

2006

# Legitimizing Global Trade Governance: Constitutional and Legal Pluralist Approaches

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## Recommended Citation

Buchanan, Ruth. "Legitimizing Global Trade Governance: Constitutional and Legal Pluralist Approaches." *Northern Ireland Legal Quarterly* 57.4 (2006): 1-19.

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## LEGITIMATING GLOBAL TRADE GOVERNANCE: CONSTITUTIONAL AND LEGAL PLURALIST APPROACHES

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### Introduction

This article will take up the conversation about legal pluralism in the context of debates over transnational governance, where legal pluralism has of late attracted considerable attention.<sup>1</sup> Legal pluralism has its roots in legal sociology and anthropology, and particularly in the study of the co-existence of non-state, customary law or community norms with formal law.<sup>2</sup> In the transnational context, this original focus is expanded to include the co-existence, within a particular territory, of multiple normative regimes; local, national and international. What is important to note, however, is that in this shift the conceptual orientation of the term remains the same: the effort to provide an empirically accurate description of multiple positive legal orders. That is, legal pluralism is conventionally utilized to identify a relevant attribute of the social fields in which law operates.<sup>3</sup> So, most recent considerations of ‘global legal pluralism’ either invoke or illustrate the multiple, diverse and possibly even contested sources of law in transnational arenas, and argue for their growing sociological significance. As I will elaborate below, while legal multiplicity is highlighted and even valorized in some of these accounts, their analytic reach is circumscribed by a positive conception of law itself.

While it is difficult to disagree with the chorus claiming that transnational institutions must recognize pluralism as a relevant attribute of the global social fields that they seek to govern, it is also the case that this apparently modest descriptive claim embeds a number of assumptions about both law and the social that have for some time been subjected to considerable scrutiny within socio-legal scholarship.<sup>4</sup> At the very least, it appears to posit

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<sup>1</sup> See generally Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (2004); Teubner, “Global Bukowina: Legal Pluralism in World Society”, p.3, in Teubner, (ed), *Global Law Without a State* (1997); Wolfe, “See You in Geneva? Pluralism and Centralism in Legal Representations of the Trading System” (2005) 11 *Eur.J.Int’l Rel.* 339; Macklem, “Militant Democracy, Legal Pluralism and the Paradox of Self-Determination”, 4 *I.J.C.L.*488 (2006).

<sup>2</sup> Melissaris, “The More the Merrier? A New Take on Legal Pluralism” (2004) *Soc. & L.S.* 57 at 58. For influential summaries of the field, see also Griffiths, “What is Legal Pluralism?” (1986) 24 *J. Legal Plur.* 1 and Engle Merry, ‘Legal Pluralism’ (1988) 22 *L. & Soc. R.* 869.

<sup>3</sup> Griffiths, *supra* n.2, at 2.

<sup>4</sup> As the relationship between ‘law’ and ‘society’ is the core concern of this field, the sources that could be cited are manifold. Some ‘classic’ considerations might include Trubek and Esser, “‘Critical Empiricism’ in American Legal Studies: Paradox, Program, or Pandora’s Box?” (1989) 14 *L.&Soc. Inquiry* 3; as well as the

as self-evident a distinction between the legal and the social fields, each understood as autonomous, coherent and therefore available for objective description. In some further accounts, which I will discuss in more detail, a normative claim is added to the empirical one, in which the ‘problem’ of legal multiplicity is resolved by reference to some higher regulative principle, such as a constitution.

In this article, however, I seek to invest legal pluralism with quite a different analytic status.<sup>5</sup> My approach has affinities with those who have identified legal pluralism as an aesthetic choice, an ethos, or a form of critical theory.<sup>6</sup> My point is neither to map a complex global legal environment nor to offer a theory of law per se. Rather, and very much like several of the other papers in this symposium issue, I am attempting to open up a space in which to engage in a dialogue about different possible ways of imagining law.

My own approach to the question of legal pluralism is historical, practical and critical.<sup>7</sup> It takes as its starting point a critique of the tendency in contemporary debates on global governance to think of law as a privileged vehicle for carrying us towards some shared horizon of aspiration, that is, some more perfectly democratic or inclusive or responsive legal order to come. That imagined future is rendered unattainable, I will argue, by the very conception of law in which it is conceived, a conception that also functions to limit our perceptions of legality in the present. An alternative might be found in the re-traversal of the terrain of legal theory from the perspective of an ethos or ethic of pluralism. Such an undertaking might invite a re-framing, at least provisionally, of such fundamental questions as the boundaries and form of law. It becomes, if only for a moment, possible to imagine legal forms and institutions as both contingent and continually revisable. Through such a re-framing, I seek to open up new avenues for re-conceiving dominant forms of global governance and new opportunities for those whose interests are inadequately addressed by current institutions.<sup>8</sup>

The article situates its practical critique specifically in relation to the World Trade Organization, and in particular, the range of responses to the widely articulated concern over that institution’s ‘crisis of legitimacy’. Concerns about legitimacy are frequently connected closely to the question of

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essays collected in Sarat, Austin, Constable, Engel, Hans and Lawrence (eds.), *Crossing Boundaries: Traditions and Transformations in Law and Society Research* (1998).

<sup>5</sup> This formulation was prompted by Professor Davina Cooper’s probing commentary on an earlier version of this paper presented at the Annual Meeting of the American Law and Society Association, Las Vegas, Nevada, June 2005.

<sup>6</sup> See Manderson, “Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory” 20 (1995) *MULR* 1048; Davies, “The Ethos of Pluralism” (2005) 27 *Syd LR* 87; Kleinhans and MacDonald, “What is a *Critical* Legal Pluralism?” (1997) 12 *Can.J.L. & Soc’y* 25

<sup>7</sup> My orientation draws heavily on Tully’s account of critical philosophy in “Political Philosophy as a Critical Activity” (2002) 30 *Pol. Theory* 533.

