The Incurable Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy

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Abstract:
Transnational private regulatory governance in a host of areas from food and product safety, aviation security, accounting, corporate and labor standards, as well as forestry and marine stewardship has long attracted the attention of those with concern for the public interest. The chapter recognizes these concerns, which are usually expressed in terms of a wide-ranging legitimacy deficit of private governance regimes. At the same time, I contend that there is no easy fix in response to regulatory developments that have their origin in nation-state transformation and in a functionally differentiated proliferation of global societal activity. I provide a brief account of what is here called the ‘Global Governance condition’ and of the particular challenges emanating therefrom for the development of legal agency. I then engage with law’s potential to resituate itself in a global context against the background of competing accounts of functionalism and normativism. Thereafter follows a discussion of the particular role played by private law in navigating public and private interests and of the (futile?) aspirations for a political critique. The next section contextualizes the public-private law dynamics against the background of a high degree of functional and sectorial specialization which characterizes transnationalization processes and significantly challenges any effort of designing overarching and inclusive models or concepts of post-national justice. The concluding section interrogates the prospects of an interdisciplinary and normative engagement with the pressing political regulatory challenges that arise from law’s transnationalization.

Keywords:
Transnational Private Regulatory Governance; regulatory capitalism; private governance; legitimacy; rule of law; critical theory; systems theory; methodological transnationalism.

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The Incurable Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy*

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A. Introduction

As transnational commercial lawyers have long known, border crossing, globe-spanning economic activities and business practices prompt legal responses that extend the public-private interplay and legal pluralism of the nation-state to – literally – unchartered territory.¹ In the transnational space of exchange and trade of the modern age, law evolves through the interplay of “transnational lift-off and juridical touchdown”², constantly re-drawing the boundaries between private agency and public authority. As for lawyers, these contemplate whether or to what degree segments of this transnational regulatory regime – the mysterious and mesmerizing lex mercatoria – should properly be called law.³ And while from the perspective of sociology

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*This chapter is part of an ongoing research project investigating the tensions between the global proliferation of private regulatory arrangements and a growing concern regarding the protection of public interests in this constellation. The following pages are based on my presentation at the American Society of International Law – ASIL – International Legal Theory Interest Group Symposium, ‘The Rise of Non-State Law’, Tillar House, Washington, D.C., in May 2013. I am grateful to Professor Michael Helfand for the invitation and for the organization of a very stimulating and diverse symposium. It built on earlier presentations at Indiana University, Maurer School of Law, at Osgoode Hall Law School in Toronto, the European University Institute, Florence, at McGill University, Faculty of Law and the Law School of Graduate Studies, Nagoya University, Japan. I am indebted to Yuki Asano, Larry Backer, Paul Berman, Takeshi Fujitani, Michael Helfand, Sally Merry, Christiana Ochoa, Alessandro Somma, Colin Scott and Dai Yokomizo for generous comments and feedback. Finally, I am grateful for the permission to draw in very small parts on an essay on ‘The Ins and Outs of Transnational Private Regulatory Governance’, published in the German Law Journal in December 2012.

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and geography, the evolving landscape challenges conceptions of location and boundaries⁴, for political science the focus must be on the element of authority.⁵ In other words, the urgent political question of transnational governance regards control, the emblem of power. As the sites and trajectories of transnational governance continue to span more and more regulatory areas, the combined question of ‘who’s in charge and to whose benefit?’ has to move into the center of an interdisciplinary engagement. Law’s history of interdisciplinarity situates it well for a productive contribution to this enterprise, which is one that must go beyond lip-service to the need of thinking about law and globalization from an interdisciplinary perspective; crucially, it is the normative challenge of transnational governance which prompts a reflection on its stakes, interests and aspirations. Law’s engagement with the spatialization of transnational governance regimes under post-national⁶ conditions must address the normative challenge, political philosophers and political scientists have long been addressing.⁷ The question raised in this chapter is how law and, more specifically, developments in private law theory address the normative challenges of transnational private regulatory governance. The larger issue behind this question concerns private law’s contribution to a legal theory of global governance, with the contention – from a historical perspective – that private law has always played a central role in social regulation.⁸ The chapter will provide a brief account of what shall here be referred to as ‘the Global Governance condition’ and of the particular challenges emanating therefrom for the development of legal agency (B) and for law’s imagination against the background of competing accounts of functionalism and normativism (C). Thereafter follows a discussion of the particular

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⁵ See now the brilliant analysis by Nicole Roughan, Authorities (2012), as well as by L. C. Backer, 'Governance without Government - An Overview', in G. Handl, J. Zekoll and P. Zumbansen (eds), Beyond Territoriality. Transnational Legal Authority in an Age of Globalization (Brill, 2012),


role played by private law in this context in navigating public and private interests (D) and the (futile?) aspirations for a political critique (E), while the next section contextualizes the public-private law dynamics studied earlier against the background of the high degrees of functional and sectorial specialization that characterize transnationalization processes and significant challenges these pose for any effort of designing overarching and inclusive models or concepts of post-national justice (F). The concluding section interrogates the prospects of an interdisciplinary and normative engagement with the pressing political regulatory challenges that arise from law’s transnationalization (G).

