## Articles

# The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"[*]

*By Peer Zumbansen*[**]

### A. From Law to Global Governance

The continuing proliferation of transnational private regulatory governance challenges 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 areas, but also in the field of internet governance, corporate law and labor law, where the rise to prominence of private actors has become a defining feature of the emerging transnational regulatory landscape. One of the most belabored fields, the transnational law merchant or, *lex mercatoria*, has gained the status of a *poster child*, as it represents a laboratory for the exploration of "private" contractual governance in a context, in which the assertion of public or private authority has 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. A central challenge resulting from case studies such as the transnational law merchant is from which perspective we

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ought to adequately study and assess the justifications, which are being offered for a contractual governance model, which prioritizes and seeks to insulate "private" arrangements from their embeddedness in regulated market contexts, on both the national and transnational level.

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 is at stake when 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" 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. 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 was able to scrutinize the nature of law and legal ordering without regard to the context or environment, in which legal ordering occurs, the transnationalization of law challenges such practice 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. 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 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 can hardly be overstated, and the current interdisciplinary engagement with transnational law and regulatory governance must be seen as a continuation of these approaches.

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' 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. 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 and relativized the priorly assumed role of the state in the production of legal

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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, have been changing in a fundamental way. With the prevailing unavailability of a 'world government', or a 'global constitution', lawyers find themselves in an unavoidable conversation with other disciplines concerning the nature and structure of a sphere, which continues to be depicted through labels that hide rather than readily reveal the disciplinary grounding of the forthcoming 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 predominantly operational 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, say political science, is echoed and similarly resounding 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.

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. a comparatively functional rule of law framework on the global level, say for the regulation of global financial markets or the protection of social rights, and the simultaneously increasing proliferation of private agency in the creation of governing norms and their dissemination[1], the prospects of a "legal" framework for global governance has itself become a question of concern in a host of disciplines. Ranging from law to sociology, political science, geography and political philosophy, law's disembeddedness from the nation-state prompts inquiries into the possibilities of

[1] *See* for example, TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS. THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2012).

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'reembedding' law or, alternatively, transposing and translating nation-state-"tested" frameworks and categories of legal regulation into the global governance context. 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.

**B. Law and (World) Society: From normative to cognitive expectations**

These introductory observations suggest that differing views regarding the *legal* nature of transnational private regulatory governance are but stand-ins or echoes of much deeper-running concerns with the fundamental transformation of legal regulation today. The contentions regarding, for example, the lex mercatoria's "autonomy" as well as the legal nature of its norms then illustrate the pressure of legal semantics, doctrine and terminology to keep pace with societal evolution, with the fact of continuing societal differentiation and the increasingly fragmented regulatory texture in relation to social differences and conflicts. This suggests, then, that questions such as those pertaining to the legal versus non-legal nature of norms, which govern transnational commercial relations – as they are central not only to the much written-upon field of the 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 the relationship between law and society in light of a loosening of the 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.

Such questions, however, are not in any way new to law and legal scholars. Over time, the need to adapt the law, its theory, doctrine and instruments to a however interpreted, ever-changing context, in which the depictions of the role of the state shifted between ruler and protector, mediator and facilitator, was widely acknowledged, even if with significantly different ideological underpinnings.[2] The continuing evolution of legal theory, then, underscores the importance of taking into consideration the lessons of the nation-state for an emerging transnational legal theory, given that the nation state provided – in the West – 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. The difference between a state/society model, on the one hand, and that of a functionally differentiated (world) society, which replaces the hierarchy

[2] Philip Abrams, *Notes on the Difficulty of Studying the State*, 1 J. OF HIST'L SOCIO. 58 (1988); Michel-Rolph Trouillot, *The Anthropology of the State in the Age of Globalization: Close Encounters of the Deceptive Kind*, 42 CURRENT ANTHROPOLOGY, 125 (2001).

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between the state and society with the coevolving presence of different rationality systems (such as the economy, politics, religion, art, or law), on the other, is significant as it helps us to better understand how much of the current legal language is shaped by the former theory, while the changes in governance, so often exclusively associated with the advent of globalization, are mostly explained against the background of the characteristics of the latter theory. To adequately understand the present state of legal theorizing of transnational governance, it might be helpful, then, to consider both the persistence of the former and the promise of the latter theoretical model of society.