<sup>8</sup> As Tully, *supra* n.7, at 534, cogently describes it, the activity of critique “seeks to characterize the conditions of possibility of the problematic form of governance in a redescription (often in a new vocabulary) that transforms the self-understanding of those subject to and struggling within it, enabling them to see its contingent conditions and the possibilities of governing themselves differently”

pluralism. In the WTO context, perceived deficits of democracy and accountability are seen to undermine its claim to legitimate authority.<sup>9</sup> The domination of internal WTO agenda setting and negotiation processes by a few developed nations, and its relative impermeability to civil society organizations have been widely critiqued on the grounds that they reveal deep inadequacies of pluralism and democracy within the institution.<sup>10</sup>

Although the debate over how to address these inadequacies has been rich and multifaceted, the range of approaches can be summarized in terms of two contrasting ideal-types. The first is characterized by a formal, positive and singular conception of law, and might be described as the ‘constitutional’ approach. Constitutional approaches in relation to the WTO tend to advocate an expansive and hierarchical approach to institutional reform that would aim to incorporate actors and interests who claim to have been previously excluded, as well as to consolidate the WTO’s legitimate authority over a broad swathe of contemporary transnational governance issues. A ‘pluralist’ or ‘cosmopolitan’ approach, in contrast, would include an attentiveness to norm creation at the informal level and a much more modest conception of the appropriate policy scope of the institution. It would posit the WTO as one norm creating body among many in the international community, and encourage an interactional process of norm-creation among variously situated international actors.<sup>11</sup>

This article will examine only one dimension of these broadly contrasting approaches, the legal-theoretical. On the premise that one’s legal theory matters, that is, it has (material) consequences both for the design of institutions and for the conduct of actors within them, I seek both to investigate the concepts of law that are embedded within these debates, and to consider their effects. Further, the debate over the constitutionalization of the WTO is not considered in isolation, but as one animated by and illustrative of a more general concern: how to legitimate the exercise of public authority beyond the state.<sup>12</sup> This article takes the issue of the legitimacy of the institutions of international governance as its point of departure.<sup>13</sup> However, legitimacy is here understood as ‘problematique’: that is, a form of problematization that emanates from a historically contingent set of conceptions and practices relating to international institutions, law, and democracy.<sup>14</sup>

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<sup>9</sup> Krajewski, “Democratic Legitimacy and Constitutional Perspectives of WTO Law” (2001) 35 *J.W.T.* 167.

<sup>10</sup> Jawara and Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* (2003)

<sup>11</sup> Brunnee and Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39 *Colum. J.Transnat’l L.* 19.

<sup>12</sup> Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (2001), p.4. See also Howse, “From Politics to Technocracy - And Back Again: The Fate of the Multilateral Trading Regime” (2002) 96 *AJIL* at 94.

<sup>13</sup> Coicaud and Heiskanen, *The Legitimacy of International Organizations* (2001); Delbruck, “Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?” (2003) 10 *Ind. J.Global Legal Studies* 29.

<sup>14</sup> Tully, *supra* n.2, at 551, in attempting a definition of “political theory” defines a “subaltern school” of political theory that does not seek a normative solution but

### The 'Legitimacy Crisis' and Legal Formalism

The apparent intractability of the debates over the legitimacy of an international institution such as the WTO, my argument will suggest, is in large measure a reflection of the legal framework in which they are typically cast. A legitimacy critique already identifies the problem as a matter of institutional design. By calling into question the architecture of the institution itself, as opposed to its failure to achieve any particular desired outcomes, the critique invokes formalist debates over what H.L.A. Hart has called 'secondary' rules.<sup>15</sup> In Hart's hierarchical conception, secondary rules, the 'rules of the rules' or the rules that determine which rules are indeed 'law', are a necessary part of a mature and functioning legal system.<sup>16</sup> Indeed, Hart's question, considered in the final chapter of *The Concept of Law*, "Is international law really law?"<sup>17</sup> is one that continues to vex international lawyers.<sup>18</sup> Despite the obvious difficulties in adapting a positivist view of law to the contemporary international legal arena, it continues to exert a significant 'pull'.<sup>19</sup> Legitimacy critics (and defenders) routinely invoke a relatively narrow range of familiar legal theoretical presumptions, based on a questionable analogy with domestic legal realms, about the proper foundations of legal authority, and by implication, the necessary forms of legitimate legality, in the international realm.

The vast majority of participants in these debates, whether they might be broadly characterized as 'defenders' or 'critics' of the current institutional order, share certain foundational assumptions about the nature of the international community and the form of international law, even as they disagree over the specific legal and institutional arrangements that might best achieve the imagined ends. This 'shared sensibility' has been described as

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grounds itself in practical concerns. This type of political theory utilizes historical surveys in order to be able to see "practices and their forms of problematization as a limited and contingent whole", at 534. "If we are to develop a political philosophy that has the capacity to bring to light the specific forms of oppression today, we require an Enlightenment critical 'attitude' rather than a doctrine, one that can test and reform dubious aspects of the dominant practices and form of problematization of politics against a better approach to what is going on in practice", at 537.

<sup>15</sup> See, e.g. Trachtman, in adopting HLA Hart's formalist hierarchy of primary and secondary rules to questions of constitutionalism at the WTO, proposes that a special type of secondary rule, a 'tertiary rule,' is necessary to determine the allocation of authority between constitutions in the international realm. Trachtman, "The WTO Constitution: Tertiary Rules to Untangle Intertwined Elephants" (2004) *unpublished* (on file with author), p.4.

<sup>16</sup> Hart, *The Concept of Law* (2nd ed., 1961).

<sup>17</sup> *ibid.* at p.209. "It is indeed arguable, as we shall show, that international law not only lacks secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules. These differences are indeed striking and the question, 'Is international law really law?' can hardly be put aside."

<sup>18</sup> Pahuja, "Power and the Rule of Law in the Global Context" (2004) 28(1) *MURL* 232; see also, Kennedy, "When Renewal Repeats: Thinking Against the Box" (2000) 32(2) *N.Y.U.J.Int'l Law & Pol.* 335.

<sup>19</sup> Brunnee and Toope, *supra* n.12, at 22-24.

‘cosmopolitan’ or even ‘messianic’.<sup>20</sup> It locates the antagonists of debates over international governance within a shared horizon of aspiration: a ‘better’, more inclusive and democratic world order which functions as an ever-present, yet continually deferred backdrop, to the discourses of global governance. As Anne Orford has described, in relation to the ‘linkage’ debate over trade and human rights, “proponents and opponents of the WTO both use an appeal to ‘democracy to come’ as the foundation of the arguments about the need to reform existing laws and institutions”.<sup>21</sup>

My aim in this article is to consider in more detail what embedded assumptions about the necessary or possible forms of law are mobilized within these debates, and what role they might play in shaping the future of international governance. It is my argument that how we imagine the ‘form’ of law makes a significant difference both to our conceptualization of problem and the available range of possible solutions. Much work in this field envisions pluralism as an important vehicle by which to improve the legitimacy, democracy and accountability of the WTO and other institutions of transnational governance. Integrating non-governmental actors and ‘disaggregating’ conceptions of sovereignty or the state are typical pluralizing gestures found within this literature.<sup>22</sup> Yet, at the same time, these debates have tended to re-inscribe presumptions of about the positive and unified (monist) nature of law conveyed through their reliance on the language of coherence, linkages or constitutionalism.

