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- empirical studies of the emergence, evolution and transformation of international and/or transnational legal orders, including accounts and explanations of how law is constructed within different communities of interpretation and practice.

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Rough Consensus and Running Code

A Theory of Transnational Private Law

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HART PUBLISHING
OXFORD AND PORTLAND, OREGON

As such, we do in no way purport to defend either field as self-explanatory or, even less, as objectively given. Meanwhile, our interest in private law is further nurtured by the extremely rich body of work on the regulatory character of private law that well precedes the famous *publicisation* of private law throughout the rise and consolidation of the Western welfare state.[289] Precisely with regard to the highly ambivalent and crucial role played by contract and property in the evolution of legal thought,[290] we find here a sheer inexhaustible—and as regards our project surely inexhausted—reservoir of inquiries and explorations into the regulatory character of private law instruments. Given the high degree of adaptability of private law regulation to changing circumstances in long- and short-term perspective,[291] it has been a highly demanded framework in the continued search for adequately complex law. Lastly, to return here again to the remarks made above with regard to social norms, contract law is doubtless the most vividly discussed field of regulatory law that is competing and in tension with alternative approaches to social ordering. It is with these considerations in mind, that we have chosen to concentrate on private law examples in our attempt to identify constitutive elements of a theory of transnational law.

B. The Transnational: A Realm of Borderless Self-Regulation?

The choice of a private law perspective in the context of analysing evolving forms of transnational norm creation receives further support in light of the high degree of hybrid regulation that marks the transnational space. The apparent legal vacuum on the global level which some see as decline of sovereignty, others as opportunity and still others as the core of a legal pluralist perspective on society,[292] is fast filled by various processes of self-regulation and 'private ordering'.[293] Yet, the move from an embedded, institutionalised and historically evolved national political framework into the great unknown of the global arena continues to be accompanied by fierce

[289] Franz Wieacker, 1967; John N Adams and Roger Brownsword, 1987; Esser, 1996.
[290] Morris R Cohen, 1927; C B Macpherson, 1967.
[291] See Macaulay, 1963; Macneil, 1985; Kreimer, 2005.
[292] Till Müller, 2008, 34–35; Claudio Franzius, 2009, 37: '*Mit dem Souveränitätsbegriff lässt sich der Regulierungsverbund nicht erfassen. Governance, rechtswissenschaftlich reformuliert, unterläuft Begriffe, die für den Staat entwickelt worden sind*'. See also Louis Henkin, 1999, 13: 'What shall we do about the "S word?" I have tipped my hand. We need to address what has happened to traditional notions of sovereignty as a result of forces we have identified, and others, globalization, the market, and cyberspace'. See, in this regard, also Richard Ford, 1999, and Hannah L Buxbaum, 2009.
[293] Marc Galanter, 1981; Oliver Williamson, 2002; Avinash K Dixit, 2004; Robert D Cooter, 1994, 215: 'Rather than proceeding from top to bottom, lawmaking can proceed from bottom to top'.

disputes over categories and distinctions.[294] Depending on one's viewpoint, processes of self-regulation can be categorised as *private* regimes, combining social norms, alternative dispute resolution, and non-legal sanctions, which can then be understood as natural expressions of the market's self-regulatory capabilities.[295] From another perspective, however, they may very well constitute an infringement on the state's regulatory prerogative.[296] While the former can point to the well established, 'spontaneous evolution'[297] of the already alluded to law merchant, or *lex mercatoria*, or to the triumphant story of 'enabling (corporate) law',[298] the continental public lawyer is likely to remain sceptical with regard to the ubiquitous, aspirations of sovereignty displayed by private norm entrepreneurs.[299] Radicalising Weber's rationalisation and disenchantment concept,[300] 'Systems Theory of Law'[301] develops a theory of functional differentiation, which responds to globalisation by ascribing evolutionary priority to 'issue-specific' and 'self-contained non-state legal regimes', which evolve around functionally differentiated spheres of transnational communication and transaction.[302] Doing away with national borders and eventually shuddering at the prospect of law—as such—having been perhaps but a 'European anomaly',[303] this approach has no trust in an exclusive law generating authority ascribed by many to the state, but is left to apply the legal code far into the last corners of societal organisation.

These deconstructions of law's hierarchy, unity and embeddedness raise the question whether and from which standpoint 'private' regimes can and should be understood as law. Under the influence of legal positivism, whereby law was understood as the command of a sovereign backed by force[304] and whereby a close connection, if not an identity between the state and the law, was assumed,[305] much of Western jurisprudence anchored law exclusively in the nation-state.[306] This association of the legal regime with the nation-state facilitated the domestication of political power under the rule of law. The price for the *internal* formalisation and modernisation of private law produced by the nineteenth-century constitutional state

[294] A Claire Cutler, 1997; Christine Chinkin, 1999; Peer Zumbansen, 2004c; Ralf Michaels, 2009b.
[295] Lisa Bernstein, 1992; Lisa Bernstein, 2001; Gillian K Hadfield, 2001.
[296] Paul Kirchhof, 2001; Martin Wolf, 2002.
[297] Friedrich A Hayek, 2002.
[298] For an assessment, see Melvin Eisenberg, 2005.
[299] Felix Hanschmann, 2009.
[300] Max Weber, 1946.
[301] See Niklas Luhmann, 1992a; Niklas Luhmann, 2004; Peer Zumbansen, 2006a.
[302] Andreas Fischer-Lescano and Gunther Teubner, 2004.
[303] Niklas Luhmann, 2004.
[304] John L Austin, 2002.
[305] Hans Kelsen, 1961.
[306] Simon Roberts, 2005; but see Colin Scott, 2008b.

was, however, the nationalisation of the once common European law, the so-called Roman *ius commune*,[307] as well as the decline of the medieval Law Merchant, or *lex mercatoria*.[308]

In order to prevent cross-border trade from suffering from the resulting *external* territorial fragmentation of law, eventually the idea emerged of creating a 'world private law' by means of international treaty harmonisation.[309] This endeavour, however, turned out to be more difficult than expected. More than one hundred years of work within different organisations like the Hague Conference on Private International Law (1893), Unidroit (1926) and UNCITRAL (1966)[310] have resulted in little but fragments, including the 1980–UN Convention on the International Sale of Goods (CISG).[311] The post World War II ideological division into the West, the East, and the South was certainly adding further obstacles, but even after the fall of the Iron Curtain matters did not improve. The negotiations on a Global Judgments Convention, first initiated in the early 1990s in The Hague,[312] quite recently failed for reasons of a purported transatlantic *Justizkonflikt* (Jurisdictional Conflict), which suggests that even the member states to the OECD are unable and/or unwilling to come together to create a common constitution of world trade.[313] At this point, it appears as if hopes for a world private law based on multilateral treaties are in vain.[314]