B. The Global Governance Condition: Questioning the Standard Account

As in Shakespeare’s plays, it is only when a third party arrives, knocks on the door and enters the scene that the actors on stage are bound to see more clearly what it is they are in fact struggling with. Public law’s catch-up game with transnational private regulatory governance over the past decades is illustrative in that regard. Whether the focus is on food safety or intellectual property rights attached to foods, on accounting standards, on forestry or marine stewardship, on the taming of multinational corporations or the promotion of human rights


14 S. Ponte, 'The Marine Stewardship Council (MSC) and the Making of a Market for “Sustainable Fish”', (2012) 12 Journal of Agrarian Change 300-315. See also the main site for the Marine Stewardship Council at: http://www.msc.org/.

principles\textsuperscript{16} as well as social, labor\textsuperscript{17} and environmental\textsuperscript{18} standards in the context of trade agreements\textsuperscript{19} and finance arrangements\textsuperscript{20}: each field raises pertinent questions as to the possibilities of influencing the evolving governance structures with a view to protecting public interests and social, environmental and cultural values. Most certainly, the complexity of these challenges drives the general state of alert, in which policy makers, scholars, activists, community groups and NGOs have been for a long time, being engaged in political awareness building and analysis, policy development, agenda formulating and resistance.\textsuperscript{21} While for the “West” the globalization challenge continues to be analyzed above all against the background of an alleged erosion of state sovereignty\textsuperscript{22}, the analysis offered by scholars focusing on indigenous peoples\textsuperscript{23} as well as on constitutional developments in the “Global South”\textsuperscript{24} points to the significant asymmetries and omissions in this “post-national” narrative.\textsuperscript{25}


\textsuperscript{20} B. J. Richardson, \textit{Socially Responsible Investment Law: Regulating the Unseen Polluters} (Oxford University Press, 2008). See also the website: http://www.ussif.org/.


It is against this background that the original stage setting for our analysis will likely have to be revisited in a fundamental way. It is within a Western, post-nation state scenario that the question about the role of private law in an ever faster proliferating realm of “private” transnational regulatory governance unfolds against the growing concerns with the precariousness of maintaining public interest representation (so-called “input-legitimacy”26) pathways on a global level. From the Global South perspective, the red thread of the narrative which traces the rise of the nation-state from the middle-ages through nationalization and constitutionalization processes and two world wars towards the consolidation of an international political order of sovereign and equal nation states27 is in fact much more porous, ripped and stitched together throughout time, revealing a host of contestations, alternative paths and roads not taken.28 We can hardly overestimate the significance of the tensions in this constellation, which arise between the standard Western account of the nation-state and its claim to political sovereignty and economic competition on the one hand, and the challenging of that account through evidence of the omission, suppression, violence and asymmetry that really shaped the evolution of the international order, on the other.29 It is one of the greatest challenges in global governance research in general, and in legal theory in particular, to find a suitable, adequate way to address the relationship between “societal” and “political” ordering, between market and state, private


and public, against the background of such contested framework narratives. But, while such context-sensitive work has been done for a while already in the realm of human rights theory in the context of a critical engagement with ‘comparative legal traditions’ and ‘cultures’, promising evidence in the area of private regulatory governance, or in private law more generally, is still lagging behind. As private lawyers strive to underscore a normative foundation for their field, they point to private law’s efforts in resisting the continuously forceful, neo-liberal thrust of the prevailing international economic order. Meanwhile, scholars who associate themselves with different strands of systems theory, regulation theory or critical theory focus on the messy-ness of the inchoate and highly decentralized landscape of transnational private regulatory governance, rendering the boundaries between a “public” and a “private” law approach to economic globalization more ambiguous. In contrast then, the institutional and constitutionalist investigations by political scientists focus on questions of agency, interests, and accountability, and such studies find their echos, above all, in public and public international law scholarship. By contrast, private law and private law theory are, for the most part, still the missing voices here, although the field has a rich tradition in critically


investigating the regulatory challenges that arise from a state’s political apparatus responding to rapid societal and economic change.\textsuperscript{37} Furthermore, it seems obvious how the task to decipher the hybrid regulatory code of transnational governance would require a substantial contribution from scholars working in these traditions.\textsuperscript{38}

