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**Globalisation and the Conversion of Democracy
to Polycentric Networks:
Can Democracy Survive the End of the Nation State?**

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Globalisation and the conversion of democracy to polycentric networks: Can democracy survive the end of the nation state?

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Is globalisation destroying the State and democracy?

Are the State and civil society endangered by globalisation?

The critical view of the “manic logic of global capitalism” (Greider 1997; Hertz 2001; Forrester 1999) is determined by the fear that the global expansion of the market economy will dissolve – or at least considerably weaken – the legal, political and cultural ties of the economic systems. This problematic development is thought to be caused by an economic trend whereby firms progressively transfer investments to countries offering favourable institutional infrastructures that allow them to reduce wage costs (Rodrik 1997). This is associated with a fear that states might “race to the bottom”, resulting in lower wages but also the demolition of social security systems. The race might even transcend economic policy and undermine State democracy. The policy decisions of nation states are increasingly dependent on global economic development lines over which they have increasingly diminishing influence. On this view, various types of law – especially labour and social law, but also environmental and planning law, and the development of transport systems and education (to mention just a few examples) – become “location factors” whose value and importance are determined on the global market. Democratic policy and decision-making at the nation State level have only a limited influence over such location factors. Firms that operate globally are thought to be able to escape involvement in political deliberation at nation State level. By removing firms from the economic and labour jurisdictions of any particular nation State, they are also perceived to be able to evade democratic, parliamentary decisions.

Protection of the labour force and social security in case of unemployment, illness etc. might thus transform into a system of social *insecurity*, and State protection can become a competitive disadvantage that leads to unemployment because the “protected” labour power is too expensive and therefore not in demand. Less-productive employees are particularly threatened under these conditions. If the very object of democratic decision-making is increasingly de-territorialized, the very substance of the democratic nation States will ultimately be affected (Guéhenno 1995; 1998; Moravcsik 1998). This is because it will either become the victim of competitive cost calculations when decisions are

* Translated by Iain L. Fraser.

being made about where to locate a business (as in the case of environmental protection regulations), or because tax revenue in the long term erodes as a consequence of globalisation, making the financial basis even for not directly economy-related policies disappear. This has severe effects on popular participation in the network of charitable organisations, neighbourhood assistance, political parties and their informational infrastructure, newspapers and other Media (local and transregional), that nourishes the democratic life of “civil societies”. A division arises between those people whose careers and incomes are increasingly determined by global decision-making processes (and who have some influence over these) and those working in areas under greater economic control of the State or directly dependent on its social benefits. This is observable even in societies with economies that are largely centrally controlled. This leads to divergent economic and political development. The political orientation of economic organisations is the development of global arenas of the de-territorialized economic order, so they are less involved in the networks of civil society within the nation State, less dependent on nation State decisions, and contribute less to maintaining the civil society infrastructure of the nation States in which they are based.. This endangers the non-economic “social capital” (Putnam 2000; Ladeur 2000) on which maintenance of modern – non-traditional – societies depends. This phenomenon can be seen particularly in the threshold countries of the Third World. For example, Castaneda (1996) has described the rise of a Mexican social stratum that is actively involved in the economic integration of Mexico and the U.S. through NAFTA. The lives of these people are determined far more by American than Mexican politics. Yet they are not citizens of the U.S. and can not participate in U.S. politics, and they are legal participants in Mexican politics, even though the latter is of only slight importance to them.

This development is also evident in the economically dominant countries, though it is less dramatic than in the threshold countries. The differences result chiefly from the fact that the governments of economically strong countries compensate for their declining domestic decision-making powers by obtaining rights of involvement at supranational and international levels (such as the EU and WTO) (Moravcsik 1998; Weiler 2000). In this way they securing legitimacy for the national neo-liberal policy they pursue partly from conviction and partly due to transnational constraints.

The recent literature also displays an attempt to explain the formation of Third World associations between the State and organized crime as a manifestation of globalisation. In many countries, local elites’ dependence on the leading economic regions has grown into an import economy in which there is a reluctance to export globally marketable goods. Instead they favour the emergence of a heterogeneous social capital comprising social mobility, an inclination towards individuality and enterprise among local elites (Bayart 1999). This development is disadvantageous to the inclusion of the population in the

economy, politics and culture, and leads – especially with the devaluation of anti-communist loyalty as a tradable commodity on the political world market – to links between the State and organized crime (see de Soto 2000 for general doubts concerning the viability of a capitalist economic system for non-western countries).

This description of the effects of globalisation on nation State politics accords with the neoliberal position that has been winning influence in the economic and social sciences, though it offers a more positive evaluation of the erosion of the State's decision-making capacity. The state's assumption of responsibility for decision-making in a multitude of areas that go beyond the classical liberal functions of protecting negative freedoms can be criticised (Rosa 2000; Ladeur 2000). It does not enhance the inclusive effect of democracy by producing *de facto* positive freedom for all citizens, but is instead an illegitimate way of restricting individual autonomy and responsibility. It has negative effects on market dynamism and the “discovery procedure” (v.Hayek), which institutionalises the search for innovations or for the efficient satisfaction of existing preferences. It also saps the “social capital” of post-modern society. The expectation of State aid removes individuals' incentives to adapt to and learn from a rapidly changing environment. By contrast, the alleged loss of the “embeddedness” of democracy in civil-society (Granovetter 1992: 304; Pettit 1997) is either ignored or disputed, while the performance of the family and public education, and the “docility” (“adaptability”) and therefore flexibility they produce, is stressed as a pre-condition for the maintenance of market society (Simon 1983).

Alongside the possibility that big transnational undertakings can go “forum shopping” (which concerns their individual choice of law decisions and state decisions about regulatory systems), there has recently also been a self-production of norms or functionally equivalent standards in the practice of transnational legal transactions. The *Lex Mercatoria* of the Middle Ages was an early form of transnational legal practice beyond the State and was associated with personal trust between merchants. A post-modern variant of this sort of law is increasingly developing (Teubner 1997; generally March/Olsen 1995:115, 158; 1999). Its conditions go beyond the personal relationships of those involved and require longer-term ties. They have become specified through experience of the interchangeability of roles (*e.g.* buyer and seller, producer and recipient of services etc.) and the development of atypical relational (incomplete) co-operation agreements. A new decision-making perspective is developing in the bigger firms, not least because of increasing mutual dependency (beyond the bounds of earlier practical exchange relationships). This is oriented towards the *institutional* reduction of uncertainty and the creation of co-operation on the basis of common interests. The rise of knowledge as an important resource is particularly enabling complex ties among contractual parties. It is oriented towards co-ordinated and structured invention and towards allowing an

overlapping of perspectives because it is thought to be important to maintain a productive basis of legal constraints and possibilities to associate, as well as the reliability of contractual relationships in the face of uncertainty. Whether the self-organized production of binding effects is to be seen as “law” in the traditional sense, or as mere *de facto* coercion, is a question of mainly theoretical importance (Koh 1997; see also Abbott et al. 2000). The functional equivalent compels an affirmative answer (particularly because it is only then that productive questions about co-operation and relations between self-created company law and national law can be asked). We shall return to this in more detail; at this point, the goal is to describe the phenomena of globalisation. At any rate, the future of the economic system (including its organizational and institutional varieties) is far less obvious than many critics of globalization seem to assume (Hertz 2001; *The Economist* 22 Dec 2001, p.76). It is involved in a process of self-transformation but this evolution is multifaceted and cannot be reduced to the dominance of a handful of multinational firms.