Against this background, the assumption of a functionally differentiated world society appears less threatening to the long-held views of law's relation to the state. At the same time, to theorize the role of law in world society implies quite a radical shift in perspective. To the degree that law is now seen as one among other societal forms of communication, its alleged hierarchical and ordering function appears in a new light.[3] While in the context of the nation state and its associated legal systems, law was charged with the tasks of stabilizing expectations and meeting normative needs[4], its role in a differentiated world society appears to both undermine and expand this ‚legal mindset' in a radical manner. Central to this shift is a reorientation of the function foremost ascribed to law: rather than stabilizing *normative* expectations, the law is now seen as having to stabilize *cognitive* expectations. In other words, law becomes a broker, mediator, translator of competing, intersecting knowledge bodies. One consequence of this reorientation is its turn to an openness of goals, as law's primary function is no longer defined as one of bringing about desired (normative) results, but to open up, to facilitate and to institutionalize and consolidate learning opportunities.[5] 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.[6]

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[3] HELMUT WILLKE, SMART GOVERNANCE. GOVERNING THE GLOBAL KNOWLEDGE SOCIETY (2007).

[4] Peer Zumbansen, *Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law*, 56 AMER. J. OF COMP. L. 769-805 (2008).

[5] Niklas Luhmann, *Die Weltgesellschaft*, 57 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 1 (1970), reprinted in LUHMANN, SOZIOLOGISCHE AUFKLÄRUNG 2 (2nd ed., 2005) 51-71, at 55: "Kognitives Erwarten sucht sich selbst, normatives Erwarten sucht sein Objekt zu ändern. Lernen oder Nichtlernen – das ist der Unterschied."

[6] Karl-Heinz Ladeur, *Die rechtswissenschaftliche Methodendiskussion und die Bewältigung des gesellschaftlichen Wandels*, 64 RABELSZ 60-103 (2000); id., *Constitutionalism and the State of the 'Society of Networks': The Design of a New 'Control Project' for a Fragmented Legal System*, 2:4 TRANSNATIONAL LEGAL THEORY 463-476 (2011). *See also* Luhmann, *Weltgesellschaft*, *supra*, note 5, at 57: "Offensichtlich ist mit Hilfe der normativen Mechanismen, vor allem des Rechts, auf der Ebene politisch konstituierter Regionalgesellschaften eine evolutionär unwahrscheinliche Hochleistung stabilisiert und damit erwartbar gemacht worden – nämlich die verlässliche Motivation zu nahezu beliebig spezialisierbarem Handeln. [...] Es könnte sein, daß diese eigentümliche Kombination von Recht und Politik gerade in ihrer besonderen Leistungsfähigkeit eine Fehlspezialisierung der Menschheitsentwicklung war, die sich, vorläufig jedenfalls, nicht auf das System der Weltgesellschaft übertragen lässt."

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 ascribed to it on the basis of both a positivist, Kelsenian, or a normative, Fullerian or Dworkinian, model. If law's function were adequately described as one of mediating, translating, and brokering competing and conflicting societal rationalities and meanings, the question regarding law's proper *core* would become urgent. This concern with an allegedly fundamental and inherent normative orientation of law 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.

A brief recourse to the idea of "seminal" or "landmark" cases in a country's legal imagination may illustrate this point. To take one example, the U.S. Supreme Court's 1905 decision in *Lochner v New York*, where the Court struck down the New York legislator's regulation of maximum working hours for bakers, bears all of the characteristics of a case that is apt to catch the spirit of a moment and, by consequence, cast a significant shadow into the future. Lochner's legacy[7] is deeply embedded in a particular discursive trajectory that marked or, marks, the conflict between progressive and conservative, left and right positions vis-à-vis market governance. The cornerstones of such conflicts are easily identified within a nation state's particular, idiosyncratic history of constitutional rights, "materialization" of private law, the pros and cons of welfarism and the eternal anxiety over competing approaches of how to best promote societal freedom. And, while no one would claim that all was ever good in the nation state, the proliferation of private governance regimes presents us with a formidable challenge to identify a global or, transnational framework within which the conflicts associated with Lochner would be debatable anew but differently. The emergence of a vast transnational regulatory landscape, the absence of a world constitutional framework (let alone, text) and the volatile, context-specific public participation opportunities, which give only a meager echo of democratic processes, point to the degree to which Lochner has become "disembedded" and would now have to be revisited in a newly conveived "context".