Certainly, there has been a vivid search for both models of global harmonisation as well as for alternative conceptualisations of law-making: international law scholars, not only those with expertise in international economic or commercial law,[315] have long been seeking alternative paths to achieve legal certainty on a global level. As alluded to above, Philip Jessup's functional concept of transnational law continues to occupy an important place in this effort. Transnational law, for Jessup, was 'all law which regulates actions or events that transcend national frontiers', a definition he put forward with the aim of founding a branch of jurisprudence not only distinct from but also more comprehensive than the state-centred law of nations. Jessup's transnational law comprised national and international as well as public and private law.[316] In a parallel attempt to theorise law on a global level, authors such as Berthold Goldman and Clive Schmitthoff began, albeit with certain distinctions,[317] to promote a specifically *a*-national understanding of the term transnational law. It was, as we saw, in this context that these authors suggested reviving the medieval Law Merchant in the context of modern international commercial arbitration.[318]

Today the literature on transnational law and the New Law Merchant has become both abundant and extremely diverse, following the logic of world society's functional differentiation. Unsurprisingly, no theoretical consensus on the concept of transnational law seems to be in sight. While these divergences continue to encompass disagreements in substance as well as in method,[319] the evidence from legal practice appears to suggest a certain relaxation of the tenuous opposition between defenders and opponents of a transnational law merchant: looking at this constellation, a number of scholars have been pointing to a distinct '*practice* of transnational law', in light of which the field is held to be too important for it to be buried under inadequately narrow doctrinal and conceptual constructions. Certainly, where the self-proclaimed transnationalist takes comfort in the no doubt lively practice of border-crossing commercial agreements, the indirect dismissal of the question 'But, is it law?' meets with distinct criticism.[320] The undisputed evidence of the existence of rules of *lex mercatoria*[321] does not suffice to make the ghosts disappear that have been haunting us in relation to the nature and relevance of such rules, in particular for our general understanding of law—inside and outside of the nation-state.

Inherent to this continuing brawl are questions of legitimacy. Such questions have always been raised in the context of private law-making[322] and they return in somewhat accentuated fashion in the transnational arena. The absence of a firmly demarcated institutional structure amplifies the already pressing, historical concerns over the role of the state vis-à-vis the market. As such, these concerns have been receiving a great deal of attention: understanding the emergence of 'private authority' in the international arena as a distinctive mark of global governance, we are intrigued by observations by political scientists who question the viability of clean-cut

[307] Reinhard Zimmermann, 2001.
[308] Uwe Blaurock, 1998; A Claire Cutler, 2003, 144.
[309] Ernst Zitelmann, 1888; see Klaus Peter Berger, 2001a.
[310] Peer Zumbansen and Maria Panezi, 2008.
[311] See Franco Ferrari, 2005.
[312] Joachim Zekoll, 1998; Vaughan Black, 2000; Michael Traynor, 2000.
[313] Samuel P Baumgartner, 2003; Gralf-Peter Calliess, 2004.
[314] Herbert Kronke, 2003; Herbert Kronke, 2005; Ulrich Drobnig, 2001.
[315] See, eg, Paul B Stephan, 1999, and Joel Trachtman, 2000.
[316] Philip C Jessup, 1956; Peer Zumbansen, 2006d; Christian Tietje and Karsten Nowrot, 2006.

[317] See above, Chapter 2, A.
[318] Berthold Goldman, 1956; Clive M Schmitthoff, 1964b; Klaus Peter Berger, 2001a.
[319] For a concise discussion, using the example of *lex mercatoria*: Karsten Schmidt, 2007.
[320] See the introduction to and contributions in: Klaus Peter Berger, 2001b; in contrast, see the scathing critique by Thomas Schultz, 2008, 709: 'And so we come to the end of these different lines of argument that all led us to conclude that the *lex mercatoria* is not law, because it is not a legal system, because it cannot be a set of *legal* rules without deriving its non-State juridicity from its belonging to a non-State legal system, and because being a method of rule-selection necessarily relies on the assumption that the *lex mercatoria* is a legal system'.
[321] Karsten Schmidt, 2007, 160: '*Nichtjuristen werden staunen, wie denn über Regeln gestritten wird, deren Existenz doch offenbar festgestellt werden kann*'.
[322] Louis Jaffe, 1937; Robert W Gordon, 1985; Colin Scott, 2008b.

public-private distinctions to delineate spheres of human activity.[323] Of great interest here is the political scientist's treatment of codes of conduct, best practice guidelines and, particularly, standards: studying such forms of private norm-creation through the lens of analogies between national and global regulation, a differentiated picture begins to emerge. Rather than evidencing a blanket loss of state sovereignty, scholars such as Peter Drahos and John Braithwaite have been insisting on a multifunctional assessment of in fact several globalisations. To these globalisations, then, of firms, markets and regulation, Drahos and Braithwaite attribute different forms and processes of a transformation of sovereignty and contend that '[t]here is no reason to think that globalisation strips states of their sovereignty in equal measure'.[324] This re-orientation of focus to the nation-state and its sub-entities[325] as the places 'where the work of globalisation gets done' (S Sassen) has proven crucial for on-the-ground studies of state transformation in a great variety of functional areas.[326] Such studies of the changing landscape of—unequally empowered—*actors* on the one hand[327] and of norms on the other[328] provides important insights into the shifting boundaries between state and non-state, national and global institutions, as well as into the deep transformation of the regulatory apparatus. These echo and parallel a long-standing critique among lawyers with regard to the analytical quality of the public-private distinction in distinguishing areas of law on the one hand and in attributing a particular normative orientation to a legal instrument on the other.[329]

C. Private Ordering and Public Authority: Scrutinising Democratic versus Economic Functions of Law

Given the existence of non-state normative orders in the transnational sphere,[330] the decisive question—for lawyers—seems to be how to reconstruct this social reality from the point of view of 'law'.[331] In an important

[323] Rodney Bruce Hall and Thomas J Biersteker, 2002, 4; A Claire Cutler, 2003.

[324] Peter Drahos and John Braithwaite, 2001, 106, 107.

[325] Saskia Sassen, 1998, 161, 164: 'Major cities in the highly developed world are the terrain where a multiplicity of globalization processes assume concrete, localized forms'.

[326] See, eg, the telling illustrations in Stephan Leibfried and Michael Zürn, 2005, and the study by Jochen Zimmermann, Jörg R Werner and Philipp B Volmer, 2008.

[327] Drahos and Braithwaite, 2001, 124: 'The contest amongst actors is an unequal one'.

[328] Nils Brunsson and Bengt Jacobsson, 2000; Dieter Kerwer, 2005b, 620–28, drawing on a comparative study of soft law approaches for an outline of how the regulatory potential of standards can be assessed from a legitimacy and accountability perspective.

[329] Roscoe Pound, 1939; Martin Bullinger, 1968; Carol Harlow, 1980.

[330] A Claire Cutler, 2003.

