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Peer Zumbansen

Osgoode Hall Law School of York University, pzumbansen@osgoode.yorku.ca

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Neither ‘Public’ nor ‘Private’, ‘National’ nor ‘International’: Transnational Corporate Governance from a Legal Pluralist Perspective

PEER ZUMBANSEN*

This paper contends that the challenging nature of the regulation of global corporate conduct requires an adequately differentiated approach towards the identification and analysis of the norms in question. In part I, I review the context of ‘state intervention’ and ‘market self-regulation’, in which the current discussion of regulatory responses to the economic/financial crisis and the role of self-regulation occurs, before laying out the concept of ‘transnational legal pluralism’ in part II. In part III, I argue that an exemplary area such as corporate governance can best be understood as an instance of transnational legal pluralism, a field that becomes visible through a particular methodological lens. In part IV, I conclude by suggesting how the lessons of such a case study can contribute to an ongoing theoretical investigation into the nature of global regulatory governance, using the concept of ‘rough consensus and running code’.

INTRODUCTION

Much of today’s writing on ‘global governance’ presumes a fundamental gap between the domestic forms, institutions, and instruments of legal regulation on the one hand and what is perceived as a dramatic regulatory void on the

* *Osgoode Hall Law School, York University, 4700 Keele St., Toronto, Canada M3J 1P3*
pzumbansen@osgoode.yorku.ca

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global scale on the other. This anxiety is particularly accentuated with regard to border-crossing, global corporate activity, which is seen as having over time successfully escaped the reach of traditional, nation-state-based forms of regulation. As the literature on the challenges of regulating the conduct of multinational business corporations (MNCs) has been growing exponentially, the question remains, however, whether or not an answer to this alleged exhaustion of the regulatory state in the face of global corporate (mis-)conduct is likely to be found in the *extension* of the regulatory grasp of the nation state – or of international state bodies – in a kind of ‘expanded jurisdiction’ sense. By contrast, what appears to emerge from a continuing assessment by lawyers,¹ political scientists,² and economists³ of the corporate, labour law, and human rights dimensions of MNC is a growing awareness of the need to approach the problem from what has fruitfully been referred to as a ‘regulatory governance’ perspective.⁴ From this vantage point the challenge presents itself as no longer one of law’s limits (or as the ‘end of the state’), but as one which is foremost concerned with the way in which law operates, is created and enforced in the global arena. And from this perspective, then, we can begin to take into view the actually *existing* forms of corporate regulation. In other words, a theory of norm creation in the context of global market activities might not be found through a mere extension or *translation* of nation-state-based doctrine onto a rudimentarily defined sphere ‘beyond’ or ‘outside’ the nation state. What is needed, instead, is a theory that allows for reflection on the manifold ways in which norms have been emerging in the space between what we refer to as the ‘domestic’ on the one hand and the ‘global’ on the other. As elaborated in this paper, for a legal theory of global regulation, ‘space’ is not meant to depict a geographical realm, but instead a *methodological* one in which the meanings – and limitations – of our distinction between the ‘national’ and the ‘global’ can be addressed.

Such reflection must incorporate a high degree of empirical evidence of existing forms of self-regulation such as codes of conduct,⁵ of best practices,

- 1 P. Muchlinski, *Multinational Enterprises and the Law* (2007, 2nd edn.); see, previously, D.F. Vagts, ‘The Multinational Enterprise: A New Challenge for Transnational Law’ (1969) 83 *Harvard Law Rev.* 739–92.
- 2 J. Ruggie, ‘Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework’. *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises A/HRC/14/27* (2010), at <http://baseswiki.org/w/images/en/0/04/2010_Advance_Edited_Report.pdf>.
- 3 J.H. Dunning and S.M. Lundan, *Multinational Enterprises and the Global Economy* (2008, 2nd edn.).
- 4 C. Scott, ‘Regulatory Governance and the Challenge of Constitutionalism’ in *The Regulatory State: Constitutional Implications*, eds. D. Oliver, T. Prosser, and R. Rawlings (2010).
- 5 D. Vogel, ‘The Private Regulation of Global Corporate Conduct’ in *The Politics of Global Regulation*, eds. W. Mattli and N. Woods (2009) 151–88.

recommendations, and ‘social norms’⁶ or ‘governing contracts’,⁷ but it must do so against the background of a theoretical investigation into the concept of law, which underlies and informs the almost habitual, routine distinction between ‘law’ on the one hand and these myriad ‘alternative forms of regulation’ on the other. The lawyer (as any other scientist) cannot simply ‘go out and see’, but must account for the conceptual bias with which this confrontation with ‘reality’ occurs. In this process, the study of the fast-proliferating forms of public-private, hybrid norms that apply to market activity turns into self-reflection on the theoretical starting points of the larger legal theory from the vantage point at which this incorporation of empirical evidence takes place.⁸ It is, thus, not simply an option to build a theory on, say, the ‘fact’ of ubiquitous forms of market self-regulation but, instead, a necessary reflection on how one or more existing theories of how legal norms are in fact incorporated *into* and account *for* this particular empirical evidence.⁹

The core contention of this paper is that the challenging nature of the regulation of global corporate conduct requires an adequately differentiated approach towards the identification and analysis of the norms in question. The central question is: ‘*What is the concept of law that underlies the regulation of global corporate conduct?*’ which I will try to answer by proceeding in three steps. In part I, I briefly review the context of ‘state intervention’ and ‘market self-regulation’, in which the current discussion of regulatory responses to the economic/financial crisis and the role of self-regulation occurs before laying out the concept of ‘transnational legal pluralism’ in part II. In part III, I argue that an exemplary area such as corporate governance can best be understood as an instance of transnational legal pluralism, that is, as a field that becomes visible through a particular methodological lens, which revisits the long-standing legal sociological analysis of norm creation in the transnational arena. A brief introduction follows into the place and relevance of corporate governance codes in the present evolution of this regulatory area, emphasizing the particular nature

6 L. Bernstein, ‘Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’ (1992) 21 *J. of Legal Studies* 115–57.

7 See the contributions to the Symposium: ‘Governing Contracts: Public and Private Perspectives’ (2007) 14 *Indiana J. of Global Legal Studies* 183–483.

8 S. Macaulay, ‘Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein’ (2000) 94 *Northwestern University Law Rev.* 775–804; V. Nourse and G. Shaffer, ‘Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?’ (2009) 61 *Cornell Law Rev.* 61–137.

9 See, in this context, P. Zumbansen, ‘The Conundrum of Order: Governance from an Interdisciplinary Perspective’ in the *Oxford Handbook of Governance*, ed. D. Levi-Faur (2011), available at: <<http://ssrn.com/abstract=1671673>>; P. Zumbansen, ‘The Future of Legal Theory’ (2010), contribution to the Hague Institute of the Internationalisation of Law (HiiL) Project on ‘The Future of Law’, at <<http://ssrn.com/abstract=1688455>>.

and dynamics of overlapping forms of state and non-state, hard and soft regulation. The central insight from this section is concerned with refuting the common view that transnational governance unfolds in considerable distance from state-based law, making it an allegedly autonomous realm. In fact, a close study of a new governance form such as corporate governance codes written by mostly private, occasionally mixed, public-private expert committees, reveals the ‘close ties’ between state and market in initiating, formulating, and implementing this type of regulation. In part IV, I conclude by suggesting how the lessons of such a case study can contribute to an ongoing theoretical investigation into the nature of global regulatory governance, using the concept of ‘rough consensus and running code’.

I. MARKETS AND STATES AS REFERENCE POINTS IN THE REGULATION DEBATE

The ongoing investigations among administrative and constitutional lawyers, political scientists, sociologists, and regulatory theorists give ample evidence of how the state has long become involved in complex collaborations, delegations, trade-offs, and a myriad other divisions of labour with civil society or ‘market’ actors.¹⁰ At the same time, there is a rich repository of studies related to the creation and nature of norms in the context of market self-regulation, that point not to the end of the state but, rather, suggest a highly complex relationship between state and non-state actors in the production and administration of these norms.¹¹ In light of this evidence, the oft-painted picture of law’s limits, or even exhaustion, under the impact of globalization begins to fade. Instead of a futile struggle, where nation states play a regulatory and policy catch-up game with de-territorialized corporate and commercial actors or other amorphous crystallizations of globalization forces, an image has long begun to form, which depicts a rising number of actors with the capacity to expand on a vast territorial and operational scale.¹² Central to this depiction is an intricate overlapping of ‘hard’ and

10 See, for example, M. Loughlin, ‘The Functionalist Style in Public Law’ (2005) 55 *University of Toronto Law J.* 361–403.