The neoliberal anti-critique sees the “competition of institutions” (Eichenberger/Frey 2001) as an important prerequisite for rational regulation-making. It is also important in the context of legitimate State action. The movement of firms between different systems, or even the development of a state-free regulatory system on the basis of non-personal trust and the capacity to develop longer-term perspectives for action in transnational legal transactions, is as a sort of “second-order” discovery procedure. It not only produces criteria for individual decisions but enables – through the competing patterns of social institutions, including the alternative between public and private rules – the optimisation of social norm systems. The criterion of market-defined efficiency is introduced as an argument in political decision-making procedures at national level (“law and economy”), but also as an object of practical options by market actors and of self-organization of regulatory patterns that spontaneously form on this basis.

New institutional forms of globalisation

The institutional forms of globalisation, whether organized on a public- or private-law basis, similarly arouse mistrust in the public debate: the WTO rules and procedures are perceived to have a strong free-trade orientation and to be too closed to considerations of conflicting goods and interests (environment, social interests, and so on). At the same time, its intergovernmental component is dominated by the national executives. It thus evades the Parliaments (Zolo 1997; Housman 1994; Bronckers 1999; Scholte 1997), while the supranational approaches to the development of a dispute settlement procedure (WTO) that is oriented to continual application and review of the rules have – as in the EU (ECJ) – a judicial constitution and are thus similarly largely institutionally guaranteed by democratic policy-making organized through nation States. They are perhaps even more adjusted to it than is the case at the national level, because

the recruitment processes also run only through the national executives. In relation to the development of international commercial law through the WTO – and especially the “judicial” component (see Hilf 2001; for the ECJ see Weiler 1998), – it seems difficult to develop a conception of the unity of the legal system following the traditional nation state model, and to, for example, formulate general principles that correspond to national general administrative or private law, or even to the corresponding written or unwritten procedural rules of national legal systems. This problem is already evident at the EU level, which is similarly dependent, for the implementation of specific legal norms, on underpinning through the (diverse!) infrastructure of national legal systems. Here the question arises as to how far a supranationally organized unification of global legal relations, founded on the basis of a world free-trade system, can intervene in national legal systems. The WTO admittedly allows reservations in favour of national regulations – as does EU law, though only to a limited extent – but the prerequisites and scope for them remain unclear. There are, in particular, no systematic rules that link transnational WTO law and national regulations, such as criteria focusing on policy formation in the individual nation states themselves, according to which the two potentially conflicting aspects could be harmonized with each other (Trachtman 1999; McGinnis/Movsesian JAHR). Here again the question arises as to how far national cultural, social and political peculiarities can be brought to bear legally, and how far a supranational or transnational standard of general principles and procedural rules can and should be presumed. Another manifestation of globalisation that democratic theory perceives to be problematic lies in the formation of international financial markets (Underhill 1995; Jackson 1999; Picciotto 1999; Hirst 1997). These are thought, above all, to worsen, or spark off, regional economic crises: the extreme volatility, particularly of some highly speculative financial instruments and especially in view of the speed and ease of world-wide data transfer and the accumulation of small disruptions of equilibrium into crisis-type collapses, is seen as a risk for the stability of world markets in general and individual regional markets in particular.

The internationally institutionalised organizations for dealing with crises – the IMF and the World Bank – are seen to be politically inadequate because of their allegedly one-sided orientation to market criteria. They are also thought to be economically inefficient, as their limited capacity to act is at least in part already discounted by States with unstable economies (that is, the need to help risky developments that are about to fail is already factored in). This not only allows irrational government policies, but systematically redistributes their consequences to economically weak groups (McGinnis/Movsesian JAHR). In addition, the private self-regulatory institutions that set “best practice” standards in risk limitation on financial markets (notably through “accounting rules” for creating transparency in evaluating firms, and their development risks), are seen by democratic theorists to be questionable because they delegate quasi-legal

norm setting functions to private economic institutions (Picciotto 1999; Koh 1997).

The alternative to the development of various private independent international and supranational or self-organized forms of global economic institution is a legal strategy to limit the freedom of transnational economic relations “beyond the State” (McGinnis/Movsesian JAH). This is to be implemented partly by the EU and partly by the nation States, especially in various schemes of national economic protectionism. The “institutional competition” among the States can also be limited by setting various minimum standards.: In established transnational economic areas with strong legal systems, like the EU, these could include common tax rates, social security principles and similar regulations with binding effect for the national legislatures, in order to limit competition over “location factors”. The aim is to underpin “negative” integration (by removing of quota rules and similar anti-market restrictions) with an eye to creating a common market through a strategy of positive integration (Scharpf 1993). In relation to products standards, this policy has been replaced by the “new approach” of mutual recognition of national standards on the basis of common normative quality requirements (Joerges 1999). The EC Commission has now proposed a policy of harmonizing essential fiscal, labour-law and social-law conditions. It is therefore doubtful whether Member States will want to be so extensively bound. It is noteworthy that at the (failed) negotiations for the development of the WTO system, the new EC Commissioner for free trade, Pascal Lamy, wished to be guided by the idea that “freeing trade should be controlled, steered and managed according to the concerns of EU countries”(The Economist 27 Nov 1999: 13). It is accordingly to be expected that the problem will not actually be dealt with within the EU, but will instead be shifted in a different form and with other matters by EU Member States to the WTO level. Thus, the EU wants to emphasise greater consideration for the “precautionary principle” at the WTO context, particularly to avoid conflicts about genetically modified products, use of hormones in meat production, and so on (for environmental policy see Trachtman 1999; Lipschulz 1997). This would expand the area of discretion for social regulations.

One theoretically ambitious answer by critics of globalisation lies in the – utopian-sounding – project for a democratic world government with a democratically constituted world public as its counterpart (Habermas 1995, 1995a). This would be based on large supranational systems like the EU, and would be able to generate legitimacy from deliberative processes rooted in civil societies. With a strong shift in emphasis towards a “polyarchy” of the post-modern variant of democracy in a globalised society, Gerstenberg/Sabel (1997;for a critique see Rosenblum 1994; I.Shapiro 1999) also stress the possibility of establishing legitimacy through public deliberative processes. Christian Joerges (1999; for the international level Risse 2000; Zürn/Wolf 1999) has classified the European “comitology” as a form of transnational deliberation

that makes the States amenable to promoting a pluralized public interest beyond their own frontiers, and that can compensate for the deficiency of hierarchical democratic strands of legitimacy. Criticism of this seems justified in so far as there is, as yet, only a diluted relationship between civil society and its discussion venues. Instead, more effort should be made concerning the “managerial” aspect of building transnational co-operation networks (Krasner 1999:12; Koh 1997; Ladeur 1999; see also Teubner 1999, 346), which are coming to typify globalised law “inside Europe too”. To that extent the comitology might very well be regarded as a network of overlapping networks that is typical of the globalisation of law, it is able to supply a functional equivalent for national standardization and – through the distribution of heterarchical participation relationships – the national hierarchical legitimacy structures.