[331] Ralf Michaels, 2005; for a more recent presentation of this idea, see Ralf Michaels, 2007a.

chapter, a part of which he first presented in 1980 at Osgoode Hall Law School in Toronto, Stewart Macaulay began with the following observation:

> Much of what we call governing is done by groups that are not part of the institutions established by federal and state constitutions. If governing involves making rules, interpreting them, applying them to specific cases, and sanctioning violations, some or all of this is done by such different clusters of people such as the Mafia, the National Collegiate Association, the American Arbitration Association, those who run large shopping centers, neighborhood associations, and even the regulars at Smokey's tavern. It may be necessary to draw a sharp line between public and private governments such as these in order to think about law, but in reality there is no such division. To the contrary, one finds instead interpenetration, overlapping jurisdictions, and opportunities for both harmony and conflict among public and private governments.[332]

Macaulay's suggestion at the time was to fundamentally upset the state-originates-in-the-state thesis that continued to hold prominence even among those scholars who purported to assume a decidedly sceptical attitude towards law. He proposed, therefore, a distinct 'private government perspective' that would both recognise the effect that private associations had on government and treat dearly held distinctions between public and private spheres as doubtful rather than given.[333] Against the background of an extremely rich, empirically evidenced picture of the manifold overlappings of public and private forms of conflict resolution and norm-creation, Macaulay cautioned against the option of capturing this varied landscape by a mere 'expansion' of the concept of the 'legal system': 'such a move glosses over whether it makes a difference if a particular function is performed publicly or privately'.[334] With reference to Niklas Luhmann's idea of a 'thematisation threshold' (determining the moment of transitioning a 'social' problem into a 'legal' question with largely unpredictable consequences), Macaulay emphasised the importance of studying the place of law in the particular context of different social groups and settings rather than assuming that the role of law in society be determinable in a general fashion.[335] From such an inside perspective, the role of law, in principle regarded as playing a considerable role in establishing legitimacy or providing for symbolic satisfactions, would come to be seen instead as mediated, filtered or distorted by the different layers and overlappings that characterise what Sally Falk Moore famously identified as 'semi-autonomous

[332] Stewart Macaulay, 1986, 445–46.

[333] *Ibid*, 445.

[334] *Ibid*, 471: 'Turning to law usually means withdrawing from the relationship in question, and often one needs support to replace the benefits of the situation rejected. A legal discussion may initiate a chain of events with an unpredictable outcome, and the more uncertain the future, the more support is needed'.

[335] *Ibid*, 472.

fields'.[336] One of the insights gained here was certainly a renewed confirmation of what anti-Formalists had stressed already long before, namely that the transposition of a *social conflict* into a *legal case* was likely to narrow the analytical and potentially emancipatory or empowering range of addressing the 'real' issues at stake, such as economic inequalities, access to justice, education etc by reformulating the conflict with reference to existing concepts of property, freedom and so on.[337] After a review of a great number of theoretical assessments of the transformation of the regulatory landscape during and after welfare state legal-instrumentalism, Macaulay remained fundamentally sceptical with regard to what he found to be 'curiously apolitical' depictions of legal change.[338] With regard to Karl Klare's analysis of the evolution of workers' rights under twentieth-century American trade unionism,[339] Macaulay criticised Klare's overconfidence in these groups' ability 'to write any program they pleased'; assessing Teubner's evolutionary account of law's development from formal, through substantive, to reflexive rationality, Macaulay accused Teubner of omitting from his account 'those who attempt to plan changes or individuals and groups struggling for advantage and power'.[340] In unirritable clairvoyance, Macaulay, roughly 25 years ago predicted: '[r]eflexive rationality would seem only to postpone the day of reckoning for a distinction that Kennedy (1982) tells us is hard to take seriously'.[341] This assessment is, sadly, echoed in present depictions of a dramatic lack of irony in neo-liberal celebrations of societal self-regulation and freedom of contract—without much regard to the always inherently contested and constituted nature of private ordering.[342] In his forward-looking contribution, Macaulay not only provided for an extremely rich portrait of private, and indeed 'mixed', government in the United States, but also put his finger on the open wound of the unresolved questions whether, on the one hand, we should indeed have any reason to trust in the democratic potential of private ordering or whether, on the other, law and its internal logic would be able to unfold its regulatory potential: 'the benefits of a division of labor do not establish that present chains of command are natural or inevitable'.[343]

[336] Sally Falk Moore, 1973.
[337] Macaulay, 1986, 482; see Robert L Hale, 1923, and Morris R Cohen, 1927; see also Gunther Teubner, 1983, 249: 'Legal structures so conceived reinterpret themselves, but in the light of external needs and demands. This means that external changes are neither ignored nor directly reflected according to a "stimulus-response scheme". Rather, they are selectively filtered into legal structures and adapted in accordance with a logic of normative development'.
[338] Macaulay, 1986, 500.
[339] Karl E Klare, 1978.
[340] Macaulay, 1986, 500.
[341] *Ibid*, with reference to Duncan Kennedy, 1982b.
[342] Kerry Rittich, 2005; see also Peer Zumbansen, 2008a.
[343] Macaulay, 1986, 504.

The importance of such critical depictions of private ordering lies in their reminding us of the stickiness of evolutionary change of law and society. Just like through the functionalist lens we are likely to see, in sobering clarity, the increasingly disintegrated and fragmented nature of highly specialised functional spheres,[344] the critical reading of modern society will insist on the relevance of 'purposive' or 'responsive' law,[345] of an untiring contestation of the tension between formal and social equalities, and of the gap between the 'is' and the 'ought to be'.[346] In a benevolently critical discussion of Lisa Bernstein's work on trade usages and private arbitration in the diamond and cotton industries, Macaulay found Bernstein's work to illustrate a

> movement away from what Max Weber called 'substantive rationality', toward his 'formal rationality'. To the extent we ignore custom and courses of dealing and performance, we reinforce the role of the written contract. This, in turn, reinforces the power of those who draft these documents, usually the lawyers who represent those with superior bargaining power.[347]

These two ways of thinking about the role of law in society—one mired in a functionalist depiction of societal subsystems, each evolving according to its own logic, with the law being no exception,[348] and the other one embracing an encompassing theory of society as driven by critique, contestation and an untiring struggle with competing values[349]—seem, to us, to be complementary, not exclusionary. To be sure, such a position inevitably meets with concerns regarding conceptual coherence.[350] We contend, however, that incoherence is unavoidable, given the particularly elusive nature of law as an aspirational concept on the one hand,[351] and law's extremely differentiated forms of appearance on the other.[352] Writing *after* the Legal Realist and Critical Legal Studies' attack on legal formalism and 'classical legal thought',[353] after 'positivism' and 'natural rights' theory, after 'responsive' and 'reflexive law', we are left to operate in yet another highly contested

[344] Gunther Teubner, 1983.
[345] Philippe Nonet and Philip Selznick, 1978.
[346] Erhard Blankenburg, 1984; David Trubek, 1972b; Philip Selznick, 1969.
[347] Stewart Macaulay, 2000, 800.
[348] Niklas Luhmann, 1989a.
[349] Philippe Nonet and Philip Selznick, 1978; Ian R Macneil, 1980; Hugh Collins, 1997; Thomas Wilhelmsson, 2004.
[350] Niklas Luhmann, 1992b.
[351] David M Trubek, 1986, 590–91: 'Weber spoke of rationalization as a "fate", by which he meant an unavoidable development. But this is a tragic fate, for in the end of the process of legal rationalization leads to the denial, not the realization, of the ideals of Western law ... The result, Weber suggested, is that instead of being the shield of liberty, legal rationalization is part of the general process of societal change in which Western society has created rigid structures that enslave us as they seem to promise liberation'.
[352] Rudolf Wiethölter, 1989, 797; Rudolf Wiethölter, 2006.
[353] Duncan Kennedy, 2001a; Duncan Kennedy, 1975.