### **Pluralizing the WTO from Within: The Mystical Appeal of Constitutionalism**

Why is it that, in our heterogeneous and constantly changing global context, a ‘constitutional’ conception of law seems so compelling? In most accounts, the quest for a ‘post-national’ constitutionalism is described as emerging in response to perceived ‘deficits’ of governance at the transnational level: of democracy, legitimacy, accountability. It is also a response that seeks to draw from the deep well of signification that constitutional discourse carries in the west. As Neil Walker observes, “the normatively continuous idea of constitutionalism is linked in a powerful and resilient chain of signification to a whole series of core governance values— democracy, accountability, equality, separation of powers, rule of law and fundamental rights”.<sup>23</sup>

The appeal of constitutionalism as an explanatory framework for current and anticipated developments in the international trading regime is multifaceted. Firstly, constitutional theory conventionally provides an account of the political foundations of legitimate legal authority, which as we’ve seen, has been called into question in the WTO context. Secondly, the ‘hands-tying’

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<sup>20</sup> Buchanan, “Global Civil Society and Cosmopolitan Legality at the WTO: Perpetual Peace or Perpetual Process?” (2003) 16 *LJIL* 673; on the messianic, see Orford, “Trade, Human Rights and the Economy of Sacrifice” (2004) *Jean Monnet Working Paper*, and Koskenniemi “Legal Cosmopolitanism: Tom Franck’s Messianic World” (2003) 35 *N.Y.U.J.Int’l Law & Pol.* 471 at 486.

<sup>21</sup> Orford, *ibid.*, at 4.

<sup>22</sup> Walker, “The Idea of Constitutional Pluralism” (2002) 65(3) *M.L.R.* 317; Slaughter, *A New World Order* (2004).

<sup>23</sup> Walker, *supra* n.22 at 344.

quality of constitutionalism appeals to advocates of a liberalized global trading order, such as Ernst Ulrich Petersmann, who sees its benefits threatened by the potential capture of the domestic political process in member-states by various special interests.<sup>24</sup> Constitutional debates also hold out the promise of ‘recognition’ and ‘accommodation’ of diverse constituencies and normative claims within a single unifying framework. Hence, they resonate with those who are concerned with linkage issues, often identified as the range of ‘trade and . . .’ concerns: environment, human rights, labour, or sustainable development. Indeed, one might suggest that the turn to constitutional discourse at the WTO seems to offer all things to all people: it first grounds WTO law in political legitimacy, then sets it above the fray of politics, all the while promising a dispassionate arena for the fair resolution of fundamental normative disagreements.

What binds these very disparate approaches and perspectives together is a set of ideas about ‘constitutionalism’ that are, in turn, dependent upon a particular view of law. So it is that we find some commentators drawing our attention to points of convergence between WTO legal structures or practices and domestic legal forms, such as the juridification of the dispute resolution process by the introduction of the Appellate Body and the types of reasoning it has deployed.<sup>25</sup> Others base their arguments on the points of divergence; maintaining that the WTO as currently constituted must fail the test of constitutional adequacy because of its deficits in the realm of democratic representation, ‘voice’ or citizenship.<sup>26</sup> In both cases, however, the implicit standard is municipal or state constitutionalism. In this way, constitutional debates about the WTO have the effect of making our discussions of the global trading order look more like the formal and autonomous picture of ‘state law’ that implicitly functions as the standard of legality against which all other forms of normative ordering are judged.<sup>27</sup> They also have the effect of setting the WTO further apart from (and possibly above) other institutions (and mechanisms) through which transnational economic relations are governed, in line with the implicit assumption that ‘legal orders’ must be hierarchical. Debates about economic governance framed in constitutional terms resonate with a wide range of differently positioned actors in part

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<sup>24</sup> Petersmann, “Constitutional Primacy and ‘Indivisibility’ of Human Rights in International Law? The Unfinished Human Rights Revolution and the Emerging Global Integration Law”, p.211, in Griller (ed.) *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order* (2002).

<sup>25</sup> Cass, “Constitutionalization of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development of International Trade” (2001) 12(1) *EJIL* 39.

<sup>26</sup> Krajewski, *supra* n.9; Howse and Nicolaidis, “Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?”, p.73, in Verweij and Josling (eds.), “Deliberately Democratizing Multilateral Organizations”: (2003) 16(1) *Governance*.

<sup>27</sup> “Much of the effort in recent inter-state trade, environmental and human rights negotiation has been directed to reducing the distance between these transnational and national normative constructs by recasting the former in the image of the latter”: MacDonald, “Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism” (1998) 15 *Ariz.J.Int’l & Comp.L.* 69 at 80.

because they tend to transpose familiar arguments from the domestic realm onto the terrain of international economic law.

Further, constitutional discourses are frequently identified as a framework within which competing normative claims are balanced and accommodated. That is, constitutionalism is one vehicle within which the challenges presented by political pluralism for governance are to be managed, at both the national and transnational level.<sup>28</sup> Within the WTO, constitutionalism is often presented as offering both a principled way to integrate the acknowledged variety of ‘trade and . . .’ concerns that have accompanied the expanding agendas of recent negotiating rounds and a foundation for engagement with non-state or civil society actors. As has frequently been observed, fostering political pluralism requires the development of mechanisms of democratic accountability, as well as the capacity to facilitate political trade-offs between areas of jurisdictional authority.<sup>29</sup> Each of these presumes a ‘totality’ in relation to which the balancing or accounting is done. In its current form, the WTO is usually recognized as lacking both the jurisdictional scope and autonomy and the law-making authority to facilitate such balancing.<sup>30</sup> Advocates of WTO constitutionalism seek to redress this lack by expanding both the scope and the authority of the WTO, while scholars located within what I’ve described as the pluralist approach would prefer that these normative conflicts be resolved outside the institution.

Most fundamentally, I would argue, the attraction of constitutionalism is the view that, in purporting to ground legal authority in a founding act of political will, constitutional approaches offer a type of ‘practical’ solution to the “thorny issues of the non-foundational foundations of law.”<sup>31</sup> A constitution is essentially an originary narrative, in that it offers an account of the source of both legal and political authority.<sup>32</sup> It does so by purporting to ground that authority in the political will of a ‘people’ understood to be capable of acting as a unified entity. The ‘people,’ however, cannot come into existence as such until after the founding inaugurated by the constitution. The constitutional ‘moment’, then, is always a type of ‘pious fiction’.<sup>33</sup>

Critical scholars have for some time scrutinized this paradox of law’s purported ‘founding’ in a constitutional moment – as Peter Fitzpatrick has perhaps put it most succinctly, that “the origin has to ‘be’ before and after the

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<sup>28</sup> Walker, *supra* n.22.

