beliefs or economic products and capital, from one societal context to another.²² The central concern of transnational governance, as for example epitomised in the EU's internal market, is to reduce frictions of transfer through the reduction of barriers of social exchange.²³ Thus, the central overriding function of modern states and transnational governance differ fundamentally.

¹⁹ To this one can, as a third dimension, add that both modern national and transnational forms of ordering rely on formal organisation as their basic organisational form. Exploring this dimension however goes beyond the scope of this article.

²⁰ P F Kjaer, 'Context Construction through Competition: The Prerogative of Public Power, Intermediary Institutions and the Expansion of Statehood through Competition', forthcoming, *Distinktion: Scandinavian Journal of Social Theory*.

²¹ M Foucault, Foucault, *Il faut défendre la Société. Cours au Collège de France, 1975–76* (Gallimard, Paris, 2007).

²² For the concept of transfer see; R Stichweh, 'Transfer in Sozialsystemen: Theoretische Überlegungen', 2005, Paper 12. Available at; http://www.unilu.ch/deu/prof._dr._rudolf_stichwehpublikationen_38043.html.

²³ Contexts which in the case of modern statehood tend to be nation state contexts but which in the large parts of the world where modern statehood has not been realised or only partially realised also implies transfer and incorporation into the type of social orders operating "beneath" the formal setup of states, in the form of indigenous communities, quasi-feudal family based networks and the like. See also M Amstutz, 'Métissage. Zur Rechtsform in der Weltgesellschaft', in A Fischer-Lescano, F Rödl and C

In terms of social practise the recalibration of the transnational from colonialism to governance regimes implies a shift to managerialism.²⁴ A shift which also can be understood as a shift from normative to cognitive modes of expectations, with normative expectations understood as expectations which are upheld in case of non-realisation and cognitive expectations as modes which are changed in case of non-realisation.²⁵ It is this shift which lies at the heart of the emergence of novel types of transnational law and the political. For the political three dimensions can be briefly highlighted:

Nations and Stakeholders

The nation is a central medium of the political system of modern states, in the sense that the nation is the object against which the political system orients itself. As already pointed out by Rousseau, the nation is not, however, to be understood as the sum of the individual wills of a given number of people.²⁶ Furthermore, as argued by Foucault, the nation is not the subject which constitutes the state. On the contrary, the nation is an object constructed by the state.²⁷ In concrete, the nation is a generalised and therefore abstract construction developed and stabilised by states which fulfil three inter-connected purposes:²⁸

First, the concept of the nation is deployed by political systems in the state form in order to delineate the reach of their power and thereby the segment of the world to which they claim supremacy. The inclusion/exclusion mechanism defining the belonging to a nation can take different forms: territorial delineations, citizenship, or cultural criteria in relation to language, ethnicity and religion.

U Schmid (eds.), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa* (Nomos Verlag, Baden-Baden, 2009) 333 – 51.

²⁴ M Koskeniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education', 2007, 1, *European Journal of Legal Studies*, 1-18.

²⁵ N Luhmann, 'Die Weltgesellschaft', *Soziologische Aufklärung 2. Aufsätze zur Theorie der Gesellschaft* (Westdeutsche Verlag, Opladen, [1975] 2009) 51-71.

²⁶ JJ Rousseau, *Du Contract Social ou Principes du Droit Politique* (Hachette Littératures, Paris, [1762] 2005).

²⁷ M Foucault, *Il faut défendre la Société. Cours au Collège de France, 1975–76* (Gallimard, Paris, 2007) 21ff.

²⁸ É Balibar, *Nous, citoyens d'Europe? Les frontières, l'État, le peuple* (La Découverte, Paris, 2001) 31ff ; D Richter, *Nation als Form* (Springer Verlag, Wiesbaden, 1996) 72ff.

Second, the nation is used as a form through which political systems in the state form transpose their power into other parts of society, while – at the same time – enabling them to extract resources from other segments of society. The deliberate construction of, for example, myths of origin and “purified” languages and claims to solidarity within a nation are deployed in order to enhance the acceptability and thus the level of compliance with the collectively-binding decisions produced by political systems in the state form.²⁹ In other words, it is the instrumental codification and systematization of pre-existing socio-cultural patterns or lifeworlds by modern states that provides a source of legitimacy. A source which is particularly relevant in relation to the extraction and transposing of resources, for example, in the form of taxes and military recruits, from the rest of society and into the state.

