

# Democracy for Transnational Regimes

— Wil Martens

## I. Introduction

- 1 Regulation of contested social and environmental issues is increasingly a matter of governance arrangements beyond the nation state. These arrangements are often distinguished in international, supranational, and transnational ones.<sup>2</sup> International regulation has the sovereignty of states as a starting point and is about voluntary agreements between them. Supranational regulations are hierarchically placed above nation-states. Transnational regulations enter into and surpass the boundaries of nation-states. This essay concentrates on transnational regulations, particularly those in which private<sup>3</sup> parties are influential.

Transnational regimes<sup>4</sup> have especially been developed to fill voids or transplant malfunctioning national and international governments. They govern nowadays with regard to internet, safety of goods, food safety, quality of labor life, protection of the environment, financial aspects of firms, relations in supply chains, epidemics, child labor, assessment of scientific work, and many more subjects. Some examples of well-known regimes include ICANN (internet), FSC (sustainable forests), and ILO (labor life).<sup>5</sup> Rules of transnational regimes are in many cases accepted or adopted in domestic regulation by nation states. It is no exaggeration to say that transnational regimes are very influential in daily <sup>o</sup>life<sup>o</sup>.

The contribution of such regimes to democratically structured life is contested. They are on the one hand recognized as indispensable forms of effective self-regulation, providing solutions to urgent coordination problems. On the other hand they are depicted as instruments of domination, subjecting social and individual life to rules crafted in the interest of the rich and powerful. In this last role they have grave democratic deficits.<sup>6</sup> The (un-)democratic character of

### <sup>o</sup>COMMENT

EVERT VAN DER ZWEERDE

I would like to see a clear demarcation between those forms of governance that are beyond the state, but of the same kind, and those that do 'govern', but are clearly not 'political' in the same sense. What, for example, is the relationship between government, governance, and the role of (corporate) financial institutions that assess the credibility of nation-states, making them loose their AAA-status? Most importantly, what does, can or should 'democracy' mean in such cases?

### REPLY

WIL MARTENS

Even at the end of my essay I cannot fully answer what democracy means in the relationship between regulatory regimes that severely influence nation states. But, this essay clarifies what it means to say that regulatory regimes that cannot be said to depend on states and state-based democracy are democratized themselves. Indeed, the collectives I call transnational regimes are in many respects different from nation states; they are in a certain sense voluntary and above all they are only about one issue in the life of its participants. Nevertheless they are political in a sense very similar to politics in nation states. Transnational regimes entail legislative bodies that produce authoritative rules for its participants, in a situation of divergent values. That is why it makes sense, in my opinion, to require their democratization.

COMMENT<sup>o</sup>  
STEFAN SCHEVELIER

Habermas's plea for a European constitution and a more deliberative democratic Europe appears to be a successful attempt to generalize his theory. In terms of re-specifying, others have taken up Habermas's project and taken it to transnational and mass-democracy contexts, e.g. Bohman, Benhabib.

REPLY  
WIL MARTENS

The situation is, I believe, more complicated.

I will show in part III that Habermas is not successful, because (a) he misunderstands many transnational regimes as being technical matters, for which it would be a mistake to demand democratization, while actually these regimes have a political character, and (b) it seems improbable that the problems dealt with in these regimes can be regulated by means of political forms that are either a continuation of nation states or that have the form of a (federal) state.

As far as I can see, Bohman and Benhabib do not discuss the 'private' transnational regimes that are central in my essay.

transnational regulation is the object of scrutiny in this essay. Its central question is: can and should transnational regimes be democratic?<sup>7</sup> This question is especially pertinent with regard to transnational regimes in which private parties are influential. In these cases the democratic character cannot be based on democracy of nation states, as states are one among many actors they cannot control. This makes transnational regimes interesting from the perspective of democracy. They provoke thoughts about the possibility to democratize transnational governance apart from nation states, and about the kind of democracy that is then required .

This examination of transnational regimes will draw on Habermas's<sup>2</sup> conception of deliberative democracy.<sup>8</sup> Deliberative democracy means, roughly, that the laws of a community are prepared by civil discourses, and thereupon discussed and decided by representatives of the community. This procedure allows us to speak reasonably about self-regulation of a collective.

Habermas's theory of deliberative democracy proposes an integrated set of concepts for the description and assessment of the different components of self-regulation. More than other conceptions of deliberative democracy,<sup>9</sup> Habermas's conception makes clear that in modern societies civil discourses are part of a constellation of five differentiated but connected regulative elements: preparing civil discourses, deciding representative politics, adjudication based on politically decided laws, implementing administration, and an explicit meta-regulation of these first four elements in a constitutional framework. Only together do they provide democratically legitimated authoritative regulation.

Habermas developed his conception of deliberative democracy with regard to well-defined populations of nation states. This conception cannot simply be applied to transnational regulations, in which the specialized national institutions are bypassed and transgressed. Transnational regimes seem to lack a well delimited people; as a consequence representation is difficult. They seem to exhibit relatively undefined 'soft laws', and have a lack of enforcement capacities. At first glance, it is difficult to imagine how they could be democratic in the sense of Habermas's conception of deliberative democracy.

That it is not easy to generalize and then re-specify Habermas's theory<sup>3</sup> of deliberative democracy for transnational regulation is shown by his own attempt to do so<sup>o</sup>. He sees no transnational alternative for the rather well-defined peoples of nation-states as bases of deliberation and representation, and consequently thinks about transnational

democracy as a continuation of national democracy. This train of thought leads him to a partly false and partly very bleak description of the possibilities of democratic transnational regimes, especially those in which private parties are influential. Habermas cannot imagine a *demos* and a democratic decision-making process for such cases. I will argue, however, that it is possible to reconstruct transnational regimes in terms of representation of a delimited *demos*, producing authoritative rules that are recognizable as the rules of the people. This kind of description enables an assessment of the democratic character of regimes that (fail to) take the values and meanings of persons and collectives they subject to their rule into consideration. It opens an unexpected view on a broad range of issue-centered regimes that accommodate a diversity of values in a more-or-less democratic way.

- 4 My argument proceeds in four stages. First, I give a short overview of the main concepts of Habermas's idea of deliberative democracy for modern nation-states. This overview explicitly focuses on what I see as the five core components of deliberative democracy, which in attempts to use this conception for transnational regimes are normally perceived only partially. From the nation-state model I distill a general conception of democratically legitimated authoritative regulation. Second, I assess Habermas's attempt to adopt his conception of national deliberative democracy for a reconstruction of transnational regimes as a form of democracy. This attempt is disappointing as it fails to investigate the democratic characteristics and possibilities of transnational regulation apart from national democracy. Third, I undertake a reconstruction of the democratic qualities of transnational regimes. It shows that these regimes are able to <sup>o</sup>integrate<sup>o</sup> the 'instruments' of democracy developed in the nation-state: public discourse, representation, law, administration and constitution, in flexible, value-oriented collectives. This is the central part of the essay. In the fourth and last stage I conclude that transnational regimes can be seen as worthy forms of value-oriented self-regulation of collectives and not just as temporary substitutes for state-based national or cosmopolitan democracy.

## II. Components of Deliberative Democracy for the Nation State

- 1 Before I describe the core components of deliberative democracy, I offer a short characterization of some of its premises. Habermas's conception of deliberative democracy in *Between Facts and Norms* is devised "to show how the old promise of a self-organizing community of free and equal citizens can be reconceived under the conditions

### <sup>o</sup>COMMENT EVERT VAN DER ZWEEDE

Here, I think, the question of agency becomes crucial: WHO is going to actualize this potentiality? Are these transnational regimes to become (more) democratic in the sense outlined by you, or are they to be made (more) democratic.

### REPLY WIL MARTENS

I hope to show that they can be democratized, that some of them already are partly democratized by using, in their own way, the forms of democracy developed in nation states, and finally, I will emphasize that this must be required of them by persons and collectives that are interested in having a voice in realization of values that are at stake in the regimes.

COMMENT<sup>o</sup>  
STEFAN SCHEVELIER

Remarks like this are based on the mistaken assumption that nation-states offer qualitatively different kinds of possibilities for identification. The obvious examples for identification are trivial (the color orange, national football team, or stroopwafels), shared by other countries (language, climate, level of wealth), or could be created/discovered/recovered, in other spaces (a shared history, head of state, shared culture).

The current collection of nation-states is young, and contingent. States like India contain more diversity and a larger number of citizens than the whole of Europe combined. Tell me why a nation-state like India is possible, but a united Europe is not.

REPLY  
WIL MARTENS

Probably we underestimate identification if it is thought about as a matter of (trivial) symbols only. We all have many feelings of belonging and solidarity. We (can) see family, neighborhood, city, nation, but also Europe and the World as collectivities we belong to and identify with. I am not sure that we know very well how this complex works.

COMMENT<sup>o</sup>  
STEFAN SCHEVELIER

Complex modern societies extend beyond national borders. Likewise, discourse and will-formation extends beyond borders.