terrain, which is, as we noted before, characterised by an intricate correlation of overlapping and interpenetrating processes. Much suggests that the present engagement with the role of the state and the nature of legal regulation can only be a highly charged and risky enterprise. In light of the dramatic falsification of assumptions about the respective capacities and roles of state and market that reigned supremely over the closing decades of the twentieth- and well into the first of the twenty-first century,[354] there is little room for complacency. 'All that is solid…'. Our present interest in the idea of private government is thus an admittedly ambitious attempt to identify a timely response to challenges identified as 'Globalisation', 'Europeanisation' and 'Privatisation', because it must at the same time address the long-standing contestations of law and legal regulation.[355] In the present context of a heated debate over the formal and substantive qualities of the rule of law,[356] on the one hand, and over law's contested relevance in what some see as a borderless and pluralist world and others as one dominated by powerful interests,[357] on the other, advances in legal doctrine are inseparable from developments in legal theory, as well as the sociology and philosophy of law. Understanding current inquiries into the nature and role of law in a globalised world as being *political* asks us, above all, to acknowledge the persistence of questions of power, of exclusion and silencing that must be central to a legal theory project of transnational law, but not to attempt to simply equate the present contexts of changed norms and actors with those of *yesterday*.[358] As recently expressed by Regina Kreide, the parallel processes of socialisation (growing importance of non-state actors in the formulation and creation of international rules) and juridification (formalisation ['legalisation'] and 'proceduralisation of infrastructure according to international law')[359] amount to a pressing challenge of legal and democratic theory, in particular with regard to the 'dysfunctionalities' of these parallel developments, of which Kreide observes that

> [t]hey range from the generation of hegemonic, democratically deficient legislation, to its deformalisation and a lack of separation of powers in a multi-leveled system, to the disempowerment of politics and the exclusion of a great part of the global population from access to money, knowledge, power, and judicial outlets for grievances.[360]

[354] Paul Krugman, 2008; Robert Skidelsky, 2009; Christian Marazzi, 2009.
[355] For a promising approach in this vein, see Victoria Nourse and Gregory Shaffer, 2009.
[356] On the one hand: Richard A Posner, 1998a, on the other: Kerry Rittich, 2004; Alvaro Santos, 2006.
[357] Jack Goldsmith and Eric Posner, 2005.
[358] Boaventura de Sousa Santos, 1987.
[359] Regina Kreide, 2009, 18–19.
[360] *Ibid*, 19.

Echoing the far-reaching deformalisation and functionalisation trends we can witness in many areas of domestic law,[361] Kreide observes: '[p]olitical power and the market enter into an alliance that, without being based on a *legal* acquisition of power, cuts across the functional differentiation between right and wrong, government and opposition, haves and have-nots'.[362] Similarly, Nancy Fraser has recently pointed to the particular challenges of transposing the embedded forms of political struggle over redistribution, recognition and representation into a world, in which particularly the last dimension had arguably become very questionable, given the absence of established structures securing, belonging to and participation in the formation of political will.[363] While this view tends to overlook the exclusionary basis on which the contained inclusion structures were inherently based and shielded from the outside,[364] it goes some way in illustrating the tension between something we could refer to as *embeddedness politics* and the emerging politics of transnational governance.

The paradoxical foundation of a contemporary *political* theory of law[365] that is caught between the struggle with past experiences and semantics on the one hand and risk, uncertainty and experimental vocabulary on the other, becomes apparent in the continuing disputes between those that either want to distinguish or to analogise state and non-state forms of rule-making. Echoing the arguments raised in the discussion over *lex mercatoria* as law, some scholars suggest that to underestimate the functional equivalence of private ordering regimes to state-made law (accomplished through the bundling of different mechanisms of private governance into an effective 'private legal system'[366] that would consequently encompass legislation, adjudication and enforcement of norms) would reflect an insufficient understanding of the 'aggregate efficiency of the [private ordering] system',[367] while at the same time furthering the gap between this efficient system and the law, surviving only as an unrealised ideal of a unified effective normative order. To overstate the—existing[368]—constraints of secrecy as one of several indicators of a perceived lack of legitimacy of the private legal system in comparison with state-made law, would occur, however, at the price of ignoring the extremely complex and often intransparent

[361] Daniela Caruso, 2006, 69–71; for international law: Manfred Lachs, 1972.
[362] *Ibid*, 22, with reference to Hauke Brunkhorst, 2005, 166.
[363] Nancy Fraser, 2009.
[364] See, eg Antony Anghie, 2006, and Will Kymlicka, 2007. Very instructive is the debate between Seyla Benhabib and her critics in Seyla Benhabib, 2006.
[365] See also Victoria Nourse and Gregory Shaffer, 2009, 121, 131, speaking of 'emergent analytics, which is the idea that any dynamic realism takes its concepts from the world and not from disembodied theory.'
[366] Lisa Bernstein, 2001, 1726.
[367] Lisa Bernstein, 1992, 151.
[368] *Ibid*.

relations between state and private actors in contemporary governance.[369] Further, to lament the allegedly *deficient* quality of privately made norms, would equate to a failure to recognise the parallels between presently emerging non-state normative orders and their relationship to the state, on the one hand, and previous assertions and contestations of such developments, on the other.[370] Long before mainstream public law, in particular administrative law, had become productively interested in the (public) governance function of private law arrangements,[371] private lawyers had begun to grapple with ways to adapt their legal categories, concepts and instruments to rapid social changes.[372] The long-standing private law debates centering on the 'constitutionalisation' of the legal order must be seen as a direct outflow of earlier assessments of the public force of private law.[373] They provide a tremendously rich reservoir for current conceptualisation projects of public-private regulatory regimes.