I want to argue that the re-invigoration of private law within the political science and public law dominated discourses on global governance must occur against a background of a comprehensively reconceptualized framework of how we – and others – are speaking about globalization and the law in the first place. This reconceptualization is prompted by the significant challenges that post-colonial and third-world-approaches-to-international-law scholars have been formulating in response to the otherwise canonic and typical account of the Westphalian rise of the Western nation-state, its transformation in the twentieth century and the erosion of the nation-states’ regulatory sovereignty in an increasingly globalized world of the twenty-first century.\textsuperscript{39} The post-colonial challenge in legal and political theory makes more than clear today that a re-invigoration of private law’s abilities to “pierce the legal veil” in an attempt to render visible the social and economic inequalities that pervade the realities underneath the floorboards of rules and principles in legal argument\textsuperscript{40} can no longer take the troubled regulatory history of the Western welfare state as its obvious starting point and as its all determining frame


of reference. The next order of the day must be to ironicize\(^{41}\), to relativize\(^{42}\) and to ‘provincialize’\(^{43}\) the ever so sophisticated analysis of the decline of the regulatory (Western welfare) state in the 1970s and 1980s\(^{44}\) in order to more adequately interrogate the ‘public-private’ divide – a pillar in the standard Western account of law’s historical development\(^{45}\) – against the background of the present transnational context. Such a project, however, would go beyond what can even remotely be attempted in the confines of these brief remarks. Meanwhile, it helps to better understand the confined nature of most of the conversations about the legitimacy deficit in (private) global governance, if we take note of the fact that before long we will need to substantively widen our scope of analysis.\(^{46}\) In other words, it will no longer be enough to engage in efforts of patching the legitimacy deficits of transnational private regulatory governance solely against the background of a (Western) welfare state having experiencing dramatic erosions of his regulatory powers. Instead, in the years ahead we will need to critically engage with the phenomenon of private regulatory power against the background of a far-reaching, post-colonial critique of the universalist accounts of the rise of the Westphalian international order (of sovereign nation states) and of their subsequent demise through “privatization, (Europeanization) and globalization.”\(^{47}\)

C. The Aspirational, Navigational Role of Lawyers in the Transnational Space


\(^{44}\) See only the contributions to G. Teubner (ed) Dilemmas of Law in the Welfare State (Walter de Gruyter, 1986).


\(^{46}\) An area where this North-South dialogue has been taking place for quite some time, however, is international investment law: see eg the work by M Somarajah, G van Harten or D Schneiderman.

For the time being, the engagement with the legitimacy deficit of a proliferating, neo-liberal global order has been based on the ‘rise-and-fall‘ narrative of the Westphalian order and its subsequent transformation into fragmented international legal regimes and hybrid, public-private governance arrangements.\textsuperscript{48} The explanation offered for the precarious stance of public values in the emergence of a market-driven sphere of global private self-regulation has had its regular origin in the alleged exhaustion of the nation state’s regulatory capacity – with globalization merely accentuating and amplifying the state’s inherent adaptation problems to complex social arrangements and financial pressures.\textsuperscript{49} In light of overwhelming, spatial regulatory challenges such as climate change, security, migration, poverty and hunger, legal theorists began translating the quite recently learned lessons from the death of the “regulatory state“\textsuperscript{50} and the rise of its successor\textsuperscript{51} into an evolving theory of global governance, which aspires to generate a multidisciplinary account of the challenges of globalization for political and legal theory. While scholarly contributions to that endeavor fill the metaphorical shelves of ever faster expanding online library resources\textsuperscript{52}, we can – for the purposes of our present inquiry – distinguish between two broad strands in legal scholarship on this question, which turn out to largely correspond to alternatives in the underlying social-political theory. The rough demarcation, then, emerges as between what we may call “functionalist“ and “normative“ approaches to the analysis of law’s role in a globalized world. While scholars sympathizing with the former approach seem more ready and willing to accept a high degree of world society’s functional differentiation into specialized, self-regulating fields of activity (and corresponding rationality\textsuperscript{53}), scholars who


endorse a normative stance have tended to highlight the dramatic risks of the loss of coherence and legitimacy in a fragmented global order.  

Regardless of the side on which scholars would see themselves in this dispute, each group would find itself struggling over at least a working definition of law in this global context. Again, the juxtaposition would follow well-known lines: while one group (the “normative” one) adhered to a model of law, which would be defined through an institutionalized framework to produce, enforce and adjudicate binding norms, the other group – in a functionalist vein – would understand law, above all, as a process of stabilizing expectations. Meanwhile, complementing and complicating these accounts, we find two contentions about the nature of law, which shift the definitorial perspective towards an assessment of the long-term effects of legal governance. Here, we find, on the one hand, assertions whereby law primarily serves purposes of emancipation and should thus be associated with ideas of hope, liberation, “voice”), while law’s character, as defined on the other hand, is governed by its function as oppressor, silencer and violent actor.