The critical movement against the present forms and institutions of globalisation bases itself either on an association between territorial sovereignty and democracy (at least in practice, coming to terms in this variant with the political objectives of protectionist movements), or aims to extend a “civil society on a world scale” following the classical democratic model of the State (Habermas 1995a). That is, it promotes a world-embracing network of public-interest movements, citizens’ initiatives, associations, and a corresponding informational discussion infrastructure modelled on its classical state-centred predecessors. In part, the world-wide Internet-organized (and not ineffective) protests against the 1999 WTO meeting in Seattle (The Economist 27 Nov 1999, p.13), and NGOs acting at an international level, are seen as a core around which a global civil society can crystallize.

Interim summary

In a first intermediate stage, it should first be stated that fears that globalisation endangers social security, the state democratic institutions and social coherence cannot be rejected outright. However, economists correctly note that the inevitability of such a development is implausible. It can hardly be proven that wage levels have a decisive influence on companies’ investment decisions (Krugman 1996). If they did, far more undertakings would have established themselves in Eastern Europe and the Third World. Economists rightly note the compensatory effect of productivity rises, which is ultimately decisive for decision based on the cost of production. Nevertheless, the market position of less-qualified workers is at serious risk in the leading economic nations, as more and more unskilled work is being shifted to less-developed areas. But, in a view oriented to the development prospects of the world economy, this is not *a priori* negative. Furthermore, it can be seen that political stability and the reliability of political and legal framework conditions are also important location factors, as are workers’ skills. On these criteria, the industrialized countries retain an important advantage over the poorer regions, which almost always have worse-functioning civil institutions (administration, legal system, and so on). Moreover,

the rise of information and knowledge as decisive production resources – a point we return to – similarly speaks against the likelihood of a major shift of investment to the Third World. A large number of transfers of investment outside the EU are associated with the globalisation of markets, which compels companies to be present in the various economic areas at more than a commercial level.

Paul Krugman (1996) has rightly pointed out that globalisation's effects on the modern economy are have not “yet” been exaggerated. The pressure for change under which the political and legal institutions of post-modern societies are emerging is not produced primarily by globalisation processes, but is instead connected with the basic transformation of the economy into the “knowledge society” (Shapiro/Varian 1999). This generally makes the economy flexible and also favours globalisation processes as *one* of its manifestations. Pressure on the welfare State, the rise of neo-liberal policies, and similar manifestations of the weakening of the democratic welfare state, have additional causes. These are found inside the various social and political systems, and particularly in those related to the new organizational forms accompanying the transition to the “knowledge society”, which are making the boundaries between inside and outside, market and company, public and private, increasingly permeable (von Krogh/Nonaka 2000). This development has consequences for the maintenance of the normal employment relationship, or the legal forms of “corporate governance”: the permeability of company boundaries also allows new hybrid legal relationships to emerge. These can be found between an employee's position and entrepreneurial independence, or between traditional exchange relationships or work contracts and the social integration of production in firms that allows flexible linkages between productive processes (for example, through quality management contracts).

Accordingly, globalisation has an undeniable effect on the transformation processes that are breaking the bounds of traditional legal institutions in post-modern society (Zacher 1992). We shall therefore start by trying to identify the prerequisites and bases for the institutionalisation of democracy and its association with the nation state. The question has to be asked so that the adaptability of democracy to the changed conditions of the global flexible forms of the economy and of labour and their association with political institutions can be re-thought. The conception of democracy presupposed by globalisation's critics may very well turn out to be too narrowly associated with a concept of sovereignty oriented to a single will (Strong 1994; Rosenblum 1994; 1978; see also Bohman 1997). In conditions of globalisation, such a will is *de facto* difficult to maintain because it has lost discriminatory capacity. In the same sense, the “knowledge society” contains linkages between changing social economic forms, and it is necessary to inquire about the possibilities of developing political and legal institutions that count as a functional equivalent of liberal democratic statehood. The critique of globalisation and its effects on state and democracy

assumes that only state-centred democracy can be defended against globalisation – specifically against the danger of protectionism – unless a global state has to reproduce the classical ordering forms of the nation state on a worldwide scale. A third possibility, that might lie in strengthening non-state, de-territorialized, self-organized networks and their co-operation with heterarchical plural public institutions beyond the hierarchical model of the state, is thereby ruled out. It can be deduced from this approach that the possibility of a combination of various transnational public forms of guaranteeing learning capacity and the enabling and enhancing of self-observation and observation of others within a global “network of networks”, adapted to the self-organizing and self-transforming de-territorialized networks of relationships, is here thought to be plausible (Guéhenno 1998). One may start from achievements of democracy still seen in earlier variants of theory, while the close association with state sovereignty has instead pushed the unitary-will component to the fore.

Democratic theory and the challenge of globalisation

Democracy – sovereignty – volonté générale

The neoliberal anti-critique of the objections to globalisation sketched above has the merit of drawing attention to the question of the limits of democracy as a form of unitary state-centred policy formation. Liberalism has always stressed the order-creating achievement of negative freedoms (Ladeur 2000), and also dimensioned its concept of the democratic state and of the general interest to be formulated by it, particularly the general law, on this basis. This does not rule out the fact that liberal freedoms must themselves have democratic legitimacy in the constitution: this is chiefly because democracy has to break with the heteronymous will of the sovereign monarch and thus ultimately a God-willed order. While it makes use of the old form of unity formation in the concept of “popular sovereignty”, it in practice stresses the facts of tradition by shifting the emphasis onto “will as a creative force of order” (Rosenblum 1994: 82; Scholte 1997; Scholte et al.1999: 107; Van Creveld 1999: 220). The link was possible because monarchical sovereignty too was construed as that of *all*, thereby making everyone author of the sovereign act and thus committing them to subjection (Zarka 1998:129). In Rousseau, this form takes on a fictitious character: the legal order must be understood “as if” it was produced by all. This means a break with the *de facto* link with tradition.