Or, would you argue that a discussion about the preservation of the rainforest is only public will formation if it is about a rainforest in 'our' country, with a co-national?

REPLY  
WIL MARTENS

Of course, communication and co-operation extend beyond boundaries, but that does only mean that national societies do not regulate all the actions and communications of 'their' population. And, of course Habermas agrees that discussions about rainforests are public will-formation beyond national borders. But when these discussions take place between non-state organizations, are they then public discussions and public will-formation? I believe that there is a conceptual problem on this point in Habermas.

of complex societies".<sup>10</sup> The objective of his 'reconstruction' is to answer the question in *which way* and *to what extent* modern complex societies can and should realize the normative idea of self-regulation of a community.<sup>11</sup>

Complex societies are, in this case, nation-states in which a people, characterized by a plurality of values, meanings and identities,<sup>12</sup> decides as a political community, through discursive processes of opinion- and will-formation, about the legal rules it wants to obey to. Discursive processes give birth to a reasoned public opinion that functions as the basis for political legislation, which provides the legitimate framework for adjudication and administration. Citizens of these societies are protected and affected by the normative rules drafted by legislation on the basis of public discourse; they build a delimited collective with which they can identify.<sup>13</sup> Habermas contrasts the nation-state with the 'European Union' and the 'World', which do not have public opinions, and hardly offer possibilities for identification<sup>o</sup>,<sup>14</sup> characteristics that make them inapt for 'autonomous' democratization.<sup>15</sup>

In relation to these premises Habermas describes deliberative democracy's discursive processes as taking place in *civil society* on the one hand, and in *formal political institutions* on the other. Together they produce the legitimate rules of a community. *Civil society* is a complex of communications in which free and equal citizens debate and deliberate, more or less unconstrained, about preferable ways of living and about the values, goals and rules that should orient them. In complex modern societies citizens come from a plurality of cultural backgrounds and inspirations. The general normative idea behind Habermas's model of democracy is that these citizens all have equal rights and possibilities to participate in communication<sup>o</sup>.<sup>16</sup>

*Formal political institutions* (government and parliament) produce deliberations and decisions about the laws of a community. They are empowered by the people to produce its laws. Empowerment takes place in general elections that appoint some citizens as representatives of the community for the production of its laws. Rights and obligations of representatives to produce laws can be withdrawn in future elections.

In their law-making processes, legislators draw on normative, pragmatic and empirical reasons they dispose of on the basis of general and free debates and deliberations in civil society. In this respect, political institutions function as an outflow of civil society. They are embedded in the whole of communications of the free and equal citizens of a nation-state, and build "the organized midpoint or focus of the society-wide circulation of informal communication".<sup>17</sup> Legislation within the framework of the indicated democratic

procedure results in legitimate laws, which are collectively binding for a national community. Such laws are produced in accordance with the so called ‘principle of democratic legitimacy,’ stating that “only those statutes may claim legitimacy that meet with the assent of all citizens in a discursive process of legislation that in turn has been legally instituted.”<sup>18</sup>

- 3 Laws are most of the time too general and too open to be *cognitively* helpful as clear guidelines for the behavior of citizens. They need specification and mediation if they are to support the attainment of collective goals and values. Besides, under pluralist circumstances laws encounter a *motivational* problem. Modern citizens do not share one culture with unquestioned habits, values, and norms. This means that the laws prescribe behaviors that for parts of the population are counterintuitive, and directed at strange or even abject values and goals. Laws must therefore be supplemented with monitoring and sanctioning, which ascertain obedience to the rules when intrinsic ethical and moral motivation are lacking.<sup>19</sup> Specification and supplementation of legislative rules occurs through ‘administration’ and ‘adjudication’, themselves regulated by law.
- 4 The operations of the executive and coercive organizations of the modern state – *the administration* – mediate the realization of laws. Networks of organizations concretize the general laws, for example with respect to housing or education, with rules for typical cases. They develop programs for the realization of values, goals, and norms, take decisions in individual cases, and are legitimated to command the use of force if that is necessary for the realization of the law in their domain.<sup>20</sup>

On the basis of knowledge of the characteristics of their domains, administrative organizations prepare law-proposals for the legislative bodies. The administrators of a domain have a profound influence on legislative processes through these proposals, and through the orientation of the implementation of laws by their own normative reasoning and their communication with affected citizens. Administration is therefore never simply the execution of the results of public and political deliberation and decision-making. It is not a strategic-instrumental<sup>21</sup> consequence of the democratically decided normative rules, as Habermas sometimes suggests. Administration involves normative programs that are developed in discursive exchanges with politics and affected citizens. These discursive exchanges entail opportunities for the democratization of administrations. Thinking along these lines could be fruitful for an understanding of transnational regimes, as I will show in part IV of this essay.

*Adjudication* is the process of coherent and consistent application of 5 laws to particular cases, in order to determine whether these cases conform to the laws.<sup>22</sup> Judgments about conformity or non-conformity are produced by an organized complex of courts. The judgments of the courts should guarantee (a) certainty and (b) legitimacy.<sup>23</sup> *Certainty* means that actors should know which behavior is legally required and enforced. It demands consistent application of the law, within the framework of an existing legal order. Certainty makes behavior consistent and predictable, which in turn enhances its coordination in associations, organizations, and societal subsystems. *Legitimacy* concerns the reasonability of the procedures used to make and apply the laws. A court decision must not only fit in the framework of existing positive law, it must also harmonize with rules and principles that are *at the moment of decision* accepted as reasonable. If conditions and values change after law-generation, positive law can appear as unreasonable. In that case judges must look for reasonable decisions that take relevant features of the situation into consideration.

Certainty and reasonability are contradictory demands. Taking new situations and their consequences into account to avoid unreasonable judgments produces indeterminacy that must be closed by 'interpretative reasoning' of judges.<sup>24</sup> This leads to the creation of new rules and therefore to uncertainty for cases that must be adjudicated. Habermas diagnoses this tension, and concludes that judges cannot avoid being legislators who make political choices.<sup>25</sup> This is why courts come up with justifications for their legislative decisions,<sup>26</sup> which can become elements of public discourses. Public discussion about case law made by the courts democratizes this kind of legislation.<sup>27</sup>

Both in administration and in adjudication one finds thus that the 6 application of politically decided laws can never be *purely realization*. Administration and adjudication always entail *creative* or *legislative* moments. Habermas admits<sup>28</sup> that these legislative moments should and also could be democratized by the installation of discursive procedures, in which justifications for this legislation are investigated and debated. Democratic legislation is for this reason not only a matter of the functionally specialized instances of parliament and government, but also of public discussions about 'peripheral' law-making in administration and adjudication.

It is, finally, characteristic for modern regulation by law that the 7 rules for legislation, administration, and adjudication are themselves laid down in meta-laws, called *constitutions*. Constitutions prescribe amongst other things: delimitations of citizenship, equal rights of

citizens to elect representatives; rights, obligations and procedures of the legislative bodies; rights and obligations of the courts and the administrative bodies. A function of constitutions is to protect rules for democratic legislation and implementation against disagreement and disobedience of powerful parts of society. A constitution that legalizes the idea of authority as ultimately stemming from the will of civil society is the keystone of the whole of institutions of deliberative democracy.<sup>29</sup>

- 8 Is it possible to transplant the summarized components of deliberative democracy for nation states to transnational regimes? Habermas's conception of deliberative democracy presupposes the existence of a people that is delimited from other peoples by territorial boundaries and by identification with the nation. National communities are at the same time characterized by a plurality of values and interests. Transnational regimes do not concern <sup>○</sup>a territorially delimited people<sup>○</sup>; they are on the contrary characterized by participants, values, laws, administrations, and adjudications that transgress territorial boundaries. Identification with a regime is not easy in this situation. With respect to plurality, however, transnational regimes are not very different from nation-states. Regimes normally include a range of 'stakeholders' with a variety of values and interests.

When we abstract from the kind of delimitation and identification that are typical for the nation-state, but keep in mind the demands of self-regulation by law under pluralist circumstances, we find a set of *generalized* characteristics of deliberative democracy, which can also be applied in reconstructive descriptions of transnational regimes. This procedure provides the following general characteristics of the components of deliberative democracy:

- (a) A delimited people rules itself via the detour of a specialized political-legislative entity that is authorized to produce explicitly formulated, collectively binding laws.
- (b) Pluralism of values of the people demands representation and legislation by means of procedures that make laws acceptable for its various parts.
- (c) Formal political legislation should depend on free opinion-formation in which all *demos*-members have equal rights and opportunities to participate. Legitimacy of laws depends on public discourse.
- (d) Legislation must be supplemented by administration and adjudication that take care of specification, monitoring and sanctioning, to overcome cognitive and motivational deficits of the members of the *demos*.

<sup>○</sup>COMMENT  
STEFAN SCHEVELIER

At a glance, the concept of a territorially delimited people seems very appealing and even intuitive. But what exactly does the term mean? What do territories and people have in common? What is delimited about a people? What is delimited about a people's territory? I am not quite sure yet what distinguishes transnational from nation state regimes.

