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Legitimacy and Compliance in Transnational Governance

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Abstract

Power, rule, and legitimacy have always been core concerns of political science. In the 1970s, when governability appeared to be problematic, legitimacy was discussed both in the context of policy research and by critics of the capitalist state. More recently interest turned to governance beyond the nation-state. The legitimacy of transnational (i.e., European and international) organizations, of international regimes and of the – hard or soft – law they formulate is held to be deficient because they are lacking in democratic legitimation. This discussion only rarely refers to Max Weber. This paper tries to show that returning to Max Weber can clarify some points in the discussion of legitimacy and compliance beyond the nation-state. Relating the alternatives to democratic legitimation to Weber's concept of legal legitimacy throws a new light on the presumed legitimacy deficit in transnational governance that makes it appear less dramatic. With Max Weber we can also develop a more sanguine view of the consequences of legitimacy deficits for compliance.

Zusammenfassung

Macht, Herrschaft und Legitimität waren immer zentrale Themen der Politikwissenschaft. Als in den Siebzigerjahren des vorigen Jahrhunderts Regierbarkeit zum Problem wurde, befasste man sich mit Legitimität als wichtiger Ressource des Nationalstaats. Neuerdings hat sich das politikwissenschaftliche Interesse auf Fragen des Regierens jenseits des Nationalstaats erweitert. Die Legitimität transnationalen, europäischen ebenso wie globalen Regierens erscheint aufgrund mangelhafter demokratischer Legitimierung defizitär. Diese Diskussion bezieht sich selten auf Max Weber. Dieses Papier will zeigen, dass die Bezugnahme auf Max Weber einen Beitrag zur Diskussion über Legitimität und Compliance jenseits des Nationalstaats leisten kann. Aus der Perspektive von Webers Begriff legaler Legitimität betrachtet, erscheinen die in der Literatur erörterten Alternativen zu demokratischer Legitimierung weniger defizitär und die Folgen eines vermeintlichen Legitimitätsdefizits für Compliance weniger dramatisch.

Contents

1 Legitimacy: The concept

Power, rule, and legitimacy have always been core concerns of political science. However, as Suchman (1995: 572) observes, "(m)any researchers employ the term *legitimacy*, but few define it." If it is defined, reference is mostly made to Max Weber and his definition of the three types of legitimate domination. For Weber, the systematic empiricist and action theorist, a social order is legitimate if it is held to be binding and exemplary; it is the *belief* in the exemplary and binding nature of a social order that constitutes legitimacy, whether this is the order of marriage or of political rule (Weber 1956: 26). The legitimating belief attributes the right to make binding decisions to some person or institution, and constitutes at the same time the normative (moral) obligation of specified subjects to comply, irrespective of the costs or benefits accruing to them if they do. Though this is often not done, the social scientist should insist on Weber's definition: legitimacy is a belief, an empirical phenomenon to be established as other socially relevant subjective phenomena, and not something to be inferred from compliant behavior nor deduced from the presence or absence of its presumable determinants. Whether a legitimating belief is widely shared or not is an empirical question of great practical importance, but need not be included in the very definition of legitimacy.

In the 1970s, when governability appeared to be problematic, legitimacy was discussed both in the context of policy research and by critics of the capitalist state. Policy researchers were concerned about the directive capacity *(Steuerungsfähigkeit)* of government and discussed its prerequisites (Mayntz 1975; Mayntz/Scharpf 1975). Among the prerequisites of an active policy stance, political support was seen to play a crucial role – support of the given political system, of a specific government, and "of specific policy decisions, expressed in the willingness to comply with them" (Mayntz/Scharpf 1975: 21). Legitimacy was seen as one possible source, or motive of support, but it was realized that legitimacy is potentially scarce. Legitimacy deficits were highlighted by critics of the capitalist state. Offe (1972) and Habermas (1973) agreed that the need for legitimacy had increased dramatically with the interventionist stance of the state that resulted from attempts to contain the economic crisis inherent in a capitalist economy. State interventionism led to spiraling demands which governments were increasingly unable to meet. However, the growing legitimacy deficit was not simply attributed to the inability of governments to meet popular demands. Referring back to Max Weber, Habermas argued that the belief in legitimacy depends on claims that must be accepted as truth (Habermas 1973: 133–136), but that truth claims became increasingly precarious; his crisis of legitimacy is basically a crisis of culture.