11 L. Bernstein, ‘Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms’ (1996) 144 *University of Pennsylvania Law Rev.* 1765–821; G. Hadfield, ‘The Public and the Private in the Provision of Law for Global Services’ in *Contractual Certainty in International Trade. Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges*, ed. V. Gessner (2009) 239–56; for a discussion, see, for example, G.-P. Callies and P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (2010) ch. 2.

12 See, for example, W. Mattli and N. Woods, ‘In Whose Benefit? Explaining Regulatory Change in Global Politics’ in *The Politics of Global Regulation*, eds. W. Mattli and N. Woods (2009) 1–43; For earlier investigations, see the contributions to A.C. Cutler, V. Haufler, and T. Porter, *Private Authority and International*

'soft' norms, which are being produced by both state and non-state actors in the regulation of these activities, an overlapping which in itself still remains in need of much greater explanation as to the transition as well as the relations and linkages between hard and soft norms. Overshadowing this ongoing investigation are too often cliché-like associations of hard norms with the state, while soft norms are relegated to an allegedly separated, quasi self-regulatory sphere of the market. Especially in times of perceived 'regulatory' and 'market' failures¹³ the strained nature of such categorizations becomes strikingly apparent, and our analysis is redirected to long-standing findings regarding the regulated and constituted nature of markets¹⁴ and to the long-grown web of institutions and practices of public-private interaction between the state and the market.¹⁵ Thus, despite the exaggerated news of its decline, the state continues to be deeply involved in the production and administration of the norms that govern the global marketplace¹⁶, even if it is far from the sole author of governing regulations.¹⁷

This constellation invites analysis from a host of perspectives, and the intriguing emphasis placed by legal scholars in the recent past on the importance of 'regulation' and 'governance' is an important and crucial element in this regard.¹⁸ It is becoming increasingly clear that a legal theory of these forms of regulation 'within' and 'beyond' the nation state cannot be

Affairs (1999) and the important study by A.C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Economy* (2003).

- 13 See the astute observations by K.W. Dam, 'The Subprime Crisis and Financial Regulation: International and Comparative Perspectives' (2010) 10 *Chicago J. of International Law* 581–638.
- 14 R.L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Q.* 470–94; M.R. Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Q.* 8–30.
- 15 P.P. Craig, 'Constitutions, Property and Regulation' (1991) *Public Law* 538–54, reprinted in *Regulation*, ed. C. Scott (2003) 145–62; C. Harlow, 'The "Hidden Paw" of the State and the Publicisation of Private Law' in *A Simple Common Lawyer. Essays in Honour of Michael Taggart*, eds. D. Dyzenhaus, M. Hunt, and G. Huscroft (2009) 75–97.
- 16 See, for example, S. Sassen, 'The State and Globalization' in *Governance in a Globalizing World*, eds. J.S. Nye and J.D. Donahue (2000) 91.
- 17 K.W. Abbott and D. Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 *Vanderbilt J. of Transnational Law* 501–78; R.B. Hall and T.J. Biersteker, 'The Emergence of Private Authority in the International System' in *The Emergence of Private Authority in Global Governance*, eds. R.B. Hall and T.J. Biersteker (2002) 3–20; Cutler, op. cit., n. 12.
- 18 See the introduction to this volume by C. Scott, F. Cafaggi, and L. Senden, pp. 1–19. See, also, C. Scott, 'Regulation in the Age of Governance: The Rise of the Post-regulatory State' in *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*, eds. J. Jordan and D. Levi-Faur (2004) 145–74; B. Morgan and K. Yeung, *An Introduction to Law and Regulation. Texts and Materials* (2007); F. Cafaggi, 'New Foundations of Transnational Private Regulation' in this volume, pp. 20–49.

adequately developed *from within*, but must instead take into account how existing forms of regulation testify to an intricate overlap of different forms and concepts of regulation. The impressive rise in importance of *new institutional economics* in the idea of competition over a pervasive theory or concept of ‘governance’ is of eminent importance in this regard.¹⁹ As a result, ‘economic governance’²⁰ has developed into a sophisticated regulatory theory that must be taken seriously by anyone interested in the evolution of regulatory governance – which certainly should include lawyers.²¹ As this short paper cannot do justice to the rich and wide-ranging exchanges between lawyers and economists on the respective boundaries and overlaps between their fields,²² it must suffice at this point to note that the general contention regarding a *choice* between state ‘intervention’ and ‘self-regulating markets’ regularly renders invisible and de-politicizes the de facto applied theories of political and legal order. Long before scholars (and policy-makers) began recently to unveil the regulatory ‘reality’ of what had until now been portrayed as an overwhelming ‘retreat of the state’ in the face of economic and financial globalization over the past thirty years,²³ there has existed a great body of work addressing and describing the complex regulatory constitution of market activity.²⁴ Central to this line of argument had always been a scrutiny of the role of *legal rights* in furnishing market actors with legally sanctioned freedoms to engage in binding activities. In other words, markets did not simply evolve according to ‘natural’ laws, but were instead subject to and the result of regulation, at the centre of which existed a fragile if crucial tension between ‘negative’ and ‘positive’ rights.²⁵

- 19 See D.C. North, *Institutions, Institutional Change and Economic Performance* (1990); O.E. Williamson, ‘The New Institutional Economics: Taking Stock, Looking Ahead’ (2000) 38 *J. of Economic Literature* 595–613.
- 20 O.E. Williamson, ‘The Economics of Governance’ (2005) 95 *Am. Economic Rev.* 1–18.
- 21 P. Zumbansen and G.P. Calliess, ‘Law, Economics and Evolutionary Theory: State of the Art and Interdisciplinary Perspectives’ in *Law, Economics and Evolutionary Theory*, eds. P. Zumbansen and G.P. Calliess (2011).
- 22 For the area of corporate law, see, for example, G.K. Hadfield and E. Talley, ‘On Public versus Private Provision of Corporate Law’ (2006) 22 *J. of Law, Economics and Organization* 414–41.
- 23 See D. Campbell, ‘The End of Posnerian Law and Economics’ (2010) 73 *Modern Law Rev.* 305–30; L.E. Mitchell, ‘Financialism – A (Very) Brief History’ in *The Embedded Firm: Corporate Governance, Labour and Financial Capitalism*, eds. C.A. Williams and P. Zumbansen (2011, forthcoming).
- 24 See the references in n. 14 above and see, further, B.H. Fried, *The Progressive Assault in Laissez Faire: Robert Hale and the First Law and Economics Movement* (1998).
- 25 R. Wiethölter, ‘Die Position des Wirtschaftsrechts im sozialen Rechtsstaat’ in *Wirtschaftsordnung und Rechtsordnung, Festschrift für Franz Böhm zum 70. Geburtstag*, eds. H. Coing, H. Kronstein, and E.-J. Mestmäcker (1965) 41–62; P. Zumbansen, ‘Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law’ (2008) 56 *Am. J. of Comparative Law* 769–805.

The ‘mindset’ described above regarding ‘free’ markets and ‘enabling’ states²⁶ provides a pertinent background and context for an analysis of a form of regulation that has attained considerable prominence in recent decades – that of market self-regulation through ‘private’ standard setting and best practice ‘in the shadow’, as it were, of an allegedly ‘formal’ framework, offering safeguards and an effective institutional foundation associated with the state and its authority to make law. The following section will illustrate the problematic consequences of such categorizations and distinctions for an adequate understanding and theorizing of the widely proliferating forms of transnational law making.

II. TRANSNATIONAL LEGAL PLURALISM: NEITHER NATIONAL NOR INTERNATIONAL, NEITHER PUBLIC NOR PRIVATE

The following observations are limited to what can at best be a cursory study of the institutional and conceptual dimensions of a particular form of market regulation illustrated by the example of corporate governance codes. Such an investigation offers a host of insights into the particular way in which market regulation has been evolving in a framework that cannot be adequately depicted as either national or international, public or private. Instead, the particular relation between state and non-state actors in the initiation and execution of the norm-creation process and the ensuing implementation, dissemination, and administration of the norms in question defy categorization that would allow one neatly to assign authority for such a particular regulatory regime to one side or the other. The chosen field, corporate governance, is a case in point in the study of transnational law making, as I will try to argue by scrutinizing both the underlying meaning of transnational and the concept of law informing this approach. I will argue, that areas such as corporate governance regulation must today be understood as instances of ‘global assemblages’,²⁷ or, from a legal theoretical viewpoint, as examples

26 For a succinct analysis and critique, see S. Deakin, ‘Corporate Governance and Financial Crisis in the Long Run’ in Zumbansen and Williams, op. cit., n. 23. See, also, K. Rittich, ‘Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates’ (2005) 55 *University of Toronto Law J.* 853–68.