Third, the nation is a conceptual form through which social complexity is reduced and the reflexivity of the state is increased at the same time, in the sense that the concept is deployed in order to delineate the part of the world which a political system in the nation-state form takes account of in its decision-making. The United States Congress, for example, is only obliged to take account of the impact that its decisions have on the nation of the United States and not the impact on the nations of Canada and Mexico, although the factual impact tends to be just as significant for the Canadians and the Mexicans.

The function of delineating a specific segment of the world is closely-associated with the concept of democracy. Democracy can be understood as a specific form through which the political system reflexively observes the segments of society which are external to the political system. A form that is characterised by a duality between stability and change in the sense that the people, through the conception of the nation as a single entity, is defined as a relatively stable entity at the same time as the “nature of the people” in terms of preferences, interests, and norms remain dynamic, thereby allowing the political system to increase its level of reflexivity and thereby its ability to adapt when changes occurs in its environment. Thus, the specificity of democracy, when compared to other forms of rule such as feudalism and totalitarianism, is that, within the framework of the nation, it remains open to the future, in the sense that it is not prescribed what counts

²⁹ E Cassirer, *The Myth of the State* (Yale University Press, New haven, CT, [1946] 1977).

as a politically-relevant problem or how it should be dealt with.³⁰ In this specific sense, democracy is characterised by a high level of adaptability, and this is probably the reason why it has proved to be “evolutionary superior” when measured against the other forms of political rule which have existed to date. Or to express it differently, the success of democracy, as the gradual expansion of state-based democracy throughout the globe over the past 200 years testifies, is intrinsically linked to its function as a reflexivity-increasing instrument.

In contrast to the national level, the transnational level is, tentative attempts to democratise the EU apart, not characterised by democracy. Internally, no transnational organisation relies on a “hierarchy with a divided peak” in the form of the government/opposition distinction just as they externally do not engage in the act of universal suffrage. The reason for this absence can be traced back to the absence of territorially-delineated polities at the transnational level. The functionally-delineated character of transnational organisations and regimes provides a structural set-up which implies systematic uncertainty concerning what the collective is to which decision-making within transnational structures should orient itself. Whereas normative theories of justice tend to argue that those affected by decisions should have a say on those decisions the reality is that, at the transnational level, it is highly difficult to establish who are actually affected. Thus, when compared with nation states, it remains far more uncertain what segment of their social-environment transnational structures should observe in order to be able to reflexively adapt to changes in their environments.

It is against this background that the concept of stakeholders has emerged as a central institutional and semantic category. Both public and private transnational organisations continuously engage in sustained efforts to define the set of stakeholders with whom they seek to engage and to develop platforms for the stabilisation of expectations vis-à-vis these stakeholders. In praxis, the concept of stakeholders acts as a substitute to the concept of the nation for transnational governance regimes. Stakeholders can be defined as an institutionalised set of “actors” who are granted the status of “affected parties” and thereby acquire the right to “feed into” decisional processes at the

³⁰ M Foucault, *Il faut défendre la Société. Cours au Collège de France, 1975–76* (Gallimard, Paris, 2007) 24ff; N Luhmann, ‘Die Zukunft der Demokratie’, *Soziologische Aufklärung, Band 4. Beiträge zur Funktionalen Differenzierung der Gesellschaft* (Westdeutscher Verlag, Opladen, 1994) 131–38.

same time as they also serve as the addressees for such decisions. Thus, stakeholder status serves as a form through which the entity in question delineates the section of its social environment which it regards as relevant. It is the form through which it transmits the social components that it produces at the same time as it serves as a frame through which changes in the social environment can be observed, thereby providing a basis for increased adaptability through increased reflexivity.