Implicitly or explicitly, the discussion in the 1970s referred to the modern, capitalist nation-state. With European integration and the advent of "global governance," governance theory expanded to include governance beyond the nation-state. In the literature on global governance, which is generally of an institutionalist rather than realist bent, reference is often made to legitimacy. The legitimacy of transnational (i.e., European and international) organizations, of international regimes and of the – hard or soft – law they formulate is held to be deficient because they are lacking in democratic legitimation, and this is perceived as a problem for transnational governance. This discussion only rarely refers to Max Weber. In what follows I try to show that returning to Max Weber can clarify some points in the discussion of legitimacy and compliance beyond the nation-state. Relating the alternatives to democratic legitimation to Weber's concept of legal legitimacy throws a new light on the presumed legitimacy deficit in transnational governance that makes it appear less dramatic. With Max Weber we can also develop a more sanguine view of the consequences of legitimacy deficits for compliance.

2   Legal legitimacy

The claim to legitimacy and the belief in it can have different bases. Max Weber, we know, distinguished between traditional, charismatic, and legal legitimacy (Weber 1956: 157–182). Legalization is a pervasive, often noted trend at all political levels (Voigt 1980; Zürn/Zangl 2004), and legal legitimacy is therefore assumed to be the prevalent form of legitimacy in the modern world. This assumption is likely to be correct as far as the legitimacy claim of political institutions and of corporate actors established in conformity with the law is concerned, but it need not be true for the legitimating beliefs held by their subjects. There need be no correspondence between the basis on which legitimacy is claimed by an authority and the legitimating belief motivating its acceptance. Often legal norms are accepted as binding because a charismatic political leader formulates them or because they are the appropriate, time-hallowed way of doing things. For Weber it was obvious that, in real life, legitimating beliefs have different bases; in modern constitutional states and in legal theory, legality is assumed to be the prime basis of legitimacy. Though it would be interesting to test this assumption empirically, this is not the purpose here. We turn instead to the problem of the dual nature of legal legitimacy.

For Max Weber, legitimacy based on legality is rational legitimacy. In the literature, legitimacy based on legality is in fact widely called "legal-rational," rather than simply legal. Johannes Winckelmann (1952: 38–39, 60–61) has argued at length that for Weber, legal authority meant not only formal legality, but included value rationality *(Wertrationalität)*.[1] Strictly speaking, value rationality means that an action or decision is in agreement with specific, historically or culturally defined values; in discussions of

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1   Weber himself did not explicitly distinguish between formal legality and value rationality.

legal legitimacy, "value rational" is taken to refer to the content or substance, the "what" rather than the "how" of a policy. A decision would then possess legal legitimacy if it is arrived at in a procedurally correct fashion *and* if it meets material or substantive criteria. In German legal theory, this dual nature of legality has long been discussed in connection with the notion of *Rechtsstaat*, which is seen to consist of formal and material elements, the material aspect being closely linked to ideas of justice (Schulze-Fielitz in Dreier 2006: 198–199). The combination of formal (procedural) and substantive rationality is often found in definitions of legitimacy; examples are the definition of legitimate rules by Huckel (2007: 120) and the definition of "moral legitimacy" by Suchman (1995: 579–581).

Acknowledging the dual nature of legal legitimacy raises the question of the relationship between formal (procedural) legality and substantive rationality. In normative concepts of legal legitimacy, both are seen to be causally connected: a specific procedure is assumed to generate substantively rational decisions or policies. In this case, legitimacy is given if the formal procedure used to generate decisions or policies meets specific criteria. According to Luhmann, formal procedures in adjudication and in political decision-making that grant equal and objective rights to everyone can confer legitimacy because they guarantee everyone the chance of getting a satisfactory decision outcome and of having everyone's interests taken into account (Luhmann 1969: 30). In empirical reality, however, a procedure that grants equal and objective rights to everyone does not guarantee the substantive rationality of decisions. Following Winckelmann's interpretation of Weber's concept of legal legitimacy, both mere formal legality as well as "justice" rendered by illegal means would be considered to lack legitimacy: procedure and outcome must *both* be valued positively, but their evaluation may well rest on different sets of values.