27 For this concept, see S. Sassen, *Territory – Authority – Rights. From Medieval to Global Assemblages* (2006). For earlier elaborations, see S. Sassen, *The Global City* (1991); J. Stiglitz, *Globalization and Its Discontents. Essays on the New Mobility of People and Money* (1998). See, also, M. Amstutz and V. Karavas, ‘Weltrecht: Ein Derridasches Monster’ in *Soziologische Jurisprudenz. Liber Amicorum für Gunther Teubner zum 65. Geburtstag*, eds. G.-P. Calliess, A. Fischer-Lescano, D. Wielsch, and P. Zumbansen (2009) 647–74; M. Amstutz, ‘Métissage. Zur Rechtsform in der Weltgesellschaft’ in *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*, eds. A. Fischer-Lescano, F. Rödl, and C. Schmid (2009) 333–51.

of transnational legal pluralism.²⁸ As such, a regulatory field such as corporate governance is, on the one hand, neither exclusively national (domestic) nor international, while, on the other, this does not imply the elimination or the overcoming of the nation state.²⁹ In addition, such an area cannot adequately be grasped through a separation of public and private as long as that distinction seeks to demarcate two distinct and autonomous norm-creating actors.³⁰ Instead, the evolving regulatory regimes or, ‘assemblages’, as coined by Sassen, are constituted through persistent local activity and interpretation, comprised of human, institutional, and technological elements, the latter resulting predominantly from the breathtaking advances in information technology (‘digitalizations’).³¹ By comparison, as will be laid out in more detail below, the concept of transnational legal pluralism illustrates a continuing need for a specifically legal perspective on the reconfiguration of an increasingly cross-jurisdictional, transnational regulatory landscape. Such a perspective incorporates long-standing legal sociological insights into pluralistic normative orders³² and a renewed analysis of Polanyi’s assessment of market dis/embeddedness.³³

III. TRANSNATIONAL CORPORATE GOVERNANCE

1. *The transnational regulatory landscape*

Corporate governance has to be seen in the context of a highly diversified series of transnational norm-setting processes resulting in a veritable explosion of corporate governance codes in Europe and elsewhere. With the proliferation of corporate governance codes, influenced and pushed by international³⁴ and transnational activities of norm setting, discussion, and

28 P. Zumbansen, ‘“New Governance” in European Corporate Governance Regulation as Transnational Legal Pluralism’ (2008) 15 *European Law J.* 246–76, at <<http://ssrn.com/abstract=1128145>>; P. Zumbansen, ‘Transnational Legal Pluralism’ (2010) 1 *Transnational Legal Theory* 141–89, at <<http://ssrn.com/abstract=1542907>>.

29 Sassen, *op. cit.* (2006), n. 27, p. 325.

30 C. Harlow, ‘“Public” and “Private” Law: Definition without Distinction’ (1980) 43 *Modern Law Rev.* 241–65.

31 Sassen, *op. cit.* (2006), n. 27, p. 349 (noting the importance of focusing on financial centres, not ‘markets’, ‘as key nested communities enabling the construction and functioning of such cultures of interpretation’).

32 E. Ehrlich, *Fundamental Principles of the Sociology of Law* (1913/1962); G. Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism’ (1992) 13 *Cardozo Law Rev.* 1443–462.

33 K. Polanyi, *The Great Transformation. The Political and Economic Origins of our Time* (1944); J. Beckert, *The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology*, Max-Planck-Institute for the Study of Societies, Discussion Paper 07/1 (2007).

34 OECD; WCFCG; IVCGN.

thought exchange,³⁵ it has become increasingly difficult to identify a single institution or author of a set of norms. Instead, much of the production and dissemination of corporate governance rules operates through the migration of standards³⁶ and a cross-fertilization of norms. A distinct feature of this de-territorialized production of norms is the radical challenge these processes pose for our understanding of what we call *law proper*. The dissemination of corporate governance codes, disclosure standards and rules, best practices and codes of conduct, affects the entire juridical ‘nexus of corporate governance’ as comprised of norms pertaining to company law, labour law, and securities regulation,³⁷ as the decentralization of norm producers is repeated, mirrored, and reflected in the hybridization of the norms themselves. It is in this sense, that the study of the proliferation of corporate governance codes and company law production in general, and of the rules of remuneration disclosure in particular, feeds into a broader research inquiry into the changing face of legal regulation in globally integrated marketplaces. A more serious engagement between political economists and economic sociologists on the one hand and corporate law scholars on the other about the distinct institutions and dynamics of regulatory change, which constitute the direly neglected groundwork, as it were, of what has for nearly two decades now been discussed under the umbrella of the ‘convergence v. divergence’ of corporate governance standards,³⁸ would complement and challenge the apparently exclusionary choices between harmonization and regulatory competition with a considerably deeper and more differentiated assessment of present market-‘disembeddedness’.³⁹

Against this background, corporate governance emerges today as a telling illustration of the fundamental transformations informing the regulatory instruments and institutions of market governance. As corporate law is being shaped by a complex mixture of public, private, state- and non-state-based norms, principles, and rules which are generated, disseminated, and monitored by a diverse set of actors, a closer look at this field can serve

35 ECGI, INSEAD, Euroshareholders.

36 See, for a comparable analysis of ‘migrating’ human rights standards, C. Scott and R. Wai, ‘Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential of Transnational “Private” Litigation’ in *Transnational Governance and Constitutionalism*, eds. C. Joerges, I.-J. Sand, and G. Teubner (2004) 287–319.

37 See J.W. Cioffi, *Public Law and Private Power: Corporate Governance Reform in the United States and Germany in an Age of Finance Capitalism* (2010).

38 H. Hansmann and R. Kraakman, ‘Toward a Single Model of Corporate Law?’ in *Corporate Governance Regimes. Convergence and Diversity*, eds. J. A. McCahery, P. Moerland, T. Raaijmakers, and L. Renneborg (2002) 56–82.

39 See, for example, S.M. Jacoby, ‘Corporate Governance in Comparative Perspective: Prospects for Convergence’ (2002) 22 *Comparative Labor Law & Policy J.* 5–32; C. Crouch and W. Streeck, ‘Introduction: The Future of Capitalist Diversity’ in *Political Economy of Modern Capitalism. Mapping Convergence and Diversity*, eds. C. Crouch and W. Streeck (1997) 1–18.

two purposes, both of which this paper briefly addresses. One is the way in which the analysis of contemporary corporate governance regulation can help us to assess the emerging, new framework within which corporate governance, but also other rules of market regulation, are evolving. Secondly, through the way in which we begin to understand this emerging transnational regulatory framework as an illustration of contemporary rule-making in spatial regimes not confined to nation states' jurisdictional boundaries, these regimes can be seen as new instantiations of the legal pluralist order that legal sociologists have long been concerned with and in the context of which they asked how 'to investigate the correlations between law and other spheres of culture'.⁴⁰ On this basis, the *transnational* emergence of regulatory regimes raises similar questions. The transnational lens allows us to study such regimes not as being entirely detached from national political and legal orders, but as emerging out of them, and reaching beyond them. The transnational dimension of the new actors and the newly emerging forms of norms radicalizes their 'semi-autonomous' nature, represented in the tension between a 'formal' law and policy-making apparatus on the one hand and spontaneously evolving 'informal' norms in particular social contexts on the other.⁴¹

2. *Corporate governance codes*

The development of corporate governance codes is thus an example of intricate, domestic and transnational, multi-level processes of norm generation and norm enforcement. Starting from mere factual evidence, the emergence of corporate governance codes in recent years has begun to alter fundamentally the legal landscape of corporate law.⁴² Despite their recognition as an essential element of corporate law,⁴³ these codes constitute a particular challenge to other, statutory approaches to law making, as they are regularly drafted by non-state actors such as non-governmental associations, private industry institutes or corporate actors.⁴⁴ In general, corporate

40 Ehrlich, op. cit., n. 32, pp. 486–506; see, also, G. Gurvitch, *Sociology of Law* (1947); M. Rheinstein, 'Review: Two Recent Books on Sociology of Law [reviewing Timasheff's 'Introduction' and Gurvitch's 'Elements']' (1941) 51 *Ethics* 220–31, at 221–2.