In over-emphasising those aspects of private law that help to enable cross-border exchange through the provision of legal certainty, however, the transnationalists put their trust in a functionalist approach, which risks neglecting the cultural and political dimensions of law. As a result, they almost deliberately produce a variety of standard objections regarding the necessary limits to private autonomy with respect to commutative justice (eg the protection of weaker parties in contract law) as well as public policy (eg the protection of fundamental common values like competition or human rights) and, thus, the legitimacy of privately created transnational law.[374]

As a reaction to such critique, some scholars propose to limit the extent of the private production of law to issue areas in which the state is disinterested because no public policy is involved. Commercial law, where merchants presumably meet on an equal footing, is often offered as example. That this case deserves particular attention was recognised already during our discussion of *lex mercatoria*. The heated nature of this debate can only be explained in so far as *lex mercatoria*, or law merchant illustrates the multifaceted nature of forms of private ordering. From the perspective then of scholars interested in social norms theory,[375] *lex mercatoria* can be seen

[369] See only Carol Harlow, 2009.
[370] Louis Jaffe, 1937; Hans Großmann-Doerth, 1929; Hans Großmann-Doerth, 2005; Franz Böhm, 1960.
[371] From the German discussion, See, eg Wolfgang Hoffmann-Riem, 1997; Martin Bullinger, 1996; Hans-Heinrich Trute, 1996; from the UK debate (with comparative assessments), see Tony Prosser, 1995, and RAW Rhodes, 1994; from the US debate see, eg, the outstanding work by Jody Freeman, 2000b; Jody Freeman, 2000a, and the contributions to Jody Freeman and Martha Minow, 2009.
[372] See, eg, Anton Menger, 1968; Otto Kahn-Freund, 1966, and Franz Wieacker, 1953.
[373] See only Rudolf Wiethölter, 1974.
[374] A Claire Cutler, 2003, 241; see Klaus Peter Berger, 1999, 64, 75.
[375] See the collection in John N Drobak, 2006.

as a powerful illustration of the proliferation of normative regimes without law,[376] while others continue to scrutinise the distinctly 'public' dimensions of such non-state-based forms of transnational regulation.[377] Moving from transnational commercial law back to (domestic) commercial law, there is of course a rich tradition of scrutinising the public-private distinction and the respective rule-making competences of public and private actors in the context of defining the scope of commercial activity and its regulation. One of the sets of questions having arisen in this context is, of course, the long-standing discussion over the importance of trade usages, custom and business practices as relevant sources of party obligations in commercial litigation.[378] Lately, Gillian Hadfield has made a number of important contributions to this debate in a series of papers on commercial law, corporate law and regulatory theory. In her 2001 article on 'Privatising Commercial Law' Hadfield begins with a straight-forward critique of the unjustified costs associated with the state's monopoly over the creation, administration and enforcement of law:

> The state's monopoly over legitimate coercive power is not, in itself, problematic; this monopoly is definitional of the state. The problem lies in the state's monopoly over the rules and procedures governing the application of coercion. Not only does the state enforce a contract, it designs and administers contract law and procedure. And it does so with all the drawbacks of an insulated service provider: unresponsive to costs, reluctant to innovate, bureaucratic in its methods of collecting and processing information, shut off from entrepreneurial creativity and effort. These drawbacks contribute to the high cost of law.[379]

Central to her project is, as a first step, the differentiation of specific functions carried out by a legal system and, as a second, the allocation of these functions to different actors. The fundamental distinction that Hadfield recognises in a legal system is that between the *economic* and the *justice*, or *democratic* functions.[380] In an eclectic yet suggestive list pertaining to the latter function, we find the tasks to 'oversee the institutions of democratic governance, administer the modern welfare state, protect individual rights, ensure social order, and provide a means of non-violent dispute resolution among citizens'.[381] The economic function of the legal system includes, essentially, the provision of the 'structure and the regulation necessary for the operation of efficient markets'.[382] Hadfield suggests that the economic function of the legal system can just as well be assumed by what she calls

[376] Peter H Huang and Ho-Mou Wu, 1994; Robert D Cooter, 1994.
[377] See Moritz Renner, 2009, and Moritz Renner, 2010.
[378] See Lisa Bernstein, 1996, Lisa Bernstein, 1999, and Stewart Macaulay, 2000.
[379] Gillian K Hadfield, 2001, 40.
[380] See Gillian K Hadfield, 2001, and Gillian K Hadfield, 2000.
[381] Hadfield, 2001, 40.
[382] *Ibid.*

'private legal regimes'. Assuming that we would here be concerned solely with the relations among corporations, little regard would have to be paid to questions of equity or fairness. Worried that the only pressure on the judicial system that at this time administers, through corporate and contract law, the behaviour of corporations, would be a competitive 'law market'[383]—that is, forum shopping for the 'best' law available—Hadfield refers to the charter competition usually associated with the US state of Delaware[384] and envisages

> a world of truly competitive privatised corporate contract law, [in which] contracting parties would face a marketplace of alternative regimes. Private firms would design packages of substantive and procedural law that would govern the interpretation and enforcement of corporate contracts.[385]

Just as we were beginning to suspect certain analogies between this depiction of commercial law and the 'romance' and symbolic power of the law merchant discussed earlier, Hadfield evokes the 'purely private origins of medieval commercial law'.[386] She makes the point that central to the medieval legal regime is—and, to be sure, much of the current interest in old merchant law likely has to do with—the fact that 'the power to coerce compliance with a legal regime can be decoupled from the function of designing and administering the system according to which that power will be exercised'.[387] Among the decisive characteristics that mark this commercial law is the fact that 'unlike the state law of contract' these 'systems often adopt simple rules and strict rules of interpretation',[388] something that strongly echoes other contemporary assessments of the shortcomings of contract adjudication as contrasted with private parties' bargains.[389] Summarily referring to 'medieval merchants, trade associations, and securities exchanges', Hadfield posits that these private regimes can perfectly well create norms, which can nevertheless come under the scrutiny of adjudicators and policy-makers. In response to eventual concerns regarding the narrowly constructed functional orientation of these private legal systems, she highlights reputation, information technology, organisation and private competition' as the core elements of these systems' basis of legitimacy.[390]

Hadfield's original distinction between the legal system's democratic, or justice function and its economic function was based on the premise that 'privatisation is justifiable only for those areas of law in which efficiency is

[383] For this term, see now Erin A O'Hara and Larry E Ribstein, 2009.
[384] William L Cary, 1974; Ralph K Winter, 1977; Lucian Ayre Bebchuk, 1992; Roberta Romano, 1993.
[385] Hadfield, 2001, 41.
[386] *Ibid.*
[387] *Ibid*, 42.
[388] *Ibid*, 43.
[389] Robert E Scott and George G Triantis, 2006; Robert E Scott, 2007.
[390] Hadfield, 2001, 44–45.

the only value at stake'.[391] Hence, in situations where market efficiency is the sole issue at stake, the competition of different private legal regimes will lead to first-best solutions. Hadfield underlines, however, that such a model is developed for a competition among corporations. In the case of individual citizens, the picture could look somewhat similar or, in fact, very, very different: 'when non-economic values such as justice and due process are at stake, the effort to increase efficiency has to take place within the context of the public regime for reasons of democratic legitimacy'.[392] Historically, Hadfield posits, private legal regimes have only flourished where there was a certain absence of a public law regime. And as a matter of systematic orientation, she holds that public law, instead of disappearing completely,

> will remain crucial where the situation calls for the (public law) system to 'lend' its coercive power to the enforcement of private rules ... The essential task for public law is to identify the points at which public legal structure is needed to facilitate the emergence and maintenance of efficient competition among private legal providers.[393]