Now, the dramatic and sobering experience of those engaged in the functionalist-normative debate over law’s role in global governance has been that these distinctions do not matter that much at the end of the day. From the perspective of ever faster evolving regimes of transnational private regulatory norms and standard setting – seen as potentially responding to a decline of state regulatory capacity by filling public goods gaps – it became more and more clear, that the second definitional approach of law’s globalized nature might in fact be the most appropriate: law in a global context comes in many forms, shapes and sizes but its main function can be seen

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54 See the contributions to A. v. Bogdandy/I. Venzke (eds), International judicial lawmaking on public authority and democratic legitimation in global governance (Springer, 2012).


as consisting of stabilizing the expectations of its stakeholders.\textsuperscript{58} That, however, renders the original starting point of an ambiguous, complementary state of public and private law perspectives on global governance ever more poignant. Recognizing that the “public” rescue of private regulatory arrangements would have to occur in a context that we find increasingly difficult to assess on the basis of an all-encompassing, uncontested normative foundation such as a universalist human rights account, the bright line distinction between public and private begins to fade once more. In a fragmented global sphere, which is marked above all by existential contestations of normative stances, worthy interests, viable representation and political voice, there appears to be little room for a one-size-fits-all theory of global justice. Instead, in a gesture of denial, we may either resort to quasi-revisionist, post-Westphalian accounts of state sovereignty\textsuperscript{59} which entirely ignore the post-colonial and indigenous contestation of the international legal order narrative or we can throw ourselves into the god-less and center-less realm of global functional differentiation, in which the stakes of a transnational merchant community\textsuperscript{60} compete with the moral stakes raised by indigenous, epistemic and other situational communities. In that constellation, even a renewed interest in “power”\textsuperscript{61} is not likely to solve the differentiation conundrum we are faced with per se, but will have to take the diverse accounts of what constitutes societal, institutional, and structural power as a necessary starting point. The differentiation of human interactions and epistemes\textsuperscript{62} has rendered the normative landscape unpenetrable and unintelligible for any attempt to provide an exclusive, coherent account of who’s “up”, “down”, “right” or “wrong”.


That said, where can we situate today the ever more pressing anxieties about the legitimacy deficits of transnational private regulatory governance? It appears as if we are back to where we started from, with the only difference now being, that we realize that it is not just a simple choice between a ‘functionalist’ and a ‘normative’ theory of global regulatory governance. Instead, we see that the former gives expression to the undeniable degree of societal differentiation on a global scale, while the latter points to the complementing efforts to submit these processes to a critical engagement. While proponents of the systems theory account of societal differentiation would contend that such ‘critical engagement’ is impossible as there is no general outside vantage point from which such interrogation would be possible, critical (legal, political) scholars (must) insist on a way in, behind and underneath this facade.

Surely, and in light of the above described tensions, the main character of transnational legal governance must be defined as functionalist, in that law (along with various forms of “soft” law, norms, codes, standards, recommendations and guidelines) responds to the regulatory-organizational challenges of complex fields of global interaction. Echoing the changing roles that lawyers have assumed in the context of transformed and globalized state functions in the twentieth century, transnational lawyers today must be at once litigators, policy makers, legislators and norm entrepreneurs, activists and community organizers. The nature, roles and functions of the transnational lawyer evolve in relation to the functional differentiation of their areas of engagement. With the rise of expert knowledge, the scrutiny of competing opinions and epistemes, law and legal consultancy fuses into a complex, multi-tiered enterprise of regulatory governance. And while the normative challenges arising from these developments accrue, the questions of how to adequately address them grow in complexity. Lawyers, stepping out of

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their traditional roles of serving a client’s interests and/or promoting the public interest, find themselves engaged in navigating ethnographies of competing stakes and interests, mapping and identifying competences and authorities, formulating policy and identifying appropriate levels of regulation, contributing to the formulation and creation of adequate norms, while maintaining, overall, a highly functional, particularized outlook and focus. Lawyers as regulatory actors, then, operate in newly expanding frameworks, which evolve around the transformation, disaggregation and transnationalization of municipal institutional safeguards and representation processes. International organizations, regulatory networks and regimes, hybrid governance institutions and shifting interest coalitions such as the “G 20”, but also grass-roots movements, community organizations and social movements, as well as information and community building fora for new voices, new movements and actors such as the World Social Forum bring core political concerns around representation and ‘affectedness’, participation and accountability into sharp relief. If a straight-forward, institutionally and normatively coherent, ‘public’ (rescue) response to the legitimacy woes of transnational private regulatory governance were possible, then how could such a response look like – in view of the diversified institutional and organizational landscape we just depicted? From which vantage point should we begin to look for answers to the question of who’s in and who’s out? Attempts to formulate responses are made from within a host of disciplinary, conceptual imaginations, including Global Administrative Law, Global Constitutionalism and Cosmopolitanism, Regulatory Capitalism as well as


Transnational Governance.77 Offering rich accounts of the institutional and normative conundrum presented by law’s entanglement with globalization, this scholarship can no longer easily be categorized as either descriptive or prescriptive, an observation which seems to confirm our previous contention that it is unlikely to find a ‘quick fix’ for the increasingly detailed accounts of regulatory differentiation and ever more pressing normative questions.