However, in Rousseau, democracy is not fixed on bringing about the institutionalisation of unity in the state as bearer of the “volonté générale”: it has its root in the free will of all and thus also refers to the “Other” I can find in myself through others (Van Creveld 1999: 220; . In the pre-modern period, the transcendental Other imposed on the individual from outside was decisive for the conception of the state and for the individual’s self-perception. The concept of “volonté générale” may in part be seen as creating a quasi-totalitarian link

between individuals and the people. But, more correctly, one may – with T. B. Strong (1994: 83) – bring against this that the generality of the will paradoxically presupposes a “multiple, decentred self”. Since the God-willed – that is, heteronomous – definition of “humanness” is no longer available, only a new openness of the distributed “small general wills”, with the common freedom of all as condition for the freedom of the individual, is conceivable. And it is only through the non-closure of the “multiple or divided self” that the capacity arises to produce collective social orders under the changed conditions. The “*volonté générale*” then becomes that which “resists deconstruction of the self into the immediacy of power relations in modern society”. This becomes possible only by “the will of the common self” opposing actual circumstances (Strong 1994: 84). The previous (traditional) form of personality was based on incorporating collective norms, but not in the form of interiorisation (which assumes a link with the individuals’ own selves). This means the person in the traditional pre-modern order must identify with the totality of society, and acquires self-determination only within a symbolically pre-given fixed regulatory framework. In the modern sense, the human being is thus not yet an individual. The symbolic order constitutes the person directly. Even in the early modern period, the “precedence” of the collective is explicitly recognized; at the same time, in the interest of enabling individuals’ freedom of choice, it is oriented towards an interiorising appropriation. The individual obtains the “right to criticize” (Gauchet 1999: 176) and is no longer bound by the factuality of relations; binding by legal rules replaces binding by traditional customs. The collective norms need to be individually appropriated, and allow for variation but also for production of novelty. But the symbolic order does not develop its organizing and structuring power directly in the consciousness, which passes few alternatives for individualization, as all of the individuals bear the collective order within themselves. Thus the modern conception of a collective order based on the “general will” makes a decisive break: the will becomes a creative force and shakes off the weight of tradition.

The “*volonté générale*” is one way of denoting the paradox thus produced, that the will keeps the relationship between individual and collective in suspense. The general will refers to the individual will. This can in turn only confirm itself through recognition of the other (equal) wills. The modern individual is required to have the capacity to look at society from the viewpoint of others; these others are no longer the pre-determined transcendental Other, so this relationship of interiorisation of the Other must take on an abstract, generalizing form that, at the same time, contains a fictional aspect of “as if”. The form of justification of the state and the collective order points to the self-justification of the language of *law* rendered autonomous, which can hold the relationships of will together (Zarka 1998: 240).

Juergen Habermas (1996) has recently started again from this construction, in seeing the democratic *process* as the source of the law’s legitimacy, in so far as it

must understand itself as a rational procedure of formulating the general will (Descombes 1999: 35, 46; Lateur 2000a). Its rationality follows from the fact that the process follows the rules of an inter-subjective “communicative reason”. But here one might join V. Descombes in asking what sort of universalism it is that can be based on nothing but a consideration about the conditions of rational discussion (as Habermas derives from it the concept of a world civil society, we shall return to this below). This “deliberative” re-formulation of the democracy concept is only conceivable on the basis of an already existing unity, but it cannot itself establish this. In this way, Habermas wishes to transcend the law’s tie to religion, but ultimately the law’s link with social reality is also abandoned. However, the law – as an autonomous thing emerging from the connection between morality and religion – consists of nothing other than the emergence of ties and linkage patterns that make the uncertainty of the new modern order bearable and enable the formation of expectations under conditions of partial knowledge. Law functions on the basis of the capacity and willingness of the individuals (and organizations) to internalise the self-organizing constraints and operate with the possibilities contained in them (Descombes 1999: 48).

Democracy and the change in forms of subjectivity

The differing emphases on collective decision (democracy) and on individual freedom (liberalism) point to the two strands of a dilemma. A modern democracy can no longer have common interest as a basis; this is a problem that is supposed to be coped with through the circular proceduralisation of democracy. Conversely, liberalism tends to narrow the scope of collective political decisions in favour of spontaneous discovery procedures that are institutionalised through the liberal freedoms, thereby insisting on the limits of democracy. This dilemma can be resolved because of the objective historical process that has taken the place of breakdown of the unity of the “Other” of the symbolic order (Sibony 1980; Seligman 1990); (which implied, above all, the priority of religion) into differing rationalities of law, morality, and so on. On the view adopted here, this is perceived as a manifestation of the autonomisation of law. The dissolution of the transcendental “Other” in modern legal society is reflected in the breakdown of the distinction between the “universal and the particular” that constitutes the modern concept of “subject”: the subject is characterized by its share in humanity in general. Here the autonomisation flows from conditions that are created by the “pre-individual” formation of the order, because the individual still has to develop a perspective on the totality of the collective order – an important distinction from the post-modern evolution of the collective – while the collective patterns of order lose their substance (determined by ties to factuality) and admit subjectivity and a general will open to the Other henceforth only in a distributed, split form. The stable boundary between the universal and the particular gets lost (Seligman 1990: 125). The universal and the particular coincide, bringing the conception of the society as a product of universal subjects (that is, of a general

will) that no longer has its reference point outside the individuals in the transcendental “Other” but is oriented towards the discovery of the “common self” in the other. This makes order conceivable only through the mediation of a medium oriented towards self-transformation. This medium is the law, which replaces the structuring function of tradition and the binding effect of the divine (heteronomous) will.

These problems can be overlooked if, like Habermas, one equates the question of the law’s functions with that of the legitimacy of statutes (Descombes 1999: 48). The notion of replacing the transcendental foundation of law by a discussion procedure is related to the fact that, in contrast with pre-modern society, there are no longer any common values (which could be identified with the transcendental “Other”) that must be replaced by the self-justifying reflective activity of joint debate. But this still presupposes the necessity and possibility of a foundation for law in an overreaching order which, though it has lost its content (substance), continues its claim, which can be redeemed through a discussion procedure. However, if modern society has lost its transcendental foundation and the law has come out of its link with religious and moral values, the question that must first be asked is one about the function of an autonomous legal system, and it cannot be answered by exchanging moral foundation values for ethic-discursive argumentation procedures. If the law acquires autonomy (see generally Luhmann 1993) by differentiating its own function out of the example of the primarily religiously integrated tie to tradition and the associated stock of values, then the question of the foundation of law itself loses its basis. This does not mean the question of the legitimacy of statutes has no meaning – quite the contrary – but the autonomisation of law brings a shift in perspective that first accentuates the function of law, thereby raising the question of the possibilities and the ties (with no moral, religious or quasi-transcendental foundation) and becoming able to form and uphold stable expectations.

Democracy needs a multiplicity of viewpoints to determine the effect of statute on the legal system; this makes deliberation an important element in social self-observation, but the law cannot have the foundational effect ascribed to it by Habermas. That would mean neglecting the functions of the other components of law – court practice, contract law, standards, social practice and other rules of experience – that constitute a component of law. The acts of the democratic legislator must not only meet constitutional norms and requirements of public debate; they are above all dependent on the “embeddedness” of autonomous law in a network of possibilities and constraints for linkage, as well as relations of social norms and expectations that are not absorbed into rules of discourse but are tied to a practice of law. This also pre-structures the problems (“issues”) that have to be dealt with and that the Act’s operation must be linked to, if it is not to fail. The democratic argumentation procedure cannot replace this productive and practical network of possibilities (Pettit 1997: 201, 245). It is only through the practical formation of this sort of network of relations among individuals, storing

up linkage patterns and rules among the individuals, that the paradox of the self-construction of society from the relations between the wills of open subjects no longer tied to something pre-given can be resolved. According to Habermas, individuals can ultimately attain freedom only in the publicly constituted space. This space is fixed to the finding of explicit consensus mediated through discourse, and around which also the *part* of civil society that, for Habermas, constitutes the *whole* of it (that is, the circles, movements, groups) that reason about problems of the public interest abstractly from purposes, is centred (Honneth 1998: 763, 768).