REPLY  
WIL MARTENS

In a nation state the people is delimited by geographical boundaries. Government concerns all the respects of all those persons that live within certain boundaries. In transnational regimes delimitation is based on regulation with regard to issues. The people can be spread all over the world.

- (e) Administration and adjudication are not purely realization of law, but fulfill also legislative functions. In this sense they could and should be democratized.
- (f) Rights and obligations of members, legislation, administration and adjudication are in turn described in constitutions, which are adjudicated and enforced.

### III. Deliberative Democracy Beyond the Nation-State

Soon after *Between Facts and Norms* Habermas realized that his theory of politics and law neglected the increased supranational and transnational regulation, which influences the laws inside nation states. States have lost a considerable proportion of their autonomous regulative capacity. This development is taken into account in Habermas's further political thought.<sup>30</sup> For the theory of deliberative democracy this means paying attention to the question, how self-rule of a people can be realized in the case of regulation beyond the nation state. The following sections concentrate on Habermas's reconstruction of transnational regimes. Special attention is given to some features that make this conception implausible.

Habermas's description of regulation beyond the nation-state sticks to most of the main convictions displayed in *Between Facts and Norms*. He states that (a) democratic politics (civil society and legislation) should guarantee the ruled a determining influence on the orientation of the rulers and the content of the laws. In this vein he demands democracy for supra- and transnational regulation. (b) Laws require adjudication and administration that take care of their implementation. The last requirement can only be fulfilled by an authorized administrative apparatus, enjoying a monopoly on violence.<sup>31</sup> (c) Democratic legislation based on political identity, public discourse, and elected legislation exists for the time being only in national communities. Supranational and transnational legislation are at best democratic in an indirect way.<sup>32</sup>

In *supranational* governance collaborating nation-states give birth to authoritative regional or world-wide institutions. Important examples are the European Union, the World Trade Organization and organizations such as the World Health Organization and the Food and Agricultural Organization, of the United Nations. Habermas interprets the institutions of the United Nations as a starting point of "a ... world organization specialized in securing peace and implementing human rights worldwide".<sup>33</sup> These institutions could be developed into a fully fledged guarantee of the basic rights of all nation-states and of their individual citizens. Under this regime the world organi-



zation would also protect individual citizens against rule violations by the states they live in.<sup>34</sup>

The United Nations institutions have a *hierarchical* status *vis-à-vis* the member states, and would decide and implement the principles, norms and measures agreed upon by the participating nation states.<sup>35</sup> A 'world-government' would, in Habermas's conception, however, not dispose of the means of enforcement necessary for the guarantee of peace and human rights. These means should be lent by the member states of the international community. This results in a limited world constitution (concerning the issues of peace and human rights) and a world government without a state, in the sense of capabilities to exercise political power through administration, police and military force.<sup>36</sup>

Democracy in the supranational sphere is a matter of continuation of national democracy. In the case of the institutions of the United Nations "democratic states [...] represent the most important source of democratic legitimation for a legally constituted world society".<sup>37</sup> The legitimation of political decisions, which is produced by opinion and will formation in civil society and politics, can in supranational governance not proceed directly from citizens to governing power. The individuals should in this case be represented by state-functions and institutions – representing the representatives of a people –, deemed responsible for their national citizens.<sup>38</sup>

- 4 World-wide and regional *transnational* regimes concern *functional domains* and are in Habermas's view important for decent living, justice, and prevention of ecological threats. In these domains networks of states, corporations, and non-governmental organizations address problems created by the dependencies of the 'functional differentiation of world society'. Global functional differentiation demands coordination that enables world-wide interdependent, problem-oriented spheres of activities.<sup>39</sup> These coordination problems cannot be dealt with by individual nation-states; they involve activities in many states and often involve nation-states without effective regulation.

Habermas sorts transnational coordination problems into two categories: those that are more or less 'technical', and those that have a genuinely 'political' character.<sup>40</sup> These two kinds of problems are and should be dealt with in different kinds of institutional arrangements. I will emphasize later (III, 8) that this is a problematic distinction.

- 5 *Technical* problems are handled in networks that coordinate governmental and non-governmental actors through information exchange, consultation, control, and agreement. Examples Habermas

COMMENT<sup>○</sup>  
STEFAN SCHEVELIER

What is political and what is technical is itself a political question. For instance, the regulation of telecommunication is only functional if it does not serve some political agenda, which, in light of the NSA scandal is patently not the case.

REPLY  
WIL MARTENS

I do not think that the distinction between the political and the technical is made in the political domain. Declaring climate to be technical means to cover its political character. Whether something is political or not depends on the different values and interests that are connected to objects and events. If there is contestation about values and interests, something is political.

points to are: standardization of measures, for instance of quality management or administration; regulation of telecommunication, like the internet; disaster prevention; containing epidemics and combating international crime. Regulation in these functional domains can proceed in an instrumental fashion, and does not in his eyes require democratization.

<sup>○</sup>*Political* problems concern functions with impact on interests rooted in (more or less just) distribution-structures of national societies. Examples here are global energy, environmental problems, financial and economic policy. In these last cases, Habermas thinks, the functionally differentiated, multilateral networks must be structured in such a way that representatives of democratic nation-states or supranational entities can have the last word. This idea can only function if political power is concentrated in the hands of few global players (like USA, China, EU) that are able to negotiate binding compromises and implement the resulting rules for large territories<sup>○</sup>.<sup>41</sup>

For political cases Habermas discusses (a) decision-making, implementation and enforceability, and (b) legitimacy. 6

(Ad a) *Decision-making, implementation and enforceability* are a problem, because “in issues of truly global political scope, we lack at present the necessary institutions and procedures to decide upon programs and implement them on a broad scale.”<sup>42</sup> In other words, legislation and administration for a cosmopolitan democratic order do not exist. Besides, actors that are capable to introduce procedures and institutions of this order are lacking. As long as nation-states define themselves as competing sovereign entities that want maximum influence on transnational issues, it will be difficult to change this.

(Ad b) *Democratic legitimacy* of political regulations depends on the legitimacy of the negotiating and deciding partners – they should be representatives of the respective nation-states and their populations – and the democratic nature of the procedures for decision-making. Besides, legitimacy demands well-developed processes of public political opinion- and will-formation in the involved nation-states with regard to important transnational issues. Democratic legitimacy is difficult, because the relationship between representatives and represented is long and unclear; representatives stand for national populations as a whole, and hide the plurality of values and interests with respect to particular issues. Besides, the opinion- and will-formation processes of citizens and politicians on transnational issues are ill-developed; they concentrate on issues that are decided upon by national politics, which allow political parties to demonstrate the differences between them and their rivals.<sup>43</sup>

7 What conclusions can be drawn from Habermas's attempt to reconstruct nation-state-transgressing-governance as a matter of continuation of national deliberative democracy? For the *political issues* dominated by powerful regional regimes his analysis shows, firstly, that the representation of the value-plurality of the people, which is typical for the nation-state, cannot be continued on a transnational level.<sup>44</sup> Political discussions, party programs, and elections in nation-states are about the national way of life in all its different respects. National parties differ on constellations of issues. This organization of political life is indeed ill-suited for representation of divergent values and interests in transnational regimes, which are about single issues. Secondly, it indicates that severe obstacles for civil discourses about transnational issues exist on the national level. Together these points make the prospects for deliberative democracy concerning 'genuine political' transnational issues very bleak.

Transnational networks occupied with, what Habermas calls, *technical* issues seem to have no chance at all to get democratized. They do not count as objects worth democratizing. Democracy is superfluous or even disturbing here, as these networks deal with problems that should be <sup>9</sup>left to the instrumental efforts of experts.

A more general point can be added here. As long as nation states describe themselves as sovereign units that in the first place look for their own relative advantages, there is little hope that these states converge on issues that are important for humanity as a whole. Successful coordination on issues like climate-change, world-wide poverty, weapons of mass destruction, and pollution is very improbable when nation-states compete for power and wealth.

In summary, Habermas's reconstruction amounts to a vision in which democracy remains in the first place a matter of nation-states. Ever more fields and issues of modern social life shirk of the demand for democracy, because it is either politically impracticable or technically ill-suited. Ongoing expansion of transnational cooperation and corresponding functional governance means, in his analysis, that the importance of democracy will steadily decrease. Actions will instead be regulated by powerful elites and experts, producing rules which were never thought, communicated and decided about by the humans they affect.

8 Confronted with this result of Habermas's reconstruction of transnational regimes, the question arises whether its arguments for a negative assessment of the possibilities of democratization of transnational regimes are convincing. I think they are not, for several reasons.

COMMENT  
EVERT VAN DER ZWEEDE

If they *should* be left to experts, who decides about this? At nation-state level, the question which problems should be left to experts can be decided democratically, but that means that any normative statement *that* particular problems should be left to experts is a position within a political field. So, why has it been decided already when it comes to this higher level?