D. Private Law’s Role in the Transnational Space: Complicity or Resistance?

So, what can be “done”? The continuing proliferation of transnational private regulatory governance raises dramatic challenges to conceptions of legal authority, legitimacy and public regulation of economic activity. The pace at which these developments occur is set by a coalescence of multiple regime changes, predominantly in commercial law areas78, but also in the field of internet governance79, corporate law80 and labor law81, where the rise to prominence

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77 See the contributions to T. Hale/D. Held (eds), Handbook of Transnational Governance. Institutions and Innovations (Polity Press, 2011).


of private actors has become a defining feature of the evolving transnational regulatory landscape. One of the most belabored fields, the transnational law merchant or, *lex mercatoria*, for some time had assumed the status of a *poster child*, as it represented a laboratory for the exploration of “private” contractual governance in a context, in which the assertion of public or private authority had itself become contentious.  

The ambiguity surrounding many forms of today’s contractual governance in the transnational arena echoes that of the far-reaching transformation of public regulatory governance, which has been characteristic of Western welfare states over the last few decades. What is particularly remarkable, however, is the way in which the depictions of “private instruments” and “public interests” in the post-welfare state regulatory environment have given rise to a rise in importance of social norms, self-regulation and a general anti-state affect in the assessment of judicial enforcement or administration of contractual arrangements.

It seems obvious by now, that to contend ourselves with a recurring focus on the law/non-law nature of the *lex mercatoria* falls short of grasping the more important question, namely, why this distinction matters and what the stakes are of searching for a solution in this context. To be sure, striving to either ascertain or to reject the legal nature of the predominantly “self-made”

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norms of the *lex mercatoria* redirects attention to the setting and context in which legal norms are created, enforced and adjudicated. From a traditional perspective, such questions have regularly been raised with reference to dimensions of legality, on the one hand, and legitimacy, on the other. In response, I contend that what appears to be emerging from the alluded-to rise in importance of private as well as hybrid actors engaged in transnational norm production, standards, guidelines, codes and best practices, however, is a new concept of “context”. Whereas much of legal theory and philosophy, especially in the analytical tradition, chose to scrutinize the nature of law and legal ordering without taking a greater interest in the context or environment, in which legal ordering as well as social conflicts occur, a legal pluralist account of law challenges such an approach in a fundamental way. Once the reference framework, illustrated by assertions of the “rule of law”, “legal unity”, “normative hierarchy” or the “separation of powers” becomes questionable in a global setting, law’s relation to its ‘outside’, its context, as it were, moves into the center of analysis. From that perspective, the legal pluralist critique of the monist model of legal ordering can productively inform the analysis of transnational law.

The law-state nexus, which has for so long been one of the centrally underlying assumptions at least in ‘Western’, ‘Northern’ legal epistemology, becomes relativized to the degree that regulation through law becomes ‘de-centred’ (J. Black). This de-centering of state-originating law into highly specialized fields of norm production had long marked the transformation of the welfare state and is further propelled and amplified by the transnationalization of law.

These developments, as long as they were conceived to be taking place within a more or less institutionalized nation state setting prompted legal sociologists to question law’s and lawyers’ grasp of the reality in which legal decisions were being made, norms produced and their effectiveness measured. The legal sociological contribution to a fundamental critique of law

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can hardly be overstated, and the current interdisciplinary engagement with transnational law and regulatory governance must be seen as a continuation of these approaches.\textsuperscript{89}

As a result, the “context” in which the analysis of law, its foundations and its effectiveness takes place is itself one which cannot simply be ‘seen’\textsuperscript{90} or taken for granted when contemplating the legal nature of regulatory norms. Instead, context has become a factor that forms a crucial part of our assessment of the legal nature of the norms and their processes of creation and implementation under consideration. For example, a simple distinction between a “national” and a “global” context of law does not go far enough in addressing the correlation between a theory of law and a theory of the context in which law is embedded. Precisely because processes of ‘globalization’ or ‘transnationalization’ have decentered, relativized and provincialized the prior assumed role of the state in the production of legal norms, we need to scrutinize the new environment in which norms are being created and their nature ascertained.

Such a shift of perspective has far-reaching consequences for legal theory and for the philosophy of law but also for legal doctrine, in that many of the routinely assumed institutional frameworks for references to “public” or “private” law, for example, constitutional and administrative law on the one hand, contract, labor or corporate law on the other, can be seen in a new light. With the prevailing unavailability of a ‘world government’, or a ‘global constitution’, lawyers find themselves not only in an unavoidable, but necessary conversation with other disciplines. Such conversations concern the nature and structure of a sphere, which continues to be depicted through labels that hide rather than reveal the disciplinary grounding of the analytical assessment. References to “global governance”, “world society” or “global constitutionalism” abound, but their definitional scope might appear less targeted than would likely be desired by those hoping to gain a clearer understanding of the consequences of globalization for their respective discipline. At the same time, the promise of such conceptual labels should be seen to lie in the opening up of perspectives that they generate. Global governance, arguably, is a term


with a predominantly operational function within a political science framework, but it is by no means limited to the categories and concepts of that discipline. Instead, global governance cuts across disciplinary boundaries in that it pushes established frameworks (“politics”), distinctions (“public”/”private”), instruments (“elections”) and concepts (“sovereignty”) to extreme limits, at which point it becomes obvious how this strain on the architecture of one discipline is echoed and similarly resounds in other disciplines as they are dealing with pressures of globalization. From that perspective, global governance becomes a formula with which we can depict changes internal to respective disciplinary frameworks on the one hand, and through which we can verbalize the coalescing and overlapping of different disciplinary perspectives in a collaborative effort to make sense of the transformations associated with globalization, on the other.