The concept of the nation is a deeply normative concept expressing an idea of substantial unity which, even though nations from a historical and factual perspective rarely have been particularly stable in terms of their extent and composition, is upheld over time. In contrast, the concept of stakeholders is a strongly-cognitivated concept. This is most clearly visible in relation to the dynamic composition of stakeholder frameworks, which is characterised by a high level of inter-changeability, since the composition of the group of stakeholders can be changed as the problem constellations with which the entity in question is faced changes. Thus, the dynamics of inclusion and exclusion operate with a far higher speed in relation to stakeholder frameworks, thereby making the borders of stakeholder regimes extremely contingent and fluid. This tends to make stakeholder frameworks more adaptive than the form of the nation and thereby potentially even more “evolutionary superior” than democratic structures. On the other hand, and bearing in mind that the production of social meaning (Sinn) relies, to a high extent, upon re-iteration,³¹ the price paid for such fluidity might be a “loss of depth”. The impact which can be achieved through the stakeholder form might, therefore, turn out to be relatively limited.

The Public Sphere and Transparency

Original dating back to the seventeenth century, the concept of the public sphere, understood as an intermediary framework in which normative visions are developed and subsequently transposed into the political system, and, as such, the site where the will formation of the nation is taking place, has gained a distinct relevance for democratic

³¹ P F Kjaer, ‘Systems in Context: On the Outcome of the Habermas/Luhmann-debate’ (2006), Sep., *Ancilla Iuris*, 70.

theory and praxis in the decades following Habermas' re-construction in the early 1960s.³² In the wake of Habermas, several perspectives have emerged each of which has emphasised different aspects. Bo Stråth and Hagen Schulz-Forberg distinguish between a late-modern, a post-modern and a relational perspective.³³ The former, building directly on Habermas' work, emphasises a unitary concept in which a singular public sphere acts as mediator between an institutionalised political system in the state form and the rest of society. The post-modern approach, associated with the work of Nancy Fraser, instead emphasises the existence of a plurality of discursive arenas which operates in a parallel manner and which serves as a basis for the development of counter-discourses, challenging the hegemonic narratives of institutionalised power structures.³⁴ The relational approach, in contrast, uses the concept of the public sphere as an umbrella concept which emphasises the social praxis of articulating values, norms and symbolic codes in social settings characterised by complex network-based interactions between individuals, groups and formal institutions. Thus, the relational approach is weakening the link to nation-state institutional set-ups, and, instead, sees the public sphere as a phenomenon which tends to emerge in a wide variety of contexts.³⁵ Whereas the late-modern approach emphasises dialogue and the possibility of rational consensus, and the post-modern emphasises the possibility of developing alternative, more confrontational, visions of society which are capable of challenging the existing hegemonic structures, the relational approach further tends to be more open-ended concerning the exact normative orientation of communicative praxis.

When factual developments are observed, the public sphere seems to be an increasingly marginalised institution. The mass media system has increasingly overtaken and monopolised the functions of the civic public sphere,³⁶ just as the concept of public opinion, understood as a formalised instrument which is deployed by states and other centres of power in order to measure interests and preferences cognitively, have gained in

³² J Habermas, *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Suhrkamp Verlag, Frankfurt am Main, [1962] 1990).

³³ H Schulz-Forberg and B Stråth, *The Political History of European Integration: The Hypocrisy of Democracy-Through-Market* (Routledge, London, 2010) 88ff.

³⁴ N Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy', in C Calhoun, *Habermas and the Public Sphere* (MIT Press, Cambridge MA, 1992) 109-42.

³⁵ M R Somers, 'What's political or cultural about political culture and the public sphere? Toward an historical sociology of concept formation', (1995), 13, *Sociological Theory*, 113-44.

³⁶ J Habermas, *Ach, Europa* (Suhrkamp Verlag, Frankfurt am Main, 2008) 131ff

centrality.³⁷ The tendency towards a marginalisation of the public sphere, which can be observed in nation-state contexts, is being further exacerbated by increased Europeanisation and globalisation. For normatively-driven proponents and defenders of the concept, the central question today is, therefore, whether the concept can be or already has been transposed to the European and global settings.³⁸ This undertaking has, furthermore, been underpinned by descriptive analyses of the tentative emergence of a global public sphere.³⁹