System-theory and democracy

On a system-theory conception, by contrast, democracy can be seen as a “mechanism” for coupling the political system with other functional systems of society, including the law (Luhmann 1997: 845; Di Fabio 1999: 45). Democracy is thus built into a polycontextural conception that calls the possibility of hierarchical foundations for social regulatory systems through democratic procedures into question, and instead operates with a heterarchical model of the mutual overlapping of differing functional systems arising from the breakdown of the traditional pre-individual hierarchical order. Niklas Luhmann calls this mutual overlapping of self-observation and observation of others by systems is a form of “communication” that uses the adoption of others’ perspectives as an experimental irritation through which novelty can emerge through the overlapping of differing rationalities. But this would, itself, be a form of “relational rationality” that rules out the unity of foundational reason.

From another viewpoint, Alexis de Tocqueville (Holmes 1993: 23, 28, 34; Manent 1996; Gauchet 1996) earlier emphasized the indirect effects of democracy he believed he saw, not so much in politically institutionalised decisions or public debate (in this connection democratic legislation is diagnosed as pretty “mediocre”), as in the dynamisation of society: the enlivening of all sorts of activities. Tocqueville critically establishes the lacking capacity of the democratic form of government precisely in those areas that are directly the object of political decisions and therefore of public debate. By contrast, the main advantage of democracy – particularly of representative government – is identified by Tocqueville in the spread of willingness for co-operative conduct and for the development of new forms of practical actions. The replacement of the order-creating power of the transcendental “Other” produces the feeling that the citizens have something “in common”. This self-perception of dependency on the “others”, but also the insight it conveys into one’s own abilities and the possibilities of co-operation among equals, is transferred especially to the private areas of creativity and general social vitality. This is a practical manifestation of the breakdown of the incorporation of tradition into the identity of the self, which makes the multiple, split individual capable of flexible co-operation with other equally “incomplete” individuals.

This could very well be interpreted in systems theory terms as an effect of “irritation”, of production of indirect effects through structural coupling between politics, the economy and the individual consciousness: citizens’ participation in politics has its indirect effect in the mobilization of private co-operation and the enabling of the permeability of persons boundaries to mutual influences. And if many of the activated citizens deciding their own destiny are interested in politics, politics will not move away from concord with the citizens. This effect of polycentric “dispersion” of power over society with the formation of overlapping purposes and networks of relationships is also stressed by Madison in the Federalist Papers (Boyd 1999: 465, 487). He sees the positive effect of avoiding a one-sided orientation of politics. In this interpretation of democracy, the importance of democratic “consent” in political decision-making is de-emphasized, and the point is instead to distribute both private and public power in society (see Peters 333). Accordingly, the importance of the self-creation of a network of “civil norms and trust” for extending the citizen’s horizon is accentuated: through the systems’ permeability to reciprocal influences it creates democratic social capital, which enables decisions to be viable in the longer term (Seligman 1997; Pettit 1997: 201, 247).

In theories of deliberative democracy (Bohman 1997; Gerstenberg/Sabel 1997 and in this volume; Cohen/Rogers 1992; Gutmann/Thompson 1996; Schmalz-Bruns 1995), this infrastructure of social norms, networks of relationships and the trust based on them is narrowed down to the non-economic forms of mutual communication, assistance, social commitment to public goals, and so on. These become a reservoir of possibilities for democratic policy-making and decision within institutionalised statehood. However, democracy is fed not just by these parts of the civil society, but from all the living combinations of relations in individuals’ self-transcendence, and the networks of relations between them. This is also how John Dewey (1916: 74) is to be understood when he postulates a multiplicity of “shared undertakings” and experiences as the prerequisite and consequence of democracy. The “general will” thus has a substrata in the totality of “shared ideas” rooted in the “collective life” of society. This view of democracy emphasizes the bounds of collective action in view of the spontaneous relations between the wills of the market subjects, not because it mistrusts the possibilities of forming an institutionalised collective will, but because it believes it can – through the indirect collective effects of the formation of flexible practical networks of relations, the production of experience within a universally acceptable “pool of variety” and the possibility of developing trust (Klosko 1993) – secure an enormously more important organizational and ordering effect than is conceivable through public debate and politically institutionalised decisions. This form of association between politics and (economic) society is based on emergent order formation: as long as a society develops sufficient variety and dynamism – as democracy allows – it is possible to rely on the production of spontaneous patterns of order emerging from the self-organization of relations of will between

individuals and organizations and displaying a “common knowledge” produced and continually renewed by the distributed “society of enquirers”(Dewey). Those taking part are guided by the constraints and linkage possibilities that can be utilized in productive co-operation. Here it is the capacity to vary experience and practical rules, and thus to learn and to contribute to the creation of new knowledge, over and above explicit debate, that is regarded as decisive (Allen 1998: 47, 62).

This is a shift in emphasis from the mere assumption of the search for efficient rules determined by the constraints of the economic system. Instead, it is the very mobilization of productive effort that is stressed, arising from the differences between individuals enabled only by modern society, democracy and the autonomy of law; and the self-transcendence of the given society is seen as being fed from disturbance in the overlapping networks of relations.

In complex social systems of spontaneously generated macrostructures, the will relationships of individuals enable and delimit, and define, available knowledge; each separate individual or organized actor is in co-evolution with the patterns of order arising from relations with others, which characterize the infrastructure of society and the scope of their alternatives for action (Allen 1998). The autonomy of law, which cannot be reduced to the legitimacy of democratic statute, enables this self-organization of social patterns of order generated and varied as a transcendent effect from the artificial construction and design of ties over and above tradition between actors. This theoretical intermediate consideration opens up a changed perspective on democracy under conditions of globalisation. For what follows from the interpretation of democracies sketched out is that it is not so much a consensus on democratic values that explicitly constitutes the collective order (even in Rawls’s sense of an “overlapping consensus”, the core of which is fed from varying political considerations) that is needed. Instead, the concept of democracy can – following the considerations set out above – be reformulated more to the effect not of consenting to a basic stock of rules and principles. It is instead the practical, heterarchical, distributed social network of networks among citizens producing “overlapping consensus”, in the sense that the citizens are in practice involved in differing networks in different roles, and a heterarchical organized stock of linkages and co-ordinations arises from their overlapping and permeability to each other, that enables a “polycontexturally” distributed self-observation and observation of others by the various patterns of actions produced, continually feeding the associated “pool of knowledge” with novelty (Klosko 1993: 356).