In real life, different criteria are in fact often used to evaluate the formal and the material aspects of legitimacy. Authorities believed to be legally legitimate, because they have been established by and use accepted procedures, can make decisions that are not perceived as substantively legitimate. The International Monetary Fund (IMF) presumably claims compliance with the "conditionality" it imposes on creditors on the basis of legality. The creditors may not question the formal legality of the conditions imposed upon them, but substantively they often hold them to be unjust and do not feel morally obliged to comply with them. In fact, rules and decisions can be considered binding because they were made following an established procedure of due process[2] *or* because they are in agreement with widely shared values and are felt to be just. On the one hand, there is some empirical evidence for the claim that formal legality as such can confer legitimacy; Stryker (2001: 8702), for instance, refers to an empirical study that shows that the assessment of decision-making procedures as fair is more important for the perceived legitimacy of the US Congress than the substantive agreement between policies adopted by Congress and the respondents' self-interested preferences. On the oth-

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2   The concept of due process plays an important role specifically in US legal discourse; see Wasserman (2004).

er, governments as well as national and international organizations often justify their policy preferences, decisions, and administrative acts by reference not to legality, but to values (Halliday/Block-Lieb/Carruthers 2010). Such justification need not be merely tactical; it may express genuine normative conviction. But in modern societies multiple conflicting values co-exist: there are arguments for freedom as well as for equality, for shareholder value as well as for stakeholder value, for segregation as well as for integration. Legitimacy claims either try to connect to widely shared values or cater deliberately to minority preferences. In modern society we are therefore faced with a plurality of value-based legitimacy claims that reflect the existing diversity of value orientations. In practice, then, formal legality and material rationality can diverge. Occasionally the formal and the material elements of legality (and the legal state) are even seen to be opposed to each other (Weber 2007: 736).

In the course of the development of modern (Western) society, the sovereign people have become the only normatively accepted source of legitimacy for political decisions. The rules that guide democratic decision-making constitute the now dominant kind of legal-rational legitimacy (Willke 2007: 46). Max Weber did not discuss democratic legitimacy, but it is implicitly included in his category *Legalität kraft Vereinbarung,* one of the two possible bases of legal legitimacy he distinguished (Weber 1956: 198). Like all forms of legal legitimacy, democratic legitimacy has a formal and a material aspect. Irrespective of concrete decision outcomes, the very concept of (procedural) democracy contains the guarantee of highly valued, fundamental individual rights, including political and legal equality, freedom of speech, freedom of assembly, and respect of minority positions. For this reason, democratic procedures can be valued for themselves. The crucial issue is whether formally democratic decision processes will also lead to substantively rational policy decisions. In theoretically exacting conceptions of democracy this is assumed. Where democratic procedures lead to a discourse free of domination (*herrschaftsfreier Diskurs;* Habermas 1992), decisions considered just by all are assumed to result: the substantive rationality of binding decisions follows from the possibility of public deliberation. Democratic procedures can be thought to generate substantive rationality also from a systems perspective; thus a democratic constitution, by including the whole demos, makes it possible to solve socio-economic conflicts by using accepted procedural forms. The legitimacy claim of democratic regimes rests on the assumption that a procedure that itself embodies important values ensures that substantively rational, binding decisions will be made. In practice, however, political regimes are already called democratic if the major formal elements of democracy are met, even if they do not always produce decisions that are in the common interest. Majority preferences may favor ineffective rather than effective policy decisions. The flaws of and the dangers inherent in the formal procedures of democracy have been widely discussed in the literature (see already Scharpf 1970 for a review). These flaws have motivated measures to counter them but have not detracted from the conviction that, in modern nation-states, political legitimacy must be based on democratic procedures – if only because the sovereign people in a democracy can withdraw its support from a government that meets with widespread dissatisfaction.