What then, however, can or should be the role of law? Earlier in this chapter, we identified the dominant definition to be a functionalist one, a definition which holds law to be concerned, above all, with the stabilization of (highly heterogeneous) expectations of various stakeholders. At the same time, it is possible then to generalize the place of such defined law in the context of globalization. I contend that under conditions of globalization, “law” assumes the role of providing for a particular perspective on regulatory governance. The latter is no longer fully consumed under the heading of law, but must instead be deconstructed through different disciplinary lenses, only one of which is “law”. In light of the functionalist rule of law framework on the global level that we identified earlier, say, with respect to the regulation of global financial markets\(^\text{91}\) or the protection of social rights\(^\text{92}\), the simultaneously increasing proliferation of private agency in the creation of governing norms and their dissemination\(^\text{93}\) causes a considerable constitutional itch. It comes as no surprise, then, that from a host of disciplinary, descriptive as well as prescriptive perspectives, the prospects of a “legal” framework for global governance have themselves become a major concern. Ranging from law to sociology, political science, geography and political philosophy, law’s disembeddedness from


\(^{93}\) See for example, TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS. THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2012).
the nation-state prompts inquiries into the possibilities of ‘reembedding’ law or, alternatively, transposing and translating nation-state-“tested” frameworks and categories of legal regulation into the global governance context.\textsuperscript{94} Whatever might be the outcome in the short- or longterm, ‘law’s empire’ has come under considerable pressure by having to reassess its role and its bearing in a complex regulatory and normative environment.

**E. Law and Society: A View from Everywhere – or, Nowhere?**

Just to be sure, the ongoing disputes over law’s global role, including its institutional and normative dimensions – however these may be contested as non-universalist – occur in the context of deep-running divides between competing theories of society and social organization. And, it is against that background that the so far offered observations with regard to the contested legal nature of transnational private regulatory governance are but stand-ins or echoes of much larger concerns with the fundamental transformation of legal regulation today. As we saw, the contentions concerning, for example, lex mercatoria’s “autonomy” and the legal nature of its norms then illustrate the pressure that the continuing societal differentiation and an increasingly fragmented regulatory transnational fabric creates for legal doctrine, terminology and concepts. This suggests, then, that questions such as those pertaining to the legal versus non-legal nature of norms – which are clearly central not only to lex mercatoria but to the phenomena of transnational private regulatory governance more generally – are pointers to the more pressing and previously alluded to need to fundamentally rethink and re-imagine the relationship between law and society in light of a loosening state-law nexus. From this perspective, it becomes a necessity for legal scholars to consider theories of society when making statements about the quality and function of legal norms.

Importantly, such questions are not in any way new to law and legal scholars. Over time, the need to adapt law, its theory, doctrine and instruments to ever-changing societal conditions has only grown. And, however contested law’s place and contribution to such changes became, such investigations regularly unfolded with a view to the ambivalent, constantly changing relations

between law and the state. Regarding the latter, depictions of the role of the state shifted between ruler and protector, mediator and facilitator, long before state transformation would become a topic of studying the impact of globalization on law. For an emerging transnational legal theory, then, it will be decisive to learn how to engage with the lessons of the nation-state as well as with the increasing calls for their provincialization. An engagement with the regulatory experiences of the Western rule of law and welfare state of the twentieth century remains crucial in light of the fact that the nation state provided the institutional, but also the discursive context in which law’s role was negotiated, contested and continually re-defined. The content and reach of such lessons, however, depends on the degree to which it is possible to simultaneously reflect on the underlying theory of society. As noted earlier, we need to distinguish between the institutional and normative stakes of a state/society model, on the one hand, and those of concept which challenges the hierarchy-model of “state and society” by emphasizing the dynamics of co-evolving rationality systems (such as the economy, politics, religion, art, or law) in the context of a functionally differentiated (world) society, on the other. Such a distinction remains significant as it helps us to see more clearly the degree to which much of the current Western legal response to globalization has so far been shaped by a narrow account of state formation and subsequent changes. While this challenge lurks beneath the contemporary preoccupation with the perceived gap between a functionally minded mode of transnational regulatory governance and normative contentions of justice, this is not always easy to recognize and even more difficult to address. The reasons for this contraction in view can be found in law’s struggle with the overwhelming evidence of functionally differentiated societal activities. While in the context of the nation state, law was primarily tasked with stabilizing both institutional and normative expectations, its role in a differentiated world society appears to be undermined and relativized. Central to this shift is a reorientation of the function foremost