<sup>29</sup> Nanz and Steffek, “Global Governance, Participation and the Public Sphere” (2004) *Governance and Opposition* 314. See also, Howse and Nicolaidis, *supra* n.27

<sup>30</sup> “WTO law allows for the *constraint* of policies that interfere with the trading rights of members, but there no institutional arrangements provide for the creation of new, agreed-upon policies that can rebalance such trading rights with other legitimate policy objectives”; Howse and Nicolaidis, *supra* n.27 at 84

<sup>31</sup> Teubner, “Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?”, p.3 *et seq.*, in Joerges, Sand and Teubner (eds.) *Transnational Governance and Constitutionalism* (2004).

<sup>32</sup> Pahuja and Beard,(eds.), *Divining the Source: Law’s Foundation and the Question of Authority* (2004).

<sup>33</sup> Hart, *supra* n.17 at 153.

point of origination”.<sup>34</sup> Debates over transnational constitutionalization that begin from the assumption that law’s autonomy and authority are definitively secured ‘within’ the state, and that this foundational authority needs to be somehow replicated in the transnational sphere, miss this point about law’s paradoxically divided origins. The insight that law is not unified, even at its point of origination, instead leads us back towards the ethos of plurality to which I will shortly turn.

Some scholars have identified ‘the process of mutual constitution and containment’ of law and politics as a necessary, indeed defining, feature of constitutionalism.<sup>35</sup> As Gunther Teubner puts it, “The point is continually to understand the paradoxical process in which any creating of law always already presupposes the rudimentary elements of its own constitution, and, at the same time, constitutes these only through their implementation”.<sup>36</sup> This paradoxical relation is what holds law and politics, necessarily, both together and apart, enabling and constraining each.<sup>37</sup> But the pragmatic embrace of the paradoxical nature of law’s foundations, an insight already central to much contemporary legal theorizing, doesn’t yet answer the question that frames this section – what is the specific attraction of constitutionalism for these scholars?

The normative thrust of this argument finds its source in the ‘reflexive’ nature of constitutional discourse itself. Reframing public and scholarly debates in constitutional terms, for these scholars, contains the potential to transform the ongoing process of transnational juridification in such a way as to bring into being the conditions for legitimate constitutionalization that are currently lacking. As Walker puts it, “...in the final analysis the ideological dimension of constitutional politics...is not the enemy of a normative discourse of responsible self government but rather its necessary accompaniment, and indeed, a central part of its generative context.”<sup>38</sup> For Teubner, it is to ‘guarantee the chances of articulating so-called non-rational logics of action against the dominant social rationalization trend, by conquering areas of autonomy for social reflection in long-lasting conflicts, and institutionalizing them’.<sup>39</sup> Both Walker and Teubner, albeit from within quite different theoretical models, appear to be basing their argument for constitutionalism on a belief in the salutary effects of constitutional discourse itself. In the end, this approach rests on the hope that constitutionalism will “(open) up a richer and more productive normative debate”.<sup>40</sup> Even constitutional sceptics such as Howse and Nicolaidis acknowledge that this

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<sup>34</sup> Fitzpatrick, “Breaking the unity of the world: Savage Sources and feminine law” (2003) 19 *Aus Fem LJ* 47

<sup>35</sup> Walker, *supra* n.19 at 340.

<sup>36</sup> Teubner, *supra* n.31 at 16.

<sup>37</sup> Teubner, *supra* n.31 at 20; in the language of systems theory, “long term structural linkages of sub-system specific structures and legal norms are set up . . . . The important effect of structural linkage is that it restrains both—the legal process and the social process – in their possibilities of influence.”

<sup>38</sup> Walker, “The EU and the WTO: Constitutionalism in a New Key”, p.58, in de Burca and Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (2001).

<sup>39</sup> Teubner, *supra* n.31 at 13.

<sup>40</sup> *ibid.*, at 54.

self-reflexive tendency of constitutional discourse may, over the longer term, contain some limited potential to contribute to a transformation of the currently inhospitable conditions for a pluralist politics at the WTO, even as they are highly critical of most efforts to ‘bootstrap’ the legitimacy of the WTO by relying on constitutional discourse itself as the vehicle to bring about the very conditions needed for its emergence.<sup>41</sup>

Ultimately, this argument brings us back to the question to what extent do even reflexive constitutional approaches pre-determine the parameters within which transnational legality must take shape? Two tendencies are of concern here. Firstly, there is the way in which a call for constitutionalism is responsive to the discourse of ‘deficits’ mentioned earlier. That is, constitutional discourse is posited as a supplement, something that will supply ‘more’ of whatever is currently ‘lacking’ in transnational legality; democracy, accountability, legitimacy, or even, self-reflexive constitutional discourse itself. Similarly, the call for constitutionalism implies both a hierarchy and a trajectory of transnational legalities, in which some emerging legal forms are imagined as more complete (constitution-like) than others. This trajectory, which might be said to parallel to the developmental hierarchy of states in the Westphalian order, has the effect of privileging certain legal forms, such as judicial norm-generation, over others.<sup>42</sup> Further, constitutional debate tends to focus on highly formalized and juridified entities such as the EU and the WTO, while an entity such as the World Social Forum, devoted to broadening and democratizing the public debate over transnational norms, is virtually ignored. In these ways, we can see that the potential of constitutional discourse to facilitate the pluralizing and/or democratizing of the practices of transnational governance is actually quite limited. Paradoxically, despite the prominence given to the need for pluralist institutional reform within contemporary debates over the legitimacy of the WTO, closer consideration of this scholarship also reveals an enduring rigidity: the persistence of the modernist preference for coherence and order in the imagining of legal forms.<sup>43</sup>

### **Pluralizing the WTO from Without: Civil Society Engagements**

In recent years, there has been a dramatic expansion of transnational advocacy on the part of nongovernmental organizations focused on international institutions such as the WTO.<sup>44</sup> These transnational advocacy efforts and the networks that they engender are frequently described as a ‘global civil society’ whose emergence is then identified with a number of positive outcomes for global governance.<sup>45</sup> Organized civil society is often identified as providing a “discursive interface between international

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<sup>41</sup> Howse and Nicolaidis, *supra* n.27 at 91.

<sup>42</sup> Cass, *supra* n.26.

<sup>43</sup> See Manderson, *supra* n.7, for a discussion of this modernist inclination towards coherence and order as an aesthetic preference.