41 S.F. Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study' (1973) 7 *Law & Society Rev.* 719–46.

42 For an overview of existing corporate governance codes in various countries, see <http://www.ecgi.org/codes/all_codes.php>.

43 See M. Eisenberg, 'The Architecture of American Corporate Law: Facilitation and Regulation' (2005) 2 *Berkeley Business Law J.* 167–84, at 176, 182.

44 For one of the first examples, the German Corporate Governance Code, see the interview with Professor Theodor Baums, who chaired the commission that preceded the drafting commission: T. Baums, 'Interview: Reforming German Corporate Governance: Inside a Law Making Process of a Very New Nature' (2001) 2 *German Law J.*, at <http://www.germanlawJ.com/past_issues.php?id=43>.

governance codes are relatively short collections of, on the one hand, legal regulations that are already in force in a particular jurisdiction, and recommendations and suggestions, directed either to private corporations or, in some cases,⁴⁵ the law maker, concerning a company's organization, its governance rules and disclosure regime not included in statutory law, on the other.⁴⁶ In the case of the German Corporate Governance Code, for example, *recommendations* are marked by the word 'shall'. While companies are free to deviate from them, they are under an obligation to disclose this deviation.⁴⁷ By contrast, *suggestions* can be deviated from without disclosure.⁴⁸ We shall see below how the German legislator has chosen to transpose this disclosure obligation into statutory law. These hybrid norms of corporate regulation,⁴⁹ which are neither exclusively public nor private, pose a formidable challenge to traditional thinking about law-making authority, non-legal rules, and their enforcement.

Corporate governance relates to the exercise of powers inside the firm: the analytical focus can, for one, be directed to the relationship between the owner (shareholder; principal) and the management (agent). Alternatively, one may focus on the overall organizational structure of the firm. While this also includes the principal-agent ties, it also encompasses the other 'stakeholders' in the firm, such as employees and creditors. The first, control-oriented approach centres on shareholders as the prime residual claimants of the firm: therefore, the firm's organization is governed by the overriding principle of maximizing 'shareholder value'.⁵⁰ The other, stakeholder-oriented, approach considers the actors in and around the firm and its business with regard to their vested interests in the firm. It sees the firm as

45 See U. Noack and D. Zetzsche, 'Corporate Governance Reform in Germany: The Second Decade', CBCWP No. 0010 (2005) 6–7, at <<http://ssrn.com/abstract=646761>>.

46 C. Mallin, *Corporate Governance* (2005) 19–40; J. Hill, 'Regulatory Responses to Global Corporate Scandals' (2005) 23 *Wisconsin International Law J.* 367–416, at 376 (highlighting how CGC have tended to be either a response to the absence of governmental regulation or a justification of such absence); Eisenberg, *op. cit.*, n. 43, p. 182: 'bodies of standards, principles, or rules that are promulgated by private institutions, and that have force of some sort although they are not directly backed by state sanctions'.

47 'Preface', *German Corporate Governance Code* (2002) 2, at: <www.bmj.bund.de/enid/Corporate_Governance/German_Corporate_Governance_Code_1gj.html>.

48 *id.*

49 R.C. Nolan, 'The Legal Control of Directors' Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report' (2005) 6 *Theoretical Inquiries in Law* 413–62, at 418: 'complex mixtures of private and public action'; R. Mitchell, A. O'Donnell, and I. Ramsay, 'Shareholder Value and Employee Interests: Intersections between Corporate Governance, Corporate Law and Labor Law' (2005) 23 *Wisconsin International Law J.* 417–75, at 451 (clearly distinguishing CGC from law as "'self-regulation" or "soft law" provisions').

50 M.C. Jensen, *A Theory of the Firm. Governance, Residual Claims, and Organizational Forms* (2000).

embedded in a specific legal, economic and political culture, herein playing a role as societal actor.⁵¹ In contrast to the shareholder approach, this perspective takes into account the public services rendered by a large firm in view of employment capacities and overall socio-economic spin-off.⁵²

These two definitions lie at the base of a debate over different patterns of corporate organization, which was for the longest time driven by an almost overwhelming belief in what some recognized as nothing less than the ‘end of history in corporate law’,⁵³ namely, the eventual triumph of the shareholder value theory. The present crisis appears to have seriously undermined this credo. However, it is important to emphasize that what might have been perceived as a dispute merely among corporate law scholars (and policy makers) had instead long become a forum of much wider impact, as participants acknowledged the exemplary role of corporate governance for a timely and much needed scrutiny and critique of market regulation.⁵⁴

Corporate governance codes such as those developed in countries around the world illuminate the significant characteristics of law-making processes that have been undergoing dramatic changes with regard to the *actors* involved and the *nature of the norms* generated in these processes. These developments have to be placed in the wider context of law-making reform. In this respect, reform does not concern only company law but, more generally, involves national, European, and international attempts to improve law-making procedures by allowing for a wider inclusion of private actors in rule-making procedures.⁵⁵ What is involved, from the point of view of democratic theory, is a tension that has long been growing between a functionally reduced, rubber-stamping parliament on the one hand and a fast-moving, hardly controllable administration which is in close contact and interaction with private actors, on the other.⁵⁶ At the same time, the currently

51 J. Parkinson, ‘Models of the Company and the Employment Relationship’ (2003) 41 *British J. of Industrial Relations* 481–509.

52 S. Jacoby, ‘Corporate Governance and Society’ (2005) 48 *Challenge* 69–87.

53 H. Hansmann and R. Kraakman, ‘The End of History for Corporate Law’ (2001) 89 *Georgetown Law J.* 439–68.

54 See, for example, P.A. Gourevitch and J. Shinn, *Political Power and Corporate Control. The New Global Politics of Corporate Governance* (2005); P.A. Hall and D. Soskice, *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (2001).

55 See, for example, for the current endeavours on the European level, K.A. Armstrong, ‘Civil Society and the White Paper – Bridging or Jumping the Gaps?’ in *Mountain or Molehill? A Critical Appraisal on the Commission White Paper on Governance*, eds. C. Joerges, Y. Meny, and J.H.H. Weiler, Harvard Law School Jean Monnet Working Paper No.6/01 (2001) 95–102, 99–100: ‘The normative case for a more autonomised transnational civil society [...] lies in the inclusion of a new constituency of voices, interests and expertise within elite transnational governance.’

56 For a powerful reconstruction of the pertinent role of the administration in designing rules ‘close to the ground’, see the landmark assessment by J.W. Landis, *The Administrative Process* (1938).

widespread attempts at improving respective national laws on corporate governance and firm organization⁵⁷ must be seen against the background of what was until just a couple of years ago an overwhelming pressure for international convergence towards a set of corporate governance principles, most notably established in the United States and the United Kingdom,⁵⁸ an effort that was for years informed by a sense of urgency with regard to adapting stakeholder-oriented, close-knit, bank-financed corporate governance systems to an extremely volatile competition for globally available investments. This understanding is currently, at the time of writing, shaped anew by widespread concerns with the consequences and externalities of the finance capitalism of the last twenty years.⁵⁹

These developments can no longer solely be studied within contained, embedded systems of national political economies. Instead, there is a growing awareness of the fact that the adaptations of historically evolved governance systems display a particular *transnational* dimension. In light of the globally intertwined business and interaction among firms created under different legal rules, corporate governance rules have increasingly become a competitive asset in a ‘law market’,⁶⁰ a market, however, that is not only constituted by sovereign sellers with vested authority in the creation of binding legal norms, but by an amalgamation of national governments and through supranational norm setting such as by the OECD or in form of the UN Global Compact, by private parties such as multinational corporations and interest group representations. This particularly global regulatory landscape has not failed to capture the imagination of scholars of comparative law,⁶¹ regulatory theory,⁶² and institutional analysis.⁶³ The corporate governance landscape is not only populated by national governments eagerly engaged in a headstrong pursuit of regulatory reform: complementing such efforts is a vast proliferation of private and mixed public/private, hybrid processes of rule making, cutting across jurisdictional boundaries and con-

57 See the contributions in K.J. Hopt and E. Wymeersch, *Comparative Corporate Governance – Essays and Materials* (1997); T. Baums, introduction to *Bericht der Regierungskommission Corporate Governance. Unternehmensführung, Unternehmenskontrolle, Modernisierung des Aktienrechts* (2001).