### C. Transnational Private Regulatory Governance and the Empty Place of Politics?

In light of the foregoing, however, it would appear that there are significant obstacles for a political, "critical" engagement with the ideological underpinnings of the purportedly market-oriented thinking that characterizes much of today's discourse around transnational economic governance. Not only are many of the avenues of political will

[7] For more background and discussion, *see* Peer Zumbansen, Lochner *Disembedded: The Anxieties of Law in a Global Context*, IND'A J. OF GLOB. LEG. STUD. (2012), *forthcoming*, available at: http://ssrn.com/abstract=2174017 (last accessed: 1 December 2012).

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formation and contestation which have developed in the state's constitutional system unavailable in the context of transnational regulatory regimes[8], 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 give consequential voice to this diversity.

This is so despite the fact that the dramatic dimensions and repercussions of a crudely conceived (and, embraced) theory of market freedoms and private governance have become so obvious[9], which would suggest that the concerns associated with Lochner can still be formulated and tabled today – as back when. This seems to be the case even more so, because a scrutiny of the origins of the current crisis makes it so abundantly clear, that the litany of the wide-spread 'retreat of the market' and of 'deregulation' serves more as an ideological foil than to capture the in reality very extensive forms of market regulation, which constituted the context out of which the crisis erupted.[10]

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[11] as these theoretical approaches evolved in response to the transformation of the Western welfare state[12] during the last decades of the twentieth century, relate to the far reaching proliferation of alternative and hybrid forms of regulation. These transformations have left deep imprints in law in general, but particularly in the taught and practiced discipline of administrative law.[13] At the same time,

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[8] For a fine analysis of the transnational realm, *see* Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 NYU J. OF INT'L L. & POL. 1-74 (2006).

[9] ROBERT REICH, SUPERCAPITALISM. THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE (2007); Sol Picciotto, *Constitutionalizing Multilevel Governance?* 6 INT'L J. OF CONST'L L. 457-479 (2008).

[10] SIMON JOHNSON & JAMES KWAK, 13 BANKERS. THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN (2010).

[11] Gunther Teubner, *Regulatory Law: Chronicle of a Death Foretold*, 1 SOCIAL & LEGAL STUDIES 451-475 (1992) [orig.: Gunther Teubner, 'Regulatorisches Recht: Chonik eines angekündigten Todes', (1992) *ARSP Beiheft 54* 140-161]; hereto, *see* Peer Zumbansen, *Post-regulatorisches Recht: Chronik einer angekündigten Karriere*, *in* SOZIOLOGISCHE JURISPRUDENZ. FESTSCHRIFT FÜR GUNTHER TEUBNER ZUM 65. GEBURTSTAG (Gralf-Peter Calliess, Andreas Fischer-Lescano, Dan Wielsch and Peer Zumbansen eds., 2009), English version: Post-regulatory Law: Chronicle of a Career Foretold, Faculty Seminar Presentation, McGill University, Faculty of Law, 18 February 2009, available at: http://www.mcgill.ca/files/legal-theory-workshop/PZumbansen_Post-Regulatory-Law.pdf (last accessed: 1 December 2012).

[12] Gunther Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, 18 L. & SOC. REV. 291-301 (1984).

[13] *See e.g.* Matthias Schmidt-Preuss, *Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung*, 56 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 160-234 (1996); THE PROVINCE OF ADMINISTRATIVE LAW (Alfred Aman Jr., *Administrative Law for a New Century*, *in* Michael Taggart ed., 1997); Thomas Vesting, *Zwischen Gewährleistungsstaat und Minimalstaat:*

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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.[14]

This constellation, arguably, offers considerable opportunities also for a critical-political engagement, which at first sight seemed elusive from the perspective of a sociological world society account.[15] In the larger context of the field that has been referred to a number of times so far in this paper – lex mercatoria – such opportunities for contestation have been identified and taken up for some time now in the context of international economic law. In this respect, prominent and lively fields of engagement include bilateral investment treaties[16], financial regulation[17] and corporate law[18], in 'law and development'[19] 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.[20] These efforts are of particular importance in our context, as they testify to both

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*Zu den veränderten Bedingungen der Bewältigung öffentlicher Aufgaben in der 'Informations- oder Wissensgesellschaft'*, *in* VERWALTUNGSRECHT IN DER INFORMATIONSGESELLSCHAFT (Wolfgang Hoffmann-Riem and Eberhard Schmidt-Assmann eds., 2000).

[14] Rudolf Wiethölter, *Die Wirtschaftspraxis als Rechtsquelle*, *in* DAS RECHTSWESEN - LENKER ODER SPIEGEL DER GESELLSCHAFT? (Paul Bockelmann ed., 1971); Rudolf Wiethölter, *Recht-Fertigungen eines Gesellschafts-Rechts*, *in* RECHTSVERFASSUNGSRECHT. RECHT-FERTIGUNG ZWISCHEN PRIVATRECHTSDOGMATIK UND GESELLSCHAFTSTHEORIE (Christian Joerges and Gunther Teubner eds., 2003).