With an eye to the overall goal of reducing the 'costs of law in the public sphere',[394] Hadfield concludes that large parts of commercial and corporate law should indeed be privatized,[395] while other areas—such as those covered by the justice function—must not.[396] At the outset of her distinction, which she reiterated in a recent response to work by one of the authors of the present volume,[397] is as we saw the association of 'efficiency' goals with the economic function of a legal system on the one hand and the 'non-efficiency' goals with the justice or, democratic function on the other.[398] Hadfield stresses that efficiency ought not to be understood as a 'scientific or apolitical standard', but as a 'normative, value-laden criterion by which we can evaluate relationships and outcomes in a society'.[399] On this basis, Hadfield acknowledges the impossibility of a neat separation of efficiency from other normative concerns, but resists the idea that this would clearly imply the impossibility of working with a distinction between public and private. Using the example of a contract dispute between different corporate entities, she argues that these disputes (say, over the creation and interpretation of contractual obligations or performance) are exclusively raising issues of efficiency. Because, she says, 'corporate entities are not

[391] *Ibid*, 44.
[392] *Ibid*, 45.
[393] *Ibid*, 45.
[394] *Ibid.*
[395] See also Gillian K Hadfield and Eric Talley, 2006.
[396] Gillian K Hadfield, 2001, 44–45; Gillian K Hadfield, 2002, 263; Gillian K Hadfield and Eric Talley, 2006.
[397] Gillian K Hadfield, 2009a.
[398] *Ibid*, 241.
[399] *Ibid.*

political citizens and do not have moral claims to fair treatment or just distribution'[400]—a distinction she also applies to intellectual property rights held by corporations, not by individuals—she holds on to her contention presented in 2001 that '[a]ny moral or political concerns that are rooted in how the state recognises or rewards individual citizens who produce new works and ideas are a separate matter'.[401] Referring to case studies conducted on European firms purchasing software products and licences in India as one of several instances of intercorporate relations, Hadfield concludes that just as the participating actors design the content of the traded products, they are similarly suited to design 'the optimal legal rules governing the interpreration and implementation of those provisions'.[402] This 'privatisation' however, is importantly qualified: the applicable rules (standards, and norms), despite their private production, can still be regulated by public bodies such as courts, administrators and such.[403] Defending herself against the claim (made by Calliess[404]) that such norm privatisation implies the absence of public law and administration through public actors, she insists on a set of possible combinations of public and private providers of legal services.[405] Explaining this 'embeddedness' of a private norm regime in a set of established institutions and enforcement practices, for example in the field of a contract,[406] Hadfield underlines the continued relevance of what she calls the 'background legal environment'. This nod towards a Hayekian conceptualisation of the facilitative relationship between law (politics, the state) and society (freedom, contracts, individuals)[407] is an important element in Hadfield's project, because it is telling of her awareness of the muddy terrain on which multiple spheres of public and private overlap—not only in the transnational arena[408]—even if she acknowledges that '[t]he pervasive role of publicly provided law in structuring even ostensibly extra-legal enforcement mechanisms takes on a particular salience in the global context'.[409] Since even cross-border transactions, as regards their arbitration (or litigation) and enforcement, cannot avoid a particular juridical touch-down in a particular state,[410] Hadfield understands the 'background legal regime' of a given country as 'shaping the legal status of these actions',[411] and it is on this basis that she posits that the distinction between the democratic and economic functions of a legal system ought to be used as an organising principle to differentiate 'berween *legal rules or mechanisms* that are measured exclusively in efficiency terms and those that are not'.[412] Because from this perspective, according to Hadfield, some, if not many, transactions or relationships may well raise issues of both efficiency and non-efficiency (democracy, justice), the central application of the distinction lies in the identification of the functions of the legal regimes governing certain transactions or relationships.[413] Using the example of a rule that would permit 'smaller' or 'less sophisticated' firms to rescind a contract within three days without penalty, Hadfield defines such an instance as an expression of fairness, which is external to the values of the parties. In applying such a rule, it would be evaluated in policy terms as regards its success in achieving fairness goals, but there would be no reason to expect that private legal systems on their own would create such a rule. From the standpoint of the private actors that engage in rule creation in this context, fairness is external.[414]

In the article Professor Hadfield responds to, Calliess—as we do in this book—distinguished between a *co-ordinative* and a *regulatory* function of law,[415] a distinction, which we would eventually parallel with the distinction between an economic and a democratic/justice function of the legal system.[416] Hadfield resists that parallel, partially with respect to her concept of the 'background legal system', which for her appears to illustrate that there is no private legal system ever working in a complete normative vacuum. In addition, she lays out four public/private distinctions that in her view must not be conflated into the economic/justice distinction. These four distinctions relate to: (1) the nature of the *relationship* governed (individual-individual vs individual-state); (2) the status of the *provider* of legal services (private vs state entities); (3) the source of the content of legal obligations (parties themselves or the state); and (4) the source of legitimacy (consent or democratic institutions/procedures).

Hadfield suggests that the distinction between economic and justice functions of a legal system, which is not to be lined up with the distinctions between private and public in the above listed four dimensions,[417]

[400] *Ibid*, 243
[401] *Ibid*, 243.
[402] *Ibid*, 245.
[403] *Ibid*.
[404] Gralf-Peter Calliess, 2009.
[405] Gillian K Hadfield, 2009a, 245.
[406] *Ibid*, 246.
[407] Friedrich A Hayek, 2006, 130, 193–204, 194: 'True, there are good reasons why all government concern with economic matters is suspect'. Friedrich A Hayek, 1973, 113. 'In the ordinary sense of purpose law is therefore not a means to any purpose, but merely a condition for the successful pursuit of most purposes'.
[408] Gillian K Hadfield, 2009a, 241.
[409] *Ibid*, 248.
[410] Robert Wai, 2002.

[411] Gillian K Hadfield, 2009a, 248.
[412] *Ibid*, 250.
[413] *Ibid*.
[414] *Ibid*, 251.
[415] Gralf-Peter Calliess, 2009.
[416] See below.
[417] Gillian K Hadfield, 2009a, 243: 'distinguishing the economic and democratic functions of law does not imply that all other public/private dimensions must fall out the same way. Identifying the function of a legal rule as "efficiency" does not tell us whether the rule

is relevant only with regard to the critical public/private dimension of legitimacy.[418] Her claim is that private provision of law, precisely for democratic legitimacy reasons, is only an option for rules solely concerned with efficiency. Her definition of efficiency is crucial in that regard, as it reveals, upon closer inspection, that it is indeed premised on a number of additional, speculative assumptions:

> Legal rules serve exclusively efficiency goals when they can be evaluated in policy terms entirely on the basis of the extent to which they promote the allocation of resources to their highest-valued uses and the production of goods and services with minimal expenditure of resources.[419]

Her assertion that private actors can provide for better rules where only efficiency issues are concerned[420] rests on the assumption of a perfectly competitive market, populated by contracting parties aware of all externalities and 'judges of their own welfare'. This constellation, which Hayek would likely have considered overwhelming, if not unrealistic,[421] makes Hadfield's model considerably vulnerable: even if it were true that all members of a constituent assembly, engaged in devising rules applicable to their dealings, were aware of externalities and competent to assess the future rules' impact on their welfare, this would still not solve the problem of unequal starting points or asymmetric bargaining power relations. Hadfield's assumption of a competitive market appears to ignore long-standing insights into the constituted nature of markets[422] and the impossibility of assigning functional concepts such as 'property' or 'sovereignty' neatly only to one sphere.[423] The Achilles' heal of Hadfield's contention that the 'legitimacy of a private legal regime, with law produced by private entities, rests in the consent of the parties who choose to subject themselves to the regime'[424] consists in us having to assume a free choice on the part of the participating parties. Hadfield's explanation that this constellation would at any rate be an adequate depiction only for inter-corporate relations falls flat if the decisive criterion remains that 'the only public value at stake is the efficiency of

governing private relationships must be supplied by private actors and enforced through private litigation, or find its legitimacy only in the consent of private parties'.