58 See H. Hansmann and R. Kraakman, ‘The End of History for Corporate Law’ (2001) 89 *Georgetown Law J.* 439–68; critically, D.M. Branson, ‘The Very Uncertain Prospect of “Global” Convergence in Corporate Governance’ (2001) 34 *Cornell International Law J.* 321–62.

59 See Deakin, *op. cit.*, n. 26.

60 E.A. O’Hara and L.E. Ribstein, *The Law Market* (2009).

61 J. Hill, ‘Regulatory Show and Tell: Lessons from International Statutory Regimes’ (2008) 33 *Delaware J. of Corporate Law* 819–43.

62 J. Black and D. Rouch, ‘The development of global markets as rule-makers: engagement and legitimacy’ (2008) *Law and Financial Markets Rev.* 218–33.

63 See, for example, the recent monograph study by A. Busch, *Banking Regulation and Globalization* (2009) with case studies on the United States, Germany, the United Kingdom, and Switzerland.

tributing to an increasingly densely woven net of guidelines, best practices, and standards. The defining feature of the emerging transnational body of corporate governance norms is the intricate resurfacing of a series of paradoxes pertaining to the inseparability of substantive/procedural, coordinative/regulatory and authority/affectedness aspects of the norms in question.⁶⁴ In order to illustrate the theoretical challenge facing any legal theory that wishes to explain the norm creation dynamics in this area, our analysis cannot be confined to the *substantive* law governing specific forms of societal activity, which has long remained the hallmark of comparative work in the law of corporate governance;⁶⁵ rather, our attention has to turn as well to the dynamics that are unfolding between different levels and sites of rule making from a *regulatory* perspective. From this combined perspective, the law of corporate governance becomes a prime example of a *transnational law regime*. The intricate embeddedness of regulatory innovation in locally defined governance structures on the one hand, and their integration in transnationally unfolding rule-making processes is characteristic of the current regulatory landscape in corporate governance, as illustrated by the particular dynamics of corporate governance codes. From this perspective, codes are a powerful example of the way in which private ordering maintains an intricately challenging tension with the institutional frameworks for official law making.

3. *Hybrid law making: the example of the German Corporate Governance Code*

For an adequate understanding of the drafting of the German Corporate Governance Code as an illustration of transnational regulatory processes, it is important to acknowledge the particular interplay between ‘hard’ and ‘soft’ law in this fast-moving regulatory area against the background of the global convergence debate regarding corporate governance standards. The ‘hard’ law, that is of eminent interest in this context, is a 2002 Act which had prior to that passed the national parliament (*Bundestag*), and which introduced a number of substantial changes to the German *Aktiengesetz* (Stock Corporation Act).⁶⁶ This particular statute had to a large degree been contemplated

64 For a detailed discussion, see G. Hadfield, ‘The Public and the Private in the Provision of Law for Global Services’ in Gessner, op. cit., n. 11, pp. 239–56; Calliess and Zumbansen, op. cit., n. 11, ch. 2.

65 See the excellent study by D. Vagts, ‘Reforming the “Modern Corporation”’: Perspectives from the German’ (1966) 80 *Harvard Law Rev.* 23–89.

66 See *Gesetz zur weiteren Reform des Aktien- und Bilanzrechts, zu Transparenz und Publizität (Transparenz- und Publizitätsgesetz – abbr. TraPuG)* [Transparency and Disclosure Act], adopted by the German Bundestag on 17 May 2002. See, also, the documentation in (2002) *Neue Zeitschrift für Gesellschaftsrecht [NZG]* 78–81, and the comprehensive presentation of the TraPuG’s main elements by H. Hirte, *Das Transparenz- und Publizitätsgesetz* (2003).

and prepared under the auspices of two specially formed governmental commissions concerned with a reform of German corporate governance. The second of these commissions, the so-called ‘Corporate Governance Code-Commission’, had been convened with the mandate of taking up the suggestions of the first commission, central to which was the drafting of a voluntary Code of Corporate Governance Rules.⁶⁷ Among the many interesting features of the German Corporate Governance Code, by some seen as a ‘novum’ in the system of German legal sources⁶⁸, was an initially vivid but meanwhile relatively subsided debate regarding the Code’s legal nature.⁶⁹

The Code itself includes those *norms* and *regulations* that are mandatory corporate law rules which are already set out in the German Stock Corporation Law. The Code’s purpose, according to its drafters, in reiterating these norms here is to provide foreign investors with a transparent and simple introduction to central rules pertinent to the corporate governance rules existing in Germany.⁷⁰ Furthermore, the Code includes *recommendations*, which are expressed by the word ‘*sollen*’ (shall) and the observation of which is to be made transparent in an annual statement by the firm’s management.⁷¹ Lastly, the Code contains *suggestions* as to corporate conduct, the observation of which is merely ‘suggested’, but there is no obligation to disclose whether a company has followed these suggestions.⁷² The ‘*comply or disclose*’ principle which is endorsed in the Code with regard to ‘recommendations’ has been seen as an indirect enforceability anchor in the Code, whereby it could be seen to lose its genuinely voluntary

67 See press release at: <<http://www.corporate-governance-code.de/eng/news/presse-20020226.html>>.

68 P. Ulmer, ‘Der deutsche Corporate Governance Kodex – ein neues Regulierungsinstrument für börsennotierte Aktiengesellschaften’ (2002) 166 *ZHR* 150–81, at 152.

69 E. Vetter, ‘Der Deutsche Corporate Governance Kodex nur ein zahnloser Tiger? Zur Bedeutung von § 161 AktG für Beschlüsse der Hauptversammlung’ (2008) *Neue Zeitschrift für Gesellschaftsrecht [NZG]* 121–5, at 121: still not resolved satisfactorily.

70 Foreword, *German Corporate Governance Code*, at <<http://www.corporate-governance-code.de/eng/kodex/1.html>>:

This German Corporate Governance Code (the ‘Code’) presents essential statutory regulations for the management and supervision (governance) of German listed companies and contains internationally and nationally recognized standards for good and responsible governance. The Code aims at making the German Corporate Governance system transparent and understandable. Its purpose is to promote the trust of international and national investors, customers, employees and the general public in the management and supervision of listed German stock corporations.

71 See Preface, *German Corporate Governance Code 2*, at <<http://www.corporate-governance-code.de/index-e.html>>.

72 *id.*

character.⁷³ That the Code in fact attains an at least indirect mandatory character, is strengthened by the enactment of a provision in the German Stock Corporation Act (AktG), whereby the disclosure duty is codified into law.⁷⁴ But does this suffice to make the Code a piece of enforceable legislation? Others have argued that, even if there is a disclosure obligation with regard to the company's compliance with the Code's recommendations, it would be wrong to perceive the Code itself as 'law'. The latter, so it was argued,⁷⁵ would only then be the case if the recommendations themselves were being made obligatory which, arguably, they are not.⁷⁶ It appears that the Code's practical relevance is to be seen in its effect on the actual *behaviour* of firms,⁷⁷ something which appears to have continuously accrued with each passing year.⁷⁸ Whether or not firms do comply with the code's dispositions relating, for example, to transparency and disclosure of executive compensation⁷⁹ (a part of the *Kodex* that spurred concrete legislative action leading up to the entering into force of a federal statute on the adequacy of executive compensation in August 2009⁸⁰), the publication