[15] *See* Marc Amstutz, *Ibi Societas, Ibi Ius: The Conundrum of the Concept of World Law. Comments on Calliess & Zumbansen, Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart: 2010, paperback 2012), MANUSCRIPT FOR ROUGH CONSENSUS AND RUNNING CODE WORKSHOP, European University Institute, Florence, 13 May 2011, at 7.

[16] Muthucumaraswamy Sornarajah, *Power and Justice:Third World Resistance in International Law*, 10 SING. YEARBK. OF INT'L L. 19-57 (2006); Gus Van Harten/Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. OF INT'L L. 121-150 (2006).

[17] *See e.g.* the description of transnational financial regulation by Julia Black/David Rouch, *The development of global markets as rule-makers: engagement and legitimacy*, LAW AND FINANCIAL MARKETS REVIEW 218-233 (2008).

[18] *See e.g.* Larry Catá Backer, *The OECD Guidelines for Multinational Corporations: Using Soft Law to Operationalize a Transnational System of Corporate Governance*, (2009) LAW AT THE END OF THE DAY (Blog), available at: http://lcbackerblog.blogspot.com/2009/03/oecd-guidelines-for-multinational.html (last accessed: 1 December 2012), and Gregory Shaffer, *On Terence C. Halliday and Bruce G. Carruthers, Bankrupt: Global Lawmaking and Systemic Financial Crisis. Stanford, Stanford University Press*, 2010 Panel at the SASE 2010 Annual Meeting, Philadelphia, USA', 1-24 SOCIO-ECONOMIC REVIEW 1-24 (2011).

[19] Kerry Rittich, *Functionalism and Formalism: Their latest Incarnations in Contemporary Development and Governance Debates*, 55 UNIV. OF TOR. L. J. 853-868 (2005), and SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW (2011).

[20] *See e.g.* César Rodríguez-Garavito, *Ethnicity.gov. Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields* 18 (1)IND'A J. OF GLOB. LEG. STUD. 263 (2011); *see also* Kamphuis and Seck, in this issue.

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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. To the degree, however that governance challenges are identified as emerging on either a national or a transnational, global level, the relevance of the alluded-to approximation of 'national' and 'transnational' governance discourses lies in making visible the parallels between the involved and affected "interests", essentially on the question of how to identify and to verbalize that which is *at stake* – here and there and for whom. This placing of '*What is at stake?*' in the center of such a parallel reading of national and transnational governance discourses is, of course, outrageously ambitious, if not ill-directed in the first place. Because, what would the anchor or reference point be for the related assertion of those interests that testify to what *is* at stake?

In light of the complexity of the sociological account rendered by systems theory, with which this author has certain sympathies[21], the straight-forward identification of a normative goal as being pervasive in an encompassing social context is not an option. This suggests why attempts to identify universally shared value systems in the national as well as the global context must likely remain elusive.

Harking back to the just- referenced areas in international economic law, we are able to witness a significant level of efforts to initiate and consolidate processes of political and legal advocacy[22], all of whom 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.[23] These examples testify to a significant opening up of opportunities for legal-political critique.

[21] Peer Zumbansen, *Review of Niklas Luhmann, Law as a Social System*, 15(3) SOCIAL & LEGAL STUDIES 453 (2006).

[22] Kamphuis, Seck, Sukdeo, this issue.

[23] *See* Rodríguez-Garavito, *supra* note 20; *see also* Boaventura de Sousa Santos, *Beyond Abyssal Thinking* (2007) EUROZINE, available at: http://www.eurozine.com/articles/2007-06-29-santos-en.html (last accessed: 1 December 2012).

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**D. Transnational Private Regulatory Governance: A Case in Point for "Legitimacy"**

How does the foregoing relate to the continuing proliferation of highly specialized regimes of transnational private regulatory governance? Much of the work done by lawyers in this global governance realm has singled out the term "legitimacy" as a potentially effective lever to scrutinize the legal nature of evolving transnational regulatory structures. But it is here that the complexity of the idea of legitimacy in a global governance context becomes visible. In this new context, its realization depends on a comprehensive assessment of the different dimensions of "legitimacy" which lie beyond otherwise routinely assumed linkages between legality and its grounding in, say, "democratic" legitimacy. Not only has law become disembedded, but law's approaches to address its perennial legitimacy concerns[24] have lost their footing as well. 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 multidisciplinary engagement with law's relation to and place in society. Following the differentiation of modern world society, legitimacy concerns for law arise and are being addressed within highly sectionalized and specialized areas of regulatory governance. The devil, it appears, lies in the detail, here more than arguably ever before. 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 and arguably even "autonomous" regulatory governance framework. This concern is fuelled, partly, by anxieties over the 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.[25] 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[26] to environmental[27]

[24] 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 Luvois 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).