3   Alternative forms of legal legitimacy in transnational governance

If the argument is accepted that democratic procedures, i.e., a representative democracy is the best way to ensure substantively rational policy decisions, then the legal legitimacy of governance beyond the nation-state cannot be but deficient. In fact, transnational governance is widely considered to be impaired by the absence or weakness of democratic procedures of decision-making at the European level and beyond: supranational institutions are not held accountable to voters; they lack sanctioning power; there is no European, let alone global demos; and there are few institutionalized forms for the direct expression of popular preferences (Scharpf 1999; Menon/Weatherill 2008). If only democracy can legitimate power, then, as more power accrues to transnational institutions, the greater the overall legitimacy deficit must become.

In international governance in general, and in the multi-level polity of the EU in particular, states are mainly addressed and held to comply. This makes for a two-level structure of legitimation, where the consensus among national governments enjoying democratic legitimacy is normatively expected to legitimize European and international decisions. But there are doubts that the formal, democratic legitimacy of national governments does in fact carry over into transnational policy decisions. Besides, the legitimacy of transnational political intervention is increasingly precarious as "the direct influence of national governments – and most notably of national legislatures – on the shaping of international law in general or international law decisions has been reduced" (Wolfrum 2008: 2044). Much thought is therefore given to possibilities to strengthen or introduce elements of democratic legitimacy into transnational governance directly (Held 1995; Archibugi 2004; Held/Koenig-Archibugi 2005).

Attempts to "mimic national political structures and processes" beyond the nation-state are held to be impracticable (Menon/Weatherill 2008: 399); a "universal parliament" in the framework of the UN is even considered undesirable (Müller 2008). The structural features underlying international bodies make attempts to install an enlarged replica of national institutions futile. Even the EU is unlikely to turn into a representative democracy enjoying the legal power to tax citizens and to enforce compliance. But in line with Weber's definition, a direct or representative democracy is not the only procedural basis for legal legitimacy. In fact, at the transnational level of governance *alternative* forms of legitimation play a crucial role.

Following ideas expressed by Habermas (1992), deliberation is frequently seen as a form of legitimation practiced and practicable beyond the nation-state; deliberation is even considered a special form of democracy ("deliberative democracy"; see Elster 1998; Dryzek 2006; Höreth 2009). It is not unusual that procedures that legitimate, though they are not democratic in the strictly procedural sense, are subsumed under the concept of democracy; thus Héritier (2003) includes associative and expert representation in policy networks as well as horizontal mutual control among EU member states among the different forms of democratic legitimation in the composite European

democracy. Neyer (2009) speaks of the need to adapt the "orthodox" concept of democracy to the reality of governance beyond the nation-state and redefines the "demos" in transnational democracy as those affected by a given decision, thus conflating participation with majoritarian democracy. However, going back to the Weberian concept of legal-rational legitimacy, the justification of decisions by argument implied in the notion of deliberation should be considered not as a form of, but as an alternative to actually practiced democratic procedures.

Participation by representatives of organized groups of "stakeholders" in sector-specific decision processes is an alternative to formally democratic procedures closely related to deliberation. To take legitimacy as given if those subject to a regulation participate in devising it (see Willke 2007: 45) fits Weber's category of legality based on consensus *(Vereinbarung)* just as well as representative democracy does. Provided opposing views are taken into account in the process, such participation can lead to decisions accepted as appropriate, i.e., substantively rational. Participation by stakeholder representatives may appear to follow the basic logic of democratic decision-making, but its flaw is that only interested and well-organized groups participate, so that decisions cannot be said to reflect the common interest. Nor is the chance to participate always accepted; in the case of the European Water Initiative, for instance, some NGOs refused to participate because they rejected the very mandate of the negotiations, i.e., to devise viable forms of utility privatization, on normative grounds (Partzsch 2007). Kreide and Niederberger (2008) even argue that the binding power of the international legal order is deteriorating because it is increasingly created in negotiation between parties who pursue their particularistic interest.

In consequence of such doubts, more radically minded International Relations scholars have turned from legitimacy based on legal *procedures* to legitimacy based on substantively rational decision *results,* or output legitimacy. The democratic maxim of "rule by the people," meaning that political decisions are derived from the preferences of the population in a chain of accountability linking those governing to those governed, is said to produce input legitimacy.[3] Output legitimacy, in contrast, is derived from the capacity of a government or institution to solve collective problems and to meet the expectations of the governed citizens (Scharpf 1999: 16–20; Menon/Weatherill 2008: 401). The EU is held to be capable of legitimation by its output even if input legitimation is lacking, at least where policy is not about distribution or redistribution, but about effectively solving acknowledged problems (Majone 1996). Menon and Weatherill (2008) argue that the EU Commission and European Court of Justice (ECJ) provide legitimacy not only for the Union, but also for member states because they improve their problem-solving effectiveness, given that many problems can no longer be solved within the confines of single nation-states. In the prevalent version of output legitimation, democratic procedures are judged not to be necessary to produce substantively rational outcomes.