REPLY  
WIL MARTENS

It seems indeed reasonable to suppose that in Habermas's opinion decisions about whether or not something is a technical issue result from public opinion formation and political discussion. But that is only half the story. When Habermas says that something is technical he means: it is true that this issue is not a matter of contested values and interests in social reality. Against this I will hold that the issues, which Habermas calls technical, are contested in social reality, and are therefore political.

COMMENT  
STEFAN SCHEVELIER

Our primary concern should be to identify the peculiarities of the transnational sphere. Does such a sphere exist, and how is it different from the national sphere?

The whole language we use to talk about politics – be it local or global – is tainted by the dominant status of nation-states. The challenge is to use a different language

COMMENT  
EVERT VAN DER ZWEEDE

There is no particular reason why transnational regimes should limit themselves to the issue for which they were designed. No relevant societal issue is obvious or uncontested. For example, WorldBank and IMF have a major impact on the economies of developing countries. So, where does the financial issue end and the political issue start?

Things become particularly complicated when transnational regimes like the IMF and supranational institutions like the ECB join hands and work together in solving, for example, the crisis in Greece. The *demos* of Greece ended up by putting Hitler moustaches on Angela Merkel's face. There is a lot of simplification and exaggeration there, of course, but they are right in sensing that the political responsibility, and, ultimately, accountability of Merkel and the allegedly a-political responsibility of Mario Draghi and Christine Lagarde, are mixed and confused.

The critical point here, I think, is not that Lagarde and Draghi are beyond democratic control while Merkel is not, but that the way in which their roles are connected is never object of democratic deliberation (of talk, yes, but not of deliberation in the way you use it) and decision-making.

REPLY  
STEFAN SCHEVELIER

I agree with Evert van der Zweerde. You depart from a specific conception of transnational regimes – namely regimes that operate across borders and restrict themselves to a specific issue, – then you identify such functional regimes, and then you confine potential transnational politics to your limited definition of transnational regimes.

Actual transnational politics displays more variety than this discussion shows. To use an example from my own contribution to this [...]

(a) Taking a more precise look, the dichotomy of 'technical' and 'political' issues is doubtful. Many, if not all, of the so called technical regimes are actually political, in the sense that their rules address and affect persons, associations and organizations oriented at divergent values, goals and interests. The political character of, for example, regimes for internet, containment of epidemics, forest stewardship, and financial accounting is evident from past discussions about the dominance of certain interests in them, and from the divergent demands for changes of their rules. There are very few issues and regimes that are not political and could for this reason do without democracy.

This observation does not provide a solution for the problem of how to democratize. On the contrary, it aggravates the problem. Because the indicated regimes are predominantly private regimes, it is even harder to imagine their democratization via participating nation-states than in the case of 'political' ones.

(b) Habermas did not prove that transnational regimes can only be democratized indirectly, as a continuation of national democracies. This was merely suggested by his argument that a delimited people with a political identity, a public discourse, and an elected legislation can only exist in national communities. But he did not analyze any failures to democratize transnational regimes. As long as the impossibility of a reconstruction of transnational regimes as democratic institutions has not been more carefully considered, Habermas's judgment is unconvincing, and there remains hope for direct democratization of these regimes.

#### IV. Deliberative Democracy for Transnational Regimes

What could the generalized conception of deliberative democracy, I presented in 11.8, mean in the specific case of transnational regimes? An attempt to answer this question can start with some considerations about *demos* in its relation to transnational regimes. They concern: (a) the delimitation of a *demos*; and (b) the respects in which a relation of *demos* and authoritative *rulers* exists. These two points are intimately related and will be discussed together. Based on that I will deal with the specificity of (c) value and interest pluralism; (d) public discourse and legislation; (e) administration and adjudication; and (f) the meta-rules or constitution, in the case of transnational regimes. For each of these respects I will describe the characteristics that contribute to a regime's democracy, and the measure in which some current regimes are already partially democratic.

The following presentation concentrates on the way in which transnational regimes *themselves* should be democratic. This of course does not mean that I believe that democratic states and supranational regimes are superfluous for democracy of transnational regimes.

2 *Ad. A/B Demos and Rulers* Transnational regimes are concerned with an *issue*. To gain better understanding of the delimitation of the *demos* of such regimes, it is useful to examine what it means for something to be an issue. Let us assume that child-labor, deterioration of forests, world-wide epidemics, food-safety, and global warming are issues. They are states of affairs considered as problems that should be resolved or prevented. Issues result, in other words, from threats to a value in a specific domain. We generally consider health and safety as values; if these are threatened for children and food, they can become issues, i.e. matters of collective action directed at the realization of otherwise threatened values.<sup>45</sup> Such issues affect a multitude of persons and organizations, and they demand coordinated action for remediation. Regimes result from continuous attempts to organize actions in this respect. Their *demos* receive their delimitation from this construction.

3 Analyses of issue-based transnational regimes often distinguish between three categories of 'participants'.<sup>46</sup> The first category concerns the *actors* that participate in the preparation, production and implementation of the regime-rules. These are mainly corporations, NGO's, technical standard setters, experts, national states and international organizations. Actors participate in general on a voluntary basis; they have or they represent interests in the regulation of the issue at hand. The other two categories are made up by the *participants* who are influenced by the rules, further distinguished into: those directly *addressed* by the regime, and those who are (significantly) *affected* by it.

4 Should all these participants be considered as belonging to the *demos* of a regime, and be granted rights to influence its rules, because they are submitted to them? Starting from Habermas's idea of democracy as a specification of the general normative principle, which says that the validity of the norms of a community depends on the *acceptability* of these norms for all possibly affected persons,<sup>47</sup> it seems obvious that the *demos* of a transnational regime consists of all these participants.

Objections against the use of the so-called 'all-affected principle' for the delimitation of the *demos* are however abundant. The most important either point at the difficulty to discern 'the affected' or show that the all-affected principle comes at a serious cost to democracy. For reasons of space, these objections cannot be discussed in this

[...]volume, Avaaz is an organization that commits itself to "organiz[ing] citizens of all nations to close the gap between the world we have and the world most people everywhere want." This is not a one-issue group. Avaaz is of course not a regime, but it is an integral part of transnational politics.

REPLY  
WIL MARTENS

Three clarifications are in place here. First, I could indeed have formulated: an issue or issue-complex. Second, and that is something different, regimes may be oriented at the realization of a default value in a domain, but that does not imply they are restricted to one value. Later on (especially IV.8) I emphasize they have to accommodate a variety of values. Third, it is important to distinguish transnational regimes from transnational organizations (like Avaaz and ECB), that (can) play a role in or for regimes.

COMMENT  
EVERT VAN DER ZWEEDE

This notion of 'acceptability of these norms' is an example of the quintessential Habermasian trick. Acceptability means, I presume, something like 'would be accepted on the basis of a domination-free discussion between citizens regarding each other as free and equal.'

The point, however, when it comes to politics and especially to democratic politics, is not about acceptability in general, but about concrete acceptance.

REPLY  
WIL MARTENS

For Habermas, acceptability means concrete acceptance in a situation by the persons involved. However, Habermas also provides the [...] insight that even if all affected are somehow involved in the decision-making processes, concrete acceptance, can be arrived at in processes that are marred by deceit or threat and thus were inadequate for finding an acceptable solution for an issue. In such cases there would be acceptance that can be criticized. I do not believe that Evert van der Zweerde would applaud this kind of concrete acceptance.

COMMENT  
STEFAN SCHEVELIER

If you aim to construct this form of transnational democracy on Habermasian grounds, you are certainly devising an all too exclusive criterion. I believe Habermas would argue that such regimes should be as inclusive as possible. If you are not interested in a Habermasian foundation for transnational regime, you should explain why the actions of issue-based regimes do not require thorough public deliberative scrutiny.

REPLY  
WIL MARTENS

The question here seems to be: What is a Habermasian foundation? I use a generalized idea of deliberative democracy, and try to specify this for the case of transnational regimes. I think it is a logical consequence of this procedure – which is in Habermas's spirit – to state that issue-based regimes should exclude persons and organizations that want to obstruct the realization of their default value. Of course, that is never formulated as such by Habermas.

essay. I will concentrate on the presentation of a procedure, which allows the legitimate delimitation of the *demos*. I will indicate only marginally that the objections against the all-affected principle do not touch this procedure.

The following argument about the delimitation of the *demos* of 5 issue-based regimes presupposes the existence of constellations of organizations, associations and persons that regulate their collective actions in order to realize a value for a circumscribed domain. Such regimes are based on the insight that value realization depends on collective intentions that are supported by a set of connected rules or programs.

Issue-based regimes are *voluntary* in the sense that organizations, associations and persons participate in them because they share the value-orientation of the regime, and accept that the realization of this value demands production and observation of goals and rules that orient their actions. A regime can be neglected by everyone who is not convinced by either the value or the programs for its realization, and competing regimes, instituting other ways of value-realization for the same domain, can be constituted.