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ascribed to law: rather than stabilizing normative expectations, the law can now be seen as having to stabilize, above all, cognitive expectations. In other words, when no societal system can claim normative superiority or primacy before another, law – from the perspective of systems theory – becomes a broker, a mediator and translator of competing, intersecting bodies of knowledge.\textsuperscript{99} One consequence of this reorientation is law’s turn to an openness of goals, as its primary function is no longer defined – as from a critical theory perspective\textsuperscript{100} – as one to bring about desired (normative) results, but to open up, to facilitate, institutionalize and consolidate learning opportunities.\textsuperscript{101} Seen through this lens, the primary task for law is to reflexively facilitate the mediation of and between possibly very diverse and complex societal rationalities, without being able, in that process, to rely on previously established, hierarchically structured ordering patterns.\textsuperscript{102}

It is difficult to overstate the methodological consequences of this shift of perspective, from which law is seen to assume a fundamentally different role than that, which we would ascribe to it on the basis of both a positivist, Kelsenian, or a normative, Fullerian or Dworkinian, model. If law’s function could adequately be described as one of mediating, translating, and brokering competing and conflicting societal rationalities and meanings, the question with regard to law’s proper core would become urgent. This concern with an allegedly fundamental and inherent


normative orientation of law\textsuperscript{103} becomes the more pressing the more law is placed on the same level as other forms of societal communication – as a systems theory approach would suggest.

\section*{F. Transnational Private Regulatory Governance and the Empty Place of Politics?}

In light of the foregoing, it would appear that there are significant obstacles for a political, “critical” engagement with the ideological underpinnings of the purportedly market-oriented thinking which characterizes much of today’s discourse around transnational economic governance. Not only are many of the avenues of political will formation and contestation which have developed in the state’s constitutional system unavailable in the context of transnational regulatory regimes\textsuperscript{104}, but the interest constellations of ‘affected’ parties and stakeholders in many of the instances alluded to before are of such complexity that traditional political discourse does not seem adequately equipped to provide this diversity with consequential voice.

Against this background, then, it seems that there is some merit in drawing on learning experiences with legal-political critique and legal sociological insights from within the nation state as we ascertain the opportunities for a political critique of the fragmented, transnational regulatory governance landscape. In particular, the insights from ‘post-interventionist’, ‘post-regulatory’ law\textsuperscript{105} as these theoretical approaches evolved in response to the transformation of the Western welfare state\textsuperscript{106} during the last decades of the twentieth century, relate to the far reaching proliferation of alternative and hybrid forms of regulation. These transformations have

\textsuperscript{103} See only L. Fuller, \textit{The Morality of Law} (Yale University Press, 1964).


left deep imprints in law in general, but particularly in the taught and practiced discipline of administrative law.\textsuperscript{107} At the same time, private law scholars have been very prolific in tracing and further theorizing the shifts between public and private governance forms, which have greatly increased over the past decades.\textsuperscript{108}

This constellation, arguably, offers considerable opportunities also for a critical-political engagement, which at first sight seemed elusive from the perspective of a sociological account of the world society.\textsuperscript{109} In the larger context of the field that has been referred to a number of times so far in this chapter – \textit{lex mercatoria} – such opportunities for contestation have become more frequent. In this respect, prominent and lively fields of engagement include bilateral investment treaties\textsuperscript{110}, financial regulation\textsuperscript{111} and corporate law\textsuperscript{112}, in ‘law and development’\textsuperscript{113} as well as the


growing intensification in transnational human rights litigation in the context, for example, of mining operations in Latin America or North Africa. These efforts are of particular importance in our context, as they testify to both inroads and challenges in connecting discourses with a focus on nation-state based changes in regulatory governance with those which at first sight appear to be of a distinctly, if not exclusively global and transnational nature.

To be sure, international economic law is deeply impregnated by the socio-economic imagination of market governance and as such sits only uneasily with regard to a confinement to territorial boundaries or, levels of governance. With a view to the just- referenced areas in international economic law, we can witness a growing number of efforts to initiate and consolidate processes of political and legal advocacy, all of which seem to be characterized above all by a focus on process, facilitation of discourse and contestation, but not on a however narrowly defined set of principles or values. These examples testify to a significant opening up of opportunities for legal-political critique. To the degree, however that governance challenges are identified as emerging on either a national or a global level, the relevance of approximating ‘national’ and ‘transnational’ governance discourses lies in making visible the parallels between struggles in both spheres over an adequate identification and representation of affected “interests”. Here, and there, the question is how to identify and to verbalize what is at stake – and, for whom. And yet, in light of the foregoing, to place the question, ‘What is at stake?’ at the center of such a parallel reading of national and transnational governance discourses is

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115 I. Bache/M. Flinders (eds), Multi-level Governance (Oxford University Press, 2004).


enormously ambitious, if not ill-directed. Because, what should be the reference point for the related assertion of those interests that testify to what is at stake? How can we assume to identify the correct starting point in a world of contested identities and meanings?