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3   The distinction between input and output legitimacy was made by Scharpf already in 1970, where the concepts are described more elaborately.

In an even more critical argument, democracy is considered to be incapable to produce substantively rational policy outcomes.[4] Mennon and Weatherill (2008: 407) even argue that insistence on (democratic) input legitimation could impair EU effectiveness, and hold "the independence and freedom from direct democratic accountability of the supranational authorities" to be crucial for the ability of European institutions to "carry out sensitive tasks of market regulation."

In the distinction between input and output legitimacy, the dual character of legal legitimacy and the tenuous relation between its formal and material component finds its clearest expression. Historically, the idea that policies can be justified by their effectiveness in solving collective problems and generating public goods[5] is supported by the shift from stratification to functional differentiation as a basis of social order; in this process, performance has become the criterion of political legitimacy (Mayntz 1988). Yet output alone is not sufficient to constitute legal legitimacy. Decision procedure and decision output must both meet normative criteria, but they may be evaluated separately on the basis of different criteria. In practice, however, input and output legitimacy are connected. As the long and ultimately inconclusive discussion about what constitutes the "common good" makes evident, a consensual definition of a "substantively rational" policy is hard to come by. If there is disagreement about the desired policy output, a procedure is needed to settle disputes equitably. The very difficulty of defining what constitutes a legitimating output thus emphasizes the importance of input legitimacy.

However defined, output legitimacy or the problem-solving capacity of political institutions depends in large part on expertise. A lay population lacks the expertise and information needed to formulate effective policies – this is a well-recognized drawback of democratic procedure. Experts do in fact play a crucial role not only in national, but also in transnational policy processes (Quack 2010). Assuming that, beyond the nation-state, policy is concerned mainly with effective problem-solving rather than distributive issues, expertise should play a particularly important role in transnational governance. Especially in the EU, the combination of national representation and expert representation is evident, e.g., in comitology. Expert authority is often judged to be yet another form of rational legitimacy; Willke (2007: 47), for instance, mentions legitimacy based on expertise as a subtype of legal-rational legitimacy. In the same sense, Suchman (1995) speaks of "cognitive" legitimacy. This type of legitimacy is connected with the notion of *Wissensgesellschaft* and is reminiscent of the familiar distinction between authority of office *(Amtsautorität)* and expert authority *(Fachautorität)* claimed typically by pro-

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4 This may be due to the cognitive incapability of finding a correct problem solution or to the lack of consensus about what would be the correct solution. If popular notions of a just order differ or are based on conflicting values, democratic procedures may not be able to arrive at decisions considered just by all.

5 A similar idea is expressed by Rogowski (1974: 34), for whom a government enjoys rational legitimacy if it maximizes the expected utility of its citizens. Roughly similar is also Suchman's (1995) concept of pragmatic legitimacy, accorded to policies that are responsive and a benefit to the interests of a group.

fessionals and widely accepted by their clients. Rules for the use of technical appliances and prescription drugs need not justify their claim to be binding, i.e., to guide behavior, by reference to a democratic procedure; they must be comprehensible and objectively valid or causally correct. This quality is again the result of a specific procedure, i.e., of following the rules of scientific method. Decisions based on expertise can meet both procedural and substantive criteria of legitimacy, but these are not the same criteria that are used to evaluate a democratic polity.

The Achilles heel of the concept of output legitimacy lies in the difficulty to distinguish empirically between consent based on the substantive rationality of policy decisions and consent based on interest, i.e., mere instrumental rationality. A policy output or decision that corresponds to self-interest (Weber's *Interessenlage*) will obviously be accepted; the question is whether it also leads to an assessment of the policy as "just" or legitimate on the basis of the general values underlying it.[6] Though this is often implicitly assumed when the satisfaction with government or the trust in given political institutions is measured, approval of an existing order that is felt to grant one's individual well-being does not necessarily create the willingness to comply in cases where compliance is costly rather than beneficial; if this were not so, tax evasion would not be widespread.