In this reconstruction of transnational regimes, the delimitation of 6 the *demos* cannot rely on the all-affected principle alone. It is very well possible that not all persons or collectives that are affected by the programs of a regime are eligible as part of its *demos*, and are allowed to participate in its discourses and decision-making processes. The *demos* should only consist of persons, associations and organizations that share the default value-orientation of the regime and accept manifestly that their actions are regulated by authoritative legislation that supports the work on its issue.<sup>48</sup> Outsiders that signify this attitude and demand participation in the regime should be admitted. Admittance signalizes that they are recognized as serious contributors to the realization of the value(s) of the regime.

This argument makes NGO's, corporations, and other organizations, being collectives of persons that want to advance the realization of a regime-value by means of regulated collective action, eligible as participants in transnational regimes. Parties that demand inclusion without willingness to contribute to value-realization should be refused. Corporations, states or NGO's with the intention to weaken or subvert the value-orientation of a regime should be barred.

In other words, issue-based regimes should pay attention to their boundaries if they want to pursue the issue, which is the reason of their existence. They should formulate inclusion-exclusion-rules

that give participation rights only to those (collective) actors, who satisfy this 'criterion'.<sup>49</sup>

- 7 This delimitation of the *demos* implies a farewell to the often held view that the *demos* must be pre-given for the purpose of legitimacy of rulers and regulation of a regime. This view is often criticized as unavoidably circular under the equally held presumption that the *demos* must constitute itself in a first founding decision.<sup>50</sup> In my opinion, an issue-based regime without *demos* cannot exist, as such a regime implies that value-oriented persons and collectives have entrusted a board with legislative power for the realization of its value, and in turn demand authoritative programs that support them in the realization.

The *demos* an issue-based regime implies is delimited and open at 'once'. All persons and collectives that want to contribute to collective intentions concerning the regime-issue can discuss joining, and should in principle be admitted. Thus, the *demos* that has a right to influence the rules of the regime is probably fluctuating. But that is not problematic. On the contrary, the fluctuations of the boundaries of the *demos* rightly follow the fluctuations of the persons and collectives that want to oblige themselves to an organized pursuit of the value at issue. Another often discussed problem that confronts nation-state-democracy is also prevented in issue-based voluntary regimes: the exclusion of persons that demand for inclusion, but are refused for no good 'reason'.<sup>51</sup> The regimes focused upon in this essay are not confronted with this problem if they refuse participation to those actors that are not willing to promote the default value. Nor does a huge mass of serious demands for admittance bring problems. Issue-based regimes cannot become too crowded the way nation states can.

- 8 *Ad. C. Pluralism.* If transnational regimes are characterized by a default value-orientation and delimited by the rule that members should accept this value-orientation and the ensuing rules, one could suspect that they are characterized by one-sided value-orientations. Plurality would in this case only exist in the form of several one-sided regimes next to each other. Especially in absence of a worldwide public opinion and an overarching world-state, in which relative weights of values and relations between regimes are discussed and regulated, this could easily lead to a fragmentation of regimes and to contradictions between their programs.<sup>52</sup>

This fear is inappropriate, however. Value realization by means of a regime does not take place in a value-vacuum. It always involves objects and events that also have meanings and values in the context of the realization of other values. Land, animals, slaughter methods,

COMMENT  
EVERT VAN DER ZWEEDE

Here, I fully agree. I think it is important to state, and emphasize, that every regime has its *demos*, just as any policy has its 'affected'. The question is what this *demos* does, and what it can do, and what is the impact of those affected on this *demos*: are they part of it? Take human rights: there is a *demos* of Amnesty International, i.e. its members (or...?), but who are the relevant affected? At least those people who have become victims of the human rights violations of those regimes against the policies of which Amnesty is protesting. Strictly speaking, however, *those* affected are not the affected of Amnesty: those who are directly affected by Amnesty's policies are those who get support, receive letters, etc. What then is the meaning of 'demanding entrance and discuss joining'? The world, unfortunately perhaps, is not the comfort zone of discussion between Habermasians and their critics.

COMMENT  
EVERT VAN DER ZWEEDE

This remark presupposes that there can be 'good reasons' not to include someone. One could, however, argue, in line with Hannah Arendt on this point I think, that the very wish to be part of a polity, and thus enjoy the rights that that polity offers, but also accept the obligations implied, is sufficient reason.

REPLY  
WIL MARTENS

The last three remarks seem to complement each other. They all are about the relationship between being affected and being part of the *demos* in the case of issue-based transnational regimes. First of all there is a difference between nation states and regimes. Persons want to be in (or enter) a nation state because they must be part of some organized collective in order to live. As soon as they are part of a nation state they are affected/subjected by it and should therefore be given influence on its rules.

The basis for participation in a regime is different. Participants cannot generally be said to have an overwhelming interest in membership of the collective because they are in need of a collective that gives them security and chances for development. Sometimes this does play a minor role, but then only [...]

[...] for one issue of life. There are, however, also quite different interests. An important example is wanting to realize a value for a large community - often the whole world population - by organized collective activity. Besides, being part of such value-realizing collectives can be realized by the production of new collectives. Different from nation states, regimes have no monopoly over an issue. This situation makes it legitimate to refuse those participants that do not want to work on the regime's issue in a serious way. The cited criteria of Habermas and Arendt are formulated for the situation of nation states, and are in my opinion not useful for regimes.

#### COMMENT<sup>o</sup>

EVERT VAN DER ZWEEDE

Very good points! My only question concerns demarcation: the nation-state has a clear 'territory', and one could argue that for any kind of 'regime', its domain, which is not necessarily a territory, should be clearly defined. Or can it be fuzzy?

#### REPLY

WIL MARTENS

I tried to make a start with an answer to this question in my considerations about the delimitation of the *demos*. There, I indicated that the boundaries of a *demos*, deciding about inclusion and exclusion of persons and collectives in/from a regime, appear to be fuzzy in the case of issue-based regimes. This is the basis for my discussion of representation and public discussion. My proposal is: representation and discussion are a matter of values that are pursued by persons and collectives, and not simply of (proportional) representation of persons.

and transport have meaning and value in a food-safety regime, but also in the context of affordable food-supply, religious values and environmental protection. Goals and rules decided with regard to food-safety, prescribing certain cultivation procedures, could for example lead to unjust income distribution and environmentally detrimental transport movements. Such consequences for the realization of other values and interests are normally discussed in the opinion- and decision-making processes of regimes. In short, participants in issue-based regimes introduce lots of considerations about a variety of values, goals, meanings, rules and interests they find relevant for certain reasons. These considerations build the raw material for the conception of programs that could realize the default value, while also taking into account the other advanced values. Program proposals are brought under discussion and each participant pays attention to the values, goals, and rules that are relevant from her perspective; discussion leads to new proposals, to bargaining and at last to acceptable decisions. The outcome of discussion and decision-making in regimes is thus accommodated to many values besides the default one(s).

But this accommodation is not clearly visible in the formulations of the goals and rules of the regime. These are explicitly presented as programs for the realization of the default value. The programs look therefore as if they were only about, say, food-safety. This gives regimes a one-dimensional image, which easily leads to their perception as technical matters that can be left to experts. This image is utterly improper.

*Ad. D. Representation, Public discourse and Decision-making.* Identification of the *demos* is a precondition for an answer to the question: How should legislation relate to the *demos* if it is to produce acceptable rules? The difference between issue-based transnational regimes and nation states makes an adoption of models that were developed in the latter impossible. An issue-based regime attempting to realize a default value in a social space that is populated by several values needs to invent new forms of (a) representation and (b) public discourse and <sup>o</sup>decision-making<sup>o</sup>.

(a) If the programs of an issue-based regime should accommodate not only the default value, but also the other values of the *demos*, the selection-procedure for the legislation of the *demos* must be such that it leads to the *representation* of these values and interests in the legislative bodies. Representation should, in other words, be couched in terms of relevant values.



In most transnational regimes this is not directly the case. They incorporate relevant non-focal values mostly by distinguishing parties that are differently affected by the regime and are therefore supposed to have different interests or stakes that should be taken into account.<sup>53</sup> The distinguished stakeholders all get a (more-or-less) reasonable amount of seats in legislative bodies. Sometimes this procedure involves distinguishing functional groups, like producers, traders, intermediates, scientists and consumers. In other cases it is supposed that the difference between North and South is an important indicator of divergent values and interests that should be accounted for in criteria for representation. Still other cases differentiate between social, economic and environmental values and interests, and look for their representation.<sup>54</sup>

On each of these criteria, the distinguished categories of participants appoint or select their own representatives in the legislative bodies. The representatives are held accountable for the values and interests of the groups they represent. Their values should be accommodated in the programs of the regime, which should thereby become acceptable for the different participants. The indicated procedures for the selection of representatives from the different constituents of the *demos* remain, however, indirect ways of getting relevant values into legislative boards.

- II The various non-default values that exist in a *demos* can, however, also straightforwardly be taken as a point of departure.<sup>55</sup> In this case values would be equally represented in advising and deciding committees that formulate programs for the realization of default and other value(s). Members of legislative committees function in this case as *representatives of the values* that are relevant for the *demos* of a regime.