This is also the basis for trust in the political system: its permeability to incorporation of multiple social interests, its capacity to observe the social networks for potential self- blockings that may well need interventions. This means that the “democratic consensus” has its reference framework in the example of the practical linkages of the political system in other networks, and not in shared principles. The citizens observe a distributed allocation of power

and legal possibilities of action, reflected in overlapping networks. This is the basis for a practical “consensus”, not tied to “principles” (Klosko).

Subject – Democracy – Post-modernity

A further interim consideration, following M. Gauchet (1999: 176), is that we have to focus on a new model of creation of individuality in post-modernity: this is a form of individuality marked by a further weakening of the incorporation of the collective into consciousness. Following the considerations so far, this could be specified by saying that the self-transformation of the network of networks of relations between individuals and their associated linkage patterns speeds up, notably through change in the organizations which, after the end of the epoch of (stable) organizations oriented to producing quantity advantages, produce ever more possibilities. In this a centric, fragmentary context, the individual has difficulties – with both the symbolic basic structure and in cognitive respects – in recognizing the underlying patterns of order of the collective and building up a corresponding internal structure of consciousness. This also changes the position of the public and the media, which can scarcely claim to focus generalisable interests in the individual systems any longer, but which can take up and change their themes autonomously according to an economy of attention (Franck 1998). There is no reason for culturally pessimistic lamentations because of the emergence of the “internally fragmented individual” (a formulation that is, of course, a simplification) (Kondylis 1991: 83)). And the scope of this development (and the correctness of the diagnosis) certainly still needs testing. For our purposes, it is enough to state that, in the change of subjectivity from modern to post-modern society, the “univers des réseaux” (Guéhenno 1999: 111) in which individuals act and by which they are stamped becomes further autonomised, excluding any form of general subjectivity or ideal observer standpoint detached from it, from which society can be seen as a whole.

In cognitive respects, this is reflected in the fact that increasingly specialized knowledge is produced in the rapidly changing networks that transcend traditional distinctions and boundaries, which it is increasingly hard to subsume under general structural principles and rules. In the state and administration, this transformation of society is reflected in the fact that even the notion of mediating between general and particular interests and the interiorisation of a universal knowledge necessary for this is possible only within narrow limits (Guéhenno 1995: 30). The state itself becomes (at best) a “manager” (Guéhenno 1999: 61; Gottfried 1999), seeking to cope indirectly in co-operation with various private organizations, using specialized knowledge (bypassing the forms of “universalising” institutionalisation of law) with limited, situationally defined problems. Accordingly, we may join J. M. Guéhenno (1995: 93) in saying: “Nothing is more foreign to our age than the idea of a subject that could exist in and out of itself”. It is instead constituted by the networks of relations

themselves, in which it operates with the situational possibilities generated by them (Guéhenno 1999: 111), thereby transcending itself.

The compatibility of democracy and globalisation

Towards a “conception of polycentric control” of law

These long prior considerations on the concept of a model of democracy not fixated on state and public is of importance for discussing the questions arising here, to the extent that one can draw the conclusion that the development of globalisation cannot be seen as a process coming about primarily from the outside as large transnational actors break out of the territorial housing of the nation state. Moreover, the conception of democracy must also be kept open for historically varied forms of life, not least because the concept of subjectivity inevitably changes with time. Correspondingly, the institutional solutions focusing either defensively on the state (and excluding it off externally), or utopically on a world state, are entirely inappropriate. The order of the classical liberal democratic state is coming under pressure from both outside and inside because the traditional distinctions between a general interest (and universal knowledge and institutionalised stocks of rules) and the concrete particular applications of law that do not call its regulatory character into question are being undermined. This also calls into question the traditional concept of “public decision” and the notion of a subject equipped with its own will and a defined circle of possibilities of action (Strong 1994; Rosenblum 1994). The acceleration in societies’ self-transformation is reflected, above all, in the increasing importance of information and knowledge. This is becoming flexible and making permeable distinctions and boundaries that were previously assumed to be stable. This is ultimately enabling the de-territorialisation of the economy, and therefore also of law.

Against the background of the considerations presented so far, the development towards globalisation and the emergence of a complex “global public (private governance)” can be seen in more differentiated fashions. First, a note on the concept of “global governance” is appropriate to explain the terms. R. A. W. Rhodes (1996; see also Hoffman 1990; Rosenau 1992; Young 1994; Slaughter 1997) has rightly termed the concept “governance”, “imprecise but popular”. The term in fact has several meanings. However, it primarily denotes (by contrast with the classical concept of a politically and legally describable sphere of “government”), a no longer precisely legally definable area of responsibility for decisions, the binding effect of which cannot be described in traditional categories of unilateral sovereign disposal either. Instead, “governance” follows a “networked logic” (Guéhenno 1998) in which the separation between public and private, between universal and particular interest, between general norm and its application in the specific case and the hierarchically graded deciding organization (Ministry) can henceforth act to create order only to a limited extent.

This de-territorialized heterarchical linkage of differing public organizations (state, international organizations with different structures), from multinational treaty systems up to supranational institutions like the EU, cannot (after what has been said earlier) be seen without reference to the fundamentally changed relations between state and individual, and between public and private. The position of states can no longer reasonably be described using the concept of “sovereignty” (Krasner 1999:12; Scholte 1999: 427;); many legal forms are unusable, and the hitherto incompatible has become interchangeable. For instance, regulations can be made through private standards or public law-norms without having to distinguish clearly between their importance, because the concept of state sovereignty as a whole has lost distinguishability from private action within the heterarchical overlapping network (Di Fabio 1999: 133, 142. Patterns of linkage among relations between private persons do not only emerge spontaneously, but may be conceived strategically, as both private and public organizations now produce knowledge rather than merely using spontaneously generated experience. Not only do “public powers” (in the plural) emerge because sovereignty has decayed, but the state can no longer claim to regulate the “universal” and undertake lasting gradations in the superordination and subordination of interests. The aspect of creation, of experimenting with new forms of law, of producing new knowledge which does not just fit into the continuity of experience, and the importance of information as a decisive resource, are the most important features of a de-territorialized economy that admits of legal norms only with the close participation of private persons, or supports their self-organization, merely observed publicly.