However, the academic attempts to transnationalise the concept of the public sphere are carried out upon the basis of the assumption that the fundamental normative function of the public sphere remains unaltered. Also in transnational settings, the public sphere is considered a social institution which enables the formulation of normative visions and the subsequent transposition of these visions into political entities. Thus, the attempts to transpose the concept into the transnational realm tend to under-estimate the structural differences between territorially-delineated national and transnational contexts. But, as already indicated in relation to the concept of stakeholders, the problem of defining the “audience” in terms of the segment of the social environment which can be considered to be relevant components of will-formation processes, however, tend to be systematically unclear within the transnational segments of world society. As a reaction to this structural deficit, it is possible to observe that transnational regimes increasingly rely on a less normatively-demanding concept, namely, the concept of transparency. In recent decades, the concept of transparency and clear-cut commitments to transparency have become a part of the standard framework of multinational firms, public and private international organisations and other transnational bodies. The concept implies that these entities, upon the basis of self-reflexive processes, develop principles and policies of transparency which are aimed at increasing their observability by other structures through the disclosure of intentions, actions and the general state of affairs. Central

³⁷ N Luhmann, ‘Die Beobachtung der Beobachter im politischen System: Zur Theorie der Öffentlichen Meinung’, in J Wilke (ed.), *Öffentliche Meinung, Theorie, Methoden, Befunde. Beiträge zu Ehren von Elisabeth Noelle-Neumann* (Verlag Karl Alber, Freiburg, 1992) 77-86.

³⁸ H Kaelble, ‘The Historical Rise of a European Public Sphere?’ (2002), 8, *Journal of European Integration History*, 9-22; HJ Trenz and K Eder, ‘The Democratizing dynamics of a European Public Sphere. Towards a Theory of Democratic Functionalism’ (2005), 7, *European Journal of Social Theory*, 5-25.

³⁹ R Stichweh, ‘Die Entstehung einer Weltöffentlichkeit’, in H Kaelble, M Kirsch and A Schmidt-Gernig (eds), *Transnationale Öffentlichkeiten und Identitäten im 20. Jahrhundert* (Campus Verlag, Frankfurt am Main, 2002) 57-66.

examples of this include the rules guiding or determining access to documents within public international organisations,⁴⁰ the development of public registers for lobbyists and their activities⁴¹ and the steps towards the development of a global regime of financial accounting standards.⁴² In contrast to the demanding objective of common will-formation associated with the concept of the public sphere, the concept of transparency does not primarily aim at establishing positive normative concordance. Instead, the very notion of observability is essentially cognitive in nature. Strategies of transparency enable social entities to observe developments within other social entities and to adapt accordingly without necessarily engaging in the demanding task of common will-formation.

Representation and Auto-Representation

Another central concept of liberal political-theory, in particular, which continues to dominate nation-state images of political ordering, is the concept of representation. Serving as a concretisation of the concept of the nation and as a concept which is complementary to the concept of the public sphere, representation establishes a formalised reflexivity-loop, in the form of a legitimacy chain, between the political system and the rest of society. Modern political systems distinguish themselves from pre-modern transcendental forms of representation, as, for example, advocated by the Church of Rome, wherein the notion of representation is, instead, linked to the establishment of a holistic entity. Modern forms of representation, instead, unfold within the tension between formal-legal representation, which seeks to depict the population or the geographical area which the population inhabits upon the basis of generalised criteria, and substantial representation, which is aimed at achieving the highest possible concordance between the population and their elected representatives upon the basis of criteria such as language, ethnicity, gender, social class, educational level and religion.

⁴⁰ R Nickel, 'Participatory Transnational Governance', in C Joerges and EU Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance, and Social Regulation* (Hart Publishing, Oxford, 2010) 209-50.

⁴¹ L Jellum, 'Lessons to be Learned: Public Participation and Transparency in Norm Creation within the European Union and United States' (2011), No 562, *FSU College of Law, Public Law Research Paper*.

⁴² M Renner, *Zwingendes transnationales Recht. Zur Struktur der Wirtschaftsverfassung jenseits des Staates*, (Nomos Verlag, Baden-Baden, 2011).