Democracy, in the sense of equal possibilities to influence authoritative regulation, would then concern the equal possibility of each value to be taken into account in the decisions about the realization of the default value. The chance of acceptable outcomes is optimal if the decisions about goals and rules are taken as workable agreements,<sup>56</sup> looked after in discussions of the representatives, and if voting under majority rule is a last resort for decision-making. This indeed seems to be an option preferred in many regimes.

The problem then is to find a way to identify the relevant values, and the organizations and persons that can be their representatives. This essay is not the right place to propose a detailed and substantiated solution for these problems, but I will try to indicate the direction in which it can be found. In any issue-based regime where several parties cooperate, one finds discussions about the values that should be taken

COMMENT  
EVERT VAN DER ZWEEDE

A relevant *political* question is: who decided about the domains of different regimes and about their border clashes, e.g. when human rights issues and environmental issues clash? How can those borders be established 'democratically'? That is a different question than the question about the 'internal' deliberation and decision regarding values, goals, and priorities. Different regimes, each transnational, would seem to require a supra-transnational regime that establishes their interrelations. Would that have to be a (democratic) world-state? If not, what kind of form could it have?

REPLY  
WIL MARTENS

The issues – concerning problems with value realization in a domain – are produced by the regimes themselves, slowly consolidating regular internal patterns and patterns of interaction with collectives in their environment. With regard to the relations between a plurality of regimes one can say that each regime is already occupied with accommodating several values in its programs. Preventing child-labor can for example perfectly be a point in a food-safety regime, although it is not its *raison d'être*. In such cases I see no necessity for supra-national regulation of relations between regimes. See also V.4.

COMMENT<sup>6</sup>  
EVERT VAN DER ZWEEDE

Allow me a hypothesis: I think that, ultimately, your dream is one of global enlightened despotism. This is, I think, the spontaneous position of any intelligent person who sees that there are many problems, from poverty to desertification, that can in principle be solved, and who also sees that national and international politics are never going to solve them. Global enlightened despotism, to be sure, probably is the only real solution, and it may well arrive some day, but: it forgets about politics, let alone democracy.

REPLY  
WIL MARTENS

Enlightened despotism is certainly not the gist of my proposal, although a certain elitism might be its result, as in any case of government. It is political at least in the sense that in every regime there is a discussion about which values should be realized in which ways in collectively binding programs that are eventually enforced. It is democratic because it proposes equal influence to values that are at stake for persons that participate in the regime. But I agree, it all looks strange for eyes accustomed to the political stages of nation states.

into account. These discussions provide a first opportunity to identify the values that should be included in the discussions about programs. Demands for inclusion, coming from persons and organizations willing to contribute to the realization of the default value and claiming a right to represent their further values in the regime, provide a second opportunity. Such demands can be articulated by associations of directly affected persons, but also by experts or organizations that act on behalf of the affected persons. These articulations reveal in principle also the organizations and persons that could function as representatives in a regime's legislative bodies.

(b) *Discussion and decision-making.* The indicated manner to discover 12 values and their representatives demands a well functioning *public discussion*, and a firmly developed *link between public discussion and the regime's legislation*. Members of legislative bodies are not able to represent values in absence of broad communication that articulates values, related meanings, and pros and cons of goals and rules.

This communication can partly be organized by the regimes. In the example of food-safety that could for example be meetings, working groups, consultations, press and internet initiatives about the dangers of intoxication and environmental pollution, and the consequences of new rules for hygiene and pharmaceutical products devised to deal with these <sup>6</sup>problems<sup>6</sup>. Problems, values and programs should, however, also be openly discussed in a large public while remaining connected with the communications organized by the regimes. Representatives of values can thus be embedded in broad public discussions of the persons, associations and organizations they represent.<sup>57</sup>

Such communications demand a public space that is organized for the purpose of discussions about issues of transnational regimes. Discussions about transnational issues should be liberated from restrictions that are inherent to national public spheres that subordinate discussions on value-realization to national contexts in which voting for political parties that belong either to government or to opposition is central.<sup>58</sup> The focus of 'borderless' public discussions should be right away on the production of programs for issues that balance default value and further values. They are about smart solutions that permit the combination of values, and the continuous cooperation between all the representatives of divergent values, which only together can realize the default value.<sup>59</sup>

Democratizing issue-based transnational regimes demands in other words the development of transnational, issue-centered public discussion media that focus on values, regimes and programs that are useful in our lives.

14 *Ad E. Administration and adjudication.* Transnational regimes are often described as networked forms of governance without government, relying primarily on non-hierarchical forms of steering, providing principles instead of laws. This description suggests that administration and adjudication, the traditional means of implementation of authoritative rules, are needless in transnational regimes.

Regimes produce in most cases, however, not only principles, but also obligatory rules. Their predictable application demands administration and adjudication.<sup>60</sup> Regimes use *administrations* among others: to register and categorize members; to organize meetings of committees and member consultations; to be visible in public discussion and observe the development of public opinion; and, last but not least, to help the members to apply rules and to monitor and sanction (lacking) rule-application. Without organizational structures for these functions, regimes are not credible as regulators of the realization of important values, in which case it is useless to ratify rules, to declare them as binding, or to provide certifications.<sup>61</sup>

The execution of administrative functions should itself be regulated by authoritative rules. To fit in a democratic regime, administrations should be transparent and held accountable. Rules for decision-making, about for example accreditation and certification, should be public, verifiable and recoverable.<sup>62</sup>

Like in the nation states, the administrators are the professional experts in the regimes. If they keep away from acting purely as executors, and interact with the diverse members in the context of program application, they can conceive interpretations and specifications of rules that are acceptable and helpful for each of these members. And, at least in some regimes, monitoring is in the first place a matter of helping, not of sanctioning.<sup>63</sup> This interpretation of their role allows administrators to be helpful in finding acceptable solutions for the realization of the variety of values that members of regimes care about.

15 *Adjudication* is needed for similar reasons as administration. Even when rules are produced in careful democratic processes, conflicts about their meaning *in situ*, and, at the limit, about their rightfulness, loom at the horizon. Was it a breach of the rules to employ these workers? Was the decision to refuse certification really taken in accordance with prescribed procedure? In this respect too, rules of transnational regimes are not different from nation state laws. They require dispute-regulation mechanisms, which at once take care of conflict resolution and sanctioning of offenders. Fulfilling these functions also contributes to the closure of interpretive gaps in the rules, which in turn increases the predictability and coordination of actions.

COMMENT<sup>o</sup>  
EVERT VAN DER ZWEEDE

I think you are appealing to some intuition that I do not share. Constitutions are not inextricably linked to states, let alone nation-states. So you are right, transnational regimes can also have constitutions, but why would that require arguing?

REPLY  
WIL MARTENS

There is a discussion in the theory of law about the viability of the concept of constitution for supranational and transnational governance. I refer to that discussion here. I try to formulate arguments for a very broad concept of constitution, applicable to all kinds of regulated collectives. At the same time I emphasize that it makes sense to interpret constitutions in the context of democratizing these collectives. Constitutions alone cannot solve the problems related to power and governance.

Many regimes now have rules and bodies for dispute resolution,<sup>64</sup> which adopt juridical forms that were developed in nation-states. In cases of disputes, they prescribe reason-giving, rights to be noticed and heard, due process and some form of judicial review of the rules crafted by the legislative bodies, to ensure accountability and transparency. Administrative law, which is a general provision in nation-states, thus gets embedded in individual regimes,<sup>65</sup> producing 'rule of law' as far as the regime's own regulation is concerned.<sup>66</sup>

The prescriptions of administrative law provide incentives for democratization. They involve discursive procedures, in which justifications for rules can be investigated and debated. Arguments produced therein can feed back to legislative bodies and enhance rule-production.

*Ad F. Constitution.* Many transnational regimes nowadays are oriented 16 by normative self-descriptions one can call *constitutions*.<sup>67</sup> In short, regimes formulate normative meta-rules that describe what they should do, how this should be done, and which parts have which rights and obligations in doing. These normative self-descriptions have in main lines the same characteristics in regimes as in democratic nation-states. Nation-state constitutions are said to be adjudicated legal norms which, as highest law, regulate the establishment and exercise of public power as they lay the basis of power in the *demos*.<sup>68</sup> The existing normative self-descriptions of issue-based transnational regimes show that constitutions are not exclusive instruments of<sup>o</sup> nation-states<sup>o</sup>.

Regime-constitutions are useful instruments for the stabilization of 17 orientations and expectations in- and outside the regimes. Inside the regime they orient legislation, allow a judicial review of its rules, and of the implementation of rules by administration and adjudication. In cases of uncertainty or conflict about rights and obligations of committees and members of the regime or about decision-making procedures, the meta-rules of a constitution provide a possibility of adjudication. Thus, a constitution provides possibilities for checks and protests in cases of false or excessive exercise of authority, and protects a regime against threatening disagreement and disobedience resulting from the plurality of values and interests.