[418] *Ibid*, 252.

[419] *Ibid*.

[420] For an application of this idea in the field of corporate law (private rule making being described as superior to regulatory competition among incorporation states), see Gillian K Hadfield and Eric Talley, 2006.

[421] Friedrich Hayek, 1945, reprinted in Friedrich Hayek, 1945, 77: 'the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed its of incomplete and frequently contradictory knowledge which all the separate individuals possess'. 78: 'it is a problem of the utilization of knowledge which is not given to anyone in its totality'.

[422] Robert L Hale, 1923.

[423] Morris R Cohen, 1927.

[424] Gillian K Hadfield, 2009a, 252.

private relations'.[425] The fact alone that corporations interact with each other and that they draw up rules governing 'these' relations does not make these relations 'private'. It is here where Hadfield's earlier contention that her distinction applies not to the content of the rules, but to the rules themselves cannot convince.[426] By having to assume an unrealistic situation of freedom of choice, perfect information (externalities, welfare) as the hallmarks of a private legal system's legitimacy, Hadfield overburdens the members of the system with precisely these utopian conditions that have long been identified with the 'underlying values of public law'.[427] In maintaining the distinction between economic and democratic justice where private legal regimes produce rules based on consent—contrasted with the external imposition of, say, environmental or social standards onto privately enacted corporate governance regimes against the consent of their designers—Hadfield in fact renders the economic function of the private legal system compatible with, or at least not in contrast to, the democratic function.

We thus remain sceptical as to whether this approach can fully illuminate the interplay between and the nature of 'public' and 'private' regulatory regimes, be that in the context of domestic rule-making arrangements or in view of an emerging transnational legal order. As a matter of conceptual coherence, Hadfield's own assertion of the inseparability of efficiency and (other) normative concerns in our view contradicts her claim that we can nevertheless hold on to a distinction between public and private. Although she rightly, in our mind, acknowledges the historical contingency and contextual dependence of such distinctions, something she regards as informing the long-standing misunderstandings between civil and common lawyers,[428] she nonetheless pairs her non-historical, non-contextual assessment of 'corporate disputes' with distinctions between corporations (as legal fictions) and shareholders (as citizens with moral claims). Whether some among them are to be considered 'public' or 'private', however, seems to depend on the *purity* of the relations between them. If they are solely engaging in market operations, they would be from that perspective, eligible members of a *legitimate* private legal system. If they engaged in market operations and related rule-making while even incorporating 'public value' concerns (environment, employees, sustainability), these corporations would also befit a legitimate private legal system. Such rules, she admits, might not 'necessarily satisfy Aristotelian standards of either corrective or distributive justice;

[425] *Ibid*.

[426] *Ibid*, 244. 'When I speak of the privatisation of commercial contract law, however, I am referring not to the content of the legal obligations per se, but rather to the rules of the regime governing how these obligations will be interpreted and enforced'.

[427] See Dawn Oliver, 1997; for a recent application in the area of global organizations, see Armin Bogdandy, Philipp Dann and Matthias Goldmann, 2008.

[428] Gillian K Hadfield, 2009a, 239–40.

they will just be the rules that satisfy the demand of these corporations for a mechanism that overcomes the obstacles to moving ahead with the deal'.[429] Where, however, corporations would not consent to the rules promoted by some among them or ordained by an external regulator, this private legal system, due to the absence of consent, would cease to have legitimacy. As noted above, the tight combination of conditions (corporations dealing with corporations, perfect information, consent) weakens rather than strengthens her initial intuition that it might be useful to explore the legitimacy potentials of private governance regimes. But, by persistently applying the economic/justice distinction to constellations that raise both institutional and normative complexities of public and private, she seems to fall short of the promises and potentials of her own project.

As contested by Professor Hadfield, we had previously read her distinction between economic and democratic function of a legal system to be congruent with our own distinction between the *co-ordinative* (or facilitative or enabling) and the *regulatory* dimensions of law.[430] The shared challenge between Professor Hadfield's and our own project remains, that transnational governance regimes can be observed which actually do perform co-ordinative as well as regulatory functions without being compatible with conventional notions of democratic legitimacy. In that context, we are facing the challenge of how to make sense of the public/private conundra in transnational governance regimes in light of the critical discussions around (domestic) commercial law and business customs that occupied us before. As we have said, our central concern with Professor Hadfield's approach arises from her suggestion to juxtapose an efficiency-oriented realm that could be governed by private legal systems, on the one hand, with an allegedly politically laden, 'interventionist' political-legal sphere on the other. We noted that such assertions have long been meeting with substantive, and in our view convincing, contestation[431] and continue to do so.[432] There is no reason to assume that the market is the product of a natural evolution, a sphere which the law in pursuing public interests enters into as an outside, distortive force. To the degree that lawyers speak about the 'market' and to the degree that there is a deliberation about what the market is supposed to do 'on its own' or where it respectively 'fails' or 'succeeds', the market is in itself a legal construct. As a consequence, then, private law theory that is informed by a justice vs efficiency distinction has a hard time explaining the historical facticity of a more-than-a-century-long 'publicisation' or 'materialisation' of private law in response to the changing structures of society.[433] Seen through the lens of the public/private distinction, this process continues to prompt heated debates concerning the adequacy of public law 'interventions' into private law[434] or the capacity of private law instruments to pursue public interests.[435] From the viewpoint of our present endeavour to develop a theory of transnational private law, however, its impact is an even further one: the attribution of socio(-legal) conflicts to either 'justice' or 'efficiency', developed against the background of, for example, a highly adjudicated contract, property and corporate law culture, is bound to play a decisive role once it is applied outside of the nation-state. Here lies the real gist of the conflict between the 'traditionalists' and the 'transnationalists'.[436] Too much, indeed, suggests here that we are meant to believe in a renewed 'querelle des anciens et des modernes', resulting this time in the latter dismissing the former as inadequate and useless in the face of the needs of a global marketplace.[437] Not only does the implied opposition between converging, value-free transnational spaces and stubbornly diverging, politically charged local areas strike us as 'unrealistic',[438] its greater problem is indeed the further implied assumption that global markets are as such distinct from domestic ones. The long quest in legal theory to formulate a legal response to globalising markets and human activity has provided evidence supporting the conclusion that—independently of whether we approach the conundrum of the 'transnational' from within the conceptual edifices of, say, Public International Law, Conflict of Laws, or European Law[439]—the difficulties for a doctrinal lawyer of categorically separating the domestic from the transnational apparently outweigh the justifications offered in defence of an autonomous, self-standing and distinct transnational legal order.[440] From the viewpoint, then, of legal

[429] *Ibid*, 245.
[430] Gralf-Peter Calliess, 2009.
[431] Robert L Hale, 1923; Morris R Cohen, 1927; Rudolf Wiethölter, 1972b; Rudolf Wiethölter, 1986a.
[432] Duncan Kennedy, 2001b; David Campbell, 2007.