For Max Weber it would have been obvious that the perceived legitimacy of transnational authorities and the "soft" and "hard" law they produce can have a mixture of different bases – input as well as output, participation and expertise as well as effectiveness. This is argued at length by Neyer (2004). Baldwin and Cave (1999) have similarly used a set of five different criteria to assess the legitimacy of given regulations, including procedural features, expertise, and effectiveness. In an attempt to enquire into the legitimacy of governance beyond the nation-state, Take (2009) was in fact able to show on the basis of empirical case studies that the belief in the legitimacy of a regime or institution, defined as reasoned acceptance (not compliance!), is in many cases related to a number of organizational and procedural characteristics, including participation, representativity, and due process. Where he found a regime to enjoy high acceptance in spite of the lack of these procedural prerequisites, its acceptance could be explained by the conformity of its goals to universal values, i.e., its substantive rationality. Once again these results show that legitimacy can be attributed both on the basis of formal and of material criteria; though causally connected in the normative concept of legal legitimacy, in practice the two need not come together.

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6   In opinion surveys, the *satisfaction* with government and with democracy and the *trust* in political institutions, not legitimacy beliefs, are usually measured and shown to be related to socio-economic indicators; for an example, see Schäfer (2010).

4   Legitimacy and compliance

According to Max Weber, the belief in legitimacy, whatever its basis, is of functional importance for the stability of a political order. He considered the stabilizing effect of the belief in the legitimacy of an order to be decidedly superior to the stabilizing effect of self-interest and of behavior oriented at convention and tradition (Weber 1956: 23). Yet this is still a very limited claim: stability is a long-term concern and implies neither effectiveness nor short-term compliance. The accepted view in political science sounds more exacting: at least for a political order claiming popular support, the belief in its legitimacy is important because it leads to *voluntary compliance* "with undesired rules or decisions of governing authority" (Scharpf 2009: 5). But how important are legitimacy beliefs for compliance in general?

Max Weber never claimed that compliant behavior presupposes the belief in the legitimacy of an order. An empirical investigation of the bases of observable compliance would quickly show that the functional importance of legitimacy is easily overestimated. This may hold especially for legal legitimacy. If the belief in legitimacy means that decisions going against the interest of an individual or group are voluntarily accepted, it may be easier for charismatic authority and time-hallowed tradition than for positive law to stabilize political orders, especially orders that assign inferior status to large segments of the population and demand sacrifice including even one's life. However, in discussions of "compliance beyond the nation-state" (Zürn/Joerges 2005), legitimacy is usually equated with (some form of) legal legitimacy. But its relevance for compliance is recognized to be limited. Thus Zürn (2005: 26) doubts that "reservations about the normative validity of a rule" are "the most significant source of non-compliance." At least in the short run, little legitimacy is needed to uphold a regime, legal or not, that is able to reward and to punish.

In political practice, where corporate actors tend to choose their strategies deliberately, compliance is often a matter of interest. Asked whether organizations experience their regulatory environment as externally imposed constraints or as normative ideals and models for their own behavior, sociologists of law are said to tend toward the second answer, but political sociologists are doubtful (Edelman/ Stryker 2005: 538). In transnational governance it is mainly governments but also transnational corporations and organizations that are asked to comply. Empirical research on compliance in the EU suggests that member states comply primarily out of interest or ignore and try to evade EU directives.[7] In Mastenbroek's summary of the main explanatory factors put forward or tested in studies of compliance in the EU, legitimacy is explicitly mentioned but once, though there are some mentions (e.g., culture of compliance, support for Europe, or consensual democracy) that might be put into the same category (Mastenbroek 2005, table 1). The key hypothesis of this research had long been that compliance depends

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7   Admittedly, it is not always easy to distinguish between the preferences, or the "interest" of a government, and the substantive rationality of a policy, i.e., what would be its output legitimacy.