## V. Democratizing Issue-Based Subsystems of World-Society

Democratizing issue-based transnational regimes that include 1 private participants of great importance may at first thought appear as a dangerous phantasm. Does not this form of governance, as a

consequence of participation of corporations and NGO's, sooner endanger than advance democracy? On further analysis the contrary proves to be true: these regimes have an aptitude for the democratic realization of broadly shared, important values. Their basic structures are probably better suited for democracy than those of the <sup>o</sup>nation-states<sup>o</sup>.

The aptitude for democracy remains, however, invisible as long as the regimes are observed from the perspective of the idea of democracy that was developed for the nation state. If we look at transnational regimes as continuations of national democracies, we are confronted with very bleak prospects for their democratization, and, because of their continuous expansion, for the possibility of democracy at large. That is, in an exemplary manner, visible in Habermas's attempt to provide such a reconstruction. The democratic potentials of 'private' regimes only become visible if they are looked for in their own structures. This perspective demands that the contents of concepts like *demos*, representation, public discussion, and constitution drastically move away from the contents of these concepts that are typical for nation-state-democracy. This conceptual change is a prerequisite for an adequate description and assessment of transnational regimes.

- 2 Having abandoned the project of democratizing transnational regimes on the basis of national democracy, the central question is: What could be the meaning of 'autonomous democratization' of these regimes? The first step towards such a conception of democracy consists in the conceptualization of their peculiar social nature. Transnational regimes are typically concerned with 'issues', like child labor or food-safety, which are junctions of values and domains. Members of a regime worry about typical states of affairs, which are generally considered as problems that should be resolved or prevented. These problems affect a multitude of persons and organizations, which pursue, besides the default value of the regime, a lot of divergent values and interests. The *demos*, in the sense of those who should have a voice in the regime, consists only of persons, associations and organizations that share the default value-orientation of the regime and accept that their actions are regulated by authoritative legislation on behalf of its realization. Remediation of the problematic issues requires regulation of the actions of the partly diverging participants. Regimes result from attempts to continuously regulate actions in these respects.
- 3 Political processes of representation, legislation, public discourse, and administration and adjudication are all centered around the balanced realization of the default value and the further values of the participants. The selection of representatives should warrant that relevant values

<sup>o</sup>COMMENT  
EVERT VAN DER ZWEEDE

True, but only because they are agenda-setting and value-establishing institutions, which have their *internal* 'law-making', but cannot make laws and enforce them outside their own organization. The big difference between a state and a transnational regime, it seems to me, is that a state both organizes itself *and* the society of which it is the state, whereas transnational regimes can only organize themselves internally through 'legislation'.

REPLY  
WIL MARTENS

*Prima facie* your argument seems plausible. It entails, however, a conceptual flaw.

It compares the whole of a transnational regime with the state that organizes a lot of societal subsystems by means of legislation. But one should compare a transnational regime with a society *and* its state, and the state with the legislating and organizing part of a transnational regime. As soon as this is done, it becomes immediately clear that transnational regimes have their own political and administrative organization – one could say, their own state – which is, however, only organizing with regard to one issue in our life. So actually, the main difference seems to be that in cases of transnational regimes, there is an own legislation and administration for each issue, whereas traditional nation states have placed governance of all its issues and their societal subsystems in the hands of one political and administrative organization.

are included in the legislative bodies that produce the programs. Rules for discussion and legislation should preclude that relevant values are disregarded. This happens based on public discussions organized around the regulated issue, in which possibly relevant problems, solutions and representatives emerge, and in which the adequacy of representatives and their legislation can be tested. This constellation of political processes produces regulative programs, which appear as reasonable and acceptable and are therefore experienced as legitimate.

The implementation of legitimate programs in transnational regimes is not as soft as sometimes is suggested. Rules are often binding and not just suggestions to 'the' participants in the regime. The divergence of values and the cognitive and motivational characteristics of the participants make a reliable implementation of programs dependent on administration, and adjudication. These organizations help in most regimes to specify the rules, to monitor and enforce their execution, and to assist in the solution of disputes between participants with divergent values. Together they overcome the cognitive and motivational problems that remain even in regimes where participants agree about the main values their cooperative efforts are oriented at.

It is a mistake to characterize transnational regimes mainly in terms 4  
of civil discourse,<sup>69</sup> of administrative law or of constitutionalization.<sup>70</sup> Regimes cannot be reduced to a kind of autonomous public discourse, or to public discourses that prepare and criticize legislation, administration and adjudication of external state (based) authorities. Neither are they merely forms of juridical regulation. Transnational regimes consist of the full range of regulatory forms – legislation, public discourse, administration, adjudication and constitution – that were invented in nation-states, and are now being adapted to the specific social nature of transnational regimes.

Transnational regimes are not produced by external state (based) authorities; they are *self-constituted* in the course of searching for an organized answer to urgent social problems. In this sense they clearly differ from the equally issue-based regimes for health-care, energy or food-safety developed within nation-states, where basic rules for all regimes are produced by a single national legislation.

Repeatedly occurring self-constitution around issues, producing full 5  
ranges of regulatory forms in each of the produced regimes, leads to an abundance of autonomous, self-contained, differently oriented, and explicitly regulated social systems, existing alongside each other. However, these characteristics of transnational regimes do not imply that they are one-dimensional, in the sense of a closure for other

values. Democratization is important in this respect. Democratized regimes incorporate a plurality of values that are discussed in public, represented in legislation, and communicated in administration and adjudication. The programs and practices of regimes thereby accommodate a plurality of values. Amongst these values are in many cases so-called human rights.

Perceived in this way a broad manifold of democratic transnational regimes appears as a realistic utopia. For many respects of social life they are more than worthy replacements of the rules coming from a fragmented world of nation-states.

COMMENT  
STEFAN SCHEVELIER

Why would they replace a world of nation-states? I thought you had just argued for a diversified system that has both transnational issue-based regimes and national *demos*-based regimes.

REPLY  
WIL MARTENS

Maybe it is better to say that democratic transnational regimes seem to be the right form of governance in those cases where an issue is identified that requires coordination beyond the borders of a nation state. This could lead to a wide range of issue-based combinations of governance and governed. This would bring about a government, working as good as it can, for each issue world-wide. If these issue-governments could be truly democratic that would probably be the best possible governance for the issues concerned, better than a situation in which one government is responsible for all issues of the population of a restricted territory. There could be influence of the *demos* and accountability to the *demos*, for each separate issue. In the case of the nation state, democracy for all issues is blended, with unclear influence and accountability as a result.

- 1 I am very grateful for the comments I received from Judith Martens and Bas van der Linden on an early version of this essay. The comments of Evert van der Zweerde and Stefan Schevelier were invaluable. They urged me on the one hand to changes that markedly enhanced the presentation of my argument, on the other hand they provided the opportunity to rethink my conception on the basis of legitimate and interesting questions I had not yet posed myself. Bas Leijssenaar provided deadlines and help in a friendly and professional way, ever when this was useful.
- 2 Habermas, Jürgen, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society', in: *Europe the Faltering Project*, transl. C. Cronin (Cambridge etc.: Polity 2009 [2008]): 112ff.
- 3 The term 'private' is used here in the sense of non-nation-state. Later on it will become clear that what is normally indicated as private (for example actions of corporations) is actually public in the rule-setting of transnational regimes.
- 4 'Regime' means, in this essay, a complex of issue-oriented explicitly regulated actions and communications in which several collectives participate. This is elaborated in section IV.
- 5 These (and other) regimes are described in Take, Ingo, 'Legitimacy in Global Governance: International, Transnational and Private Institutions Compared', *Swiss Political Science Review* 18 (2012): 220-248.
- 6 See for example Dobner, Petra, 'More Law, Less Democracy? Democracy and Transnational Constitutionalism', in: P. Dobner & M. Loughlin (eds.), *The Twilight of Constitutionalism* (Oxford: Oxford University Press 2010): 141-162; Krisch, Nico, 'Global Governance as Public Authority: An Introduction', *I\*CON* 10 (2012): 976-987.
- 7 This means an attempt to apply an important concept from the "domestic" political tradition to the global/transnational sphere. Alongside the concept democracy, the concepts administration and constitution are often used in investigations on how to conceptualize and tame global governance. See: Krisch 'Global Governance as Public Authority', 976-987.
- 8 Deliberative democracy is often used while thinking about transnational regulation, because it provides concepts that allow analyses of (self)regulation, which deviate from the traditional democratic forms of representation and voting in the nation-state. See for example Dryzek, John, *Foundations and Frontiers of Deliberative Governance* (Oxford: Oxford University Press 2010); Habermas, Jürgen, *The Divided West*, transl. C. Cronin (Cambridge etc.: Polity Press 2006 [2004]); Habermas, *Europe the Faltering Project*; De Burca, Grainne, 'Developing Democracy beyond the State', *Columbia Journal of Transnational Law* 28 (2008): 101-158; Scherer, Andreas & Palazzo, Guido, 'Toward a Political Conception of Corporate Responsibility: Business and Society from a Habermasian Perspective' *Academy of Management Review* 32 (2007) 4: 1096-1120.
- 9 For example Dryzek, *Foundations and Frontiers of Deliberative Governance*; Scholte, Jan-Aart, 'Reinventing Global Democracy', *European Journal of International Relations* 20 (2014) 1: 3-28.
- 10 Habermas, Jürgen, *Between Facts and Norms* (Cambridge etc.: Polity 1996): 7.
- 11 See for Habermas's notion of reconstruction: Pedersen, Jørgen, 'Habermas' Method: Rational Reconstruction', *Philosophy of the Social Sciences* 38 (2008): 457-485.
- 12 Habermas, *Between Facts and Norms*, 97-98.
- 13 *Ibid.*, 107; 133. I will return to the notion of "being affected" by regulation in IV.
- 14 Habermas, *Europe the Faltering Project*, 182f.
- 15 Democratic processes functioned only in nation states; there is no European public opinion. See Habermas, *Between Facts and Norms*, 502-503. In "*Between Facts and Norms*" there is no entrance in the register for "transnational".
- 16 *Ibid.*, 135.
- 17 *Ibid.*, 182.
- 18 *Ibid.*, 110.
- 19 These are unavoidable characteristics of modern laws. Habermas, *Between Facts and Norms*, 111ff calls this the form of modern law.
- 20 *Ibid.*, 186ff.
- 21 That is the global characterization of Habermas, *Between Facts and Norms*, 192-193.
- 22 *Ibid.*, 192.
- 23 *Ibid.*, 198.
- 24 *Ibid.*, 216-220.
- 25 See for a critical reconstruction of this answer: Shih, Wesley, 'Reconstruction Blues: A Critique of Habermasian Adjudicatory Theory', *Suffolk University Law Review* 36 (2002/2003): 331-390.
- 26 Habermas, *Between Facts and Norms*, 236.
- 27 *Ibid.*, 439-440. This element plays a role in transnational regimes. See IV.15
- 28 In both cases without very much elaboration. See Shih, 'Reconstruction Blues'.
- 29 Habermas, *The Divided West*, 132. Cf. Habermas, *Between Facts and Norms*, 110.
- 30 Habermas, *Europe the Faltering Project*, 110; 112.
- 31 *Ibid.*, 112, also points to civic solidarity as an element of modern constitutional states.
- 32 Habermas, *The Divided West*, 139.
- 33 Habermas, *Europe the Faltering Project*, 112.
- 34 *Ibid.*, 112; 118f.
- 35 *Ibid.*, 123.