<sup>44</sup> I have argued elsewhere that the picture of the nation-state in decline has been frequently overdrawn. Buchanan and Pahuja, “Law, Nation, and (Imagined) International Communities” (2004) 8 *Law, Text, Culture* 137.

<sup>45</sup> See generally the various editions of the OUP *Global Civil Society Yearbook*, inaugurated in 2001.

organizations and a global citizenry” capable of “monitor(ing) policy making in these institutions, ...bring(ing) citizens concerns into their deliberations and empower(ing) marginalized groups so that they too may participate effectively in global politics”.<sup>46</sup> The discourse of global civil society is sustained by a cosmopolitan sensibility, which underpins a vision of an imagined ‘global community’ that is simultaneously inclusive, plural and governable.<sup>47</sup>

Not surprisingly, the on-the-ground struggles of transnational advocacy networks are far removed from the utopian aspirations frequently projected upon them. All too frequently, the role of transnational NGO’s in global governance is functional, technocratic and apolitical. The meetings and cooperative understandings of governance networks are usually private, informal, and lacking in mechanisms for accountability or transparency. Rather than facilitating political processes, transnational NGO’s have been criticized as effectively helping to bureaucratize and de-politicize the activities of governments across borders.<sup>48</sup> Rather than an imagined ‘voice of the people’ idealized as distinct from the dictates of both governments and the market, transnational networks of NGO’s have emerged in tandem with the shift to different styles of governing both at domestic and international levels. Moreover, the goals and interests of actors in governance networks cannot be imagined as ‘autonomous’ or ‘objective’, but are constructed through their myriad interactions embedded within these networks over time.<sup>49</sup> In these ways, it is possible to argue that the space for politics in global governance networks has been diminished, even as the participation of NGO’s has expanded.<sup>50</sup>

The constraints on the capacity of NGO networks to engender pluralism in the practices of international institutions can be illustrated by recent developments in WTO/civil society relations.<sup>51</sup> Over the past six years, various coalitions of civil society organizations have pressed for greater access to both rule-making and dispute resolution processes within the institution.<sup>52</sup> Many NGO’s and commentators would likely describe these

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<sup>46</sup> Nanz and Steffek, *supra* n.30 at 315.

<sup>47</sup> Buchanan, *supra* n.20.

<sup>48</sup> Higgott, “Contested Globalization: the Changing Context and Normative Challenges” (2000) 26 *Rev.Int’l. Stud.* 131 at 151; Chandhoke, “The Limits of Global Civil Society”, in Glacius, Kaldor and Anheier (eds.) *Yearbook of Global Civil Society* (2002).

<sup>49</sup> Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (1998).

<sup>50</sup> Kennedy, “Background Noise? The Underlying Politics of Global Governance” (1999) 21(3) *Harv.Int’l.Rev.* 52.

<sup>51</sup> Tüerk, “The Role of NGOs in International Governance. NGOs and Developing Country WTO Members: Is there Potential for Alliance?”, in Griller (ed.), p.162, *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order*, (2003).

<sup>52</sup> Action Aid/CIEL/Friends of the Earth International/IATP/WWF International (2001) Open Letter on WTO and Institutional Reform for the Fourth WTO Ministerial and Beyond, <http://www.panda.org/resources/programmes/trade/latest.htm>; Friends of the Earth International, *et. al.* (2002) “Letter to Honorable Luis Enresto Derbez Bautista, Mexican Minister of Trade” (2 April, 2002), <http://www.foei.org/trade/mexico.doc>; Raghavan, “WTO Ignores Calls for

efforts as having only very limited success, however, resulting in a few largely cosmetic institutional reforms.<sup>53</sup> That said, a focus on formal institutional resistance by the WTO to NGO demands for greater access and transparency may overlook some important but less visible shifts. A number of transnational nongovernmental organizations, at least since the Doha Ministerial Round in 2001, have increasingly targeted their advocacy efforts ‘behind the scenes’ on particular issues that will enable them to build relationships with delegates from various member-state governments. Several of these organizations have recently opened offices in Geneva to more effectively track the institution’s activities and lobby member-state representatives.<sup>54</sup> Because they are in Geneva, building close relationships with delegates and members of the Secretariat, these groups are able to gain informal access, to disseminate to other NGO’s, and even member country governments, a great deal of information that is not officially public. Some organizations have built very comprehensive websites that serve as clearing houses for reports of various negotiation developments, and detailed accounts are usually posted within days of these ‘closed door’ sessions occurring.<sup>55</sup> In general, a great deal of information about what is going on inside this allegedly closed and secretive institution is now widely available almost immediately, due to the work of a number of transnational legal advocacy and civil society groups.<sup>56</sup>

So, while many NGO’s may profess frustration at the lack of progress on the institutional reform agenda, they would also acknowledge that the environment within which trade policy is both made and adjudicated by the WTO has changed significantly in the past decade. Significantly, transnational advocacy organizations have worked with developing country governments to bolster their capacities to participate effectively in trade

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Democratic Inclusive Processes for Cancun” (20 June 2003), [www.globalpolicy.org/socecon/bwi-wto/2003/0620ignore.htm](http://www.globalpolicy.org/socecon/bwi-wto/2003/0620ignore.htm)

<sup>53</sup> O’Brien *et. al.*, *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (2000); Charnovitz, “Opening the WTO to Nongovernmental Interests” (2000) 24(1-2) *Fordham Int’l.L.J.* 173.

<sup>54</sup> Nongovernmental organizations that have opened offices in Geneva for the purpose of WTO related advocacy since 2001 include Oxfam, the Center for International Environmental Law, and the International Gender and Trade Network. Much of the information cited in this section draws on interviews conducted by the author with a range of NGO representatives in Cancun, during the Ministerial Meeting in September 2003 and in Geneva, May, 2004.

<sup>55</sup> The Canadian NGO, International Institute for Sustainable Development (IISD) is one such organization, <http://www.iisd.org/trade/wto/>. It publishes Bridges, a weekly trade news digest, for the NGO and sustainable development community. During Ministerial conferences, Bridges updates are published daily and widely distributed. <http://www.ictsd.org/weekly/index.htm>. The Minnesota-based Institute for Agriculture and Trade Policy (IATP) also operates a useful site called the ‘Trade Observatory’ at <http://www.tradeobservatory.org/> with a searchable archive of trade related news, documents and analysis from a wide range of sources.