- 73 W. Seidel, 'Der Deutsche Corporate Governance Kodex – eine private oder doch eine staatliche Regelung?' (2004) 25 *Zeitschrift für Wirtschaftsrecht [ZIP]* 285–94; W. Seidel, 'Kodex ohne Rechtsgrundlage' (2004) *Neue Zeitschrift für Gesellschaftsrecht [NZG]* 1095–6; M. Heintzen, 'Der Deutsche Corporate Governance Kodex aus der Sicht des deutschen Verfassungsrechts' (2004) 25 *Zeitschrift für Wirtschaftsrecht [ZIP]* 1933–8.
- 74 The quality and assessment of this obligatory annual 'explanation' must certainly be disputed, see, for example, M. Peltzer, 'Handlungsbedarf in Sachen Corporate Governance' (2002) *Neue Zeitschrift für Gesellschaftsrecht [NZG]* 593–9, at 594; regrettably, the newly published, leading commentary on German stock corporation law remains silent on this new codification, see U. Hüffer, *Aktiengesetz* (2002) s. 161 AktG.
- 75 H.-M. Ringleb, Introduction to *Kommentar zum Deutschen Corporate Governance Kodex [Kodex-Kommentar]*, eds. H.-M. Ringleb, T. Kremer, M. Lutter, and A. von Werder (2008, 3rd edn.); A. von Werder, 'Der Deutsche Corporate Governance-Kodex – Grundlagen und Einzelbestimmungen' (2002) 55 *Der Betrieb* 801–10; C.H. Seibt, 'Deutscher Corporate Governance Kodex und Entsprechenserklärung (s. 161 AktG-E)' (2002) 47 *Die Aktiengesellschaft (AG)* 249–59.
- 76 M. Lutter, 'Die Kontrolle der gesellschaftsrechtlichen Organe: Corporate Governance – ein internationales Thema' (2002) 24 *Jura* 83–8, 86, with regard to informations and suggestions.
- 77 C.H. Seibt, 'Deutscher Corporate Governance Kodex: Antworten auf Zweifelsfragen der Praxis' (2003) 48 *Die Aktiengesellschaft (AG)* 465–77.
- 78 J. van Kann and M. Eigler, 'Aktuelle Neuerungen des Corporate Governance Kodex' (2007) *Deutsche Zeitschrift für Steuerrecht* 1730–6, at 1733.
- 79 M. Wolf, 'Corporate Governance. Der Import angelsächsischer "Self-Regulation" im Widerstreit zum deutschen Parlamentsvorbehalt' (2002) 35 *Zeitschrift für Rechtspolitik (ZRP)* 59–60, at 60.
- 80 See *Gesetz zur Angemessenheit der Vorstandsvergütung – VorstAG*; full text at: <http://www.bmj.de/files/7db813ef5ce3522d02ef3547a4c2f341/3836/gesetz_vorstandsverguetung_VorstAG.pdf>.

of the firm's reports on the Internet,⁸¹ or the facilitating of personal exercise of shareholders' voting rights⁸² will, according to the rules established by the Code, remain within the discretion of the company.⁸³ Again, the Code explicitly foresees that companies do not have to comply with 'recommendations'. And yet they are now *obliged* to issue an annual explanation, regardless of whether or not they did comply.⁸⁴ The annual monitoring of the Code's 'acceptance' has revealed consistently growing numbers of German major corporations observing the Code.⁸⁵

Much suggests, however, that this perspective on 'hard' versus 'soft' law is inadequate to capture the particular combination of coordinative/regulatory dimensions reflected in the Code. The preceding discussion highlights how our conceptualization of the enforcement qualities of the Corporate Governance Code is informed by our understanding of the distinction between a statutory norm of law set by the state, on the one hand, and a non-binding norm of non-law on the other. This distinction, however, is a result of a continuing association of law-making power with state organs, long after the generation of norms has become characterized by a complex interplay between public and private actors – as illustrated in the case of the German Code.

Questions of authorship and legitimacy in the area of law making become elusive in light of the fact that the state is highly dependent on expert input from societal actors in carrying out its legislative and administrative functions.⁸⁶ Furthermore, it is clear that with the growing complexity of societal relations and, correspondingly, a growing demand for sophisticated and context-sensitive public governance forms,⁸⁷ any form of norm-production and implementation has become an extremely fragile process of risk taking and of trial and error. In the light of the particular governance challenges arising in modern societies,⁸⁸ an allegedly clear-cut distinction between

81 See, for example, s. 2.3.1 of the Cromme commission's German Corporate Governance Code.

82 *id.*, s. 2.3.3.

83 *id.*, s. 1: 'Foreword', differentiating between voluntary recommendations ('shall'), suggestions ('should', 'can'), and legally compelling provisions, according to existing law.

84 See Transparency and Disclosure Act, s. 16.

85 Van Kann and Eigler, *op. cit.*, n. 78, p. 1733.

86 See R.B. Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Rev.* 1669; J. Freeman, 'Collaborative Governance in the Administrative State' (1997) 45 *UCLA Law Rev.* 1–98.

87 G. Teubner, 'Juridification – Concepts, Aspects, Limits, Solutions' in *Juridification of Social Spheres*, ed. G. Teubner (1987) 3–48; K.-H. Ladeur, *The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law*, EUI Working Paper (1999).

88 See U. Beck, 'From Industrial Society to Risk Society: Questions of Survival, Social Structure and Ecological Enlightenment' (1992) 9 *Theory, Culture & Society* 97–123.

public and private governance schemes, built on the image of a sovereign, knowledgeable state presiding over a fragmented market society, would fail to grasp the intricate forms of intertwined public-private governance mechanisms, of knowledge sharing and experimental politics that characterize contemporary law making.⁸⁹

The discussion of the *rise of governance* in contemporary law making reflects a wide-ranging interest, but also a high level of concern with what is being perceived as a ‘privatization of law’.⁹⁰ As Colin Scott noted:

... recognition of private legislation reflects both a desire to better understand the diffuse nature of capacities underpinning regulatory and wider governance practices and a concern respecting the legitimacy of such non-governmental rule making.⁹¹

This combination of ‘desire’ and ‘concern’ originates from a persisting association of law and its creation with the (public) state sphere, while informal and private ordering remains relegated to the (private) market realm. Central to our analysis up to this point was an argument against this dualistic distinction, which is inadequate to grasp the ways in which both hybrid and private forms of norm generation can produce norms with regulatory functions. In concluding this section on corporate governance codes, it is time to draw out the context in which this hybrid law making occurs, a context which is both ‘real’, that is, consisting of actors, and conceptual, meaning that it is, at the same time, a particular, methodological reflection on the way that norms are being created in such areas today.

IV. CORPORATE GOVERNANCE AND THE INTRICACIES OF *ROUGH CONSENSUS AND RUNNING CODE*

The example of the German Corporate Governance Code can be taken to illustrate a theoretical concept, which Graf Calliess and I, drawing on previous work in Internet governance⁹² have been developing further as *Rough Consensus and Running Code* [RCRC],⁹³ in the following way. The German government, facing immense domestic and international pressure to

89 See, for example, M. Power, *The Audit Society: Rituals of Verification* (1997); M. Power, ‘Enterprise Risk Management and the Organization of Uncertainty in Financial Institutions’ in *The Sociology of Financial Markets*, eds. K.K. Cetina and A. Preda (2005) 250–68.

90 See the survey by J. Köndgen, ‘Privatisierung des Rechts. Private Governance zwischen Deregulierung und Rekonstitutionalisierung’ (2006) 206 *Archiv für die zivilistische Praxis [AcP]* 477–525.

91 C. Scott, ‘Regulating private legislation’ in *Making European Law: Governance Design*, eds. F. Cafaggi and H. Muir-Watt (2008) 254–86, at 254.

92 A.L. Russell, ‘“Rough Consensus and Running Code” and the Internet-OSI Standards War’ (2006) 28 *IEEE Annals of the History of Computing* 48–61.

93 Calliess and Zumbansen, op. cit., n. 11.

reform its corporate law regime so as to make German companies more attractive for global investors, was aware of the reform obstacles existing in the contemporary German political economy. At the same time, the government considered the potential of societal ('market') self-regulation, as highlighted by the Ministry of Justice. Furthermore, the German government was hardly taking a revolutionary step when inviting a Commission to draft this instrument. Even if the legislative project of drafting a national civil code in the latter part of the nineteenth century was, of course, in many ways different from the drafting of the Corporate Governance Code in 2002, the Schröder government's initiation of the Commission, which was markedly referred to as a 'Government Commission', also bears some important resemblances to its historical forerunner. In both instances, the government drew on private expert knowledge in preparing a comprehensive legislative instrument, the regulatory impact of which was perceived as being so large that its delegation to a commission of experts promised to channel otherwise conflicting and perhaps irresolvable positions through a discursive, outcome-oriented process. Certainly, the government's initiation of this norm-generation process remained ambivalent at best with regard to the legal nature of the Code growing out of the commission's work. The striking characteristic of both the process of the Code's drafting and of the Code itself remains, it seems, its *hybrid* nature between a non-binding, voluntary, 'private' regulatory instrument on the one hand and a document, linked to a statutory disclosure obligation by a federal law, on the other. Yet, neither dimension adequately depicts the dynamics that shape the emergence of the idea of a Code, the evolution of its drafting, and the intriguingly open-ended nature of the discussion around the legal nature of both the norms of the Code as of the Code itself. Instead, the discussion has made it clear that the repeated attempts to solve this dilemma by effectively avoiding the 'public' or 'private' question through designating the Code as *hybrid*, and by referring to its norms as 'soft law', achieves just that, namely, avoiding the underlying conundrum of how to integrate such governance processes into our legal theoretical methodology and doctrine. This, then, makes the example of the German Code particularly intriguing because its coming into being is reflective of both its embeddedness in a complex, historically evolved political economy that was historically sceptical with regard to private law making and market ordering,⁹⁴ and of a fast-evolving transnational regulatory landscape in which public and private actors – as 'norm entrepreneurs' – not only compete in striving to make 'better rules' but in a much richer fashion overlap, intertwine, collaborate, and antagonize, and