Within continental philosophy, in particular, the liberal notion of representation was de-constructed long ago upon the basis of the insight that a one-to-one causality between those represented and their representatives is impossible to achieve. Instead, representation is conceived of as a mere symbolic figure.⁴³ This insight leads to the idea that representation serves as a form through which the political system internally establishes a copy or a mirror image of the rest of society which is concretised through a formal legal set-up. Thus, the classical liberal perspective on the state and society is turned on its head. Instead of an “outside-in” perspective in which the main focus is on the transposition of societal preferences from society and into the state, the “inside-out” perspective emphasises that the depicting of the rest of society within the state does, indeed, increase the reflexivity of the state, but that this is a process which unfolds upon the basis of an infrastructure and criteria which are internal to the state. This tension between the external and the internal perspective can, however, be softened through a dialectical perspective on the tension between the external and the internal dimensions and the possibility of achieving a stabilisation of expectations through learning processes that unfold over longer time-spans.⁴⁴

The central, though not the only, form of representation in its modern form is universal suffrage through elections. As such, the modern form of representation is inherently bound to the concept of the nation and to the concept of territoriality. Transnational structures are however structurally barred from relying on these concepts, thereby making the question of how they construct internal images of their environments a central issue. In the search of a substitute, entities which operate within the transnational space have been forced to develop strategies of self-representation upon the basis of - to use a Habermasian term - dramaturgical rationality. As re-constructed by Martin Herberg in relation to the environmental protection measures of multinational companies,⁴⁵ transnational structures re-present themselves towards their social

⁴³ H Brunkhorst, ‘Constitutionalism and Democracy in the World Society’, in P Dobner and M Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) 179-198.

⁴⁴ K Eder, *Geschichte als Lernprozeß? Zur Pathogenese politischer Modernität in Deutschland* (Suhrkamp Verlag, Frankfurt am Main, 1992); J Habermas, ‘Constitutional Democracy: A Paradoxical Union of Contradictory Principles?’ (2001) 29, *Political Theory* 766-81.

⁴⁵ M Herberg, *Globalisierung und private Selbstregulierung. Umweltschutz in multinationalen Unternehmen* (Campus Verlag, Frankfurt am Main, 2007); M Herberg, ‘Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making’, in O Dilling, M

environments in a particular manner. Similar frameworks can be observed within public internal organisations. A common feature of both public and private transnational organisations is that they develop policy-programmes and establish targets for their achievement just as they develop ethical charters and accountability instruments through which their activities can be observed and evaluated.⁴⁶ Thus, in contrast to the “passive” concept of transparency, the concept of self-representation implies an “activist” approach. Public and private entities of transnational ordering declare their intentions publicly. With such conscious acts, these entities present themselves to the world in a manner which aims at actively co-constructing the expectations of the rest of world vis-à-vis these entities. But, at the same time, these acts tend to become self-binding in that their repeated non-fulfilment leads to an erosion of their credibility. Thus, acts of self-representation are illocutionary acts which are structurally-linked to an intention of actual realisation.⁴⁷

Closely-related to the concept of representation, the concept of delegation plays an important role in the institutional set-up of states as well as in their interaction with the transnational layer, through the delegation of competences to international organisations. However, a delegation is always more than just a delegation. Each delegation of legal competencies implies a de facto recognition of the autonomy of the structures to which competencies are delegated. Structures which operate upon the basis of delegation tend to exercise significant discretionary powers and to frame policy areas in a manner which produces a limited number of options for further policy development. They also tend to develop specific norms and become policy actors in their own right.⁴⁸ The delegation of competencies always implies a step into the unknown and into the uncontrollable. Thus, a “gap” exists between what can be controlled through delegation and the structures which are actually in place. It is this gap which is filled through the emergence of different forms of self-representation measures.

Herberg and G Winter (eds.), *Responsible Business. Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing, Oxford, 2008) 17-40.

⁴⁶ See, for example, the International Non-Governmental Organizations Accountability Charter. Available at: http://www.realizingrights.org/pdf/INGO_Accountability_Charter.pdf.

⁴⁷ An insight typically associated with the work of JL Austin and JR Searle but which was originally developed by A Reinach. See *The Apriori Foundations of the Civil Law* (Offenbach: Ontos Verlag, [1913] 2013).