<sup>56</sup> *E.g.* within weeks of its issuance on February 7, 2006, the Confidential Interim Panel Report in the dispute over the import prohibition of GM food products by the European Union was leaked, and made available on the Friends of the Earth site: [http://www.foeeurope.org/biteback/WTO\\_decision.htm](http://www.foeeurope.org/biteback/WTO_decision.htm).

negotiations and in trade disputes.<sup>57</sup> Some have even provided assistance in the preparation of legal arguments for trade disputes to small country governments. Many seek to provide in depth information and research on issues of concern to particular member states, such as the campaign by Oxfam leading up to the Cancun Ministerial Round to publicize the impact of cotton subsidies on the West African nations of Burkina Faso, Benin, Chad, and Mali.<sup>58</sup> Such efforts on the part of NGO's in support of member country governments can raise the profile of issues, getting new topics on the agenda (as in the case of cotton subsidies) or even result in changes to negotiated text (as in the Doha Declaration on TRIPS and Public Health).<sup>59</sup> During the 2003 Ministerial Meeting in Cancun, NGO's convened at least a dozen parallel conferences and workshops on various trade policy issues, many of which attracted both 'official' members of delegations as well as academics and activists. Finally, in the realm of dispute resolution, the ongoing controversy over the consideration of amicus briefs has not prevented a number of organizations from continuing to prepare and file such briefs.<sup>60</sup> Even though they may not be formally cited or 'considered' by the Appellate Body there are good reasons to believe that they are indeed read, and that over time the submission of persuasive and well argued briefs from third parties may well function to 'broaden the perspectives' of judges.<sup>61</sup>

In the interstices of the relatively formalized procedures for dispute resolution, and in conference rooms and hotel lobbies in Geneva, Doha, Cancun and Hong Kong, ongoing debates over the appropriate scope and substance of trade policy are taking place. To the extent that a number of civil society organizations have invested their resources in developing the capacity to speak the language of trade policy and in closely monitoring current developments in Geneva, they have indeed become participants in the collective process of norm-generation in and around the WTO. Yet, even as trade governance has become pluralized in recent years, these developments don't appear to be leading to the type of institutional transformation that many have suggested is so urgently needed. This is because expanded participation in governance networks is a significant, but not the most significant, mechanism of pluralization. There must also be the opportunity for a plurality of institutional and legal forms to develop and evolve. While one form of plurality may lead to the other, it doesn't necessarily follow that

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<sup>57</sup> Tüerk, *supra* n.51.

<sup>58</sup> [http://www.oxfam.org.uk/what\\_we\\_do/issues/trade/bp30\\_cotton.htm](http://www.oxfam.org.uk/what_we_do/issues/trade/bp30_cotton.htm).

<sup>59</sup> "In my view, the [TRIPS and Health Declaration] is perhaps the most concrete result of this campaign of NGO's, of public demonstrations that have been seeking to rebalance the system of globalization rules. . ." Rubens Ricupero, Secretary General of the United Nations Conference on Trade and Development (UNCTAD) on the Trips and Health Declaration adopted at the WTO's Fourth Ministerial Conference in Doha, Qatar, November 2001; as quoted in Tüerk, *supra* n.51 at 170.

<sup>60</sup> See, for a recent example, the brief filed by the Center for International Environmental Law (CIEL) in the *Brazil-Retreaded Tyres* case at [http://www.ciel.org/Tae/BrazilRetreadedTires\\_Amicus\\_7Jul06.html](http://www.ciel.org/Tae/BrazilRetreadedTires_Amicus_7Jul06.html).

<sup>61</sup> Howse, "Membership and Its Privileges: the WTO, Civil Society and the *Amicus* Brief Controversy" (2003) 9(4) *ELJ* 496.

a more diverse set of participants will produce more diverse institutional arrangements.

One of the key claims made in this article is that the modest degree of success arguably achieved by recent NGO efforts to engage with the World Trade Organization and to influence both its institutional structure and its decision making processes fails to include a re-conception of legal forms and institutions, and for that reason, falls short of the degree of transformation that it seeks. I have argued that debates over the reform of the institution, while they rarely consider law in an explicit or conceptual manner, are frequently infused with an implicit notion of law as an autonomous and distinct realm, precise and technical in nature as opposed to indeterminate and political. This conception places a serious constraint on the scope of reforms aimed at pluralizing the institution and on the range of subjects who can be imagined as potential participants in World Trade Organization 'law-making' practices. To the extent that they deal with technical legal issues, only those groups from organized civil society that have developed the expertise to engage with these issues can participate. This constraint is also manifested in a growing divide between those civil society groups that have chosen to pursue 'inside' versus 'outside' strategies in relation to the WTO.

I have argued that, much like the constitutionalists, civil society engagements with the World Trade Organization have been oriented by the problematique of legitimacy. Their efforts are similarly hamstrung by a persistent idea that formal (positive) law is the source and guarantor of legitimacy. This is reflected, for example, in the focus on the need for formal legal reforms to improve the external transparency of the WTO, notwithstanding significant developments at the informal level. More generally, to the extent that advocacy successes at the informal level are not reflected in formal institutional reforms and/or clearly defined legal norms, they are seen as somehow lacking, inadequate or underdeveloped. It can also be seen in the way that they frame their call for pluralism in terms of participation, imagined as a separate matter from the actual legal frameworks that these subjects are engaging with. In arguing that there is no great distance between the 'pluralist' approach of civil society and the constitutional approaches discussed earlier, I am suggesting that for each, a monist conception of law itself functions as both an anchor and a limit to the re-conceptualization of global trade governance. Both fail to recognize the existent plurality of diverse and competing legal forms in the international, and circumscribe further developments by locating them within the utopian and perennially incomplete project of cosmopolitan law.

### **Global Trade Governance Unbound?**

I have suggested that the apparent conflict between two approaches or styles of thinking about law has defined the space within which the debates over the future of the World Trade Organization as an institution are taking place. The debates tend to oscillate between two positions that might be identified as 'constitutionalist' and 'pluralist'. This final section will attempt to step back from the current debates to examine the question of the frame itself. Is

it possible to re-imagine transnational governance in a way that is not ‘bounded’ by these two poles of constitutionalism and pluralism?<sup>62</sup>

The apparent conflict between these two approaches obscures the fact that, as I’ve argued, they share a certain style or habit of thinking which foregrounds questions of ‘legitimacy’ and links them to a particular way of conceiving law. These approaches also share, with the constitutional approach, a tendency to think of law in terms of coherence, order, and totality. In this final section of the paper, I consider whether it is possible to open up a space for thinking about law in a different way. It should be clear by now that I am not seeking to offer a pragmatic alternative to currently mooted proposals for institutional reform. Instead, I am intentionally occupying a position that is both provisional and provocative. My modest aim is to interrupt the established parameters of current debates over WTO governance in order to speculate about what implications a metaphoric shift in our capacity to imagine legal forms might have in this context.<sup>63</sup>