mainly on the "goodness of fit" between EU policy requirements and existing institutions at the national level. But, "the various case studies on the goodness of fit hypothesis have pointed out the limited explanatory value of the hypothesis" (Mastenbroek 2005: 1110). Instead, government preferences, domestic support and opposition, and supra- and international pressure are now seen to be decisive. In the comparative study by Falkner et al. (2005), it was found that, while in a few EU member countries the observance of EU law is highly valued and typically overrides domestic concerns, domestic interests prevailed in the majority of cases: compliance being high where the substantive content of the Directive agreed with the policy preference of the government and major interest groups and low where it did not. This seems to be similar at the international level. In his study of dispute settlement in GATT and WTO, Zangl (2006) finds that compliance results mainly from the fear that reputation will be damaged in the case of non-compliance and from the fear of the sanctions that GATT or WTO permit the claimant to use; a feeling of normative obligation towards the dispute settlement procedure and its outcome turned out to be the least important compliance motive.

Governance in Europe involves a compliance–legitimacy relationship between the Union and the member states, constrained by a compliance–legitimacy relationship between member governments and citizens (Scharpf 2009). Compliance motives are likely to differ between these two relationships, depending on whether governments, private corporate actors, or individuals are asked to comply. The same should hold for compliance with international rules. But ultimately the effectiveness of transnational norms depends on individual compliance. Though corporate actors are likely to choose more consciously than individuals in everyday situations between whether to comply or defect, individuals' compliance with tacit and manifest rules is also often motivated by interest, either directly because one is rewarded or because compliance avoids negative sanctions. However, "rational choice deterrence models give a misleading picture of compliance" (Edelman/Stryker 2005: 539); legal sanctions in particular are often too small and come too late to count. Max Weber did not hold interest, i.e., the expectation of reward and fear of punishment, but habit to be the most frequent base of individual behavior. Literally he spoke of *Eingelebtheit* (Weber 1956: 23); this corresponds to the now frequently used concept of taken-for-grantedness.[8] The functional importance of this behavioral orientation for the persistence of a given social order is likely to be considerably greater than the belief in its legitimacy, especially in cases where a social order that should go against the interests of significant parts of the population appears to be stable. Hirschman (1986: 81) notes that history is full of cases where neither voice nor exit were observed,

> in spite of many reasons for discontent and unhappiness. There is no doubt, as many commentators have pointed out, that passivity, acquiescence, inaction, withdrawal, and resignation have held sway much of the time over wide areas of the social world.

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8   While Weber clearly distinguished the taken-for-grantedness of an order from the belief in its legitimacy, an emphasis on compliance can lead to conflating both; thus Suchmann (1995) considers taken-for-grantedness as one among several types of legitimacy.

Strategies of adaptation and avoidance, of bending rules, making use of legal loopholes, and "making the best" of situations seem often preferred to voice and exit, both of which are costly. But the most powerful psychological mechanism underlying unquestioning compliance is probably the adaptation of the level of aspiration to the chances of satisfaction, which makes that deficits are accepted without protest, and even miserable situations are defined as "normal." Anyone who has lived through a war knows that "objectively" unbearable situations can come to be considered normal, are taken for granted and adapted to – just as one adapts to a hostile natural environment or to "fate."[9] In the long run, however, taken-for-grantedness is an instable base of compliance; it can be punctured by the knowledge of, or even the mere belief in alternatives. Not day-to-day compliance, but the long-term stability of a political order is more safely based on legitimacy beliefs.

Legitimacy beliefs appear to be of minor short-run importance for the compliance of individual and of corporate actors. Why then should legitimacy be discussed so consistently in relation to transnational governance? The presumably deleterious weakness of legitimacy in transnational governance is not an empirical conclusion from research; it is a judgment derived from a – strongly normative – political philosophy. A world in which responsibly acting autonomous persons realize shared values is the perennial ideal of political philosophy. Exit and voice are reactions of self-reliant actors – habit and passive tolerance are not. It is the normative philosophical stance of political scientists that makes them enquire into legitimacy, rather than their empirical interest in the sources of compliance.

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9   This mechanism, of course, also makes a life in luxury appear "normal" and something that is taken for granted; "normal" can be both good or bad, not only in the eyes of the beholder but also in the perception of the individual concerned.

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