⁴⁸ J Cohen and CF. Sabel, 'Global Democracy?' (2005), 37, *New York University Journal of International Law and Politics* 763-97.

V. The Turn to Justification and its Structuring through Law

In practice, the move towards self-representation points towards a substitution of democracy with justification.⁴⁹ A form of justification which, in contrast to mainstream ideas of democracy, relies upon a specific kind of ex post rather than ex ante logic, in that social entities which produce effects on other segments of the world are inextricably bound to subsequent demands for the justification of these effects. Thus, the striving towards establishing a reflexive mode of self-representation is intrinsically linked to the stabilisation of the dialectical relation between power-producing entities and those subjected to the consequences of this power within an institutional form, such as the stakeholder form, in which specific structures of justification can unfold.

Such justifications are however always process based. Political orders produce a newer ending stream of decisions and in particular in institutionalised settings such decisions built on previous decisions and in fact grow out of previous decisions.⁵⁰ This is inescapable insofar as not taking a decision also amounts to a decision. In practise, the distinction between ex post and ex ante is therefore dissolved through recourse to time insofar as procedures for claiming and providing justification are built into the legal frameworks framing the stream of political decision making with the consequence that the possibility of demanding and delivering justifications is reproduced in every act. The static ex post/ex ante perspective is thereby being substituted with a perspective of continued learning and correction where the justification or the lack of justification informs the next decision. It is in this context that counter-factual normative principles gain the status of secondary forms of ordering in so far as they, typically in an institutionalised teleological form, provide the principles from which both the selection of decisions and the form of their justification is derived. But at the same time, the realisation of a justification perspective at the transnational level of world society is

⁴⁹J Neyer, 'Justice, Not Democracy: Legitimacy in the European Union' (2010), 48, *Journal of Common Market Studies*, 903-21; J Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (Oxford University Press, Oxford, 2012).

⁵⁰ N Luhmann, *Legitimation durch Verfahren. 6. Auflage* (Frankfurt am Main, Suhrkamp Verlag [1969] 2001).

mainly materialised in rather mundane but nonetheless pivotal and very crucial questions concerning the practise of administrative law and the possibility of judicial review.⁵¹

This means that the legal infrastructure through which decision making processes are framed and stabilised moves to the forefront. The cognitivisation of political-administrative processes implies a reconfiguration of normative modes of communication. However, this reconfiguration does not imply a diminishing centrality of normative modes but rather implies that they gain a more indirect strategic role, providing a second order stabilisation of increasingly cognitivised processes. As exemplified by the “ever closer Union” teleology of the EU, normative outlooks become densified into principles serving as tools of selection between multiple options for decision making. This again implies that law and not politics becomes the central grid for structuring, nurturing and safeguarding normative outlooks in transnational settings.

The key characteristics of transnational law can be described with concepts such as hybridity, fragmentation, adaptation and learning, and inter-contextuality.⁵² As for the latter concept, transnational processes unfold in a heterarchical world and this necessitates a co-evolutionary perspective capable of highlighting the interfaces between and mutual fixation of different political orders. The co-evolution of different political orders tends to be conditioned by the existence of organisational sites which are located in-between these orders. In the case of the EU, Comitology committees, for example, serve as channels through which transfers between the EU and the Member State legal orders take place.⁵³ They are frameworks that are located in the “no man’s land” between different legally-condensed social orders and which simultaneously make the resources of Member State administrations available for the EU apparatus and the resources of the EU available for the Member State administrations, thereby allowing for mutually-reinforcing co-evolutionary processes. From this perspective, a deepening of European integration is, therefore, not to be understood as a zero-sum game which necessarily implies a weakening of the Member States. On the contrary, the establishment of increased compatibility between the Member State legal orders via the EU framework as well as

⁵¹ See also the contribution of Ester Herlin-Karnell to this special issue.

⁵² P F Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (Routledge, London, 2014) 65.