94 See H. Großmann-Doerth, 'Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht [1933]' in *Das selbstgeschaffene Recht der Wirtschaft. Zum Gedenken an Hans Großmann-Doerth (1894–1944)*, eds. U. Blaurock, N. Goldschmidt, and A. Hollerbach (2005) 77–96; D. Hart, 'Zur konzeptionellen Entwicklung des Vertragsrechts' (1984) 29 *Die Aktiengesellschaft (AG)* 66–80.

thereby contribute to a constantly changing *space* that Saskia Sassen has referred to as both institutional *and* normative.

The concept of *Rough Consensus and Running Code* combines a deliberative perspective with an experimental, law-making one. Drawing on expert and stakeholder knowledge, the regulating body, which can be public, private or hybrid, will seek to identify an evolving – *rough* – consensus in light of which it will put forward an experimental draft body of norms. These, in turn, will receive feedback and remain open to adaptation and change, constituting a *running code*. RCRC seeks to capture the particular tension between multipolar, formal/informal processes of deliberation and consensus-seeking, on the one hand, and the emergence of regulatory instruments with experimental and adaptable character on the other. Central to this approach is the emphasis on the inseparability of elementary features in theories of social order, which are traditionally defined through distinctions. Examples include, foremost, the distinction between public and private or between state and market, but also – as regards the ‘function’ of a norm – the distinction between coordination and regulation.⁹⁵ The RCRC model seeks to capture the particular tension inherent to norm-generating processes where the nature of the particular issue does not easily lend itself to an association with only one of these elements. The evolving norms and the processes of their generation in sensitive regulatory areas defy a categorization of either public or private, coordinative or regulative. As a result, their classification as either ‘law’ or ‘non-law’ depending on their origin in a recognized, competent law-making authority is as problematic as is the declaration that a norm constitutes a merely ‘private’ arrangement or, ‘social norm’. RCRC, thus, problematizes the tension between the definition of a norm’s legitimacy as law or non-law with reference to whether or not it emanated from an ‘official’ law-making authority, on the one hand, and as to whether the legitimacy of norms should be measured in light of the input into their creation by those ‘affected’ by the norm, on the other. As we have tried to show with regard to the fast-evolving regulatory fields of transnational contract and corporate law, the particular dynamics of norm creation in sensitive societal areas characterized by a hybrid combination of official and unofficial actors and a high degree of experimental, tentative, reflexive regulation, suggest the impossibility of associating such processes with only one of the identified sides.

From this perspective, the transnational regulatory landscape of corporate governance is marked by the intricate collision of public, private, and hybrid ceaselessly evolving norm-making processes that arise between regulatory arenas populated by actors inside and outside of the nation state. These norm-making processes are complex in the sense that the identification of

95 See G. Hadfield, ‘The Public and the Private in the Provision of Law for Global Services’ in Gessner, op. cit., n. 11, pp. 239–56.

either coordinative (facilitating) or regulatory (redistributing) functions can no longer occur on the basis of distinguishing between the public or private nature of the actors involved.⁹⁶ Instead, the norm-making processes have to be seen as *law generating* when and where we are willing to recognize the inseparability of the coordinative/regulatory dimension from the authority/affectedness dimension of these processes. This connection distances the RCRC process from a new institutional economic assessment of formal/informal rule creation and ties it into a comprehensive and interdisciplinary investigation into the foundations and processes of global law making as currently pursued by sociologists, political scientists, and philosophers as well as legal pluralist scholars.

Against this background, what can be learned from this example for other contemporary forms of law making? Recognizing a growing interest among legal scholars in the origins and prospects of what is conventionally referred to as a 'privatization of law',⁹⁷ it is necessary to emphasize that the *regulatory* function of the Code does not follow from the state's enactment of a statutory disclosure obligation, as was repeatedly argued by those identifying the Code as a public regulatory instrument. What constitutes an unsatisfactory answer to the question whether or not the Code is law resulted from the recognition that, in fact, not only the underlying drafting process but also the envisioned enforcement mechanism are intriguingly complex and arguably open-ended for a reason. The government did not make the Code directly or indirectly enforceable when it enacted the disclosure requirement, as it did not itself enact an ultimately effective sanctioning mechanism in the case of non-disclosure or deficient disclosure. Instead, the government's action in this regard illustrates a particular set of features that characterize law making in the area of corporate governance and many other regulatory areas today. The Code can only fulfil its function of influencing corporate behaviour and, as such, rendering German corporations more competitive, if a sufficient number of market participants endorse the Code's rules to make them matter. In that sense, a *rough consensus* regarding the Code's normative obligations must exist for it to have any influence on the corporate landscape. This rough consensus must not encompass each and every of the Code's recommendations or, perhaps even less, its suggestions. Instead, it suffices that there is among market participants a far-reaching agreement – a rough consensus – as to the binding quality of the Code's content. That this is the case has been verified by a number of empirical studies since its publication.⁹⁸ Secondly, the particular quality of the Code's

96 But see Hadfield, *id.* and Hadfield and Talley, *op. cit.*, n. 22.

97 J. Köndgen, 'Privatisierung des Rechts. *Private Governance* zwischen Deregulierung und Rekonstitutionalisierung' (2006) 206 *Archiv für die zivilistische Praxis [AcP]* 477–525; G. Borges, 'Selbstregulierung im Gesellschaftsrecht – zur Bindung an Corporate Governance-Kodices' (2003) 32 *ZGR* 508–40.

98 Van Kann and Eigler, *op. cit.*, n. 78.

three-pronged regulatory nature of information (restatements), recommendations, and suggestions in connection with the statutory disclosure requirements for recommendations leads to a complex constellation of the Code's regulatory impact. Where a rough consensus is being attained, it might set into motion the generation and crystallization of a *customary law* of corporate governance norms, namely, with the passage of time and an increasing acceptance of the Code among market participants. With the crystallization of certain corporate governance rules, parts of the law of corporate governance can develop into a regime which can further develop and solidify in the future. In light of such an incremental growth of norms through piloting (drafting a code), implementing (publishing it), and enforcing them (through a communication obligation set by the state on the one hand, and a market shaming process on the other), the Code can contribute to the growth of a corporate governance regime, which can become ever more comprehensive, while at the same time being more flexible, open, and adaptive to changes than a statutory provision would be.

Seen in this light, the Code is illustrative of how recommendations can be made to enter a regulatory realm which is occupied by both public and private norm-entrepreneurs, including the state that is pursuing corporate law reform, and private actors such as banks, investments funds, and expert groups calling for new rules to govern corporate conduct but also other stakeholders such as unions and business ethics propagators. From this perspective, the Code denotes how recommendations can increasingly be recognized as 'rules to be followed', long before they may grow into widely accepted norms of 'good governance'. That the latter is not oriented towards a reductionist concept of market efficiency is maintained by connecting the coordinative/regulatory dimension with that of authority/affectedness. It is against this background, then, that we need not only to return to the original question of whether the Code is law, but also dare to inquire whether we have been asking the right question.