- 36 See for this distinction of state and constitution: Habermas, *The Divided West*, 131. For critical remarks on Habermas's conception: Scheuerman, William, *Frankfurt School Perspectives on Globalization, Democracy, and the law* (New York & London: Routledge 2008): 158ff.
- 37 Habermas, *Europe the Faltering Project*, 115-116.
- 38 *Ibid.*, 117-118.
- 39 *Ibid.*, 114.
- 40 *Ibid.*, 113-114; also 123.
- 41 *Ibid.*, 114-115.
- 42 *Ibid.*, 123.
- 43 On doubts about the possibility of international and transnational democracy based on extension of nation-state democracy, see: Christiano, Thomas, 'Is Democratic Legitimacy Possible for International Institutions?' in: D. Archibugi & M. Koenig-Archibugi (eds.), *Global Democracy: Normative and Empirical Perspectives* (Cambridge etc.: Cambridge University Press 2012): 69-95, 79ff.
- 44 This point is affirmed by other authors; see for example Krisch, Nico, 'Global Administrative Law and the Constitutional Ambition' in: *The Twilight of Constitutionalism*: 246ff.
- 45 A more elaborated analysis of the relation between values, definition of the situation and collective action can be found in Martens, Wil, 'Kollektive Intention und Definition der Situation', in: A. Ziehmman (ed.), *Offene Ordnung* (Wiesbaden: Springer VS 2012): 183-208.
- 46 See Cafaggi, Fabrizio, 'New Foundations of Transnational Private Regulation', *Journal of Law and Society* 38 (2011): 20-49. The distinction is analytical.
- 47 Habermas, *Between Facts and Norms*, 107n.
- 48 On silent and explicit communication of acceptance: Gilbert, Margaret, *A Theory of Political Obligation*, (Oxford: Oxford University Press 2006).
- 49 The aim is not to imagine and think about new decision-making units, which would be designed starting from democratic principles. See for this difference: Koenig-Archibugi, Mathias, 'Fuzzy Citizenship in Global Society', *The Journal of Political Philosophy* 20 (2012) 4: 456-480. Cf. Abizadeh, Arash, 'On the Demos and its Kin: Nationalism, Democracy, and the Boundary Problem', *American Political Science Review* 106 (2012) 4: 867-882.
- 50 See Abizadeh, 'On the Demos and its kin'; Lindahl, Hans, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', M. Loughlin & N. Walker (eds.), *The Paradox of Constitutionalism* (Oxford: Oxford University Press 2007): 9-24.
- 51 See for discussions of exclusion: Agné, Hans, 'Why Democracy Must be Global: Self-Founding and Democratic Intervention', *International Theory* 2 (2010): 381-409.
- 52 This fear is discussed in critical assessments of Luhmann's systems theory. In relation to law his fear is discussed under the title 'fragmentation'. See Koskeniemi, Martti, 'Fragmentation of International Law? Postmodern Anxieties', *Leiden Journal of International Law* (2002): 553-579.
- 53 It is supposed that being affected by a regime is having an interest with regard to this affection. See for a clear relationship between affected and stakeholders: McDonald, Terry, 'Citizens or Stakeholders? Exclusion, Equality and Legitimacy in Global Stakeholder Democracy', *Global Democracy*: 47-68.
- 54 This is the case in GlobalGAP, in the description of Hachez and Wouters *Journal of International Economic Law*. Other cases are described in Take, 'Legitimacy in Global Governance', 232 ff.
- 55 I don't believe there is much of a difference with Dryzek's and Niemeyer's proposal to have discourses represented (Dryzek, John & Niemeyer, Simon, 'Reconciling Pluralism and Consensus as Political Ideals', *American Journal of Political Science* 50 (2006): 634-649). I prefer speaking about the integration of values, as this is closer to the identification of regimes as value oriented institutions. This subject can't be further discussed here.
- 56 For workable agreement, see Dryzek, John, 'The deliberative democrat's Idea of Justice', *European Journal of Political Theory* 12 (2013): 329-346. I prefer this term to consensus.
- 57 Regimes are not part of civil society, as is sometimes suggested (for example Scherer & Palazzo, 'Toward a Political Conception of Corporate Responsibility'), but distinguish themselves in a political and a civil (or, an organized and a more spontaneous) part of the regime; see Habermas, *Between Facts and Norms*; Teubner, Gunther, *Constitutional Fragments: Societal Constitutionalism and Globalization*, (Oxford: Oxford University Press 2012).
- 58 See about subordination of regimes in nation-states Teubner, *Constitutional Fragments*, ch. 2, emphasizing constitutions.
- 59 See Take, 'Legitimacy in Global Governance', 238.
- 60 See about the tendency of regimes to be ever more working with rules instead of only with principles: Thompson, Grahame, *The Constitutionalization of the Global Corporate Sphere?* (Oxford: Oxford University Press 2012): 172.
- 61 Which is something regimes do: see Take, 'Legitimacy in Global Governance', 230, table 2.
- 62 See about transparency *ibid.*, 225; 233. Take indicates that transparency differs in transnational regimes.
- 63 See Take, 'Legitimacy in Global Governance'; Edward, Peter & Willmott, Hugh, 'Discourse Ethics and Normative Business Ethic', in C. Luetge (ed.), *Handbook of Philosophical Foundations of Business Ethics* (Dordrecht etc.: Springer 2013): 549-580, complain about this.
- 64 Take, 'Legitimacy in Global Governance'.
- 65 There is a movement to come to global administrative law to domesticate the particularities and uncertainties. See Kingsbury, Benedict, Krisch, Nico & Steward, Richard,

'The Emergence of Global Administrative Law', *Law & Contemporary Problems* 68 (2005): 15-61.

- 66 See on rule of law in transnational regimes: Thompson, *The Constitutionalization of the Global Corporate Sphere?*, ch. 6.
- 67 See for the notion of self-description and its functions for example Luhmann, Niklas, *Organisation und Entscheidung* (Wiesbaden: VS Verlag 2001): 417ff.
- 68 See for (somewhat differing) descriptions of the functions of democratic constitutions: Grimm, D., 'The Achievements of Constitutionalism', in: *Twilight of Constitutionalism*, 9. Walker, Neil, 'The EU and the WTO: Constitutionalism in a New Key', in: G. De Burca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues*. (Oxford: Hart 2001): 31-57, 33.
- 69 A widespread tendency in literature on transnational regimes: see for example Scherer & Palazzo, 'Toward a Political Conception of Corporate Responsibility'; Dryzek, *Foundations and Frontiers of Deliberative Governance*. Critical is Bohman, James, *Democracy Across Borders* (Cambridge: MIT Press 2007): 44.
- 70 The last interpretations are widespread in juridical theory.