⁵³ P F Kjaer, *Between Governing and Governance: On the Emergence, Form and Function of Europe’s Post-National Constellation* (Hart Publishing, Oxford, 2010) 50ff.

compatibility with the EU legal order itself provides the Member States with resources and increased operational freedom that underpins, rather than undermines, the further evolution of the Member State legal orders.⁵⁴

Another, and more central, reason for the larger role of cognitive components, relative to normative components, within transnational processes is the inter-contextual function of transnational processes. The constitutive function of transnational processes is, as mentioned, the facilitation of the transfer of social components from one context to another. This was the case for colonialism as well as for contemporary global regulatory frameworks. Common for, otherwise, very different processes such as risk regulation within the WTO and the EU, the Open Method of Co-ordination Processes within the OECD and the EU as well as corporate social responsibility processes are their orientation towards the enablement of the transfer of social components from one context to another. Such transfers are, however, only possible if the condensed social components in question are made compatible with the context to which they are transferred. The kind of legal stabilisation mechanisms which have emerged within such structures tend to be oriented towards enabling embeddedness through adaptation upon the basis of reflexive processes. Thus, transnational processes and, with them, the specific type of law guiding such processes tend to be structurally-oriented towards facilitate learning processes, and are, therefore, characterised by a higher reliance on cognitive, rather than normative, structures of expectations.⁵⁵

The inter-contextuality dimension combined with the stronger cognitive component means that the effects on society produced by the kind law which has been described as transnational, global or world law is very different than the effects produced by national law. The central characteristic of nation-state law is the production of social integration through the upholding of norms which are maintained even when not (fully) materialised in society. Transnational law also produces social integration, in the sense that it is oriented towards bridging contexts. The manner in which this is achieved is, however, the direct opposite of nation-state law. At least when observed from a

⁵⁴ For the same insight developed in the vocabulary of the historical discipline: Alan S. Milward, *The European Rescue of the Nation-State*, 2nd edition (Routledge, London, 2000).

⁵⁵ M Amstutz and V Karavas, 'Weltrecht: Ein Derridasches Monster', in GP Calliess, A Fischer-Lescano, D Wielsch and P Zumbansen (eds.), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag* (Walter de Gruyter, Berlin, 2009) 645-672.

continental European civil-law perspective, national law produces integration through - in terms of space - the construction of clearly-delineated national contexts and - in terms of time - a reduction in the pace of societal development in the sense that the norms upheld by the legal system change at a slower pace than other societal norms. Thus, nation state law introduces a kind of “friction” which tends to reduce the contingency, volatility and speed of social change. Transnational law, instead, produces an acceleration of time and an expansion in space, in the sense that it is oriented towards reducing the “friction” which societal processes, such as economic transactions, encounter due to the existence of the diversity of cultures, functional spheres and states. This might also explain why transnational law is characterised by a far higher level of judicial activism in the sense that courts tend to act as the catalysts - rather than as the enforcers - of already established norms.⁵⁶ Just as the move from democracy to justice, with its turn from *ex ante* to *ex post*, implies a fundamentally different notion of the political, the societal impact of law is turned upside-down when one compares nation-state and transnational law.

VI. Conclusion

Within analytical philosophy great hopes has been attached to the concept of justice and that to such a degree that it has been considered the “master concept” from which all central insights can be traced back to. From a more descriptive perspective the praxis of justification is rather a very central but also very limited and specific dimension of social processes. The turn to justification reflects a temporalisation of the social world, where reality is constituted in the distinction between past and future. This again implies that within the never ending stream of political and administrative decisions every decision could have been different. All decisions are therefore faced with a demand for justification. Why that decision and not another? Justifications thereby fulfil a central role in the stabilisation of expectations and demands *vis-à-vis* a given chain of political decision-making. This is particular the case in transnational settings as the broader

⁵⁶ J Scott and S P Storm, ‘Courts as Catalysts: Rethinking the Judicial Role in New Governance’ (2007), 13, *Columbia Journal of European Law* 565-94.

contextual frameworks, which at the nation state level have been established through century long processes of state-building, are absent at the transnational level of world society. In this volatile context, frameworks of justification become a substitute for the type of reflexivity established through democratic process at the nation state level. A move which not only reflects the structural foundation and functional orientation of transnational processes but also implies a fundamentally different kind of law and politics, as the foundation of transnational law and politics in contrast to national law and politics are given ex post rather than ex ante.

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