As suggested, the perspective taken vis-à-vis reform issues related to corporate governance has been informed by both a public-private, official-non-official distinction between law and non-law, on the one hand, and a deeply felt scepticism about the chances for the law reform of historically grown, path-dependent norms and institutions, not only in 'Germany Incorporated',⁹⁹ on the other. And, indeed, the legacies with which we have been struggling, are weighty. In contrast to the institutional and methodological side of norm setting and law making in the context of increasingly 'privatized' law-making forms, most contemporary commentators of corporate law reform have not yet begun to embrace such a perspective. As it stands, law reform continues to be conceptualized largely with regard to a

99 P.A. Hall and D. Soskice, 'An Introduction to Varieties of Capitalism' in Hall and Soskice, op. cit., n. 54, pp. 1–68.

dualistic perception of state regulation and ‘intervention’ on the one hand and market order and self-regulation on the other. Traditionally, the German choice was thus: ‘To regulate or not to regulate’. And, the traditional answer was, indeed, to regulate.¹⁰⁰ The realm of options for the protection of shareholders’ interests have thus been perceived to range from coercive, binding law (‘vested rights’) to an approach of entrusting this protection to the capital market.

But it is against this background that – on both sides of the Atlantic, and beyond – the search for ‘good governance’ in company law will continue. It will do so by involving the wide range of public, private, and hybrid law-making forms to which we have increasingly grown accustomed. For this, valuable lessons can be drawn from earlier examples of commercial self-regulation (for example, standard contracts), as well as from other, contemporary developments in other fields (environmental law, commercial arbitration¹⁰¹). The rich spectrum of experiences on the national, European, and international level is reflective of an on-going search for ways to adequately mobilize societal knowledge while being aware and conscious of divergent national trajectories of socio-legal and economic development. The enactment of the Corporate Governance Code and the installation and, indeed, highly effective continuation of a ‘standing commission’ to review its acceptance and the need of amendments are both illustrations of a change in approaching law reform in a politically highly contested area. At the same time, the development of codes, in Germany as in many other countries, by private and public actors, both domestically and transnationally, suggests the emergence of legal regimes that can no longer adequately be explained with reference to the ‘state’ or the ‘market’. Instead, the emergence of a transnational law of corporate governance is characterized by an intricate combination of public and private agency, but also of a variety of regulatory, evolving instruments.

As corporate governance scholars continue to sharpen their analytical lenses for the study of formal/informal norm creation and the particular socio-economic cultures¹⁰² in which different hybrid regulatory approaches

100 See the brilliant account by G. Spindler, ‘Deregulierung des Aktienrechts?’ (1998) 43 *Die Aktiengesellschaft (AG)* 53–74, 53 ff., 57, stressing the different approach taken by American corporate law, which – for the most part – is state law, which is, in turn, ‘enabling’ law, giving firms great discretion in designing their governing law. ‘Corporate law’ as such, then, serves for one as a framework providing default rules, while, on federal level, it contains a considerable number of binding rules to safeguard investors’ interest and trust in the capital market.

101 See, for example, F. De Ly, ‘Lex Mercatoria (New Law Merchant): Globalisation and International Self-Regulation’ in *Rules and Networks. The Legal Culture of Global Business Transactions*, eds. V. Gessner, R.P. Appelbaum, and W.F. Felstiner (2001) 159–88.

102 See A.N. Licht, ‘The Mother of all Path-Dependencies: Towards a Cross-Cultural Theory of Corporate Governance Systems’ (2001) 26 *Delaware J. of Corporate Law* 147–205.

emerge, it becomes evident to which degree ‘comparative corporate governance’,¹⁰³ is being transformed into an inter-disciplinary regulatory analysis. Our focus on the way in which corporate governance principles are migrating between different national political economies, on the one hand, and newly forming regulatory spaces,¹⁰⁴ on the other, informs and accentuates our perceptions not only for the existing *differences* in national corporate laws, but more importantly for the fact that conventionally viewed ‘national corporate governance systems’ have long become transnationally constituted spaces of institutional and normative interaction and contestation. They are, thus, anything but peaceful, embedded legal orders. Instead, they are marked by a fundamental regulatory transformation in which social norms and ‘soft law’ become intertwined, changed, adapted, and interwoven within a regulatory environment of ‘hard’ law which itself is no longer stable.

The case of corporate governance reform, which I have highlighted in this paper, illustrates the degree to which the contested issues and the successively made proposals that grew out of a far-reaching and open-eyed gathering of information and evidence by national and supranational policy makers, expert committees, and scholars were of a veritable *transnational* nature, emerging from parallel reform efforts in other countries, among private and non-state actors around the world. In that sense, domestic company law reform must be seen as part of an emerging transnational legal pluralism. Its defining feature is the fundamental contestation of the very distinction that legal pluralism has always struggled with: that between law and non-law.

CONCLUSION

Corporate governance norms provide a telling example of the transformation of traditional state-originating, official norm setting in favour of increasingly decentralized, multi-level processes of norm production. At the same time, not only are norms produced on more levels: the nature of these norms themselves changes dramatically. This constellation, however, suggests nothing less than a fundamental contestation and erosion of boundaries between state and non-state actors, between official and unofficial law, between public and private ordering, and it is here where we see a recurrence but also a reformulation of Polanyi’s astute observations as to the pressures

103 M.J. Roe, ‘Comparative corporate governance’ in *The New Palgrave Dictionary of Economics and the Law*, ed. P. Newman (1998) 339–46.

104 M. Amstutz, ‘In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning’ (2005) 11 *European Law J.* 766–84; see, also, M. Amstutz and V. Karavas, ‘Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum’ (2006) *Rechtshistorisches J.* 14–32.

on market regulation to answer to the dynamics of what he called the danger of disembedding the market from society and of the ‘double movement’ of both emancipatory and containing liberalization.¹⁰⁵ The novelty of this blurring of boundaries between traditional norm creating and executing spheres appears as a direct result of a specific historical experience of a particular framework of socio-economic, political-legal regulation that characterized the twentieth-century rise of the social and welfare state.¹⁰⁶ This experience was aptly identified and premeditated by turn-of-the-century sociologists and lawyers, and powerfully captured by Max Weber’s sobering assessment of the disenchantment of modernity.¹⁰⁷ Irredeemably thrown into the iron cage of modern rationalization,¹⁰⁸ contemporary hopes are pinned – if at all – on a transformative realization of emerging self-regulatory potentials. Current attempts to rethink legal regulation as ‘regulatory governance’, ‘regulatory capitalism’, or ‘rough consensus and running code’ should be seen in this light.

The framework of transnational corporate governance regulation can only be understood against the background of, and in light of, the complex, intertwined nature of corporate governance regulation as it unfolds in a context marked by tensions between national and, for example, European aspirations for market competitiveness, market and polity integration dynamics, and the increasingly transnational nature of firms’ operations and regulations. A viable theory of transnational law making must seek to acknowledge these contextual tensions and draw on the various learning experiences with regard to market regulation in order to integrate them productively into an enriched concept of regulatory governance. Such a theory might then be able to capture the particular dynamics of transnational corporate governance regulation through its structuring capacities for distinguishing between the substantive and procedural dimensions of contemporary norm creation. The particular promise of a theory such as RCRC here lies in its capacity to draw conceptual lines between the experi-

105 Polanyi, op. cit., n. 33.

106 N. Luhmann, *Political Theory in the Welfare State*, tr. by J. Bednarz Jr. (1990); M. Stolleis, ‘Die Entstehung des Interventionsstaates und das öffentliche Recht’ (1989) 11 *ZNR* 129–47.

107 M. Weber, *The Protestant Ethic and the Spirit of Capitalism*, tr. by T. Parsons (1930); M. Weber, *On Law in Economy and Society*, tr. by E. Shils and M. Rheinstein (1967); D. Trubek, ‘Max Weber on Law and the Rise of Capitalism’ (1972) *Wisconsin Law Rev.* 720–53; R. Wiethölter, ‘Proceduralization of the Category of Law’ in *Critical Legal Thought: An American–German Debate*, eds. C. Joerges and D. Trubek (1985) 501–10; G. Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law & Society Rev.* 239–85; G.-P. Calliess, *Prozedurales Recht* (1999); P. Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag* (2000).

108 R. Sennett, *The Culture of the New Capitalism* (2006); T. Judt, *Ill Fares the Land* (2010).

mentation with norm-creating processes, which are understood as contextualized learning processes ('rough consensus'), on the one hand, and the assessment of emerging normative bodies on the other ('running code'). The promise of RCRC lies in its sensitivity with regard to knowledge emanating from concrete regulatory contexts that are recognized as norm proposals. Within the process of disseminating such norm proposals, they are gradually evolving into programmes of regulation. Emerging into a still-evolving running code, such norm programmes remain fully assessable from any factual or normative standpoint, while not sacrificing their ongoing regulatory function. As such, this model strives – not unlike competing governance concepts – for coherence, applicability and, ultimately, legitimacy.