[25] For an insightful scrutiny, *see* GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS. SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012); *see* the comprehensive engagement with this work by Karl-Heinz Ladeur, *The evolution of the law and the possibility of a "global law" extending beyond the sphere of the state – simultaneously, a critique of the "self-constitutionalisation" thesis*", ANCILLA IURIS (2012), available at: http://www.anci.ch/_media/beitrag/ancilla2012_220_ladeur.pdf (last accessed: 1 December 2012).

[26] *See* Katharina Pistor, *Towards a Legal Theory of Finance*, COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 12-323 (2012), available at: http://ssrn.com/abstract=2178000; John Biggins, *"Targeted Touchdown" and "Partial Liftoff": Post-Crisis Dispute Resolution in the OTC Derivatives Markets and the Challenge for ISDA*, 13(12) GERM. L. J. 1297 (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1297-1325_Articles_Biggins.pdf (last accessed: 1 December 2012); Colin Scott, *Beyond Taxonomies of Private Authority*

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regulation, investment law[28] or commercial transfers[29], 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.[30]

The papers that form part of this symposium, address the legitimacy concerns around a fast expanding transnational landscape of private, non-state regulatory actors and regimes from such an expanded perspective. They show how many of the concerns formulated with reference to "legitimacy" arise in response to the apparent absence of much of the institutional and normative architecture in a transnational setting, which has often been associated, at least, with the Western welfare and nation state-narrative.[31] These 'post-modern anxieties', as keen observers have once noted with regard to (international) law's struggles to maintain a regulatory grip of global realities[32], continue to accompany and to

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*in Transnational Regulation*, 13(12) GERM. L. J. 1326 (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1326-1335_Articles_Scott.pdf (last accessed: 1 December 2012).

[27] Kirsten Mikadze, *Public Participation in Global Environmental Governance and the Equator Principles: Potentials and Pitfalls*, 13(12) GERM. L. J. 1383 (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1383-1408_Articles_Mikadze.pdf (last accessed: 1 December 2012); Sara Seck, *Home State Regulation of Environmental Human Rights Harms as Transnational Private Regulatory Governance*, 13(12) GERM. L. J. 1360 (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1360-1382_Articles_Seck.pdf (last accessed: 1 December 2012); Andrian Lozinski, *The Equator Principles: Evaluating the Exposure of Commercial Lenders to Socio-Environmental Risk*, 13(12) GERM. L. J. 1487 (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1487-1507_Articles_Lozinski.pdf (last accessed: 1 December 2012); Gail Henderson, *Institutional Investors as Transnational Environmental Regulators? The Limits of Responsible Investing as Environmental Regulation*, 13(12) GERM. L. J. 1409 (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1409-1434_Articles_Henderson.pdf (last accessed: 1 December 2012).

[28] Douglas Sarro, *Do Lenders Make Effective Regulators? An assessment of the Equator Principles on project finance*, 13(12) GERM. L. J. 1522 (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1522-1555_Articles_Sarro.pdf (last accessed: 1 December 2012).

[29] Agnieszka Janczuk-Gorywoda, *Public-Private Hybrid Governance for Electronic Payments in the European Union*, 13(12) GERM. L. J. 1435 (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1435-1455_Articles_Janzcuk-Gorywoda.pdf (last accessed: 1 December 2012).

[30] Tony Porter, *Transnational Private Regulation and the Changing Media of Rules*, 13 GERM. LAW JOURNAL 1508 (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1508-1521_Articles_Porter.pdf (last accessed: 1 December 2012); Matthew Chan, *Psychological Actors – Behavioral Analysis of Equator Principles Adoption*, 13(12) GERM. L. J. 1336 (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1336-1359_Articles_Chan.pdf (last accessed: 1 December 2012).

[31] *See* Scott, *supra* note 26, and Porter, *supra* note 30, both in this issue.