G. Transnational Private Regulatory Governance: Still a Case in Point for “Legitimacy”?

Looking back, what have we learned in terms of identifying starting points for a critical engagement with highly specialized regimes of transnational private regulatory governance? As noted before, much of the work done by lawyers in this global governance realm has either called for a public interest defense or singled out “legitimacy” as a potentially effective lever to scrutinize the legal nature of these transnational regulatory structures. But it is here that the complexity of the global governance context in relation to any encompassing concept of legitimacy has become more visible. In the transnational regulatory context, the pursuit of legitimacy depends on a comprehensive assessment of the different dimensions of this idea which lie beyond otherwise routinely assumed linkages between legality and its grounding in, say, democratic legitimacy.¹¹⁹ Not only has law become disembedded, but law’s approaches to address its perennial legitimacy concerns¹²⁰ have also lost a lot of their footing.¹²¹ Legitimacy concerns for the law today are inextricably caught up in law’s existential efforts to redefine and to ascertain its role in societal governance altogether. As such, legitimacy in law and of law has become a laboratory for a multi- and interdisciplinary engagement with law’s relation to and its place in society.¹²² Following the differentiation of modern world society, legitimacy concerns

¹²⁰ An illustration of this continues to be the debate between H.L.A. Hart and L. Fuller. See Herbert Lionel Adolphus Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593 (1957/8), and Lon L. Fuller, Positivism and Fidelity to Law – A Reply to Professor Hart, 71 HARV. L. REV. 630 (1957/8). See the essays concerning this debate in The Hart-Fuller Debate in the Twenty-First Century (Peter Cane ed., 2010).
¹²² One of the best studies outlining this context is by E. Darian-Smith, Laws and Societies in Global Contexts. Contemporary Approaches (Cambridge University Press, 2013).
for law arise and are being addressed within highly sectionalized and specialized areas of regulatory governance, that is to say, they arise in a context that puts enormous pressure on any attempt to submit this constellation to an overarching theory of politics, or justice. But, at the same time, one can discern a distinct and pressing concern with this move away from an embedded system of law to a “global”, decentralized regulatory governance framework. This concern is fuelled, partly, by anxieties over a possibly empty place of politics in the evolving global governance landscape. Albeit, neither the concept of politics itself nor the institutional or procedural framework in which we would have to re-situate politics today are evident. This leaves lawyers, in particular, as they set out to redraw the map of law’s legitimacy in a global context from the perspective of a proliferating transnational private regulatory governance framework, in a considerable dilemma. Faced with a multitude of overlapping, fast-evolving private regulatory governance regimes in areas ranging from financial to environmental regulation, investment law or commercial transfers, lawyers must continue to both expand their expertise with regard to specialized, technical transactional areas and appreciate the


relevance of non-legal ordering and regulatory concepts which underlie and inform many of the emerging governance regimes. 130

Transnational private regulatory governance as a field of research sits squarely in the discursive context of state transformation, both from a national 131 and a transnational 132 perspective, as it addresses a fundamental de-centering of both rule creation, dissemination and adjudication processes and of the conceptual frameworks with which we have learned to measure the legality and legitimacy of these processes. 133 This unsettling of the state-law nexus has come under broad scrutiny, a development that finds expression in numerous iterations under titles such as Law and Globalization 134, Global Legal Pluralism 135 as well as Transnational Law. 136 Notwithstanding their analytical and conceptualizing function, such frameworks are drawn upon in an attempt to address the contested nature, form and scope of law ‘in a global context’, that is a context that has greatly amplified law’s normative and pluralist challenges. The multifaceted phenomenon of transnational private regulatory governance can here serve as a powerful illustration of how the analytical interest in the maintenance of the state-law nexus must move away from law itself and towards an engagement with the Actors, Norms and Processes [ANP] in which law appears to be


132 Gregory Shaffer, Transnational Legal Process and State Change, 37 LAW & SOCIAL INQUIRY 229 (2011)


caught up. These three categories, then, assume the role of *translation devices* through which governance discourses as they have unfolded in the nation-state context can be put in relation to governance discourses on the transnational level. Instead of transposing nation-state originating concepts such as the rule of law, judicial review or separation of powers onto the global scale, the use of ANP might help to highlight the parallels but also the distinct differences and incompatibilities between known regulatory concepts and those which seem to be emerging on the transnational level. From the perspective of an ANP approach to the study of “law and globalization”, transnational private regulatory governance offers numerous crucial insights into the newly forming relations between law and society in a global context. Part of the reason for the lively scholarly interest in these processes can be found in the way, that these transnational regulatory regimes appear to enunciate and embody all these transformations which are associated today with the nation state in a globalized setting. The state’s alleged retreat, its loss of regulatory ability, reach and implementation are frequently invoked as mere mirror effects of a widely encompassing privatization and autonomization of regulatory regimes, associated with a neo-liberal transformation of public governance. It is against that background, that a legal theoretical engagement with transnational regulatory governance becomes crucial. Such a legal theory must adopt a perspective of *methodological transnationalism* in view of the differentiation of regulatory systems across spatial boundaries in an attempt to more effectively engage with the contested aspects of legality, accountability and legitimacy.