Martti Koskeniemmi, a provocateur whose project has sympathies with my own, developed a dichotomy similar to the one I have outlined above, in a recent talk.<sup>64</sup> Koskeniemmi identifies these two approaches, ‘constitutional’ and ‘legal pluralist’ as reflections of the modernist tendency to pit narratives of unity and fragmentation against one another. In his account, unity or constitutionalism is considered as a hegemonic project, impelled by a totalizing logic of power, globalization, and empire; against which plurality is frequently posited as the counter-hegemonic vehicle of freedom and innovation. Koskeniemmi chooses to describe these contrasting approaches to representing law in the transnational as ‘legal mindsets’ rather than as legal theories, both to highlight their location within these wider narrative streams and to reveal their subjectivity and fluidity. According to him, both are responses to the problem of ‘fragmentation’ of international law and neither is entirely successful in meeting the challenge of mediating between the need for ‘centrality and control on the one hand, diversity and freedom on the other’.<sup>65</sup> They cannot be successful, in part, because he argues that as ‘generalizing doctrines’ the meaning of these approaches is not pre-determined; it depends on context. As he puts it, “their political significance

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<sup>62</sup> There are at least two scholarly variants of the ‘pluralist’ approach. The first is broadly oriented towards democratic accountability and representativeness. See for example, Nanz and Steffek, *supra* n 30; Krajewski, *supra* n 9; Charnovitz, *supra* n 54. The second approaches the question of pluralism in terms of the problem of establishing ‘linkages’ between the WTO and other transnational regimes of normativity. See for example, Howse and Nicolaidis, *supra* n 27; Snyder, “Governing Economic Globalization: Global Legal Pluralism and European Law” (1999) 5(4) *EJL* 334; Perez, *supra* n 1.

<sup>63</sup> For a powerful articulation of the significance of the ‘imaginary’ in constructing the realm of the possible, see the chapter, “A Politics of Economic Possibility” in J.K. Gibson Graham (2006) *A Postcapitalist Politics* (U of Minnesota Press). See also J.K. Gibson Graham, (1996) *The End of Capitalism (as we Knew it): A Feminist Critique of Political Economy*.

<sup>64</sup> Martti Koskeniemmi, “Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought” Presented at Harvard University, March 5, 2005.

<sup>65</sup> Professor Koskeniemmi, not incidentally, was functioning as the Chair of a Study Group on Fragmentation within International Law for the International Law Commission at the time.

is ambivalent. Each may be used to support as well as to challenge the existing state of affairs.”<sup>66</sup> In Koskeniemmi’s account, as in mine, the differences between constitutional and pluralist approaches are minimized. What is of greater analytic significance for each of us is the connections among these mindsets, rather than their clashes.

Where my argument differs from his is in what we make of this insight. He argues by way of conclusion that the task for critical lawyers should be to reveal the multiple and shifting politics of these competing regimes, and to politicize the discourse of multiplicity itself.

“This is why I am not worried about the multiplicity of regimes or the clash of legal rationales. On the contrary, they are the platform for today’s politics. The real concern is the homogeneity of the cultural and professional outlook of the participants, the pretense that the decision follow cognitive or technical grounds and are therefore immune to political contestation . . . I want to suggest that the discourse of multiplicity itself should be redescribed in political terms, as a competition between different systems and criteria for allocating resources between social groups.”<sup>67</sup>

While I agree that it is important to understand the impact of competing normative regimes for differently situated publics, I’m not sure that shifting the analysis from the legal to the political register necessarily makes things more transparent. Representing international legality in this way seems to suggest that politics is something that is somehow ‘outside’ or ‘beyond’ the law, rather than already embedded within legal discourses and institutions. As Koskeniemmi well knows, while law and politics are interpenetrated, legal discourses cannot be equated in any straightforward way with political outcomes. Moreover, while a critical investigation of the politics of law in particular contexts can be quite helpful in revealing law’s failures and exclusions, it has little to say about the productive or generative aspects of law, or about the capacities of legal subjects to contest or make new meanings out of the law.

I believe a more generous reading of Koskeniemmi is available, however. Of course he can be read as calling for more attentiveness to the particular effects of different ways of talking about law – this is clear when he speaks of the limitations of a technocratic, realist approach that draws heavily on certain branches of International Relations theory and sees little of value in the more aspirational discourses of public international law. But, he also reminds us of Kant’s dictum that rules don’t determine their own application. Rather, they must be interpreted and applied by legal subjects, operating within particular discursive and institutional contexts. Indeed, one of his signature contributions has been to draw greater attention to the work of these subjects in the making of international law.<sup>68</sup> So it would seem that his conception of law must also include an important role for the law creating function of legal subjects.

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<sup>66</sup> Koskeniemmi, *supra*, p.18.

<sup>67</sup> *Supra* p.21.

<sup>68</sup> Martti Koskeniemmi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1879-1960* (Cambridge, 2001).

This reading would bring Koskeniemmi much closer to my own provocation: which rests in the attempt to imagine law as itself inherently plural, a quality that I posit as emerging from an appreciation of the manifold potential of a world of law-creating subjects. While an understanding of subjectivity as law-making also underpins Koskeniemmi's account, he is more concerned with the relatively homogeneous professional category of international lawyers, whom he fears are lacking both creativity and political commitment. I am more interested in exploring what new pathways for thinking are opened up when we think of a much wider range of subjects as potentially law-creating in this way.<sup>69</sup>

My effort to re-imagine the 'bounded' discourses of global trade governance in this way has been inspired by the 'radical' or 'critical' legal pluralism of Rod McDonald, who has suggested that we need to think of law in terms of a 'metaphor of multiplicity'.<sup>70</sup> MacDonald's legal pluralism is quite distinct from the varieties of pluralism found in contemporary international legal discourse discussed above and from mainstream theories of law. It departs from the view that law is necessarily formal and can be exclusively identified with state action. Neither does it rely on a dichotomous construction of law and politics (or society).<sup>71</sup> Where this account of law differs most significantly from the conceptions that I have argued are embedded within the discourses of trade governance, including those identified with 'global legal pluralism', is in its resistance to the cosmopolitan urge to accommodate difference within some overarching totality.