The very production of new possibilities beyond experience is a reason for the rise of self-organized private-, or only imperfectly publicly established legal-, binding: this also applies to legal phenomena such as the *Lex Mercatoria* (Teubner 1997). Especially when the stress is placed on the rise of information in the economy and the formation of new ways of producing and organizing the development of new stocks of knowledge tied to practical networks, the hierarchically graded state order (in the traditional sense) can no longer be a reference framework for thinking about “public governance” (whether as the classical sovereign state or the utopian world state, conceived essentially on the same pattern, only extended world-wide). In this sense, J. A. Scholte (1999: 427) rightly says that the bounds of the state are not being crossed (nonetheless ultimately observed) but “transcended” (the territorial reference is being evaded overall through the rise of information and the formation of new hybrid forms of economic organization and the importance of financial markets). This makes “parallel governments” – international, supranational and national – emerge, which no longer have the various separate competences of the past, but bring into being “associations” (networks whose reference no longer lies in a geographically described competence). This leads to “overlapping regulatory systems”, among which it is necessary to use a form of co-ordination that no

longer follows the traditional model of stable (federal state) or vertical (intergovernmental) demarcations (see Freeman 2000; Lindseth 1999). It must instead follow a logic of its own of linkages (“relational rationality”), and a search for rules of “intersystematicity” (Harrington/Van Hoecke 1998) of co-operative harmonization between regulatory systems. By contrast, traditional international legal transactions were characterized more by one-off state-mediated contacts that did not change the structure of national law as a whole.

This does not mean – as has been claimed in the literature (Ohmae 1995) – the end of the state or of national law: instead the state is being transformed, itself inevitably taking up elements of transnational de-territorialized self-organization of variable networks, and orienting itself, for instance, border-crossing transnationally variable interests rather than just to national clienteles. In this way, the state’s territorial unity becomes permeable both from the inside and from the outside for the pursuit of changed interests, calling for new procedural forms for upholding them. In this sense, the WTO and its forms of dispute settlement can also be seen as a form of emergence of a new co-operative law, the logic of which no longer follows classical international law but in the long term requires a process of variable linkage and compatibilisation of differing legal norms and principles and creation of global procedural rules and principles developed in practice case by case, but not accessible to any general fixation.

The network of legal regulations, of partly governmental, partly transnationally private, partly international origin is typified by its incompleteness and openness to situational experimental linkages and specifications. But even at the national level, this is not essentially different as the development towards regulation is no longer primarily a movement of de-juridification but more towards a co-operative private-public strategy of situational legal ties processed through a combination of varying competences, legal forms and involvements. The state has, in turn, become a “network of public and private collective actors” (Teubner 1999: 346); this facilitates its further de-centralization, also through the transnational co-operative networks. Creating these follows the transnationalisation of markets, which produces a dense network of legal relationships beyond national frontiers that can no longer be translated into the traditional system of nationally channelled “external trade relationships”. This development has considerable repercussions for the overlapping between domestic and transnational law. Taking this into account, the conception of “legalization” of international relations recently formulated by Abbott et al. (2000) seems too narrow: they stress, above all, the advantage of law lying in its binding effect owing to its “precision” of rules. But this very thing is tending to be of decreasing importance within domestic legal relations. The specifically legal aspect of the new domestic and transnational relations in conditions of complexity lies more in the fact that those involved enter into a network of various co-operative relationships that process ties through association constraints and possibilities going beyond current interests and will relationships. This peculiarity is marked chiefly by the search,

utilizing the law's autonomy to stabilise emergent linkage patterns produced through practice that cannot be reduced to *ex ante* harmonization of mutual interests (because these, specifically, must bind uncertainty and enable learning, and thereby offer advantages even where short-term interests are frustrated). However, the possibility of utilizing the network of legal possibilities of relation offers, on the whole, a considerable institutional advantage just because the calculation of interests in conditions of complexity is often not readily possible. In particular, the need for experimental production of new operating possibilities is given only on the basis of the possibility of forming and institutionally underpinning expectations through law. Accordingly, one cannot reduce the law to a stock of rules. The network continues to function primarily by operating with the legal possibilities of linkage and binding. "Precision" is therefore not some pronounced feature of post-modern law, but the productive operation with ties that produce more possibilities of experimental action on the basis of partial knowledge (Ladeur 1997).

As an interim consideration we should state that the manifestations of globalisation cannot be established solely by the quantity and multiplicity of the crossings of the nation-state's boundaries alone; instead, a qualitatively new process of self-transformation of economy, state and law is emerging, covering all social institutions and calling for new descriptions.

Prospects of Democracy in times of globalisation

The considerations so far about a less state-fixated form of democracy and the importance of forming new institutional modes of globalisation allow some consequences be drawn for reformulating the democracy principle in conditions of post-modernity: if democracy were necessarily bound up with the classical hierarchical concept of the state and popular sovereignty, globalisation would not really be compatible with the maintenance of democracy, especially as a world state is not conceivable (for various reasons, but not least because a global state would not really be compatible with the maintenance of a hierarchical order).

This link is however – as we have shown – not necessary: indeed, it cannot be reconciled with the transformation of the forms of individuality in post-modern society. A non-hierarchical variant of democracy would focus less on common decision through sovereign organized unity of will than on producing a distributed self-observation and observation of others made possible by a "network of networks" and the associated productive association possibilities and constraints, which are so openly dimensioned that far-reaching inclusion of citizens is guaranteed. This makes democracy conceivable even in conditions of a heterarchical social self-organization that escapes the conceptual grip of the traditional categories (Ohmae 1995).

As shown earlier, the conception of classical liberal democracy and of citizens' consensus to its basis must also be reformulated more openly if consensus is associated less with the concept of a common substance of values and procedures

than with mutual control through overlapping networks of relations that also correspond with the transformed conception of a form of “networked variable a centric individuality” in post-modern society. On this basis, the concept of participation rights can also be productively reformulated. The specific network method of distributing such rights (possible, for instance, also through NGOs) could contribute to mutual monitoring through self-observation and observation of others among the various networks. Under such conditions, participation is not a manifestation of direct democracy (which would in turn be unity-related) but an adjusted variant of the linkage among various networks taking on the inclusion of all citizens in altered shape. If participation is separated from the idea of direct democracy, then perspectives open for a model of “control through transparency” (Lindseth 1999; Héritier 2001) and “learning through mutual observation” (March/Olsen 1995: 105, 158), which could be systematically improved through procedures and adapted to new challenges through linkage rules. In this way, learning processes might be established and maintained through the mutual irritation of systems and networks. The state would then have a decentralized function: the maintenance of the productivity and innovative capacity of the networks and supplying them with diversity and observing the results (March/Olsen 1995: 225; 1999; Guéhenno 1998: 18). Against this background, participation and transparency would have more the function of enabling the mutual irritation of the networks of relations, than of aggregating a general will in unitary fashion.

One of the most important ways of linking up networks and mutual openness might lie in the introduction of nationally organized “accountancy rules”, or rules formulated through social standardization bodies, establishing a constraint to improved self-observation and flexibilization of the networks of relations (such as rules for finance markets, but also collective wage negotiations, and so on), that would correspond to the aspect of drafting and experimenting through systematic incorporation of self-observation procedures. In view of the growing acceleration of self-transcendence of the social “network of networks”, the point would be to organize systematic constraints to produce knowledge, as it would no longer be possible to rely on the spontaneous production of knowledge. Especially at transnational level, there would be a need to institutionalise transparency and accountancy to cope with global problems (like environmental protection) and other complex issues. One might also think of establishing agencies that are largely screened off from political influences and that could create the necessary knowledge basis for decisions.