[433] See, eg Franz Wieacker, 1967, David Trubek, 1972a, or Patrick Atiyah, 1979.
[434] Uwe Diederichsen, 1997; Duncan Kennedy, 1982a; Peer Zumbansen, 2003b.
[435] Gunther Teubner, 1999a; Thomas Wilhelmsson, 2004.
[436] Klaus Peter Berger, 1999.
[437] See, eg, Michael Joachim Bonell, 2001b; for a critique, see Peer Zumbansen, 2002a; Martin J Doris, 2006, 398.
[438] Ralf Michaels, 2007b, 1005: 'This distinction between value-free transnational areas of law that converge, and value-laden local areas of law that do not, is not in accordance with reality'.
[439] Luis de Lima Pinheiro, 2001; see also the contributions to Martin Schulte and Rudolf Stichweh, 2008.
[440] See, eg, the observations by Karsten Schmidt, 2007, 171: '*Die bestehenden rechtskulturellen Gegensätze sprechen auch unter dem Eindruck der Globalisierung immer noch gegen die Annahme, dass bald ein umfassendes Welt-Gewohnheitsrecht vorhanden sein wird*'. See also David Kennedy, 2009, 58: '[…] I worry that our efforts to comprehend global governance have focused far too much on the authority of agents we see to act within structures we understand. We have paid too little attention to the myriad ways power flows through flows of finances, resources, of affiliation and disaffiliation, the social movements of wills to power, the desire to submit, the experience of triumph and victimization, pride and shame. All these things move like a virus or a fad, but our epidemiology is weak, and our sociology of status convention and emulation at the global level is rudimentary.'

sociology, the picture changes yet again: understanding society as 'world society', the distinctions between the domestic and the transnational appear as a side product and contingent fact from within functional discourses that reconstruct historical developments according to their particular functional code.[441] While the sociological account, which posits society as constituted by functionally differentiated communications—one of which is the legal system,[442] obviously seems to present considerable challenges for a theory of law based on the central role of the state, there appears to be much less anxiety from the viewpoint of economics with regard to this account. This is, at least, the impression we gain from the rather jaunty assertions of a borderless world of commercial transactions.

III. A THEORY OF TRANSNATIONAL PRIVATE LAW

In the remainder of this chapter we set out the basic elements of a theory of transnational private law, which will serve as the conceptual framework for the two examples we explore in the following chapters. In the first part of this section we argue that both the content (substantive dimension) and the authors (procedural dimension) of transnational private law must be categorised as *hybrid* with regard to a traditional distinction between public and private law spheres (Section IIIA). Drawing in particular on New Institutional Economics theories of private ordering and economic governance (IIIB) we then define our concept of *transnational law regimes*, which we develop on the basis of a fundamentally hybrid character of transnational private law (Section IIIC). On that basis, we address the contested issues concerning both the legal status and the legitimacy of such *transnational law regimes*. Building on a conceptual proposal first advanced in the area of Internet standards,[443] we discuss a comprehensive substantive/procedural concept, 'Rough Consensus and Running Code' (RCRC), which we use to conceptualise elements of transnational private law as a way of thinking about a modern theory of customary law (Section IIID).

A. Co-ordination versus Regulation: Revisiting the Public-Private Divide

> 'People do not see law as salient to their lives; at best, it is a background factor with limited impact'.[444]

[441] Niklas Luhmann, 1970.
[442] Niklas Luhmann, 1985; Niklas Luhmann, 1989a; Niklas Luhmann, 2004.
[443] David D Clark, 1992; Andrew L Russell, 2006.
[444] Stewart Macaulay, 1986, 469.

In the era of the Western sovereign nation-state, legal theory for the longest time remained concerned with a distinction between public and private spheres of society on the one hand[445] and competing, non-hierarchical claims of legal pluralism on the other.[446] On the basis of a neat distinction between the public and the private, the state is—assuming a *substantive* role—burdened with the task of minding the public good and looking out for the pursuit of common welfare in a society composed of self-interested individuals.[447] *Procedurally* the state is constructed as a distinct actor, conceived as being in a unique position to institutionally enable the representation of the whole towards the rest of society. A variety of qualifications apply to both dimensions.

On the *substantive* plane, state law is divided into private law and public law. The former is held to be concerned with the relations between individuals; through the guarantee of property rights and the enforcement of contractual agreements, the state facilitates the co-operation of economic actors in markets, among others; this can be called the *co-ordinative function* of law. In contrast, public law would be seen as regulating the activities of the state in relation to the individual; the ambit of thus conceived public law as regulatory law would encompass constitutional law, criminal law, tax law and other branches of administrative law, by which the state directly regulates societal relations with respect to public values, eg free competition, distributive justice, or the protection of the environment; this would be referred to as the *regulatory function* of law.[448] To be sure, both (co-ordinative) private and (regulatory) public law are intrinsically linked to an underlying idea of *justice*: this makes the distinction between co-ordinative and regulatory law blurry and less productive than the proponents, say, of a Private Law Society, would have it. According to these theorists working in the tradition of Friedrich Hayek and the ordo-liberal School of Thought, the distinction between a co-ordinative and a regulatory function of law, respectively associated with private and public law, was crucial for the preservation of a sphere of allegedly uninhibited freedom—represented

[445] See only Max Rheinstein, 1967; Duncan Kennedy, 1982b.
[446] Harry W Arthurs, 1988.
[447] Jacques Chevallier, 2004, 12: *'L'État s'inscrit pleinement dans cette logique de la modernité, caractérisée par l'empire de la Raison et dominée par la figure de l'Individu: élément de rationalisation de l'organisation politique, il permet de réaliser un compromis subtil entre le primat accordé à l'individu et la nécessité de création d'un ordre collectif'.*
[448] For the distinction between *co-ordinative* and *regulatory* standards see Lawrence Lessig, 1999b: 'A coordinating standard is a rule that facilitates an activity that otherwise would not exist. A regulating standard restricts behavior within that activity, according to a policy set by the regulators. A coordinating standard can be imposed from the top down, or emerge from the bottom up; a regulating standard is ordinarily imposed only from the top down. Driving on the right side of the road is a coordinating standard. A speed limit is a regulating standard'. See also Raymund Werle and Eric J Iversen, 2006, 22; Harm Schepel, 2005, 2–6.