Without the need for recourse to a unifying image of the constitutional moment, a radically legal pluralist imaginary could embrace multiplicity, heterarchy, and diversity. It might allow for the possibility of thinking about transnational legality without a 'centre', or normative hierarchy. That is, the relationship between emergent transnational regulatory regimes need not be reduced to a necessary relation of superior/inferior as judged by the extent to which they are more or less 'legal' or 'constitutional'. Rather, they could be understood in a variety of ways: overlapping, discrete, competing, interpenetrated, mutually constitutive. In this way, the public discussion about the emergence and evolution of transnational legal norms might both be opened up to include a much wider range of formal and informal, institutional and discursive mechanisms, and to consider them on their own terms, rather than in relation to where they sit on a spectrum of 'legitimacy' in which 'formal' law still occupies the highest rung;

“A *radical* legal pluralism seeks neither a separation, nor an eventual reconciliation, of multiple legal orders. Normative heterogeneity exists both between various normative regimes which inhabit the same intellectual space, and within the regimes themselves. The flux of power within and between

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<sup>69</sup> On the creative and politically transformative potential of subjects, see Gibson-Graham, *supra* n.65.

<sup>70</sup> MacDonald, "Here, There . . . And Everywhere: Theorizing the Legal Pluralism of Jacques Vanderlinden", in Kasirer (ed) *Melanges Jacques Vanderlinden* (2006). See also MacDonald, *supra* n. 28; and Kleinhans and MacDonald, *supra* n. 7. A sympathetic approach is also found in Melissaris, *supra* n.2.

<sup>71</sup> MacDonald, *supra* n. 28 at 74.

these regimes is determinative of their reconstruction within any given time-space. The condition of living through the construction of normative regimes frustrates any attempt to unify or order them. That is, a *radical* legal pluralism must be polycentrist<sup>72</sup>

Debates within the frame of what I am calling legal plurality can be contrasted with dominant approaches in the ways they might envision the participation of global civil society. An illustrative example of the latter is found in the framework provided by de Burca and Walker, in their role as editors of a collection of essays on the topic of “Law, Civil Society and Transnational Economic Governance.”<sup>73</sup> In their introduction, although they acknowledge the multiple discourses of civil society in careful detail, law is represented as a ‘central steering mechanism’: “One general and overarching question concerns the possibilities and limits of the role of law, in its institutional and discursive specificity, within the post national setting...does law, as a central steering mechanism, inevitably organize civil society in such a way as to reduce its autonomy?”<sup>74</sup> The way the question is posed here, I would argue, prefigures its answer. If law is conceived as both centralized and autonomous, that is, an institutionalized realm of ‘coordination’ that is separate from politics, it is hard to imagine it as capable of facilitating a multiple and diverse politics of global civil society. This is because in mainstream approaches, the legal/political subject (here, civil society) can only be constituted, or ‘called forth,’ by being ‘called into line.’<sup>75</sup>

Far from being ‘autonomous’ actors that might be envisioned to redress current ‘imbalances’ in global governance, I have argued that organized civil society networks have emerged and taken shape in response to developments in transnational governance. The discourse, methods, and objectives of both civil society and governance networks must be understood as inter-subjectively constituted. What is important to stress, however, is that this insight has particular consequences for how one imagines the ‘form’ of law. Law can no longer be imagined independently from these ongoing processes of inter-subjective norm generation, but is itself generated by them.

I have suggested that concerns with the legitimacy of transnational governance turns our attention towards questions of legal form, rather than substance, so that its outcomes are necessarily framed in terms of processes or procedures rather than rules. Through the lens of legal pluralism, in contrast, the construction and contestation of normative frameworks by legal subjects becomes the focus of the inquiry. For example, while much work has been done to more fully integrate the reconsideration of questions of recognition and participation into constitutional approaches to the WTO, the risk of dealing with these issues in constitutional terms is that they will become just another institutional design problem; another procedural detail

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<sup>72</sup> MacDonald, *supra* n.28 at 21.

<sup>73</sup> de Burca and Walker, “Law and Transnational Civil Society: Upsetting the Agenda?” (2003) 9(4) *EJL* 387.

<sup>74</sup> *ibid.*, at 389.

<sup>75</sup> Christodoulidis, “Constitutional Irresolution: Law and the Framing of Civil Society” (2003) 9(4) *EJL* 401 at 426.

to be worked out by the institutional engineers of the global legal order. In my view, the answers to such questions cannot be pre-determined. Institutional frameworks, the meaning of participation and the sources of legitimacy can and likely will be a multiple, contestable, and evolving as the subjects that are to be governed.

Imagining law as polycentrist, intersubjectively constituted and non-prescriptivist also facilitates a reflexive approach to the relationship between law and politics in the international realm. Law is not a separate and distinct realm of normative ordering. As Koskeniemi reminds us, law provides a fluid and evolving space and discourse within which competing normative claims are debated, engaged, negotiated and compromised. Yet, law and politics should not be imagined as discrete realms of activity, whether it is law or politics that is placed in the driver's seat. Rather, they need to be understood as intimately tied together in a mutual relation of 'constituent complicity'. It then follows that instead of being fixed and determinate, the form of law itself must also always be subject to re-conceptualization and transformation. Allowing ourselves to re-conceive of transnational legal institutions and the politics surrounding them in this way, I argue, could further the dual aims of fostering political pluralism and increasing the legitimacy of an institution such as the WTO.

For example, from within this perspective, we can consider how new instantiations of transnational political practice, such as those exemplified by various transnational movements for global social justice over the past decade, might influence the form of transnational legal regimes, as well as the converse. Global civil society exists and operates from within relatively more 'disorganized' and 'organized' manifestations, yet a focus on its relation to more 'constitution-like' legal forms such as the World Trade Organization will tend to highlight the activities of the relatively more organized nongovernmental organizations, and those activities in particular that are specifically directed towards the 'constitution' of that institution. Law need not only be imagined as the necessary 'institutional' container of an unruly and disruptive 'politics' that is 'prior' to law but must be authorized by it. The form of law itself might also be understood in its more 'disorganized' form, as potentially plural, disruptive, subject to re-conceptualization and transformation.

There is indeed a crisis of legitimacy in global trade governance. The need to democratize and pluralize transnational economic institutions such as the WTO is pressing. The most significant barriers to reform, however, are not in fact the formal, institutional obstacles that attract the bulk of attention. Rather, they are the conceptual foundations of the debate itself, including most importantly assumptions about the autonomous and 'monist' nature of law, and the institutionalized relationship between the realms of law and politics. Re-envisioning the form of law as itself plural and contested invites us to transcend the limitations of the constitutional (and constitutive) form in which we currently find ourselves compelled to imagine the relationship between law and politics in the realm of trade governance. In this conception, the parameters of law are determined by the potential of a diverse array of lawmaking subjects; its only limitations the limits of our ability to imagine alternative legal worlds. Unbounding our conception of transnational governance in this way frees us to engage with a much broader set of subjects and concerns than we might otherwise, and could provide a

more productive avenue through which to approach the pressing issues of inclusion, legitimacy and accountability.