If the form of self-transformation of post-modern societies thus described is taken into account, a new perspective on the crisis of the Welfare state also opens up: social security adapted to the changed conditions of the global economy is not only not incompatible with the requirements of a knowledge society, but is incompatible with it because social security is the very thing that makes it

possible and acceptable to take risks. As labour power is largely territorially bound, there would be a need to strengthen the state's possibilities within the global network of public actors in the area of social security, but simultaneously to dimension security systems in a way that would facilitate adjustment to the changed constraints, but that would not offer the possibility of evading adjustment. The theme taken here allows no more than these hints; at any rate, it follows that, at least for the moment, the possibility of conveying responsibility for social security to transnational systems seems very limited. When analysing the specific role of the nation state and the transformation it is undergoing in the process of globalisation, one has first of all to lay open a certain idea of its origin and function. This remains implicit in many critical approaches. Many critics of the globalisation process presuppose a concept of the nation state as a model that we must focus on when considering the establishment of a new international order.

This idea refers to a one-sided construction of the modern state. Its role, which in fact allows for abstract legal relationships beyond the traditional order, was always based on the necessity to make order possible under conditions of change that destroy a sense of continuity (Midlarsky 2001: 36, 50; Toulmin 2001: 158). The state will also be able to fulfil this role under new conditions in the future (that is, the organization of solidarity in the form of transferring knowledge to new generations, guaranteeing safety, and protecting order from basic social risks). But the importance of a "symbolic intensification" (Habermas) of political order, as opposed to the structuring of economic and social order through efficient rules, should not be overestimated. The liberal collective order is not abstract, but consists of a universalised economic practice that abstracts from traditional relationships.

However, economic orders of in the future will be increasingly characterized by legal models that are no longer based on abstract rules (as it was the case on the European continent) structured by hierarchical order. This is because law and legal practice will be much more intertwined (Laddeur 2000a Rabel). All the fundamental separations and distinctions that lie at the basis of legal order are questioned. Market and organization are no longer kept separate, hybrid models coordination are spreading, and they no longer differentiate clearly between internal and external (exchange) relations ("relational contracts" for long term relationships), markets are re-established within the organization ("profit-centres"), cooperation and competition overlap ("joint ventures" in high technology). This tendency demands flexible new forms of legal regime that do not allow for stable legal and administrative hierarchical order but that are part of a heterarchy of overlapping public and private rules, practices, standards.

This tendency, which can now only be referred to in a sketchy way, has almost nothing to do with globalisation; it is due to the rise of information and knowledge as the main economic resource. Globalisation is just one phenomenon, which is also made possible by this transformation of the economic

order. The major part of the recent problems of government cannot be attributed to a tendency of globalised economic conglomerates to shift production from one country to another as they please. They stem “from within”. Abstract rules of law and hierarchical decision-making no longer work – even when mediated by big “representative” organizations (trade unions, employers’ associations, and so on) – because society is undergoing a rapid process of transformation towards network-like self-organized types of coordination. Society creates flexible patterns of coordination with overlapping and heterogeneous models, instead of opting for clear-cut alternatives. This evolution creates trouble for a state whose basis had been a model of universal and abstract order which were exempt from processes of change.

In the new “society of networks” (Castells 1998), the state does not find stability in the realm of intermediary organizations that stem from the welfare state and had produced practical organizational knowledge for public decision-making. This evolution has changed the welfare state, but it will not make the state itself obsolete. It is the welfare state, in particular, which is based on the assumption that only the citizens of a specific state profit from its (re-)distributional activities (Gilpin 2001: 366); this notion is valid not only for social assistance and social security, but also for economic intervention (such as the protection of declining industries). In this respect, the state loses its hold on the economy and this lack of efficiency of public activities raises some doubt as to whether this development should be deplored.

Globalisation is only one phenomenon of transformation of the state, and it is hitherto not very important. But whereas “protectionism” has a bad image, the contrary is true for “democracy”. All the interests that claimed protection from economic change in the past, prefer to invoke “democracy” when they protest against globalisation. This might be understandable inasmuch as new forms of public governance (a term whose openness reflects the evolution of forms of public order beyond the state) have yet to be found both at the level of the nation state and at the global level, which might be adapted to network-like organizations and the rise of the “knowledge society”. These forms have to be based on cooperation, proceduralisation (instead of substantive goals), and flexible adaptation to uncertainty. This is valid for all levels of public order, from the nation state to global order.

The reproduction of the state model at the European-, or even at the global-, level would be a step in the wrong direction. This model is not obsolete, but it cannot meet the requirements for flexibility that are created by the knowledge society and the new global order.

This is why the a-centric structure of the EC might turn out to be a functional hybrid organization that, beyond the rhetoric of the “Europe of nations” or “the Member States as the masters of the treaty”, should not be transformed into a state-like organization with a constitution as a “foundational act” of its own. There are also theoretical reasons for this. The new, hybrid types of organizations

do not have a hierarchical structure, and the new problems of public order cannot be managed by reproducing the old state model at a more abstract level. The predominance of the intergovernmental element in the European model – as opposed to the supranational element (which serves an element of stabilization and continuation of order) – might do justice to the social processes generating international, transnational and domestic networks of overlapping heterarchical networks in a much more flexible and adaptive way than would a superstate. This open construction would also be able to better integrate the problems of the Member states themselves, which used to be kept separate from questions of European institution building.

The Prime Minister of Luxembourg, J. C. Juncker, recently proposed abandoning the idea of a European constitution altogether. He instead suggested thought about how to introduce elements of European integration and transnational governance into the constitution of Member States. This might be a productive idea as it allows for much more openness for the phenomenon of overlapping levels of order. This normative concept comes close to the empirical approach of “intergovernmentalists” to the European integration process. A. Moravcsik rightly argues that the European integration process can easily be interpreted as the outcome of a “post modern, multicultural experiment” (2001: 118), which has been “accepted by overlapping cultural and political groups” in Member States. With reference to the overestimation of the “democratic deficit”, he points out that within the nation state there is a habit of insulating certain interests from processes of balancing countervailing interests (competition, monetary policy, and so on). In spite of the rhetoric of democratic decision-making, political processes in Member States are increasingly characterized by a dominance of special interest groups. This is due to the fact that the integrative function of representative “encompassing” groups (Olson) is breaking down, whereas constraints of reciprocity and compliance may exclude narrow short-term interests at the European level. The same might be valid for the international level. In many cases, we can observe the discrepancy between democratic rhetoric and the narrow mindedness of political groups, especially in Third World countries, abusing political power for the preservation of interest structures that are far from productive for the population as a whole.

International law could also profit if it could be mobilized for breaking up the traditional core of state sovereignty and deploying the internal dynamic of states.

In the long run, responsibility will be concentrated neither at the level of domestic governments nor at the supranational level of international organization alone; it will instead rest with private-public networks of decision-makers and groups that overlap at national, transnational and international levels (Reinicke 1998; Gilpin 2001: 384). In the long run, democracy is characterized by its potential to adapt to new challenges, and to reinforce the dynamic of societies, not by strong states.

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