[32] Martti Koskenniemi & Paivo Leino, *Fragmentation of International Law: Post-modern Anxieties*, LEIDEN J. OF INT'L L. 553-579 (2002)

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inform numerous engagements among scholars today with the *impact* of globalization on law. The authors contributing to this symposium appear to agree that law, as discipline, theory and practice can today hardly be imagined outside of the context of globalization. In addressing the myriad ways in which globalization unsettles and undermines the nexus between state and law, that is the assumption that law emanates from authoritative institutionalized processes grounded in a state-based system of norm-creation, -implementation and adjudication, scholars are seeking ways to resituate and reconceptualize the core and the boundaries of law in the context of transnational governance. This unsettling process has not stopped before areas that were once irrefutably and exclusively tied to concepts of state sovereignty.[33] Furthermore, it gives new meaning to those areas testifying, above all, to law's ambiguous stance and involvement in the creation and maintenance of conditions of precariousness.[34]

Transnational 'private' regulatory governance sits squarely in the discursive context of state transformation, both from a national[35] and a transnational[36] perspective, as it addresses a fundamental decentering of rule creation, dissemination and adjudication processes and of the conceptual frameworks which depict both legality and legitimacy of these processes. 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*[37], *Global Legal Pluralism*[38], or say, Transnational Law.[39] Notwithstanding their

[33] Amar Bhatia, *'In a Settled Country, Everyone Must Eat': Four Questions About Transnational Private Regulation, Migration and Migrant Work*, 13(12) GERM. L. J. 1282 (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1282-1296_Articles_Bhatia.pdf (last accessed: 1 December 2012).

[34] Charis Kamphuis, *Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account*, 13(12) GERM. L. J. 1456 (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1456-1486_Articles_Kamphuis.pdf (last accessed: 1 December 2012).; Vanisha Sukdeo, *Transnational Governance Models: Codes of Conduct, and Monitoring Agencies as Tools to Increase Workers' Rights*, 13(12) GERM. L. J. (2012), available at: http://germanlawjournal.com/pdfs/Vol13-No12/PDF_Vol_13_No_12_1556-1567_Articles_Sukdeo.pdf (last accessed: 1 December 2012).

[35] STEPHAN LEIBFRIED & MICHAEL ZÜRN EDS., TRANSFORMATIONS OF THE STATE? (2005); Peer Zumbansen, *Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law*, 56 AMER. J. OF COMP. L. 769-805 (2008), available at: http://ssrn.com/abstract=1128144 (last accessed: 1 December 2012); reprinted in NILS JANSEN & RALF MICHAELS EDS., BEYOND THE STATE – RETHINKING PRIVATE LAW 349-386 (2008).

[36] Gregory Shaffer, *Transnational Legal Process and State Change*, 37 LAW & SOCIAL INQUIRY 229 (2011).

[37] Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COL. J. OF TRANSNATIONAL L. 485-556 (2005); Ulrich Sieber, *Rechtliche Ordnung in einer Globalen Welt*, 41 RECHTSTHEORIE 151-198 (2010).

[38] Ralf Michaels, *Global Legal Pluralism*, *Duke Public Law & Legal Theory Research Paper No. 259* (2009), available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430395 (last accessed: 1 December 2012); Paul Schiff Berman, *Global Legal Pluralism*, 80 SOUTH. CAL. L. REV. 1155-1237 (2007).

[39] PHILIP JESSUP, TRANSNATIONAL LAW (1956); Clive Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions*, *in* THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS (Norbert Horn and

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analytical and conceptualizing function, such frameworks are still failing to provide for definitive answers regarding the nature, form and scope of law 'in a global context'. 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 caught up.[40] 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, a 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", it is little surprising that 'transnational private regulatory governance' [TPRG] attracts much attention. Part of the reason for the lively scholarly interest in these processes can be found in the way, that TPRG appears 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, themselves defined by their capacity to effectively promote non-state rule creation as well as adjudication. And yet, the work on TPRG which is gaining more and more momentum, suggests an ever more differentiated engagement with aspects of legality, accountability and legitimacy, so often highlighted in this context.

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Clive Schmitthoff eds., 1982); Christian Tietje & Karsten Nowrot, *Laying Conceptual Ghosts of the Past to rest: The Rise of Philip C. Jessup's 'Transnational Law' in the Regulatory Governance of the International Economic System*, 50 ESSAYS IN TRANSNATIONAL LAW (2006).

[40] ALFRED AMAN & PEER ZUMBANSEN, TRANSNATIONAL LAW: ACTORS, NORMS, PROCESSES (2013) (*forthcoming*).

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